Salinas California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. R. NORTON COMPANY,	)		
	)	Case Nos.	
Respondent,	)	79-CE-78-EC	79-CE-360-SAL
	)	79-CE-142-EC	79-CE-362-SAL
and	)	79-CE-236-EC	79-CE-366-SAL
	)	79-CE-264-SAL	79-CE-367-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	79-CE-359-SAL	79-CE-367-1-SAL
	)		
Charging Party.	)	8 ALRB No. 76	

DECISION AND ORDER

On June 5, 1981, Administrative Law Officer (ALO) Michael H. Weiss issued the attached Decision in this proceeding. Thereafter, the United Farm Workers of America, AFL-CIO (UFW) and Respondent J. R. Norton each timely filed exceptions with a supporting brief, and the UFW, Respondent and the General Counsel each filed a reply brief.[1/]

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

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

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[1/]Respondent moved to strike footnote 1 in the UFW's brief in reply to Respondent's exceptions, which contains a quotation from a grower-shipper journal. We find it unnecessary to rule on Respondent's motion, as we have not relied on that footnote in reaching our findings of fact and conclusions of law.

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

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

Failure to Rehire Don Jose Ramirez's Wrap Machine Crew

Foreman Don Jose Ramirez's lettuce wrap machine crew (Crew W) began work in Salinas on May 7, 1979, and was laid off about two weeks later, on May 23, because the wrap machine broke down. Ramirez took the names and telephone numbers of the 30 to 35 crew members and told them that he would call them back to work as soon as the machine was repaired. Five or six of the crew members were immediately assigned to another machine crew. Three of the crew members who were laid off (Maria Ramirez, Ramona Lujan and Maria Soila Lerma) each .sought work several times in the weeks following the layoff, by applying at Respondent's office or directly to Ramirez. Each time they were

[3/]Respondent has excepted to many of the ALO's credibility resolutions. To the extent that an ALO's credibility resolutions are based on the demeanor of the witnesses, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) Our review of the record herein indicates that the ALO's credibility resolutions are supported by the record as a whole, including his crediting of forewoman Maria Sagrario Perez's testimony at the reopened hearing in this case. Contrary to Respondent's assertion, we find her testimony at the reopened hearing to be internally consistent, and find no reason to discredit it. However, we have found it unnecessary to rely on her testimony in making our findings of fact and reaching our conclusions of law in this matter.

[4/]After the ALO issued his Decision and recommended Order, the UFW moved to consolidate this matter with another case (Case No. 81-CE-12-SAL) pending against Respondent. Respondent filed an opposition to the motion. As we find that the requested consolidation would not effectuate the purposes of the Agricultural Labor Relations Act, we hereby deny that motion.

told that the wrap machine was not yet repaired and that they would be notified when it was ready. The ALO found that Respondent violated section 1153 (c) and (a) of the Agricultural Labor Relations Act (Act) by laying off the members of Crew w because of their union activities. Respondent excepts to that conclusion.

We reject the ALO's conclusion that the layoff of Crew W constituted a violation of the Act. As there is insufficient evidence to establish that the wrap machine breakdown was contrived, we find no discriminatory basis for Respondent's action on May 23. However, there is ample support in the record for the conclusion that Respondent violated section 1153(c) and (a) by failing and refusing to rehire the members of Crew W later in the season when new wrap machines were put into operation.[5/] (Sam Andrews' Sons (Aug. 15, 1980)

6 ALRB No. 44.)

The members of Ramirez's wrap crew were openly engaged in various union activities: they talked with UFW representatives in the fields, distributed union literature, wore union buttons, and insignia, and were the first group to select a crew representative. On the day the wrap machine broke down, members

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[5/] Contrary to the ALO, in reaching this conclusion, we do not rely on the testimony of Maria Montiel and Elisa Covarrubias, who testified that forewoman Perez pointed to a wrap machine and said it would be stopped because all the people were Chavistas. Montiel testified that the machine Perez pointed to was not Ramirez's machine, which later broke down, but foreman Abelardo's machine. Covarrubias was not sure which foreman was in charge of the machine to which Perez pointed, but, in light of Montiel's testimony, we cannot find or infer that the machine was Ramirez's.

of Crew W had placed UFW flags on the machine. Respondent's anti-union animus, as well as its knowledge of this union activity, is amply demonstrated in the remarks of forepersons Ramirez and Perez and vice president Pena, described in the credited testimony of Maria Ramirez, Lujan and Lerma. Respondent's knowledge of Crew W's union activity, coupled with strong evidence of its anti-union animus, and the fact that crew members were not recalled, even after new wrap machines were put into operation, establish General Counsel's prima facie case of a section 1153 (c) violation.

Upon the General Counsel's establishment of a prima facie case, the burden shifts to Respondent to establish that it would have taken the same action absent the employees' protected activities. (Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18; Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721.) We find that Respondent failed to meet this burden. Although Ramirez was not reassigned to another wrap machine for the remainder of the season, Respondent was well aware that members of Crew W wanted to return to work, since several Crew W employees checked at the office several times looking for work. Another wrap machine started in July, and employee Lerma testified that she saw four machines working in June. The evidence indicates that workers from one crew were often moved to another crew and, on one occasion, two crews were merged into one. In fact, when Ramirez's machine broke down, five or six employees from Crew W were immediately

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transferred into another machine crew.[6] Respondent argues that there is insufficient evidence to establish that all of the other Crew W members thereafter applied for rehire. However, such attempts were unnecessary, since Ramirez took the crew members' telephone numbers and informed them that he would call them when the machine was fixed. (George Lucas and Sons (Oct. 23, 1979) 5 ALRB No. 62.) Respondent failed to show that the employees in Ramirez's crew who were laid off on May 23, 1979, would not have been recalled even absent their protected union activity. We therefore conclude that Respondent violated section 1153 (c) and (a) of the Act by failing or refusing to rehire the members of Ramirez's wrap machine crew because of their union activities.[7]

Denial of Work to Ramon Diaz on August 14, 1979

Respondent has excepted to the ALO's conclusion that Respondent violated section 1153(c) and (a) of the Act by refusing to hire Ramon Diaz on August 14, 1979, because of his union activities. As we find merit in this exception, we reverse the ALO's conclusion and hereby dismiss that

[6] Maria Ramirez testified that the five or six crew members who did not vote during the selection of a union crew representative were not the same crew members who were immediately assigned to another machine crew when Ramirez's machine broke down and the other crew members were laid off.

[7] During the compliance stage of this proceeding, the Regional Director will determine the precise date(s) on which work for which members of Crew W were qualified became available, for purposes of determining the starting date of each discriminatee's backpay period. (Golden Valley Farming (Feb. 4, 1980) 6 ALRB No. 8.) Since some of the crew members were immediately transferred to another crew on May 23, 1979, Respondent has incurred no backpay liability as to those workers.

allegation of the complaint.

Diaz was rehired by Respondent in late 1977, and was an active union adherent during the 1979 Salinas harvest. In June or July of 1979, he was elected to represent the ground crews on the UFW's ranch committee. One of his responsibilities as a committee member was to communicate employees' grievances to foremen and supervisors and to assist in resolving problems that arose between Respondent and its workers.

On August 9, vice president Peter Orr notified the harvesting crews that they were being laid off until August 15, because of the poor quality of the lettuce and the low market price. As the market situation apparently improved over the weekend, Orr told his supervisors to arrange for the harvest workers to return on Monday, August 13. Foreman Obdulio Magdaleno went to Respondent's Galinas labor camp early on August 13, and told the 15 workers there, including Diaz, that there would be work for them that day. Diaz declined the offer, stating that he had not expected to return to work that day and was tired (he had spent the weekend at a UFW march and convention in Salinas). Other employees agreed to work, and several of them asked Diaz whether it was all right to work. Diaz said it was all right and did not discourage any of the other employees from working.

The next day, August 14, the foremen arrived early at the camp to pick up workers. Foreman Pedro Juarez told the employees at the camp that there was work for all who

wanted it. The ALO credited Diaz's testimony that Juarez called him an agitator because he had told people not to return to work on the preceding day. Diaz ate breakfast and then went out to the bus, where foreman Pedro Flores said there was no work for Diaz because he (Flores) already had enough staplers. Diaz testified that, although he usually works as a stapler, he has worked at cutting and packing lettuce when there is no stapling work, and that he was willing to cut or pack that day. Diaz returned to work on August 15, the day crews were originally scheduled to resume work.

We find that the evidence does not establish that Respondent's foremen denied Diaz work for a discriminatory reason, since the General Counsel failed to establish that there was any work available for Diaz on August 14, after he finished his breakfast. By the time Diaz finished his breakfast, Juarez, his regular foreman, had already left the camp. Diaz testified that, when foreman Flores said he did not need any staplers, he did not ask Flores for work cutting and packing because he saw that the bus was full. As the General Counsel has failed to establish a prima facie case that Respondent discriminatorily deprived Diaz of employment, we hereby dismiss the allegation in the complaint to that effect.

Threat to Diego De La Fuente in August 1979

We affirm the ALO's conclusion that Respondent violated section 1153(a) of the Act when crew pusher Raul Ramirez yelled at Diego De La Fuente and threatened him with discharge because he had engaged in union and protected concerted activities.

De La Fuente had missed work three times during the week, twice for meetings of a worker's industry negotiating committee and once for the August 28, negotiations meeting between Respondent and the UFW. He had received prior permission for each absence from either foreman Roberto Santamaria or crew pusher Abel Luna. When De La Fuente returned from the third meeting, Ramirez, who had just replaced foreman Santamaria while he was on vacation, angrily told De La Fuente in the presence of the crew that the next time De La Fuente went to a meeting, he would have to ask Ramirez for permission personally, and that Ramirez would fire him the next time he was late.

In its exceptions brief, Respondent suggests that De La Fuente was absent on several occasions without seeking prior permission from a supervisor. The record evidence, however, is to the contrary, and instead supports the ALO's finding that De La Fuente had received a supervisor's approval for each of his previous absences. There was no evidence that Respondent required any employee to do anything more than inform his or her supervisor of an upcoming absence. We find that Ramirez's threat to De La Fuente, a prominent union activist, in the presence of the crew, tended to interfere with De La Fuente's and other employees' section 1152 right to engage in protected concerted activity and therefore constituted a violation of section 1153(a) of the Act.[8]

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[8] Member McCarthy would find nothing remotely violative of the Act in temporary foreman Raul Ramirez's directive to Diego De La Fuente that he seek permission before being absent from work. (Martori Brothers Distributors (July 27, 1981) 101 Cal.App.3d 826.

Unilateral Wage Increase Instituted Effective September 4, 1979

The ALO concluded that Respondent violated section 1153 (e) and (a) of the Act by unilaterally increasing its employees' wages effective September 4, 1979, without bargaining with the UFW, its employees' certified bargaining representative. Respondent excepted to that conclusion, arguing that the September wage increase was consistent with its past practice of remaining competitive in the industry, and that the UFW had accepted Respondent's interim wage proposals in the previous two years. Respondent further argued that it acted in good faith by notifying the Union of its intent to raise wages and giving the Union a chance to bargain over a proposal. The UFW, however, rejected Respondent's wage proposal twice and was unyielding in its position that it wanted Respondent to accept an overall contract package, including all economic and non-economic terms.

We find no merit in Respondent's exception. A review of the parties' bargaining history and the facts leading u? to implementation of the wage increase indicates that Respondent did not engage in good faith bargaining over the increase.

Respondent began negotiating with the UFW in 1975, shortly after the UFW was certified as the exclusive bargaining representative of the employees of its Salinas operations.[9] The parties met only during the Salinas harvest and then suspended negotiations until the harvest returned to Salinas. During their 1976 negotiations, the UFW and Respondent agreed to almost

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[9] (See J. R. Norton Co. (Nov. 24, 1975) 1 ALRB No. 11.)

all the terms of the then existing collective bargaining agreement between another grower, Inter-Harvest, and the UFW,[10/] and negotiated several local issues. In 1977 and 1978, the UFW either agreed to or did not oppose Respondent's implementation of interim wage adjustments that were an integral part of the Inter-Harvest agreement.

In 1979, Respondent advised the UFW that it would not join other growers in industry-wide bargaining,[11/] but would negotiate with the UFW separately while monitoring the industrywide negotiations. The industry-wide bargaining group did not meet with the UFW between February 28 and June 1979, because the employers in the group had declared an impasse.[12/] Negotiations resumed in June 1979, with the Union and industry representatives exchanging proposals. Richard Thornton, Respondent's negotiator, was also one of the principal negotiators in the industry-wide bargaining, and presumably reported the progress of those negotiations to Respondent.

