King City, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

McCARTHY FARMING COMPANY, INC., SOUTHDOWN LAND COMPANY, and SAN BERNABE, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos.	
	80-CE-21-SAL	81-CE-35-SAL
	80-CE-65-SAL	81-CE-36-SAL
	80-CE-65-1-SAL	81-CE-37-SAL
	80-CE-331-SAL	81-CE-39-SAL
	80-CE-21-SAL	81-CE-42-SAL
	80-CE-31-SAL	81-CE-43-SAL
	81-CE-34-SAL	81-CE-56-SAL
		81-CE-65-SAL
	9 ALRB No. 34	

DECISION AND ORDER

On August 26, 1982, Administrative Law Judge (ALJ)[1/] Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, General Counsel, the United Farm Workers of America, AFL-CIO (UFW), and Respondent each timely filed exceptions and a supporting brief, and Respondent filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs, and has decided

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

to affirm his rulings, findings,[3/] and conclusions, as modified herein, and to adopt his recommended Order, with modifications.

The ALJ found that the adoption of a new seniority system by Respondent was not unlawful, partly because it did not have a disproportionate impact on union members or union adherents, citing NLRB v. Atlanta Coca-Cola Bottling Co. (5 Cir. 1961) 293 F.2d 300 [48 LRRM 2724]. We do not adopt the rule that a disproportionate effect need be proven as a prerequisite to a finding of unlawful discrimination. A discriminatory act may violate section 1153(c), even absent a disproportionate effect, provided the act, as a natural and foreseeable consequence, tends to encourage or discourage union activity. (Majestic Molded Products (2nd Cir. 1964) 330 F.2d 603 [55 LRRM 2816]; Rosen Sanitary Wiping Cloth Co. (1965) 154 NLRB 1185 [60 LRRM 1114]; NLRB v. Computed Time Corp. (5th Cir. 1975) 578 F.2d 790 [100 LRRM 2532].) However, as we find that Respondent's change in seniority rules was not based on discriminatory reasons, we affirm the ALJ's conclusion and hereby dismiss that allegation.

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[3/] We reject the ALJ's finding that Respondent refused to rehire Maximiliano Casteneda during the harvest because his application contained a misrepresentation. Rather, we find that there is insufficient evidence to establish that Casteneda was denied rehire because of his union activity. Accordingly, we dismiss the allegation of discrimination as to him.

We also reject the ALJ's finding that there was insufficient proof of company knowledge of union activity of Epifanio Silva Medina, but we dismiss the allegation as to Medina because we find there is insufficient evidence that Respondent unlawfully discriminated against him.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent McCarthy Farming Co., Inc., Southdown Land Company, and San Bernabe, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their participation in concerted activity protected by section 1152 of the Act.

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

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

(a) 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.

(b) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from November 30, 1979, until September 3, 1980.

(c) 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.

(d) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of 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.

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

Dated: June 14, 1983

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office by the United Farm Workers of America (AFL-CIO), the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing where each side had a chance to present its facts, the Board has found that we have violated the agricultural Labor Relations Act by interrogating an employee regarding her union sympathies and activities, 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 you and all other farm workers these rights:

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

Because this is true, we promise you that:

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

WE WILL NOT interrogate any employee regarding his or her union activities or beliefs.

Dated: McCARTHY FARMING COMPANY, INC., et al.

By: _____
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

McCarthy Farming Co., Inc., et al. (UFW)

9 ALRB No. 34
Case Nos. 80-CE-21-SAL et al.

ALJ DECISION

The underlying complaint alleges various 1153(a) violations, e.g., unlawful interrogations, threats, and surveillance, and two 1153(c) violations consisting of 1) the discriminatory failure to rehire 56 pruners in December 1980 for the 1980/81 season who had worked the previous pruning season, and 2) the discriminatory layoff of two crews on February 20, 1981, the crews consisting of pruners from the 1979/80 season.

During 1980, Respondent implemented a new seniority system whereby the grape pruners and grape harvesters had to work until layoff during both seasons in order to maintain seniority. As this was a change in past practice and most employees were not timely notified of the change, many of the pruners lost their seniority and were not hired at the commencement of the subsequent pruning season. The first 1153(c) allegation involves this failure to rehire. After the commencement of that subsequent pruning season, Respondent hired 57 of those same pruners into two crews designated for special tasks. These crews were laid off after five weeks. The second 1153(c) allegation is that this layoff was premature and discriminatorily motivated.

During the 1979/80 winter pruning season, an employee-initiated organizing drive occurred. The organizing was quite open and Respondent responded with a vigorous "No union" campaign. Many employees signed UFW authorization cards but apparently not enough to constitute a showing of interest as no representational petition was filed. It was during this period that the 1153(a) violations were alleged to have occurred.

The ALJ found that Respondent's change in seniority system was initiated prior to any union organizing activity as Respondent hired labor consultant Tony Mendez in the fall of 1979. Mendez, after a survey of Respondent's personnel practices, recommended the changes which were subsequently made and began implementing them prior to the 1979/80 pruning season. The ALJ found the failure to give notice to the employees of the changes was a result of the confusion caused by the changes and changing supervisors, and was not discriminatorily motivated. The ALJ also found that the implementation of a new seniority system could not be discriminatory since it was applied across-the-board to all employees. Consequently, the ALJ dismissed this allegation. Additionally the ALJ reviewed the application of the new rules to the individual employees and found no instances of individual discrimination.

Regarding the rehire and subsequent layoff of the two crews in 1981, the ALJ credited Respondent's business explanation for its conduct and dismissed that allegation also. Respondent had

asserted that the special task that one crew was hired to do (tying early-budding grapes) was substantially completed, and that it was not cost efficient to have the other crew continue pulling stumps, as the existing crews could do that work sporadically and more efficiently, as there was no urgency to do the job.

The ALJ found one instance of unlawful interrogation and dismissed the other 1153(a) allegations for failure of proof. The interrogation consisted of Respondent's agents meeting with one of the most active union supporters, Rosa Morfin, and asking her why she was organizing, what she wanted, and informing her she could only speak for herself and not a group.

BOARD DECISION

The Board affirmed the findings and conclusions of the ALJ with few modifications. The Board affirmed the dismissal of the allegations of individual discrimination against Maximiliano Casteneda and Epifanio Silva Medina, but based its dismissals on grounds different than those relied upon by the ALJ. The Board dismissed Casteneda's case because the insufficient evidence of his union activity made a finding of a causal connection between the union activity and the failure to rehire untenable. Medina's case was dismissed because there was no proof of discrimination.

Regarding the implementation of the new seniority system, the Board held that it was not necessary to find a discriminatory effect for there to be a violation of 1153(c). However, as the change in seniority rules was not made for discriminatory reasons, the Board dismissed the allegation.

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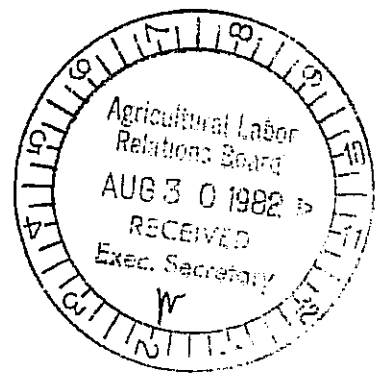
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 80-CE-21-SAL
	)	80-CE-65-SAL
McCARTHY FARMING COMPANY, INC.	)	80-CE-65-1-SAL
	)	80-CE-331-SAL
Respondent,	)	81-CE-21-SAL
	)	81-CE-31-SAL
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	



Appearances:

James W. Sullivan, Esq.,
for the General Counsel;

William A. Quinlan, Esq., and
Bert Hoffman, Jr., Esq.,
of Quinlan, Kershaw,
Fanucci and Hoffman,
for the Respondent;

Alicia Sanchez,
for the United Farm Workers
of America, AFL-CIO,
for the Charging Party.

Before: Matthew Goldberg
Administrative Law Officer

DECISION OF THE ADMINISTRATIVE LAW OFFICER

I. STATEMENT OF THE CASE

Commencing April 15, 1980, the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union") filed a series of charges and served them on McCarthy Farming Company, Inc. (hereafter referred to as "Respondent" or the "Company") as follows:

Charge	Date Filed	Date Served
80-CE-21-SAL	4/15/80	4/15/80
80-CE-65-SAL	5/21/80	5/21/80
80-CE-65-1-SAL	6/20/80	6/20/80
80-CE-331-SAL	12/9/80	12/9/80
81-CE-21-SAL	2/19/81	2/18/81
81-CE-31-SAL	2/23/81	2/23/81

The charges alleged various violations of Sections 1153(a) and (c) of the Act. Partially[1/] based on these charges, the General Counsel for the Board issued a consolidated complaint on February 18, 1981. A "First Amended and Consolidated Complaint," dated April 10, 1981, was subsequently issued, and incorporated each of the charges ennumerated above. General Counsel issued a Second Amended and Consolidated Complaint dated May 6, 1981.[2/] Respondent timely[3/] filed an answer denying, in essence, the commission of

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1. The initial complaint issued in this case referred to charges 80-CE-65-SAL, 80-CE-65-1-SAL, and 80-CE-331-SAL, and also included a reference to charge number 80-CE-337-SAL. This last-mentioned charge was not incorporated into subsequent amended complaints, offered as an exhibit at the hearing, and presumably was not presented as a basis for one of the issues framed in this case.

2. The various complaints and notices of hearing were all duly served on respondent.

3. The parties apparently arrived at an accommodation regarding the initial complaint which obviated respondent's need to file an answer thereto. Respondent represented that the General Counsel informed it soon after the issuance of the first complaint that General Counsel would be filing an amended complaint and that Respondent need only file one Answer which referred to this later pleading.

any unfair labor practices. At the pre-hearing conference those issues which the "Second Amended and Consolidated Complaint" added were severed from the case.[4/] General Counsel ultimately filed a document entitled "Second Amended Complaint", which essentially paralleled the "First Amended etc." and contained certain other changes as conformed to proof.

After the pre-hearing conference held on May 8, 1981, the hearing opened on May 12, and proceeded over the course of twenty-nine hearing days. The General Counsel for the Board, the Respondent, and the Union appeared through their respective representatives.[5/] All parties were afforded a full opportunity to present evidence, to examine and cross-examine witnesses, and submit oral arguments and briefs.

Based upon the entire record, including my observation of the demeanor of the witneses as they testified, and having read and considered the briefs submitted since the close of hearing, I make the following:

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4. Those issues were based on charges numbered 81-CE-34-SAL, 81-CE-35-SAL, 81-CE-36-SAL, 81-CE-37-SAL, 81-CE-39-SAL, 81-CE-42-SAL, 81-CE-43-SAL, 81-CE-56-SAL, and 81-CE-65-SAL. They are to be the subject of another hearing and decision.

5. Representatives for the Union were not present for much of the hearing.

II. FINDINGS OF FACT

A. Jurisdiction of the Board

1. Respondent was and is, at all times material, an agricultural employer within the meaning of section 1140.4(c) of the Act;

2. The Union was and is, at all times material, a labor organization within the meaning of section 1140.4(f) of the Act.[6/]

B. The Unfair Labor Practices Alleged

1. Discriminatory Refusal to Rehire: Paragraph 5(h)[6a/]

a. Facts Essentially Not in Dispute[7/]

The Respondent is a California corporation engaged in the production, among other crops, of premium varietal wine grapes. While it conducts grape operations in several locations around the state,[8/] the area where the events with which this proceeding is concerned took place in southern Monterey County near King City. There respondent cultivates and harvests wine grapes over approximately 8,700 acres on what has been termed one of the largest, if not the largest, contiguous such acreage in the world. The property is a major portion of the 13,000 total acres known as

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6. The jurisdictional facts were deemed admitted by the absence of a specific denial in Respondent's answer pertaining thereto. (Regs. Section 20232.)

6a. The Paragraph referred to is the one setting forth the specific allegation in the "Second Amended Complaint."

7. These findings are based on uncontroverted or corroborated testimony and stipulations. Where a conflict in the evidence arises specific reference will be made to the witness who supplied a particular aspect of a contention.

8. Among those are vineyards in the following counties: Santa Barbara, Kern, San Joaquin, Fresno and Madera.

the Southdown or San Bernabe Ranch.[9/] The areas on the ranch not designated for grape cultivation are devoted to alfalfa, row crops and pastureage. The alleged violations involved solely those seasonal workers employed in the grapes.

There are two primary seasons for respondent's operations and two distinct coexistensive peak labor force periods. The pruning season customarily begins in December each year and proceeds over the next several months, after which time the crews perform a myriad of other tasks, including tying vines, budding, suckering, transplanting, pulling stumps, weeding, and general maintenance and clean up work. Labor requirements, from a maximum level reached in January and February, begin tapering off in May. A minimal number of workers are retained throughout the summer. For example, in 1980, about sixty "seasonal"[10/] employees remained during this time, as opposed to the approximately 350 seasonal workers employed during the peak of the pruning season. This remaining group of sixty or so seasonal workers were eventually laid off in the beginning of September.

The grape harvest generally commences in mid-September and lasts for six or seven weeks. The number of seasonal employees working during the peak of the harvest is roughly equivalent to the number employed during the pruning season peak, or three hundred fifty.

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9. Subsequent reference to the respondent may be made utilizing these names.

10. "Seasonal" employees generally do not include tractor drivers, irrigators, or maintenance personnel.

Prior to and including the 1979-80 pruning season, seasonal work forces were supplied via labor contractor Joe Silva. On August 14, 1980, Silva retired, and respondent assumed full management and control over the hiring and retention of its seasonal workers.

Before the 1979-80 pruning season began, however, respondent began to institute a series of fundamental changes in its personnel policies. Initially, it hired a labor relations consulting firm under the direction of Tony Mendez. Mendez, after conducting his own survey regarding personnel policy "deficiencies" at the Southdown ranch, formulated a series of programs which he felt would alleviate some of these problems. He implemented instructional sessions attended by respondent's foremen, designed to sensitize the supervisors to employee problems, enhance interpersonal relationships between management and employees, and also to advise foremen on the "do's" and "don'ts" of conducting themselves in the course of a Union organizational campaign.[11/] Mendez and ranch manager Ron Lopopolo admitted in essence that improvements in the methods in which management functioned were necessary to counter employee perceptions of the desireability of Union representation.

That abuses existed under Silva's regime was not contested

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11. Respondent's attitude toward organization was openly "no-union." It conducted a campaign of its own, more fully discussed below, designed to meet head-on the Union organizational drive which began in January and February 1980. Notwithstanding allegations of violations regarding isolated supervisor conduct, also discussed infra, integral aspects of the campaign were not alleged as contrary to the Act. When organizing activities recommenced in the 1980-81 pruning, they were met with a similar response by the company.

by respondent. Rumors persisted of the securing of employment through mordidas or bribes or the exacting of sexual favors. As elements of respondent's fringe package became more complex, such as the health insurance program, Silva's operation demonstrated an inability to adequately manage them.

Perhaps of greatest importance to the efficient functioning of respondent's vineyard, according to its managers, was the need to regularize its hiring and layoff practices. Silva's paternalistic and oftentimes irregular employment methods were incapable of providing what they felt respondent's increasingly more sophisticated operation demanded: a stable, permanent work force available to respondent as its needs required. Silva had, in years previous, essentially permitted employees to come and go as they liked, reporting for work after a season had begun or discontinuing employment before a season had ended. Additionally, Silva would take groups of employees or whole crews under his charge away from the respondent's ranch to work elsewhere for short periods. Respondent could not rely, under the old system, on the continued availability of its workers and the predictability of their output.

In order to partially remedy this specific situation, Mendez recommended the institution of a "hire-date" system. Pursuant to that system, employees reporting during the 1979-80 pruning season and forward would be assigned a hire date coinciding with their first day on the job. Layoffs would be determined in reverse order of hire-date: simply, last hired would be the first to be laid off. Counsel stipulated that from November 30, 1979, the first day of the 1979-80 pruning season, forward, layoffs were

determined according to the hire-date system.

Not only were layoffs so determined, but as became apparent with the passage of time and the commencement of ensuing seasons, so were particular eligibility and priority for employment in those seasons. The prime focus of the hearing and the major source of controversy centered around the loss of that employment eligibility. Simply stated, General Counsel contended that many individuals were not rehired for the 1980-81 pruning season because of their Union activities, while respondent maintained that the respective losses of employment priority status were due solely to the implementation of and adherence to the newly instituted hire-date system.

Before examining the individual circumstances of each employee alleged to have been discriminated against, certain other actions taken by the respondent pursuant to Mendez' recommendations are noteworthy. Mendez suggested that respondent's labor-related supervisorial hierarchy be solidified and methods for transferring directions between respondent and the labor contractor be improved. With respondent's approval, Silva hired Larry De Santiago as labor manager to provide overall supervision of the work force, as well as to oversee benefit programs, formally institute and administer the hire-date system, and instruct foremen on its application. De Santiago, apart from being Silva's son-in-law, had had experience working as a supervisor at Interharvest under a UFW contract: he was familiar with the operation of a hire-date or seniority system which, he maintained, was roughly equivalent to the one instituted by respondent.

In a further effort to improve communications between

respondent and the labor contractor, and to formalize the chain of command, respondent hired, as its own employee, Valentin Zuniga, who occupied the position of "Labor Production Coordinator." Zuniga's functions were to act as liason between respondent and the Silva operation, coordinate work schedules for the crews, transmit instructions from the ranch manager to Silva's foremen, and check all the time sheets. When Silva retired, Zuniga, in addition to overseeing the wholesale transfer of the Silva Southdown work force to the respondent's rolls, assumed all of the duties of Larry De Santiago, who had previously been fired by Silva in June of 1980.[12/]

In addition to the establishment of the hire-date system and the changes in the management heirarchy noted above, respondent instituted a new policy in the 1979-80 pruning season concerning leaves of absence. Leaves of absence were routinely granted for whatever period requested by the employee if for a medical or essentially "emergency" reason, such as a death in the family or immigration problems. A written leave slip was issued to the worker, who was expected to return to work when the leave period ended. Failing to do this, the employee was considered to have voluntarily "quit" his/her employment. As a further consequence, the employee would also lose his/her "hire-date" and thus would not have priority status for employment in future seasons.

Other bases also arose which eventuated in the loss of

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12. De Santiago's dismissal had little, if anything, to do with respondent. Apparently, conflicts between De Santiago and Silva arose as a result of De Santiago's insistence upon adherence to the hire-date system he had helped institute. This often ran counter to Silva's notions of employment priority based on personal and/or work relationships with particular employees.

one's hire-date. Two of these, discharge for cause and having three consecutive unexcused absences, were not subject to controversy or extensive debate. Two other rationales which respondent maintained caused the loss of the hire-date were disputed by General Counsel as either not subject to universal application or which, it was contended, gave rise to the discrimination complained of herein.

The first of these was the common practice[13/] among the great bulk of respondent's seasonal employee complement to leave respondent's employ prior to actual lay-off but during the period of diminishing employment (e.g., May or June) to secure work at other Salinas Valley agricultural employers. This practice was the natural outgrowth of the winding down of respondent's operations as the summer approached, while other Salinas Valley employers were gearing up for their respective peaks of employment. As work availability with respondent declined, work availability at other farms in the vicinity rose. In seasons past, respondent's workers under Joe Silva were informed of impending lay-offs and were encouraged to voluntarily thin the ranks of the work force by seeking employment elsewhere.[14/] Many of the workers alleged to have been discriminated against had seniority at other employers, such as Basic Vegetable, Frudden Produce, and Meyer's Tomato. They were recalled to these jobs in the period when lay-offs at the

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13. As will later be seen, many of the alleged discriminatees followed the procedure described.

14. Worker Leopoldo Guillen testified that his foreman Lupe Velasco repeated this sentiment to his crew in 1980, as did Valentin Zuniga, as testified to by workers Dominga Gaytan and Hector Munoz.

respondent were imminent.

Nevertheless, this practice ran counter to respondent's recently initiated hire-date program designed in part, according to respondent, to maintain a certain continuity or stability in its work force.[15/] Consequently, when workers left for other employment, they were issued personnel action notices[16/] which stated that they had voluntarily "quit" their jobs at Southdown. While the argument was advanced that such a voluntary quit would result in the loss of an employee's hire-date, at least five such individuals alleged as discriminatees had their names listed on the hiring lists naming employees eligible for initial hire posted at or near the beginning of the harvest season.[17/] Valentin Zuniga eventually admitted that the fact that a person was deemed a "voluntary quit" would not necessarily eliminate him/her from consideration for a job in the picking.[18/]

Of greater impact in this case was the other "rule" which

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15. This notion was expressed numerous times in the testimony of Tony Mendez, general manager John Cedarquist, and Ron Lopopolo, as well as throughout respondent's post-hearing brief.

16. The notices had the printed heading "Joe Silva Termination Notice" although they were utilized to memorialize a variety of personnel actions, including leaves of absence (as per above), lay-offs, discharges for cause, as well as voluntary quits.

17. The individual circumstances of these workers will be treated with greater specificity below.

18. Respondent hired more than one hundred workers for its 1980 harvest who had no previous experience working at Southdown. In the absence of discrimination a "voluntary quit" should theoretically be in no worse position regarding employment than a new hire. Larry De Santiago asserted that this was the policy, as he understood it, regarding "voluntary quits" who had lost their hire-dates.

respondent implemented regarding the maintenance of an employee's hire-date: the necessity to report for a subsequent cultural practice following the end of a particular season. Specifically, it was the failure of the bulk of the named discriminatees to report for work in the 1980 harvest season which caused them to lose their original hire-dates, and thus their places in line, so to speak, for consideration for priority employment in the 1980-81 pruning season.[19/] However, including all of the named discriminatees, approximately one hundred workers lost their seniority as a result of not reporting for work during the harvest.

As noted above, many of the alleged discriminatees worked for other agricultural employers in the area following their employment in the pruning at Southdown. Often this work carried through respondent's harvest season. The custom of many of these workers would be not to work for respondent during its harvest but only to report back for the subsequent pruning season. When these alleged discriminatees returned to Southdown in early December for the 1980-81 pruning season, many of them heard for the first time that in order to be considered among the initial group to be hired for that season they had to have worked in the previous harvest season: simply stated, in order to prune, they had to have picked. General Counsel alleged that the refusal to hire this group at the start of the pruning season was unlawfully motivated and the result of discriminatory treatment designed to discourage participation in Union activities.

