STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROTHERS COMPANY, INC.,	Case Nos.	79-CE-222-EC
	79-CE-204-EC	79-CE-247-EC
	79-CE-205-EC	80-CE-8-EC
Respondent,	79-CE-206-EC	80-CE-78-EC
	79-CE-207-EC	80-CE-81-EC
and	79-CE-208-EC	80-CE-115-EC
	79-CE-219-EC	80-CE-116-EC
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	79-CE-220-EC	80-CE-146-EC
Charging Party.	9 ALRB No. 30	

DECISION AND ORDER

On February 11, 1981, Administrative Law Judge (ALJ)[1/] Stuart W. Wein issued the attached Decision and recommended Order in this proceeding.[2/] Thereafter, Respondent, General Counsel, and the United Farm Workers of America, AFL-CIO, (UFW) each timely filed exceptions, with a brief in support of exceptions, to the ALJ's Decision. Each party thereafter timely filed a brief in reply to the exceptions of the other parties.

Pursuant to Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority

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

[2/] This proceeding is based on three consolidated complaints covering 15 unfair labor practice cases. The allegations based on one of the cases were dismissed by the ALJ during the course of the hearing pursuant to a request of the General Counsel, Case No. 79-CE-222-EC. Seven of the remaining cases were severed by the ALJ pursuant to a formal settlement agreement between the parties: Case Nos. 79-CE-204-EC, 79-CE-205-EC, 79-CE-206-EC, 79-CE-219-EC, 80-CE-8-EC, 80-CE-81-EC and 81-CE-115-EC.

in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm his findings, rulings, and conclusions of law only to the extent consistent herewith and to adopt his recommended Order as modified herein.

Failure to grant promised bonus. We find merit in Respondent's exception to the ALJ's finding that it failed to fulfill a supervisor's promise of an end-of-season bonus to tractor drivers in order to discourage the worker's support for the UFW in violation of Labor Code section 1153(c) and (a).

Tractor drivers Adolfo Martinez and Juan Cervantes testified credibly that in July of 1979, supervisor Ray Gutierrez told the members of the irrigation crew that they would receive a year-end bonus of $50, $100 or $150 if they met certain conditions. Gutierrez offered no explanation for the differential and did not state whether the bonus would be a payment to the crew as a whole or in separate payments to the crew members.

Although Gutierrez was called by the General Counsel to testify on two separate occasions during the course of the hearing, he was never questioned about the alleged promise. Gutierrez left Respondent's employ in October 1979. In December 1979, before the season had ended, crew members asked labor relations director Kelly Olds about the status of the bonus which Gutierrez had mentioned. Olds replied that he had no prior knowledge of Gutierrez' alleged promise, and stated that Gutierrez had no authority to make such a promise, that no such bonus had

been authorized or contemplated by Respondent, and therefore that no bonuses would be paid.

Even assuming that Gutierrez did make a promise which Respondent subsequently declined to honor, no violation of the Agricultural Labor Relations Act (Act) can be found absent a showing that either Gutierrez' promise, or Respondent's subsequent disavowal thereof, was related to the employees' union activities. The ALJ apparently interpreted Martinez' and Cervantes' account of Gutierrez' statements to find therein an implied suggestion that payment of the bonus was conditioned on the employees' avoidance of union-related interruptions in their work. Martinez testified that Gutierrez had said:

> Boys, the machines are going to start working. And, he said, the old man - because this is what they called [district manager] Harry Davis - said to me for me to offer you bonuses so that you will do better work and the machines will be stopped for less time and that you will take care of the equipment.

Cervantes testified that Gutierrez told him:

> Jesus, this year you will have bonuses so that you'll work well as you have up until now and you will not be involved in so many problems and all those things.

We believe that a fair reading of Gutierrez' statements suggests only that he was attempting to encourage the workers to maintain and service their tractor equipment in order to avoid "... so many problems," i.e., "down time" due to mechanical malfunction. Those statements, without more, do not warrant a finding that the workers were promised additional compensation if they abstained from participation in union activities. General Counsel has not proved, by a preponderance of the evidence, that,

as alleged in the complaint, Respondent's withdrawal of the bonus program was discriminatorily motivated by the employees' union activities. We find no violation of Labor Code section 1153(c) or (a) and therefore we hereby dismiss the allegation.

Unilateral change in harvest wage rate. As alleged by General Counsel, the ALJ found that Respondent increased the wages of its Imperial Valley harvesting crew upon the commencement of the Imperial season in November of 1979 without giving the UFW prior notice thereof or an opportunity to bargain about the increase, and thereby violated Labor Code section 1153(e) and (a). As there was no increase in the harvest wage rate in November 1979, we find merit in Respondent's exception to this finding.

In D'Arrigo Brothers Company (1982) 8 ALRB No. 45, we found that Respondent had unilaterally increased the wages of its harvest workers in the Salinas Valley in August 1979. We rejected Respondent's past-practice defense for its actions, concluded that it had violated its duty to bargain with the incumbent union, and issued an appropriate remedial Order.

It was that increased wage rate which the Salinas workers earned, beginning in Salinas in August 1979 and continuing thereafter when they subsequently harvested for Respondent, first in Arizona, and ultimately in the Imperial Valley in November of that year. There were no further adjustments to their wages after August. As General Counsel has not set forth a prima facie violation of the Act, we hereby dismiss the allegation.

Failure to adjust wages for the permanent Imperial Valley ranch crew. Having alleged that Respondent unilaterally increased

the wages of its Imperial Valley harvesters in November 1979, as discussed above, General Counsel alleged further that Respondent failed to contemporaneously raise the wages of its permanent Imperial Valley ranch crew in order to discourage the crew's support and activities in behalf of the UFW. As the ALJ had already found, erroneously, that Respondent raised the wages of its harvesters at the beginning of the Imperial season, he assumed that Respondent was therefore obligated to similarly raise the wages of the permanent ranch crew as well. He concluded that Respondent's failure to grant the raise was intentional and based on the permanent employees' visible support for the UFW, and that Respondent thereby violated Labor Code section 1153(c) and (a). We find merit in Respondent's exception to those findings.

Kelly Olds, Respondent's labor relations director, testified that the crew's wage rates are dictated solely by the prevailing Imperial Valley rate for tractor drivers, irrigators, shovelers, and sprinkler workers and that there had been no upward movement in the prevailing rate for those job classifications after March of 1979, at which time the crew had been granted an increase. Olds recounted the results of his telephone survey of area growers which he said established no change in rates for the aforementioned job classifications. During the course of the hearing, counsel for General Counsel indicated that he intended to independently assess the sources of Olds' information in an attempt to discredit his assertion that the prevailing rate had remained constant since the preceding March. Later in the hearing, however, General Counsel conceded that he was not optimistic that

he would be able to refute Olds' claim.

Even if General Counsel had established a prima facie case of unlawful discrimination, which he did not, we would find that Respondent has met its countervailing burden of proving a nondiscriminatory business justification for not raising the wages of the ranch crew in November 1979.[3/] (Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].) Accordingly, we dismiss the allegation.

Change in seniority classifications. General Counsel alleged that Respondent's implementation of a new seniority system for irrigators and shovel workers in October 1979 was designed to adversely affect the seniority status of seven irrigators in retaliation for their union activities and therefore was in violation of Labor Code section 1153(c) and (a). General Counsel alleged further that Respondent failed to notify and bargain with the UFW over this change in violation of Labor Code section 1153(e) and (a).

The ALJ agreed, finding that Respondent's failure to continue to rank the shovelers last for purposes of seniority was a deviation from its past practice in retaliation for the union activities of the irrigators who were "bumped" by the shovelers under the new arrangement. The ALJ also found that Respondent violated its duty to bargain by its failure to notify and negotiate

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[3/] Moreover, we have already rejected the underpinnings of the ALJ's analysis. Since we found that Respondent did not raise the harvest wage rate at the commencement of the season in the Imperial Valley, the ALJ's reasoning, based on a purported obligation of Respondent to likewise raise wages for its permanent ranch crew, is misplaced.

with the Union over the change in seniority.

We find merit only in Respondent's exception to the first of those findings; that is, that the change in seniority was based on discriminatory considerations and was therefore a violation of Labor Code section 1153(c) and (a).

The ALJ found that Respondent offered a legitimate business explanation for its decision to initially consolidate the three-person shoveling crew with the larger irrigation crew in early 1978.[4/] When Ray Gutierrez became foreman of the permanent Imperial Valley ranch crew at that time, he was given separate crew lists for irrigators and shovelers. The shovelers were required to prepare fields for the irrigators and, on occasion, were assigned to straight irrigation shifts. Gutierrez said irrigators had complained to him that the shovelers were not doing an adequate job and consequently the irrigators had to redo their work. Gutierrez said he felt that if the shovelers were required to actually irrigate the same fields in which they had performed the preparatory work, they would have a better understanding of what was required of them. For that reason, he thereafter assigned the shovelers to perform irrigation tasks in addition to their own shoveling work.[5/]

[4/] It was neither alleged nor found that the initial grouping of the shovelers with the irrigators constituted an unlawful unilateral change within the meaning of Labor Code section 1153(e).

[5/] Gutierrez said the shovelers in particular welcomed the new arrangement. Thereafter, whenever it became necessary to augment the irrigation crew, Gutierrez assigned the shovelers to irrigation work ahead of the new hires. The shovelers would also be eligible for night-duty irrigation for which they receive a bonus of 21 cents an hour.

Gutierrez explained to the irrigators as well as the shovelers that he was merely adding the names of the three shovelers to the bottom of the irrigators' seniority list so that there would be no impact on the seniority rankings of the irrigators. Although the shovelers had a longer employment history with Respondent than did some of the irrigators, they still would be laid off sooner and recalled later than the irrigators. That seniority list, and its order of layoff and recall, was followed until October 1979. By that time, Frank Santana had replaced Gutierrez. Santana testified that the shovelers had questioned their separate seniority rankings since they felt they were now part of a single integrated irrigation crew. Santana discussed their concerns first with Respondent's payroll clerk and then with district manager Harry Davis, who told him he didn't know the details of the arrangements made by Gutierrez and suggested that Santana refer all matters concerning seniority to Kelly Olds. Olds told him that Respondent's policy required that the seniority status of individual members of a particular crew be measured according to original date of hire. Santana proceeded to rely on Olds' directive. The parties stipulated that in October 1979 the seniority list was changed in that the separate list for the shovelers was eliminated altogether and the names of the three shovel workers were incorporated into the overall irrigation list according to each worker's date of hire. This change gave rise to the present dispute, with General Counsel contending that seven irrigators were adversely affected in that

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they lost their prior seniority status to the shovelers.[6/]

In order to prove a prima facie case of discrimination in employment under Labor Code section 1153(c) and (a), General Counsel must establish that the irrigators engaged in union activities, with Respondent's knowledge, and that there was a causal connection between those activities and Respondent's ultimate realignment of the seniority rosters. Respondent may avoid liability under the statute by proving, by a preponderance of the evidence, that its actions were consistent with past business practices and that it would have taken the same action even in the absence of the irrigator's union activities. (Wright Line, Inc., supra, 251 NLRB 1083 [105 LRRM 1169].) Assuming that General Counsel has established a causal connection, we find that Respondent's adherence to its established policy with regard to seniority in this instance is sufficient to have overcome a prima facie showing of discrimination.[7/] Accordingly, we dismiss the

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[6/] General Counsel had noted at hearing that while some workers seemed to have been recalled out of seniority, it was for reasons other than those at issue here. Santana said that he had hired additional irrigators for the first time in October 1980 and may have hired a couple of them as early as September 1980. He said that everyone who was on layoff status at the time should have been recalled before any new hiring took place, but that two former irrigators were not. Isodoro Jordan, for example, who had the least seniority, had been omitted from the list. Santana corrected the error and put Jordan to work. Another employee, whose name Santana could not recall, had moved and Respondent had difficulty locating him. Santana said he sent some people to look for him and that he ultimately returned, about 10 days or so after new people had been hired, but was given work.

[7/] We leave for resolution at the compliance stage of this proceeding Respondent's contention that irrigator Alfonso Baez suffered a reduction in seniority, not because of the incorporation of the former shovelers' list with the irrigation list, but rather

(fn. 7 cont. on p. 10.)

allegation which is based on a violation of Labor Code section 1153 (c) and (a).

