STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROTHERS COMPANY OF CALIFORNIA,	)	
Respondent,	)	Case Nos. 80-CE-256-EC
and	)	81-CE-68-EC
	)	81-CE-74-EC
	)	81-CE-126-EC
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	82-CE-17-EC
	)	82-CE-19-EC
Charging Party,	)	
and	)	9 ALRB No. 3
CARLOS CHAVEZ VASQUEZ,	)	
Charging Party.	)	

DECISION AND ORDER

On August 12, 1982, Administrative Law Officer (ALO) Brian Tom issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent, and the United Farm Workers of America, AFL-CIO (UFW) each timely filed exceptions and a supporting brief, and each filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[1/] 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

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[1/] All section reference herein are to the California Labor Code unless otherwise stated.

to affirm the rulings, findings, and conclusions[2/] of the ALO as modified herein and to adopt his recommended Order with modifications.

The Subcontracting of Bargaining Unit Weeding and Thinning Work

The ALO concluded that Respondent violated section 1153 (e) and (a) of the Agricultural Labor Relations Act (Act) by unilaterally subcontracting a portion of its weeding and thinning work to labor contractor crews from mid-October 1980, to the end of the 1980-1981 weeding and thinning season. The ALO found that Respondent's past practice was to utilize its seniority workers to the fullest extent possible, but to subcontract some of its weeding and thinning work, if necessary. From the beginning of the 1980-1981 season to mid-October 1980, Respondent subcontracted such work for purely economic reasons, including a shortage of buses and supervisors and an increase in the amount of work to be done caused by field and crop conditions. However, when Respondent's buses and supervisors returned to the Imperial Valley from Salinas in mid-October, Respondent continued to utilize labor contractor crews

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[2/] We affirm the ALO's conclusion that Respondent violated section 1153(c) and (a) by discharging Juan Urrutia, and violated section 1153(a) by threatening its employees. We also adopt the ALO's recommended dismissal of the allegations that Respondent violated the Act by discharging Miguel Gonzalez and by withholding overtime from employee supporters of the UFW. We find that the ALO's recommendations are well supported by the record. Both the Respondent and the General Counsel excepted to some of the ALO's credibility resolutions. To the extent that an ALO's credibility resolutions are based on the demeanor of the witnesses, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24; Standard Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) Our review of the record herein indicates that the ALO's credibility resolutions are supported by the record as a whole.

rather than rehiring its seniority weeding and thinning workers. The ALO found that Respondent had a duty to bargain over the subcontracting commencing in mid-October, since there was then no longer any economic reason for continuing the subcontracting arrangement, Respondent did not follow its past practice of utilizing its own seniority workers as much as possible, and an entire crew was not rehired as a consequence.

While we agree with the result reached by the ALO, we disagree with his rationale. The ALO based his conclusion on two National Labor Relations Board (NLRB) cases, Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] and Westinghouse Electric Corporation (1965) 150 NLRB 1574 [58 LRRM 1257]. In those cases, the employers subcontracted bargaining unit work to independent contractors, and the work was thereafter performed by employees who were not part of the certified bargaining unit. In the instant matter, the weeding and thinning work continued to be performed by bargaining unit employees, although they worked in labor contractor crews rather than Respondent's seniority crews.[3/] In Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85, we noted that the engagement of a labor contractor does not necessarily, or by itself, constitute contracting out of bargaining unit work. However, the use of employees provided by a labor contractor to perform tasks customarily performed by

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[3/] Pursuant to section 1140.4(c), farm labor contractors are not agricultural employers, and the agricultural employees provided to an employer by a labor contractor are members of the employer's bargaining unit because they are employees of the employer for all purposes under the Act.

employees hired directly by the employer may constitute a unilateral change in the employer's hiring practices, and an employer would violate section 1153(e) and (a) by instituting such a change without giving its employees' certified bargaining representative prior notice thereof and an opportunity to bargain about the proposed change.

Respondent's practice was to utilize its seniority workers first in its weeding and thinning season, and then to hire labor contractor crews when and if it became necessary to do so in order to protect the crop. Nevertheless, in mid-October 1980, when Respondent's buses and foremen returned to Blythe and Respondent could have recalled all of its seniority workers, it continued to employ workers provided by the labor contractor. We find that Respondent instituted that change in its hiring practices without giving the UFW prior notice or an opportunity to bargain, and thereby violated section 1153(e) and (a) of the Act.

The Unilateral Change in Recall Procedure

The ALO found that, in May 1981, Respondent changed its method of recalling workers by instituting a written recall method instead of its previous written and oral notification system. However, the ALO found that, with minor variations, the time Respondent gave employees to report to work remained constant, and that the change in the recall procedure was too insignificant to require bargaining, since Respondent customarily used written notices to recall some employees, and there was no evidence that the change affected any of the employees in any manner. General Counsel and the UFW excepted to the ALO's recommended dismissal of

this allegation, and we find merit in their exceptions.

An employer's implementation of a change in its employees' terms and conditions of employment, without giving the employees' certified bargaining representative prior notice thereof or an opportunity to bargain about it, constitutes a per se violation of section 1153(e) and (a) regardless of the employer's good or bad faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; N. A. Pricola Produce (1981) 7 ALRB No. 49.) By such unilateral action, an employer bypasses the employees' certified bargaining representative and thereby undermines the union's status as the employees' chosen representative.[4/]

We affirm the ALO's finding that Respondent instituted a change in its recall procedure. Prior to May 1981, Respondent relied almost exclusively on word-of-mouth, personal visits, and telephone calls to contact its seniority workers for purposes of recall, and sent letters only when oral notification failed. After May 1981, there was a significant increase in the number of recall letters sent, and the ALO credited production manager Mike Garcia's testimony that Respondent changed to a new system of recalling all seniority workers by certified letters and discontinued the use of word-of-mouth or telephone contact.

However, we reject the ALO's finding that there was no change in the number of days Respondent gave the seniority workers

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[4/] In order to prove that a unilateral change in wages or working conditions violated section 1153(e), General Counsel need not prove that any employee suffered a loss by reason of the change. The national board has noted that "the loss, if any, is a matter to be determined in the compliance stage of the case." (American Gypsum Company (1977) 231 NLRB 1291, 1299 [97 LRRM 1069].)

to report to work. Respondent introduced into evidence 29 recall letters, dated throughout the years 1977 through 1980. Many specify a reporting date within two to seven days following the date of the letter, while others require the addressees to report within 72 hours after receipt of the letter, or to call the office to set up a time to return to work. General Counsel introduced 37 recall letters, all of which were sent after May 1981. Those letters are essentially identical, and each specifies a date and hour for the employee to return to work and indicates that, if the employee fails to report in time, he or she will be considered a voluntary quit. Almost all the letters require the workers to appear for work within three to five days of the date of the letter. Two of the letters instruct the employee to report to work on the date which the letter itself bore. Based on that evidence, we find that Respondent did change the amount of time it gave employees to report to work.

In its response brief, Respondent argued that the change in its recall method was not a mandatory subject of bargaining because it did not result in the elimination of bargaining unit jobs. However, Respondent offered no support for that novel argument. Mandatory subjects of bargaining are those which set a term or condition of employment or regulate the relation between the employer and the employee. (Womac Industries, Inc. (1978) 238 NLRB 43 [99 LRRM 1185].) The recall method Respondent used established when laid-off employees would be required to return to work in order to retain their jobs and their seniority. The change Respondent instituted in its recall method involved a condition of

employment and therefore constituted a mandatory subject of bargaining.

The NLRB has held that the institution of new work rules, without consultation with or prior notice to the union, violates the National Labor Relations Act (NLRA). (Schraffts Candy Company (1979) 244 NLRB 581 [102 LRRM 1274].) In Electri-Flex Co. v. NLRB (7th Cir. 1978) 570 F.2d 1327 [97 LRRM 2888], the court upheld the NLRB's finding that an employer violated section 8(a)(5) of the NLRA by unilaterally implementing a new call-in rule, which required employees to report by a specified time if they were going to be absent from work. The national board rejected the employer's argument that a call-in rule had always been in force in the plant, and that the institution of the new rule was merely an attempt to improve the system in accordance with union demands on which agreement had already been reached at the bargaining table. The board noted that the call-in rule had previously been enforced in an inconsistent manner, and that many employees were unaware of its existence. (See also Harowe Servo Controls, Inc. (1980) 250 NLRB 958 [105 LRRM 1147], where the national board found that the employer violated the NLRA by unilaterally changing the grace period within which employees could be late for work without losing any pay.)

It is true, as the ALO noted, that some unilateral changes which employers make in their employees' working conditions are too insignificant to constitute violations of the Act. (Masters Slack (1977) 230 NLRB 1054 [96 LRRM 1309].) However, we reject the ALO's finding that the change Respondent instituted in its recall

procedure was such an insignificant change. In Master Slack, the NLRB found that certain changes, including requiring employees to tuck in their shirttails when leaving the building, and to call the receptionist rather than the supervisors to report an absence from work, did not violate the NLRA. However, the national board found that the employer violated the NLRA by instituting several other changes, including changes in the tardiness and absenteeism rules, wage increases, production rates and quotas, layoff, recall, and life and health insurance plans.