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19. In fact, none of the alleged discriminatees worked in respondent's 1980 harvest.

Although not hired at the beginning of the 1980-81 pruning season, many of those who had worked previously at Southdown were hired to work in two crews, those of Ramon Garcia and Jose Rivera, from January 14 and 15, 1981, respectively, until their layoff on February 20, 1981. General Counsel further alleged that this layoff was premature and likewise the result of discrimination. This allegation will be discussed in a succeeding section.

While respondent maintained that as part and parcel of its hire-date system, the "failure to report to work on a recall" would result in the loss of ones' original hire date, it was not essentially disputed that respondent failed to inform the bulk of employees[20/] as they left for whatever reason after the 1980 pruning season that if they did not report to work for the 1980 harvest, they would lose their priority hiring status for the 1980-81 pruning season.

Lopopolo, Zuniga and Mendez each testified that Larry De Santiago[21/] was responsible for apprising foremen of the changes in

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20. After Silva's retirement on August 14, 1981, Zuniga did see to it that seasonal workers in crews that remained employed at that time were informed of the necessity of reporting to work for successive cultural practices in order to maintain their original hire dates.

21. Curiously, General Counsel did not allege that Larry De Santiago was an "agent" of the respondent in its "Second Amended Complaint" although he did so in the prior "Second Amended and Consolidated Complaint." It should not be subject to serious debate that Larry De Santiago was an "agent" of respondent, acting on its behalf until his discharge in June 1980. Under Labor Code Section 1140.4(c) "the employer engaging [a] labor contractor . . . shall be deemed the employer for all purposes under this part." Thus, the employees of contractor Silva are deemed employees of the

(Footnote continued ----)

respondent's personnel policies, and did so at least to some extent. For example, numerous workers testified that they were aware of the "last hired, first laid off" rule, and that this had been explained to them when they began working in the 1979-80 pruning season. De Santiago was also responsible for the preparation of layoff lists and the instruction of foremen as to whom to lay off and when. However, De Santiago did not see to it that the foremen told their workers that they had to report for the picking season in order to have pruning employment priority. Significantly, De Santiago admitted that he did not hear of such a rule while employed at the

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(Footnote 21 continued)

respondent, who "engage[d]" him at times material. Larry De Santiago, Silva's labor manager, possessed several of the indicia of supervisorial authority set forth in section 1140.4(j) of the Act, including the authority to hire, lay off, discharge and assign employees "in the interest of the employer," which in this case, under section 1140.4(c), was the respondent itself. Accordingly, I find that he was a supervisor within the meaning of the Act. "Agency" has been established where an individual acts under an employer's direction and control, as De Santiago did both indirectly through Silva and directly through respondent itself, and/or where, as here, an employer has ratified, condoned, acquiesced in or approved his acts directed towards the employer's employees. See generally Venus Ranches (1977) 3 ALRB No. 55; Perry's Plants (1979) 5 ALRB No. 17. It has also been held by this board that foremen and supervisors, although working directly for a labor contractor, are considered agents of the primary employer for the purposes of the Act. Ernest J. Homen, sub. nom, Frudden Produce Co., Inc. (1978) 4 ALRB No. 17. Clearly then, De Santiago was at the time he was employed by Silva to work with respondent's labor force, an agent of respondent. Respondent is thus liable for his acts. (Venus Ranches, supra; N.L.R.B. v. Russel Manufacturing Company (C.A.5, 1951) 27 LRRM 2311.

Southdown ranch.[22/]

Although respondent appears to argue to the contrary in its brief, almost none of the "rules" regarding hire-date, seniority, lay-offs, and loss of employment eligibility are contained in its employee handbook which was read to employees prior to the beginning of the 1980-81 pruning season. The handbook was prepared by Bruno Castillo, regional labor coordinator for respondent, and the Mendez labor consultants at some time prior to August 1980. Thus, despite respondent's contentions that the "rules" were formulated and in effect prior to the commencement of the 1979-80

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22. Respondent attempted to rehabilitate De Santiago's testimony on this point when it called him as its own witness. He was asked about his "intentions" regarding the rule applicable to failing to respond to a recall for the harvest season.

> O (Mr. Quinlan): . . . at the time you initiated it, what did you intent [sic] would happen to somebody who didn't honor a recall and work in the harvest season?
>
> A (De Santiago): Well, he was just automatically terminated . . . I presumed he would come back and apply . . . if we had any openings, he can probably come back.

The minimal probative value of this testimony notwithstanding, when called by General Counsel, De Santiago's demeanor was surly and evasive, and indicated an inherent lack of credence which could be attached to his testimony. Additionally, the numerous conflicts (as per the foregoing) between his testimony when called as a witness for the General Counsel and when recalled subsequently as a witness for the respondent underscore this conclusion. Consequently, I find that De Santiago was not aware of the existence of the rule whereby it was necessary to report for the harvest in order to maintain eligibility for hiring in the ensuing pruning season. De Santiago unabashedly stated when recalled by respondent and under cross-examination by the General Counsel that he told "all the foremen" and "all the people" that a worker would have to report for the picking in order to maintain his/her seniority. This revelation was conspicuously absent from his testimony when called initially by the General Counsel as part of his case-in-chief, and later in his direct examination when called as a witness for respondent. Nowhere were De Santiago's assertions corroborated by foremen or workers.

pruning season, the respondent produced and maintained a handbook after that season concluded which omits reference to many of them.

An examination of the booklet reveals that "hire-date" or "date of hire" is mentioned only in connection with eligibility for benefits, not in terms of eligibility for continued employment or vulnerability for lay off. The so-called "three-day" rule is alluded to under "absenteeism." However, having three consecutive unexplained absences merely makes an employee "subject to termination" (not mandatory language) and there is no reference to a loss of seniority or hire-date. By contrast, however, should an employee fail to return from a leave of absence, on the date scheduled, "employment . . . will be terminated." This rule comports with that enunciated via testimony and enforced regarding particular employees.

In the section headed "Lay-offs," it states that "layoffs, insofar as possible, will be made according to the employee's length of service and ability to perform their jobs." Nowhere evident is any language setting forth the rule established via the testimony of numerous witnesses regarding lay-offs being determined according to hire-date. "Length of service" is clearly not the equivalent; nor is there any mandatory language regarding the implimentation of any formal seniority system.

No reference is made to the "rule" that a voluntary quit results in the loss of one's hire-date. The booklet merely states: "You are expected to continue working until the time that the lay-off occurs."

The section entitled "Recall" similarly omits any reference

to priority in employment eligibility based on date of hire. It simply states that the respondent will make "reasonable efforts" to recall former employees, not that it definitely will.

Thus, the contents and existence of the employee handbook, prepared prior to the 1980 harvest and read to employees before the 1980-81 pruning season began, appear to contradict respondent's assertions that the rules for loss of seniority or loss of hire-date were formulated and put in effect prior to the 1979-80 pruning season. Obviously, if such rules were in effect, why were they not published or disseminated to the employees who would be charged with a knowledge of them? It is clear that while many employees felt the impact of such rules, in most instances the rules became known to them ex post facto.[23/]

Similar to the lack of notification of the company's newly instituted rules regarding the hire-date system was the lack of notice, which had been promised, of the announcement of the beginning of the harvest. Several company witnesses, including Zuniga, De Santiago, Mendez and foremen De Lara, Garcia, Noriega and Soto testified that respondent originally intended to announce its harvest recall by the sending of post cards to laid-off employees. However, the cards were not sent,[24/] and one may only speculate as to the reason or reasons therefor. Although General Counsel argues

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23. Although respondent attempted to present evidence and/or arguments to the effect that the rules were published by "word-of-mouth," this cannot be viewed as a substitute for authorized publication by company personnel.

24. Counsel stipulated that the decision not to send the cards was made no later than August 21, 1980, nearly one month before the harvest actually began on September 19.

that the proferred reasons for not sending out cards were unsatisfactory[25/] and provide evidence of discrimination, the fact remains that no cards were sent to any workers: the failure of the company to do so was across-the-board, not directed at any particular worker or group of workers, and thus cannot in any sense

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25. Tony Mendez suggested (perhaps facetiously) that the resondent did not send out cards because "we didn't have a stamp." It hardly seems likely that a company with a ten million dollar annual operating budget would be hindered in achieving its stated goal of maintaining "continuity" in employment by inattention to such a minor detail and/or expenditure.

Another reason proferred by Lopopolo and Mendez for not sending out cards was the winery strike which created uncertainties as to when the harvest would actually begin. However, the strike, which commenced on September 5, began some two weeks after the decision not to send the cards was made.

Perhaps the most credible reason for the failure to attend to this administrative detail was the confusion intendent upon the transposing of all of the employees in the Silva Southdown work force to the aegis of the respondent. Zuniga stated that his office was somewhat understaffed, although he did have the assistance of four additional persons in August. Silva's retirement was somewhat abrupt. Zuniga stated that he learned of it only several days before it happened, and respondent was unprepared to a certain extent for the transfer of the work force. Zuniga testified that he had little or nothing to do with the actual supervision of employees under Silva prior to De Santiago's discharge, and thus would be unfamiliar, at least initially, with the significance of all of their employment records. Respondent adopted wholesale the hire-date system begun by Silva in the 1979-80 pruning season. The amount of effort in compiling all of the necessary information from the Silva records in order to determine harvest employment eligibility was by no means insubstantial. Although hire-dates were recorded in one series of documents, those documents did not contain either employee addresses or whether or not the particular employee maintained or lost his/her seniority. While the addresses could easily be compiled from the Silva compensation records, the continued eligibility for employment could only be determined by searching through individual employment records, a process which would perforce be time-consuming when one considers that approximately three hundred individual employees were involved.

be deemed discriminatory.[26]

The method ultimately relied upon for manifesting harvest employment eligibility was the posting of various employee lists at or near the commencement of the harvest season. Although there was testimony that some employees were advised to check the lists to determine whether they were entitled to harvest employment priority, other witnesses stated that they were not so informed.[27] Apparently, respondent relied in no small measure upon word-of-mouth to disseminate the fact that the harvest was about to begin, and that people should come in, check the lists, and "register" for work.[28] No formal announcement was made by the company.

Employees whose names were on the harvest lists and who failed to register for employment in that season lost their "seniority," or the benefit of their hire-date, for priority in employment for subsequent seasons, e.g., the 1980-81 pruning.[29]

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26. Organizing activities at Southdown occurred only during the pruning seasons of 1979-80 and 1980-81, not during the harvest of 1980. Although it might be argued that the "group" which was the object of the discrimination were those workers who customarily pruned but did not appear for the harvest, there was no showing, as will later become apparent, that this group was any more or any less active in Union activities than those who did participate in the harvest and who did not lose their seniority.

27. Zuniga, when he assumed responsibility for direct supervision of the seasonal work force on August 14, 1980, informed employees then working of the posting of the lists. Many workers, laid off or leaving respondent's employ prior to this time, testified that they were not told of the lists.

28. Several workers testified that they acted on what they had heard from fellow employees to the effect that they should go to the company office and "register" or fill out an application.

29. As noted elsewhere, nearly one hundred pruning season employees lost their seniority for this reason.

However, as General Counsel aptly points out in his brief, the fact of whether employees were told that lists were to be posted for harvest employment eligibility is not as critical as the fact, as the record reflects, that they were not informed that employment in the harvest was essential for preserving that seniority and hence priority status for employment.

Each of the alleged discriminatees named in Paragraph 5(h) shared in common the failure to report for, or to work in, repsondent's 1980 harvest season. When they reported for the 1980-81 pruning season, as they had customarily done in the past, other workers who had established and preserved their hire-dates, most commonly by working through the harvest, were given preference for employment in the pruning and hired in their stead.

b. Organizational Activities at Southdown in the 1979-80 Pruning Season and Respondent's Attitude Thereto

It was universally acknolwedged that organizing activities per se did not occur at Southdown prior to the 1979-80 pruning season. In January 1980, employee Jesus Morfin[30/] visited the offices of the Union in Salinas. There he obtained authorization cards for the Southdown employees and was also told that Union personnel would be unable to assist him in the campaign. Essentially, then, organizing at Southdown assumed a "grass-roots" aspect.

Representatives for each of the crews were appointed[31/] to

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30. The particular circumstances surrounding his tenure at Southdown and the alleged discrimination resulting therefrom will be treated infra.

31. Whether they were volunteers or elected by their respective crews is unclear from the record.

foment Union support among the workers and distribute Union leaflets and authorization cards. Included among the representatives were Jesus and his wife Rosa Morfin, Vicente Robles, Lupe Banuelos, Santiago and his wife Emma Mendoza, Ismael Gomez and Salvador Mendoza.[32/]

Respondent's awareness of the campaign itself, as distinguished from its awareness of the participation in it of particular individuals, was not subject to dispute.[33/] Most of the various organizing activities were carried on quite openly, in the fields and company busses while foremen and supervisors were in close proximity. However, as will be seen, the openness of the campaign may have contributed in some measure to the professed lack of company knowledge of individual Union activities: the fact that such activities were ongoing and permitted, for the most part, to proceed without hindrance, would make any one person's receipt of a card or Union literature unremarkable enough as to allow such activity to occur unnoticed by a foreman or supervisor.

Jesus Morfin was able to gather a total of 182 cards among the Southdown seasonal employees. The Union filed a Notice of Intent to Organize on March 25, 1980. However, no further steps toward obtaining a representation election were taken that

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32. As will later appear, Rosa Morfin, Robles, Banuelos, Emma Mendoza and Salvador Mendoza were not claimed to be victims of discrimination and continued to work at Southdown through the dates of the hearing.

33. For example, supervisor Valentin Zuniga and foremen Juan de Lara and Ramon Garcia admitted knowledge of organizing activities occurring in early 1980.

season.[34/] General Counsel speculates that the Union did not possess a sufficient showing of interest since the number of "steady" or year-round employees at Southdown, when added to the number of seasonal workers employed there, was more than double the number of cards obtained.[35/]

The respondent's attitude toward unionization was as unconcealed as the campaign itself. That attitude may be summarized as one of open opposition. Part of Mendez' duties, as noted, were to instruct foremen how to deal with employees engaged in organizing. While Mendez himself testified that he employed the mnemonic "TIPS" (no threats, interrogation, promises or surveillance) to bring home the lesson of non-interference to the foremen, Lopopolo candidly admitted that, mitigating influences notwithstanding, respondent was firmly committed to a policy that the company remain non-union.[36/]

Pursuant to that policy, Mendez supervised the issuance of a series of company leaflets, beginning in late January 1980, designed to counteract the organizational efforts of Morfin et al.

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34. For example, no evidence was adduced that non-employee organizers availed themselves of access to Southdown employees.

35. For the sake of comparison, respondent employed about 120 "steadies" and 390 seasonal workers in the 1981 peak. No figure was available for the "steadies" in 1980. General Counsel relies on assistant ranch manager Bill Petrovic's estimate of 330 seasonal employees in the 1980 peak to assert that the obtaining of 182 cards was evidence that the organizing drive that year was "very successful."

36. Only two allegations of independent section 1153(a) violations occuring during 1980 remained after the close of General Counsel's case-in-chief. Neither of these involved statements, per se, by supervisors made during the course of the "no-union" campaign.

General Counsel agreed that these leaflets, as well as those distributed in the following year, did not contain statements which constituted unfair labor practices under section 1153(a), and were permissible expressions of employer opinion under section 1155. However, the leaflets may be used to provide background information regarding the alleged unfair labor practices, and to shed light on employer motivation. (Smith's Transfer Corp. (1966) 162 NLRB 143; Consolidated Accounting Systems (1976) 225 NLRB 105; see also Hendrix Manufacturing Co., Inc. v. N.L.R.B. (5th Cir. 1963) 321 F.2d 109; N.L.R.B. v. Exchange Parts (1964) 375 U.S. 405 at p. 409.)

The first of these leaflets says in Spanish, "What is the ranch's point of view regarding the Farmworker Union -- we energetically oppose having the union here." It goes on to state why the company is opposed to the Union, and why authorization cards should not be signed. Subsequent fliers provide the company viewpoint on authorization cards and information on access. Another depicts a parrot overhearing a conversation between a worker and a union adherent, and questions the type of leadership provided by a group of supporters which "does not know what it wants." The leaflets were distributed among the crews by foremen.

General Counsel adduced other evidence of respondent's pervasive anti-union attitude. Labor contractor Joe Silva, in remarks to Jesus Morfin detailed infra, made no secret of the fact that he was unalterably opposed to the Union. These remarks were uncontroverted. Foreman Lupe Velasco did not refute that on one occasion, he opined to employee-organizer Rosa Morfin that the Union was "no good," and that a certain garlic company had gone broke

after the Union came in. Velasco similarly let it be known to alleged discriminatee Antonio Lopez Gonzalez that he had once been a member of the Union and that it was no good. Gonzalez also testified that Larry De Santiago told him that the Union was not "worth anything," that it could not benefit the workers and that they should avoid getting involved in it.

Respondent argues in its brief that a critical inquiry is necessary as to who initiated the aforementioned conversations to establish their non-coercive nature, and that each such expression of a foreman's or a supervisor's opinions about the Union constitutes "free speech" protected by section 1155 as interpreted in N.L.R.B. v. Gissel Packing Co. (1969) 395 U.S. 575. General Counsel did not allege any of them as independent section 1153(a) violations, and none of them, other than the Silva conversation with Morfin (infra) contained any "threats of reprisal . . . or promise of benefit." It is clear that no finding of a section 1153(a) violation can be based on them. It is also clear that they provide essential background information and evidence that this respondent was possessed with union animus.[37/]

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37. Certain other witnesses testified that their foremen told them that they were making "lists" of Union supporters during the 1980 Union organizational campaign. These matters are dealt with in detail in subsequent sections. In sum, I did not find that it was established by a preponderance of credible evidence that such acts in fact occurred. What appears is that respondent's attitude toward the Union may have created a fertile atmosphere for the growth of certain rumors based on half-truths. In 1980, respondent was required to compile a roster of employee names and residence addresses to provide to the ALRB and eventually to the Union pursuant to the Board's pre-petition list requirements. It is conceivable that certain employees believed that the lists so formulated were only of those who favored the Union.

c. Legal Analysis and Conclusions

Since its decision in Nishi Greenhouse (1981) 7 ALRB No. 18, this Board has adopted the so-called "Wright Line" test to determine whether a violation of section 1153(c) has occurred where there appear several rationales for employer action regarding employee tenure. See generally, J & L Farms (1982) 8 ALRB No. 46; Martori Bros. v. A.L.R.B. (1981) 29 Cal.3d 721. Once General Counsel has established a prima facie case of discriminatory action, the burden shifts to the employer to demonstrate that it would have taken the same action regardless of the protected concerted activities of the employee. (Wright Line (1980) 251 NLRB 1085, and cases cited above.)

Under Lawrence Scarrone, (1981) 7 ALRB No. 13, a prima facie case of unlawful discrimination consists of proof, by a preponderance of the evidence, of the following elements: that an employee or group of employees had engaged in protected, concerted activities; that the employer had knowledge or believed that the employee or group had participated in these activities; and that the employee or group were discharged or otherwise discriminated against because of such participation, i.e., there was a causal connection between the participation and the decision regarding employment status. Stated simply, pursuant to Wright Line, a violation of section 1153(c) exists where "but-for" an employee's engaging in protected, concerted activities, he/she would not have been discharged or otherwise been the object of discrimination.

It should be emphasized that as restated by the Court of Appeal, Fourth District, "the mere fact that an employee is or was participating in union activities does not insulate him [or her] from discharge for misconduct or give him immunity from ordinary employment decisions." (Royal Packing Co. v. A.L.R.B. (1980) 101 Cal.App.3d 826, 833; see also Mt. Healthy City Board of Education v. Doyle (1977) 429 U.S. 274). The fact of "discrimination" must also be established in addition to proof of a change in that employee's work status, i.e., it must be shown that similarly situated individuals were afforded disparate treatment. (Tenneco West, Inc., (1980) 6 ALRB No. 3; N.L.R.B. v. Whitfield Pickle Co. (C.A.5, 1967) 374 F.2d 576.)[38/]

Furthermore, essential to a finding of a violation of section 1153(c) of the Act is the conclusion that the motive behind a particular employer action was to "encourage or discourage" membership in a labor organization. As stated by the Fifth Circuit Court of Appeals in Dan River Mills, Inc. (CA 5, 1960) 274 F.2d 381,

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38. Too often the mere fact of a discharge or change in work status is relied upon to establish what is believed to be a prima facie section 1153(c) case, and the element of disparate treatment is ignored. For example, if General Counsel's evidence in its case-in-chief reveals that a company has a policy of discharging employees after three days' unexplained absence, and a known union adherent was discharged for violating that rule, the participation of the employee in protected concerted activity, the knowledge of that participation by the employer and the discharge, in and of themselves, are insufficient to make a prima facie showing. To complete its case, General Counsel must also prove that the discharge was discriminatory in some manner, such as by demonstrating that the employer had not discharged other employees who, like the alleged discriminatee, had violated the rule in question. (See, e.g., Tenneco West, Inc., supra; Hansen Farms (1978) 4 ALRB No. 87.) This vital element of "discrimination" is in fact part and parcel of the "causal relationship" alluded to in Lawrence Scarrone, supra.

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> [A] discharge becomes forbidden only if motivated by an unlawful purpose to discriminate against the Union or its adherents. A general bias or a general hositility and interference, whether proved or conceded, does not supply the element of purpose. It must be established with respect to each discharge. But antiunion bias and demonstrated unlawful hostility are proper and highly significant factors for Board evaluation in determining motive.

Since I find, as discussed below, that the employer's personnel policy changes in 1979-80 were not so motivated, it follows that respondent did not violate section 1153(c) of the Act by revamping its seniority system, and by refusing to initially rehire the group of employees alleged as discriminatees herein.

General Counsel recognizes in its brief that an employer may institute any type of seniority system it desires, as long as the implementation of such a system is not prompted by an unlawful, discriminatory motive or does not have an unlawful, discriminatory effect. (Kansas City Power & Light Co. v. N.L.R.B., 111 F.2d 340, 6 LRRM 938 (1940)). However, borrowing language from Radio Officer's Union v. N.L.R.B. (347 U.S. 17, 33 LRRM 2419 (1954)), he argues that discriminatory motivation may be inferred where the "natural" or "foreseeable consequence" of employer action is to weaken Union support among its employees. This statement, while correct to a degree, ignores the simple reality that where an employer alters any of its personnel policies while organization is in progress, such alterations are bound to have an effect on union supporters as they affect the work force as a whole. What is crucial is determining if a violation of the Act exists under these circumstances is an inquiry whether the system would not have been implemented or would

not have had an impact on these employees "but-for" their participation in Union activities. Put another way, did the system disproportionately affect Union supporters? See generally, N.L.R.B. v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300 (C.A.5 1961).[39] Based on the proferred evidence, that question in regard to respondent's hire-date system must be answered in the negative.