With respect to the allegation that the change constituted an unlawful unilateral action in violation of Labor Code section 1153(e) and (a), it is clear that Respondent did not inform the UFW of the seniority list changes or give the UFW an opportunity to bargain about the changes before instituting them. In considering whether Respondent thereby violated section 1153(e) of the Act, we note the National Labor Relations Board's (NLRB) Decision in Pan-Abode, Inc. (1976) 222 NLRB 313 [91 LRRM 1250], where the national board stated:

> In order for General Counsel to prove a prima facie case with respect to an alleged violation of Section 8(a)(5) [of the National Labor Relations Act (NLRA),8/] he need only prove that an obligation to bargain under Section 9(a) existed and that Respondent refused to bargain ... Respondent's motivation in instituting such changes [is] totally irrelevant in determining the existence of a violation under Section 8(a)(5).
> (Id. at 313, 315.)

Following a representation election which was held on September 9, 1977, the UFW was certified as the exclusive collective-bargaining representative of all agricultural employees employed by Respondent in its Salinas and Imperial Valley operations. (D'Arrigo Brothers of California (1977) 3 ALRB No. 37.) On or about September 16, 1977, pursuant to the Board's

(fn. 7 cont.)

because he had voluntarily interrupted his employment with Respondent, thereby relinquishing his original date of hire for purposes of establishing his seniority status at times material herein.

8/Correspondingly, section 1153(e) of the ALRA.

certification of the UFW, the Union invited the Company to commence negotiations. The Employer invoked a technical refusal to bargain at that time in order to institute a judicial challenge to the certification Order. In D'Arrigo Brothers Company (1982) 8 ALRB No. 45, we followed an NLRB precedent which holds that an employer has a continuing duty to bargain with a certified bargaining representative during the period of time when it is seeking judicial review of the NLRB's certification. (NLRB V. Winn-Dixie Stores, Inc. (5th Cir. 1966) 361 F.2d 512 [62 LRRM 2218].) Since Respondent's inchoate duty to bargain began to run from the date of the Board's certification in D'Arrigo Brothers of California, supra, 3 ALRB No. 37, and became officially activated upon receipt of the UFW's request to commence bargaining in September of 1977, Respondent unquestionably had a duty to bargain with the UFW over the terms and conditions of employment affecting the unit employees at all times material herein.

Respondent's only defense to the allegation is that the changes in the seniority list were necessary in order to conform with established past practice in that regard and that the changes followed an established pattern. Notwithstanding the fact that the changes were consistent with Company policy, we find that Respondent violated its duty to bargain with the incumbent union. As the NLRB stated in Amsterdam Printing and Litho Corp. (1976) 223 NLRB 370 [92 LRRM 1243]:

> Nor do we find merit in the assertion that these unilateral changes are justified by past practice, as the practices of Respondent prior to the certification of the Union do not relieve it of the obligation to consult with the certified Union about the implementation of these practices as affecting the wages, hours, and

other terms and conditions of employment of the unit employees.
(Citations; Id. at 370, 372.)

It is therefore found that by changing the seniority list of the irrigators and shovelers in October 1979 without consulting the Union, Respondent violated section 1153(e) and (a) of the Act.

Failure to bargain over change in Lorenzo Espinoza's terms and conditions of employment and subsequent layoff. The ALJ recommended dismissal of General Counsel's allegation that Respondent assigned Lorenzo Espinoza more tedious work in retaliation for his union activities. We adopt the recommendation pro forma as no party excepted thereto. However, he found merit in General Counsel's further contention that Respondent made a change in Espinoza's assignment which required it to notify and bargain with the UFW about the change, and concluded that Respondent's failure to do so was in violation of Labor Code section 1153(e) and (a). He also concluded that Respondent repeated the same violation by its failure to notify and bargain with the Union over its subsequent discharge of Espinoza.[9/] We find merit in Respondent's exceptions to those two latter findings and conclusions.

Espinoza was hired as a shop mechanic to service farm equipment. In the off-season, his duties were performed mainly in the area of the shop where such equipment is parked or stored.

[9/] We adopt, for the reasons stated by him, the ALJ's finding that Espinoza was discriminatorily discharged in retaliation for his union activities in violation of Labor Code section 1153(c) and (a) and reject Respondent's exception to the ALJ's findings and conclusions in this regard.

However, as the season progresses, the equipment is moved into the fields where Espinoza was expected to perform some on-site maintenance functions (mainly checking and adding oil). For that phase of his duties, he was provided with a service truck.

The ALJ found that the alleged "change" in Espinoza's work involved only an extension of the duties for which he was initially hired, that is, the servicing of equipment in the field as well as in the shop. He also found that the timing of the "change" (the field aspect of Espinoza's duties) "correspond[ed] to Respondent's undisputed needs in this regard rather than to an anti-union motivation." On that basis, he recommended dismissal of the allegation that Respondent assigned Espinoza to a more tedious task for discriminatory reasons.

Nevertheless, on the sole basis of supervisor Frank Santana's description of Espinoza's field service responsibilities as a "little different from just shop mechanic," the ALJ apparently found that there was enough of a "change" to have invoked a duty on behalf of Respondent to negotiate with the UFW. We disagree. Given the ALJ's explicit finding that Espinoza's servicing of farm machinery equipment in the field was part and parcel of the maintenance duties for which he was hired, we do not believe that Santana's inconclusive statement supports or warrants the ALJ's finding that there was a change in his work which required Respondent to notify and negotiate with the Union. Since Espinoza was hired to service equipment, tractors in particular, it should not be material whether he was required to do so in the field on occasion as well as in the shop. Accordingly, we hereby dismiss

the allegation.

We also reverse the ALJ's conclusion that Respondent violated Labor Code section 1153(e) and (a) by its failure to offer the UFW an opportunity to negotiate with regard to the layoff or discharge of Espinoza. General Counsel had asserted in the complaint only that Respondent violated its duty to bargain by its failure to notify the UFW of its discharge of Espinoza and negotiate with the Union the effects of the discharge upon him.[10/] The duty to bargain, as set forth in Labor Code sections 1152.2 (a) and 1156, does not obligate an employer to notify and/or bargain with the union about either its decision, or the effects thereof, to lay off, or discharge or make minor changes in the job assignments of any unit employee(s). As there was no such obligation, there was no violation in Respondent's failure to notify and bargain with the Union about the layoff or discharge.[11/]

[10/] The standard invoked by General Counsel is suggestive of "decision and effects bargaining" concepts which have meaning where there is a partial or total termination of a plant or department, including the subcontracting out of unit work. General Counsel did not pursue such an approach although Kelly Olds had testified that Respondent, in looking for ways to reduce overhead costs in the shop, had decided to replace Espinoza with shop foreman Fred Head, who had been on another, now-completed assignment, and had contemplated that tractor drivers henceforth could be required to perform some of their own maintenance tasks and that equipment suppliers could be called upon, as in the past, to perform service work on contract. The record does not reveal whether Respondent carried out such a plan.

[11/] Moreover, we have already affirmed the ALJ's conclusion that Espinoza was unlawfully terminated. Our Order herein, insofar as it pertains to Espinoza, will require that Respondent reinstate him to the same or substantially equivalent employment from which he was discharged and make him whole for all economic or other related losses he has sustained as a result of the unlawful action

(fn. 11 cont. on p. 15.)

REMEDY

We have concluded that Respondent unlawfully discharged Lorenzo Espinoza on December 10, 1979, in violation of Labor Code section 1153(c) and (a), and that Respondent violated Labor Code section 1153(e) and (a), in October 1979, by changing the seniority rankings of certain members of its permanent Imperial Valley irrigation crew. Accordingly, our Order will include provisions for the reinstatement of Espinoza, with backpay, and a makewhole remedy for Respondent's refusal to bargain over the seniority changes.

ORDER

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

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee because of membership in or support of the United Farm Workers of America, AFL-CIO, (UFW) or any other labor organization.

(b) Instituting or implementing any change(s) in any of its agricultural employees' seniority or any other term or condition of their employment without first notifying and

(fn. 11. cont.)

against him. The "effects" on Espinoza of his unlawful discharge will be remedied under Labor Code section 1153(c) and (a) rather than, as General Counsel suggests, Labor Code section 1153(e) and (a) as well.

affording the UFW a reasonable opportunity to bargain with Respondent concerning such change(s).

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

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

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

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

(c) Upon request, meet and bargain collectively with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees concerning the unilateral changes heretofore made in the seniority rankings of its irrigators and shoveler/irrigators.

(d) If the UFW so requests, rescind the unilateral changes heretofore made in the seniority rankings of its irrigators and shoveler/irrigators.

(e) Make whole its affected employees for all economic losses they have suffered as a result of the unilateral

changes Respondent made in their seniority, from October 1979, to the date such makewhole is paid, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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

(g) 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.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all year-round agricultural employees employed by Respondent in the Imperial Valley any time during the period from December 10, 1979, until the date on which the said Notice is mailed.

(i) 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.

(j) 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 year-round Imperial Valley 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 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.

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

Dated: May 25, 1983

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

PATRICK HENNING, 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 compliant which alleged that we had violated the law. After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Agricultural Labor Relations Act (Act) by discriminating against an employee by discharging him because of his union activity and also by changing our employees' seniority rankings without first notifying the United Farm Workers of America, AFL-CIO (UFW) as your representative. The Board has told us to post and publish this Notice and to mail it to those who worked for us between 1979 and the present. 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 OFFER Lorenzo Espinoza his old job back and we will reimburse him for all money he lost, plus interest, as a result of his discharge.

WE WILL REIMBURSE all irrigation employees who worked for us for all economic losses they suffered as a result of the unilateral changes we made in their seniority rankings, plus interest.

WE WILL NOT discharge, lay off, or otherwise discriminate against any agricultural employee with respect to his or her job because he or she belongs to or supports the UFW or any other union.

WE WILL NOT make any change(s) in the terms or conditions of employment of any of our agricultural workers without notifying the UFW and giving it an opportunity to bargain about such change(s).

Dated: D'ARRIGO BROTHERS COMPANY, INC.

By: _____
(Representative) (Title)

If you have any questions about your rights as farmworkers or about this Notice, you may contact any office or the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (714) 353-2130.

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

9 ALRB No. 30

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

D'Arrigo Brothers Company, Inc.

9 ALRB No. 30

Case Nos.	
79-CE-204-EC	79-CE-247-EC
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79-CE-208-EC	80-CE-115-EC
79-CE-219-EC	80-CE-116-EC
79-CE-220-EC	80-CE-146-EC

ALJ DECISION

The ALJ found that Respondent discriminatorily laid off shop mechanic Lorenzo Espinoza on December 10, 1979, in retaliation for his union activities in violation of Labor Code section 1153(c) and (a). In addition, he found that Respondent violated its duty to notify and bargain with the UFW in violation of Labor Code section 1153(e) and (a) concerning two unilateral changes in Espinoza's terms and conditions of employment--first, by a change in his assignment and, secondly, by its ultimate termination of his employment.

The ALJ also found that Respondent again violated its duty to bargain in violation of Labor Code section 1153(e) and (a) by its unilateral increase in the wage rate of its Imperial Valley harvest workers in November 1979. Reasoning that Respondent was obligated to likewise adjust wages for the permanent Imperial Valley ranch crew at the same time, he found that Company failed to do so in order to discourage the crew's support for the UFW in violation of Labor Code section 1153(c) and (a).

The ALJ found that Respondent engaged in additional violations of Labor Code section 1153(c) and (a) by its failure to honor a supervisor's end-of-season bonus to tractor drivers and by its change in the seniority status of certain of its irrigators in order to inhibit support for the UFW. The change in seniority was also found to be a violation of Labor Code section 1153(e) and (a) because Respondent failed to notify the UFW and negotiate about the change before it was implemented.

BOARD DECISION

The Board affirmed only the ALJ's findings that Respondent discriminatorily laid off Espinoza in retaliation for his union activities in violation of Labor Code section 1153(c) and (a) and failed to notify and bargain with the UFW concerning the change in seniority in violation of Labor Code section 1153(e) and (a). The Board dismissed all remaining allegations.