On August 20 and 21, a majority of Respondent's harvesting crews engaged in work stoppages in order to induce Respondent to resume bargaining and sign a contract with the UFW.

[10/] Most other area vegetable growers had also agreed to the terms of the Inter-Harvest agreement with the UFW, and the parties referred to it as the "master agreement".

[11/] The nature and history of the industry-wide bargaining which occurred in the vegetable industry in 1978 and 1979 is described in Admiral Packing Company, *et* al. (Dec. 14, 1981) 7 ALRB No. 43.

[12/] In Admiral Packing Company, supra, (Member McCarthy dissenting) we found that the impasse declared by the employers was not a bona fide impasse.

On the morning of Tuesday, August 21, Peter Orr, Respondent's vice president, went to the field and told the employees that Respondent was agreeable to meeting with the Union to negotiate. Orr provided a telephone number for a UFW representative to call to make arrangements for a meeting.

Respondent and the UFW met on August 28. At that meeting, the Union expressed disappointment with Respondent's wage proposal of $4.60 an hour for lettuce cutters and packers and a general field wage rate of $4.50. Several other area contracts included a $5.10 hourly rate for cutters and packers. The rest of Respondent's proposal was nearly identical to the proposal made by the employers at the industry-wide bargaining in June, two and a half months earlier, with the exception that a few holidays were deleted. At the end of the meeting, the parties scheduled another meeting for September 12, two weeks later, to give the Union an opportunity to respond to Respondent's proposal.

Beginning August 31, and continuing thereafter for 8 or 9 work days, a majority of Respondent's employees participated in work stoppages, continuing the demand they presented on August 20 and 21, that Respondent resume bargaining with the UFW and reach contract.

On September 5, Respondent sent the UFW a telegram which modified Respondent's latest wage proposal, increasing the general field rate to $5.00 and the lettuce rates to $5.10 for cutting and $5.30 for packing. The remainder of the telegram read as follows:

> The company intends to adjust its present wages to the 1979 proposal effective week ending September 10, 1979. This wage adjustment in no way represents a commitment

> by the union and/or the company regarding future wages or any retroactive application of wages and benefits negotiated by the company and the union, but is simply a continuation of the past practice of the company to insure that its agricultural employees receive wage rates equal to that established by the industry as a whole.
>
> If we do not hear from you by September 10, 1979, we will assume that you are in agreement with this interim adjustment.

On September 6, the Union sent Respondent a telegram in which it rejected Respondent's telegraphic wage offer and indicated that all economic and noneconomic issues were still outstanding and needed to be resolved in negotiations. Respondent replied by telegram on September 7, requesting that the Union reconsider its rejection of the September 5 wage proposal. On September 12, the parties met for a bargaining session at Hartnell College in Salinas, with more than half of Respondent's work force in attendance. At that meeting, which lasted only 10 or 15 minutes, the Union repeated its rejection of Respondent's wage proposal absent negotiations on an overall contract package. The Union's negotiator offered Respondent its choice of two options: (1) to accept the terms of a contract recently signed between Sun Harvest and the UFW, or (2) to begin bargaining from the UFW's June 8 industry bargaining proposal. Respondent's negotiator, Richard Thornton, said that Respondent would need time to review the Sun Harvest agreement.

On September 12, Respondent instituted the pay raise it had proposed in its September 5 telegram. The rates became effective in paychecks for the week September 4 through September 10.

Respondent argues that the wage increase was merely a

continuation of its past practice, and thus an exception to the holding of NLRB v. Katz (1972) 369 U.S. 736 [50 LRRM 2177] that an employer violates section 1153(e) and (a) of the Act by changing its employees' wage rates without bargaining with their certified bargaining representative. As the ALO noted, Respondent has a heavy burden of showing that the increase was automatic and granted according to definite guidelines. (NLRB v. Allis Chalmers Corp. (5th Cir. 1979) 601 F.2d 870 [102 LRRM 2194].) We have held that, where the amount and/or timing of a wage increase is informed by a substantial measure of discretion, an employer violates the Act by granting such an increase without prior notice to or bargaining with the union. (Kaplan's Fruit and Produce Company (July 1, 1980) 6 ALRB No. 36; N. A. Pricola Produce (Dec. 31, 1981) 7 ALRB No. 49; George Arakelian Farms (May 20, 1982) 8 ALRB No. 36.) If wage increases are granted with such regularity that they can be considered automatic, but the employer exercises some degree of discretion concerning, for example, the amount or timing of the increases, the employer may lawfully implement the increases but must bargain over the discretionary aspects thereof. (Oneita Knitting Mills (1973) 205 NLRB 500 [83 LRRM 1670].)

Respondent has failed to show that the wage increase it granted effective September 4 was a continuation of its past practice or was granted according to definite guidelines. Although it had granted interim wage increases in the previous two years with the Union's approval or tacit acquiescence, both of those wage changes occurred in mid-July. Both wage increases were the

same as those provided for in the Inter-Harvest agreement, the terms of which had been implemented by Respondent while the parties were negotiating. In contrast, the wage increase at issue in this case occurred in early September and was based on no articulated objective criteria.[13/] The only evidence of past practice concerns wage rates dictated by a contract over a relatively short period of time. Such evidence is insufficient to meet Respondent's burden of proving that the increase was automatic. (Martori Brothers, concurring opinion (Mar. 23, 1982) 8 ALRB No. 23.) In short, there is no evidence that the September 1979 increase was anything but discretionary.

Respondent also argued that it would have been useless for it to attempt to negotiate with the UFW over the wage increase, since the Union had already rejected the proposal twice, once by telegram and once at a negotiating session, and the UFW's position was clear and unyielding that it wanted Respondent to accept an overall contract package, including all economic and noneconomic terms. Respondent argued that it showed good faith by notifying the Union of its intent to implement a wage increase and giving the Union a chance to bargain.

Respondent clearly informed the Union of its intended wage increase. However, the National Labor Relations Board (NLRB) scrutinizes such notice given by an employer in order to determine

[13/]Respondent asserted in its September 5 telegram that it was raising wages in order to remain competitive. However, both Richard Thornton, Respondent's negotiator, and Marion Steeg, the Union's negotiator, testified that, at the time of the parties' bargaining meetings in August and September of 1979, no industry-wide rate had yet been established in the area.

whether the employer is acting in good faith or in a manner that undermines the collective bargaining process. The national board requires that, if an employer notifies a union that it wishes to implement a wage increase, such notice must be given to the union early enough to allow the parties to engage in fruitful negotiations. (NLRB v. J.H. Bonck Company (5th Cir. 1970) 424 F.2d 634 [74 LRRM 2103] -- employer violated section 8(a)(5) of the National Labor Relations Act (NLRA) (analogous to section 1153(e) of our Act) by instituting wage increase three days after making economic proposal to union; NLRB v. Exchange Parts Company (5th Cir. 1965) 339 F.2d 829 [58 LRRM 2097] -- employer violated the NLRA by implementing layoffs only a few hours after notifying union of intended layoffs, since unilateral action frustrated statutory objective of establishing working conditions through collective bargaining and denied the union the opportunity to make reasonable counterproposals.) The employer must afford the bargaining representative sufficient advance notice to permit a reasonable opportunity for meaningful collective bargaining with regard to the intended action. (Beryl Chevrolet, Inc. (1975) 221 NLRB 710 [91 LRRM 1030].)

On September 5, Respondent made a proposal to increase wages to rates greater than those it had proposed in previous bargaining sessions, and then notified the Union that it intended to implement the new wage rates unless it heard from the Union by September 10, two days before the next scheduled bargaining session. Respondent had made a complete contract proposal at the August 28 meeting, and the September 12 meeting was scheduled in

order to give the Union an opportunity to respond to that proposal. However, before the Union could offer its counterproposal, Respondent gave notice to the Union of its intent to implement higher wage rates than the parties had previously discussed and requested the Union's approval. Although the Union, by its telegram of September 6, and orally at the September 12 meeting, rejected the proposed wage increase, Respondent instituted the increase on September 12, to be effective for the work week beginning September 4. Lucretia Gower, Respondent's payroll clerk, testified that, about a week before the end of that payroll period (September 10), Peter Orr told her to hold up on the final pay figures for the paychecks because Respondent planned to implement a new pay raise. The new figures were given to Gower on September 12, and she used them for the payroll for the pay period ending September 10. It appears from the timing of the increase that Respondent was not interested in engaging in serious bargaining about the new wage proposal and had no intention of providing the Union with an adequate opportunity to bargain. (Beryl Chevrolet, Inc., supra, 221 NLRB 710.)[14/]

The NLRB disapproves of the type of "piecemeal"

[14/] We find that the Union did not waive its right to bargain over the wage change by insisting on negotiating a full contract. The NLRB will not lightly infer that a union has waived its right to bargain over any mandatory subject of bargaining. (Caravelle Boat Company (1977) 227 NLRB 1353 [95 LRRM 1003]; Kaplan's Fruit and Produce Company, supra, 6 ALRB No. 36.) In the present case, the UFW responded to both of Respondent's inquiries by stating that it wished to continue full negotiations rather than bargain over a single issue.

bargaining suggested by Respondent's attempts to isolate the single issue of wages from the remainder of the contract terms to force the Union to bargain over that one issue. For example, in Kroehler Mfg. Co. (1976) 222 NLRB 1269 [91 LRRM 1382], the national board found that an employer violated section 8(a)(5) of the NLRA by unilaterally changing the working conditions of its unit employees without first bargaining with the union and that the employer's action was not justified by either its alleged difficult economic situation or the union's failure to promptly request bargaining about the proposed changes. The NLRB found that the union had not waived its bargaining rights, and had instead immediately responded by presenting a proposal for a full contract and urging the company to expedite negotiations. The NLRB noted that:

> The Union was under no obligation . . . to negotiate this, its first contract, on a piecemeal basis. All terms and conditions of employment were subject to negotiation and, indeed, were on the bargaining table.... The Union by seeking to negotiate and reach agreement on a complete contract ... cannot be found to have waived its bargaining rights or to have been dilatory in failing to seek prompt bargaining only on the three changes which Respondent proposed to implement immediately. Respondent's asserted generally poor business conditions in our view did not provide such an emergency situation as might have required the Union to abandon the normal approach to collective bargaining in favor of a piecemeal or ad hoc approach. (Kroehler Mfg. Co. , supra, 222 NLRB at 1270-1271.)

The NLRB views with disfavor a piecemeal approach to negotiations because of the interdependence of the issues discussed in bargaining. "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other

areas." (Korn Industries, Inc. v. NLRB (4th Cir. 1967) 389 F.2d 117, 121 [67 LRRM 2148.) In Federal Pacific Electric Company (1973) 203 NLRB 571 [83 LRRM 1201], the NLRB rejected the employer's attempt to bargain over the single issue of an immediate wage increase, where the union declined to negotiate on just one item, and instead requested resumption of full bargaining negotiations. The company's implementation of its proposed wage increase was found to be evidence of bad faith bargaining.

In Winn-Dixie Stores, Inc. (1976) 224 NLRB 1418 [92 LRRM 1625], the NLRB considered a factual situation strikingly similar to that in the instant case. In Winn-Dixie, during the course of negotiations, the employer proposed an immediate wage increase so that it could remain competitive in the labor market. The union refused to consent to the increase and requested continued bargaining concerning all the contract terms. The NLRB found that the employer's implementation of the wage increase violated section 8(a)(5) of the NLRA, rejecting the company's argument that, once it had informed the union of its proposed action and allowed the union reasonable time to discuss the change, it could grant the increase even over the protest of the union and before reaching impasse. The NLRB agreed with its administrative law judge that:

> ... Application of such a view ... would make a mockery of collective bargaining. For, it assumes that "reasonable time to discuss" is afforded simply by proposing the change in two letters and then putting it into effect after a single bargaining session and hence envisions contract negotiations as a one-sided formality whereby mandatory subjects of bargaining sought by an

employer, need not await agreement on a contract, but may be implemented directly simply be [sic] being placed on the table, and remaining there only for the period necessary to evoke union protestations. (Winn-Dixie Stores, Inc., supra, 224 NLRB at 1437.)