As repeatedly pointed out, nearly 100 employees lost their seniority rights to preferential hire in the 1980-81 pruning season by not working during respondent's 1980 harvest. The record evidence demonstrates, however, that of these 100, only five were

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39. I find this case particularly apposite since the Fifth Circuit in its analysis conceded that, as here, "[t]his case unquestionably shows anti-union animus." (48 LRRM 2731). There it was alleged that of a total lay-off of forty-seven workers, the lay-off of a particular twenty-three employees was unlawfully motivated. Unlike the present situation, however, the lay-offs were determined not according to a pre-determined system, but were solely based on the subjective judgments of supervisors. The Court found adequate economic justification for the lay-offs, and like the instant case, held that a "blanket finding of discriminatory" treatment as to the twenty-three employees was unwarranted by the facts:

> ". . . We fail to understand the blanket finding of discriminatory discharges. The blanket is too short: if we pull it up to cover our ears, it exposes our toes. If all forty-seven employees were discriminatorily discharged, it seems to us that the complaint should not have been limited to twenty-three employees. And, if each employee, as an individual, was discriminatorily discharged, there should have been a finding as to each. The easy way out of making a blanket finding might be acceptable if, but only if, all or a disproportionate number of the employees had been union members or union adherents; it is wholly unacceptable when half of those discharged were not union members or engaged in union activities, and, considering only the evidence favorable to the Board's findings, a scant twenty-one (nineteen, according to the Company) were known as union sympathizers. . . . Here, where the dismissals are separate incidents and there is no evidence that union adherents were treated more severely than others, a blanket finding evades the responsibility placed on the board and, ingenuously, attempts to evade the burden of proof the law places on the General Counsel."

shown by General counsel to have openly participated in Union activity, while another fifteen were shown at minimum to have "received" authorization cards. Of this latter group, I found, as discussed infra, that company knowledge of Union activity was definitively demonstrated with only three employees; insufficient proof was adduced on this issue as to six others, while as to the remaining six company knowledge was only arguably established. As to an additional fourteen workers alleged as discriminatees, no evidence whatsoever was presented that they engaged in any protected activities at times material. This failure of proof is heightened by the fact that a total of 182 workers signed authorization cards in the 1979-80 pruning season.

Thus, an examination of the particular activities of each of the alleged discriminatees, as more fully detailed below, reveals no pattern among them vis-a-vis the extent of their participation in protected, concerted activities. Some were extremely visible and vocal union adherents; some hardly so, if at all. The one common factor linking all of the alleged discriminatees was an employment pattern to the effect that they were employed by respondent during the pruning season of 1979-80, they did not work at Southdown during the 1980 harvest season, they expected to be rehired as in previous years when pruning recommenced in December 1980, and were not. General Counsel's statement that respondent's "manner of implementing its seniority system directly served its anti-union purpose by eliminating so many of the employees who had participated in the Union's organizing campaign" finds scant support, if any, in the record.

It also follows from an analysis of the evidence that respondent was not concerned with the "fact of a union majority" as per Kawano, Inc. 4 ALRB No. 103, aff'd 106 Cal.App.3d 937 (1980), in promulgating its seniority rules. Proof was insufficient to conclude that among those who had lost their seniority in 1980 as a result of the operation of the new system there was a greater proportion of Union adherents than "no-Union" workers. Likewise, among those who had not worked in respondent's harvest[40/] but who worked in the pruning there was an inadequate showing that this "group" was any more populated with Union adherents than was respondent's work force as a whole. "Absent a showing of knowledge by this employer of union activity on the part of at least a significant number of the discharged employees, there is insufficient evidence to support a finding of anti-union discrimination." N.L.R.B. v. Computed Time Corp. 587 F.2d 790, 100 LRRM 2533, 2537 (C.A.5 1979).

As pointed out in its brief, General Counsel need not prove absolute exclusion of pro-Union employees from the work force to make out a case of unlawful discrimination. However, it is noteworthy that many of respondent's most visible and vocal Union adherents were not adversely effected by the new seniority system. If, as General Counsel contends, the intent behind the system was to discourage Union activities, why did the system permit the continued presence of some of the more central figures in the Union organizational campaign?[41/]

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40. As noted, this was the most prevalent "seniority breaking event" among the discriminatees.

41. See footnote 32, supra.

General Counsel contends that despite the uniform application of its seniority rules among "pro-Union" and "no-Union" employees, the implementation of the rules itself was discriminatorily motivated. Fatal to his analysis was citation to cases which are clearly distinguishable on their facts from the instant case. Included in consideration of this point are HLH Products Division of Hunt Foods Company 164 NLRB 61, enf'd 396 F.2d 270 (C.A.7, 1978); Porta Systems, 238 NLRB 31, enf'd 625 F.2d 399 (C.A.2, 1980); Piezo Manufacturing Corp. 125 NLRB 686, enf'd 290 F.2d 455 (C.A.2, 1961); Majestic Molding Products 143 NLRB 71, enf'd 330 F.2d 603 (C.A.2, 1964); and Rosen Sanitary Wiping Cloth 154 NLRB 1185 (1965). In each of those situations, evidence of discriminatory motivation was supplied not only by other, pervasive unfair labor practices but also by the timing of the policy change under scrutiny. In each case, the change was "precipitous," following closely on the heels of either the advent of a union organizational campaign or a demand for recognition.

By contrast, the retention of the Mendez brothers who formulated the hire-date system pre-dated the onset of any organizational activities.[42/] Admittedly, many of their programs were designed as a type of prophylaxis to counter incipient unionization. Additionally, the failure to publicize all of the particulars of the system to certain groups gave rise to certain suspicious feelings regarding respondent's motives (see discussion,

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42. Support for this conclusion may be found in the testimonies of respondent's witnesses Cedarquist and Mendez as well as the testimony of General Counsel's witness Jesus Morfin.

infra). But such cannot provide a substitute for actual proof of anti-union motivation, particularly in the absence of a showing of prior or co-extensive Union activities. While many of the Southdown employees felt the impact of the system's rules after the Union had attempted to enlist their support, it appears that a good number of these rules were installed and in force prior to any organizational efforts.[43/]

Although it should not be the province of this Board to examine the adequacy of a respondent's judgment in implementing a business decision (see N.L.R.B. v. Computed Time, supra; N.L.R.B. v. McGahey 233 F.2d 406, 413 (C.A.5, 1956), it is clear that this respondent provided ample economic justification for the course that it pursued in 1980. It demonstrated a definite need to regularize its hiring and layoff practices. Concomitantly, it also showed the necessity for implementing a system and for directly supervising its work force once the labor contractor it had previously utilized had retired, which would provide adequate awareness for employees who observed its rules that their jobs would be secure through ensuing seasons, notwithstanding the lack of notice of those rules generally, until the 1980-81 pruning season.

General Counsel argues that the lack of notice of the particular rules of the seniority indicates an unlawful intent inherent in the system. The rule which had the most widespread impact among the Southdown employees and of which a significant

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43. Documentary evidence demonstrated that by operation of the system, five persons had lost their seniority status in December, 1979, and twenty-five had lost it in January, 1980.

proportion were not notifed was the one where in order to be eligible for preferential hire in the pruning, one had to have worked in the prior harvest. General Counsel further asserts, that the "continuity in employment" often urged by respondent as the raison d'être of the seniority system was undercut by the failure to adequately apprise its employees how the system functioned.

That someone would be held accountable for a rule which he/she has no direct knowledge of would hardly seem to comport with general notions of fundamental fairness. Nevertheless, it is the function of this Board and this hearing officer to determine whether the effectuation of such a policy was not merely "unfair," but rose to the level of an unfair labor practice. In order for there to be a finding of a violation of section 1153(c), it must be shown that a particular personnel action was taken because of employee participation in Union activities. Despite the harshness of the result which might follow, it is not enough to show that an employer lacked judgment, sensitivity, or consideration for its workers in instituting or enforcing a series of personnel-related rules. J.G. Boswell (1978) 4 ALRB No. 13; cf. Ron Nunn Farms (1978) 4 ALRB No. 34.

In sum, it is concluded that General Counsel has failed to demonstrate, by a preponderance of the evidence, that respondent violated section 1153(c) by instituting and enforcing its hire-date system in 1980 It is recommended that the allegation pertaining to

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the refusal to re-hire employees[44] effected by it in December, 1980 be dismissed.[45]

Similarly, I do not find that respondent violated section 1153(a) via the institution and operation of its seniority or hire-date system. As correctly pointed out by General Counsel in his brief,

> The test for a violation of section 1153(a) does not focus on the employer's knowledge of the law, on the employer's motive or on the actual effect of the employer's action . The test is whether the employer engaged in conduct which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. (Nagata Brothers, (1979) 5 ALRB No. 39.)

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44. Below are analyzed the circumstances of each particular employee, and whether it can be adjudged that he/she was the victim of individual discrimination.

45. Respondent argues that paragraph 5(h) should be dismissed because of certain "pleading defiencies." It asserts that the theory of the case propounded by the General Counsel as manifest in the "Second Amended Complaint" was not the same as that under which the case was brought to hearing and presented.

The original complaint refers to December 8, 1980, as the operative date on which the alleged act of discrimination (refusal to re-hire) took place. The "Second Amended Complaint" states that employees "from December 1979 to May 1980 . . . engaged in an active union organizing campaign . . . [a]s a result, Respondent changed its method of hiring before December 1980 . . . By virtue of these discriminatorily motivated charges (sic) Respondent refused to rehire the following individuals . . . ." Respondent argues that by virtue of this language, General Counsel, "after the close of his case, . . . change[d] the time of the alleged discriminatory acts and thus the nature of his case."

Contrary to Respondent's contention, I specifically do not find that allegation finally enunciated framing this particular issue was not so far outside the parameters of the original complaint as to be tantamount to a denial of due process by virtue of a lack of proper notice. Respondent itself admits that "the loss of seniority which occurred . . . to employees . . . [at various

(Footnote continued----)

Nothing inherent in respondent's hire-date system, it could reasonably be said, interfered with, restrained or coerced the organizational rights of its employees. Such rights were not restricted, lessened, or governed thereby; nor were those who exercised same penalized merely for that exercise by the operation of the system.

Contrary to the assertion by General Counsel that "a normal consequence of this action by Respondent was to convince employees that their exercise of section 1152 rights was futile," evidence of the organization campaign of 1981 showed that interest in the Union was even greater that year[46/] than in the year previous. It may be inferred that the implementation of the system itself actually encouraged more workers to become interested in organizing, since the employer had instituted changes in their job statuses which many felt had to be met with an effective counter-force, one which would be a check against the seemingly arbitrary use of management prerogative. Furthermore, over forty years ago, in a case which is

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(Footnote 45 continued)

times in 1980] . . . did not have its effect until December 1980." The "act" of discrimination does not date from the time that the seniority system was changed, but only when those changes became manifest or apparent to the employees effected. See, generally, Wisconsin River Valley Carpenters (Skippy Enterprises) (1974) 211 NLRB 222, 226, 227; see also Alabaster Lime Co., Inc. (1972) 194 NLRB 1116; Hot Bagels and Donuts of Staten Island (1977) 227 NLRB 1597. Thus, while the system may have been restructured prior to December 8, it was not until that date that the alleged discriminatees felt the impact of the change. This is fully in keeping with the original allegation upon which the operative paragraph, 5(h), is based. The current 5(h) served only to elucidate rather than transmute General Counsel's overall theory of the case.

46. This conclusion is based on the testimony of numerous witnesses which showed that they participated in protected concerted activities in 1980-81 despite not having done so in the prior year. (See discussion of paragraph 5(i), infra.)

still good law, it was recognized that the imposition of a seniority system, in and of itself, did not interfere with the free exercise of workers' organizational rights. (See Kansas City Power and Light Company, supra.)[47/]

d. The Individual Discriminatees

(1) Introduction

The following chart lists all of the alleged discriminatees set out in paragraph 5(h) of the Second Amended Complaint.

By way of summary, I was unable to conclude that any of them, as an individual, was the victim of section 1153(c) discrimination. What ensues is an analysis of the particular circumstances of each worker which points to that conclusion.

None of these individuals worked during the harvest of 1980. That in and of itself would be what respondent termed a "seniority breaking event": failure to honor a recall subjects an employee to the loss of the benefit of his/her hire-date, and concomitantly deprives him/her of preference in hiring for a particular cultural practice. The term "voluntary quit" or "V.Q." as used below and throughout the course of the hearing means that an employee left work at Southdown before he/she was actually laid off. In most instances, employees who were "voluntary quits" left respondent's employ to work at other agricultural concerns. "On

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47. General Counsel argues that the lack of notice of the intricacies of the hire-date system violated section 1153(a). He was not able to demonstrate how, in particular, such a lack of notice interfered with or restrained, etc. the section 1152 rights of Southdown employees. That many had their job statuses adversely effected is insufficient proof of this matter; what is necessary is a showing of how organizational rights were effected.

list" means that their names appeared on the lists which respondent posted at or near the commencement of the harvest season. The lists were compiled on the basis of one's hire-date from the 1979-80 pruning season and signify an employee's eligibility and preference for employment for the 1980 harvest. Generally, those who were "voluntary quits" were eliminated from consideration for preferential hiring, although some notable exceptions, shown below, arise due to what respondent deemed an administrative oversight.[48]

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48. As previously noted, determination of employee's "good standing" or maintenance of hire-date could only be made by searching through literally hundreds of individual Silva employment records. Further, as noted previously, Zuniga admitted that being a "voluntary quit" would not necessarily eliminate one from the preferential hiring lists, at least insofar as the 1980 harvest season was concerned.

	Laid Off	Voluntary Quit	On Harvest List
Avigail Castaneda		X	
Maximiliano Castaneda		X	
Jose Chavira	X		
Alberto (Sylvestre) Delgado	X		
Andres Dias V.	X		
Auventino Diaz E.	X		
Hilda Torres Galaviz		X	
Carlos Garcia	X		
Martin Garcia	X		
Dominga Gaytan		X	X
Ismael Gomez		X	X
Antonio Gonzalez L. 49/			
Pedro Gonzalez		X	
Irma Guillen	X		X
Leopoldo Guillan		X	X
Jose Henera	X		X
Juan Lopez		X	
Maria Lopez	X		
Santiago Lopez	X		
Cruz Medina	X		
Santiago Mendoza		X	
Jesus Morfin		X	
Hector Munoz		X	X
Sacramento Quintana S.		X	
Alberto Reyes N.		X	
Jose Reyes	X		
Evangelina Rivera	X		X
Aurora Rodriguez	X		X
Aurora V. Rodriguez	X		X
Salvador Romero	X		X
Manuel Salgado		X	
Epifanio Silva		X	
Steven Suarez		X	
Luis Valencia	X		X

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49. Respondent contended, as discussed infra, that Antonio Gonzalez was not a seasonal employee, but worked for Silva in various capacities, principally maintenance. Personnel action regarding him was thus not noted by the company.

Thus, every individual named in paragraph 5(h) experienced a "seniority breaking event" which deprived him or her of eligibility for preferential employment in the 1980-81 pruning season. These "events" arose as a result of the institution of respondent's hire-date system. In order to determine whether the imposition or the application of the hire-date system by respondent was unlawfully discriminatory in the case of each worker, it is necessary to attempt a cohesive analysis of the composition of the group alleged as discriminatees in paragraph 5(h). The difficulty posed by this endeavor is that this "group," if it might be termed as such, was fairly heterogeneous. The only connective thread linking all of them was that despite their employment in the previous pruning season, they did not work in the respondent's 1980 harvest, and they were not hired as individuals when the 1980-81 pruning season began. No pattern was discernible among them as regards their specific work histories other than that noted above, their membership in a particular crew or crews, or most importantly, the extent of their individual participation in protected, concerted activities. As this last factor is a requisite, for all intents and purposes, to a finding, if any, of unlawful discrimination under the Act,[50/] analysis will proceed along the lines of categorizing

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50. As previously discussed, it may not be necessary to a finding of a violation of section 1153(c) under certain circumstances, to demonstrate union activity and employer knowledge of that activity for each specific member of a group or class where the discrimination is directed at that group rather than at individuals: (Kawano, Inc., supra.) "When an employer is found to have been concerned more with the fact of a union majority than with individual union activities it is not necessary to prove employer

(Footnote continued----)

sub-groups among the discriminatees according to their range of union activities prior to the manifestation to them of the adverse impact of the hire-date system in December, 1980.

(2) Non-participating Individuals

(a) Preliminary Statement

The record demonstrates that prior to the December, 1980 hiring for the 1980-81 pruning season fourteen of the thirty-four alleged discriminatees failed to engage in minimal protected activities, if they engaged in any at all. The fact that slightly less than half of the alleged discriminatees were participating in any noteworthy Union activities before that time diminishes substantially from any inference that the imposition of the hire-date system, which detrimentally affected them, was motivated by Union animus or, stated in another way, that the system was implemented to rid the Southdown work force of a pro-Union group or the fact of a Union majority. (Kawano, supra). What it does tend to show is that the system had consistent effects on the work force as a whole, "pro-Union" and "no Union" alike. About 350 seasonal workers were employed during respondent's 1979-80 pruning peak; 182 of these signed Union authorization cards; about 100 of the total of 350 lost their seniority as a result of the operation

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(Footnote 50 continued----)

knowledge of each alleged discriminatee's union affiliation or support." However, I specifically found that, given the wide divergence of work histories among the discriminatees, the respective scope of their participation in union activities, and the continued presence of Union support despite the operation of the system, this case is not susceptible to the "class"type of analysis utilized in the Kawano situation.

of the hire-date system by failing to work in the harvest. Out of this one hundred, only 20, or one-fifth, were shown to have participated in at least "minimal" union activity.[51/] Thus, a lesser proportion of "card recipients" (20 of 182) was shown to have been affected by the system than was demonstrated for the Southdown work force as a whole (100 of 350), or for the theoretically "no-Union" segment (80 of 168).[52/]

The following persons are included within the group currently under discussion:

1. Avigail Castaneda
2. Maximiliano Castaneda
3. Jose Chavira
4. Alberto (Sylvestre) Delgado
5. Andres Diaz V.
6. Juventino Diaz E.
7. Carlos Garcia
8. Domino Gaytan
9. Pedro Gonzalez
10. Evangelina Rivera
11. Aurora Rodriguez
12. Aurora V. Rodriguez
13. Manuel Salgado
14. Luis Valencia

(b) The Case of Maximiliano Castaneda

With the exception of Maximiliano Castaneda, there is absolutely no evidence in the record of any of the above workers participating at Southdown in Union activities of any sort before

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51. For purposes of this analysis the dividing line between the instant group of fourteen and the twenty remaining is that with the latter, evidence was adduced to show that they at least received or signed Union authorization cards.

52. Even assuming for the sake of discussion that all of the alleged discriminatees were active in Union affairs, the impact of the system change would not be significantly greater than that for respondent's entire employee complement: 34/100 approximates 1/3; 1/3 $\doteq$ 1/3.5 (100/350).

they were informed in December, 1980 that they would not be among the group of preferential hires for the 1980-81 pruning season. As regards Maximiliano, he testified that during January of 1980, while working in the crew of Ramon Garcia, he told fellow workers David and Jessie Martinez and Juan Rodriguez, that "we should get together and join the Union because Ramon was cheating us in the bunches and he used to pull them apart and make us work harder." Garcia, by his estimate, was about ten meters away, facing the group while cutting twine.[53/] This was the only event prior to December, 1980, in which General Counsel adduced evidence which indicated Maximiliano Castaneda's participation in protected concerted activities. It hardly qualifies the Castanedas, husband and wife, for the appellation "Union activists" or "open Union organizer" applied to them by General Counsel in his brief.

Subsequent events over the course of the 1979-80 pruning season, which will be more fully discussed below, led to Castaneda's separation from the company and the loss of his hire-date. While "a discriminatee's role in protected concerted activities" need not necessarily "be an active or vocal one to support a conclusion that his discharge violated . . . the Act," (Matsui Nursery, (1979) 5 ALRB No. 60), it is highly questionable that respondent devised an elaborate seniority system to rid its employee complement of workers such as Maximiliano. Respondent developed, or was in the process of

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53. Garcia was not asked to specifically deny hearing what Castaneda said. He merely denied witnessing anything which the Castanedas had done which he considered "Union activities," a conclusionary statement at best. Neither the Martinez' nor Rodriguez were called as witnesses.

developing, such a system and Castaneda, in a sense, was one of its early casualties.

Maximiliano and his wife Avigail were given "voluntary quit" notices for (presumably)[54/] leaving work prior to their official lay-off date. He testified that he asked supervisor Gabriel de Santiago[55/] for a "permit," or leave of absence, so that he might take his wife, Avigail, to Mexico to attend to a medical problem. Maximiliano said that he requested that the leave be for an indefinite period of time. According to his testimony, De Santiago told him that if his foreman, Ramon Garcia, was still working with a crew, he could return to work at Southdown; otherwise he would have to wait until the harvest season for work. When Castaneda actually returned in late May, he was told by Gabriel De Santiago that Garcia's crew only had about two or three days of work remaining before it was laid off.

Foreman Ramon Garcia presented a somewhat different view of Castaneda's leaving Southdown. Beginning March 10, 1980, Avigail Castaneda was absent from work for one week. Garcia was told initially that she had a sick child, and would therefore not be reporting. On March 17, both Avigail and Maximiliano asked Garcia if they could get a leave of absence to return to Mexico for medical

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54. The wording on the notice, as will be seen, was somewhat different.

55. Gabriel De Santiago was the son of Larry, and worked under him, also acting, as Larry did, as a liason between Silva and McCarthy. He had the authority to hire, fire, and discipline workers, which the record evidence, both documentary and testimonial, shows he exercised. Although not alleged as a supervisor, I find that he was such within the meaning of section 1140.4(j) of the Act.

treatment. He asked the Castenedas to sign[56] Silva "Termination[57] Notices," telling them that he would check with Larry or Gabe De Santiago to ascertain whether such a leave were possible, and that they should come back on Monday for an answer whether the leave was granted.