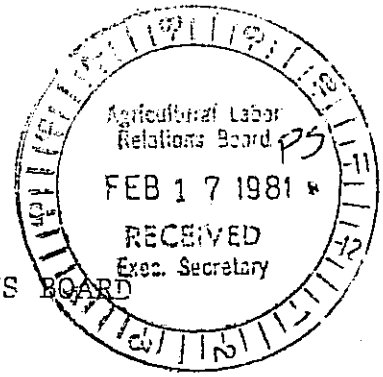
REMEDY

The Board ordered that Respondent reinstate Espinoza to the same

or substantially equivalent employment and make him whole for all losses resulting from his unlawful layoff. With respect to the change in seniority concerning certain members of the irrigation crew, the Board directed that Respondent make them whole for any losses in pay which may have resulted from the unilateral alteration of their seniority rankings and, should the Union so request, rescind the changes which were implemented in October of 1979.

* * *

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



STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROTHERS COMPANY, Respondent, vs. UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-204-EC 79-CE-205-EC 79-CE-206-EC 79-CE-207-EC 79-CE-208-EC 79-CE-219-EC 79-CE-220-EC 79-CE-222-EC 79-CE-247-EC 80-CE-8-EC 80-CE-78-EC 80-CE-81-EC 80-CE-115-EC 80-CE-116-EC 80-CE-146-EC

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of El Centro, CA
for the General Counsel

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DECISION

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer:

This case was heard by me on August 13, 14, 15, November 5, and 6, 1980 in El Centro, California.

Three consolidated complaints, amended 4 August 1980, and 7 November 1980, were based on fifteen charges filed by the UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereafter the "UFW" or "union"). The charges were duly served on the Respondent D'ARRIGO BROTHERS COMPANY on 10 December 1979, 11 December 1979, 12 December 1979, 31 December 1979, 7 January 1980, 29 January 1980, 21 February 1980, and 13 March 1980. The cases were consolidated pursuant to Section 20244 of the Agricultural Labor Relations Board's Regulations by Order of the General Counsel dated 28 July 1980.

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

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

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

FINDINGS

I. Jurisdiction:

Respondent D'ARRIGO BROTHERS COMPANY is engaged in agriculture -- specifically the growing and shipping of lettuce, broccoli and "mostaza" in Imperial County, 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.

Although the Respondent did not admit to such, I also find that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act. See Hemet Wholesale Company (June 17, 1977) 3 ALRB No. 47, review den. by Ct. App., 4th Dist., Div. 2, September 14, 1977.

II. The Alleged Unfair Labor Practices

Charges related to Paragraphs 22(a), 22(b), 22(c), 22(d), 22(e), 22(h), 22(i), and 22(n), and 22(o) of the amended and consolidated complaints were resolved by formal settlement between the parties. Consequently, I sever case nos. 70-CE-204-EC, 79-CE-205-EC, 79-CE-206-EC, 79-CE-219-EC, 80-CE-8-EC, 80-CE-81-EC and 80-CE-115-EC from this proceeding and make no findings or conclusions based on the allegations contained therein. See Sam Andrews' Sons (1980) 6 ALRB No. 44.

At the close of testimony, General Counsel moved to dismiss Paragraph 22(m) relating to case No. 79-CE-222-EC as no evidence was introduced in support of the allegations contained therein. The motion to dismiss was granted at the hearing.

The remaining paragraphs of the amended and consolidated complaints charge Respondent with violations of Sections 1153(a), (c) and (e) of the Act by (1) unilaterally assigning more tedious work to employee LORENZO ESPINOZA and changing the conditions of Mr. Espinoza's work; (2) discharging Mr. Espinoza because of his activities in support of the UFW; (3) unilaterally promising and then not delivering a two-hundred ($200) dollar year-end bonus to

tractor drivers; and (4) implementing a new seniority system affecting irrigators, shovelers, and sprinkler workers which resulted in the discriminatory layoffs of UFW supporters Martin Jimenez Diaz, Maximiliano Diaz, Antonio Pulido, Florencio Vasquez, Guillermo De La O, Espiridion Gastelum, and Alfonso Baez. Respondent is further charged with violations of Sections 1153(a) and (e) of the Act by unilaterally raising the wages of its harvest workers employed in the Imperial Valley. The Respondent is finally charged with violations of Sections 1153(a) and (c) of the Act by its discriminatory exclusion of irrigators, tractor drivers, and sprinkler workers employed in the Imperial Valley from wage raises given harvest workers to discourage the ranch employees from engaging in activities in support of the UFW.

The Respondent denies that it violated the Act in any respect. Specifically, Respondent contends that Mr. Espinoza was laid off because of the excessive overhead costs incurred in the mechanic shop where he worked; that no authorized agent promised any year-end bonus to its tractor drivers; that harvest worker wages were raised to maintain parity with the wages earned by Respondent's Salinas harvesters, many of whom continued in the Imperial Valley harvest of Respondent's crops; and that competitive wages for farm (or ranch) employees[1] in other Imperial Valley locations did not justify a comparable salary hike for these categories of workers. The change in seniority

[1]Tractor drivers, irrigators and sprinkler workers.

occurred because of Respondent's decision to combine the irrigators and shovelers into one category in order to improve work performance. Respondent further contends that it was under no duty to bargain with the union pending a final decision re certification.

III. Background

Respondent grows and ships iceberg, romaine, red-leaf and green-leaf lettuce, broccoli, mostaza, wheat, cotton, tomatoes, and other vegetables in different localities in California and Arizona. Starting from Salinas -- the home base for the company -- iceberg lettuce harvest crews generally work from 15 April to 1 October. They then move to Huron, California, until the beginning of November, when the crews move to the Arizona harvest areas -- in Yuma and Welton. Around the first of December, harvest crews move into the Imperial Valley and then are split between Huron and Yuma in March. The broccoli harvest generally occurs between 10 February and 1 December in Salinas with the balance of the year in the Imperial Valley. The mostaza is harvested in the Imperial Valley between 15 December and 15 March, and in Salinas the remainder of the year. Mixed lettuce crews -- romaine, red-leaf and green-leaf -- follow much the same pattern as the other lettuce crews with the exception that they do not go into Huron, California, or the Arizona areas.

The work force may be divided into two general categories: (1) Ranch or farm crews -- e.g. tractor drivers, irrigators, shovelers, and sprinkler workers -- which are generally stable for

each area of the Respondent's operations, and (2) harvest crews, a majority of which move from one area to the next during the year.

The chief managerial personnel of Respondent's Imperial Valley operations which is the situs of the alleged unfair labor practices are: (1)Mr. D'Arrigo; (2) Kelly Olds -- labor relations manager; (3) Harry Davis -- district manager; (4) Robert Mott -- production manager since June 1980; (5) Francisco (Frank) Santana -- production foreman and supervisor of the tractor and irrigation foremen; (6) Ray Gutierrez -- former production manager "in complete charge" of Respondent's Imperial Valley farming operations until October 8, 1979.

On September 2, 1975, the UFW filed a petition for certification as Respondent's collective bargaining representative. On September 9, 1975, the Board conducted an election among Respondent's agricultural employees pursuant to this petition. Respondent thereafter filed objections to the election and in D'Arrigo Brothers of California (1977) 3 ALRB No. 37, the Board dismissed these objections and directed that certain challenged ballots be opened and counted in the presence of parties.

On August 24, 1977, the UFW was certified as the bargaining representative of all agricultural employees of Respondent at its Imperial Valley and Salinas locations. On or about 16 September 1977, the UFW requested that Respondent begin collective September bargaining. The Board's certification was upheld by the denial of review from the Court of Appeal for the First Appellate District on March 20, 1980, in Case 1 Civ. No.

44814 (4 ALRB No. 45 (1978). On 30 May 1980, the Board found that Respondent had a reasonable good faith belief that the certification was invalid and reconsidered its previous make whole remedy. (D'Arrigo Brothers of California (1980) 6 ALRB No. 27.)

Respondent has conceded that it refused to bargain until 28 May 1980 -- shortly after the Court of Appeal decision. All of the unfair labor practices stem from various employment decisions--changes in working conditions, raises, seniority changes -- which occurred during the pendency of the certification litigation. Two of the alleged violations relate to the layoff of shop mechanic Lorenzo Espinoza on December 10, 1979, and to the alleged discriminatory layoff of seven (7) irrigators on February 9, 1980. Because the bargaining issues are intertwined with all other alleged violations, I will discuss each factual pattern with a view to the §1153(a) and (c) implications, and then review the potential §1153(e) violations.

IV. Change of Working Conditions and Layoff of Lorenzo Espinoza

A. Facts:

Lorenzo Espinoza was hired as a mechanic for Respondent in October 1978. His original duties included working in the shop, some maintenance and welding. After approximately one year, Mr. Espinoza also was assigned to service and to check equipment at Respondent's Imperial Valley ranch sites. Mr. Espinoza's original duties were computed at a straight hourly rate for eight hours work and overtime ("time and one-half") thereafter. When his

duties expanded, however, the normal work shift became nine (9) hours before overtime was paid.

Apart from the change in the nature of his duties, Mr. Espinoza worked without incident until he was given a raise in November 1979 to $7.00/hour. As a UFW sympathizer, Mr. Espinoza volunteered to go to the union office on Saturday, December 8, and show his check stub to union officials. At the office, Mr. Espinoza was given a UFW button which he stuck on his lower left shirt pocket and wore to work the following Monday, December 10.

Mr. Espinoza arrived at work as was his custom at approximately 5:45 a.m., on December 10. He worked the usual three-to-four hours servicing the machinery in the field, returned to the shop and had a conversation with Supervisor Frank Santana. The Supervisor asked Mr. Espinoza's thoughts of the UFW. The latter stated he "approved"; Mr. Santana voiced the fear that the UFW created problems, "strikes and all this". (R.T. Vol. II, p. 16, l. 13-25).

Supervisor Santana next contacted Mr. Espinoza after lunch that day by phone, while the mechanic was driving to Brawley in the Respondent's truck. Espinoza was asked to return to the shop as soon as possible. There, Mr. Espinoza was advised by District Manager Harry Davis that he -- Mr. Espinoza -- would be laid off immediately, because he was one of the most recent hirees, the company was having financial difficulties, and one person could run the shop for awhile. Mr. Espinoza was not called back to work until the end of June 1980. He worked one day (July 14), leaving

in a dispute over his wage rate. He was offered $6.00/hour -- $1.00/hour less than he had been earning in December 1979.

Labor Relations Manager Kelly Olds testified for the Respondent that the rationale for Mr. Espinoza's layoff was a budgetary problem rather than any anti-union animus. The efficiency of the Ranch 40 shop where Mr. Espinoza had been working was "bad"; and Mr. D'Arrigo had asked for cutbacks. (R.T. Vol. III, p. 18, ll. 1-21). The decision was made to "phase down" the shop following the busy season and utilize the services of local tractor and automobile repair shops as opposed to the Respondent running its own shop. Fred Head -- a "lead" or "foreman" -- who had been on loan to the broccoli shed-- was transferred back to the shop to replace Mr. Espinoza. Mr. Head was terminated in January 1980, and no replacement was made until the attempted "recall" of Mr. Espinoza in June - July 1980.

Supervisor Frank Santana further explained that there had been no real "change" in Mr. Espinoza's job description, but that as a D'Arrigo mechanic, he had to service the equipment in the field as needed. No complaint by Mr. Espinoza regarding this "change" in the terms and conditions of work had been brought to Supervisor Santana's attention prior to filing of the formal charge herein which was served by mail on 10 December 1979 -- the day of the layoff.

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

1. Layoff of Lorenzo Espinoza of December 10, 1979:

Section 1153(c) of the Act makes it an unfair labor practice for an employer "(b)y discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization". The General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the layoffs or discharges. Maggio-Tostado, Inc. (1977) 3 ALRB No. 33. The test is whether the evidence, which in many instances is largely circumstantial, establishes by its preponderance that employees were laid off for their views, activities, or support for the union. Sunnyside Nurseries (May 20, 1977) 3 ALRB No. 42, enf. den. in part, Sunnyside Nurseries, Inc. v. Agricultural Lab. Relations Board (1979) 93 Cal. App. 2d 922. Among the factors to be weighed in determining the General Counsel's prima facie case are the extent of the employer's knowledge of union activities, the employer's anti-union animus, and the timing of the alleged unlawful conduct.