On appeal, the Fifth Circuit rejected the national board's conclusion that Winn-Dixie violated section 8(a)(5) and (1) of the NLRA by implementation of the wage increase, finding that the employer complied with its statutory duty to bargain by giving the union notice of its desire to raise wages and meeting with the union in a bargaining session at which the union presented counter-proposals. (Winn-Dixie Stores, Inc. v. NLRB (5th Cir. 1978) 567 F.2d 1343 [97 LRRM 2866].)

However, Winn-Dixie continued to unilaterally raise its employees' wages, and the NLRB had another opportunity to comment on Winn-Dixie's piecemeal approach to bargaining. (Winn-Dixie Stores, Inc. (1979) 243 NLRB 972 [101 LRRM 1534].) In that' case, the employer, by letter, again proposed to implement a wage increase immediately without prejudice to further bargaining on the subject. The union rejected the offer and requested resumption of bargaining, stating its desire to bargain with the employer not only over wage increases, but increases in other benefits as well and other terms and conditions of employment. There was no major change in the parties' contract positions at the next bargaining session, but the company stated that it was eager to implement the wage increase because the employees had not received a raise in 18 months and an increase was needed to keep the company's wage rates competitive with other employers in the area. The union again refused and

insisted on reaching agreement on a variety of terms before agreeing to any pay raises. The parties met later on two consecutive days, after which the employer advised the union that it was implementing the proposed wage increases.

On the above facts, the NLRB concluded that Winn-Dixie violated section 8(a)(5) and (1) of the NLRA. The board discussed the Fifth Circuit's earlier Winn-Dixie opinion, and reaffirmed the board's position that "absent extenuating circumstances, an employer must bargain to impasse prior to implementing unilateral changes in working conditions."[15/] The national board noted that the Fifth Circuit Court's approach would allow an employer to unilaterally change any term or condition of employment as soon as the bargaining representative was notified and given an opportunity to discuss the change. An employer would thus be able to implement any and all changes it desired regardless of the state of the negotiations. The board found that that method of "bargaining" did not satisfy the statutory definition of the duty to bargain:

> ... Instead, under this approach, form, rather than substance, becomes the determinative factor in deciding whether the bargaining obligation has been fulfilled. In consequence, meaningful collective bargaining is precluded and the role of the bargaining representative is effectively vitiated....

[15/] In Southern Wipers, Inc. (1971) 192 NLRB 816 [78 LRRM 1070], the national board found that such extenuating circumstances existed where the parties had engaged in hard bargaining, without progess, over a long period of time, the issue was of major importance, and the employer was able to demonstrate that it was necessary to implement the change at that time. Under those circumstances, the board found the employer did not violate its duty to bargain by unilaterally implementing merit increases.

> Bargaining presupposes negotiations -— with attendant give and take -- between parties carried on in good faith with the intention of reaching agreement through compromise.... Clearly this duty [to bargain] requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond. Such tactics amount to little more than a ritual or pro forma approach to bargaining and hardly constitute the "kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement." (Fn. omitted.) (Winn-Dixie Stores, Inc., supra, 243 NLRB at 974-975.)16/

Respondent's conduct in the present case clearly evidenced the "ritual" or "pro forma" approach to bargaining described by the NLRB in Winn-Dixie. Respondent's September 5 telegram about its proposed wage increase did not so much present the Union with an opportunity to meet and bargain about the wage increase as it gave the Union a short-notice opportunity to register its approval or disapproval of Respondent's intended wage increase. (Winn-Dixie Stores, Inc., supra, 243 NLRB 972.) Under applicable NLRA precedents, Respondent may not, absent extenuating circumstances, lawfully isolate the issue of wages from the rest of the contract terms, and its asserted willingness to continue bargaining over wages after implementing the increase is immaterial to the determination that Respondent unlawfully implemented the increase. (Ibid.) We therefore conclude that

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16/ The national board has continued to follow the position expressed in both of its Winn-Dixie cases. (See M. A. Harriscn Manufacturing Company, Inc. (1980) 253 NLRB 675 [106 LRRM 1021]; National Press, Inc. (1979) 246 NLRB 1071 [103 LRRM 1087].) Although the Fifth Circuit rejected the board's position in Winn-Dixie, the national board's rationale for finding such wage changes to be violations of the NLRA was affirmed by the Fourth Circuit in Korn Industries v. NLRB, supra, 389 F.2d 117.

Respondent's implementation of the wage increase on September 12, absent impasse and without giving the UFW sufficient opportunity to bargain over the proposed increase, violated section 1153(e) and (a) of the Act.

We reject the ALO's conclusion that Respondent violated section 1153(e) and (a) of the Act by failing to meet with the UFW for 5 or 6 months following the September 12 meeting, Neither the charge nor the complaint in this matter included a general allegation that Respondent violated the Act by failing or refusing to meet and bargain in good faith with the Union during the period after the September 12 meeting. The events occurring after the September 12 meeting, if any, were not fully litigated at the hearing and therefore cannot be the basis for the finding of a violation.

The Work Stoppages and Replacement of the Workers on September 13

As noted *supra*, Respondent's harvesting crews engaged in work stoppages in order to induce Respondent to resume negotiations with the UFW and to sign a contract, and the complaint in this case alleged that Respondent violated section 1153 (c) and (a) of the Act by refusing to rehire the work stoppage participants in subsequent seasons because of their concerted activities.

Work stoppages occurred on August 20 and 21, and then for 8 or 9 consecutive work days, beginning August 31. On each day when a work stoppage occurred, the employees appeared at the regular starting time, worked for a few hours, and then left, after telling their supervisors why they were leaving. Almost

all the members of the ground crews engaged in the work stoppages, along with a majority of the wrap machine workers. The work stoppages continued until Thursday, September 13, when Respondent replaced the employees who were participating in the stoppages and prevented them from entering the fields.

Discussions among Respondent's representative, Board agents, and UFW representatives, which took place over the weekend of September 15-16, resulted in an agreement that Respondent would allow the replaced employees to return to work if they would agree to cease engaging in such work stoppages and to sign a document indicating that they would follow their foremen's orders. On Monday, September 17, the workers reported to Respondent's office and signed a document stating that they agreed to return to work and would not leave work until instructed to do so by the foremen.

At the hearing, General Counsel argued that Respondent violated the Act by replacing the work-stoppage participants on September 13 in retaliation for their protected concerted activities. Respondent argued that the work stoppages constituted unlawful concerted activity, and therefore were not protected. Alternatively, Respondent argued that it had the right to replace striking workers in order to continue its business. The ALO considered it unnecessary to resolve that issue since, regardless of the protected or unprotected nature of the employees' actions, he found that Respondent condoned the workers' allegedly unprotected concerted activities when it resumed an employment relationship with them. (NLRB v. Colonial Press, Inc. (8th Cir. 1975) 509 F.2d 85u [99 LRRM 2903]; Poloran Products of Indiana, Inc.

(1969) 177 NLRB 435 [71 LRRM 1577]; Jones & McKnight, Inc. v. NLRB (7th Cir. 1971) 445 F.2d 97 [77 LRRM 2705].) In such circumstances, Respondent could not thereafter rely on the same misconduct as a basis for discharging, refusing to rehire, or otherwise discriminating against the employees. (NLRB v. Colonial Press, Inc., supra. 509 F.2d 850; Confectionery and Tobacco Drivers and Warehousemen's Union v. NLRB (2d Cir. 1963) 312 F.2d 108 [52 LRRM 2163]; NLRB v. E. A. Laboratories, Inc. (2d Cir. 1951) 188 F.2d 885 [28 LRRM 2043].) Respondent did not except to the ALO's finding that, by allowing the replaced employees to return to work, it had condoned their prior participation in the work stoppages.[17]

We disagree with our concurring colleague's discussion of the condonation doctrine and its application to the facts of this case. Member McCarthy would find that the list signed by the work-stoppage participants, which he characterizes as a "strike settlement agreement," does not constitute condonation of the employees' activity. Member McCarthy's reference to Jones S McKnight, Inc. v. NLRB, supra, 445 F.2d 97 is confusing, since the court in that case, faced with facts quite similar to those in the present matter, found that the employer condoned the strikers' activity. In Jones & McKnight, a

[17] In his proposed remedy, the ALO recommended that Respondent not be ordered to reimburse its workers for the four days' wages they lost while they were replaced (September 13, 14, 15 and 17), since there was almost no lettuce production on September 13 and 17, and September 15 was a Saturday, usually not a work day. Neither General Counsel nor the Charging Party took exception to that portion of the ALO's proposed remedy.

group of workers engaged in a work stoppage and picketed the employer's plant in an attempt to pressure the employer to implement certain changes in their working conditions. The strike violated a no-strike clause in the employees' collective bargaining agreement. The picketing was successful, and few employees entered the plant. In an effort to resume normal production, a management representative offered to put the employees back to work and to meet some of the strikers' demands, and "reluctantly" agreed to reinstate several strikers who had been discharged, on the condition that the strikers cease picketing and remove the picket signs by a certain time. The court, after citing Packers Hide Association v. NLRB (8th Cir. 1966) 360 F.2d 59 [62 LRRM 2115] (also cited by Member McCarthy in his concurring opinion), noted that the "key element of condonation is a clearly evidenced intention and commitment on the part of the employer to overlook the misconduct and to permit a continuation or resumption of the company-employee relationship as though no misconduct had occurred". (Jones & McKnight, Inc. v. NLRB, supra, 445 F.2d at p. 103.) The court affirmed the NLRB's finding that the employer condoned the strikers' activity when it offered to allow the strikers to return to work. The court rejected the employer's argument that condonation was not established because the employer's agreement to resume the employment relationship was conditioned on the cessation of picketing so that normal production could resume, and because the employer agreed only reluctantly to reinstate certain discharged strikers. On the contrary, the court found that there was nothing equivocal about.

the employer's agreement that all of the employees could return to work.

We disagree with Member McCarthy's suggestion that a finding of condonation in the present matter is foreclosed because Respondent reinstated the work-stoppage participants subject to the condition that they not engage in similar work stoppages, or because Respondent's reason for offering to allow the workers to return was its need to resume normal production. We note that no employee was disciplined in any manner because of his or her participation in the work stoppages. No warnings or disciplinary notices were issued, and no employees were suspended. Assuming that the work stoppages were unprotected activity, the ALO's finding of condonation is fully supported by the record.

Change in Working Conditions

We affirm the ALO's conclusion that Respondent violated section 1153 (e) and (a) of the Act by removing the kitchen utensils from its Salinas labor camp and changing the manner in which the labor camp residents paid for their food, without giving the Union notice or an opportunity to bargain about those changes in working conditions. Respondent provided its workers with free lodging at a labor camp it leased, and also provided kitchen utensils for the camp and allowed the cook to purchase food for meals in Respondent's name. The food was then paid for through deductions from the workers' wages. The workers therefore received their meals at the labor camp at a reduced rate, since Respondent provided utensils for cooking and a credit line which facilitated the purchase of food. Those arrangements, provided

to Respondent's employees without charge, were a part of the workers' wages for employment services and therefore constituted terms and conditions of their employment. (Filice Estate Vineyards (Oct. 25, 1978) 4 ALRB No. 81.)

On September 13, Respondent unilaterally changed its policy by removing the kitchen utensils and requiring the workers to vouch for the check used to pay for the food at the local grocery stores, rather than relying solely on Respondent's credit. As a result, the workers had to purchase new utensils to use during the few remaining weeks of the Salinas harvest.

Respondent argued that it owned the kitchen utensils and had no duty to provide the replaced workers with a labor camp or utensils, and that, when the employees returned to work on September 17, there was a new cook and the food was purchased with Respondent's check. Respondent further asserted that the utensils were taken to New Mexico to be used in the next harvest. Those arguments do not provide a defense to the allegation that Respondent violated the Act by unilaterally changing the wages and working conditions of its employees. Respondent's witnesses testified that the replaced employees who lived in the labor camp were not discharged, and Respondent allowed them to remain in the labor camp during the period of the work stoppages and the period when they were replaced. While Respondent may not have had a duty to provide employees with kitchen utensils and a credit line before the Union was certified as their exclusive collective bargaining representative, once it established such conditions of employment, it could not lawfully change them without giving

the Union notice and an opportunity to bargain about such a change. (AS-H-NE Farms (Feb. 8, 1960) 6 ALRB No. 9; Pacific Mushroom Farm (Sept. 22, 1981) 7 ALRB No. 28.)