When the Castanedas failed to report on the following Monday, Garcia asked workers David and Jesus Martinez what had happened to them. He was told that they had left, they had gone to Mexico.[58] After discussing the matter with Gabriel, it was concluded that the two workers should be issued "voluntary quit" forms. Garcia and De Santiago then presumably filled out the blank forms which the Castanedas had signed. The actual notices state that the two were "voluntary quit," "going back" or "moving to" Mexico, and make no mention of the purported medical problem.

Avigail essentially corroborated her husband's testimony in regard to the request made to Gabriel for a leave of absence. Avigail also testified that she and her husband spoke with Ramon prior to leaving for Mexico. Gabriel was not called as a witness, nor was Maximilliano or Avigail called to refute what Garcia had testified concerning. Accordingly, both versions are credited to the effect that on one occasion the Castanedas spoke with Gabriel

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56. Castaneda stated that he did not remember if the form had writing on it when he signed it for Gabriel.

57. As previously stated, the notices were used for a variety of personnel actions, not just terminations.

58. Castaneda did not deny that he and his wife had left for Mexico at that time.

concerning a leave,[59] while on another they spoke to their foreman.

Regardless of the probative value one attaches to either version, the fact remains that the Castanedas knew they could not simply leave work unannounced and without explanation, and return later to be re-employed. They were aware that a "permit" or a leave of absence had to be obtained in order to secure their employment possibilities at Southdown for the future[60] and thus were cognizant, at least minimally, of a system at the company whose rules affected their job statuses. Specifically, Avigail testified that she knew of the rule whereby if one was absent without excuse for three days, "you lose your job and you can't be hired back."

The evidence also demonstrates, however, that it was never explained to the Castanedas the full ramifications of their actions as it affected their hire dates. Nevertheless, General Counsel failed to show that the Castanedas, in regard to their "voluntary quits" were victims of any sort of "disparate treatment." No proof was adduced that any other employees at Southdown were granted unlimited and indefinite leaves of absence for reasons other than pregnancy.[61] To the contrary, the record reveals that, in the main, employees had been granted medical and other types of leaves, but these were given for stated periods. Further, when the Castanedas applied for their leaves, any employee who left the

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59. As Gabriel had hired them to work at Southdown for that season, this would seem logical.

60. Maximilliano admitted as much.

61. Employee Emma Mendoza, a Union representative, received such a leave on March 12, 1980.

company for any one of a number of reasons,[62] but for an unspecified period of time, was given a "voluntary quit" notice. Likewise, anyone who failed to return from a leave of absence on the date specified would be considered a "voluntary quit." As Avigail testified, anyone absent for three days, "without getting a permit" would "lose [his/her] job."

Numerous examples[63] appear in the record of individuals who had some "seniority breaking event" at or near the time the Castanedas were issued voluntary quit notices. In all, the evidence demonstrates that seventy-nine persons, including a few of the alleged discriminatees, lost their hire-dates by the time of the first layoff in the 1979-80 pruning season on April 3, 1980. The system was thus already in place by the time the Castanedas, like all other Southdown employees, became subject to its rules.

I specifically find that the issuance of their voluntary quit notices was not discriminatory but in keeping with respondent's nascent hire-date system: regardless of any participation in protected, concerted activities, it was amply demonstrated that respondent would have taken the same action regarding their tenure. Accordingly, no violation of section 1153(c) involving the Castandedas can be made out based on these facts. (J & L Farms, supra; Nishi Greenhouse, supra.)

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62. These reasons included leaving to work at another company or to attend to personal business.

63. Among these were "voluntary quits" Jose Munoz and Maria Barrera who by 2/29/80 and 3/4/80, respectively, had failed to report to work for three consecutive days.

At this point it would be sufficient to conclude that the Castanedas were not subject to discimination of any sort regarding their employment status were it not for a suspicious set of circumstances which arose when Maximiliano applied for work in the 1980 harvest. As he testified, in August, 1980, he filed an application for the harvest at Southdown. He and his wife had worked in previous harvests there. He was assisted in filling out the application by a "secretary" there, later identified as Maria Marrufo.

After the harvest had already started, and Castaneda still was not called to work, he decided to return to the office to see what had happened. Once there, he spoke with Bruno Castillo who told him that his application was not on file, nor was his name on the list of workers to be hired. Maximiliano insisted that it was on file, and Castillo, looking around, eventually found the application. Upon examining it, Castillo remarked, according to Castaneda: "From the beginning you've been lying. You quit the job." Castillo was presumably referring to the portion of the application which sets forth that the "reason for leaving" his previous employment with Joe Silva was a "lay off." Silva's records, then recently transferred to Southdown, deemed that Maximilliano was a "voluntary quit". The application plainly states on its face that "any false information on this application may result in discharge." Although he himself could barely read, Maximiliano testified that Maria explained to him at the time she helped him fill out the application that "anything that I put down there wrong . . . they could fire me."

Maximiliano disputed what Bruno had told him, saying that he "had permission from Gabriel." Castillo thereupon told him that "Gabriel had nothing to do there, that he would hire the people that he wanted to and that if I had any complaints, to go to Gonzales [where Silva's offices were located] and complain."

Once again, it appears that Maximiliano was victimized by the new system of which he had little understanding and which was apparently never fully explained to him. While he may have felt that he was "laid off" by Silva and granted a leave of absence by Gabriel De Santiago, the company deemed him a "voluntary quit," and struck him from the seniority lists.[64/]

Evidence that the company refused to hire him for its 1980 harvest because on one occasion he told fellow workers of the advantages of organization in no way preponderates over the strong inference that Maximiliano was not then hired because, in respondent's eyes, he had given false information on his application.[65/] Accordingly, it is determined that respondent did

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64. A series of seniority lists, and the lists used for hiring in the 1980 harvest season, were admitted in evidence. The "A" or master seniority list was used as the basis for preparing subsequent lists which were posted for harvest employment eligibility. All those workers who had a "seniority breaking event" prior to the first layoff, or April 3, 1980, were omitted from this "A" list. Maximilliano and Avigail Castaneda were in this category. Curiously, however, on the handwritten "working" copy of the "A" list, Maximilliano's name was inserted, and the notation "NS" for "no show" appears next to it. Maximiliano did not testify that he went back to Southdown to seek employment after his encounter with Castillo. The lists which were actually posted contained neither of their names.

65. While the refusal to hire Castenada for the harvest was not alleged as a violation of the Act, his failure to work in that season was a "seniority breaking" event which caused him to lose the benefit of his hire-date, and which resulted in his being refused re-hire, initially, when he applied for work in the 1980-81 pruning.

not act in contravention of section 1153(c) when it deprived Maximiliano of the benefit of his original 1980 hire-date, nor when it did not hire him for the 1980 picking season, thus placing him in the category of all of the alleged discriminatees who were notified in December that they had to have worked in the harvest in order to have preference for employment in the pruning.[66]

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66. Avigail also applied for work in the harvest but was not hired. As stated, no evidence was presented of her engaging in protected concerted activities. As proof does not preponderate that the resondent did not discriminate against her husband in the 1980 harvest, utilizing his case to bootstrap hers and link a discriminatory motive to the treatment of her tenure is plainly not warranted by the evidence.

(c) The Employees Remaining

No evidence was adduced, as previously stated, that the twelve employees in this group, apart from Maximiliano and Avigail Castaneda, arguably participated in any protected concerted activities prior to the time they were initially denied employment, or preference for re-hire, in the 1980-81 pruning season.[67/] These employees did not belong to any particular crew or crews, nor did they demonstrate any particular work pattern other than the failure to work in respondent's 1980 harvest which was universal among the discriminatees.

Rather than providing an extensive analysis of each employee's particular situation, the following chart shows for each employee the first year of employment at Southdown in the pruning, the name of his/her foreman, the employee's hire-date, and the reason proferred by respondent for losing his/her preference for hire for the 1980-81 pruning season. "NS" below means that the worker was named on the hiring lists for the 1980 harvest, but did not register or work. In the great majority of cases those whose names appeared on the harvest lists had worked until their lay-off date. That date is noted in the NS column in parentheses. A "VQ" or "voluntary quit," on the other hand, left Southdown before he/she was due to be laid off. Also in the VQ column is the date on which the employee left, and the name of the agricultural employer, if any is shown in the record, that he/she went to work for following that

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67. Aurora Rodriguez worked at Frudden's where, during the summer of 1979 there had been a strike. There was no showing, however, that Ms. Rodriguez participated in strike activities, or that respondent was aware of any such participation.

time. A mark appearing in the column headed "picking" signifies that the employee worked in the harvest at some point in the years worked at Southdown.

NAME	FOREMAN	HIRE DATE	FIRST YEAR PRUNING	VQ	NS	AGRI. EMPLOYER	PICK-ING
Jose Chavira	J. Torres	2/4/80	1980		(5/19/80)		
Alberto (Slyvester) Delgado[68/]	J. DeLara	12/29/79	1979-80		(5/21)		
Andres Diaz	W. Crespo	2/25	1975		(5/14)	Basic	
Juventino Diaz	W. Crespo	2/25	1979		(5/14)	Basic	
Carlos Garcia[69/]	R. Noriega	12/20/79	1979		(5/31)	Basic	
Dominga Gaytan[70/]	J. DeLara	11/30/79	1973	7/7/80	X	King City Packing	
Pedro Gonzales[71/]	W. Crespo	2/25	1979	3/26/80		Merritt Packing	
Evangelina Rivera[72/]	J. Dominguez	2/29	1980		(4/3)		
Aurora Rodriguez[73/]	R. Garcia	1/14	1979		(5/14)	Frudden's	X
Aurora V. Rodriguez	R. Garcia	1/14	1979		(5/14)	Frudden's	v
Manuel Salgado[74/]	R. Garcia	1/14	1978	5/14/80	X		X
Luis Valencia	R. Garcia	1/16	1979		(5/14)	Frudden's	

68. Delgado's name did not appear on any of the posted lists, though it was carried on the respondent's "A" list, or seniority list used to formulate the harvest lists. Respondent's witnesses explained that failing to register for the harvest or file an application would mean that it would not "slot in" the employee to a hiring list. However, it also appears that many employees, particularly those in the first crews hired, need not to have "applied" to be named on the harvest lists.

69. Garcia, although having worked until layoff, was not named on the hiring list. In fact, he asked foreman Jesse Torres in September "when the picking would be." Torres told him to check the harvest lists; if his name were not there, they would not be hiring him. Garcia's name did not appear on any list, as it should have, according to the hire-date system. Respondent maintained that this was the result of a clerical error. Indeed, the Silva lists showing Southdown employee hire dates contain seventeen workers with the surname Garcia. Thus, an error in trasposition is not surprising. Notwithstanding this, no evidence of Garcia's union activities was presented. It cannot be inferred, therefore, that the omission of his name from the hiring lists was unlawfully motivated.

70. Gaytan left Southdown before her layoff, and was considered a voluntary quit. Her name, however, does appear on the harvest hiring lists, and she was considered a "no-show" for the harvest. Arguably, she lost her seniority through either of these events. The appearance of her name on the harvest list is due, once again, according to respondent, to a clerical error. It serves at minimum to show that errors would be made. Further, since no protected, concerted activities were engaged in by Gaytan in the 1979-80 pruning season, no unlawful motive may be inferred from the appearance of her name on the list, her categorization as a "no-show when she did not work in the harvest, or the concommitant loss of her hire-date.

71. Gonzalez maintained that he worked in the pruning until "it ended" in 1980. Gonzalez' last day of work at Southdown was March 26. Company records reveal, however, that no one was laid off in the pruning prior to April 3. He was issued a "voluntary quit" notice.

72. Ms. Rivera's name did appear on a harvest list, though it was among the last to be posted (list "G"). She filed an application in August, 1980, and even checked to see if her name was on one of the posted lists. On two occasions she did not see her name; apparently, the "G List" had not been posted at such times. Whether an employee might actually be present to see his/her name on a posted list appeared to be a hit-or-miss proposition. It seemed quite possible for an employee to visit Southdown on a day when the list containing his/her name was not posted, only to neglect to

(Footnote continued----)

In sum, apart from a few minor clerical errors which arose in the course of transposing names from one of the various seniority or hiring lists to another, respondent consistently followed a set procedure regarding the loss of one's hire date, and the concomitant loss of pre-eminent eligibility for hire in the 1980-81 pruning season. Either by virtue of a "voluntary quit" or a failure to work in the 1980 harvest season, each of the twelve workers named above, plus Avigail and Maximiliano Castaneda, lost their seniority at Southdown. As amply demonstrated by the existence of this particular sub-group of employees, Union activity notwithstanding, respondent would have acted in a similar fashion regarding their tenure and/or eligibility for preferential rehire. The absence of evidence of any participation by these workers, in protected, concerted activity prior to respondent's personnel action regarding them denotes the failure of prima facie proof of unlawful

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(Footnote 72 continued----)

return when the appropriate list was on display. Respondent at times suggested that employees who were eligible for hire and whose names were not on the posted lists should have checked with office personnel as some of them actually did. By contrast, the evidence demonstrated that many former employees, as the 1980-81 pruning season began, checked with people in the office to determine if they would be hired for that season.

73. Aurora Rodriguez is the mother of Aurora V. Rodriguez and of Luis Valencia. All three filed applications with the company in August 1980; all three of their names appeared on harvest lists. Luis and Aurora V. never actually sought work in the picking other than filing an application; Aurora was the only one who requested that she be hired for the harvest. She filled out an insurance card on October 2, and was in fact hired to work in that season. She did not, however, present herself for work at the appointed time.

74. Salgado's name appears as "Saldago" on the harvest hire list. He was, like Dominga Gayton, a "voluntary quit" whose name was inserted, nonetheless, on the harvest hiring sheets.

discrimination (Lawrence Scarrone, supra).

Accordingly, it is recommended that the 5(h) allegation (refusal to re-hire) regarding these individuals be dismissed.

(3) Individuals Involved in Minimal Union Activity

Another group of alleged discriminatees engaged in minimal union activities, at least to the extent of signing or receiving union authorization cards during the 1979-80 pruning season. Some also discussed the Union while supervisors might have overheard them. The cards were, for the most part, received and/or executed during work times while foremen and/or supervisors were in the vicinity. However, the circumstances of many of the signings were inconspicuous enough as to not permit the creation of an inference of company knowledge of Union support from these employees, at least by a preponderance of the evidence.

As with the previous sub-group discussed, the following chart sets forth the name of the alleged discriminatee, his/her foreman, hire-date, respondent's reason for the loss of his/her seniority, the date of his/her layoff or "voluntary quit," the name, if shown in the record, of any agricultural employer he/she worked for during the summer of 1980, the first year that he/she had worked in the pruning at Southdown, and whether or not he/she worked in the harvest there in prior seasons.

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NAME	FOREMAN	HIRE DATE	FIRST YEAR PRUNING	VQ	NS	AGRI. EMPLOYER	PICK-ING
Hidelisa Galaviz[75/]	W. Crespo	12/3/79	1978	2/28/80	X	Basic	
Martin Garcia	R. Garcia	1/16	1980		(5/14)		
Irma Guillen (Guitierrez)	R. Garcia	1/16	1978(?)		(5/14)		
Leopoldo Guillen	L. Velasco	12/3/79	1979-80	7/11	X	Basic	X
J. e Herrerra	R. Noriega	1/14	1977		(5/21)	Fruddens	X
Antonio Lopez	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Maria Lopez	J. DeLara	1/7	1978		(5/19)	Gonzales Packing	X
Santiago Lopez	J. DeLara	1/7	1973		(5/19)	Gonzales Packing	
Cruz Medina	R. Noriega	12/12/79	1975		(5/21)	Basic	1 yr. 1976
Hector Munoz	J. Torres/ L. Velasco	11/30/79	1978	7/2	X	Fruddens	
A erto Reyes Nevarez	J. Torres	12/27/79	1971	5/15			X
Salvador Romero	J. Soto	1/7	1973		(5/19)	Basic	
Epifanio Silva	A. Chevez	12/7/79	1979	6/23		Meyers Tomato	
Sacramento Quintana Silva	J. Torres	11/30/79	1978	1/30		Meyers Tomato	
Steven Suarez	J. Soto	12/5/79	1978	5/28		Basic	

75. Ms. Galaviz was another employee deemed a "voluntary quit" whose name also appeared on the harvest lists. Her particular circumstances are discussed at length below.

With each of the employees in this particular sub-group, General Counsel has failed to establish, by a preponderance of the evidence, that respondent violated section 1153(c) of the Act by refusing to initially re-hire them when they applied for work in December, 1980 for the upcoming pruning season. The reasons for concluding this, vis-a-vis each particular worker listed, are set forth below.

It is recommended, therefore, that allegations of discrimination against them, as individuals, be dismissed.[76/]

(a) Hidelisa Galaviz

Hidelisa Galaviz, hired initially for the 1979-80 pruning in December 1979, was transferred to the crew of Lupe Velasco in January 1980. While in the crew, Ms. Galaviz received a Union authorization card from co-worker Lupe Banuelos. She testified that her foreman was "near," "on the bus" at the time. She admitted that her foreman did not comment to her about the card. However, she stated that he talked "with the crew in general about the cards," that "whoever signed the cards, they would be laid off and they would have no more work," and that Velasco said he "would make a list of the people, of the names of the people that signed the card so that they would have no more work."[77/]

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76. The "class" theory of discrimination is discussed elsewhere.

77. These statements are relevant to certain independent 1153(a) allegations and as reflections on respondent's union animus. They will be referred to where such matters are discussed in succeeding sections.

Velasco, while admitting that he was aware of Banuelos' Union activities since they were carried on in his presence, denied any knowledge that Galaviz signed an authorization card, and further denied making the anti-union statements attributed to him by her.

I specifically do not credit Ms. Galaviz' assertions regarding statements by Velasco regarding the fate of Union card signers. Ms. Galviz maintained that Velasco made his remarks to the whole crew, during the afternoon break. Several of her fellow crew members who were also alleged as discriminatees were called as witnesses,[78/] but were not asked to substantiate her version of Velasco's remarks. Her own husband, Fidel, initially alleged as a discriminatee but subsequently dismissed from the complaint, was unable to supply any of the details to which she testified about Velasco's purported statements save that "he was going to make a list of all those who signed up and . . . turn it over to Gabriel [De Santiago].[79/] The time of the statement attested by Hidelisa, "January," "about three o'clock" during a break, conflicts with that supplied by her husband, "February or March," while Velasco was "checking the work there in the crew." Further, based upon her testimony in other areas, some of which are discussed below, I additionally find that Ms. Galaviz was not a credible witness, and

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78. These workers included Leopoldo Guillen and Hector Munoz. Guillen testified that Rivera, Velasco's assistant, was making a list of union supporters. This is discused infra.

79. Several workers testified about their foremen assembling lists of Union card signers. Respondent contended that foremen were simply gathering names and residence addressed to be furnished in conjunction with a pre-petition employee list necessitated by the Union's filing a Notice of Intent to Organize.

accordingly discount the impact of much of her recitation.[80] Testimony of a witness found to be unreliable as to one issue may be disregarded as to other issues. (San Clemente Ranch, Ltd. (1982) 8 ALRB No. 50.)

Notwithstanding the foregoing, I find there is insufficient evidence to conclude that respondent had knowledge prior to December 1980 that Hidelisa Galaviz was a Union "supporter."[81] Although the mere receipt of an authorization card might suffice to indicate participation in Union activities, Galaviz testified that she simply "received" a card from Banuelos, not that she signed it. Likewise, absent from her tesitmony was any description as to the foreman's actions, if any, when she "received" the card: he was simply "on the bus." She failed to state what he was doing or where he was looking at the time, or whether there was any indication whatsoever that he perceived her interaction with Banuelos at the critical moment. Velasco, by contrast, admitted that Banuelos was giving out cards in his presence. The receipt of a card by a particular worker, given the overall scope of this conduct, would be singularly unremarkable in the absence of other extrinsic factors.

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80. At one point in her testimony, Ms. Galaviz was asked to identify a document. She stated: "It's a paper that states we were being fired because we wanted to put a union." Actually, the paper is a company leaflet which requests its workers not to sign authorization cards, and to report to their foreman if they are pressured into doing so. There is no reference to anyone being fired. Such blatant misstatements from Ms. Galaviz, who parenthetically admitted to being able to read Spanish, infected the entirety of her testimony, and demonstrated her penchant for exaggeration and distorting the truth.

81. General Counsel's statement in his brief that Hidelisa was "openly involved in union organizing" during the 1979-80 pruning season has absolutely no support in the record.

General Counsel argues in his brief that the manner in which Ms. Galaviz lost her hire-date in February is a "classic example of individual discrimination against known union adherents . . ." The assumption of company knowledge in that phrase notwithstanding, the record reflects that Galaviz lost her seniority by failing to return on time from a leave of absence. General Counsel contends that the circumstances surrounding the leave raise suspicions which indicate conduct by respondent which was unlawfully motivated.[82/]

In essence, on February 2, 1980, Galaviz requested that Gabriel De Santiago issue her a leave of absence permit. Although she testified that the leave was needed so that she could go to Mexico for treatment of a medical problem, the permit states clearly on its face that the leave was given so that she could attend to some property matters there. She admitted that the leave slip was filled in before it was given to her, yet she failed to testify that the discrepancy between her asserted reason for the leave and the one which appears on the document was brought to any one's attention. Leaves of absence for medical reasons were routinely granted by respondent at that time, and doubtless one would have been issued to Ms. Galaviz had she in fact requested it. This provides yet another indication of Ms. Galaviz' lack of candor.

Other examples of her inability to testify truthfully appear elsewhere in the course of her discussing the leave. She

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82. The operative date of the purported discrimination directed towards Galaviz was December 8, 1980, not the date when she actually lost her hire-date the previous February.

states that she obtained this leave for "one month"; the permit, which she had in her possession for a time, states that the leave period was only for about two weeks. She initially denied knowing why she had to get a leave slip; then she stated that she was aware that one was necessary to preserve her job and seniority. Galaviz testified inconsistently at various points in her testimony regarding when she returned from Mexico: it was first "at the end of March," then, "about the middle of March"; and finally, at "the beginning of March." She initially denied speaking with Larry De Santiago upon her return from Mexico, and signing the "voluntary quit" notice which states that she failed to return as scheduled, only to admit these facts moments later.