Although not conceded at the hearing, Respondent's knowledge of Lorenzo Espinoza's UFW sympathies and activity may be inferred[2] from the following: Lorenzo Espinoza (and other ranch employees) spoke openly in front of supervisors about the union. In October 1979, Mr. Espinoza and Supervisor Santana engaged in a discussion regarding a Bruce Church bus which had been boarded up

to avoid rock-throwing by strike sympathizers. Mr. Espinoza opined that he would not go into the shop if people were throwing rocks, but would rather stay with friends of his (and thus honor a UFW strike). On December 10, 1979, Lorenzo Espinoza arrived at work with a UFW button on his left shirt pocket, which he received over the weekend after having attended a union meeting to discuss the lack of raises for the other ranch personnel. Mr. Espinoza had just received a $1.00/hour wage increase and brought his check to the UFW office to corroborate the raise.

While Supervisor Santana denied seeing the UFW button, I credit Mr. Espinoza's version of events in this regard for the following reasons: (1) Mr. Espinoza related a conversation he had with the supervisor at about 9:00 a.m. - 10:00 a.m. that morning regarding his views of the UFW. Supervisor Santana expressly asked Mr. Espinoza what the latter thought about the UFW, and Mr. Espinoza proffered his view that the union would help the workers get the raise they desire. The supervisor did not deny or confirm the conversation, but did corroborate Mr. Espinoza's testimony regarding the later events of the day:

The mechanic was called at mid-day on the truck radio to immediately return to the shop. At the shop, Supervisor Santana told Mr. Espinoza that Harry Davis wanted to speak with him. The district manager then informed Mr. Espinoza that he

[2]See S. Kuramura, Inc. (June 21, 1977) 3 ALRB No. 49, review den. by Ct. App., 1st Dist., October 26, 1977, hg. den. December 15, 1977.

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was being laid off "for economic reasons" effective that day.

(2) Several charges filed by the UFW[3] and served upon Respondent on 10 December 1979 bear the date of 8 December 1979 -- the precise day on which Mr. Espinoza testified to having gone to the union office. Thus, they tend to corroborate Mr. Espinoza's chronology of union activities.

(3) Mr. Espinoza further testified that Supervisor Santana had during this period expressed some dissatisfaction over the disclosure to other workers of the mechanic shop wage increases. The disclosure would ultimately lead to the aforementioned charges filed and served on Respondent on 10 December 1979. Supervisor Santana neither confirmed nor denied having mentioned this disclosure of salary or even having inquired as to whether or not Mr. Espinoza divulged the information.

(4) Mr. Espinoza testified in Spanish and somewhat hesitantly in English. I found his testimony, however, to be direct, precise, and sincere. On one occasion, he volunteered to produce his July 1980 paycheck to confirm that his salary had indeed decreased. For reasons described, infra, I find Mr. Santana's recollection of events somewhat less persuasive.

Apart from Supervisor Santana's prediction that the UFW would bring " a lot of problems" which I consider protected free speech under Section 1155 of the Act (and therefore not supportive of General Counsel's theory), there are not insignificant indicia of Respondent's anti-union proclivities

[3]General Counsel Exhibits I-T, I-U, I-V, I-W, and I-X.

on the record. Specifically, former Production Manager Ray Gutierrez testified that Harry Davis had pointed out certain union activists -- Florencio Vasquez, Jesus Mejia, Antonio Pulido, and Arnoldo (sic) Martinez--as "trouble-makers",and had told Gutierrez that Vasquez and Jose Anaya had been previously dismissed from the company because of their UFW activities. Irrigator (union activist) Florencio Vasquez testified that foreman Bobby Sanga had singled him out for dismissal "in any way possible", upon seeing the irrigator distributing some papers in the field.

Supervisor Santana also shared tractor driver Jesus Cervantes' theory that wage raises were not given to the tractor drivers and irrigators because the "old man" (Harry Davis) wanted to "push them out". I credit Mr. Cervantes' recitation of this conversation in Mr. Santana's pickup. While the supervisor denied the conversation, Mr. Cervantes was quite precise as to the substance and circumstances surrounding the dialogue. Contrary to Respondent's assertions that Mr. Cervantes contradicted himself as to when the conversation occurred, and could not recall where he was or what he was doing at the time (see Respondent's Brief II, p. 21, ll. 12-17), I find that Mr. Cervantes' recollection of the discussion was fairly specific. He remembered the time of day -- in the morning just before noon (R.T. Vol. II, p. 12, l. 20); he recalled that the supervisor was giving him a ride to his car or to a tractor (R.T. Vol. II, p. 43, ll. 5-7); and he was consistent in his testimony that the conversation occurred

two to three days after the meeting between the ranch workers and Supervisor Santana in January.(R.T., Vol. II, p. 47, ll. 19-20). Although counsel had initial difficulty in ascertaining the number of prior written declarations made by Mr. Cervantes, the witness was able to assist, and gave a plausible explanation for his omission of reference to the supervisor. (R.T. Vol. II, p. 52, ll. 2-6).

Mr. Santana testified that he viewed his role as somewhat of a "buffer" between management and the workers. When there was unrest and the workers requested meetings with company personnel, the supervisor served as the intermediary to set up such discussions. He further engaged in similar discussions regarding the union with other employees, e.g., Lorenzo Espinoza, and encouraged certain irrigators to pursue their rights under the Act when the change in seniority was implemented. While he seemed sincere in his testimony, the supervisor also appeared to be placed in an "uncomfortable" predicament. At one point, he volunteered that he could not understand any reason for the combination of the irrigators and shovelers into one seniority list.

Nor do I find the omission of the Santana-Cervantes conversation in Mr. Cervantes' prior declarations (General Counsel Exhibits #2, 3, 4) critical. Mr. Cervantes considered the supervisor a friend, who he did not wish to single out for blame. While his declaration (General Counsel Exhibit #4) indicates that he felt the lack of a wage raise was "discriminatory" he did not

specify the bases for that discrimination. The other declarations (General Counsel Exhibits #2 and 3) related to other issues -- vacation pay and the alleged bonus offer. Because of the supervisor's role as intermediary and the other discussions revealed at the hearing, I do not credit Mr. Santana's statement that this was not the type of conversation he would likely have with a worker. As Mr. Santana was a "friend"[4] of the workers, yet at the same time a member of supervisory management, I find it more likely than not that the conversation in the pickup did occur.

Although the supervisor denied any specific directive on the part of his superiors to dismiss any employee or in any way discriminate against workers because of union activity, I find that his viewpoint as recited to Mr. Cervantes does lend some credence to General Counsel's theory that underlying anti-union animus triggered Respondent's wage and labor policies. Because of his supervisory role and relationship to key management personnel of Respondent, I find that Mr. Santana's statement to be based on more than what he "imagined" to be Respondent's policies, and therefore an admission binding upon Respondent. Bogart Sportswear Manufacturing Company (1972) 196 NLRB 189 [80 LRRM 1262], affirmed in relevant part (5th Cir. 1973) 485 F. 2d 1203 [84 LRRM 2313].

Respondent contends that the layoff of Mr. Espinoza was

[4]This"friendship" obviously had limits, however, in light of Mr. Cervantes' revealing testimony at the hearing.

dictated solely by economic circumstances. In order to reduce overhead and increase the efficiency of the shop operation, foreman Fred Head fulfilled Mr. Espinoza's responsibilities for a month, with private repair shops utilized on an "as needed" basis thereafter. This position is certainly consistent with the personnel changes occurring at Respondent's Imperial Valley ranches during the pertinent period of time. Mr. Head was 90-95% complete with his work setting up the broccoli shed. Welder and shop assistant Luis Ramirez had transferred over to another job location. The "low man" on the seniority list was Mr. Espinoza, and the decision was made by Mr. Kelly Olds and Harry Davis to lay him off.

Respondent's business justification, however, does not withstand close scrutiny. While Supervisor Santana described the early December period as a "slack time" for the company machine operators, and thus a period of relative inactivity for the shop personnel, testimony from witnesses Florencio Vasquez and Antonio Pulido places the layoffs of said personnel closer to February and March. Mr. Santana was also somewhat uncertain in this regard, at one point conceding that the majority of tractor driver layoffs occurred in late January, although "one or two" may be laid off in December. (R.T. Vol. III, p. 76, ll. 11-21).

The layoff of the shop mechanic was particularly mystifying in light of the recent $1.00/hour wage raise which had been given to Mr. Espinoza and Luis Ramirez. Apparently, the same personnel

(Kelly Olds and Harry Davis) involved in the investigation and computations which led to the raise also decided upon the layoff for "economic considerations" one month later. Additionally, on the first day that Mr. Espinoza openly demonstrated his UFW support and indicated his pro-UFW views to his supervisor, he was notified of the layoff. The record reflects that this notification was made at mid-day on the first day in the work week and occurred with some haste as Mr. Espinoza was interrupted while on an errand in the company pickup truck.

The Act does not give the Board a license to dictate the methods by which an employer chooses to reduce its work force. However, said action may not lawfully be taken for prohibited purposes. See Maggio-Tostado, Inc., supra, citing NLRB v. Midwest Hanger Co. (8th Cir. 1973) 82 LRRM 2693. In the instant case, I find that the preponderance of the evidence establishes that the layoff of Lorenzo Espinoza was motivated by illegitimate purposes. It was announced on the first day that Mr. Espinoza's union sympathies became apparent to the Respondent. It followed the supervisor's displeasure expressed toward Mr. Espinoza when the foreman was approached by tractor drivers and irrigators who were not granted comparable wage increases. Had the economic reasons "really" motivated the layoff, it is difficult to conceive why the shop mechanic was awarded a substantial increase in salary one month previously.

Mr. Espinoza may well have had the least seniority remaining in the shop in light of the dual welder-mechanic role of Luis

Ramirez, and the return of lead mechanic Fred Head from his duties at the broccoli shed. Respondent's adherence to seniority, however, does not adequately explain the method and timing of the layoff. Harry Davis -- apparently the person responsible for this decision -- failed to testify about his motivations in this regard.

Nor does the effort to "recall" Mr. Espinoza in June-July 1980, ameliorate the unlawful motivation in the original layoff decision. Indeed, the recall effort was not undertaken until some seven months after a formal charge had been filed and served on the Respondent. (General Counsel Exhibit I-R). The new salary offered was $1.00/hour less than that which Mr. Espinoza had been earning on the day of his layoff. Whether or not said offer would effectively limit the Respondent's back pay liability to Mr. Espinoza, it cannot legitimize the discriminatory nature of the December 10 action and I so find. Had Mr. Espinoza's union sympathies not been revealed on the morning of December 10, 1979, he would not have been laid off. Such conduct on the part of the employer violates Sections 1153(a) and (c) of the Act, and I shall recommend the appropriate remedy therefor.

2. Change in Working Conditions.

I reach a different conclusion with respect to these Section 1153(a) and (c) allegations concerning Mr. Espinoza.

Transfers or changes in assignments may constitute unfair labor practices where occasioned by alleged motivation. (See Arnaudo Bros. Inc. (October 12, 1977) 3 ALRB No. 78, enf'd by Ct. App., 3rd Dist., May 16, 1978, hg. den. June 27, 1978. NLRB v Tamper, Inc. (4th Cir. 1975) 522 F. 2d 781 [89 LRRM 3634], enf'd in part 85

LRRM 1375). The elements of discriminatory purpose existing with respect to the layoff determination, however, are not present in this economic decision of the Respondent. The "change" in Mr. Espinoza's work essentially involved an extension of his duties. Not only was he to repair equipment in the shop, he was to service the equipment in the field. (See R.T. Vol. II, p. 7, ll. 10-18). A dispute which arose regarding the accrual and computation of overtime pay was apparently resolved by the wage raise which was given to the shop mechanics (Mr. Espinoza and Luis Ramirez) a few weeks prior to the layoff.

Mr. Espinoza made no initial complaint about the "additional" duties and the charge (General Counsel Exhibit I-T) ultimately filed was not served by mail until December 10, 1979 -- the date of the layoff. The timing of the "change" in assignment corresponds to Respondent's undisputed needs in this regard rather than to any anti-union motivation. Indeed, the new assignment preceded Mr. Espinoza's union discussion with Supervisor Santana, as well as the mechanic's initial wearing of a UFW button on the job.