We find that the change Respondent instituted in its recall method was significant enough to constitute an unlawful unilateral change. The word-of-mouth method Respondent utilized before May 1981, to recall its seniority workers is quite efficient in the agricultural context, where workers are often contacted through foreman, other workers, and family members. Many agricultural employees have difficulty receiving mail in a prompt and efficient manner. Workers often leave one area when the harvest or other season is completed and do not return until work starts in the following season. Many workers have several addresses, or use post office box addresses, or live in labor camps or motels, where mail is not delivered directly to each employee. Given the difficulty many agricultural workers have receiving mail, Respondent's change to recalling seniority workers exclusively by the use of certified mail could result in employees not being able to report to work in time to retain their seniority, especially in light of the short time period the employees were given in which to report to work. The UFW, as the employees' chosen bargaining

representative, should have been given an opportunity to bargain over such a significant change, and Respondent's implementation of the change without such notice or opportunity to bargain violated section 1153(e) and (a) of the Act.[5/]

Foreman Roberto Castro's Interrogation of and Threat to Vicente and Manuela Ramirez and the Weeding and Thinning Crew

The ALO credited the testimony of employees Vicente and Manuela Ramirez concerning foreman Roberto Castro's comments on November 18, 1981. On that day, Castro told Vicente Ramirez that he understood there was going to be a meeting, and he wanted to know what the meeting was about. Both Vicente and his wife Manuela testified that, later that day, when the weeding and thinning crew members were in the bus waiting to leave the ranch, Castro repeated the same statement to the crew, and added that he wanted to know who the representative of the crew was. He added that he wanted all the workers to attend the meeting, because it might be very important. When Castro asked where the meeting would be held, Vicente replied that it would be at his house that afternoon. Castro said that everyone should go and find out what the meeting

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[5/] We reject the argument of General Counsel and the Charging Party that Miguel Gonzalez was prejudiced by the change in Respondent's recall system, because he failed to report to work within the time specified in his recall letter, and was therefore considered a voluntary quit. Respondent's efforts to recall Gonzalez, however, spanned the period before and after the change in the recall procedure. Pursuant to its past practice, Respondent tried to locate Gonzalez through co-workers and his brother Martin in April and May 1981. When Miguel did not report to work based on that word-of-mouth notification, Respondent sent him a certified letter on June 11, 1981. Although that letter was mailed after Respondent changed its recall procedure, Miguel was not prejudiced by that change, since he had already received oral notification pursuant to the previous recall system.

was about, and that he also wanted to know what it was about.

Castro then told the employees that he knew there were "agitators" among the workers and that he was going to investigate, because it was not "convenient" for him or for Respondent to have such agitators working there. Castro said that he would find out who the agitators were, and that he would take away their work. Vicente responded that, if Castro thought he was an agitator, he should take his work away from him. Vicente testified that Castro also said that he did not want the weeding and thinning crew members to talk to workers from the state, but he did not respond when Vicente asked him whether Respondent was prohibiting the employees from talking to ALRB agents.

The ALO recommended that the allegation based on the above incident be dismissed, as there was no evidence that the meeting Castro mentioned involved protected concerted activities, and no evidence of the context of Castro's questions about a representative or his remarks about agitators. We find merit in the exceptions of the General Counsel and the UFW to the ALO's recommended dismissal of the allegation.

The test for whether an employer's statements constitute a threat or other form of interference, coercion, and/or restraint "is not the employee's reaction but whether the statements would reasonably tend to interfere with or restrain employees in the exercise of their rights guaranteed by the Act." (Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 18.) Castro's remarks to the crew are clearly the type of statements that would reasonably tend to interfere with the employees' exercise of their section 1152

rights. Castro said that he knew a meeting was scheduled, asked where the meeting was going to be held, and asked who the crew's representative was. He said that he was going to find out who the agitators were and discharge them. The employees could reasonably believe that Castro's remark about "workers from the state" was a reference to ALRB employees.

The case relied upon by the ALO, Faith Garment Company (1979) 246 NLRB 299 [102 LRRM 1515], is inapposite. In that case, a supervisor and a worker were talking about whether an employee who had been at work for several days had lost her job. The supervisor said that the company would get rid of all "trouble-makers". The NLRB's Administrative Law Judge noted that, in some contexts, the word "troublemaker" could be a reference to a union adherent. However, under the circumstances, its meaning was unclear, since the conversation had nothing to do with organizational activity, and there was no evidence that the employee being discussed was a union supporter. (See also Anton Caratan & Sons (1982) 8 ALRB No. 83.) Although, in the instant case, foreman Castro did not use the word "union" or UFW, the import of his remarks was clear, especially in light of his question about who the crew's "representative" was, his advice to avoid "state workers," and his failure to deny that he meant ALRB agents. Castro made it abundantly clear to the workers that he was aware of their activity, and that he intended to find out who was behind it and get rid of the "agitators". We find that foreman Castro's remarks clearly tended to interfere with, restrain, and coerce agricultural employees in the exercise of their section 1152

rights, and we therefore conclude that Respondent thereby violated section 1153(a) of the Act.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent D'Arrigo Brothers Company of California, it officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Unilaterally changing its hiring practices or unilaterally changing its recall procedure, or otherwise making any unilateral change in its agricultural employees' wages, hours, or working conditions, without giving the United Farm Workers of America, AFL-CIO (UFW) prior notice and an opportunity to bargain about such changes.

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

(c) Threatening any agricultural employee(s) with loss of employment, possible civil litigation, or any other reprisal because of his/her (their) union activities and/or protected concerted activities.

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

2. Take the following affirmative actions which are

deemed necessary to effectuate the policies of the Act:

(a) Upon the UFW's request, rescind the unilateral changes it instituted in its hiring practice in October 1981, and in its recall procedure in May 1981, and thereafter notify and meet and bargain collectively in good faith with the UFW, at its request, over any proposed changes in Respondent's hiring practice, recall procedure, or any other term or condition of its employees' employment.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's contracting out of weeding and thinning work from mid-October 1980, until the end of the 1980-1981 thinning and weeding season, and/or as a result of the May 1981, change in its recall procedure, which caused the employees a diminution or loss of work, 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) Offer to Juan Urrutia immediate and full reinstatement to his former job or substantially equivalent position, without prejudice to his seniority or other employment rights or privileges, and make him whole for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, 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.

(d) 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.

(e) 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.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from May 31, 1981, until the date on which the said Notice is mailed.

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

(h) 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.

(i) 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: February 9, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

MEMBER McCARTHY, Dissenting in part:

I would find no violation of the Act in Respondent's modification of its recall system. In changing from a system which involved either oral or written notification to one which was based on written notices, Respondent did not affect working conditions in any substantive way. Contrary to the majority, I find no difference of any consequence in the fact that written notices under the old system generally gave workers from 2-7 days to report for work while those under the new system generally gave workers 3-5 days. Moreover, the majority has blithely assumed that the word-of-mouth process it extols would not be operative in any way under the new system. Indeed, the new system is apt to generate considerable word-of-mouth notification as workers who receive the written notices inform their friends and associates that Respondent has sent out the call for workers. If anything, the new system provides even greater assurance that Respondent's employees will learn of the recall in a timely fashion.

As in Cattle Valley Farms (1982) 8 ALRB No. 59 (acquisition of land) and Joe Maggio, Inc. (1982) 8 ALRB No. 72 (change in method of lettuce harvesting), the record fails to demonstrate that the change implemented by the employer will have any significant impact on the working conditions of the employees. I agree with the ALO's conclusion that under such circumstances, bargaining is not required.

Dated: February 9, 1983

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, D'Arrigo Brothers Company of California, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by: changing our hiring and recall procedures without giving the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative of our employees, advance notice of the changes and a reasonable opportunity to bargain about those changes; discharging Juan Urrutia because of his union activities; and threatening employees with discharge or court action because of their union activities or other protected concerted activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

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

WE WILL NOT hereafter discharge, lay off, or in any other way discriminate against, any agricultural employee because he or she has engaged in union activities or other protected concerted activities.

WE WILL reinstate Juan Urrutia to his former or substantially equivalent employment, without loss of seniority or other employment privileges, and WE WILL reimburse him for any pay and other money he has lost because we discharged him, plus interest.

WE WILL NOT change our hiring or recall procedures or any other of your working conditions without first notifying and bargaining with the UFW about such matters because it is the representative chosen by our employees.

WE WILL, if the UFW asks us to do so, rescind either or both of the changes we previously made in our hiring and recall procedures, and WE WILL make each of our employees whole for all economic losses he or she has suffered as a result of the changes, plus interest.

WE WILL NOT threaten any employee with discharge, court action, or any other reprisal for joining, supporting, or assisting the UFW, or engaging in any other protected concerted activity.

Dated: D'ARRIGO BROTHERS COMPANY OF CALIFORNIA

By: _____
Representative Title

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

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

D'Arrigo Brothers Company of California (UFW)

9 ALRB No. 3
Case Nos. 80-CE-256-EC
81-CE-68-EC
81-CE-74-EC
81-CE-126-EC
82-CE-17-EC
82-CE-19-EC

ALO DECISION

The ALO found that, during the first month of its weeding and thinning harvest, Respondent subcontracted some of the weeding and thinning work to labor contractor crews for purely economic reasons, including a shortage of buses and supervisors and an increased amount of work caused by field and crop conditions. However, after the first month of the season, when Respondent's buses and supervisors became available, Respondent continued to utilize labor contractor crews, rather than following its past practice of utilizing its seniority workers to the fullest extent possible. The ALO concluded that Respondent violated Labor Code section 1153(e) and (a) by subcontracting weeding and thinning work when it could have hired back its seniority workers. The ALO also concluded that Respondent did not violate the Act when, without notifying or bargaining with the Union, it changed its employee recall procedure by instituting a written recall method instead of its previous written and oral notification system, since the time Respondent gave employees to report to work remained the same, the change was too insignificant to require bargaining, and there was no evidence that the change affected any of the employees in any manner.