Refusals to Rehire Work-Stoppage Participants in Subsequent Seasons

As Respondent's harvesting operation moves around the "harvest circuit" from Salinas to New Mexico, to Arizona, to Blythe, California, to the Imperial Valley, and back to Salinas, many of its employees follow the circuit, working in some or all of the harvesting locations. The complaint in this case alleged that Respondent violated section 1153(c) and (a) of the Act by failing or refusing to rehire Salinas workers who engaged in the August and September 1979 work stoppages when they subsequently applied for work in Respondent's other harvesting locations. The ALO found that it was appropriate to analyze the evidence using the group discrimination approach we set forth in Kawano, Inc. (Dec. 26, 1978) 4 ALRB No. 104, affirmed Kawano, Inc. v. ALRB (1980) 106 Cal.App.3d 927. While we do not fully agree with the ALO's discussion of the Kawano case, nor his application of its holding to the facts of this case, we do conclude that Respondent violated section 1153 (c) and (a) of the Act by its group discrimination and failure or refusal to rehire many of the Salinas work-stoppage participants.[18]

[18] During the hearing, General Counsel argued that Respondent acted improperly by instructing forewoman Perez to make gifts to two witnesses she solicited to testify on behalf of Respondent. The ALO found that Perez bought a dress for one witness and paid another $300 in cash for her expenses. Respondent excepted to the ALO's findings concerning its handling of the witness fees. We find this matter is not an issue in the case, and we do not rely on the ALO's finding in reaching our conclusion.

Respondent's hiring practices were disputed at the hearing. General Counsel asserted that Respondent's workers were encouraged to "follow the circuit" and when they did so they were rewarded with seniority. General Counsel attempted to prove that Respondent's foremen often visited their craw members' homes or waited in special meeting places to inform the workers when the next season would begin and when buses would leave to transport them to the next harvest area. General Counsel argued that, if the workers expressed interest in working in the next location, the foremen had customarily assured them that they would have a job there. Respondent, on the other hand, disavowed any seniority or preferential hiring system and asserted that it has never hired employees in succeeding harvests on a seniority or guaranteed basis. Instead, workers were told approximately when the next; harvest would begin and, if they applied in time and there was work then available for them, they were hired. Respondent asserted that the only reasons any of the Salinas work-stoppage participants were not hired in subsequent harvests was that they did not make a timely application for work when work was available.

In order to establish a prima facie case of a discriminatory discharge or discriminatory refusal to rehire, the General Counsel must show by a preponderance of the evidence that the employee had engaged in protected activity, that the employer had knowledge of the activity, and that there was some causal connection or relationship between the protected activity and the discharge or failure to rehire. (Verde Produce Company (Sept. 10, 1981) 7 ALRB No. 27.) Where the alleged discrimination

consists of a refusal to rehire, the General Counsel must ordinarily show that the discriminatee made a proper application for work at a time when work was available, the employer's policy was to rehire former employees, and the employer refused to rehire the employee because of his or her union or other protected activity. (Verde Produce Company, supra.)

In Kawano, Inc., supra, 4 ALRB Mo. 104, the Board addressed a refusal-to-rehire allegation in the context of group discrimination, and found that the employer unlawfully discriminated against 53 documented workers from the Tijuana-San Ysidro areas who were customarily hired through a "raitero" or driver system. Under the raitero system, drivers picked up workers at the border area and drove them to the employer's fields, where they were routinely hired by the foremen. The Board found that the employer discriminated against the group of Tijuana-San Ysidro workers by dismantling the raitero system and changing its hiring policy so that workers had to apply directly in the fields.

In Kawano, this Board addressed two elements of a prima facie case of discriminatory refusal to rehire: (1) whether the alleged discriminatee made a proper application at a time when work was available, and (2) whether the General Counsel must establish that the employer individually discriminated against each employee associated with an identifiable group. The Board held that-the General Counsel need not prove a proper application was made by each employee if part of the discriminatory scheme was to prevent or discourage employees from making such applications, or if the employer changed the required method of

application without giving notice to the employees. The employees of Kawano were foreclosed from applying in their usual fashion because the raitero system had been dismantled and no effective new method of application was made available to them. The workers unsuccessfully sought work by talking to the one remaining raitero and by inquiring at Respondent's fields or in its business office.

We found that the Kawano employees had indicated their availability and desire to work, citing International Brotherhood of Teamsters v. U.S. (1977) 431 U.S. 324 [97 S.Ct. 1843], in which the court held that, even when nonapplicants are relieved of the burden of proving proper application, "a showing must be made, as to each non-applicant, that he or she would have applied but for the employer's discriminatory practices." We noted that, since the Kawano employees were available for work, and the employer hired many more than their number during the two years following the change in its hiring practice, the General Counsel was not required to prove specific application and availability of work as to each discriminatee. However, we rejected the ALO's conclusion that the General Counsel need not show specific application and availability of work in any case involving discrimination against a class of workers. (Kawano, supra, 4 ALRB No. 104 at p. 6.)

In Kawano, this Board noted that a group analysis does not relieve the General Counsel of the burden of proving that the discrimination applied to each of the employees involved. However, where the discrimination is directed at a group, the

burden as to each discriminates may be met by a showing that the group was treated discriminatorily and that the discriminatee is a member of the group. Despite the fact that Kawano hired some documented workers from the Tijuana-San Ysidro area, the Doard found discrimination against the group, noting that NLRA precedent does not require a showing that all members of the group were denied rehire. The Board's finding in Kawano was supported by evidence of discriminatory motive in the statements of John Kawano and several foremen, and in the employer's other demonstrations of anti-union animus.

On appeal, the court upheld the Board's group discrimination rationale in Kawano, noting that not all the employees who testified presented equally strong cases with respect to union activity, length of service with the employer, and persistent, strong efforts to get rehired. (Kawano, Inc. v. Agricultural Labor Relations Board, supra, 106 Cal.App.3d 937.) However, the court found that the strong cases carried the weaker cases. The court noted that, under NLRB precedent, "if an employer unequivocally and publicly promulgates his unconditional refusal to rehire a certain category of employees, proof of such promulgation excuses the need to prove individuals in the category made applications for rehire which would under the circumstances have been futile." (Kawano, Inc. v. Agricultural Labor Relations Board, supra, 106 Cal.App.3d at 952.)

Respondent's hiring practices differ somewhat from those of the employer in Kawano. Whereas all the Kawano workers applied for work with raiteros in the Tijuana-San Ysidro area,

the workers who testified at the hearing in the instant matter described the different manners in which they individually arranged for work with Respondent. Some, like Felix Garcia and Ramon Diaz, learned of the starting date for the next harvesting area when their foremen visited their homes in Calexico or sent word through other workers about when the bus would leave from Calexico. Other workers asked their foreman at the end of each season for work in the next harvest, and were told approximately when the next season would start and were assured that they would be hired. Many workers visited regular checkpoints, such as a drugstore and several gas stations in Calexico, and an ice cream parlor in Mexicali, to find out from their foreman the date on which the harvest would start in the next area. Differer workers had different practices for notifying their foremen that they wanted to travel to the next location. However, it is clear that the workers who wished to follow the circuit had developed relationships with their respective foremen that made it possible for them to obtain work in succeeding harvests year after year. Many employees who testified at the hearing had followed Respondent's circuit for over five years.

We find the facts in this case different from Kawano, where the employer dismantled its raitero system. Here, Respondent's foremen, in many individual cases, changed their usual procedure of advising workers when the next harvest would start, thus making it difficult or impossible for the workers to arrive at the next location in time to be hired. We find that Respondent discriminated against the Salinas work-stoppage

participants because they had engaged in union and concerted activities in Salinas in 1979. We base this finding on the General Counsel's showing that a clearly identifiable group of employees engaged in union activity and other concerted activity, that Respondent had knowledge thereof and harbored anti-union animus, and that several of Respondent's foremen told employees that Respondent would not rehire them because of their union and concerted activity.[19] As a result, many of the Salinas work-stoppage participants were not rehired in subsequent harvests.

A clearly defined group of Salinas employees engaged in the work stoppages. Each member of the group had to sign a list before returning to work on or after September 17. The list, which was introduced into evidence at the hearing as General Counsel's Exhibit 2, contains approximately 117 signatures. Although Respondent's vice president, Peter Orr, testified that Respondent did not retain the original of the list more than a few weeks, each of Respondent's foremen was given a copy and therefore had easy access to the names of the employees who participated in the work stoppages. In addition to the work stoppages, the Salinas employees were involved in other union activities, described elsewhere in this Decision

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[19] As noted earlier, the matter of whether the workers' participation in the work stoppages was a protected concerted activity is irrelevant because, even if the workers' conduct was not protected, once Respondent condoned that activity by resuming an employment relationship with the workers, it could not rely on the same conduct as a basis for refusing to rehire them, or otherwise discriminating against them. (Confectionery and Tobacco Drivers and Warehousemen's Union v. NLRB, supra, 312 F.2d 108.)

and in the ALO's Decision, including electing UFW crew representatives, placing UFW flags on lettuce wrap machines, wearing UFW buttons and other insignia, and participating in contract negotiating sessions. Respondent and its foremen were well aware of these activities.

As in Kawano, there is substantial direct evidence in this case that Respondent discriminated against an identifiable group, the Salinas work-stoppage participants, when they applied for work in subsequent seasons. For example, the ALO credited .employee Ramon Diaz's testimony that, when he asked foreman Pedro Juarez for work in the New Mexico harvest, Juarez replied that he had instructions from his supervisors not to give work to anyone who had been a trouble maker in Salinas. Employee Diego De La Fuente testified that, when he talked to foreman Pedro Flores in Salinas about obtaining work in New Mexico, Flores replied, "Why go there, you're not going to get work," and added that the Union "wasn't worth anything there." Foreman Juarez told employee Jose Farias that he did not know when work would start in New Mexico, but that Respondent did not want workers from Salinas. Employee Jose Alonzo worked in New Mexico for one day for foreman Enriques, who then told him that he could not continue working because there were orders from the "higher-ups" to fire him. Employee Octavio Rios testified that pusher Abelardo told him that the Respondent did not want Rios to be hired in New Mexico and did not want to hire people who

participated in the work stoppages.[20]

Further evidence of Respondent's anti-union animus is provided in our findings in this Decision that Respondent violated the Act: by refusing to rehire the members of Don Jose Ramirez's wrap machine crew because of their protected concerted activities; by threatening employee Diego De La Fuente because of his protected activity; and by unilaterally changing the wages and working conditions of its employees without bargaining with the Union.[21]

The record is repLete with examples of Respondent's supervisors changing their usual practices in order to make it difficult or impossible for the Salinas workers to apply for rehire or be rehired.[22] For example, although in previous years foreman Santamaria had notified employee Felix Garcia at

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[20] Rosendo Casillas, Eduardo Gomez, J. Refugio Chairez, Ramon Lozano, and Ernesto Montiel testified concerning similar remarks made by foremen Juarez and Flores.

[21] As further evidence of Respondent's anti-union animus, we also take note of a previous case in which we found that Respondent violated section 1153(e) and (a) of the Act by its "technical refusal to bargain" with the certified union. In determining that the makewhole remedy was appropriate, we found that Respondent did not have a reasonable good faith belief that the certification of the UFW was invalid. (J.R. Norton Company (May 30, 1980) 6 ALRB No. 26.)

[22] We note that the NLRB does not require the showing of a proper application if part of the discriminatory scheme is to prevent such applications from being made. (Piasecki Aircraft Corp. v. NLRB (3d Cir. 1970) 280 F.2d 575 [46 LRRM 2569]; Kawano, Inc., supra, 4 ALRB No. 104.) The evidence in this case indicates that many employees who participated in the Salinas work stoppages were unable to arrive at subsequent harvests in a timely manner because several of Respondent's foremen changed their customary practice of advising employees of the starting date in the next harvesting location.

home concerning when work would start in Arizona, he failed to so notify Garcia in 1979. Foreman Flores failed to call employee Ernesto Montiel when work began in New Mexico, even though he had previously promised Montiel that he would call him, and had called him in past years. Employee Juan Quintero testified that, after the 1979 Salinas harvest, the foremen stopped their previous practice of notifying the workers of the starting date for the next harvest. Although foreman Flores had, in previous years, always called at J. Refugio Chairez's house to notify him when the next season would start, he did not do so in 1979.[23]

Respondent asserted two business justifications for not rehiring the Salinas workers. We affirm the ALO's finding that the proffered business justifications are unconvincing and pretextual. Respondent argued that a decrease in the demand for lettuce caused it to reduce its work force in the 1979 New Mexico harvest. Respondent further argued that there was no change in its hiring policy, but that the Salinas workers were not hired because they did not make a proper application in a timely manner. Similar arguments were advanced and rejected in Kawano.