The Respondent has a fundamental right to assign duties and arrange work schedules in accordance with its best judgment, absent contractual restrictions or unlawful motivation. Such decisions are not to be disturbed absent proof that the change was intended to inhibit the exercise of Section 1152 rights or that the adverse effect of the change on employee rights outweighed the employer's business justifications. Rod McLellan Co. (August

30, 1977) 3 ALRB No. 71, review den. by Ct. App., 1st Dist., Div. 4, November 8, 1977, hg. den. December 15, 1977). The re-definition of Mr. Espinoza's job duties neither purported to nor tended to adversely affect or inhibit his exercise of Section 1152 rights. I thus conclude that the assignment change was dictated by legitimate economic concerns, rather than by any attempt to discourage union activity or membership. I recommend that the Section 1153(c) allegation of Paragraph 22(f) of the amended complaint be dismissed.

V. The Exclusion of Irrigators, Tractor Drivers, and Sprinkler Workers From the November 1979 Wage Raises Given to Imperial Valley Harvest Workers.

A. Facts:

Tractor driver Rodolfo Martinez and irrigator Antonio Pulido described Respondent's previous policy of yearly raises which were awarded in the middle of July. These increments in pay were generally "across the board" -- that is, they applied to harvest and ranch workers alike. In 1979, however, the entire work force received raises in March 1979. Only the harvesters and Salinas ranch workers received raises in August 1979, which rates were carried over to the Imperial Valley harvest crews when the season commenced[5] in November 1979. The Imperial Valley ranch workers were thus not included in these raises.

[5]The base rate for Respondent's Salinas and Imperial Valley tractor drivers was $4.12/hour after March 1979. That rate was raised to $5.00/hour in August 1979 and $5.65/hour in July 1980 for Salinas only. The harvest workers were paid by piece rate.

All Imperial Valley tractor drivers and irrigators openly supported the UFW according to Mr. Pulido. Tractor driver Jesus Cervantes attended the 1977 UFW Fresno convention, and with fellow ranch workers distributed pamphlets to the workers in the fields. The unrest of the ranch crews occasioned meetings with company personnel (Kelly Olds, Harry Davis and Frank Santana) in December 1979 and January 1980.[6] At the December meeting attended by ranch crews but not field workers, the employees asked for a pay raise because of the raises given in Salinas. They were told by Mr. Olds through interpreter Frank Santana that such raises would be unlawful, and that Respondent would not grant any pay hikes until 50% of the other Imperial Valley growers gave similar raises.

In Janaury 1980, a meeting among the ranch crews and Supervisor Santana produced a similar result. Tractor driver Jesus Cervantes further testified that a few days after the January meeting, he had a conversation with Supervisor Santana in the latter's pickup truck. Cervantes opined that the ranch crews were not getting raises because the company wanted to push them out. Mr. Santana replied: "Yes, that is what the company wants." (R.T. Vol. II, p. 40, l. 28; p. 41, l. 1).

Supervisor Santana specifically denied the latter conversation with Mr. Cervantes as discussed, supra. Respondent

[6]Worker discontent over treatment by the foremen occasioned a meeting in 1979 during which the ranch crews asked for a union contract. (R.T. Vol. I, p. 35, ll. 15-16)

explained the wage variations on purely economic terms: Respondent was paying what it felt to be competitive wage rates in all areas. It had investigated various companies in each of these localities, and set the wages accordingly. Harvest workers were receiving more because they carried the higher Salinas wage rate with them "around the circuit". Since the tractor drivers, irrigators, shovelers, and sprinkler workers did not normally move from area to area, their salaries would not necessarily be identical for all regions. Labor Relations Manager Kelly Olds denied any anti-union animus in the wage structure, pointing out that there was extensive union activity in the field (harvest) crews as well as in the ranch crews. Mr. Olds confirmed the Respondent's position that it had refrained from bargaining because it felt that the election had been held unfairly, and that there would be no negotiations until that issue was resolved. When the certification litigation terminated, negotiations commenced on or about 28 May 1980.

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

General Counsel suggests that Respondent's failure to raise wage rates for its Imperial Valley ranch crews contemporaneously with the raises granted its Imperial Valley harvesters constitutes a discriminatory "penalty" aimed at discouraging union activity. Such conduct would constitute violations of Sections 1153(a) and (c) of the Act. Akitomo Nursery (1977) 3 ALRB No. 73, Helen S. Pasko d/b/a American Steel Linen Co. (1974) 210 NLRB 811 [86 LRRM

1285]; J. C. Penney Co. (1973) 202 NLRB 1108 [82 LRRM 1803].

It is conceded that Respondent's tractor drivers, irrigators, and sprinkler workers were highly visible UFW supporters who distributed leaflets in the fields, wore union buttons and caps and other insignia to work, and attended UFW conferences, all with the knowledge of Respondent's supervisory personnel. Respondent's anti-union animus has been demonstrated, inter alia, by the direction of Harry Davis to former production manager Ray Gutierrez to watch out for "trouble-makers"; by Mr. Davis' statement that Jose Anaya and Florencio Vasquez had been previously terminated because of their union activities; by the threat of foreman Bobby Sanga to dismiss UFW activist Florencio Vasquez without cause; by Supervisor Santana's statement that Harry Davis was attempting to "push out" the UFW active ranch workers by freezing their salaries.

Respondent has sought to explain the exclusion of its ranch workers from the wage increases by economic jusitifcation. Its analysis of competitive wages in the Imperial Valley dictated that the ranch crews would not receive the yearly wage increase which was the general custom of all areas. Wage rates were increased for the harvest workers based upon competitive wage considerations in the Salinas area. These raises were carried "around the circuit", having originated during the 1979 harvest in Salinas. But since a majority of Imperial Valley farm operations paid their ranch crews comparable salaries to those earned by Respondent's ranch crews, no upward adjustments were made in the wages of these

more geographically stable workers. Respondent further contended and explained in the December 1979 meeting with the ranch crews that it would be "unlawful" to grant a wage increase which was not merited by competitive rates.

Reviewing the entirety of the evidence, I find that Respondent's rationale for the exclusion of the ranch workers from the wage raises given to the harvest workers to be pretextual. In doing so, I am mindful of the indicia of anti-union animus, the greater and more visible UFW activities of the ranch crews, the past company practice of yearly "across the board" wage increases for ranch crews and harvest crews alike, and the lack of any significant documentation to substantiate the differentiation made in the instant case. While Respondent attempted to distinguish between the more stable ranch crews, and the more "transient" harvesting crews, said effort is tarnished by analysis of the individual crop operations: To wit, the "mostaza" harvesters primarily resided in the Imperial Valley, and did not follow the yearly "circuit" of Respondent's California Agricultural operations. Yet, they were recipients of the November 1979 wage increase. While only some 5% of the harvest force worked in the "mostaza", there is no reasonable economic justification based on Salinas wage rates for their November Imperial Valley raises. While it might have been somewhat incongruous to differentiate wage rates among the types of harvesters, at least such a differentiation would be supportable by the alleged economic justification which was actually proffered

for the exclusion of the ranch crews from the November, 1979, increments.

Nor is Respondent's assertion that the Imperial Valley harvesting crews were equally as pro-union as its ranch workers persuasive. The ranch workers perceived that they were being "pushed out" because of their UFW activities, which perception was shared by Supervisor Santana. Tractor driver Florencio Vasquez had been previously singled out and discharged for union actitivites. Former production manager Ray Gutierrez was warned to watch out for "trouble-makers" and promised a bonus to tractor drivers if they"[would] not be involved in so many problems and all of those things". (R.T. Vol. II, p. 51, ll. 16-19). The issues litigated referred solely to problems among the Respondent's Imperial Valley ranch crews rather than to the harvest workers. Respondent produced no evidence -- other than Kelly Olds' assertion that the harvesters had engaged in a one-day work stoppage in 1977 -- that the union activities of the harvest crews were either as visible or as extensive as those of the ranch crews.

In N.L.R.B. v Dothan Eagle, Inc. (5th Cir. 1970) 434 F. 2d 93, 98, the court, in reviewing an employer's refusal to grant wage increases to some but not all employees following an election campaign stated:

> "The issue under the Act is therefore whether in form and in purpose the withholding or conferring of economic benefits was to discourage and frustrate the statutory right of employees freely to organize and bargain collectively."

Quoting N.L.R.B. v Dorn's Transportation Co. (2nd Cir. 1969) 405 F. 2d 706.

Where the Respondent, as here, had an established policy of granting a wage increase in July, which was widely known and in effect a considerable length of time, I find that the change in wage policy effectively tended to weaken the union by focusing upon the most active UFW partisans -- the tractor drivers, irrigators, and sprinkler workers, The ultimate result of the exclusion of the ranch crews could be demoralizing.

Respondent's reliance upon N.L.R.B. v Best Productions Co., Inc. (9th Cir. 1980) 623 F. 2d 70 (Respondent's Brief II, pp. 20-21) is misplaced. There, the Ninth Circuit overturned the N.L.R.B. finding of an unfair labor practice in the absence of substantial evidence linking the employer's anti-union animus to an employee's suspension for excessive absenteeism. In Best Products, a union activist employee was disciplined for excessive absenteeism. Although the Board inferred anti-union animus from previously litigated unfair labor charges, the Ninth Circuit ruled that a general anti-union spirit, absent a history of concerted unlawful conduct was not evidence of unfair labor practices. The court further noted that the employee's absenteeism rate was the highest for any employee of the company during the period in question, and that discipline was common in such cases.

In contrast, the alleged "rationale" for the wage differentiation herein was undocumented except for the rather cursory testimony of Kelly Olds. Other incidents demonstrating

anti-union animus were contemporaneous with the wage increase, and also specifically targeted at the more activist ranch workers. The bifurcation of the raises between harvesters and ranch employees represented a departure from previous conduct by the Respondent. As in Shattuck Denn Mining Corporation v. N.L.R.B. (9th Cir. 1960) 362 F. 2d 466, 470, I infer unlawful motivation in light of the absence of a persuasive explanation for the employer's actions. The surrounding facts tend to reinforce this inference of unlawful motivation. I find by the preponderance of the evidence that the wage policy was implemented to discourage union activity. As such, it is violative of §1153(a) and (c) of the Act, and I shall recommend the appropriate remedy. See Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36.

VI. The 1979 Promise and Failure to Provide Bonuses for Tractor Drivers.

A. Facts:

Tractor driver Rodolfo Martinez testified that in July, 1979, former Production Manager Ray Gutierrez offered a bonus to Respondent's Imperial Valley tractor drivers as follows: "Boys, the machines are going to start working. The old man [Harry Davis] said to me for me to offer you bonuses so that you will do better work and the machines will be stopped for less time and that you will take care of the equipment." (R.T. Vol. I, p. 27, ll. 16-20). Bonuses in the amounts of $200, $100, and $50 were promised. The offer was made in the presence of Mr. Martinez, tractor driver Pedro Carillo, and Jesus (Refugio) Cervantes, as

well as truck driver Juan Urrutia. Jesus Cervantes confirmed that in June or July 1979, Mr. Gutierrez spoke to him personally and said that the company was offering year-end bonuses of $200 and $100 so that workers would "work well" and would "not be involved in so many problems and all of those things." (R.T. Vol. II, p. 41, ll. I6-19; p. 42, ll. 1-6).

While Mr. Gutierrez was called to testify on behalf of the General Counsel on two occasions, he offered no information regarding the proffered bonuses. Rather, Respondent contended through Labor Relations Manager Kelly Olds that the workers discussed the issue of the promised bonus for tractor drivers at the December, 1979, meeting. Mr. Olds explained through Supervisor Santana that the only person who had the authority to grant a bonus to any D'Arrigo worker was Mr. D'Arrigo himself. "[U]nless they see something in writing with Mr. D'Arrigo's signature on it, promising a bonus, that it was quite a lot of hot air." (R.T. Vol. III, p. 5, ll. 22-24). Mr. Olds denied that Mr. Gutierrez had the authority to promise bonuses, and stated that there would be none given to the tractor drivers whether or not Gutierrez actually had made the promise. District Manager Harry Davis further testified that Mr. Gutierrez was terminated for "poor performance" in December 1979 following his medical leave of absence in October 1979.