From none of this can it be determined that Hidelisa Galaviz was subject to any sort of discriminatory treatment. It is clear that a rule was in effect at that time that an employee who failed to return from a leave when scheduled lost his/her seniority.[83/] Galaviz admitted that she herself determined the amount of time she needed for the leave.[84/] She further admitted that she did not return as scheduled and was informed when she finally spoke to one of respondent's supervisors that she could not come back to work for that reason, and was issued a "voluntary quit" notice.

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83. For example, employees Jose Munoz and Maria Barrerra lost their hire-dates for this reason at about the same time as Galaviz.

84. General Counsel's statement in his brief that she "received a leave set by Gabriel De Santiago for an unrealistic 15 days" runs counter to the witness' own admission that she requested that period of time.

Accordingly, it is determined that insofar as Hidelisa Galaviz was concerned, company knowledge of her participation in protected concerted activities prior to the time of her losing her hire-date has not been established. Further, even assuming the contrary to be the case, no unlawful motivation or act of "discrimination" has been shown, since it was amply demonstrated that respondent would have acted as it did regarding her tenure even in the absence of Union activity.

(b) Martin Garcia

Garcia, after having been laid off at Southdown on May 14, 1980, visited the ranch offices about ten days before the picking started[85/] to inquire about employment. Apparently, his wife Carmen had filled out an application for him previously, on August 21. He was told by "Maria," a secretary, that he would be sent a card informing him of the beginning of the harvest. As may be recalled, no such cards were sent in 1980.

The witness stated that he was unable to read. His name actually was posted for work in the picking. Unfortunately for him, it does not appear that he checked for the posting of his name.[86/] Various of his relatives worked at Southdown, including alleged discriminatee Evangelina Rivera (Mendoza). Rivera stated that she looked for her own name on the lists, but not for that of her brother-in-law Martin Garcia.

Thus, by not reporting for the harvest, Martin Garcia was

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85. The harvest at Southdown began on September 19.

86. Even if he had actually gone out to the ranch, Garcia demonstrated that he had difficulty in recognizing his name.

considered a "no show" and was dropped from the seniority rolls, thus losing his preference for hire in the 1980-81 pruning season.

Garcia stated that while he did receive and sign a Union authorization card in 1980, this took place at his home. Company knowledge of this event, at least, was not established. However, he testified that one day he was speaking with Miguel Jimenez and Jose Gomez ("El Fish"), two of the more active and obvious Union advocates employed at Southdown, who also worked in his crew.[87/] The foreman, Ramon Garcia, approached and allegedly told Martin that "he didn't want me talking to them because there were going to be fired -- then I also would be fired, that Larry [De Santiago] had told him to get a list of all workers that had signed up for the Union . . . He asked me if I knew any of them that had signed the cards . . . He asked me if I had signed, and I said, 'Yes'." Whereupon, according to Martin's testimony, Garcia "made" him "destroy . . . the card," saying "If you throw this away, the other ones wouldn't be worth anything, and this way, you wouldn't be fired."

Ramon Garcia denied the foregoing in all of its particulars, and moreover, denied any knowledge that Martin was in favor of the Union. Interestingly, he did make a list of his crew members wherein he noted their respective work performances. While Jimenez received a 60% rating and Gomez one of 70%, and both were labeled "troublemaker[s]," Martin Garcia was rated at 100% and was

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87. Parenthetically, both Gomez and Jimenez worked until laid off in the 1979-80 pruning season and worked again in the harvest. Neither of these workers lost their hire-dates in 1980 and were among those initially hired for the 1980-81 pruning.

termed "a hard worker, always in the front of the crew."

Neither Jimenez nor Gomez was asked to corroborate Martin Garcia's account. However, Garcia himself did not impress me as one who would fabricate such matters out of whole cloth. His inability to recollect certain other, less detailed events, such as for whom he was currently employed, and the circumstances surrounding the filing of his application for the harvest, did indicate that his memory was somewhat imperfect. Further, although there were several allegations involving worker interrogation and surveillance of Union activites, these specific instances were not. It is therefore difficult to credit Martin's version of his encounter with Ramon Garcia, and use that as a basis for establishing company knowledge of his Union activities.

That issue, however, need not be resolved. Martin, clearly, could have obtained employment in the harvest, thus preserving his hire-date for the ensuing pruning season. Whether through inadvertence, neglect, or the simple inability to recognize his own name when printed, Martin did not become aware that his name was on the employment list, and did not report for the 1980 harvest at Southdown. Like approximately 100 others, he lost his hire-date as a result. The failure to rehire him was not "but for" his Union activities: an employee had to work in the 1980 harvest to preserve his eligibility for preferential hiring in the 1980-81 pruning season.[88/]

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88. The lack of notice of the harvest through the sending of post cards, like the lack of notice of the seniority preserving rules in general, is discussed elsewhere.

(c) Leopoldo Guillen

Guillen left Southdown in July 1980 prior to his actual layoff to work at Basic Vegetable where he admitted he made "more money." Despite his being considered a "voluntary quit," his name appeared on the posted harvest hiring lists. However, he continued to work at Basic throughout the course of the 1980 harvest, and stated he did not want to work for respondent at that time, although he had done so in the previous year.

Regarding Union activities, Guillen testified that he received an authorization card in the field from Jesus Morfin who "distributed them to the people." Leopoldo signed the card after work in the presence of Jesus and possibly his wife, Rosa, and "no one else." Company knowledge of these activities was therefore not established: no evidence was proferred of the presence of supervisors, etc. at pertinent times.

Guillen also testified, however, that Jose Rivera, who was an assistant foreman at that time, told him that "he was taking a list of all those that had signed cards," and that Guillen told him that he had signed one. Rivera himself stated that he did in fact collect a list of names and residence addresses of workers in the crew, "because the State was going to need it. Something about the Union also. He denied making a list of card signers, and denied further that he asked Guillen if he had signed one.

As previouslyly noted, Respondent contends that the lists referred to by Guillen and other employees was one compiled for the purpose of providing the ALRB a pre-petition employee list under Regulations section 20910. In the absence of corroboration under

S. Kuramura, (1977) 3 ALRB No. 49, I am unable to credit Guillen's version of the facts. If the whole crew were involved in the list situation, as he testified, surely one of Guillen's fellow crew members might have substantiated his assertions.[89/]

Furthermore, it seems highly improbable that after respondent had engaged a labor counsultant who conducted training sessions for foreman as to how they should conduct themselves in the context of a Union organizing campaign, that these foremen should not only make lists of Union supporters but also announce to the workers that they were doing so.

The list situation notwithstanding, Rivera did not directly deny that Leopoldo told him he had signed a card. Respondent denied in its answer, however, that Rivera was a supervisor prior to August 14, 1980. No proof of his supervisorial status during the 1979-80 pruning season was offered, although Rivera was admitted to be a foreman/supervisor, at least insofar as the 1980-81 season was concerned. Company knowledge of Guillen's Union support, therefore, was not timely established.

Assuming, however, for the sake of argument that respondent did have knowledge of Guillen's signing a card, it remains that he would have lost his hire-date even in the absence of such activity by virtue of his being a "voluntary quit" or a "no-show" for the 1980 harvest. As a result, Guillen also lost his preferential status for hire in the 1980-81 pruning season.

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89. Hidelisa and Fidel Galaviz testified somewhat differently, that it was the chief foreman, Lupe Velasco, who collected the list. Their characterization of the situation was discredited. Irma Guillen, Leopoldo's wife, was not asked about Rivera's "list" when she was called as a witness.

(d) Irma Guillen

I find that company knowledge of Ms. Guillen's Union activities was not established. She testified that she received a card from "El Fish" in the fields during the lunch break. The foreman Ramon Garcia was "close by . . . , eating," but no further evidence was adduced as to whether he was looking in Irma's direction or whether he remarked anything to her about the card.

Irma's tenure at Southdown was a matter fully within her own control. She stated that Gabriel De Santiago announced to her crew that workers would be called back when the picking started. As noted numerous times throughout this decision, no one was actually solicited by the company to return for work: the burden was on the employee to apply for the harvest. Ms. Guillen was unemployed throughout the summer and fall of 1980. Since she had worked until her layoff date in May, 1980, her name did appear on the harvest hiring list as Irma Gutierrez, apparently her maiden name. Doubtless she would have been hired for that period if she had applied. As a "no show" her name was deleted from the 1980-81 preferential hiring list for the pruning.

Based on the foregoing, there can be no finding of unlawful discrimination regarding Irma Guillen.

(e) Jose Herrerra

As with Irma Guillen, no company knowledge of Herrerra's Union activity was established in the record. While he signed an authorization card, no evidence was adduced that a supervisor was present at the time and/or might have seen or learned of the activity.

Herrerra's name did appear on the harvest list. Unfortunately, he reads little Spanish and on the occasion when he went to Southdown to view a list he did not see his name. Similarly, during the course of the hearing, he was unable to initially recognize it when given the opportunity to examine a list which contained it. Since he was employed elsewhere at the time of the harvest, it is uncertain whether he would have then worked for respondent. However, what is certain is that he was considered a "no show" for the harvest and was emended from the seniority roster.

Through none of this can be discerned an unlawful discriminatory motive in failing to rehire him for the 1980-81 pruning season.

(f) Antonio Lopez

Antonio Lopez was a "permanent" (as contrasted with "seasonal") employee of the labor contractor, Joe Silva. He worked year-round for Silva at various ranches. He was paid a salary, as opposed to an hourly wage, and performed a variety of functions, principally involving maintenance. Although much of his work was done on the Southdown property, it involved equipment which had been brought there from other ranches where Silva had been engaged, as well as equipment used by respondent. Some time in July 1980, Lopez was fired by Silva for allegedly damaging a Silva truck.

Lopez testified that he received a Union authorization card from Jesus Morfin in February 1980, while foreman Jorge Soto was standing nearby. Lopez also stated that he revealed his pro-Union attitudes to Larry de Santiago and Lupe Velasco.

In October 1980, the worker applied for a job as a tractor

driver or picker under the name "Luis Tapia." He was told that no work was available at the time since most, if not all, of the hiring for the harvest had already taken place.[90/] Because he had never been a seasonal employee at Southdown and worked directly for Silva, Lopez (or "Tapia") had no work history with respondent and no "hire-date." Accordingly, he was not on any of the preferential hire lists, and was not eligible for priority in employment for the 1980-81 pruning season. He would not have been hired even in the absence of Union activities. Further, since he was a permanent "Silva employee," he cannot be included within the "class" of seasonal employees alleged as discriminatees.

(g) Maria Lopez

Although respondent argues to the contrary, I find that Maria Lopez' Union activity and company knowledge thereof, prior to December 1980, were established in the record. Maria received an authorization card during the morning break from employee-organizer Vicente Robles. Foreman De Lara was, at that time, seated in the crew bus, about two rows distant. Although this evidence in and of itself might be insufficient to prove knowledge, as De Lara denied knowing that Lopez "signed" a card, Maria testified further that she participated in small gatherings headed by Robles wherein the Union was discussed. One of these meetings took place on the bus while De Lara was present.

Additionally, Maria worked at Gonzalez Packing, which is under Union contract, and testified that on one occasion was termed

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90. October 6, 1980, was the last day respondent hired workers for its harvest that year.

by Joe Silva as a "Chavista de hueso Colorado," or a true or definite Chavista. Such assertions were uncontroverted.

Lopez stated that during the harvest she asked De Lara if it was true that she and other workers had been "fired"[91/] the previous Spring because they were Chavistas, to which De Lara allegedly responded "yes." De Lara denied saying this. This account, as was demonstrated by her subsequent testimony, appeared to be somewhat fanciful. Maria showed that she was aware that her hire-date determined the date of her layoff. She did harbor suspicions, however, that anti-Union motivation was at the base of these actions.

Further, as the full recitation of the above incident showed, she had in fact gone to De Lara's house, where the conversation took place, to, among other things, ask his advice. She had heard that to insure a job in the pruning, one had to have worked in the picking. She asked De Lara whether she should leave her job in the tomatoes (at Gonzalez Packing) to come work in the harvest. De Lara responded, she admitted, that the choice was up to her, that although she might make more for the present in the tomatoes, ultimately she would earn a greater amount working for the respondent in the grapes. The record is unclear as to whether jobs in the harvest were actually available at the time she visited

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91. During the course of Ms. Lopez' testimony, a relatively inexperienced translator was employed. Depending on local usage, the same Spanish word for employment status might be translated differently. For example, "parar" meaning literally "to stop," might mean "to fire" or "to lay off." The translator did not appear well-versed in the varying usages of these terms. Hence, some confusion arose in the record as to whether Maria was actually saying, in this context, that she was "fired."

De Lara.[92/] However, it is clear that Maria opted to continue working at Gonzalez Packing, where she had seniority. Maria was thus fairly unique among the discriminatees in that she was aware that a seniority rule had been implimented by the company, a corollary of which was that in order to maintain one's eligibility for preferential hiring in the pruning, one had to have worked in the harvest.

As Maria did not work in the harvest, she lost the benefit of her hire-date. Her Union activity notwithstanding, she was not hired initially for the 1980-81 pruning season because she had not maintained her seniority.

(h) Santiago Lopez

Santiago Lopez, the husband of Maria Lopez, did not testify. The only evidence presented regarding his participation in protected, concerted activity was that he was present when Maria and several other workers met with Vicente Robles in January and February, 1980, to discuss the Union and the signing of authorization cards.

Like Maria, he had seniority at Gonzalez Packing and worked there rather than at Southdown during the grape harvest. Unlike Maria, however, his name was left off the harvest hiring list. Since no evidence other than the foregoing was elicited to show his Union activities, I am constrained to conclude that the omission of his name was through inadvertence rather than due to unlawful

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92. She stated that De Lara suggested that she call the Immigration service if she wanted a job in the harvest, an apparent reference to the job openings which might occur if certain harvest workers had their immigration status examined.

motivation. The "but for" causational link between his Union activity, if any, and respondent's conduct, is all too tenuous.

Since he did not work in the harvest, his name was dropped from respondent's seniority list. He had accompanied his wife to De Lara's home and at that time presumably learned, as she did, that this would occur. Accordingly, it is for this reason, and not any Union activity, that he was not considered among the first to be hired for the 1980-81 pruning.

(i) Epifanio Silva Medina

No company knowledge of Medina's Union activity was established. He testified simply that he received an authorization card from Lupe Banuelos at the company shop. He failed to state whether any foremen or supervisors were present at the time.

Medina filed an application prior to the harvest. At the time, he was told by a "secretary" in the office that Silva was no longer there, that in order to prune, he would have to have picked. He explained that he had not recently worked in the picking, but wanted to work in the pruning. The "secretary" added that if he were called he would have to come. Medina thereupon told her that he was working at Basic, and did not know if he would actually work in the harvest.

In fact, Medina was called on the telephone by foreman Jesse Torres to come to work in the harvest. Medina declined. He thus lost his hire-date and was not hired initially for the 1980-81 pruning.

A prima facie case of discrimination against this worker has not been established. He lost his seniority by failing to work

in the harvest, though given the choice by foreman Jesse Torres and apprised of the ramifications of not doing so by respondent's office personnel.

(j) Hector Munoz

Evidence of Munoz' participation in protected activities prior to December 1980 was not firmly established. He testified that he received an authorization card from worker Ismael Gomez and signed the card while his foreman at the time, Jesse Torres, was about eight feet away. Torres denied any knowledge of this. Absent from Munoz' account was any statement of what Torres was doing when Munoz got the card so as to give rise to the possible inference that Torres might have noticed the event.

Munoz stated that when the opportunity arose for him to work at Frudden's where he had been employed in previous seasons, he asked both Larry De Santiago and Valentin Zuniga whether his job in the next year's pruning would be jeopardized if he left Southdown at that time, prior to his layoff. According to the worker, neither supervisor said it would be. This testimony was not directly refuted by either when they testified. By contrast, Lupe Velasco, who gave Munoz his "voluntary quit" notice, stated that he told Munoz he would lose his seniority thereby and could only come back as a new hire. Foreman Jesse Torres, for whom Munoz performed car repairs on occasion, testified that he told Munoz during the harvest that he needed to file an application for work as a new hire, since he had lost his seniority as a voluntary quit. Munoz denied on rebuttal that this took place, though he admitted to having a "faulty memory" of matters occurring at that time.

Despite his "voluntary quit" status, Munoz' name was on a harvest hiring list. He did not work in the harvest. Thus, there were two separate "seniority-breaking" events which would cause him to lose his hire-date, and his eligibility for preferential hire in the pruning, even in the absence of any union activity.

Further, as noted above, insufficient evidence was proferred regarding respondent's knowledge of Munoz Union activity.

(k) Alberto Reyes Nevarez

Nevarez stated that he received a Union "paper" or "card" from Rosa Morfin during a break in January of February 1980. Nevarez signed the card. At the time, his foreman was about "ten meters" distant. However, Nevarez was unable to state what the foreman, Jesse Torres, was doing at the time, (save "he was there, around the tractor"), or in what direction the foreman was facing. As Torres denied any awareness that Nevarez was involved with the Union, evidence proferred by the worker is insufficient on which to base a finding that respondent had knowledge of his Union activities.

Nevarez apparently had problems with the immigration authorities. In order to avoid further complications, he began working at Southdown under the name of "Enrique Lares," who was actually Nevarez' brother-in-law. Nevarez also utilized Lares' social security number.

In May 1980, Nevarez approached Larry De Santiago and asked if he might revert to working under his own name and social security

number. When De Santiago said that he could not,[93/] Nevarez stated that he no longer wanted to work under the name of Lares, and actually quit his job. He was issued a "voluntary quit" notice by De Santiago.

Although Nevarez applied for work in the harvest, he was not hired. Further, he was not hired when he applied for work in the pruning in early December.

Through none of this can there be found any inkling of discriminatory treatment. Company knowledge of Nevarez' Union activities was not established. Nevarez' loss of his hire-date and hence preferential status for employment was due to his leaving Southdown more or less voluntarily, as a result of his problems with immigration authorities, and I so find.

(1) Salvador Romero

Romero received an authorization card from Jesus Morfin in January or February, 1980. At the time, his foreman and the crew were all eating lunch on the bus. The foreman, Jorge Soto, was seated about "four seats" from where Romero received the card. Although there was no indication from Romero's testimony that Soto took note of the event, the foreman was close enough to it as to give rise to an inference that he was aware that it had taken place. Soto's statement that he "didn't know" if Romero was "active for the Union" is not, in the strict sense, a denial of any knowledge of Romero's participation in protected activities. I therefore find

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93. Apparently, Nevarez could not work under his own name because he had been picked up by the immigration authorities. This would in turn create problems for the contractor Silva.

that there is sufficient evidence to conclude that respondent, via Soto, had knowledge of Romero's Union-related conduct.

Notwithstanding this, respondent deemed Romero a "no show" when, despite his name appearing on the harvest hire list, he failed to present himself for work during the 1980 harvest. Romero was working at Basic during those months, and had never worked in the harvest at Southdown. His name was therefore dropped from the seniority list, and he was denied preference for employment when the 1980-81 pruning season began.

As the foregoing was fully in keeping with respondent's newly instituted hire-date system, Romero would not have been given preference for employment in the 1980-81 pruning even in the absence of any Union activity.

(m) Epifanio Silva Medina

Epifanio Silva received a Union authorization card some time in 1980 from Rosa Morfin during a break. Their foreman, Soto, was about ten meters away at the time. During Silva's cross-examination it became apparent that he was totally unaware of what his foreman was doing at the time the card was passed to him, or at minimum, that the foreman was even looking in his direction. As such, no inference of Company knowledge of Silva's Union activity can be created.

Despite his filing an application for the harvest, Silva was not hired. He had, during the previous season, left work at Southdown prior to his scheduled layoff date to secure employment at Meyer's Tomato. He was therefore deemed a "voluntary quit" by the company, and lost his place on the seniority list. As a further

consequence of being a "voluntary quit" and not working in the harvest, Silva was denied preference for employment as the 1980-81 pruning season began.

Without company knowledge of Union activity, as here, a case of unlawful discrmination cannot be made out (Lawrence Scarrone, supra). While it is somewhat suspicious that Silva was denied employment in the harvest despite filing an application for same,[94/] suspicion alone is insufficient to supply the essential element of a prima facie case, i.e., knowledge, which was found to be lacking here. (Cf. Tex-Cal Land Management (1979) 5 ALRB No. 29.)

(n) Sacramento Quintana Silva

As with several other employees in this sub-group, General Counsel failed to prove by a preponderance of the evidence that respondent had knowledge of Union activities of Sacramento Quintana Silva. The alleged discriminatee testified that he received a Union authorization card from an unknown person while working in Jesse Torres' crew. The worker was unable to state what his foreman was doing, or how far away the foreman was, when Quintana signed the card. He testified merely that Torres was "there, in front of the machine." Such testimony is inconclusive.

Quintana also stated that his work ended around February 1980, when immigration authorities picked him up. He was deemed to

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94. As a "voluntary quit", Silva should have been in no worse position than a new hire in the absence of discrimination. Many of the people in this category did secure employment in the course of the 1980 Southdown harvest, established hire dates before or during the harvest, and concomitantly, were treated as preferential hires for the 1980-81 pruning season.

be a "voluntary quit." When he returned to Southdown, he was informed that he could not be rehired. Although he filed an application for work in the 1980 harvest, he was not hired.

As a "voluntary quit," his name ordinarily would be deleted from the lists. Quintana visited the office once to check for harvest employment after he had filed an application, but was told that they were not hiring.

Quintana's name, therefore, was not placed on the preferential hire list as the 1980-81 pruning season began, and he was not hired initially for that period. However, without company knowledge of his Union activities, it cannot be said that "but for" such activities, he would have been rehired to start work in the pruning season.

(o) Steven Suarez

Suarez received a Union authorization card from Jesus Morfin in January or February 1980, which he signed. He testified that foreman Jorge Soto, was, at the time, "a couple of rows away." In the face of Soto's assertion that he was unaware whether or not Suarez was a Union sympathizer, I am unable to find that the respondent had knowledge of such based on this scant evidence.

Suarez was a "voluntary quit" who left Southdown in May to work at Basic Vegetable. He testified that Larry De Santiago told him when he received his voluntary quit notice that he would be able to return for the pruning the year following. While De Santiago denied informing anyone who was a voluntary quit that they might be rehired for the pruning without losing their seniority, I did not

find De Santiago to be a credible witness,[95/] and resolve this conflict in Suarez' favor.