We agree with the ALO that, contrary to Respondent's assertion, the record evidence establishes that there was no significant decrease in the size of Respondent's work force during the 1979 New Mexico harvest. Respondent continued to hire and employ a full complement of workers in its New Mexico, Arizona,

[23] In addition, Ernesto Montiel, Abelardo Chairez, Sr., Mauricio Chairez, Juan Quintero and Ramon Diaz testified concerning changes in their respective foremen's previous practice of advising them of the starting date of the next harvesting season.

Elythe, California, and Imperial Valley harvests in late 1979 and early 1980. We find that those positions could have been, and absent unlawful discrimination would have been, filled by the Salinas work-stoppage participants who intended to follow the circuit.

Respondent's supervisors denied that they changed their hiring practices or that they were told not to hire the Salinas workers. They also denied that they ever granted any preference or seniority to workers who followed the circuit, but instead informed workers approximately when the next season would start and hired then if they applied at a time when there was work available. We first note, as did the ALO, that, although Respondent may not have followed a formal seniority system, there is abundant evidence that the workers believed an informal seniority system was in effect, and they were told that they would be given preference in hiring if they followed the circuit.[24/] In addition, Respondent maintained a list of its senior workers and rewarded continuous employment by presenting its workers with pins at an annual awards dinner commemorating their accumulation of 1,000 or 2,000 hours of work.

As noted above, there is substantial evidence that several of Respondent's supervisors did in fact discontinue their

[24/]This is reflected in the testimony of Felix Garcia, Diego De La Fuente, Maria Estela Mendoza, .Magdalena Cardoza, Maria da Jesus Montiel, Maria Montiel, Luz Montiel, Jose Alonzo, Mauricio Chairez, J. Refugio Chairez, Pedro Ilaciel and Primitive Leyva. Also, several forepersons testified that they gave some preference to workers who had worked for Respondent in the past, since the forepersons know those employees and their work.

past practice of personally contacting workers to tell them when the next season would be starting, and promising them work in that season. We find that it is highly unlikely that, absent discriminatory conduct, workers, who in past years had been able to successfully follow the harvesting circuit, would suddenly, in 1979, have so much difficulty learning when the next harvest would start. The direct and circumstantial evidence of Respondent's anti-union animus leads to the conclusion that Respondent changed its policy of giving preference in hiring to workers who followed the circuit, and of giving those workers prior notice concerning the starting dates of subsequent harvests, because of the workers' participation in union activity and other protected concerted activities in Salinas in 1979.

Respondent argued that we cannot find that it discriminated against the work-stoppage participants as a group because it did hire a certain number of the Salinas workers in the Mew Mexico harvest and in subsequent harvests. However, of the 44 harvesting employees who testified at the hearing, 34 expressed an interest in working in New Mexico or attempted to get jobs there, but only 12 were hired.[25] Of the 8 who sought work in Arizona, all but one were hired. However, of the 33 who wished to work in Blythe, only 6 were hired, and only 4 of the 35 who desired work in the Imperial Valley were hired. This is a sufficient showing, especially in light of the evidence that foremen

[25] We have not included, in the number of workers "hired" those who were given only one day's work in a subsequent harvesting location.

told various workers that higher authority had instructed them not to hire Salinas workers because of their participation in the work stoppages, to indicate that Respondent unlawfully discriminated against the group, despite the fact that Respondent did rehire some members of the group.[26/] As the Board noted in Kawano, the NLRB does not require a showing of complete exclusion of the group from the work force in order to find that an employer discriminated against the group. (NLRB v. Shedd-Brown Mfg. Co. (7th Cir. 1954) 213 F.2d 163 [34 LRRM 2278]; NLRB v. Hoosier-Veneer (7th Cir. 1941) 120 F.2d 574 [8 LRRM 723]; Borg-Warner Controls (1960) 128 NLRB 1035 [46 LRRM 1459].) Regardless of Respondent's reasons for rehiring some of the Salinas workers, that in no way lessens the impact or illegality of the discrimination it practiced against the other members of the group.

In his proposed remedy, the ALO recommended that all the persons listed in an appendix to his Decision be offered reinstatement to their former or equivalent jobs and be made

[26/] The number of interested applicants who were able to obtain work in New Mexico and Arizona consists primarily of the Chairez family, including Abelardo Chairez, Sr., Abelardo Chairez, Jr., Atanacio Chairez, Maria de la Luz Chairez, Ana Luisa Chairez, Mauricio Chairez, and J. Refugio Chairez, who worked in New Mexico and then in Arizona (with the exception of Maria de la Luz Chairez and Ana Luisa Chairez). The Chairez family's attempts to locate work with Respondent in Blythe and the Imperial Valley met with less success, resulting in the much lower number of interested applicants from the Salinas work-stoppage participants group being hired in those locations. Respondent could not, by hiring one family to work in New Mexico and Arizona, eliminate the clear inference of a pattern and practice of discrimination against the Salinas work-stoppage participants which we find in the record as a whole. As the harvest proceeded around the circuit, Respondent was able to reduce the number of Salinas work-stoppage participants it hired to only four of those members of the group who testified at the hearing.

whole for the economic losses they suffered because of Respondent's failure or refusal to rehire them. The ALO's list includes the names of 100 wo'rkers, most of whom signed the agreement to return to work. The list also includes nonapplicants, friends or relatives of past or present employees of Respondent who were deterred from making applications, and the members of foreman Ramirez's Crew W. The ALO recommended that each of those individuals should be considered a presumptive discriminatae entitled to backpay, reinstatement, or preferential seniority, or some combination of all three.

We reject as overly broad the ALO's recommended remedy. In the present case, where Respondent engaged in a pattern and practice of unlawfully discriminating against various members of a clearly defined group in retaliation for the Union and concerted activities of that group, we shall not order Respondent to affirmatively remedy the losses suffered by a group member unless that group member testified at the hearing that he or she applied for and was available for work, or that his or her failure to apply for work was based on a reasonable belief that such application would be futile,[27] or unless some other person testified credibly concerning the group member's availability and application for work, or his or her reasonable belief that such application would be

[27] We do not require an employee to apply for work if the employee's knowledge of the employer's discriminatory hiring practice would lead him or her reasonably to infer that further efforts to seek employment would be futile. (Abatti Farms (May 9, 1979) 5 ALRB No. 34; Kawano, Inc. v. ALRB, supra, 106 Cal.App.3d 927.)

futile.[28/] Where the General Counsel has established that a group member was available and applied for work, or did not apply because the group member reasonably believed such application would be futile, and the group member was not in fact hired, we shall presume that the group member was not hired for a discriminatory reason, based on the member's participation in the group's union or other protected activities. We base this presumption on our finding that Respondent unlawfully discriminated against the group. The burden then shifts to Respondent to show that it had another, nondiscriminatory reason for not hiring the group member. Respondent here has failed to make such a showing. We have already discussed the pretextual nature of Respondent's proffered business justifications.

Employee witnesses testified at the hearing concerning their attempts to obtain work in the subsequent harvests in New Mexico, Arizona, Blythe, California and the Imperial Valley. When we conclude that an employer has violated the Act by failing or refusing to rehire an employee for discriminatory reasons, we customarily defer to the compliance stage of our proceedings the question of when the worker would have been hired, absent the employer's discriminatory conduct. (Kawano, supra, 4 ALRB No. 104.) We shall follow our usual procedure in the instant matter. For

[28/]In allowing witnesses to testify as to the availability for work and job applications of other persons, we note that agricultural workers often apply for work as a family, through one family member. For example, in the present case, Respondent's foreman notified Abelardo Chairez, Sr. or his brother Atancio Chairez concerning when the members of the Chairez family could begin working. (See George Lucas and Sons (Oct. 23, 1979) 5 ALRB Mo. 62.)

example, where we conclude that Respondent unlawfully discriminated against an employee by failing or refusing to hire him or her for work in the New Mexico harvest, the backpay period will run from the date on which the employee would otherwise have been hired in that harvest and continue up to the date Respondent communicates a bona fide reinstatement offer to the employee.

We shall apply the rebuttable presumption established in Kawano, supra, 4 ALRB No. 104, that each discriminatee would have worked the same number of hours per year after the discriminatory refusal to rehire as he or she did in the year preceding the discrimination. In other words, if a discriminatee previously worked in New Mexico, Blythe and the Imperial Valley, but not in Arizona, there is a rebuttable presumption that the employee would have worked the same number of hours in those three harvests the next year, absent the employer's discrimination. "Where it is unclear which discriminatees would have been hired at what times, resolving such uncertainties either during the compliance period or in ancillary proceedings is an efficient and fair method of determining Respondent's obligation to make employees whole." (Kawno, supra, at p.18.)[29/] The burden is on Respondent to show diminution of its backpay obligation, based on e.g., the discriminatee's interim earnings during the backpay period,

[29/] Some of the employees Respondent refused to rehire because of Union- or concerted activity first worked for Respondent in the 1979 Salinas harvest, and therefore do not have an employment history from the preceding year. We leave to the compliance stage of this proceeding determination of which harvests those employees would have worked following the 1979 Salinas harvest, absent Respondent's discriminatory practices.

unavailability for work, or the lack of openings in Respondent's operations for which he or she is qualified, for reasons unconnected with discrimination. (Ibid.)

In sum, based on all the evidence in this case, we conclude that Respondent violated section 1153 (c) and (a) of the Act by refusing to rehire the 1979 Salinas harvest workers in retaliation for their participation in union activities and/or work stoppages. Like the evidence in Kawano, the record in this case contains "strong" and "weak" cases in terms of the leadership roles played by various workers in the union activities and work stoppages, and in terms of their efforts to obtain employment in subsequent harvests. We find, however, that the strong cases, coupled with the evidence of anti-union animus, establish a pattern and practice of discrimination against the Salinas workers as a group.[30]

We make the following findings concerning the work-stoppage participants' applications and availability for work in Respondent's subsequent harvests.

New Mexico Harvest. After the Salinas harvest ended, Respondent's first opportunity to discriminate against the Salinas work-stoppage participants was in the New Mexico harvest. At that

[30] We are not able to locate Respondent's Exhibits T-l to T-4 (copies of Respondent's payroll records for the last week of 1978 and 1979 Salinas harvest and the first week of the 1978 and 1979 New Mexico harvests). However, the ALO did not rely on these documents in reaching his decision in this matter, and Respondent did not mention these exhibits in its exceptions brief. Furthermore, Respondent's Exhibits P and Q, which we have reviewed, are summaries of the information included in Exhibits T-l through T-4. We therefore conclude that the absence of those exhibits does not preclude our reaching a decision in this matter.

time, Respondent violated section 1153(c) and (a) of the Act by discriminating against the following employees because of their union activity and participation in the work stoppages: Raraon Diaz, Manuel Estrada and Filimon Lozano sought work from foremen in Calexico, and Octavio Rios applied for work in the fields in New Mexico. Maria Estela Mendoza, Magdalena Cardoza, Luz Montiel, Maria de Jesus Montiel, Elisa Covarrubias, and Jose Angel Covarrubias all drove to New Mexico and applied to foreman Jose Lopez for work, but left when they ran out of money and a friend told them that none-of the Salinas workers would be hired. Arturo Hoyos met this group of workers on his way to New Mexico, and turned back to Calexico upon learning that the group had not: been hired and that Respondent would not hire Salinas workers. Rosenda Casillas did not go to New Mexico because foreman Flores failed to tell him when the season would start, although Flores had previously promised that he would. Pedro Naranjo did not go to New Mexico because foreman Flores had not assured him a job and he knew that many former Salinas employees had returned from New Mexico without being hired. Ramon Serna thought that he could not apply for a job in New Mexico after he was replaced in September of 1979, and, in addition, supervisor Pena told him there would be no work for him in New Mexico. Francisco Arallano did not go to New Mexico because Serna told him he would not get work there, Ernesto Montiel, Eduardo Gomez, and Jose Alonzo were all hired in New Mexico, but were terminated after working one day, and Francisco Jiminez was given work only on the last day of the harvest. Diego De La Fuente, Jose Quintero and Jose Farias

did not travel to New Mexico because various supervisors told them they would not be hired there. We find that Hoyos, Serna, Arellano, De La Fuente, Quintero, Farias and Naranjo all reasonably assumed that it would be futile for them to travel to New Mexico, and we will therefore include them in our remedial Order based on their availability for work and interest in working.