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

Applying the same considerations to the alleged failure of Respondent to grant the bonus promised by former Production Manager Ray Gutierrez, as to be applied to the exclusion of ranch workers from the November,1979, wage increase, I reach a similar conclusion. Insofar as the bonus proffered by Mr. Gutierrez would amount to benefits comparable to the wage increases sought by the ranch crews, Respondent's failure to grant the bonus to the tractor drivers are violative of Sections 1153(a) and (c) of the Act, I reject defendant's contention that Mr. Gutierrez had no authority to make such an offer, since Mr. Davis conceded that the former production manager was responsible for "all farming operations" including hiring, firing, and general supervision of the Imperial Valley operations. (R.T. Vol. V, p. 75, ll. 24-26; p. 76, ll. 1-2) Further, Respondent admitted in its answer to complaint (General Counsel Exhibit #I-A) that Ray Gutierrez was its agent at all relevant times and is thus estopped from denying that agency relationship at this time. Sam Andrews Sons (1980) 6 ALRB No. 44, citing Bogart Sportswear Manufacturing Company (1972) 196 NLRB 189 [80 LRRM 1262], affirmed in relevant part (5th Cir. 1973) 485 F. 2d 1230 [84 LRRM 2313].

While there may have been no prior policy of Respondent to grant bonuses of the type promised by Mr. Gutierrez, the ultimate refusal to fulfill this promise effectively "froze" the tractor

drivers' wages as discussed supra. The impact and intent was to discourage the most active union supporters. Said conduct is violative of §1153(a) and (c) and I so find.

I find that the testimony of tractor drivers Rodolfo Martinez and Jesus Cervantes provided substantial and uncontroverted evidence that Mr. Gutierrez did indeed promise the bonus sometime late June or early July 1979, contrary to Respondent's contentions (see Respondent's Brief II, pp. 16-17). The discrepancies regarding the exact date of the promise, and the actual amounts to be offered were not significant in light of Mr. Gutierrez' failure to deny his conduct.

I decline to find that the promise itself constituted a separate violation of §1153(a) and (e). The bonus offer may be said to be a prototype violation -- particularly to the extent that it can be viewed as a "velvet-covered" threat to the tractor drivers to avoid (union) problems. The promise was apparently made, however, more than six months prior to the filing of the pertinent charge. (General Counsel Exhibit I-N, filed January 29, 1980). This Board has ruled that the statute of limitations is not jurisdictional but must be the subject of an affirmative defense. See Perry Farms, Inc., (April 26, 1978) 4 ALRB No. 25, enf. den., Perry Farms v Agricultural Labor Relations Bd. (1978) 86 Cal. App. 3d 448, citing Chicago Roll Farming Co. (1967) 167 NLRB 961, 971 [66 LRRM 1228], enf'd. (7th Cir. 1969) 416 F. 2d 346 [72 LRRM 2683].

Although I find that no issue of the statute of limitations

was raised in either the pleadings or Respondent's Briefs (I and II), I note that General Counsel conceded the statute of limitations difficulties at hearing and suggested that the essence of the charge (Paragraph 22 of the Amended Complaint) was the failure of the Respondent to grant the bonus rather than the actual promise. (R.T., Vol. III, p. 97, ll. 7-12). Because this concession by General Counsel may have occasioned Respondent's omission of this defense in its briefs, because the promise itself might not have been fully litigated in light of General Counsel's position (see Shumate v. NLRB (4th Cir. 1971) 452 F. 2d 717 [78 LRRM 2905, 2908], and because the ultimate remedy I shall propose in this matter will be unaffected by finding another (set) of §1153(a) and (e) violations for the promise itself, I will treat the allegations (as they have been pleaded) as one congeries of facts sustaining violations of §1153(a) and (c) of the Act. That is, the violation of the Act stems from the failure to fulfill the earlier promise of the bonuses. Of course, the circumstances surrounding the original promise may be utilized as evidence of Respondent's subsequently charged unlawful conduct. Sunnyside Nurseries, Inc., 4 ALRB No. 88 (1978); Local Lodge No. 1424 v. The National Labor Relations Board (1960) 362 U.S. 411; Seine and Line Fisherman's Union of San Pedro (1960) 136 NLRB No. 2, [1], affirmed (9th Cir. 1967) 374 F. 2d 974.

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VII. Implementation of a New Seniority System Affecting Irrigators and Shovelers.

A. Facts:

Sometime during the 1978-1979 Imperial Valley harvesting season, Production Foreman Ray Gutierrez decided to change the existing seniority system involving the irrigators and shovelers. Up until that time, two separate lists ranking employees in order of hire were kept for the shovelers and the irrigators. (General Counsel Exhibits #5, 6). Mr. Gutierrez, with the approval of Harry Davis, eliminated the seniority list for shovelers with the intent of placing the names from the eliminated list at the bottom of the irrigator list.

That the latter scheme was intended by Mr. Gutierrez was supported by his testimony, as corroborated by Supervisor Santana's conversation with him, and the "rumors" that spread among the irrigators and shovelers during the 1978-1979 season. Since the plan had not been implemented by October, 1979, (the shovelers were hired after the irrigators in the fall, 1979), I do not find the shovelers' denial of having been previously informed of the plan to be critical to General Counsel's case.

Because there was some opportunity for irrigators to earn more than shovelers due to overtime and night work, Mr. Gutierrez testified that the shovelers -- Juan Garcia, Jesus A. Alvarado, and Jorge Alvarado consented to this change. Additionally, since there was irrigation work to do following the completion of shoveling, irrigators normally were later to be laid off than

the shovelers and earlier to be recalled. Thus, the placement of the shovelers at the bottom of the irrigation list would not in reality change the order of layoff and/or recall. This change was engineered, according to Mr. Gutierrez, because of the small number of shovelers, the utilization of the shovelers for irrigation work and vice versa, and the thought that the shovelers would do better work as irrigators, if they could observe the effects of the shoveling on the irrigation.

Mssrs. Gutierrez and Harry Davis were aware of the UFW support among irrigators, who often wore buttons, caps, and attended negotiation meetings. Indeed, Harry Davis had warned Mr. Gutierrez about "trouble-makers" Jesus Mejia, Florencio Vasquez, and Jose Anaya, and suggested that the latter two employees had been previously dismissed by the company for union activities. (R.T. Vol. IV, p. 24, ll. 14-23). The shovelers were less active -- they did not wear UFW buttons or caps and only very recently attended the Salinas negotiation sessions.

After Mr. Gutierrez' departure, however, irrigators Florencio Vasquez, Martin Jimenez Diaz, Maximiliano Diaz, Antonio Pulido, Guillermo De La O, Espiridion Gastelum, and Alfonso Baez were laid off prior to former shovelers Jesus Alvarado and Juan Garcia. Jorge Alvarado followed Florencio Vasquez on the "new" seniority list, but preceded the six other alleged discriminatees. (General Counsel Exhibit #7). When the workers were recalled in September,1980, the former shovelers again preceded the irrigators. The irrigators approached Supervisor Santana about

the new seniority system in the fall of 1980 and were informed that the shovelers had worked longer with the company, that he (Santana) did what the company told him, and that they should fight the case if they wanted because they had the right (to do so). (R.T. Vol. IV, p. 39, 11, 26-28).

Respondent stipulated that the seniority policy did change and that layoffs and recalls of irrigators and former shovelers were made on the basis of the August 28, 1980, irrigator seniority list. (General Counsel Exhibit #7). It denied anti-union motivation for the change, with Supervisor Santana testifying that the shovelers kept their original dates of hire because it was the company, rather than the workers themselves, who initiated the combination of irrigators and shovelers. Office Manager Erlene De Long, at the instructions of Messrs. Santana and Kelly Olds, thus wrote in the employee numbers of former shovelers Juan Garcia and the Alvarado brothers on the July 3, 1979 irrigator seniority list, (General Counsel Exhibit #5), in order of the respective dates of hire.

The ultimate decision regarding the ranking of the employees on the new irrigator seniority list would have to come from Salinas -- from Kelly Olds and/or Mr. D'Arrigo. Mr. Gutierrez was not authorized to place the former shovelers at the bottom of the new irrigator list, and both shovelers Juan Garcia and Jesus Alvarado denied having agreed to the seniority change or even having discussed the change with Mr. Gutierrez, until September 1979. The hourly wage rate of shovelers and irrigators

was identical.

While neither Kelly Olds or Mr. D'Arrigo testified regarding the rationale for the ultimate seniority decision, former District Manager Harry Davis described company policy as follows: Where two classifications are combined into one, one crew would go to the bottom of the list of the other crew unless the two jobs were "related" and the eliminated crew had experience in the incorporated category.

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

Applying the identical standard to Respondent's decision to combine the irrigator and shoveler seniority lists, it is apparent that the "merger" itself cannot be regarded as discriminatory. Respondent proffered a legitimate reason for the decision -- to improve the work performance of the shovelers who would take more pride in their shoveling if they were also required to do the follow-up irrigation work. This rationale was uncontroverted.

It is the subsequent decision to place former shovelers Juan Garcia and the Alvarado brothers on the new irrigation list according to their original dates of hire which impacts adversely upon irrigators and union activists Florencio Vasquez, Antonio Pulido, Guillermo De La O, Espiridium Gastelum, Martin Jimenez Diaz, Maxmiliano Diaz and Alfonso Baez. This action is particularly suspect in light of the indicia of anti-union animus discussed supra. Not only were the irrigators "frozen" out of

the yearly wage increase, the new seniority system would effectively mean less work for them at Respondent's ranches.

Respondent's justification for the placement of the shovelers on the new list is not persuasive. While it contended that this decision had to be made by Kelly Olds and/or Mr. D'Arrigo, neither testified at the hearing regarding the motivation for the charge. Former Production Manager Ray Gutierrez testified that when he initiated the merger in late 1978 or early 1979, he intended for the shovelers to be placed at the end of the list. Former District Manager Harry Davis opined that in a job category change of this type, his view of company policy was that the shovelers would go to the bottom of the new irrigator list unless they had substantial experience as irrigators. Supervisor Santana conceded that he could not understand the reason for the change.

While the record is not clear as to the extent of irrigation experience of Mr. Garcia or the Alvarado brothers (they apparently had done some irrigation for Respondent), one of the avowed reasons for the elimination of the shovelers was their inability to properly prepare the ground for the irrigators. Had they extensive experience as irrigators, it is unlikely that their shoveling work would be "below-par". Further, it was conceded that under the two-seniority list "regime", shovelers were normally laid off prior to the irrigators and recalled later, because of the nature of their work. There was irrigation work to be done following the completion of shoveling, and apparently irrigators were the first to return to prepare for the upcoming

harvest season. Thus, a continuation of company policy would naturally suggest that the three shovelers be placed at the bottom of the irrigation list. The expectations of all concerned were that the shovelers worked fewer days seasonally than did the irrigators. Adherence to that company policy called for the implementation of Mr. Gutierrez' original plan.

In light of the prior findings of §1153(a) and (c) violations, I find the absence of a valid business justification for the "bumping" system inaugurated to be critical. (See Arnaudo Bros., Inc. (October 12, 1977) 3 ALRB No. 78, enf'd by Ct. App., 3rd Dist., May 16, 1978, hg. den. June 27, 1978; E. I. Dupont deNemours & Co. v. N.L.R.B. (4th Cir. 1973) 480 F. 2d 1245 [83 LRRM 2756], enforcing (1973) 199 NLRB 1044 [82 LRRM 1071]. The new policy -- which departed from past company practice -- purported to further discourage the union sympathies of the seven alleged discriminatees. I thus find that the seniority system change violated Sections 1153(a) and (c) of the Act and I shall recommend the appropriate remedy therefor.

VIII. The Bargaining Issues:

A. Facts:

All of the events litigated at the hearing occurred after the UFW certification in 1977, but before the final court decision affirming that certification. (D'Arrigo Brothers of California (July 14, 1978) 4 ALRB No. 45, review den. by Ct. App., 1st Dist., Div. 2, February 26, 1980, hg. den. April 4, 1980.) The Board has ruled that the Respondent's litigation posture during

this interim period was one taken in "good faith". (D'Arrigo Brothers of California (1980) 6 ALRB No. 27.) The issue for decision then, is whether the aforedescribed unilateral actions of Respondent (layoff and change of working conditions of Lorenzo Espinoza, wage increase for harvest workers and change in seniority system for the irrigators and shovelers) constitute a refusal to bargain violative of §1153(a) and (e) of the Act, and if so, what is the appropriate remedy.[7]

B. Analysis and Conclusions:

Under the ALRA, it is an unfair labor practice for an employee "[t]o refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5..."