Although Suarez filed an application in August 1980, he was not hired for the harvest. He learned at that time that to protect his eligibility for work in pruning, he needed to work in the harvest. Suarez apparently chose to continue working at Basic through the time of respondent's harvest. Because of his "voluntary quit" status and his failure to work in the harvest, Suarez, according to the company's rules, lost the benefit of his hire-date.

I find that, given the absence of company knowledge of Suarez' Union activity, the reason or reasons he was not initially hired for the 1980-81 pruning season were totally unrelated to any unlawful anti-Union motive.

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95. The reasons for this conclusion appear elsewhere in this decision.

(4) Visible Union Adherents

Of the thirty-four alleged discriminatees, only five could truly be designated as open Union supporters to the extent that a definitive finding could be made of company knowledge of their Union activities. These employees include Jesus Morfin, Santiago Mendoza, Ismael Gomez, Jose Reyes and Juan Lopez.

(a) Jesus Morfin

Jesus Morfin began working at Southdown for Joe Silva in 1976. In the 1979-80 pruning season, he was employed in the crew of Jorge Soto. Beginning in January 1980, Morfin openly spoke with workers about the benefits of organizing during breaks at the fields, and also distributed authorization cards at such times. In fact, he was at the head of the 1980 organizational drive.

At one point during those times, Morfin was approached by the contractor, Joe Silva. Morfin testified that Silva told him that while he knew they were organizing, it "wasn't convenient for [them] to do that, because there was no more work in town and nothing else to do, and if the company knew, then we could have problems and . . . we would lose everything . . . ."[96/] Jesus replied that his "name was Jesus Morfin, and that [he] was . . . not going to sell [him] self, that [he] would keep struggling to put [his] union there." Whereupon, Silva went to speak with the foreman, and Morfin heard him to say that, in essence, he would employ more crews in order to create less work for each individual, "so that they can take to the

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96. This testimony was unrefuted. Silva did not testify. General Counsel agreed that in presenting the above recitation he was "not seeking a separate 1153 (a) violation."

street, . . ., they can eat roots from the river, because they do do not want to work." Morfin was thus clearly identified with the 1980 organizational compaign at Southdown. Silva's attitude toward the campaign was likewise starkly delineated.

Morfin had begun working at Basic Vegetable in 1977, and had acquired seniority rights at that company. The season there typically ran from June to November. When it came time to return to Basic for the 1980 season, Morfin approached Larry De Santiago and asked him for a "permit" for a leave of absence, to enable him to work at Basic, then return to employment without hindrance at Southdown. De Santiago did not give him a permit, since he did not want Morfin, in the worker's words, "to go and come." Valentin Zuniga also turned down Morfin's request for the permit. Morfin admitted that he was aware that he needed a permit and a leave of absence to preserve his seniority. When Jesus concluded that he would return to employment at Basic despite not obtaining a leave, he was issued a "voluntary quit" notice on June 2, which he actually refused to sign.

General Counsel argues that the "refusal" by respondent to give Jesus Morfin a leave was evidence of its "anti-union animus." He gives credence to testimony by certain other employees[97/] concerning remarks made by Valentin Zuniga in late May and June to the effect that the work was slowing down, and that employees should consider taking vacations or seeking work elsewhere. Zuniga denied making such statements. They would in fact, seem illogical in the

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97. This testimony was supplied by workers Leopoldo Guillen, Dominga Gayton, Hector Munoz and Juan R. Lopez.

face of the creation and implementation of the hire-date system which encouraged people to work up until their layoff date, the issuance of the plethora of "voluntary quit" notices before and during those times for conduct similar to Morfin's, and the fact that Zuniga had little, if anything, to do with the day-to-day supervision of employees prior to Silva's retirement in August. While employees in prior seasons may have been encouraged to seek other jobs when the work was slowing down, thus easing the supervisor's burden of deciding who was to be laid off, the determination of layoffs by hire-date objectivized the situation to the extent that such considerations were no longer operative.

That Morfin was denied a leave of absence in order to work elsewhere was fully in keeping with respondent's hire-date system. It has nowhere been shown that Morfin was thus the subject of "disparate treatment," and hence discrimination: no evidence was presented to the effect that other workers were issued leaves prior to their layoffs to resume work at other concerns, or that such workers were permitted to maintain their seniority at Southdown under such circumstances.

In August, Jesus visited respondent's offices to make out an "application." He had found out that Silva was no longer in charge of seasonal employment at Southdown, and that the company itself was by that time overseeing the hiring process. He was under the impression that the application was for the pruning season, since, apart from a week or two in his first year at the ranch, he

had never worked in the picking.[98/]

As with all of the other alleged discriminatees, when Jesus Morfin presented himself for work in December 1980, he was told that in order to be considered among the first ones to be hired for the pruning, he had to have worked in the previous harvest. As he had not, Jesus was not hired when the pruning season began.

Similarly, as I have found with the other alleged discriminatees, Jesus Morfin lost his seniority through one of the company's newly promulgated rules, rules which were applied universally without regard to whether a person had participated in protected activities. It was well established that Jesus Morfin organized on behalf of the Union; that respondent, via its supervisors and Joe Silva, had knowledge of such activities; and that respondent had adopted a "no-union" philosophy. Nevertheless, respondent would have treated Jesus Morfin's tenure at Southdown in the same manner, even in the absence of his Union activities: Jesus Morfin lost his seniority date by virtue of his being considered a "voluntary quit", and was thus not among those employees eligible for preferential hire as the 1980-81 pruning season began.

It is therefore recommended that the allegation of individual discrimination against Jesus Morfin be dismissed.

(b) Santiago Mendoza

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98. Interestingly, his wife Rosa Morfin, Union representative for the crew of Adolfo Chavez, also filed an application about that time. She had worked until her layoff in the pruning, obtained a medical leave for the harvest season of 1980, preserved her hire-date, and was on the preferential hiring list for the 1980-81 pruning.

In the 1979-80 pruning season, Mendoza had one of the earlier hire-dates, having begun working at Southdown on December 3, 1979. He had worked there since 1974. While employed in the harvest for only the first two years of his tenure, Mendoza worked in the pruning for each year through the 1979-80 season. As a member of the crew of Raul Noriega that season, he was the Union representative for the crew, explaining to workers the advantages and benefits of organizing, and passing out leaflets and authorization cards.

Mendoza admitted that Noriega was not around when the worker achieved his Union representative status. However, he stated that the foreman would be present when he passed out leaflets. Although Noriega testified that he was unaware of Mendoza's Union representative status, he was not asked to specifically disclaim any knowledge that Mendoza was engaged in activities on behalf of the Union. Accordingly, I find that respondent via Noriega did possess such knowledge.

Like Jesus Morfin, Mendoza had worked for several seasons at Basic Vegetable. When it came time for him to resume his employment there during the first part of June, he asked Noriega to give him a leave of absence. Like Morfin's request to De Santiago, Mendoza's request was denied, and he was given a "voluntary quit" slip.

On September 2, Mendoza filed an application which had written at the top "wait until pruning." Mendoza's name did not appear on any of the posted hiring lists. He was, however, listed

the "working" copy of the "A" seniority list[99] as a "no show." Either as a result of being a "voluntary quit" or of not working during the harvest, Santiago's name was dropped from the seniority list, and he lost his eligibility for preference in hiring for the 1980-81 pruning season.

Santiago Mendoza was thus treated like any other employee at Southdown that season. His Union activity notwithstanding, he lost his seniority by leaving work before his layoff date and hence being considered a voluntary quit. No "discrimination" regarding him has been shown, and it is recommended that the allegation pertinent thereto be dismissed.[100]

(c) Ismael Gomez

Ismael Gomez began working at Southdown in 1977. He never worked during the harvest, but rather was employed just for the pruning and tying. After a short stint in Jorge Soto's crew at the beginning of the 1979-80 season, he was transferred to the machine pruning crew of Jesse Torres.

While in the crew, Gomez discussed the Union with his co-workers, and distributed authorization cards and leaflets. At one point, he asked his foreman if he might borrow a pen to be used

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99. As noted, this was the list used as the primary source of the posted lists, although it was not posted itself.

100. Interestingly, Santiago's wife, Emma, obtained a leave of absence in the 1979-80 pruning season due to pregnancy, found her name on the harvest hire lists after checking on at least four separate occasions, worked during the harvest, and, being eligible for preferential hire, was hired in the 1980-81 pruning. Emma was also a Union representative for her crew. It may thus be inferred that Santiago was acquainted with the seniority rules at respondent's ranch.

for signatures on the cards.[101/] At another, Gomez assisted co-worker Jose Reyes (also an alleged discriminatee) in passing out leaflets which Torres claimed were from the ALRB and which set out "the rights of the worker."

Torres admitted that he had conversations with his workers about the Union. Gomez stated that Torres once asked him "why do you want to get the union here" and "if it would do him any harm or prejudice . . . if the union came in." Torres did not refute this.

While respondent seems to argue that it was not aware of Gomez' Union activities, I find to the contrary. Torres stated he did not know whether Gomez was passing out cards or if the worker had signed one. The foreman further testified that he was responsible for two distinct crews working in separate blocks and would split his time between the two. Respondent contends that this arrangement gives rise to the inference that organizing activity in the crew might have proceeded unobserved by the foreman. However, given the converstaions about the Union, the distribution of the leaflets in the bus, and the lack of a direct denial by Torres of any awareness of Gomez' attitudes regarding the Union, I conclude that respondent did acquire knowledge during the course of the 1979-80 pruning seasons that Ismael Gomez was in favor of the Union.

Gomez also had worked at Meyers Tomato since 1977. When he was recalled for employment there in April 1980, Gomez stated that he asked both his foreman and Gabriel De Santiago whether he could obtain a "permit" to return to Meyer's. According to Gomez, both

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101. Torres stated that Gomez wanted the pen to write a letter to his girl friend in Mexico.

supervisors told him it was "all right," since they were soon going to lay off the crew. However, Torres testified that he informed Gomez when the worker told him he would be leaving that Gomez would be losing his seniority and would have to come back to Southdown as a new hire.

I do not credit Gomez' version of this encounter since no supervisor could logically make the statement that the "crew would be laid off": layoffs that season were, as universally attested to, determined not by crew but by hire-date. Many of those with Gomez' hire-date, or December 5, 1979, it was shown, were not laid off until July 2, at the earliest. While a particular crew under a particular foreman might cease to operate during a given season, the workers with the most senior hire-dates would be reassigned, not laid off.

Further, despite the testimony of some workers that they were encouraged to seek other employment when the work load was diminishing, no evidence was adduced that any worker was given a "leave of absence" in order to resume employment elsewhere. Accordingly, Gomez, like those other workers, was issued a "voluntary quit" notice, which he understood was not given to him for the purposes of allowing him to return to work, without qualification.

Gomez' name, undoubtedly through inadvertence, did appear on a harvest hiring list. However, he continued to work at Meyers at that time, and did not become employed in the Southdown harvest. When he returned for the 1980-81 pruning season, he was informed that he was not entitled to be among the first group hired. Gomez

obviously lost his seniority, as he had been informed, either by a "voluntary quit" or by virtue of not working in the harvest. No disparate treatment of his work status has been shown, notwithstanding his activities on behalf of the Union. His work pattern at Southdown in 1980 was not in conformity with the rules for maintaining seniority.

It is therefore recommended that the allegation regarding discrimination against him be dismissed.

(d) Jose Reyes

Jose Reyes began working at Southdown in 1976. He worked in the harvest in 1976 and briefly in 1979, having worked each year since 1976 in the pruning, tying, and budding. Beginning January 2, 1980, he was employed in the crew of Raul Noriega. He was then transferred to Jesse Torres' crew, and worked until his layoff on May 21.

The fact of Reyes' Union activities, and company knowledge thereof, was substantially uncontroverted. Reyes was the Union representative for his crew. He talked about the "benefits of joining the union," and distributed authorization cards and Union literature while his foreman was close at hand. The foreman was not asked to deny knowledge of Reyes' activities.

Reyes went to work at Basic from July 1, 1980 to October 22 of that year. Since he worked until his layoff, he should have been named on the harvest hiring lists, but was not.[102/] On the working

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102. Valentin Zuniga stated that for a worker to have been "slotted in" to the "C" harvest hire list, he needed to have timely filed an application. Little credence can be attached to this explanation, since other workers were named on the lists (e.g., Jose Herrerra and Maria Lopez) who did not file applications, yet who had, like Reyes, worked until their layoff dates.

copy of the master seniority list, Reyes was deemed a "no show." Although Reyes testified that he made an application for work in the harvest on or about October 22, 1980, and was not hired, the company representative at the hearing was unable to locate a written one for him. Seniority lists reveal that the last date for hiring in the harvest was October 6. Thus, it appears that Reyes "applied" too late for work in that season. Significantly, no evidence was adduced that Reyes inquired about harvest employment while the hiring for same was in progress.

As a harvest "no show", Reyes lost his place on respondent's seniority list and thus his eligibility for preferential hire in the 1980-81 pruning season. Given his 1980 employment pattern at Southdown, Reyes would have been denied hiring preference for the 1980-81 pruning season even in the absence of any Union activity.

It is accordingly recommended that the allegation pertaining to the discriminatory refusal to rehire this worker be dismissed.

(e) Juan Lopez

Juan Lopez started working at Southdown in the pruning season of 1978. He was one of the earliest hires for the 1979-80 pruning season, having begun on November 30, 1979 in Jesse Torres' crew.

Lopez testified that while in the crew he acted as a Union organizer, talking to his fellow workers about the Union as well as distributing authorization cards. Lopez asked the foreman Torres

for a pencil on one occasion while he was distributing cards.[103] Lopez also openly discussed the Union with his foreman, saying he had been a union representative at Carl Maggio, and explaining to Torres "how the Union worked . . ." Torres did not deny that any of the foregoing took place. I therefore find that respondent was aware of Lopez' sentiments about the Union and his activities on its behalf.

Interestingly, Lopez was, in February or March 1980, elevated to occupy the position of "second" or assistant to the foreman.[104]

Lopez testified that in May he decided to leave Southdown for other work. He informed both Larry De Santiago and the foreman Torres of this, who stated, according to the worker, that it was "all right," and he could "keep that job and come back." Lopez in fact went to work for Frudden's where he had worked in the previous year. Before his departure, he was given a paper which states clearly that Lopez was a "voluntary quit to work at another job."

As a "voluntary quit," Lopez lost his eligibility for preferential hire in ensuing seasons. No discrimination was established in his case since he, like other workers who left Southdown before their layoff date, lost the benefit of their hire date. Lopez was not treated any differently than other workers similarly situated, his Union activity notwithstanding.

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103. This testimony is strangely reminiscent of a similar incident attested to by Ismael Gomez.

104. Neither General Counsel nor respondent claimed that "seconds" were supervisors within the meaning of the Act.

It is therefore recommended that the allegation regarding the discriminatory refusal to rehire him be dismissed.

2. Discriminatory Layoff: Paragraph 5(i)

a. Facts not Essentially in Dispute

Most[105/] of the alleged discriminatees were rehired by the respondent on January 14 or 15, 1981, to work in two crews under the respective supervision of Ramon Garcia and Jose Rivera. These crews were laid off on February 20, 1981. By virtue of this employment, individuals reacquired the hire dates that, where pertinent, were lost through the operation of respondent's seniority system in the year previous.[106/]

That the layoffs were consistent with respondent's seniority system was not disputed: these employees, with the least amount of seniority, were laid off before any others. Further, no additional seasonal workers were hired for the 1980-81 pruning and tying after this group was laid off.

b. The Crux of the Controversy

General Counsel claims that organizing was rampant throughout these two crews during the period of their employ; that

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105. Santiago Mendoza, Silvestre Delgado, Martin Garcia, Juan Lopez, and Alberto Reyes Nevarez were not named as discriminatees in this allegation. Among them were individuals who sought work at Southdown as the pruning season began, but upon learning that they would not be among the group first hired, did not return there to seek employment again during the 1980-81 pruning season.

106. Respondent points out that there are no Silva compensation records in the 1979-80 pruning season for seven of the alleged discriminatees in paragraph 5(i). Candelairo Garcia, Rafael Garcia, Rafael Lizama, Herberto Rivera and Modesto Romero are included in this group.

respondent, through Valentin Zuniga, had announced to them that the work they were to do would last for about eight to ten weeks; that the crews were given particular tasks, not performed by other workers or other crews; that this work was not completed and hence the crews were laid off prematurely on February 20, 1981; and that the motivation for the layoffs was the Union activities of the crew members.

Respondent, on the other hand, basically asserts that the crews were not promised work for this length of time, but were told in one instance that they might expect employment for four to six weeks; that the crews performed essentially all of the work that they had been hired to do; that other, more senior employees were entitled to do whatever work remained; and the layoffs were non-discriminatory and consonant with respondent's seniority, or last hired, first laid off system.

A crew was hired under the direction of Jose Rivera on January 15. On its first day, Valentin Zuniga addressed the workers in this crew. Conflicting versions of what he said at that time were offered. It was universally acknowledged that Zuniga announced that the crew would be involved in heavy work, the pulling of stumps. General Counsel's witnesses, including Jesus Morfin, Manuel Salgado and Maria Lopez, each stated that Zuniga announced that the crew would work from eight to ten weeks. Other witnesses, including those called by respondent, testified that in addition, Zuniga stated that Rivera's would be the only crew to perform such

work.[107]/

Respondent's witnesses, including some alleged as discriminatees,[108]/ each testified that Zuniga's estimate of the time they would be employed was "approximately four to six weeks." Zuniga himself testified to this particular estimate, but denied telling the crew that they would be the only ones to be doing the stump pulling work.

I am inclined to credit respondent's version of the time estimate and thus remove this inference-raising building block from General Counsel's attempt at constructing a case of discrimination. Each one of the witnesses from the stump crew who supported General Counsel's version had an arguable bias in that he/she was alleged as a discriminatee. No disinterested witnesses were called to substantiate this version. On the other hand, witnesses called by respondent, despite their being claimed discriminatees, testified in a manner inconsistent with their own personal interest, to the effect that Zuniga had promised work for "approximately four to six weeks."[109]/

One witness called by the General Counsel, Steven Suarez, stated in response to a non-leading question by respondent's counsel

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107. Witnesses in this category included workers Noradino and Enedina Mandujano, and foreman Raul Noriega.

108. In this group were Betty J. Rodriguez and Vicente Argueta.

109. The fact that General Counsel did not ask all or a great number of its percipient witnesses about the incident does not, as respondent suggests, create a negative inference on the point. Evidence of this nature tends to be cumulative and hence objectionable.

that Zuniga's estimate was "approximately four to six weeks."109a/ Both he and Betty J. Rodriguez indicated in their testimony that the eight to ten week estimate was contrived by the workers themselves. Suarez admitted being present during a meeting of crew members on the first day of work were it was discussed that they were going to claim that Valentin had told them that the work would be eight to ten weeks, despite his statement promising only four to six weeks. Betty Rodriguez testified that when the crew was laid off, the crew understandably became more and more dissatisfied with the situation: "Jesus Morfin . . . was very mad . . . He told the whole crew and . . . they were all . . . talking at the same time. They all got mad, and getting more mad because Mr. Morfin was telling them it wasn't right that we had to be stopped . . . . and all the people were getting riled up. And so he says we going to stick all together from eight to ten weeks (sic)." No witnesses were called by General Counsel to refute this evidence.

General Counsel places much emphasis on the assertion that workers in Rivera's crew were told that this was the only crew to be performing this work, and that by the time the crew as actually laid off, only 60% to 70% or 350 of 600 acres of the work had been completed. As noted, Zuniga himself denied making the statement attributed to him. However, the statement, even if made, is not without ambiguities. Zuniga might well have meant that Rivera's crew would be the only crew to be doing said work at that particular point in time, not that it had exclusive rights to the work.

109a. Suarez was not specifically asked about this during the course of his direct examination.

Further, the statement might have been couched in such terms that the supervisor might have said that the only work the crew would be doing would be stump pulling (as was the case), as opposed to the interpretation placed on it by several witnesses, that Rivera's would be the only crew to do it.110/

Finally, General Counsel's contention regarding the "only crew" statement seems to imply that respondent was committed to a particular course of action and did not have the option of changing its mind. As will be seen and later discussed, such decisions, as long as they are made in the absence of a discriminatory motive, are perfectly within the purview of management prerogative. In short, respondent had the right to change its mind, so long as it did so without discriminatory intent.

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110. In English, the same phrase could have the two meanings ascribed depending on how emphasis was placed in the sentence: "This crew, only, will do this work" as opposed to "This crew only will do this work." In Spanish the phrase might have similar ramifactions, once again depending on emphasis: "Esta cuadrilla solamente va hacer esta trabajo." Unfortunately, the exact Spanish words are not contained in the record.

As for the other crew, under the direction of Ramon Garcia, it had been assigned the task of tying vines. The crew started one day before Rivera's, or January 14, 1981.[111] Respondent's witnesses,[112] in testimony that was substantially uncontroverted, stated that in the previous year, a problem was created by the early "bud push" of certain premium grape varieties which accounted for about 1300 acres at Southdown. When these vines were subsequently tied, a substantial risk of breaking the buds, and thus losing the crop, occurred, as the canes from the vines were tied on the training wires. To avert this situation with the early budding varieties, an additional crew was hired to, in Lopopolo's words, "get a jump" on the tying. Lopopolo also stated that a large labor pool was available from which to obtain workers, and that factor also contributed to the decision to retain extra personnel.[113] Those who had previously been employed at Southdown were given preference for jobs in the tying and stump pulling crews.

Like the stump pulling crew, Zuniga spoke with the tying crew on its first day.[114] General Counsel's witnesses, including

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111. This earlier starting date entitled the Garcia crew to greater seniority than the Rivera crew. As will be seen, respondent argued that this greater seniority created an adverse impact on the Rivera crew, whose employees, under respondent's rules, had to be laid off before anyone from Garcia's.

112. These witnesses included Southdown ranch manager Lopopolo and John Cedarquist.

113. Testimony demonstrated that large numbers of people, in addition to those alleged as discriminatees, appeared at Southdown during the months of December and January seeking employment.