The ALO concluded that Respondent violated section 1153(c) and (a) by its discharge of employee Juan Urrutia because of his support for and activities on behalf of the Union, rather than his alleged refusal to follow a work order, but that General Counsel failed to establish that Respondent violated the Act by discharging employee Miguel Gonzalez, since Respondent fired Gonzalez because he failed to respond to a recall notice in a timely manner. The ALO also found that General Counsel failed to prove that Respondent withheld overtime from Union supporters.

Finally, the ALO concluded that Respondent violated section 1153(a) by its foreman's threats to workers that he would file a lawsuit or involve them in litigation because they attended a meeting at which the tractor drivers discussed the Union and selected a representative. However, the ALO recommended dismissal of the allegation that Respondent violated the Act by its foreman's questioning of employees about a meeting that was to be held the same day, asked who the representative of the crew was, told the employees that he was going to find out who the "agitators" were and get rid of them, and said that he did not want the employees to talk to "workers from the state."

BOARD DECISION

The Board affirmed the ALO's conclusions that Respondent violated section 1153(c) and (a) by discharging Juan Urrutia, and violated section 1153(a) by threatening its employees with a lawsuit because they attended a meeting to discuss the Union and select a representative. The Board also adopted the ALO's recommended dismissal of the allegations that Respondent violated the Act by discharging Miguel Gonzalez and by withholding overtime from employee supporters of the UFW.

The Board affirmed the ALO's conclusion that Respondent violated section 1153(e) and (a) by using labor contractor crews for a portion of its weeding and thinning work, but based its conclusion on a different rationale than the ALO. The Board found that the use of labor contractor crews did not, by itself, constitute contracting out of bargaining unit work, since the weeding and thinning work continued to be performed by bargaining unit employees, although they worked in labor contractor crews rather than Respondent's seniority crews. However, the use of labor contractor employees constituted a unilateral change in Respondent's hiring practice, and Respondent violated the Act by instituting the change without giving the Union prior notice or an opportunity to bargain about the change.

The Board also concluded that Respondent violated section 1153(e) and (a) by unilaterally changing its recall procedure without giving the Union prior notice or an opportunity to bargain about the change. The Board found that Respondent changed not only the method of recall, but also the number of days it allowed for seniority employees to report to work. The method of recall was a mandatory subject of bargaining and, although some unilateral changes which employers make in their employees' working conditions are too insignificant to constitute violations of the Act, the change in Respondent's recall procedure was significant enough to constitute an unlawful unilateral change.

The Board also concluded that Respondent violated section 1153(a) by its foreman's questioning of employees about a meeting, said he was going to get rid of the "agitators," and told the employees not to talk to workers from the state, since the foreman's questions and remarks would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the Act.

DISSENTING OPINION

Member McCarthy would find no violation in Respondent's alteration of its recall procedure. He feels that the revised system would augment the opportunities for workers to learn of the recall and that no significant adverse impact or working conditions can be attributed to the change. Under such circumstances, bargaining should not be required.

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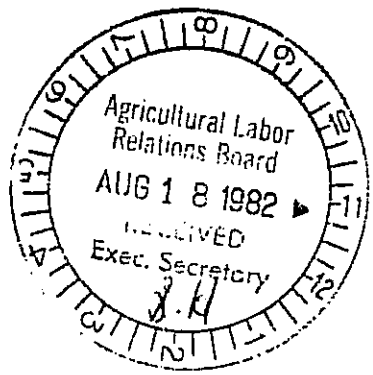
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the matter of	)	
	)	
D'ARRIGO BROS. CO. OF CALIFORNIA,	)	
	)	
Respondent,	)	
	)	
and	)	Case Nos. 80-CE-256-EC
	)	81-CE-68-EC
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and	)	
	)	
CARLOS CHAVEZ VASQUEZ,	)	
	)	
Charging Party	)	
	)	

APPEARANCES:

Richard Rivera and Darrell Lepkowsky
El Centro, California
for the General Counsel

Dressler, Quesenbery, Laws & Barsamian
by Larry A. Dawson of El Centro, California,
for the Respondent

DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

Brian Tom, Administrative Law Officer: This case was heard before me on March 15, 16, 17, 22, 23, 24 and 25 in El Centro, California.

The Third Amended Consolidated Complaint, dated March 3, 1982 (a Consolidated Complaint dated December 18, 1981, a First Amended Consolidated Complaint dated February 19, 1982 and a Second Amended Consolidated Complaint dated February 23, 1982 were

previously filed) is based on five charges filed by the United Farm Workers of America, AFL-CIO (hereinafter the "UFW" or "Union") and one charge filed by Carlos Chavez Vasquez.

The charges were duly served on Respondent D'Arrigo Bros. on December 2, 1980, July 16, 1981, September 4, 1981, December 18, 1981, January 21, 1982 and January 26, 1982.

The six charges were consolidated pursuant to Section 20244 of the Agricultural Labor Relations Board Regulations by order of the Regional Director.

The Third Amended Consolidated Complaint alleges that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter "Act").

All parties were represented at the hearing and given a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs in support of their respective positions, after the close of the hearing.

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

FINDINGS, ANALYSIS AND CONCLUSIONS

I. JURISDICTION

Respondent is engaged in agriculture in California, as was admitted by Respondent. Accordingly, I find that Respondent

is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act, as was admitted, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The General Counsel's Third Amended Consolidated Complaint as amended at the hearing alleges, inter alia, that Respondent, and/or Respondent's agents, interfered with, restrained, and coerced its employees in violation of its employees' rights as guaranteed in Section 1152 of the Act by:

1. During the 1980/81 season, subcontracted bargaining unit weeding and thinning work in its Imperial Valley agricultural operation without notifying or bargaining with the UFW.

2. Beginning on or about June 11, 1981, Respondent instituted a new employee recall procedure without notifying or bargaining with the UFW.

3. On or about July 3, 1981 discriminatorily discharged and/or refused to rehire employee Miguel Gonzalez because of his participation in union and concerted activities.

4. On or about August 31, 1981 discriminatorily discharged employee Juan Urrutia because of his union and concerted activities.

5. Beginning on or about August, 1981 discriminated against certain tractor drivers with greater seniority by assigning them fewer hours of work than assigned to tractor drivers with lesser seniority in retaliation for their union and concerted

activities.

6. Beginning on or about November 18, 1981, Respondent by and through its agent Roberto Castro, interrogated and threatened Vicente Ramirez and Respondent's weed and thin crew concerning their union and concerted activities in an attempt to discourage those activities.

7. Beginning on or about January 20 and 26, Respondent, by and through its agent Ramon Moreno interrogated and threatened Manuel Lopez Huerta, and Carlos Chavez Vasquez, respectively, concerning their union and other concerted activities in an attempt to discourage those activities.

PRELIMINARY FACTS

Respondent is a large agricultural corporation with its main headquarters located in Salinas, California. Respondent maintains a sub-office in Brawley, California, to oversee its Imperial Valley operations and it is here in the Imperial Valley that the various charges are alleged to have taken place.

The UFW has been certified as the bargaining representative for Respondent's agricultural employees in its Imperial Valley and Salinas locations since August 24, 1977. This certification was upheld by the denial of review from the Court of Appeal for the First Appellate District on March 20, 1980. Negotiations have ensued between Respondent and the UFW; however, at the time of the hearing, the negotiations

have been unsuccessful.

The various charges will each be summarized, discussed and resolved separately, as each when taken alone arises out of different sets of facts.

I. THE SUBCONTRACTING OF BARGAINING UNIT WEEDING AND THINNING WORK.

FACTS

For the past 10 years, Respondent has subcontracted part of its thinning and weeding work out to various subcontractors. This work involves primarily Respondent's broccoli, lettuce, mustard and other crops from the months September to mid-February. In addition to using subcontractors Respondent also hired its own crews for thinning and weeding.

The General Counsel contends that in the 1980-81 season, a greater part of the thinning and weeding work was subcontracted out than in prior years. As a result of the work done by a subcontractor General Counsel claims that Respondent reduced his crews from 3 to 2 during the heaviest part of the thinning and weeding season. General Counsel further contends that this change in the subcontracting practice of Respondent was done without notification or bargaining with the Union. This lattercontention is uncontroverted.

The General Counsel introduced into evidence voluminous records to support his contention that for the 1980-81 season, Respondent deviated from its past practices and subcontracted

out work not previously subcontracted. Payroll records, as well as summaries of the payroll records, were introduced into evidence for the years 1978-79, 1979-80, 1980-81. In addition to records for past years, General Counsel also introduced, without objection, payroll records for the 1981-82 season. Respondent in his defense points to facts that show that the subcontracting in the 1980-81 season was a continuation of their past practice of balancing the use of its own employees against the availability of equipment and foreman. Respondent argues therefore, that they were not obligated to notify or bargain with the Union regarding their use of subcontractors in 1980-81.

Records from subcontractors were also introduced into evidence showing the 1980-81 billings from Jose Estrada and the 1979-80 billings from Araujo and Guillen.

Richard Binns, a D'Arrigo Bros. employee for 27 years and District Manager in the Brawley area from 1968 to 1973, was called to testify regarding Respondent's practices in subcontracting work in Imperial Valley. Binns testified that Respondent's practice was to utilize its own equipment and people first and subcontract out when they had a shortage of equipment, supervisory personnel, shortage of labor and disruptions in the planting schedule. He defined shortage of equipment to include buses, sanitary units and pick-ups that had to be transported from the "northern areas", meaning Salinas.