It is as yet unsettled whether an employer is obligated during the certification litigation period to give a union which has participated in a representation election notice about changes it wants to make in its employees' wages, hours, or conditions of employment as well as an opportunity to bargain about the changes. Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54 enf. denied in part, 107 Cal. App. 3d 632 (1980), hearing granted August 28, 1980 (L.A. 31316); W.R. Grace and Co. (1977) 230 NLRB 617 [97 LRRM 1459], enf'd in part (5th Cir. 1978) 571 F. 2d 279 [98 LRRM 2001. Quoting the NLRB, this Board has found violations of Sections 1153(a) and (e) of the Act during this period by the employer's unilateral changing of employees' wages:

"...[A]n employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. . . . .Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions...."
Mike O'Connor Chevrolet, 209 NLRB 701, 85 LRRM 1419 (1974) rev'd on other grounds, 512 F. 2d 684, 88 LRRM 3121 (8th Cir. 1975).
Masaji Eto, dba Eto Farms (1980) 6 ALRB No. 20

On the other hand, there is precedent under Federal law that an employer is not under a duty to bargain with a union during the period between an election the union appears to have won, and the time the employer's objections to that election are resolved. Sundstrand Heat Transfer, Inc. v. N.L.R.B. (7th Cir. 1976) 538 F. 2d 1257.

It is equally settled under Federal law, however, that an employer acts "at its peril" in changing the terms and conditions of employment during that interim period, without bargaining. If the challenges are resolved in favor of the union, resulting in its certification, the employer's failure to bargain is considered an unfair labor practice under 29 U.S.C. §158(a) (5)

[7]Apparently, General Counsel has characterized the bonus promise to the tractor drivers and subsequent failure to grant the bonus as §1153(a) and (e) violations, as well as a §1153(c) violation. Because more than six months have elapsed between the date of the alleged promise and the filing of the charge (see discussion, supra), I decline to find a bargaining violation for the original promise. The failure to grant the bonus is more properly alleged to be §1153(a) and (c) violations similar to the pleadings characterizing the exclusion of the ranch crews from the November, 1979, raises given to the harvest work force. The §(a) and (c) implications of the failure to grant the bonus have already been reviewed.

and (1). N.L.R.B. v Allis-Chalmers Corp. (5th Cir. 1979) 601 F. 2d 870, 874; Mike O'Connor Chevrolet (1979) 209 N.L.R.B. 701, 703. Thus, in the Grace case, the NLRB held that the employer was under an obligation to bargain with the union over the effects of its decision to close down operations. The U. S. Court of Appeals for the Fifth Circuit enforced the NLRB's order therein, indicating that the employer was required to notify the union of its decision (to close the facility) "in order that the voices of those affected by the changes are heeded, and that is true even though the election challenge is still pending." Grace, supra, at 283.

Whether or not the California Supreme Court chooses to limit the employer's duty to bargain in these situations in light of the §1153(f)[8] prohibition of bargaining with non-certified bargaining units or some other distinction in the ALRA's language and legislative history which requires a different result than under Federal law, some review of the potential ramifications of the §1153(a) and (e) allegations seems warranted. That is, there may or may not be evidence of a "bad-faith" refusal to bargain in the conduct heretofore discussed with respect to alleged §(a) and (c) violations. Certainly, the Board's prior

[8] §1153(f) provides that it is an unfair labor practice for an agricultural employer"[t]o recognize, bargain with, or sign a collective bargaining agreement with any labor organiaation not certified pursuant to the provisions of this part." Respondent did not raise the issue of the significance of the §1153(f) prohibition in the certification litigation context, nor did any witness suggest that the failure to bargain was due to a belief that negotiations would be unlawful.

finding of Respondent's good faith litigation posture cannot be interpreted as a license for anti-union conduct which ultimately could impact upon future negotiations.

The unilateral wage increases granted Respondent's Imperial Valley harvest workers, the seniority changes involving the irrigators and shoveler crews, and the layoff and change of working conditions of Lorenzo Espinoza all constitute typical per se violations of §1153 (a) and (e). Hemet Wholesale Company (1978) 4 ALRB No. 75; Adam Dairy dba Rancho Dos Rios (April 26, 1978) 4 ALRB No. 24, review den. by Ct. App., 2nd Dist.,Div. 3, March 19, 1980; NLRB v Exchange Parts Co. (5th Cir. 1965) 339 F. 2d 829; NLRB v Katz (1962) 369 U.S. 736 [82 S. Ct. 1107]. Unilateral action of this type violates the duty to bargain since the possibility of meaningful union input is foreclosed. Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36 (1980), citing O.P. Murphy Produce (October 26, 1979) 5 ALRB No. 63, review den. by Ct. App., 1st Dist., Div. 4, Nov. 10, 1980, hg. den. December 10, 1980; Maseji Eto (1980) 6 ALRB No. 20.

As this Board indicated in O. P. Murphy, supra:

> "Unilateral implementation of a wage increase constitutes a change in a significant term of employment without regard to the union's role as representative of the employees, and has been considered by far the most important 'unilateral act'. NLRB v. Fitzgerald Mills Corp. 313 F. 2d 260 (2nd Cir.) cert. den., 375 U.S. 834 (1903). It is also a per se violation of the Act. NLRB v Katz, NLRB v. Burlington Rendering Co., 386 F. 2d 699 (2nd Cir. 1967)."

Respondent's contention that the wage increases are appropriate because they were a"continuation of D'Arrigo's past

practice" (Respondent's Brief II, p. 18) is ill-founded. While the "dymanic status quo "theory is the exception to the general rule (NLRB v. Ralph Printing & Lithograph Co. (8th Cir. 1970) 433 F. 2d 1058 [75 LRRM 2267], the Katz decision clearly distinguishes between automatic increases which are fixed in amount and timing by company policy and increases which are discretionary. The harvest wage increase in the instant case occurred in autumn, 1979, while former raises had all occurred in July. The amount was fixed by Respondent's sense of the prevailing rate in Salinas. Previously, wage increases had been given "across-the-board" to harvesters and ranch employees alike. Under the circumstances, I find that the wage increase ultimately granted Respondent's Imperial Valley harvesters was discretionary and therefore subject to collective bargaining. As such, the Respondent's unilateral conduct in this regard constitutes a per se violation of §1153(a) and (e).

It is uncontested that unilateral changes in working conditions also constitute per se violations of the duty to bargain. See Montebello Rose Co. (1979) 5 ALRB 64. Since Mr. Espinoza described the addition of servicing duties to his normal mechanic shop tasks, and since Supervisor Santana was to describe the serviceman job as a "little different than just shop mechanic" (R.T. Vol. III, p. 68, 11. 12-16), I find that this change taken without consultation with the union to be a further technical violation of §1153(a) and (e) of the Act.

I reach a similar conclusion with respect to the layoff of

Mr. Espinoza and the seniority change involving the irrigators and shovelers in light of prior NLRB decisions. See also Walker Co. (1970) 74 LRRM 1409; Nebraska Bulk Transport, Inc. (1979) 100 LRRM 1340; Hamilton Electronics Co. (1973) 203 NLRB No. 206.

These per se violations constitute some evidence of Respondent's overall bad-faith refusal to bargain. Montebello Rose Co., supra; Central Cartage, Inc. (1978) 236 NLRB No. 163 [98 LRRM 1554]. Respondent can persuasively suggest, however, that following the Board's finding of a "good-faith" litigation posture; and the concession that no bargaining would take place because of the (good faith) belief that the UFW's certification had not been finally resolved, there can be no finding of a bad faith refusal to bargain. The ultimate test is whether the totality of circumstances suggest that the purpose for the implementation of the unilateral changes is to discourage and frustrate the statutory right of employees to bargain collectively. NLRB v. Dothan Eagle, Inc. (5th Cir. 1978) 434 F. 2d 93, 98; NLRB v. Dorn's Transportation Co. (2nd Cir. 1969) 405 F. 2d 706.

Considering the evidence in its entirety -- the per se violations, the anti-union animus discussed supra, the finding of §1153(a) and (c) violations in the treatment of Mr. Espinoza, the exclusion of the ranch crews from benefits afforded the harvesters, and the seniority change involving the irrigators and shovelers, -- I find that Respondent effectively sought to weaken the UFW by taking the following reprisals for the union's victory in achieving the status of bargaining representative for

its employees: The wage differential intended to "push out" the more active ranch crew members, as was admitted by Supervisor Francisco Santana. It neither conformed to past company practice nor was extensively investigated before implementation. Needless to say, the union was not notified of the wage raise decision. The seniority system change reduced the period of employment for the most active irrigators -- Florencio Vasquez, Antonio Pulido, et al. Greater seniority was accorded to the less active shovelers who had been accustomed to earlier layoffs. No representative of Respondent responsible for the seniority decision testified regarding its motivation. Those who did testify suggested that (1) the shovelers were at first placed at the bottom of the seniority list; and (2) company policy likely dictated that the initial placement was the proper one. While Respondent has suggested a non-discriminatory rationale for the layoff of Mr. Espinoza, I find the timing of the layoff, the method of informing the employee of the Respondent's decision, and the recent wage increase afforded Mr. Espinoza, belies the alleged justification.[9]

Additionally, a promised bonus to the activist tractor drivers -- if they avoided "problems" and did their work (albeit an uncharged violation) provides further indicia of Respondent's unlawful motivation.

I find that Respondent's actions constitute substantial evidence of its bad-faith refusal to recognize the UFW as the bargaining representative of the employees, and of its effort to

render the union ineffectual. Although this Board may have found that Respondent's position re certification reflected a good-faith litigation posture, I find that these other factors of bad-faith support the conclusion that Respondent ultimately hoped never to reach an agreement with the union. There were no mass discharges or layoffs of UFW activists, nor company-wide changes in job categories. But the efforts to lay off Mr. Espinoza, reduce the work of the pro-UFW irrigators, and freeze the salary of the activist ranch crews cumulatively tended to affect the status of the UFW at Respondent's operations during the pendency of the litigation. The absence of reasonable non-discriminatory justifications, in conjunction with the concessions of key management personnel, suggest that Respondent intended to undermine the UFW's efforts during this period.

While Respondent may compellingly argue that it is caught in a "Catch-22" quandary -- that is, the increase of the harvest workers' wages could violate §1153(a) and (e) of the Act while

[9]In reviewing the evidence, I take note of the fact that in at least three instances, the witness with the first-hand knowledge of Respondent's alleged business rationale with respect to various decisions failed to testify on that particular issue. Thus, Ray Gutierrez did not testify regarding the bonus promise, even though he had been called on two occasions by the General Counsel (the hearing was bifurcated). Harry Davis testified regarding the irrigator-shoveler seniority lists, but failed to testify regarding the decision to lay off Mr. Espinoza. Kelly Olds described the wage increases, but did not appear to explain the seniority decision. While the seniority issue was litigated at the second portion of the hearing (November 5, 6), no explanation was given by Respondent for the absence of Kelly Olds, who had testified previously. Nor was there any reason given for Harry Davis' absence during the first part of the hearing (August 13, 14, 15) when Mr. Espinoza's layoff was considered.

the "freeze" of the ranch crew wages would violate §1153(a) and (c) of the Act -- it is suggested that the dilemma could have been avoided by negotiating directly or at least consulting with the collective bargaining representative.

As recommended by the National Labor Relations Board:

> "What is required is the maintenance of pre-existing practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amount or timing of the increases), becomes a matter as to which the bargaining agent is to be consulted."
> Oneita Knitting Mills (1974) 205 NLRB No. 76, 500

The union was entitled to be consulted regarding the timing and amount of the wage increases, the change in Mr. Espinoza's work assignment, the decision to replace Mr. Espinoza with sub-contractors, and the elimination of the shovelers' seniority list and subsequent "bumping" of the irrigators' seniority. That it was not consulted further tended to isolate the UFW from its employee base during the pendency of the certification challenge. No emergency has been alleged by Respondent which would have rendered consultation impossible or even impractical. No suggestion was offered either at hearing or in Respondent's briefs (I and II) that Respondent's conduct was guided by consideration of the prohibitions of §1153(f). By dealing directly with the employees without prior notification of the UFW, the union was left with a pyrrhic electorial victory. Once the Respondent ultimately chose to commence bargaining, many of the union activists who were instrumental in the election would

have been "frozen out". I find such result to be purposeful and underlying Respondent's conduct during the pendency of the certification election. Such conduct is violative of the basic collective bargaining goals of §1153(a) and (e) of the Act and I shall recommend the appropriate remedy.