114. Foreman Raul Noriega also spoke to the crew, reading them the company personnel handbook. He likewise did this with Rivera's crew.

Hector Munoz, Leopoldo Guillen, and Ismael Gomez all testified that Zuniga estimated that the work would last for at least seven to ten weeks. Zuniga denied making any such estimate to the tying crew. Two other witnesses called by respondent, workers Maria Montemayor and Rafael Lizama[115/] denied that they "heard" or "remembered" such a statement.

Respondent argues that since the witnesses called by General Counsel were all "organizers," with a stake in the outcome of the case, their testimony is to be viewed with circumspection. It calls attention to the fact that not all the members of Garcia's crew were asked about this issue. However, I am unable to draw any adverse inferences from this situation, since, as was noted above, under like circumstances, the testimony, if proferred, would have been cumulative. Similarly, I cannot wholly discount the testimony of five[115a/] witnesses who provided mutual corroboration of the alleged statement, and imagine some grand conspiracy whereby all agreed to make the fictitious assertion.

By the same token, Zuniga's bias is rather obvious. Montemayor's husband is foreman of the Southdown irrigators, and she lives with him in housing provided by the company. Further, Montemayor, while remembering that Noriega read "quite a number of rules" to the workers, could only specifically recall two of such rules; the three-day absence rule, and the necessity of having a

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115. Lizama was alleged as a discriminatee while Montemayor curiously was not.

115a. Jose Reyes and Antonio Gonzalez testified on this point in addition to those named above.

doctor's note when returning from a medical leave. Lizama did not categorically deny that Zuniga had made the statement: he merely testified, when asked about it, "I didn't hear. I don't remember having heard that." Similarly, Montemayor admitted that it was "hard to remember" all that was said, and since Noriega read for "about half an hour, it was a little boring listening to him."[116/]

I therefore find it more probable than not that Zuniga made the "eight to ten week" estimate.[117/] Nevertheless, I am unable to attach as great a significance to this fact as General Counsel undoubtedly would like. While it does raise suspicions as to the timing of the lay-off (as will be discussed infra), the fact remains that the "estimate" was just that, an estimate, not an ironclad commitment. General Counsel did not refute any of respondent's evidence regarding the progress of the work at Southdown during the first few months of 1981. In essence, that evidence showed that respondent was considerably ahead of schedule in its operations and that the work of the tying crew was essentially accomplished by the time of its lay-off.

Admittedly, General Counsel is at a disadvantage when faced with proof of this nature. More often than not, it is not possessed with the expertise of sophisticated argicultural planners and

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116. "A man hears what he wants to hear and disregards the rest . . ." Simon and Garfunkel, The Boxer.

117. Additional credence for this version is supplied by the fact that some of Rivera's crew members gave this as the time period stated to them. It may be inferred that the source of their assertions came from statements made by Zuniga to the Garcia crew one day before their crew was addressed.

managers whose very work entails the making of projections for crop operations, labor requirements and cost estimates, all in the face of changing weather and market conditions. Nevertheless, it remains that the testimony of Ron Lopopolo, John Cedarquist, and Bill Petrovic, respondent's assistant ranch manager, was substantially uncontroverted in this regard.

The 1980-81 pruning season at Southdown began on December 15, 1980. After the two crews in question were hired one month later, respondent's employment complement reached a total of 394. By contrast, after one month in the previous pruning season, only 212 employees had been hired. Crews were also not built up as rapidly in that year as they had been in 1980-81: hiring occurred over a two and one-half month period encompassing forty-four separate hire-dates (November 30, 1979 to March 10, 1980), as opposed to the one month and ten hire-dates it took to reach peak employment for the 1980-81 pruning. These increased numbers of employees contributed to a 37% increase in the number of man-hours for an equivalent ten-week period in a comparison of the two seasons. Zuniga testified that the 1980-81 crews, by mid-February, were four to four and one-half weeks ahead of the previous year's work.

Another factor affecting the progress of the crews was the weather. The 1979-80 season witnessed days of rain and concomitant delays due to the fact that at such times equipment could not easily be moved through the vineyard.[118/] In an equivalent period in

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118. The rain, according to Lopopolo, also delayed the start of the cane tying in that year and created the problem with the bud push that respondent sought to avert in the 1980-81 season.

1980-81, there was far less rain.

Finally, contributing in no small measure to the progress of the 1980-81 pruning work was the reduced number of acres over which operations needed to be performed. Hence, less total pruning and tying work was necessary. Respondent in both seasons was pursuing a "conversion" program,[119/] pursuant to which acreage previously devoted to red varietals was being converted to acreage producing white varietals.[120/] From a total acreage of 8,700 in 1979-80, respondent's total acreage of mature vines was reduced to about 6,000 in 1980-81 as a consequence of this program.[121/]

c. Organizing Activities in the 1980-81 Pruning Season and the Company's Response Thereto

The Union, it was demonstrated, had much appeal for the workers in Garcia's and Rivera's crews. This might be expected with this group who suddenly and in most cases without warning, found that their jobs at Southdown were not, for their purposes, as secure

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119. The "conversion" is accomplished by two methods: grafting; and root pulling (removal of the prior vine) and replanting of new vines of the desired variety. As the hearing began, thirty percent of the grape acreage at Southdown under conversion had been converted by grafting while the remainder was altered by the root pulling and replanting process. With the latter process, half of an older vine is cut off; the new vine is planted alongside the older stump; the stump is then pulled the following year. While twelve hundred acres were actually "converted" in 1981, roots were pulled over only 600 acres that year.

120. Testimony from Lopopolo provided early in the hearing indicated that thirty-five to forty percent of Southdown's vineyards would ultimately be converted from red to white wine grapes. By the time of the hearing, about 2200 to 2400 acres had been converted.

121. Under the conversion program the reduction came about as a result of cutting half-vines, unsuccessful graft operations, and the planting of young vines, which are pruned in late spring in conjunction with other operations, such as weeding and tying.

as they had been in the past.

The crews showed their support in a variety of ways. At one point during its tenure in early 1981, the crew of Jose Rivera was asked by worker Manuel Salgado to show its support for the Union by raising their hands. On the bus and in the presence of the foreman, the entire crew did so. Rivera himself admitted that most people in his crew were in favor of the Union.

As far as Garcia's crew was concerned, the foreman acknowledged that organizational activities were widespread among his workers, and that they made no efforts to conceal them. Ismael Gomez testified that he had obtained signed authorization cards from 36 or 37 people in the crew. At one point during the month that they worked, Gomez and Hector Munoz solicited names and addresses of people in the crew who showed an interest in being contacted to discuss the Union. While the foreman Garcia was seated inside, these two workers compiled such a list immediately outside the bus. Garcia admitted that he was aware that the people were involved in union activites at that time. More than thirty workers' names appear on the list.

On February 12, 1981, the Union held an organizational meeting for Southdown employees at the King City Fairgrounds. About one hundred of respondent's employees attended. While it was not definitively established that respondent was aware of the extent of participation by its own employees at the meeting, I take administrative notice that in a community the size of King City, such activities could hardly take place unnoticed.

Thus it was well established that the crews of Ramon Garcia

and Jose Rivera engaged in protected, concerted activities during their tenure at Southdown in early 1981, and that respondent was aware of that fact.[122/] However, it was also clear that Union activities were ubiquitous among the Southdown work force, and that these two crews by no means had a monopoly on them.[123/]

Similar to the prior year, respondent presented its position to counter that of the Union. Tony Mendez, Valentin Zuniga, and supervisor Efren Rivas gave the foremen leaflets to distribute to the workers. Among these was one which stated: "Here is your check. The Union still does not have it in its hands. Let's keep it that way."' Another tells workers not to let themselves be fooled by false promises, and contains translations of excerpts from news articles wherein beatings of illegals by "UFW supporters" for crossing picket lines are described, and where a report about the Supreme Court decision upholding the rights of aliens to continued employment is depicted as being opposed by the Union. Another leaflet sets out various provisions of the Union constitution with a criticism of each. A fourth parodies encounters between organizers and workers, essentially saying what a nuisance

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122. Noteworthy also is the fact that while the Union activities and/or support of many alleged discriminatees were not altogether evident in the 1979-80 season, a number of these individuals established themselves as being in the forefront of the 1980-81 organizational campaign. Among them were Dominga Gaytan, Hidelisa Galaviz, Max Castaneda, Hector Munoz, Manuel Salgado, Andres Diaz Valencia, and Juventino Diaz E.

123. For example Rosa Morfin, employed in Lupe Velasco's crew for the 1980-81 pruning, testified regarding Union activities and discussions regarding the Union in her crew. Witnesses for respondent acknowledged that organizational activity pervaded all the crews.

the organizers are, and urging the people to vote no on the Union question. One further leaflet, distributed on the day the two crews were dismissed, states: "We apologize for the pressure which you will suffer while the Union spreads its dirty propaganda. That you do not sign these cards is the most important thing you can do for us and for yourselves." (Emphasis in original.)[124/]

As with the leaflets distributed in the year previous, General Counsel maintained that they were not of such a nature as to make them unlawful, coercive statements violative of section 1153(a), but were permissible expressions of employer opinion protected by section 1155. Nevertheless, similar to the manner in which the previous year's leaflets were viewed, I find that they provide ample background evidence of respondent's anti-Union attitude, and may be utilized to support the conclusion that respondent's Union animus had by no means abated during the pruning season of 1980-81. (See discussion supra.)

General Counsel points to additional testimony which he feels sheds light on respondent's anti-Union attitude and on its unlawful motives in dismissing the Rivera and Garcia crews on February 20. For example, Manuel Salgado testified that his foreman Rivera told him that if talk of the Union continued, the crew would not finish pulling out roots, but would be fired instead. Salgado stated further that the statement was overheard by two or three others, including alleged discriminatees Masimiliano and Avigail

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124. Interestingly, foreman Jose Rivera gave several of the leaflets to Manuel Salgado to distribute. Salgado maintained he was an outspoken Union adherent who, after passing out the fliers, ridiculed their various messages.

Castaneda. Conspicuously absent from their testimony was any reference to the statement; similarly, it was not alleged as an independent violation of section 1153(a), which, if proven, it might well have been. In the face of Rivera's denial that he made the statement and the lack of corroboration, I am unable to credit Salgado's assertions in this particular.

Marina Romero had been initially hired to work at Southdown late in the 1980 picking season. She resumed employment there with the Ramon Garcia tying crew in January 1981. She testified that on the last day of work for the crew,[125] she had the following exchange with the foreman:

> (By Ms. Romero): I asked [Ramon]; why is it that you are laying off your crew and Chacel [Jose Rivera]? Do you know?
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> * * *
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> then he said no . . . -- they're not laying them off, they're discharged. He says, "Don't tell me that it's concerning the union."
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> * * *
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> And then he said, with his head, yes, because of the union.
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> * * *

Garcia denied telling her the foregoing. However, he recounted a conversation with her where instead, after Romero told him she was "scared," that "she didn't know what to do, the Union, they're going to come in and all of this," Garcia, by his account, essentially told her "it's all entirely up to you."

I do not credit Romero's recitation which appears to be somewhat fanciful. No corroboration was provided for it, despite

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125. Romero, with an earlier hire-date than many in her crew, continued to work after these workers were laid off.

the presence of another worker, Rafael Ramos, during its cause. More importantly, it greatly strains credulity to assert that Garcia told the worker that the crew was being discharged, not laid off, in the face of his being informed the day previous by Zuniga that the lay-off would be taking place, and there being no other outward manifestations that respondent was taking the course of personnel action imagined by Romero.

d. Analysis and Conclusions

It is concluded that the layoffs of the crews of Jose Rivera and Ramon Garcia in February, 1981 were not in violation of the Act. This conclusion is based principally on the fact that while General Counsel was able to establish a prima facie case of discrimination, he was not able to overcome respondent's business justification for the layoffs.

Clearly established in the record were the Union activities and support which pervaded the two crews. Also evident was respondent's Union animus. In the face of assertions by General Counsel's witnesses that the layoffs were in advance of the date promised, a week following a large organizational meeting involving respondent's employees, and prior to the actual completion of the stump-pulling work which they were assigned, an inference of unlawful discriminatory conduct might be raised. Thus, the case becomes one susceptible to a Wright Line-Nishi Greenhouse type of analysis prevalent in so-called "dual motive" situations. As General Counsel has adduced evidence leading to a prima facie 1153(c) case, the burden of producing evidence shifts to the respondent, which in order to rebut the prima facie case, must

demonstrate that it would have taken the same action even in the absence of the protected, concerted activities of its employees.[126/]

As previously noted, General Counsel did not rebut evidence that the tying crew (Garcia's) was hired for a specific job, tying 1,300 acres of the early-budding varieties, and was able to complete that job by the date of its layoff. Similarly, with the stump-pulling, while it was admitted that only 60-70% of that work had been accomplished by the time of the Rivera crew layoff, respondent established, without contradiction, that this task, which involved hard work but essentially no prior experience, could be performed at any time in conjunction with other tasks.

Lopopolo testified that employing the two crews cost the company approximately $20,000 per week. General Counsel argues that "no layoffs were necessary" since additional tying work needed to be done. However, some of the tying work which remained involved varieties which had a later bud push than those tied by Garcia's crew, and hence was work which did not have as significant a time pressure factor connected with it, and which could be done by the remaining crews when they became available.

Cordon tying was another type of work to be done. However, John Cedarquist testified, again without contradiction, that this work could be done in conjunction with suckering, which takes place

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126. The legal analysis and cases cited in the prior section discussing paragraph 5(h) are herein incorporated by reference.

from mid-April to late June.[127/] By accomplishing the task in this fashion, respondent could avoid the cost of an additional "pass" through the vineyard, at a savings of thirty to forty dollars per acre. The savings becomes substantial when one considers that thousands of acres are involved.

Further, General Counsel did not successfully rebut assertions by respondent that in the event that the two crews were not laid off, a more generalized layoff would have been necessary in March. He argues, based on Cedarquist's testimony, that "after cane tieing and pruning" (sic, emphasis mine), "cordon tieing would not start until . . . suckering . . ., which begins mid-April. The crews would be . . . stump pulling in March." Taking the fact that one crew (Garcia's) accomplished between sixty to seventy percent of the rest pulling in one month, he asserts that it would take these three to five crews no more than one week to finish the job. However, General Counsel ignores the evidence that in addition to stump pulling, cane tying of the latter budding varieties, and the early pruning also needed to be done by these crews.

Similarly, General Counsel argues that the figure of 37% more man/hours worked in 1980-81 than that for an equivalent period in 1979-80 is misleading, since no machine pruning crews worked in 1980-81, and a hand crew of 40 workers prunes only 5% faster than a machine crew of sixteen. However, respondent based its "progress" assertions not solely on manpower statistics, but also on total acreage covered.

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127. Cordon tying had been done previously from mid-March until the end of May.

Finally, respondent cogently argues that the stump crew had less seniority than the tying crew, which had finished its assigned task. It had to be laid off prior to or in conjunction with the tying crew in order to adhere to respondent's hire-date system. Since the stump work could be done any time by existing crews, Rivera's crew was laid off in seniority order at the same time as Garcia's, which had finished the job it was hired to do.

As noted, General Counsel places much emphasis on the assertion that the company promised work for between eight to ten weeks. Insofar as the stimp crew was concerning, that issue was resolved contrary to General Counsel's position. Be that as it may, while certainly raising a suspicion that the layoff was premature, the estimate, if made, could be construed as nothing greater than that. Respondent's managers, in the absence of discriminatory motivation, could clearly revise their projection, especially in the face of the progress in the work that its other crews had made.[128/]

Finally, General Counsel contends that "in none of the remaining crews was union organizing as pervasive as in Ramon and Chacal's (Rivera's) crew." Neither the record evidence nor any inferences drawn therefrom support such a conclusion. At the beginning of the case, a total of eleven allegations were severed from the instant case which involved Union-related conduct occurring after the layoff of the two crews in question and involving three

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128. Other crews completing their assigned tasks would allow them to be reassigned to the stump work.

other, specific crews, as well as conduct felt in the work force as a whole. Furthermore, many of the leaders of the 1979-80 organizational drive were still employed in 1981 after the layoff. These worker organizers included Rosa Morfin, Lupe Bannelos, Miguel Jimenez, and Jose Gomez. It cannot be assumed that these workers, employed in the crews that remained, were wholly silent or inactive in 1980-81.

In sum, therefore, I am unable to conclude that General Counsel has proven, by a preponderance of the evidence, that "but for" the union activities of the employees concerned, respondent would not have laid off the crews of Ramon Garcia and Jose Rivera. It is therefore recommended that paragraph 5(i) of the complaint be dismissed.[129/]

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129. Much of General Counsel's arguments in conjunction with this allegation concerned which crews should have been assigned to perform certain work, and that the two crews in question should have remained working although this might have led to a shortened season for the remainder of the work-force. As pointed out by respondent, these decisions are plainly the prerogative, in the absence of discrimination, of its managers. (N.L.R.B. v. Atlanta Coca-Cola Bottling Co., supra; N.L.R.B. v. McGahey (5th Cir. 1956) 233 F.2d 406, 413.)

3. Paragraph 5(b):

"Interrogation" of Rosa Morfin

a. Facts

General Counsel alleged that "Respondent through its agents Bruno Castillo and Tony Mendez interrogated Rosa Morfin about her activities on behalf of the UFW and threatened her with legal action to restrain her organizing activity."

Rosa Morfin was undoubtedly one of the more active and vocal Union adherents employed by the Respondent. Beginning in January 1980, Rosa, who worked in the crew of foreman Adolfo Chavez, openly[130/] encouraged her fellow crew members to become interested in being represented by the Union. She distributed authorization cards and garnered signatures for them.

She testified that on January 23, 1980, her foreman notified her that labor manager Larry De Santiago wanted to speak with her. De Santiago subsequently informed her that "they" wished to speak with her at the company offices. De Santiago thereupon drove her to the office, where she met with Bruno Castillo, Respondent's regional labor coordinator, and with a man whom Rosa understood to be a "lawyer," but who was later identified as labor consultant Tony Mendez.[131/]

According to Ms. Morfin, Castillo and Mendez told her that they had information that she was organizing for the Union and that

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130. The awareness by company personnel of Ms. Morfin's activities was undisputed.

131. Even by the time of the hearing, Rosa was still under the impression that a "lawyer" had participated in the interview.

while she was so engaged she had "threatened" the people in an attempt to force them to sign authorization cards. Morfin responded that she had not threatened anyone. She testified that subsequently, "they told me they could call me to court for threatening the people." Morfin thereupon replied that that was fine, she would be willing to go if called. Castillo, according to the worker, then stated, "Explain it better to the lady. I don't believe she understood it clearly."[132/] Rosa answered that she did in fact understand.

Rosa Morfin further testified that during the course of the interview she was asked how she became "representative organizer of the union," if she was "registered at some place." When Morfin told them she was "registered" at the Union office in Salinas, the "attorney" (Mendez) asked if she was registered at another unidentified office, since "they had looked for me and they weren't able to find me." She then stated that she "knew of no other place, but that if he told me where it was, then [she] would go and register."

When asked by Castillo and Mendez how she became a representative, Morfin, according to her testimony, stated that the people had elected her. The "attorney" then told her that she could discuss the Union while working with the people laboring near her, but that she could not stop working in order to do so. He also stated that she could only speak for herself, and not for her co-workers. The "attorney" also wanted to know what she was "asking

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132. That this statement was made was uncontroverted.

for," to which Morfin replied that she did not think the company should continue employing the labor contractor, since the money paid to him would be better utilized as earnings directly paid to the workers. As the interview ended, the "attorney" gave Morfin a copy of the ALRB handbook.

On cross-examination, Morfin admitted that some time around the date in question, she arranged to have a meeting with labor production coordinator Valentin Zuniga. Upon confronting Zuniga, she openly stated that she was an organizer for the Union. Although Morfin could not remember asking Zuniga to arrange a meeting with ranch manager Ron Lopopolo and later actually denied this, Zuniga himself testified that Morfin did in fact make such a request. Further, Morfin admitted asking permission from Zuniga to speak with her co-workers.[133/] However, it is uncertain from the record whether Morfin's statements to Zuniga occurred before or after the interview with Castillo and Mendez.

Mendez himself testified that he requested that Morfin be brought to the office in order to discuss reports he allegedly received regarding her "harassment" of other workers. He informed Morfin of her rights to engage in organizing activities, stating, "as long as it was not disruptive of the work force, or she stopped working herself, then she could do it at anytime during her breaks, in the morning, during her lunch hour, after work, if she wanted to." He then allegedly told her that if she were to create "disruption within the work force," she should seek help from the

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133. Zuniga stated that Morfin asked to be allowed to go "from crew to crew to talk to the people about signing cards."

Union, or refer to an ALRB handbook, which he gave her. He ended the conversation with the statement, ". . . if you continue to do harassment, then I will have to take the matter up with an attorney."

Significantly, Mendez was not asked to deny assertions made by Morfin regarding questions he asked concerning her selection as a representative, her "registration" for that post, and the reasons why she was organizing for the Union. He similarly did not deny that he stated to Morfin that she could speak "only for herself," which denigrated her status as a representative, and the fact that she claimed to have been elected by her crew members.

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b. Analysis and Conclusion

I find that the Respondent's conduct during the "interrogation," or more properly, the interview with Rosa Morfin, violated section 1153(a) of the Act.

This Board has adopted a standard regarding interrogations whereby they are not considered per se violative of the Act. Rather, an inquiry must be made as to whether the interrogation had a tendency to restrain, coerce, or interfere with the exercise of rights guaranteed by section 1152 of the Act. (Maggio-Tostado, Inc. (1977) 3 ALRB No. 33; Abatti Farms/Produce (1979) 5 ALRB No. 34, mod. 107 Cal.App.3d 317 (1980); Harry Boersma Dairy (1982) 8 ALRB No. 34.) In assessing the issue, the "surrounding circumstances" of the interview or interrogation are examined to determine whether they had a tendency to be coercive and hence run afoul of the law. (Abatti Farms/Produce, supra.)

Some federal courts have looked to the following "circumstances," among others, as a guide: the background and general attitude of the employer toward his/her employees and/or unionization; the type and/or nature of the information sought; the position occupied by the company questioner; the place and method of the interrogation; the truthfulness of the employee's responses; whether the employer had a valid purpose in conducting the interview, and communicated this to the employee; and whether the employee was assured against reprisals. See, e.g., Mueller Brass Co. v. N.L.R.B. 544 F.2d 815 (C.A. 5 1977); Federal Mogul Corp. v. N.L.R.B. 566 F.2d 1245 (C.A. 5 1978); Clothing Workers v. N.L.R.B. 564 F.2d 434 (C.A. D.C. 1978); see also N.L.R.B. v. Huntsville

Manufacturing Co. 514 F.2d 723 (C.A. 5 1975).