Preston Kelley Olds, Respondent's Labor Relation Manager from April 1977 to January 1981 also testified regarding Respondent's policy towards subcontracting during the period of time he worked for Respondent. Olds testified that the policy was to use company crews as much as possible, but from time to time the work would be subcontracted. This occurred for several reasons including the availability of equipment such as buses, the availability of supervisors, and the flow of work. Olds testified that while he worked for Respondent, thinning work was subcontracted out. He testified that in the 1980-81 season the Respondent had difficulty securing buses from the Salinas area because the buses had to be modified to meet State safety laws for farm labor use. In addition there was an overlap of crops between Salinas and Brawley resulting in a scarcity of supervisors. He also testified that in planting the broccoli, the spacing was decreased and the crop acreage was increased, requiring the use of more contractors.

Lawrence Bingham, Respondent's district manager for the Brawley area, was called to testify. Bingham has been the Brawley district manager since May 1, 1980. Bingham testified that in the 1980-81 season the broccoli and lettuce crops were extremely weedy, increasing the need for thinning at an earlier time than normal. Bingham further testified that lack of buses and foreman caused the use of subcontractors earlier in the

season. Early heat was also a factor. Bingham attempted to rent buses to replace the delayed buses from Salinas, but discovered buses could only be rented on a 3 month basis and his company could not use them for that long a period.

Bingham stated that the company policy regarding subcontracting was "to work our seniority people when we can but to protect our crop at all given times" - that is to bring in subcontractors to protect the crops.

The buses requested by Bingham were requested early in September but did not arrive until mid-October. He stated that at the beginning of the season that certain of his own employees were not hired but that by late October he was able to hire all of their own employees.

The payroll records establish the following facts: In the 1978-79 season Respondent had on its own payroll one crew in late September and early October increasing to three crews from early October to the middle of December. Thereafter until February, 1979 only one crew was employed. For the 1979-80 season, from early October until the end of November, Respondent employed three crews, then two crews for the following two weeks and one crew thereafter until the middle of January. In the 1980-81 season Respondent employed one crew beginning in late September and except for one week with two crews, stayed at the one crew level until the end of October. Thereafter Respondent employed two crews from the last week of October until December 20

decreasing to one crew until the end of January.

In the 1981-82 season, Respondent employed two crews from the middle of October until the middle of November. At that point three crews were employed until December 19, and thereafter two crews until the beginning of February. The number of employees in each crew remained consistent within the subject years.

The above facts can be summarized as follows: Respondent's normal hiring policy would be to start the season in late September or early October with one or two crews. This pattern would continue until October when three crews would be used for approximately two months. Sometime in December the work would slacken and only one or two crews would be needed until the end of the season.

The 1980-81 season, however, did not conform to the normal pattern. In 1980-81 Respondent hired only one crew through October when normally two or three crews were hired. Then beginning in November, two crews were hired during the peak seasonal activity for a two month period, when normally three crews were hired. In the last part of December though the crew level was reduced to one in conformity with Respondent's normal practice. Thus, Respondent never reached the three crew level during their period of peak which they would have in a normal year.

ANALYSIS AND CONCLUSION

Subcontracting of work previously performed by employees in a bargaining unit by replacing those employees with those of an independent contractor is a mandatory subject of bargaining. Fibreboard Paper Products Corp. (1964) 379 U.S. 203, 57 LRRM 2609.

In Westinghouse Electric Corporation (1965) 150 NLRB 1547, the Board suggested five factors to be taken into account in determining an employer obligation to bargain with respect to subcontracting. The five factors set forth by the Board are whether the subcontract (1) was motivated solely by economic considerations; (2) comported with traditional methods by which the employer conducted its business; (3) did not vary significantly in kind or degree from what had been customary under past practice; (4) had no demonstratable adverse impact on employees in the unit and (5) the union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.

Respondent argues that the subcontracting of thinning and weeding work in the 1980-81 season was in conformity with its past practices of utilizing its own employees and equipment first and subcontracting if either were unavailable. Respondent presented credible evidence that, in fact, this was their past practice and that in 1980-81 Respondent experienced a shortage of buses and foremen for part of the season. The General Counsel presented no evidence to rebut these claims.

Applying the factors set forth in Westinghouse Electric Corp. I find that, as to the period prior to mid-October, 1980, Respondent demonstrated that he was motivated solely by economic considerations in deciding to subcontract thinning and weeding work based on the lack of equipment. Respondent also showed a history of subcontracting and followed its policy in accordance with past

practice. No adverse impact was shown by the employees in that had the subcontracting not taken place, Respondent's regular employees would not have been recalled due to lack of equipment. Finally the record is silent as to the Union's opportunities to bargain.

Considering all the above factors, I do not find a violation under Section 1153(e) of the Act when Respondent unilaterally subcontracted thinning and weeding work prior to mid-October, 1980.

The situation after mid-October, however, is different. By that time, as Respondent admits, theyno longer had an equipment shortage. Nor did they demonstrate any shortage in supervisory personnel. In fact Bingham claims that by late October they re-hired all the old employees. This assertion, however, is not supported by the payroll records. Rather, the payroll records indicate that in late October through November and December, Respondent's only hired two thinning and weeding crews in contrast to their earlier practices of hiring three crews during their peak thinning and weeding season. Had Respondent followed their past practice after mid-October in the 1980-81, three crews would have been hired. In addition, as Bingham testified, the 1980-81 season required more workers rather than less due to increased acreage, weedy fields and new seeding patterns. This would suggest that

after the equipment and personnel problems were resolved, more of their own workers would be recalled to work. Instead, as Bingham admits, subcontracting, through Jose Estrada, became more extensive in comparison to earlier years.

Applying the Westinghouse test to the facts, after mid-October, I find that Respondent did not demonstrate that he was motivated by purely economic considerations. I also find that Respondent did not follow its past practices of utilizing his own employees first unless there were equipment or personnel shortages. Rather even after the shortages were resolved, a normal third crew was not re-hired. The failure to re-hire the third crew obviously had an adverse impact, as without an equipment shortage, Respondent would have called them for work. Instead Respondent chose to utilize subcontractors more extensively.

Bearing all the above factors in mind, I find that Respondent deviated from its past practices on subcontracting and therefore was obligated to notify or bargain with the Union in regard to subcontracting. Accordingly, I find that Respondent violated Section 1153(e) of the Act by unilaterally subcontracting its thinning and weeding work after mid-October, 1980 to the end of the 1980-81 season.

II. THE ALLEGED UNILATERAL CHANGE IN PROCEDURE FOR THE RECALL OF WORKERS

FACTS

Under this charge General Counsel contends that beginning June 11, 1981, Respondent instituted a new employee recall procedure without notifying or bargaining with the UFW. This "new procedure", as alleged, is essentially a change in the manner of the notice of recall, from a combination "word of month" and written notice to written notice only by certified mail.

The General Counsel called as one of his witnesses Mike Garcia, Respondent's production manager from January 5, 1981 to February, 1982. Garcia testified that he changed the system of recalling workers by using written letters for recall. In response to a question regarding the past practices of the Respondent prior to his using written letters, Garcia testified as follows: "I don't think they had a system when I was there. I never knew of any system, except people were calling wanting to know when they were going to go to work."

Frank Santana, a foreman for Respondent from 1976 to April, 1981 described the recall procedure during his tenure at the company as one where an effort was made to contact an employee by phone or through another worker and if these methods failed, by registered letter.

Kelley Olds, Respondent's Labor Relations Manager from April 1973 to January 1981 testified that the most prevalent form

of recall was word of mouth. If that didn't work, letters were used to recall workers. According to Olds letters were first used in late 1975 or 1976.

Ken Bingham, Respondent's manager for the Brawley District testified that from the time he started working at the company until the time present the Respondent has used a combination word of mouth/written letter recall policy.

In addition to testimony, both the General Counsel and Respondent introduced recall letters sent by Respondent. The letters introduced by General Counsel (GCX 1) were 36 in number, and except for 2, all were dated June 11, 1981 or after. The letters introduced by Respondent numbered 28, dated from 1977 to 1980. The contents of the letters sent after June 1981 appears to all be the same in that they specified a reporting time and location and advised the addressee that if he did not report to work, he would be regarded as a voluntary quit. So far as the time to report to work, it would range from 3 to 6 days after the date of the letter.

As for the letters introduced by Respondent covering the time period 1977 to 1980 many were worded essentially the same as the above letters; others specified a reporting time 72 hours after the receipt of the letter. In addition to testimony regarding the recall method, General Counsel also introduced evidence through Mary McCartney, a UFW negotiator, indicating that in August 1980, Respondent, as part of the then on-going negotiation, proposed a word of mouth recall system. The Union, as part of their proposal on seniority put forth a written recall requirement. In

June 1981 though the seniority proposal was withdrawn and the Union presently has no proposal regarding seniority on the bargaining table No evidence was introduced indicating that the parties had bargained to impasse.

ANALYSIS AND CONCLUSION

It appears quite evident that a change took place in Respondent's method of recalling workers in June of 1981. Garcia, Respondent's production manager and the person responsible for the recall procedure, so testified. Respondent argues in his brief that Garcia's testimony should not be given much weight because he only worked for Respondent one year and "the pressures and duties of the job were too much for him as shown by his discharge in January 1982."