Arizona Harvest. Felix Garcia did not work in the Arizona harvest because foreman Santamaria failed to notify him of the starting date, as he had promised. We therefore find that Respondent violated section 1153 (c) and (a) of the Act by discriminating against Garcia because of his participation in union activities and the work stoppages.

Blythe Harvest. Many of the workers who Respondent had discriminated against in New Mexico and Arizona unsuccessfully sought work with Respondent in the Blythe harvest.[31] In addition, Respondent violated section 1153 (c) and (a) of the Act by discriminating against the following workers because they participated in union activities and work stoppages: Manuel Ramirez,[32] Jose

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[31] Rosendo Casillas, Eduardo Gomez, Maria Estella Mendoza, Magdalena Cardoza, Maria de Jesus Montiel, Jose Alonzo, Elisa Covarrubias, Jose Angel Covarrubias, Arturo Hoyos, Filimon Lozano, Ramon Diaz, Felix Garcia, Jose Farias, and Pedro Naranjo all attempted to get work from their foremen in Calexico or in the fields in Blythe, or did not make applications because they reasonably believed that such applications would be futile.

[32] It is not clear whether Ilanuel Ramirez participated in the work stoppages and signed the list to return to work. Raraon Diaz testified that Ramirez attended negotiating meetings in August and September of 1979 as a member of the negotiating committee, and that Ramirez accompanied Diaz and other workers when they

[fn. 32 cont. on p. 47]

Lozano, Isaac Lozano, Ramon Lozano, J. Refugio Camarillo, Emilio Montiel,[33] Abelardo Chairez, Jr., Abelardo Chairez, Sr., Atanacio Chairez, and J. Refugio Chairez[34] sought work at the Calexico gas station where Respondent's buses picked up workers. Maria de la Luz Chairez, Ana Luisa Chairez, Mauricio Chairez, Mario Manual Chairez,[35] and Manuel Estrada worked for one day in the Blythe harvest and were then terminated.

Imperial Valley Harvest. In the Imperial Valley, Respondent's discrimination against the above named employees continued.[36] In addition, Respondent violated section 1153(c)

[fn. 32 cont.]

unsuccessfully applied for work in the Blythe fields. We find that Respondent discriminatorily refused to rehire Ramirez because of his participation in protected concerted activity and his association with Diaz and other employees who engaged in the work stoppage and Ramirez will therefore be included in our remedial Order.

[33]Maria Estela Mendoza testified that Emilio Montiel, Luz Montiel's brother accompanied Magdalena Cardoza and her when they applied for work in Blythe. Mendoza testified that Emilio was hired for one day, and then fired. We find that Respondent discriminated against Emilio because of his association with Luz Montiel, Mendoza and Cardoza, all of whom had engaged in union and other concerted activity.

[34]J. Refugio Chairez worked for a short time in Blythe, but stopped when foreman Flores offered him a job as a waterperson, which Chairez refused to accept. We find that Flores' failure to offer Chairez his regular work as a closer was in retaliation for Chairez's protected activities in Salinas.

[35]Although Mario Manuel Chairez left Salinas before the end of the harvest in order to return to school and therefore was not working when the work-stoppage participants were replaced, we have included him in our remedial Order because he sought work in the Blythe and Imperial Valley harvests with his family, and was discriminated against along with the rest of the family.

[36]Rosendo Casillas, Manuel Estrada, Eduardo Goraez, Jose Alonzo. Maria Estela Mendoza, Magdalena Cardoza, Maria de Jesus Montiel,

[fn. 36 cont. en p. 43]

and (a) of the Act by discriminating against Juan Zavala and Primitive Leyva because they engaged in union activities and work stoppages. Zavaia and Leyva sought employment with Respondent by contacting its foreman at the gas station in Calexico or in the fields.[37/]

Remedy

The Charging Party excepted to the ALO's failure to award the makewhole remedy to compensate Respondent's employees for the losses they suffered as a result of the unilateral increase Respondent instituted in its employees' wages, effective September 4, 1979. We find merit in this exception and snail include such a makewhole provision in our remedial Order.[38/] (Pacific Mushroom Farm, supra, 7 ALRB No. 28; George Arakelian Farm, supra, 8 ALRB No. 36.)

[fn. 36 cont.]

Jose Angel Covarrubias, Elisa Covarrubias, Arturo Hoyos, Ernesto Montiel, the Chairez family, the Lozano family, J. Refugio Camarillo, Ramon Diaz, Felix Garcia, Jose Farias, Pedro Naranjo, Octavio Rios, and Francisco Arellano, all applied for work with Respondent's foremen in Calexico or in the fields, or reasonably believed that such applications would be futile.

[37/]We have not included in our remedial Order employees who were able to obtain work in all the harvests for which they applied. These employees include Primo Ruiz, Jose Miranda, Pedro Maciel, and Baldomero and Jenaro Jiminez. In addition, we have not included Graciano Quezada, who testified that he did not seek employment with Respondent after the Salinas harvest, or Atanacio Magana, who quit working for Respondent on September 6. It is unclear whether Magana participated in the work stoppages or signed the employee list.

[38/]The ALO also failed to award the makewhole remedy for the unilateral change in the employees' wages and working conditions caused by Respondent's removal of the kitchen utensils from the labor camp and the change in the credit line for purchasing food. However, no party excepted to the ALO's failure to award makewhole for this violation.

Respondent argued that imposition of the makewhole remedy is inappropriate in this case because Respondent gave the Union notice of the proposed wage change, and the UFW twice rejected the proposal, even though it had agreed to similar wage increases in the two preceding years. In support of that argument, Respondent cites Kaplan's Fruit and Produce Co., Inc., supra, 6 ALRB No. 36, in which we declined to award the makewhole remedy, where the employer had instituted unilateral wage changes. In Kaplan's, we found that imposition of the makewhcle remedy was not appropriate because the union was partly responsible for frustrating the bargaining process, and the employer had not engaged in bad faith bargaining or surface bargaining. In the present case, we make no such finding. On the contrary, we find that the Union did not act improperly in rejecting Respondent's "piecemeal' bargaining approach while full contract proposals were still pending.

Our review of the evidence, including the timing of Respondent's wage increase and the manner in which it was implemented, establish that Respondent acted in bad faith in instituting the wage increase. Although this finding is not necessary to our conclusion that Respondent's unilateral wage increase violated the Act, N. A. Pricola Produce, supra, 7 ALRB No. 49, it is further support for our award of the makewhole remedy. We have consistently awarded the makewhole remedy to compensate employees for losses they suffer as a result of their employer's failure or refusal to meet and bargain in good faith with its employees' certified bargaining representative. (O.P. Murphy Produce Co., Inc. (Oct. 26, 1979) 5 ALRB No. 63; Montebello Rose Co., Inc.

(Oct.29, 1979) 5 ALRB No. 64, affirmed Montebello Rose Co. v. ALRB (1981) 119 Cal.App.3d 1.)

Respondent also excepted to the ALO's recommendation of a broad cease and desist order, the use of the backpay formula established in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, the lack of a cutoff date for backpay liability for each discrininatee, and the ALO's failure to confine mailing of the notice to employees who were working at the time the unfair labor practice occurred. However, in its brief in support of its exceptions, Respondent addressed only the backpay formula, arguing that the formula we established in J & L Farms is punitive because an employee's interim earnings are deducted from his or her gross backpay on a daily basis. Respondent suggests that we should instead follow the NLRB precedent established in F. W. Woolworth Co. (1950) 90 NLRB 289 [26 LRRM 1185].

This Board has broad discretion in fashioning remedies which will effectuate the purposes of the Act. (Butte View Farms v. Agricultural Labor Relations Board (1979) 95 Cal.App.3d 961; M. Caratan, Inc. (Mar. 12, 1980) 6 ALPS No. 14; Virginia Electric & Power Co. v. NLRB (1943) 319 U.S. 533 [12 LRRM 739].) We have determined that the seasonal nature of agricultural labor makes it inappropriate to follow the NLRB's practice of computing backpay on a quarterly basis. (F. W. Woolworth Co., supra, 90 NLRB 289.) Rather, in order to fully compensate discriminatees for losses they have suffered because of a respondent's discriminatory conduct, we compute backpay on a daily basis. We have also authorized the calculation of backpay on a weekly

basis or by any other method that is reasonable in light of the information available, equitable, and in accordance with the policy of the Act. (Butte View Farms (Nov. 8, 1978) 4 ALR3 No. 90, affirmed Butte View Farms v. Agricultural Labor Relations Board, supra, 95 Cal.App.3d 961; Frudden Produce, Inc. (Mar. 29, 1982) 8 ALRB No. 26.) As this Board's precedent concerning the computation of backpay has been specifically tailored to the agricultural industry in order to insure that employees are fully and fairly compensated, we shall order that backpay in this case be calculated in accordance with our established precedents.

As to the remainder of Respondent's exceptions concerning the ALO's recommended remedy, we find that the remedial provisions the ALO recommended conform with Board precedent and will effectuate the purposes of the Act. (M. Caratan, Inc. (.Mar. 12, 1980) 6 ALRB No. 14; Jasmine Vineyards, Inc. (Apr. 3, 1980) 6 ALRB No. 17, Tex-Cal Land Management, Inc. v. ALRB (1979) 24 Cal,3d 355), including the broad cease-and-desist order. In M. Caratan, Inc. supra, 6 ALRB No. 14, we announced that we would follow NLRB precedent and issue a broad cease-and-desist order only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious and - widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. (Hickmott Foods, Inc. (1979) 242 NLRB 1357 [101 LRRM 1342].) We find that Respondent's violations of the Act, including its frustration of the collective bargaining process and discrimination against employees who had engaged in concerted activity by subsequently refusing to rehire then as they

sought work throughout Respondent's harvesting circuit, warrant a broad cease-and-desist order. (St. Vincent's Hospital (1979) 244 NLRB 84 [102 LRRM 1196]; Oakwood Manor, Inc. d/b/a Danville Nursing Home (1981) 254 NLRB 907 [107 LRRM 1079]; Maxi Mart (1979) 246 NLRB 1151 [103 LRRM 1105].)

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent J. R. Norton Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to hire or rehire, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Threatening any agricultural employee with loss of employment or other reprisal for supporting or assisting the United Farm Workers of America, AFL-CIO (UFW), or any other labor organization.

(c) Instituting or implementing any change in any of its agricultural employees' wages, work hours, or any other term or condition of their employment without first notifying the UFW and affording it a reasonable opportunity to bargain with Respondent concerning such change(s).

(d) In any other manner interfering with,

restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Offer to the employees in Don Jose Ramiraz's wrap machine crew who were laid off on May 23, 1979, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them, such makewhole awards to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1932)
8 ALRB No. 55.

(b) Offer to the employees listed below, who wers discriminatorily refused rehire in Respondent's 1979 New Mexico harvest, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them, such makewhole awards to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Stte Farms, Inc., supra,
8 ALRB No. 55:

Jose Alonzo	Arturo Hoyos
Francisco Arellano	Francisco Jiminez
Magdalena Cardoza	Filimon Lozano
Rosendo Casillas	Maria Estela Mendoza
Elisa Covarrubias	Ernesto Montiel
Jose Angel Covarrubias	Luz Montiel
Diego De La Fuente	Maria de Jesus Montiel
Ramon Diaz	Pedro Naranjo
Manuel Estrada	Jose Quintero
Jose Farias	Octavio Rios
Eduardo Gomez	Ramon Serna

(c) Offer to Felix Garcia, who was discriminatorily refused rehire in Respondent's 1979 Arizona harvest, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights or privileges, and make him whole for all losses of pay and other economic losses he has suffered-as a result of Respondent's failure or refusal to rehire him, such makewhole award to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc., supra, 8 ALR3 No. 55.

(d) Offer to the employees listed below, who were discriminatorily refused rehire in Respondent's 1979 Blythe, California harvest, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them, such makewhole awards to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc., supra, 8 ALRB Mo. 55:

J. Refugio Camarilla	Mario Manual Chairez
Abelardo Chairez, Jr.	Mauricio Chairez
Abelardo Chairez, Sr.	Isaac Lozano
Ana Luisa Chairez	Jose Lozano
Atanacio Chairez	Ramon Lozano
J. Refugio Chairez	Erailio Montiel
Maria de la Luz Chairez	Manual Ramirez

(e) Offer to Juan Zavala and Primitive Leyva, who were discriminatorily refused rehire in Respondent's 1979-1980 Imperial Valley, California harvest, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire then, such makewhole awards computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc., supra, 8 ALRB No. 55.