SUMMARY

I find that Respondent violated Sections 1153(a), (c) and (e) of the Act by the layoff of Lorenzo Espinoza, and the change in irrigator-shoveler seniority. Respondent violated Sections 1153(a) and (c) of the Act by its refusal to grant wage raises to its ranch crews and by its failure to fulfill a promised bonus to its tractor drivers. Respondent violated Sections 1153(a) and (e) by the change in conditions of Mr. Espinoza's employment and by the wage raises granted its harvest workers. I recommend dismissal of all other fully litigated allegations raised during the hearing, (and which had not been resolved by formal settlement agreement among the parties). Because of the importance of preserving stability in California agriculture, and the significance of assuring that the results of the ballot are not thwarted by subsequent violations of employee rights, I find the violations to be serious, and recommend the following:

THE REMEDY

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

to effectuate the policies of the Act.

Having found that Respondent unlawfully laid off Lorenzo Espinoza, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job as shop mechanic if it has not already done so without prejudice to his seniority, or other rights and privileges. I shall further recommend that Respondent make Lorenzo Espinoza whole for any losses he may have suffered as a result of its unlawful discriminatory action by payment to him of a sum of money equal to the wages and other benefits he would have earned from December 11, 1979, to the date on which he is reinstated, or offered reinstatement, less his respective earnings and benefits, together with interest at the rate of seven percent per annum, such back pay and benefits to be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc., (May 20, 1977) 3 ALRB No. 42, enf. den. in part; Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Bd. (1979) 93 Cal. App. 3d 922.

Having found that Respondent unlawfully failed to grant wage increases to its Imperial Valley irrigators, tractor drivers, and ranch crews, I shall recommend that these employees be made whole for any losses they may have suffered as a result of Respondent's unlawful discriminatory action by payment to them of a sum of money equal to the wages plus benefits they would have earned from November 19, 1979, had they been granted raises comparable to those granted the Salinas ranch crews.[10] I find

[10]together with interest at the rate of seven percent per annum.

that this formulation would also compensate for the unfulfilled promise of the bonus to the tractor drivers, and thus do not recommend further remedy in this regard.

Having found that Respondent unlawfully changed its irrigators' and shovelers' seniority systems, I shall recommend that Respondent make Florencio Vasquez, Antonio Pulido, Martin Jimenez Diaz, Maximiliano Diaz, Guillermo De La O, Espiridion Gastelum, and Alfonso Baez whole for any losses they may have suffered as a result of this unlawful discriminatory action by payment to them of a sum of money equal to the wages plus benefits[11] they would have earned had they not been "bumped" on the new combined irrigators' seniority list from February 9, 1980, the first layoff following the new system.

With respect to the bargaining issues, General Counsel has argued that the make-whole formula set forth in Adam Dairy, dba Rancho Dos Rios (April 26, 1978) 4 ALRB No. 24, review den. by Ct. App., 2nd Dist., Div. 3, March 17, 1980 is "the only appropriate remedy". (General Counsel's Brief, p. 41). Respondent, on the other hand, has suggested that the make-whole remedy is inappropriate in light of the Board's finding that the "company had [a] reasonable good faith belief that the union's certification was invalid." D'Arrigo Brothers Company (1980) 6 ALRB No. 27.

In considering the make-whole remedy herein, I am mindful of the Board's majority decision in Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36. There, the make-whole remedy was found inappropriate although Respondent's conduct presented some

[11] together with interest at the rate of seven percent per annum.

evidence of a bad-faith approach to collective bargaining. There, certain unilateral wage increases, individual bargaining with employees, and prior unfair labor practices were found not to be sufficiently persuasive to change the majority's view of the totality of Respondent's conduct, because of "inadequate evidence of bad faith in the bargaining process."

In the instant case, the Board has already found a "good faith" rationale for Respondent's failure to bargain. D'Arrigo Brothers Company, 6 ALRB No. 27 (1980). There is no evidence of bad faith at the bargaining table. Here, however the per se violations are serious because of the discriminatory motivation underlying the §1153(a) and (c) violations. By freezing ranch employee wages for 18 months, a very clear message was given to the workers: The union activists would be pushed out of the Respondent's operations before bargaining could even take place. Additionally, the admissions by Respondent's supervisory personnel--the concession of Supervisor Sanga, the promise of a bonus by former Production Manager Ray Gutierrez if the tractor drivers avoided problems, the statements made by Harry Davis to Mr. Gutierrez, foreman Santana's threat directed at Florencio Vasquez--viewed in their entirety, seem more than the "direct evidence" of the UFW organizer's statement in the Kaplan decision. And the discriminatory layoffs and seniority changes in the instant case are much more contemporaneous with other violations than were the previous unlawful discharges in the Kaplan decision.

On balance then, I conclude that some type of make-whole remedy might well be appropriate in the factual context. However, I decline to recommend the Adam Dairy formula because of the following considerations:

(1) Insofar as the make-whole formula is designed to avoid penalty to employees who otherwise should have enjoyed the benefits of a collective bargaining agreement but for the bad faith delays by the employer, the record here is that the employers' refusal to bargain was prolonged because of its good faith litigation posture.

(2) During the pendency of the certification, and indeed, by the date of this writing, the extent of the employers' bargaining responsibilities in similar circumstances had not been adjudicated by the State's highest court. This Board's original decision suggesting that employers "act at their own peril" rendered in San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54, was at least partially annulled by the Court of Appeal's decision in San Clemente Ranch, Ltd., v Agricultural Labor Relations Bd. (1980) 107 Cal. App. 3d 632. The latter is, of course, not properly citable in light of the August 28, 1980, hearing granted by the Supreme Court of California (L.A. 31316). See California Rules of Court, Rules 976(d), 977. Without move definitive judicial guidance, it seems inappropriate to recommend further sanctions for conduct which may ultimately prove to be lawful under the ALRA.

(3) As collective bargaining is a voluntary process which

succeeds most frequently in an atmosphere of cooperation, Adam Dairy encourages the fashioning of minimally instrusive make-whole remedies which will "stir the resumption of the collective bargaining process." Since the wage increases granted the harvest workers, though illegal, apparently brought these workers up to a prevailing wage rate, a concommitant retroactive increase for the Imperial Valley ranch crews as suggested above in the discussion of remedies for the §1153(a) and (c) violations would seem more appropriate than the Adam Dairy make-whole formula. Lest there be concern that it is Respondent's unlawful conduct which is delineating the standard for relief (i.e. its unilateral wage increases), said formulation should be subject to UFW approval, or if desired, further negotiation.

(4) The thought lingers that the unlawful activity found herein may shed further light onto the Board's original determination that Respondent had litigated the election objections in good faith. However, I find that the interest in fostering judicial review as a check on arbitrary administration actions in cases where the employer has raised meritorious objections to an election is sufficiently important (see J. R. Norton Co. (June 22, 1978) 4 ALRB No. 39, enf'd in part J. R. Norton Co. v. Agricultural Labor Bd. (1979) 26 Cal. 3d 1), and alternative remedies sufficiently effective to suggest some modification of the Adam Dairy approach for the instant case.

Thus, in addition to the recommendations suggested above, and after having found that employer has engaged in certain unfair

labor practices in violation of §1153(a) and (e) of the Act, I shall recommend that the employer be required to bargain in good faith with the UFW with regard to wages, hours, and other terms and conditions of employment. [12]

I shall further recommend that the changes in Lorenzo Espinoza's working conditions, and the implementation of the new irrigators' seniority list be rescinded, if the union as the exclusive representative of the affected employees, so desires. In addition, I shall recommend that Respondent make available to the union, upon request, all records necessary and relevant to assess the alternatives available to the employees. Adam Dairy Supra, citing Unoco Apparel, Inc. (1974) 215 NLRB 89 [88 LRRM 1230]; Idaho Fresh-Pak, Inc. (1979), 215 NLRB 676 [88 LRRM 1207].

In order to further effectuate the purposes of the Act and to insure to the employees the enjoyment of the rights guaranteed to them in §1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act, and that it has been ordered not to engage in future violations of the Act. See M. Caratan, Inc. (October 26, 1978) 4 ALRB No. 83; 6 ALRB No. 14 (March 12, 1980) review den. by Ct. App., 5th Dist., May 27, 1980.

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

ORDER

Respondent, D'ARRIGO BROTHERS COMPANY, its officers, agents,

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[12] As there was no evidence of bad faith bargaining after negotiations had commenced in May, 1980, I decline at this time to recommend an Order extending the certification of the UFW as the exclusive representative of Respondent's employees as requested in the amended and consolidated complaint.

and representatives shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully laying off, changing the terms of seniority,or denying or withholding wage increases or bonuses or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(b) Refusing to bargain collectively in good faith with the UFW as the exclusive representative of its agricultural employees as required by Labor Code Sections 1153(e) and 1152.2 (a), and in particular:

1. Making unilateral changes in any of its employees' wages or terms or conditions of employment of its employees without notice to and bargaining with the UFW.

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

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

(a) Offer to Lorenzo Espinoza immediate and full reinstatement to his former shop mechanic or equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any losses he has suffered as a result of Respondent's layoff in the manner described above in the

section entitled "The Remedy".

(b) Make whole irrigators Florencio Vasquez, Martin Jimenez Diaz, Maximiliano Diaz, Antonio Pulido, Guillermo De La O, Espirdion Gastelum, and Alfonso Baez for any losses they have suffered as a result of Respondent's implementation of a new irrigators' seniority system in the manner described above in the section entitled "The Remedy".

(c) Make whole the irrigators, tractor drivers, shovelers, and sprinkler workers of Respondent's Imperial Valley operations for any losses they may have suffered as a result of Respondent's failure to grant them wage increases and refusal to bargain in the manner described above in the section entitled "The Remedy".

(d) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay and benefits due to the employees referred to in subparagraphs (a), (b), and (c) above.

(e) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees with respect to past unilateral changes regarding wage rates, mechanic shop work assignments,and irrigator and shoveler seniority in the manner described above in the section entitled "The Remedy".

(f) Upon request, bargain collectively with the UFW as

the exclusive representative of its agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(g) Upon request by the UFW, rescind the changes in Lorenzo Espinoza's working conditions, and the implementation of the new irrigators' seniority list.

(h) Furnish to the UFW the information requested by it relevant to the preparation for and conduct of collective bargaining and all records necessary and relevant to assess the alternatives available to Lorenzo Espinoza, the irrigators and shovelers, and all other ranch employees affected by Respondent's unlawful conduct.

(i) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

(k) Provide a copy of the attached Notice to each employee hired by the Respondent in the Imperial Valley during the 12-month period following the issuance of this decision.

(l) Mail copies of the attached Notice in all appropriate

languages, within 30 days of the date of issuance of the Order, to all employees employed by Respondent in the Imperial Valley at any time during the period from September 1, 1979 to the present.

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

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

It is further recommended that the remaining allegations in the complaint as amended -- not otherwise litigated or resolved by settlement -- be dismissed.

DATED: February 11, 1981.

Stuart A. Wein

STUART A. WEIN
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing at which all sides had the chance to present its facts, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act, and has ordered us to post this Notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

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

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

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

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

Because this is true, we promise you that;

WE WILL OFFER LORENZO ESPINOZA his old job back if he wants it, and we will pay him any money he lost because we laid him off unlawfully.

WE WILL PAY FLORENCIO VASQUEZ, MARTIN JIMENEZ DIAZ, MAXIMILIANO DIAZ, ANTONIO PULIDO, GUILLERMO DE LA O, ESPIRIDION GASTELUM and ALFONSO BAEZ any money they lost because we changed the irrigators' seniority system unlawfully.

WE WILL PAY, with the approval of the UFW, our Imperial Valley irrigators, tractor drivers, shovelers, and sprinkler workers employed by us from November 19, 1979, to the present

any money they lost because we unlawfully failed to grant them wage increases.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement on a collective bargaining contract concerning your wages, working hours, and the terms and conditions of employment.

WE WILL rescind our changes in the shop mechanic job assignment, and irrigator-shoveler seniority lists, if the UFW, as your bargaining representative, requests us to do so.

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

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

WE WILL NOT delay or refuse to provide the UFW with information it needs for bargaining.

D'ARRIGO BROTHERS COMPANY

By: _____
(Representative) (Title)

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