As to the former, Garcia was certainly there long enough to know how he recalled workers. As to the latter, no evidence was introduced at the hearing indicating, first that Garcia was discharged as opposed to resigning and second if discharged, the reason for such discharge. I therefore credit Garcia's testimony in regard to his using letters to recall workers.

I find that a change took place from a combination written and oral practice in recalling workers to a written recall method. General Counsel also argues that Respondent changed the term of the recall by changing the number of days given the employees to report. However, I find that, except for minor variations, the time given the employees to report remained between three to six days

from the date of the letter.

Under NLRB precedent, unilateral changes of "wages, hours, and terms and conditions of employment" as defined in Section 8(d) of the NLRA, at a time when an employer is obligated to bargain with the certified representative of the employees violates Section 8(a)(5) of the NLRA. NLRB v. Katz 369 U.S. 736, 747 (1962). General Counsel's position is that the change of a combination word of mouth and written recall procedure to a primarily written procedure is one of the terms and conditions of employment that Respondent may not unilaterally change. General Counsel cites three cases in support of its argument that "unilateral establishment of a new method of recall constitutes a change in the terms and conditions of employment." However in each of the three cases, Hamilton Electronics Company (1973), 83LRRM 1097, Caravelle Boat Co. 95LRRM 1003, 227 NLRB 1355 and Master Slack Corp. 230 NLRB 1054, the "method of recall" that was changed was a change in method for determining who would be eligible for recall. For example, in Hamilton Electronics Company, supra, the employer had previously recalled laid off employees by seniority, however, this was changed to a recall method based only on an employee's ability to perform quality work. Similarly in Caravelle Boat Co., supra, the method of recall that was changed was one where the employer had, in the past, been recalled on the basis of seniority, to one where recalls were based on seniority, work performance and past attendance record. And in Master Slack Corp., supra,

an unprecedented point system based on production efficiency was added on to the existing seniority basis for recalling workers. In each of the cases relied on by General Counsel, workers were prejudiced by the change, as, for example, in Master Slack Corp., supra, where five persons were not recalled due to the change. It would appear quite evident that the change in the standard by which workers are recalled is a change in one of the terms and conditions of employment.

In the instant case though the change in method is not as significant. Respondent was already using a written recall system for some workers, when Garcia decided that all workers should receive a written letter of recall. In addition, no evidence was introduced to indicate that the change to a strictly written recall method affected any of the worker either by resulting in a worker not being recalled or otherwise.

Not every change engaged in by employer in the day to day operation of his business rises to the level of a violation of the Act. In Master Slack Corp., supra, the employer admitted unilaterally changing the method by which workers reported absences by instructing its employees to call the receptionist rather than their supervisors when they were unable to work. The NLRB held that this was not a violation.

On balance, considering that the employer had already had a partial written recall system, that the General Counsel has cited no case holding that the change complained of is significant enough a change to violate the Act, and that no

prejudice was shown to any employee. I will recommend dismissal of this allegation of the complaint.

III. THE ALLEGED UNLAWFUL DISCHARGE OF JUAN URRUTIA

FACTS

Urrutia's Job Duties

Juan Urrutia worked for Respondent for almost a ten year period - from December 8, 1971 to August 29, 1981. His last position with Respondent was as a service truck driver beginning in August 1980. Urrutia, prior to taking the job as service truck driver, expressed reservations to Frank Santana, his foreman, about his ability to handle the job if it involved any mechanical work. He was assured by Santana, that no repair work was required in the position. With this assurance, Urrutia took the job.

Urrutia, Urrutia's two foremen during the time he has a service truck driver and Mike Garcia, Urrutia's supervisor, all testified, in essence, that the service truck driver's position involved checking the oil, water, air cleaners, diesel and batteries on various tractors used in the field. In addition Urrutia also changed oil and air filters, lubricated equipment and checked for oil leaks from the equipment. If he discovered any oil leaks, he would report them to the mechanic or foreman. All of the witnesses agreed that Urrutia was not required to make repairs, but Garcia testified that Urrutia was required to make minor repairs.

Frank Santana, Urrutia's foreman from August, 1980 to April, 1981 testified that Urrutia did a good job as a service truck driver. Ramon Moreno, Urrutia's foreman from April, 1981 to Urrutia's discharge in August, 1981 also testified regarding Urrutia's job performance. He testified that Urrutia did his work correctly. He also testified that it was not Urrutia's job to replace hydraulic hoses.

Garcia was Urrutia's supervisor from January 1981 to the date of his discharge. From August 18, 1981 to September, 1981, Moreno was on vacation. Garcia acted as Urrutia's foreman during that period. Garcia testified that, in addition to servicing the field equipment, Urrutia was also required to make minor repairs. He defined minor repairs as "tightening of a belt, the fan belt, or an alternator belt, changing the 'O' ring in the couplers, the hydraulic hoses. Changing a hose, if he sees a hose that was leaking, a hydraulic hose, he has to change it." Garcia testified that except for the oral warning he gave Urrutia leading up to the discharge, he never talked to Urrutia.

Urrutia's Union Activities

Urrutia has been a supporter of the UFW since he first began employment with Respondent in 1971. In 1980, Urrutia contributed a hundred dollars for the expenses to send a representative of the tractor drivers to attend union negotiations in Salinas. He also attended meetings of tractor drivers during that year to discuss union activities. He testified that he

discussed his participation in these meetings and his contribution for the representative with his foreman Frank Santana. Santana corroborated this statement.

Garcia's Statements regarding Urrutia

Moreno testified that he discussed Urrutia with Garcia in 1981. According to Moreno, Garcia told him that he did not like to have that man working there. Garcia also told Moreno that Ken Bingham said he did not want Urrutia there. Moreno told Garcia that "If you want to stop Juan (Urrutia) you must look for another serviceman, that I am not going to look for one." In response to a question about whether he ever told Urrutia he wasn't doing his job right, Moreno said "there was no need of that."

Santana testified that Garcia, after he came to work for Respondent, asked several times about meetings held by the truck drivers. Garcia specially asked about Urrutia and "if he was involved, you know, what his participation in them and so forth." Santana replied that so far he knew, Urrutia was involved. According to Santana, Garcia "kept commenting about Juan, you know, to watch him real close and he kept commenting that he knew that he was involved in these union activities ..... He just said to keep close tabs on Juan and, if he gives any problem, well he knew how to take care of him."

Garcia did not deny making these remarks.

Urrutia's Discharge

According to Garcia, on the Thursday before the Saturday when Urrutia was discharged, Garcia noticed that the hydraulic hose was leaking oil from a tractor. He told Urrutia it needed

'O' rings to stop the leak. Garcia testified that Urrutia said he would take care of it. On Saturday, Garcia noticed the tractor was still leaking and he asked Urrutia why it wasn't fixed. Urrutia responded that it was the mechanic's job. Urrutia also added that "If you don't like my work just tell me. Just fire me. Go ahead."

Whereupon Garcia fired him, Garcia also testified that other things influenced his decision to fire Urrutia.

> "Well, at the time he just --- the manner that he just kept pushing me on that point, 'Well, just fire me,' he's just daring me, plus these were other things that he had - - - I always had - - - when you talk to Juan and try to help him in his work, about improving his work habits, he always took it real offensive, and always was telling, 'well, if you don't like my job, just fire me.'" (TRV 27-28)

In addition Garcia also recounted an incident where a hydraulic oil filter was not replaced causing $280 worth of damages. This problem was not reported to Urrutia directly by Garcia. Rather Garcia told Moreno to tell Urrutia. Moreno did not corroborate this testimony. Garcia also complained to Santana that Urrutia was not completing his paper work in timely manner.

On redirect examination, Garcia testified that Urrutia's

response to his order on Thursday to replace the 'O' ring was that he did not have an 'O' ring. Garcia responded "see if you can get one." In response to a question that I asked, Garcia testified that he did not know whether Urrutia ever replaced 'O' rings before. And Urrutia, to Garcia's knowledge, had never received warnings regarding his work performance. I also asked Garcia if Urrutia ever told Garcia that he did not know how to change 'O' rings. Garcia responded in the affirmative and said Urrutia told him so immediately before the discharge. On further redirect by Respondent's counsel, Garcia again testified that Urrutia told him on the day of the discharge he did not know how to change 'O' ring. However, shortly thereafter, Respondent's counsel recalled Garcia to the stand and Garcia testified that Urrutia never said that. In response to a question as to why he so earlier testified, Garcia responded that he was at an Unemployment Office hearing when he heard Urrutia say that and that was the first time he ever heard it, which apparently confused him, leading to his earlier testimony.

Urrutia's version of the discharge is somewhat different. He denies that Garcia mentioned anything on Thursday regarding leaking oil. The first mention of leaking hydraulic hoses are on Friday. According to Urrutia, Garcia didn't order him to fix the hoses on Friday, rather he only said that the hoses had to be fixed.

On Saturday the 29th, Garcia confronted Urrutia about

the leaking hydraulic hoses. Urrutia replied that he did not have the equipment to fix it. He also told him that he did not know how to fix it; that it was the mechanic's job to fix it. He admits saying that "if you don't like the way I'm working, why don't you fire me. He testified that after he was fired, he went to an equipment store, bought some 'O' rings and after some effort replaced the 'O' ring.[1]

Respondent's Policy On Warnings

According to Garcia, Respondent had a policy that refusal to follow a work order leads to an automatic discharge. This policy was corroborated somewhat by Bingham.

Bingham testified that refusing to do work, which is insubordination, would led to dismissal "on the spot". However, later in response to a question regarding the disciplining of a worker who refuses to do work, he responded that the worker is first asked to do the work. A second request is then made and usually a time element is given to check back and see if the work is done. If the employee corrected his work problem, he continues on, otherwise he is terminated.