(f) Upon request, meet and bargain with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes Respondent made in its employees' wage rates and labor camp accomodations in September 1979.

(g) If the UFW so requests, rescind the unilateral changes heretofore made in its employees' wage rates and/or their labor camp accommodations.

(h) Make whole its employees for all economic losses they have suffered as a result of the unilateral changes Respondent made in their wages in September 1979, the amount of

said makewhole award to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc., supra, 8 ALRB NO. 55.

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

(j) 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.

(k) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from May 23, 1979, until the date on which the said Notice is mailed.

(l) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the time(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.

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

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

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

Dated: October 13, 1982

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

MEMBER McCARTHY Concurring:

I concur separately in the result of the majority opinion because I disagree with its broad reading of the concept of condonation.

I would find that the record evidence establishes that the series of intermittent work stoppages was clearly unprotected activity and did not, indeed could not, subsequently assume the character of a protected activity by virtue of the principles of condonation. Since my colleagues have not expressly found that the work stoppages were an unprotected activity, they would have no legal basis for invocation of the condonation doctrine. It makes no sense to find that Respondent forgave a protected act.

In my view, the proper analytical approach focuses on the settlement agreement entered into between Respondent and the Union. I rely on the ALO's findings which suggest that the parties negotiated the conditional reinstatement of workers who participated in an unprotected strike and on that basis I would

find that Respondent was precluded from later asserting that activity as the basis for retaliating against those, and only those, employees who had been lawfully discharged and were later reinstated when they accepted the terms of the agreement.

There is no question that Respondent was entitled to discharge all workers who engaged in the unprotected work stoppages. (Fansteel Corp. (1939) 306 U.S. 240 [4 LRRM 515].) Accordingly, all strikers were lawfully denied reinstatement during the course of the strike and prior to the strike-settlement agreement. (Colonial Press, Inc. (1973) 207 NLRB 673 [34 LRRM 1586], cert. den. (1975) 423 U.S. 833 [90 LRRM 2553].) Respondent made it amply clear by its actions that it was not willing to overlook the strikers' unprotected conduct, or misconduct, or to consider it trivial or minimally intrusive on its operations. Indeed, the ALO found that the recurrent work stoppages so impeded operations and so affected production that Respondent was obligated to commence hiring a new work force in order to harvest and pack its highly perishable seasonal commodities.

Thereafter, Respondent and the Union entered into the strike-settlement, wherein it was agreed that Respondent would rehire only those former employees who were willing to accept employment on the express condition that they pledge in writing to obey their supervisors and forego any repetition of their prior unprotected strike activity. Many of the strikers accepted Respondent's conditions, resumed work pursuant to the terms of the agreement, and apparently completed the season without further incident. As to those employees, I would find that Respondent

waived its right to thereafter deny them employment because they participated in unprotected strike activity.

Under this analysis, I would find that Respondent did not waive its right to deny reinstatement or rehire to the other strikers, i.e., those who failed to apply for and/or to accept reinstatement in accordance with the terms of the settlement, because of their unprotected strike activity. The strike-settlement agreement did not provide for reinstatement of all strikers but only those who made offers to return to work in accordance with the express provisions and conditions of the agreement. As some workers did nothing to register their acceptance of the reinstatement offer, they must be deemed to have lost any claim to the protection afforded by the agreement. (Woodlawn Hospital (7th Cir. 1979) 596 F.2d 1330 [101 LRRM 2300].)

Condonation necessarily contains elements of complete forgiveness and an intention to resume the former employer-employee relationship as if misconduct had not occurred. (Packer's Hide Association (8th Cir. 1966) 360 F.2d 59 [62 LRRM 2115].) This principle was ably stated by the court in Jones & McKnight, Inc. v. NLRB (7th Cir. 1971) 445 F.2d 97 [77 LRRM 2705],

> The key element of condonation is a clearly evidenced intention and communication on the part of the employer to overlook the misconduct and to permit a continuation or resumption of the company-employee relationship as though no misconduct had occurred.

I do not read the strike-settlement agreement herein as constituting a condonation of prior unprotected activity as there is no evidence that Respondent condoned or forgave the prior

activity, even as to those employees who were rehired after they signed the agreement. (Hawaii State Teachers Association v. PERB (Hawaii Supreme Ct. 1979) 520 P.2d 422 [101 LRRM 2323]; Woodlawn Hospital, supra, 596 F.2d 1330; Colonial Press, Inc., supra, 207 NLRB 673.) To the contrary, Respondent served notice of its intention to discharge any returning worker who engaged in such unprotected strike activity in the future. The fact that reinstatement was granted only subject to the stated conditions indicates the depth of Respondent's concern about the strikers' prior unprotected conduct and makes clear that Respondent did not intend to condone, to forgive, or to "wipe the slate clean." (Packer's Hide Association, supra, 360 F.2d 59.)

In the final analysis, even if the strike-settlement agreement and the subsequent rehire of workers who accepted reinstatement in accordance with the provisions of the agreement could be construed to connote condonation of the prior misconduct, such condonation clearly would not extend to those strikers who, for whatever reason, did not seek or accept reinstatement pursuant to the terms and conditions of the agreement.

Dated: October 13, 1982

JOHN P. MCCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas and El Centro Regional Offices, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, J. R. Norton Company, 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 Agricultural Labor Relations Act (Act) by refusing to rehire employees who participated in the Salinas work stoppages in August and September of 1979, or in other union or concerted activity, by threatening an employee with discharge because of his union activities, and by changing our employees' wage rates and labor camp accommodations without giving the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative of our employees, a reasonable opportunity to bargain about those changes. 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 Act is a law that gives you and all other farm workers in California these rights:

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

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

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

WE WILL NOT hereafter refuse to hire or rehire, or in any other way discriminate against, any agricultural employee because he or she has engaged in union activities or other protected concerted activities.

WE WILL reinstate to their former or substantially equivalent employment, without loss of seniority or other privileges, the members of Don Jose Ramirez's wrap machine crew who were laid off on May 23, 1979, and the following employees who we discriminatorily refused to rehire in our 1979 harvests in New Mexico, Arizona, and Blythe, California, and in our 1979-1980 harvest in the Imperial Valley, California:

Jose Alonzo
Francisco Arellano
J. Refugio Camarillo
Magdalena Cardoza
Rosendo Casillas
Abelardo Chairez, Sr.

Abelardo Chairez, Jr.
Ana Luisa Chairez
Atanacio Chairez J.
Refugio Chairez
Maria de la Luz Chairez
Mario Manual Chairez
Mauricio Chairez
Elise Covarrubias
Jose Angel Covarrubias
Diego De La Fuenta
Ramon Diaz
Manual Estrada
Jose Farias
Felix Garcia
Eduardo Gomez
Arturo Hoyos
Francisco Jiminez
Primitivo Leyva
Filimon Lozano
Isaac Lozano
Jose Lozano
Ramon Lozano
Maria Estela Mendoza
Emilio Montiel
Ernesto Montiel
Luz Montiel
Maria de Jesus Montiel
Pedro Naranjo
Jose Quintero
Manuel Ramirez
Octavio Rios
Ramon Serna
Juan Zavala

In addition, we will reimburse the above named employees for any pay or other money they have lost because we refused to rehire them, plus interest.

WE WILL NOT threaten any employee with discharge or any other reprisal for joining, supporting, or assisting the UFW or any other labor organization.

WE WILL NOT change your wage rates or labor camp accomodations or any other of your working conditions without first notifying, and bargaining with, the UFW about such matters because it is the representative chosen by cur employees.

WE WILL, if the UFW asks us to do so, rescind either or both of the changes we previously made in the wages and labor camp accommodations of our employees and we will make each of our employees whole for any economic losses he or she has suffered as a result of the wage changes.

Dated: J. R. NORTON COMPANY

By: ______________________________
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. Offices are located at 112 Boronda Road, Salinas, California 93907 (the telephone number is (408) 443-3160); and at 319 Waterman Avenue, El Centro, California 92243 (the telephone number is (714) 353-2130).

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

J. R. Norton Company 8 ALRB No. 76
Case Mo. 79-CE-78-EC, et al.

ALO DECISION

The ALO found that, even if Respondent's employees engaged in unprotected activity when they staged a series of work stoppages during the Salinas harvest, Respondent condoned the employees' conduct by allowing them to return to work after they had been replaced for three days. The ALO concluded that Respondent violated Labor Code section 1153(c) and (a) when it discriminated against the work-stoppage participants because of their union and concerted activity by failing or refusing to rehire them for work in Respondent's subsequent harvests in Mew Mexico, Arizona, and Southern California. The ALO found that General Counsel established that Respondent discriminated against an identifiable class of employees, and therefore ordered that all employees who engaged in the work stoppages (including some who did not thereafter apply for further employment and friends or relatives of past or present employees of Respondent who were deterred from making applications) be reinstated with backpay.

The ALO also concluded that Respondent violated section 1153(c) and (a) of the Act by laying off foreman Jose Ramirez's lettuce wrap machine crew because of their union activities and by denying an employee one day of work because of his participation in union activities. In addition, the ALO concluded that Respondent violated section 1153(a) of the Act by threatening an employee because of his union activities, and violated section 1153 (e) and (a) by unilaterally instituting a wage increase without providing the UFW a sufficient opportunity to bargain over the increase, by engaging in surface bargaining during the five to six months following implementation of the wage increase, and by changing the manner in which the employees' labor camp meals were prepared and paid for without giving the UFW notice or an opportunity to bargain. The ALO concluded that General Counsel failed to prove that Respondent violated the Act by the conduct of a supervisor in fighting with an employee, and failed to prove that Respondent constructively evicted employees by changing the manner in which their meals were prepared and paid for.

BOARD DECISION

The Board affirmed the ALO's conclusions that Respondent condoned its workers' participation in the work stoppages by allowing the workers to return to work, but thereafter violated section 1153(c) and (a) of the Act when it discriminated against the group of employees who engaged in union activities and work stoppages by refusing to rehire them when they sought employment in subsequent harvesting seasons. The Board based its finding on General Counsel's showing that a clearly identifiable group of employees engaged in.

union activity and other concerted activity, that Respondent had knowledge thereof and harbored anti-union animus, and that several supervisors changed their past practice of notifying workers when the next season would start and told employees that Respondent would not rehire them because of their participation in the Salinas work stoppages. However, the Board, in its Order, limited reinstatement and backpay to those group members who testified at the hearing that they applied for and were available for work, or that their failure to apply for work was based on a reasonable belief that such application would be futile, and group members concerning whom such testimony was offered at the hearing. After concluding that certain group members were unlawfully denied rehire at certain harvests subsequent to the Salinas season, the Board left for compliance the matter of determining the date on which each worker would have been rehired, absent Respondent's discriminatory conduct. The Board applied a rebuttable presumption that each discriminatee would have worked the same number of hours per year after the discriminatory refusal to rehire as he or she did in the year preceding the discrimination.

The Board also affirmed the ALO's conclusion that Respondent violated section 1153(a) of the Act by threatening an employee and violated section 1153(e) and (a) by instituting a unilateral wage increase, absent impasse, after notifying the Union of its intent to raise wages, but failing to give the Union an adequate opportunity to negotiate concerning such wage increase, and by unilaterally changing the manner by which employees' meals were prepared and paid for, without giving the Union notice and an opportunity to bargain. The Board reversed the ALO's conclusion that Respondent violated the Act by laying off the lettuce wrap machine crew, but concluded that Respondent did violate section 1153(c) and (a) by failing to recall the wrap machine crew members when work was available, because of their union activities. The Board also reversed the ALO's conclusion that Respondent violated the Act by refusing to give an employee work for one day, since General Counsel failed to establish that any work was available for that employee on that day, and also reversed the ALO's conclusion that Respondent engaged in surface bargaining for five to six months, as that allegation was not included in the complaint and was not fully litigated at the hearing.

The Board ordered Respondent to offer reinstatement with backpay to the employees it discriminatorily refused to rehire, and to make whole its employees for all economic losses they suffered as a result of Respondent's instituting a unilateral wage increase without giving the Union a sufficient opportunity to bargain. Finding Respondent's violations of the Act to be egregious and widespread, the Board issued a broad cease-and-desist Order.