In finding that this interrogation was unlawful, I rely on the following factors. The company's anti-Union attitude was well established. More importantly, Respondent resorted to the highly unusual procedure of summoning Ms. Morfin from the fields to the company offices.[134/] In the process of doing so, Rosa was led up the chain of command, as if to impress upon her the seriousness of the inquiry: it was no simple matter to be dealt with by the field foreman. Rather, Rosa was referred from the foreman Chavez to labor manager De Santiago, and from him to regional labor coordinator Castillo, a man occupying one of the highest positions in respondent's personnel department hierarchy.[135/] Further, the interview was conducted by Mendez, whom Morfin did not recognize, but whom she felt was a lawyer, or one possessed of some authority with the company. Given the location of the interview, its participants, and the manner in which it was conducted, an interview of this nature has been held "coercive" under applicable precedent. (See Hanover Concrete Company, 241 NLRB No. 120 1979.)

The employer offered no independent evidence to the effect that Morfin was, in fact, "threatening" her co-workers or using abusive language in attempting to gather signatures on Union authorization cards. By contrast, it did adduce evidence that with the advent of the 1979-80 pruning season, written notices were issued to employees who engaged in disruptive behavior or who

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134. Respondent offered no evidence that this was a common practice in dealing with employees who presented a supposed "problem" in the fields.

135. Castillo was Zuniga's and De Santiago's superior.

presented disciplinary problems.[136/] As no slips were produced involving Morfin's alleged "problem" with deportment, it may be inferred that none were issued. From this it may further be inferred that Morfin's "harassment" was more illusory than real, or at minimum, that the company chose the extraordinary procedure of calling the employee up before the company's labor coordinator and its labor consultant, rather than issue a simple warning notice, to underscore the seriousness of the disciplinary treatment it subjected Ms. Morfin to.

Finally, neither Mendez nor Morfin testified to any remarks made during the interview concerning details of the supposed "threats": she was not asked to confirm or deny the "reports",[137/] thus undercutting Mendez' proferred rational for the encounter, the ostensible "valid purpose" of the interview.

This Board has adopted the criteria set forth in Blue Flash Express, Inc. (1954) 109 NLRB 591, 34 LRRM 1384, to test the legitimacy of employee interrogations. Pursuant to the holding in that case, an employer might lawfully question an employee about his/her union sympathies only if:

1. The purpose of the questioning was legitimate;

2. The employer communicated that purpose to the employee so questioned;

3. The employer assured the employee that no reprisals would be taken;

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136. Foremen Garcia and Torres testified regarding the use of warning slips; three such notices were admitted into evidence.

137. The denial by Ms. Morfin about which she testified was her voluntary response to her interviewers' assertions. They did not request it of her.

4. The questioning took place in an atmosphere free from employer hostility to union organization.

109 NLRB at 593.

In the opinion of this writer, Blue Flash is clearly not "applicable" N.L.R.B. precedent as per Act section 1148. That case involved an employer poll designed to ascertain whether or not a "union" majority existed among its employees in order to decide whether to accord voluntary recognition, as permitted under the NLRA, to that union. Voluntary recognition of a labor organization is expressly declared an unfair labor practice under our Act. (ALRA Section 1153(f)). While employers in the industrial sector may always have a "legitimate purpose" in conducting polls of employee sentiment when confronted with a demand for recognition, these considerations do not appertain to agricultural labor relations as currently constituted.

Notwithstanding the foregoing, the standards set forth in Blue Flash have been utilized by ALO's previously, and affirmed by the Board, in determining the legality or illegality of employer interrogations. As noted above, it is questionable whether the employer's purpose for the interview here was "legitimate". Assuming for the sake of argument that it was, however, the last two criteria enunciated in Blue Flash clearly remove the Morfin encounter from the realm of legitimate employer questioning. Far from assuming that no reprisals would be taken, Mendez conveyed the impression that should Morfin advance her pro-union beliefs too strenuously, she might wind up "in court." "Reprisals" of this nature have been deemed violative of the Act, as in Paul W.

Bertuccio (1982) 8 ALRB No. 39, where it was held that threatening with a civil action workers who engaged in protected, concerted activity contravened section 1153(a).

Finally, as noted elsewhere, the employer, while not exactly "hostile" to union organization, was clearly opposed to it. The "questioning" thus took place in an "atmosphere" which would logically provide a further element enhancing its coercive aspect.

"Threats" or "harassment" are matters of definition and degree. To one such as Mendez who earns his livelihood by providing alternatives to union organizational efforts, "harassment" or "disruption" can be perceived as coming from anyone who attempts to enlist employee support for a union or who offers notions contrary to the no-union view. The central import of his remarks to Morfin was that she should "cool it": any overzealous activities, or any activities whatsoever for that matter, might lead to legal complications. Remarks such as those made by Mendez, in the context which they were uttered, clearly restrain and coerce the exercise of employee rights under section 1152.

One may also infer that Morfin's fellow employees, who were familiar with her organizing activities, saw her being called from her work station to a meeting with a company supervisor. They could logically make the connection between Union activity and supervisorial scrutiny, particularly in the context of a generalized Union animus by the company. The selective questioning of an employee, who, like Ms. Morfin, was a central figure in a union's organizing efforts, has been held, under similar circumstances, to be unlawful. (See Winter Garden, Inc. (1978) 235 NLRB No. 4.)

It is therefore concluded that respondent violated section 1153(a) of the Act by interrogating Rosa Morfin.

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4. Paragraph 5(c):

General Counsel alleged that respondent, through its foremen Velasco and Rivera, "threatened employees that the Immigration and Naturalization Service was going to search the company for undocumented workers," in order to coerce these employees into refraining from engaging in protected activities.

General Counsel adduced testimony from two employees, Rosa Morfin and Jose Chavira, on this point. Chavira stated that his foreman, Jose Rivera, in approximately February, 1981, notified him and fellow worker Martin Alvarado that "La Migra" was going to appear at the ranch.[138/] Chavira, an admitted illegal alien, also testified that on occasion, he spoke in favor of the Union while his foreman was nearby.

Rosa Morfin stated that sometime in late January or early February 1981, foreman Lupe Velasco announced during a break that the immigration was coming, and that after the break the workers who were properly documented should exchange places with those who were not in order that the documented workers would be at the edge of the field while those who were not would be further inside. Morfin also testified that she overheard Velasco say to crew member Vidal Sanchez that "for the illegals, it was not to their advantage to be involved with the union."

When called by respondent, both Velasco and Rivera admitted that they warned their workers about the imminent arrival of the Immigration Service. Velasco explained that he had gotten

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138. The Immigration and Naturalization Service did in fact show up at Southdown two or three days later.

notification from Valentin Zuniga that the Service was going to appear, and that some of his workers overheard. It was then that he reassigned work locations to the undocumented employees.

Velasco also admitted that he spoke with worker Sanchez regarding immigration difficulties. Sanchez told Velasco that the Union was assisting him with this problem. Velasco informed him that the company could also help him obtain documentation, and that he "didn't know if it would be good or bad for him to be in the Union and the strike." Velasco "told him that [he] had fixed [his] papers in Tijuana, and that the immigration there told [him] that they wanted to know whether [he] was going to work or if [he[was going to be breaking strikes, and things like that."[139/]

In none of the foregoing could there be any evidence or inference, as General Counsel alleged, that respondent "threatened" employees with action by the INS in response to organizing activities. No proof was adduced as to the coincidence of the Service's arrival with the onset or continuance of such activities. To the contrary, Morfin admitted that during her five-year tenure at Southdown, "La Migra" arrived at practically the same time every year to check for undocumented workers. Rather than couching their warnings as a threat, the foremen plainly sought to inform workers of the impending visit of the Service so that the workers might take appropriate action to protect themselves.

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139. This is an apparent reference to 8 C.F.R. 214.2(10), whereby a petitioner for a non-immigrant visa may be denied same if he/she intends to work as a strike-breaker.

Although Morfin's assertions regarding statements by Velasco to employee Sanchez might be deemed "coercive", Velasco's testimony, which supplied the total context of the remarks, creates a sufficient conflict with Morfin's as to detract from the sufficiency of General Counsel's proof. Sanchez himself was not called to corroborate Morfin's account. This Board, in S. Kuramura (1977) 3 ALRB No. 49, has noted that when faced with a direct conflict in the evidence without any further proof to "shed light on the truth of the allegation, the General Counsel has not sustained its burden . . . ."

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

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5. Paragraph 5(d):

General Counsel alleged that for approximately one week during February 1981, respondent's agents engaged in and gave the impression that they were engaging in surveillance of Union activities and also "made lists of employees who favored the UFW."

As noted by respondent in the brief, General Counsel's reply to the Bill of Particulars filed by the company enumerates three separate incidents which are asserted provide evidence of surveillance.[140/] In one of these it was claimed that labor consultant Tony Mendez was observed during the period in question to have received "lists" from foremen De Lara and Garcia. No testimony or documents were produced to substantiate this assertion. In another, General Counsel claimed that "Tony Mendez was seen . . . conferring with foreman Lupe Velasco for an extended period, reviewing and discussing a list which . . . Mendez retained."

Employee Rosa Morfin supplied the details of this encounter. A review of her testimony on this point, however, reveals nothing which would substantiate a surveillance allegation. In essence, she merely recounted that Mendez met with Velasco in the fields during work one day. Morfin did not state that any organizing or other Union activities were taking place at the time. Although she asserted that she observed the two "look[ing] at" her and fellow-employee-union organizer Juan Pulido, and reviewing a "list" which she saw Velasco supply to Mendez, Morfin did not

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140. Interestingly, General Counsel addressed only one of these in its brief, the discovery by two workers of certain "lists" made by foreman De Lara.

provide any of the particulars of their conversation, or any details regarding the contents of the "list".[141]/

Ms. Morfin's subjective impression that Mendez and Velasco were "looking" at her and Pulido notwithstanding, evidence of the mere presence of supervisors, without more, even where it is established that union or organizing activities were actually taking place, is insufficient to support a finding of surveillance. (Harry Carian Sales (1980) 6 ALRB No. 55; Kawano, Inc. (1977) 3 ALRB No. 54.) The sum total of the testimonial evidence supplied by Rosa Morfin on this point consists of her observation that Mendez and Velasco were seen talking with one another. Plainly, this cannot lead to a conclusion that respondent engaged in unlawful surveillance.[142]/

The last set of circumstances regarding "surveillance" alluded to by General Counsel in its Reply to Respondent's Bill of Particulars was the contention that two employees saw "notes" taken by foreman Juan de Lara which allegedly contained references to workers' attitudes towards the Union. Socorro Sanchez, employed at the Southdown Ranch since 1974, was a professed "organizer" for the Union. She stated that one Monday morning in February, 1981, as she boarded the crew bus, she was asked by fellow worker Jose Gomez[143]/

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141. Morfin asserted that the list was an "attendance" record. As she did not explain how she acquired knowledge of the contents of the list, her statement regarding its contents is unsupported by any proper (i.e. competent) evidentiary foundation.

142. In reality, this recitation would not have been provided were it not addressed in respondent's meticulous brief.

143. As noted, Gomez ("El Fish") was also active in Union affairs.

to read from a note book located near the foreman's or driver's seat. Sanchez claimed the notebook belonged to foreman De Lara. Sanchez testified as follows concerning what she read:

> It said Socorro Sanchez was talking at 9:20 the following conversation. I've gotten nervous. [sic.] It said that Socorro Sanchez was speaking against the company. It said that the damn company wasn't worth a darn, that what they were promising us was just a bunch of words, so that we would not organize, and as witnesses he had Alberto Zapata only, and the following was about Yolanda Ortiz . . . And it said that Yolanda Ortiz was speaking with Socorro, that goddamn Joe Silva had taken some people to work in his crew, where they were paying them more, then Silva had taken the people who worked there, and the people had remained there, they had been paid less instead of giving them a raise in salary . . . it stated that Antonio Salinas, Pedro Savala [of De Lara's crew] were undecided on signing for the union . . .

Sanchez had, prior to these statements, testified that on the previous Saturday, she had a "talk" with Yolanda Ortiz. De Lara at that particular time was seated in the company bus, which was parked about ten to fifteen rows away. The rows themselves are twelve feet apart. According to Sanchez, De Lara had a notebook in his hands at the time.

Jose Gomez himself testified that the foreman's booklet contained "some reports of work . . . and . . . reports on the workers, how we worked":

> Q: (By General Counsel): Do you remember any particular names you read about?
>
> A: Socorro only.

Gomez stated that he read an account about Socorro that she was talking "in an exaggerated manner in the crew . . . about the foreman and all that." Further, when asked if he could recall any other names that he read in the book, Gomez replied "Yolanda," undoubtedly referring to Ortiz. Subsequent to Gomez' examination of

the book, the foreman remarked to Gomez that there were "some other papers there over work that I could have read."

On cross-examination, when asked by respondent's attorney whether there was anything in what Gomez had read concerning anyone's Union activities, Gomez replied in the negative.

Numerous supervisors attested to the fact that they were aware of organizing activities taking place at Southdown, both in 1980 and 1981, and that such activities were carried on quite openly. DeLara himself freely stated that Sanchez and Gomez were known by him to be "active with the Union." DeLara denied, however, that he made lists or reports about people who were involved in Union activities.

I am simply unable, from a factual standpoint, to revolve this issue in favor of the General Counsel. On balance, Sanchez's assertions concerning the contents of De Lara's "book" were uncorroborated by Gomez, a Union activist, who was unable to affirmatively state that the notes contained any manifestation of the alleged organizational surveillance.[144/] By Sanchez's own admission, De Lara was at minimum 120 feet away from where she "talked" to Ortiz. Even given the inference that Sanchez was shouting, it is doubtful whether De Lara heard, and then recorded, the conversation in as an elaborate a detail as Sanchez recounted. This casts doubt on the probative force of the entirety of her testimony, most notably her assertions regarding workers Salinas and Savala. Such testimony would have undoubtedly provided support for

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144. The "best evidence" of De Lara's book would naturally be the book itself, if such existed.

the allegation under consideration had it been corroborated by Gomez.[145] As the evidence presented by General Counsel fails to preponderate in the instance, it is recommended that this allegation be dismissed.[146]

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145. General Counsel argues from Gomez' testimony that he only spent about three or four minutes looking at the book and "had not read much of it." However, it was Gomez who brought the book to Sanchez' attention, and Gomez whom the foreman noticed as examining the book, as indicated by De Lara's remarks to him. Sanchez stated that she stopped reading because the foreman was coming. If Gomez first perused the book, gave it to Sanchez, and then was seen by the foreman reading it, it may be inferred that he had at least as much opportunity to view its contents as she did.

146. Notably, employee Hidelisa Galaviz testified that foreman Lupe Velasco, in early 1980, was making lists of union supporters threatening to turn the list over to supervisor Gabriel De Santiago, and stating that those who had signed would have "no more work." Velasco denied saying or doing any of the matters asserted by Galaviz. Consequently, I expressly make no findings in connection therewith. However, the testimony is strangely reminiscent of the substance of the allegation contained in this paragraph.

6. Paragraph 5(f):

General Counsel alleged that on or about February 16, 1981, respondent's supervisor Ramon Garcia interrogated worker Leopoldo Guillen concerning his Union activities.

Employee Guillen[150/] had signed a Union authorization card during the 1980 pruning. He was hired in 1981 to perform tying work and began working at Southdown during January. Guillen stated that he was "elected" as member of the Union committee. Pursuant to that position Guillen distributed Union fliers and discussed the Union with his co-workers.

On February 12, 1981, a meeting at the King City fairgrounds was held under the auspices of the Union. Many of respondent's workers, including Guillen, attended that meeting. Several days thereafter, Guillen was discussing what had happened at the meeting with co-worker Alfonso Barbosa who, partenthetically, was a Union crew representative. Foreman Garcia was, at that time, walking down the rows checking the work of his crew. As he approached Guillen and Barbosa, Garcia, according to Guillen, "asked some questions": "What purpose do you have or what is the reason for you signing up with the union?" Guillen responded that they were fighting for their "seniority." Such was the sum total of the alleged "interrogation."

When called to testify, Garcia candidly stated that during the 1981 pruning season he was aware of Union activity occurring in

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150. Guillen was one of the alleged discriminatees enumerated in Paragraph 5(h). The extent of his Union activities in 1980 appears in the section wherein that charge is discussed.

his crew, that conversations regarding it were going on "all over the place." However, he denied that he made a list of those whom he believed supported the Union, asked people if they were for or against the Union, or whether they had signed authorization cards.[151/] He specifically denied asking Guillen the reason why he had signed for the Union.

Alfonso Barbosa, the only other person percipient to the "interrogation," was not called as a witness. It would be a simple matter, therefore, to state that given the conflicting accounts of the incident, the evidence supplied by the General Counsel does not preponderate, and that therefore the allegation should be dismissed. (See S. Kuramura, supra.) Nevertheless, even if I were to maintain that Guillen's version was deserving of credence, the "surrounding circumstances" of the denominated "interrogation" do not disclose any details which might be termed "coercive" and hence violative of the Act. (See Maggio-Tostada, supra; Harry Boersma Dairy, supra.) Garcia's questioning arose in the context of work, and appeared to be remarks made in passing as Garcia arrived at a particular time and place while Union organization was being discussed. Nothing in Garcia's remarks suggests a coercive reaction to Guillen's replies, nor do they hint of any reprisals which would be taken as a result of the information obtained. Further, Garcia's awareness of the

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151. Interestingly, Garcia did make up an "evaluation" sheet for his crew in the previous season. In it were listed all the members of his crew with Garcia's assessment of their particular work habits, efforts, and attitudes. Garcia apparently did this on his own initiative, since there was no evidence of any stated company policy regarding such lists, nor were there any other such lists made by other foremen.

involvement of particular crew members in Union activity would seem to undercut the inference that the foreman, by his questions, was seeking to obtain knowledge of who among his crew was in favor of the Union.

Lastly, an employer of his/her agents are free to discuss unionization with their employees and express their respective views as long as the discussions do not contain any "threats of reprisal' or "promises of benefits" (See, generally, ALRA §1155; McFarland Rose Production Co. (1980) 6 ALRB No. 18; Gissel Packing Co. v. N.L.R.B. (1969) 395 U.S. 575.) Wholly absent from Garcia's inquiries to Guillen were any such "threats" or "promises." The import of his questions appears fairly innocuous, and seems to indicate that they arose in the general context of discussion on unionization, which, under the "free speech" aspects of the Act, Garcia was at liberty to engage in.

Accordingly, it is recommended that this allegation be dismissed.

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7. Paragraph 5(g)

General Counsel alleged that foreman De Lara, in February 1980, interrogated agricultural employees regarding who among them had signed authorization cards.

As with the allegation contained in Paragraph 5(d) above, the substance of the evidence presented by the General Counsel was provided by Socorro Sanchez. This evidence, however, fell far short of establishing the essential elements of a violation of the Act resulting from an unlawful interrogation. The testimony Sanchez proferred on this issue was that De Lara had told her that he had been making a list of those who had signed authorization cards. He was going to give this list to the company and it would then fire those workers.147/ De Lara stated further, according to Sanchez, that he was leaving her name off the list so that her job would be protected.

De Lara denied that the conversation took place, and that he had any such list.

Respondent persuasively argues that it would be anomalous for De Lara, who admitted knowledge that Sanchez was a minor union supporter, to allow her to become privy to such potentially damaging information. Even if one were to credit Socorro's statement, the workers's testimony does not provide any indication that De Lara questioned her or any of her fellow employees about their union sentiments, pro or con. She merely states that de Lara imparted certain information to her. While de Lara's remarks might indicate

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147. Once again, as discussed supra, this testimony echoes that which worker Galaviz provided in reference to foreman Velasco.

he was engaged in unlawful surveillance, this was not alleged.

More importantly, General Counsel called several named discriminatees who were members of the de Lara crew at the time in question.[148] None of these provided corroboration of any element of Sanchez' testimony, nor did they testify concerning any questioning by De Lara about their union sympathies. This omission is all the more glaring since in its Response to the Bill of Particulars General Counsel explained the allegation under scrutiny as follows: "Juan de Lara interrogated his entire crew . . . at the end of the work day." (Emphasis supplied.)

It is therefore recommended that this allegation be dismissed.[149]

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148. These witnesses included Maria Lopez, Dominga Gayton, and Silvestre Delgado.

149. General Counsel argues in its brief that De Lara's statements to Sanchez were "coercive". The statements, if made, would undoubtedly be so. However, I am unable to credit Sanchez' testimony to that effect, as per S. Kuramura (1977) 3 ALRB No. 49.

III. SUMMARY AND CONCLUSIONS

A. It is recommended that the following allegations be dismissed:

1. Discriminatory failure to re-hire seasonal employees in December, 1980 (Paragraph 5(h));

2. Discriminatory layoffs of two crews in February, 1981 (Paragraph 5(i));

3. Threatening employees with immigration activities in order to coerce them into refraining from engaging in protected activities (Paragraph 5(c));

4. Engaging in surveillance of Union activities in February, 1981 (Paragraph 5(d));

5. Interrogating employee Leopoldo Guillen (Paragraph 5(f));

6. Interrogating employees in February, 1980 by foreman De Lara (Paragraph 5(g)).

B. It is further recommended that a violation of section 1153(a) be found based on the unlawful interrogation of employee Rosa Morfin in early 1980 (Paragraph 5(b)).

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ORDER

Respondent, McCarthy Farming Co., Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interrogating employees concerning their participation in concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

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

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

(b) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by contractor Joe Silva to work for Respondent at any time during the period from November 30, 1979, until September 3, 1980.

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

(d) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by questioning Rosa Morfin in January, 1980 about her union activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

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

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you.
4. To bargain with your employer to obtain a contract covering 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 or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to question Rosa Morfin about her Union activities and threatening her for engaging in these activities. WE WILL NOT hereafter question any employee simply because they engage in union activities.

DATED:

McCARTHY FARMING CO., INC.

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board.

DO NOT REMOVE OR MUTILATE.