Preston Olds, Respondent's Industrial Relations Manager

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1. The record is somewhat unclear as the exact relationship between the hydraulic hose and the 'O' rings. It appears that the witnesses used the term hydraulic hose to indicate the place where the leak occurred and 'O' rings as the part needed to stop the leak. It is quite clear, however, that the witnesses were referring to the same problem in testifying about the hydraulic hose and 'O' rings.

from April 1973 to January 1981, also testified regarding this issue. On serious offenses no warningsare given and employees could be fired "on the spot". Serious offenses are stealing, refusing to perform work, and drinking. Lesser offenses would require three warnings. He gave an example where a worker would refuse to go into a given row of crops to work as directed, but went into another row. In these cases a warning would be issued. However, if the worker refused to work at all, that would lead to a discharge. On the other hand, Santana testified that refusal to accept work would only result in a written warning and that it would take three warnings before an employee was terminated. He testified specifically that an employee would not be terminated automatically for refusing a work order. The only exception to the three warning notice rule was if an employee was caught stealing or if he was intoxicated or drinking on the job. In the event of either stealing or drinking, an employee would be automatically terminated. General Counsel introduced into evidence Respondent's form written notice. This form has printed on it a list of reasons for the issuance of the notice, Included within the list is a category called Refusal to Accept Work.

Urrutia's Alleged Supervisorial Status

Respondent, as part of an affirmative defense, raises the issue that Urrutia was a supervisor and therefore he has no recourse under the Act. Bingham testified Urrutia's job title was sub-tractor foreman and serviceman. As part of his duties,

Urrutia, according to Bingham, would help the tractor foreman tell the tractor drivers what to do, when to do it, what type of work to do, when to show up." In addition when Urrutia first became a sub-tractor foreman and serviceman, he was changed from an hourly pay schedule to a salaried one and his medical insurance plan was changed to that of salaried employees. Bingham admitted, though, that Urrutia never hired or fired anyone. Santana, when he testified regarding Urrutia's job duties, did not refer to Urrutia as a sub- tractor foreman nor did he claim Urrutia assisted him. Moreno, during his testimony, did not corroborate Bingham's testimony that Urrutia was an assistant to Moreno. Four tractor drivers were called as rebuttal witnesses by General Counsel and all denied receiving work orders from Urrutia. Urrutia himself denied that he ever supervised anyone, nor did he ever hire, fire or discipline anyone. Garcia in his testimony regarding Urrutia's job duties did not describe any duties remotely resembling supervisorial duties.

ANALYSIS AND CONCLUSION

The Board has recently adopted the Wright Line test in cases involving alleged discriminatory discharges where lawful and unlawful motives are at issue.

Wright Line, Inc. (1980) 251 NLRB No. 150 [150 LRRM 1169] Nishi Greenhouse (1981) 7ALRB No. 18.

Under Wright Line, General Counsel must first make a prima facie showing that unlawful discrimination was a motivating factor

in an employee's decision to take an adverse employment action. Having done so, the burden shifts to the employer to establish that it would have taken the same action absent the protected activity. Merrill Farms (1982) 8ALRB No. 4.

A prima facie case is established when the General Counsel has proved, by a preponderance of the evidence, that the employer knew or believed that the employees engaged in protected activities and they were discharged because of their activities. Lawrence Scarrone (1981) 7ALRB No. 13.

In the instant case, the General Counsel proved that Urrutia engaged in union or concerted activities by attending tractor driver meetings and contributing money to send a tractor driver to attend contract negotiations in Salinas. Respondent was aware of these activities as Urrutia discussed them with his foreman Santana. Santana in turn told Garcia as a result of Garcia's inquiries. Santana and Garcia's knowledge is attributable to Respondent.

These facts, in addition to Garcia's remarks to Moreno and Santana, that he wanted to get rid of Urrutia, in conjunction with his remarks that he knew of Urrutia's union activities, establish a prima facie case that Urrutia's protected activities were a motivating factor in Respondent's decision to discharge Urrutia.

Respondent's position is that it was justified in discharging Urrutia because of Urrutia's refusal to obey a job order, and that

the discharge was in accordance with its established procedures. Respondent relies primarily on Garcia's testimony in support of its positions.

I have, however, decided not to credit Garcia's testimony in regard to his motivation for discharging Urrutia. I do so on the basis of Garcia's demeanor during his testimony which appeared evasive, hesitant and lacking in candor. In addition, his testimony was also inconsistent and contradictory. Garcia originally testified that his discharge of Urrutia was because of Urrutia's refusal to obey a work order, his insubordinate remark in daring him to fire Urrutia, and previous complaints that Urrutia's failure to change an oil filter resulted in a costly engine repair and the late submission of proper work. However, after so testifying, Garcia denied that he fired Urrutia because Urrutia dared him to. In addition, his testimony regarding Urrutia's failure to change an oil filter is not corroborated by Moreno. In fact, Moreno said there was never any need to tell Urrutia that he wasn't doing his job right. Garcia's complaint that Urrutia kept daring Garcia to fire Urrutia is not consistent with Urrutia's other testimony that except for the leaking oil incident he never talked to Urrutia.

Nor was Garcia consistent in his testimony regarding whether prior to his discharging Urrutia, Urrutia claimed that he did not know how to change 'O' rings. After twice testifying that he was told by Urrutia that Urrutia did not know how to change 'O' rings, Garcia changed his testimony and said that he was not told by

Urrutia that he was unable to change 'O' rings. He seems to justify this inconsistency by explaining that he heard Urrutia say this at an Unemployment Office hearing and this apparently caused the inconsistent testimony.[2]

Nor did it appear that Respondent followed it's own established personnel policy in deciding to discharge Urrutia. I credit Santana's testimony that three written warnings were required to terminate an employee for misconduct in refusing to accept work. Santana, it should be noted, was at one point an acting supervisor and he gave instructions to other foremen regarding Respondent's warning policy. While Garcia testified that refusal to accept work called for automatic termination, both Bingham and Olds gave examples where workers would be warned first in a refusal to work situation prior to discharge. In fact, Olds referred in his example of refusal to work as a frequent occurrence.

Finally, Garcia's description of Urrutia's work which included the making of minor repairs, is not credible. Garcia described Urrutia's job duties as including minor repairs which included replacing hydraulic hoses and 'O' rings. Santana, Urrutia's foreman and the person who directly supervised Urrutia, and Moreno, Urrutia's subsequent foreman, both described Urrutia's job

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2. Another example of Garcia's inconsistent testimony involves the recall procedure. He originally testified that prior to his so doing, Respondent never sent recall letters, He later changed his testimony by saying he did not know "if they ever did or didn't."

as that of servicing equipment only and specifically excluded repairs.

Based on all the evidence I find that Urrutia's job duties did not include minor repairs and that refusal to accept a work order under Respondent's established procedures did not result in an automatic discharge.

I conclude, therefore, that Respondent failed to rebut General Counsel's prior prima facie case that Urrutia was discriminatorily discharged and will recommend that Respondent be found in violation of Section 1153(c) and (a) of the Act for its discharge of Juan Urrutia.

Finally, the evidence in support of Respondent's contention that Urrutia was a supervisor was non-persuasive. Section 1140.4(j) of the Act defines the term "supervisor" as follows:

> "The term 'supervisor' means any individual having the authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions; if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but require the use of of independent judgment."

Respondent sought to establish through the testimony of Bingham that Urrutia was a supervisor. Bingham essentially testified that Urrutia assisted Santana; however, this testimony is not corroborated by Santana. In addition, Respondent introduced evidence that Urrutia was placed on a medical insurance plan normally given only to their salaried supervisory personnel and clerical staff. However, while this may be some indication that Respondent intended to consider Urrutia in the same category as other salaried supervisorial personnel, it is not evidence that Urrutia, in fact, ever acted as a supervisor. Finally, Respondent admits that Urrutia never hired, fired, or disciplined anyone.

General Counsel, on the other hand, introduced overwhelming evidence that Urrutia was not a supervisor. Both of Urrutia's foremen, Santana and Moreno described Urrutia's duties only in terms of service work. Urrutia credibly testified that he never supervised, hired, fired, or disciplined anyone. Four tractor drivers, who were allegedly supervised by Urrutia, denied ever receiving any supervision from Urrutia.

Based on the above facts I find that Urrutia was not a supervisor and conclude that Respondent's affirmative defense is without merit.

IV. THE ALLEGED UNLAWFUL WITHHOLDING OF OVERTIME FROM UFW SUPPORTERS

The General Counsel alleges that beginning on or about August 1981, three tractor drivers, Jesus Mejia, Isadora Andrade,

and Manual Lopez Huerta, were assigned fewer hours of work than tractor drivers of lessor seniority, in retaliation for their union sympatheis and activities and their concerted activities.

Mejia has been in continuous employment for Respondent since 1975. He testified that he is fourth in seniority among the tractor drivers. Mejia attended union meetings at the UFW office and the company shop in 1980. Mejia testified that at several such meetings at the company shop a foreman was present. He testified that in September 1981 he, Jesus Cervantes and Arnoldo Martinez met with Bingham to discuss various grievances including allocating overtime on the basis of seniority. According to Mejia, Bingham told them he would respect seniority. Mejia testified that he saw 4 drivers with less seniority than he work overtime in 1981.

Andrade has worked for Respondent since 1977. He ranked sixth in seniority for tractor drivers. During 1980 Andrade participated in union meetings. These meetings were not held at the company shop. Andrade testified that in 1981 he discussed the union with his co-workers "at every opportunity". Andrade remembers 5 drivers with less seniority than he working overtime in 1981 when he was not.

Huerta, another tractor driver, was 7th in seniority. Huerta testified that during 1981 he had discussions with his co-worker about the union. The discussions would be about the desirability of having a union to receive better salaries and

better treatment. He recalls that during 1981, he saw tractor drivers with less seniority than he work Sundays when he did not.

The normal work week at the company is 60 hours a week, ten hours a day, six days a week. Hours worked on any given day over 10 hours is counted as overtime, as well as work done on Sundays. Overtime is assigned by the tractor driver foreman. Mejia, Andrade and Huerta all testified that in 1981 they only worked one, two or three Sundays.

Respondent's defense to this charge is that overtime work is assigned not merely on the basis of seniority, but also worker's skill and location in the field and further, that this has been a Respondent's practice for many years.

Olds, labor relations manager, testified that if a lesser seniority tractor driver was working in a given field, and overtime was required in that field to complete a job, the lesser seniority drivers would complete the work as it was impractical to bring in a greater seniority driver to complete the work. He explained that the reason for this policy was that the fields could be twenty to thirty miles apart requiring too much effort to assign overtime only on seniority.

ANALYSIS AND CONCLUSION

General Counsel presented his case on this allegation on the basis that the only criteria that Respondent used in assigning overtime was seniority. Respondent, however, presented credible testimony that assignment of overtime was based on three factors:

seniority, the skill of the tractor driver in relationship to Respondent's needs at the time, and logistics involving location in relationship to the work to be done.

General Counsel asked each of the alleged discriminatees whether they saw persons of less seniority working overtime when they were not. All the alleged discriminatees responded in the affirmative. However, this question was not tied in to either the driver's relative ability or location in the field. In the only instance where a tractor driver, Mejia, was questioned specifically on those points, he admitted that the other drivers of lesser seniority were working at a location eight or nine miles from where he was, and those drivers were cultivating as opposed to Mejia who was preparing ground for seeding a less skilled operation.

I find that Respondent's policy in regard to assigning overtime to tractor driver was based on the above enumerated three factors instead of purely seniority and conclude that the General Counsel did not prove a prima facie case on this allegation. Accordingly I will recommend that this charge be dismissed.

V. THE ALLEGED UNLAWFUL FAILURE TO REHIRE MIGUEL GONZALEZ

FACTS

Miguel Gonzalez was employed as a sprinkler worker for Respondent from 1974 to April 1981. Miguel normally worked for Respondent beginning in late August or early September until sometime between January and April of the following year.

In 1981, Miguel was laid off in April. Later that month, an earthquake damaged some of Respondent's property necessitating the recall of two sprinkler workers, one of whom was Miguel. Respondent attempted to contact Miguel through two co-workers, Martiniano Torres and Adrian Parra, however, was unsuccessful. Torres and Parra did however contact Martin Gonzalez, Miguel's brother. Martin, then called Sergio Rodarte, Respondent's sprinkler and irrigator foreman. Martin told Rodarte that Miguel was in Los Angeles and would not return for three days. Rodarte, then asked Martin to come in during that time until Miguel returned. Martin agreed.

After the three day period, Miguel still did not return. Rodarte testified that he continued trying to recall Miguel. Ten days after the first attempt to recall Miguel, Miguel called Respondent's shop and talked to Torres, a senior sprinkler worker and one of the persons initially sent to contact Miguel. Torres asked Miguel when he was coming back. Miguel said that his brother was covering for him.

Some six or seven days after this phone conversation, Torres saw Miguel at the border crossing. Again he asked him when he was coming back to work. Torres told Miguel that the company was waiting for him. According to Torres, Miguel said no, he was going to work in the melons.

After trying for a month to recall Miguel, Respondent sent a written notice of recall to Miguel dated June 11, 1981. The letter gave Miguel a reporting time of June 16, 1982. The

letter was addressed to Miguel at Dogwood Camp, No. 16, Brawley California, an addressRespondent's office manager Erlene DeLong got from John Hernandez of the Employment Development Department of the State of California. In addition to asking for Miguel's address, DeLong also asked Hernandez to advise Miguel that Respondent wanted him to return to work. Miguel testified that it was not until July 2, 1981, that he checked his mail at that address and picked up the letter. He reported to work on the next day and learned that he would not be re-hired.

Miguel's Union Activities

Miguel was a UFW supporter. He testified that employees would have meetings at the company and when that happened he would help notify co-workers. This occurred about six times during the year, though the record is unclear as to what year he had reference to. He testified that one time when he told some workers a meeting was scheduled, one of Respondent's foreman, Carlos Paz was close enough to have overheard his remarks.

In addition to notifying workers of the above meetings he also testified that on one occasion he asked Paz for some maps showing the locations of some of Respondent's fields. He told Paz that he needed the maps for the Union. He testified that Paz gave them to him with Paz remarking that "he was sure that the cause that we were pursuing was justified."

He also testified that around March of 1981, he along with two co-workers, asked Garcia to give the workers a travel allowance. Garcia responded that he would think about it. Two days later Miguel also asked Sergio Rodarte for the allowance.

Rodarte explained that he wanted to give the allowance but, Garcia did not, with the result that sometimes the workers would receive the allowance and sometimes not.

Miguel's Alleged Attempt To Influence The Testimony Of Gilberto Lopez

Gilbert Lopez was Respondent's sprinkler foreman beginning June 1981 for four months. He testified that Miguel came to his house in Mexicali and offered him money if Lopez would testify that Miguel had been checking with Lopez about working for Respondent. According to Lopez, Miguel also asked Lopez to say that no work was available. This conversation allegedly took place one week prior to the hearing.

Miguel admits going to Lopez's house, but only for the purpose of verifying Lopez's nickname and address. According to Miguel, one week prior to talking to Lopez he had gone to the Lopez house when Lopez was not home. He only saw Lopez's wife there and upon finding out that Lopez was unavailable, he left without asking about his address or nickname.

ANALYSIS AND CONCLUSION

Resolving first the credibility issue, I have decided not to credit the testimony of Martin, based on his demeanor while testifying, and also because his testimony itself was illogical. Martin essentially claimed that he was told by Rodarte that Miguel would only be needed for two to three days, and that he could cover for Miguel during that time. Yet Martin continued

to work for Respondent, much longer than that period, in fact, until he was laid off in March 1982. Other workers were being recalled with less seniority than Miguel, yet Martin testified that he did not know that Respondent wanted to recall Miguel. Martin testified that he kept in close contact with Miguel during this period, at the same time he claimed not to know whether or not Miguel was working elsewhere during May or June. Thus, I do not credit his version of his conversation with Rodarte when he first got notification of Miguel's recall. Rather, I credit Rodarte's testimony where he states that he told Martin that Miguel was recalled and Martin could take the place of Miguel, pending the latter's return from Los Angeles.

In regard to Respondent's allegation that Miguel tried to influence Lopez's testimony by offering money to Lopez, I credit Lopez's version of the facts. Miguel admits that he went to Lopez's house twice. He further states that he went only to determine Lopez's nickname and address. When he went the first time, he testified that as soon as he discovered Lopez was absent, he left. If, in fact, the only reason he went to see Lopez was to verify these two facts, it would seem more likely that he would have at least asked Lopez's wife if she could verify her address and her husband's nickname. It appears quite evident that Miguel must have had another subject to discuss with Lopez requiring a personal confrontation, and, in fact, as Miguel also testified, the subject of Lopez's testimony was raised. Miguel states that as

far as Lopez's testimony is concerned, he asked Lopez to "tell the truth" regarding what transpired. Miguel's denial that he offered a bribe is unconvincing as witness the following exchange:

> Q: (by Mr. Dawson): Isn't it true you returned that day and spoke with Mr. Lopez in person and offered him money not to testify.
>
> A: No, I returned, but he had already talked with the company.

The denial is ambiguous, and the reference to Lopez having talked to the company already, could certainly mean that his offer came too late.

Considering all the facts, I find that Miguel tried to influence Lopez's testimony. His demeanor while testifying appeared evasive and untruthful. In addition, I do not credit Miguel's other testimony that he was unaware that the Respondent was attempting to recall him to work during May and June.

Miguel admits that Respondent's recall letter was properly addressed to him at his residence, yet the letter stood unclaimed for over a two and a half week period. No explanation was offered by Miguel as to why he did not earlier pick up the letter nor was there ever any explanation why he did not check directly with a foreman when he realized that lesser seniority workers, including his brother, were working.

It should be noted that during the months of May and June Miguel was receiving state unemployment benefits, as he himself admits. This was during the period of time that

Respondent was attempting to recall Miguel, which would provide a motive for Miguel not wanting to be recalled.

"To establish a prima facie case of discriminatory discharge in violation of Section 1153(c) and (a) of the Act, the General Counsel is obliged to prove by a preponderance of the evidence that the employee was engaged in union activity, that Respondent had knowledge of the employee's union activity, and that there was some connection or causal relationship between the activity and the discharge." Jackson & Perkins Rose Co. 5 ALRB No. 20 (1979).

Though General Counsel was able to show that Miguel engaged in some minimal union and concerted activities, and that Respondent had knowledge of this activity through foreman Paz, General Counsel did not establish, by a preponderance of the evidence that there was any causal connection between Miguel's union and concerted activity and Respondent's refusal to rehire Miguel. To the contrary the evidence establishes that the refusal to rehire was directly linked to Miguel's lack of or untimely response to Respondent's effforts to recall him.

I conclude, therefore, that Respondent did not violate Section 1153(a) or (c) when it refused to rehire Miguel and will recommend dismissal of this allegation of the Complaint.

VI. THE ALLEGATION THAT RESPONDENT THROUGH FOREMAN ROBERTO CASTRO INTERROGATED AND THREATENED VICENTE AND MANUELA RAMIREZ AND THE THIN AND WEED CREW.

FACTS;

Vicente and Manuela Ramirez, both work in Respondent's thin and weed crew. Vicente has been so employed since 1972; Manuela since 1973. Roberto Castro was the crew supervisor for the Ramirez crew during November 1981.

Vicente testified that on November 18, 1981, in the morning, he was approached by Castro. Castro told Vicente that he understood they were going to have a meeting, and he wanted to know what was the meeting was for. There is no evidence that Vicente responded.

Later that day, in the afternoon, as the crew was leaving work, Castro spoke to Vicente's crew while they were in a bus parked at the edge of a field. According to Vicente, Castro again said that he knew of a meeting and wanted to find out what it was all about. Castro also wanted to find out who the representative of the thinners was, and when and where the meeting was to take place. Vicente responded that the meeting would take place at his house at 4 PM that day.

Castro then said he thought everyone in the crew should attend to find out what it was about. Castro also said he knew some people there were agitators among the workers and he was going to investigage to find out who they were, because it wasn't convenient for him or the company to have them working there. Castro then said he would continue investigating until he found out who they were and then he would take away their work.

Manuela was called to testify and she corroborated the essential points of Vicente's testimony.

Castro did not testify; however, Respondent introduced evidence through Marvin Kassard, Respondent's Labor Relations Manager that Castro was no longer an employee and an unsuccessful attempt was made by Respondent to locate Castro as a witness. No witnesses were called by Respondent from the members of the crew on the bus.

ANALYSIS AND CONCLUSION

The General Counsel argues in his brief that Respondent, through foreman Castro interrogated and threatened its employees in violation of Section 1153(a) of the Act by asking about "a meeting" and threatening to fire "agitators".

While Respondent did not call Roberto Castro to testify, I draw no negative inferences therefrom, on the grounds that a reasonable but unsuccessful effort was made by Respondent to locate Castro. However, I have decided to credit the testimony of both Vicente and Manuela that Castro made the various statements based on their demeanor while testifying.

Accepting their testimony as true, however, I decline to find a violation of the Act. While the General Counsel introduced evidence indicating that Castro made inquiries regarding "a meeting",nowhere in the record is there evidence that the meeting involved concerted activities. Similarly, no evidence

was introduced regarding in what context Castro requested information regarding the representative of the workers. Castro's remark that he would fire agitators is also not placed in any context.

The basis of the conversation between Castro and the weed and thin crew involved "a meeting". "Meetings" of course can be for many purposes many of which have no reference to the protected concerted activities of workers. I therefore find the question regarding a meeting too ambiguous to warrant a finding that the Respondent violated Section 1153(a) of the Act. Similarly the use of the word agitator without more is also ambiguous. The facts in Faith Garment Company 246 NLRB No. 44 involved similar language. A supervisor told an employee the company "was going to get rid of all the troublemakers". The ALJ held, in a decision adopted by the Board, that the use of the word "troublemaker" was too ambiguous to warrant a finding of a violation when the conversation in which the word was used made no reference to organizational activities.

Accordingly, I will recommend dismissal of this allegation of the Complaint.

VII. THE ALLEGATION THAT RESPONDENT THROUGH FOREMAN RAMON MORENO INTERROGATED AND THREATENED MANUEL LOPEZ HUERTA AND CARLOS CHAVEZ VASQUEZ.

Huerta and Vasquez were employed by Respondent as tractor

drivers. Huerta has been so employed from 1979 to March 1982; Vasquez from July 1981 to February 1982. Moreno was their foreman during the period in question.

On January 15th or 16th, 1982 the tractor drivers had a meeting under a tree at field 41 to discuss the Union and to select a representative for the tractor drivers in the event they wanted to talk to management. Jesus Mejia was selected as the representative.

According to Huerta, two days after this meeting Moreno confronted Huerta about this meeting and said "Manuel, I became aware that you had a meeting and the company knows about this now. I'm going to take to court those that were there." After this conversation Huerta testified that he was afraid he would be taken to court so he went to "the ALRB office to ask the lawyers what to do."

Vasquez essentially corroborated Huerta's testimony regarding the meeting of the tractor drivers in January. In addition, Vasquez recounted a conversation with Moreno some 8 to 10 days after the meeting. According to Vasquez, Moreno told Vasquez that they should not have had the meeting because the company did not want them to have meeting and not on company property. Moreno asked why they wanted a meeting and Vasquez replied that they wanted a representative. Moreno also said that the office had already contacted the court and the court was going to call the workers because they had had the meeting. Moreno

told Vasquez that it was not good or convenient to get involved because it would injure or damage him. Moreno also told him that he "should not listen to Arnoldo or Jesus Mejia because they were noting everything down on them so that they could fire them." According to Vasquez, Moreno kept asking if it was Arnoldo Martinez who had called the meeting. The following day he went to the ALRB office because he wanted to see an attorney regarding Moreno's statement that the company would take them to court.

Moreno was called as a witness by the Respondent and he denied having talked to either Huerta or Vasquez about any meetings.

ANALYSIS AND CONCLUSION

I credit the testimony of Vasquez and Huerta that their conversation with Moreno took place as they testified. Their demeanor while testifying appeared sincere and forthright. In addition, their testimony is supported by their decision to seek help from the local ALRB office as soon as they received the threat that they would be taken to court. Having found that Moreno made the statements as alleged, is there a violation of Section 1153(a) of the Act? The test for so determining is whether a comment has a reasonable tendency to interfere or restrain employee in the pursuance of protected activities under all the circumstances. Maggic-Tostado (1977) 3ALRB 33.

I find that Moreno's statements constituted a threat to either file a lawsuit or involve Vasquez and Huerta in litigation

for having had a meeting to discuss the Union and select a representative[3]. I further find that the threat would tend to interfere with the employees in the exercise of their right guaranteed by the Act and it was therefore a violation of Section 1153(a) of the Act.

THE REMEDY

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

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

ORDER

Respondent D'Arrigo Bros. of California, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against agricultural employees because they have engaged in union activity or other concerted activity protected by Section 1152 of the Act.

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3. Rayco, Inc. (1977) 231 NLRB 660, 675 violation found where employees threatened lawsuit.

(b) Interrogating or threatening employees because of their participation in protected activities.

(c) Instituting or implementing any changes in any term or condition of employment of any of its agricultural employees without giving prior notice to and bargaining with the United Farm Workers of America, AFL-CIO (UFW) about any such proposed change.

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

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

(a) Immediately offer to Juan Urrutia full reinstatement to his former or substantially equivalent job, without prejudice to his seniority or other employment rights and privileges.

(b) Make whole Juan Urrutia for all losses of pay and other economic losses he suffered as a result of Respondent's discrimination against him, together with interest thereon computed at the rate of seven percent per annum, in accordance with the formula established by the Board in J & L Farms (August 12, 1980) 6 ALRB No. 43.

(c) Rescind, upon request of the UFW, any and all unilateral changes instituted by Respondent found in this matter to constitute violations of Labor Code Section 1153(e) and make

whole all agricultural employees for any and all economic losses they may have suffered as a result of the unilateral changes.

(d) Upon request, meet and bargain collectively in good faith with the UFW concerning the effects upon its agricultural employees of the unilateral change it has instituted in the terms and conditions of their employment and, at the UFW's request, reduce to writing any agreement reached as a result of such bargaining.

(e) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll records and reports, and all other records relevant and necessary to a determination by the Regional Director, of the backpay, make-whole awards, and other amounts due employees under the terms of this Order.

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

(g) Post copies of the attached Notice in conspicuous locations on its premises for 60 days, the period and places 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.

(h) Mail copies of the attached Notice in appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed at any time between October 15, 1980 and the date on which said Notice is

mailed.

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

(j) 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 it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing as to what further steps it has taken in compliance with this Order.

Dated: August 12, 1982

Brian Tom
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties were given an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by failing and refusing to meet and bargain with the United Farm Workers of America, AFL-CIO (UFW) about our agricultural employees' working conditions, by discharging an employee because of his support for the UFW and by interrogating and threatening employees regarding their protected activities. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

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

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

Because this is true, we promise you that:

WE WILL, on request, meet and bargain in good faith with the UFW before changing our employees' working conditions because it is the certified collective bargaining representative of all of our agricultural employees.

WE WILL give backpay plus seven percent interest to Juan Urrutia, to reimburse him for all losses of pay and other economic losses he sustained because we laid him off, and will offer him immediate reinstatement to his former positions or substantially equivalent jobs without prejudice to his seniority or other employment rights and privileges.

WE WILL, if the UFW requests us to do so, revoke any changes we made in your working conditions, such as, the utilization of a labor contractor, and will make each of you whole for any loss of pay and other economic losses you have sustained as a result of those changes, plus seven percent interest.

WE WILL NOT discriminate against employees in hiring, laying off, or any other way because of their union membership or activities.

WE WILL NOT ask about or threaten employees with lawsuits because of their participation in union or concerted activities.

Dated: D'ARRIGO BROS. OF CALIFORNIA

By: _____

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 319 Waterman Avenue, El Centro, Ca. 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.