Member McCarthy, in a separate opinion, found that the intermittent work stoppages were not a form of protected concerted activity and therefore Respondent's discharge of all strikers during the course of the strike and prior to implementation of the strike-settlement agreement was not violative of the Act. But he also found that the strike-settlement agreement precluded Respondent from later asserting the unprotected activity as a basis for its refusal to rehire employed signatories to the settlement agreement. Member McCarthy specifically rejected the majority's broad reading of the doctrine of condonation, expressing the view that even if the strike-settlement agreement and the subsequent rehiring of workers who accepted reinstatement in accordance with the provisions of the agreement could be construed to connote condonation of the prior misconduct, such condonation would not extend to those strikers who did not seek or accept reemployment pursuant to the terms and conditions of the agreement.

* * *

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

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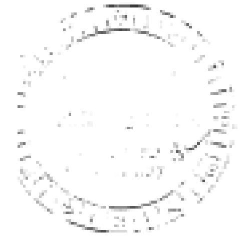

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of J.R. NORTON Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	Case Nos	79-CE-78-EC 79-CE-176-EC 79-CE-264-EC 79-CE-366-EC 79-CE-142-EC 79-CE-176-SAL 79-CE-264-SAL 79-CE-366-SAL 79-CE-367-SAL 79-CE-367-1-SAL 79-CE-359-SAL 79-CE-360-SAL

DECISION OF ADMINISTRATIVE LAW OFFICER

APPEARANCES:

For the General Counsel: NORMAN SATO , ESQ.
JAMES SULLIVAN, ESQ.
Salinas, California

WARREN BACHTEL, ESQ.
El Centro, California

For the Respondent: WAYNE HERSH, ESQ.
Western Growers Association
Newport Beach, California

TERRANCE R. 0'CONNOR. ESQ.
Grower-Shipper-Vegetable
Association Salinas, California.

For the United Farm Workers: ALICIA SANCKEZ
Salinas, California

STATEMENT OF THE CASE

Michael H. Weiss, Administrative Law Officer: These consolidated cases were initially heard by me on 24 hearing days between January 15 and February 26, 1980, in El Centro, California[1/] General Counsel's moving papers consist of five complaints issued on September 14, 1979 and December 4, 6 and 27, 1979 and January 3, 1980, respectively, and are based upon the following charges:[2/]

	ULP Charge No.	Date Filed	Date Served
1.	79-CE-78-EC	October 10, 1979	October 10, 1979
2.	79-CE-73-1-EC	November 9, 1979	November 9, 1979
3.	79-CE-176-SAL	June 25, 1979	June 25, 1979
4.	79-CE-264-SAL	August 14, 1979	August 14, 1979
5.	79-CE-366-SAL	September 14, 1979	September 13, 1979
6.	79-CE-367-SAL	September 14, 1979	September 14, 1979
7.	79-CE-367-1-SAL	September 17, 1979	September 17, 1979
8.	79-CE-142-EC	November 15, 1979	November 15, 1979
9.	79-CE-143-EC	November 15, 1979	November 15, I979

1/ The record was reopened pursuant to 8 Cal. Admin. Code $ 20262(g) and additional testimony received on October 15,20 and 27, 1980, in Salinas, California. See footnote 3, infra.

2/ The five consolidated complaints are set forth in General Counsel's Exhibit 1-14A, 17A, 18A, 20 and 21A respectively. The underlying charges can be found in General Counsel's Exhibit 1-1A-13A.

In addition, the General Counsel amended the complaint by deleting in January, 1980, Charge No. 79-CE-143-EC (re Eladio Aguirre], see General Counsel's Exhibit 1-23A, and Charge No. 79-CE-176-SAL [General Counsel's Exhibit 1-3A, re Clement Vasquez and Carlos Guillan], in February, 1980. Accordingly, neither allegation will be considered or discussed in this decision.

10.	79-CE-236-EC	December 19, 1979	December 19, 1979
11.	79-CE-362-SAL	September 11, 1979	September 10, 1979
12.	79-CE-359-SAL	September 11, 1979	September 7, 1979
13.	79-CE-360-SAL	September 11, 1979	September 7, 1979

These complaints allege various violations of Sections 1153 (a), (c) and (e) of the Agricultural Labor Relations Act [hereinafter the Act] by J. R. Norton Company [hereinafter J. R. Norton, or Respondent] occurring during the period from May, 1979 through February, 1980 and continuing thereafter.[3/]

All parties were given full opportunity to participate in the hearing and after the close of the hearing the General Counsel and Respondent each filed a brief in support of its respective

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3/ Additional charges alleging continuing discriminatory discharges and/or refusals to rehire were filed against Respondent on behalf of former workers in May and June, 1980, subsequent to the close of the hearing herein. This resulted in the issuance of Complaint Mo. 80-CE-12-SAL.

On August 15, 1980, a pre-hearing conference was scheduled regarding Complaint No. 80-CE-12-SAL for which Michael H. Weiss was designated as the Administrative Law Officer. Respondent's motion to disqualify him [Respondent contended that the same Administrative Law Officer receiving and considering evidence at the second hearing would prejudice it because a decision had yet to be issued in this case] was denied by the Administrative Law Officer [see, e.g. Lifetime Door Co., 390 F.2d 272, 67 LRRM 2704 (4th Cir., 1968), enf'g 62 LRRM 1029, 1615; cf_. Bob's Casing Crew, Inc., 458 F. 2d 1301, 80 LRRM 2090 (5th Cir., 1972)]. However, the Board granted Respondent's interim appeal and Stuart A. Wein was redesignated as Administrative Law Officer for that hearing.

Shortly thereafter, General Counsel's motion [pursuant to 8 Cal. Admin. Code § 20262(g)] to reopen the record herein to take further testimony of former forewoman Maria Sagradio Perez was granted on September 23, 1980.

position.[4/]

Upon the entire record,[5/] including my observation of the demeanor of the witnesses,[6/] and after consideration of the briefs filed by the parties, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act and that the United Farm Workers of America, AFL-CIO [hereinafter UFW] is a labor organization as defined in Section 1140.4(f) of the Act and on the basis of the pleadings and undisputed evidence I so find.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS.

The complaints, as amended, make the following substantive allegations against respondent:[7/]

4/ The parties were originally granted extensions until June 16, 1980 to file their post-hearing briefs. After the record was reopened for further testimony and evidence, the parties were 'granted until November 17, 1980 to file their supplemental post-hearing briefs.

5/ Attached hereto as Appendix I is the list of 75 witnesses called by the parties, as well as the transcript volume and page references to their testimony; Appendix II lists and describes the exhibits identified and/or admitted into evidence.

6/ The effect, if any, of Maria Sagradio Perez' recanted testimony [Administrative Law Officer Stuart Wein had granted her immunity] on General Counsel's case and/or Respondent's defense will be treated separately in the subsections hereinafter discussing each allegation.

7/ For convenience and clarity the allegations will be set forth and then considered seriatum in chronological order although neither the briefs nor the hearing testimony was presented in that "fashion.

1. In late May, 1979, respondent laid off in Salina. most of foreman Don Jose Ramirez' wrap machine crew for their concerted and union activities.[8/]

2. On or about August 13, 1979, respondent through its agents denied employment in Salinas to seniority worker Ramon Diaz because of his union activitites [Para. 7, General Counsel's Exhibit 1-17A].

3. On or about August 31, 1979, respondent through its agents threatened Diego de la Fuente with discharge for union activities [Para. 4, General Counsel's Exhibit 1-20A].

4. On or about August 31, 1979, respondent through its supervisor Maria Segrario Perez assisted in an assault and assaulted Magdalena Cordoza because of her support for and union 'activities [Para. 5, General Counsel's Exhibit 1-20A).

5. On or about September 5, 1979, respondent, unilaterally and unlawfully increased the wages it paid agricultural workers [Para. 4, General Counsel's Exhibit 1-18A].

6. On or about September 13, 1979, respondent through its agents replaced many of its workers as a result of their protected concerted activitites (work stoppages) [Para. 5, General Counsel's Exhibit 1-17A].[9/]

8/ This allegation was not separately alleged in the complaint but was fully litigated at the hearing. Accordingly, it will be considered and discussed herein. See Anderson Farm Co., 3 ALRB No. 67 (1977); Prohoroff Poultry Farms, 3 ALRB No. 87 (1977).

9/ The list of workers set forth as Attachment 1 to that com-plaint allegation is also set forth as Appendix III herein.

7. On or about September 13, 1979, respondent through its agents evicted, and/or threatened to evict and by the removal of kitchen utensils and supplies constructively evicted workers from its labor camp. [Para. 4, General Counsel's Exhibit 1-17A].

8. On or about October 8, 1979, respondent refused to rehire its former employees for the New Mexico lettuce harvest because of their support for the UFW and concerted activity in Salinas, California. [Para. 8, General Counsel's Exhibit 1-17A].

9. On or about November 15, 1979, respondent refused to rehire its former employees for the Blythe lettuce harvest season because of their support for the UFW and concerted activity in Salinas, California. [Para. 9, General Counsel's Exhibit 1-17A]|.

10. On or about December 19, 1979, respondent refused to rehire Maria Estella Mendoza, Luz Montiel, Maria de Jesus Montiel Elisa Covarrubias, Jose Angel Covarrubias, Arturo Hovos and El Chavelo", "El Chango" and ''El Rainon"[10/] because of their support for the UFW and concerted activity in Salinas, California. [Para. 4, General Counsel's Exhibit 1-21A].

11. On or about January 4, 1980, respondent refused to rehire its former employees for the Imperial valley harvest season because of their support for the UFW and concerted activity in Salinas, California. [Para. 5, General Counsel's Exhibit 1-21A].

Respondent denies that it violated the Act and

10/ For convenience, the group will be collectively referred to as the Montiel-Covarrubias group.

specifically asserts that (1) the lay-off of workers in May, 1979, was caused solely by a breakdown of Ramirez' wrap machine; (2) the wage increase was lawful and only occurred after notice and opportunity to bargain was given to the UFW; (3) no worker was in fact terminated or evicted from the labor camp although workers were temporarily replaced; and (4) the workers were not rehired solely because all openings were filled when they sought re-employment at each succeeding harvest.[11]

III. COMPANY OPERATIONS.

Respondent, a large lettuce producer, is headquartered in Phoenix, Arizona, carrying out extensive year-round farming and harvesting operations in California, as well as in Arizona and New Mexico.

Respondent's administration and management are centralized in Phoeniz, Arizona, where Art Carroll, Vice-President. and General Manager and John R. Norton, III, President, maintain their offices. All payroll operations as well as all company records are maintained there.

Organizationally, respondent's Salinas-Watsonville area farming operations are supervised by Vice-President Peter

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[11] Respondent in its answer and at the hearing challenged the Board's jurisdiction to hear and determine allegations of unlawful refusals to rehire that occurred in New Mexico and/or Arizona. It sought, unsuccessfully, to distinguish Mario Saikhon, Inc., 4 ALRB No. 72 (1978) which I find controlling factually and legally. See, also, Goodyear Tire & Rubber Co. v Unochrome International, Ltd., 104 C.A.3d 518, 524 (1980) and Fisher Governor Co. v. Superior Court, 53 C.2d 222, 275-276 (1959) for a discussion of factors taken into account in permitting jurisdiction to be taken of an out-of-state defendant in order to provide a forum in California to "affected" California residents.

Orr out of the company's Salinas office. Respondent also maintains offices inBrawley (Imperial Valley), Palo Verde (Blythe) and Chandler, Arizona, where a counterpart to Orr is responsible for the farming operation for that area. Working with the area farming manager, but reporting directly to Art Carroll is Aldaberto Pena Ventura, harvesting superintendent, who has overall responsibility for respondent's entire harvesting operation. Pena' s assistant wag the crew supervisor, Celestino Nunez.[12/] While each area employs stationary employees, principally irrigators and tractor drivers, the lettuce harvesting crews travel to each harvestina location self-contained units, with their own foremen and equipment.[12/] Chronologically, the harvesting sequence is as follows: 1) January to March in the Imperial Valley; 2) early March to early April in Blythe; 3) April in Arizona; 4) late April or early May to early October in Salinas; 5) October in New Mexico; 6) late October to early November in Central Arizona, and 7) late November to late December in Blythe. Generally, there is an overlap of a week or more between the harvesting that is winding down and the one

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(Celestino's nephew)
_12/Joe Nunez/was replaced as wrap machine supervisor at some point in late 1979 by Obdulio Magdalene who was fired during the Blythe harvest after the hearing closed and was, in turn, replaced by Roberto Sante Marie.

13/The harvesting foremen are delegated (occasionally further delegation is made by a foreman to his or her "pusher") the responsibility for hiring and maintaining their, harvesting crews. It was not disputed that the harvesting foremen are supervisors within the meaning of § 1140.4 (j) of the Act. See, e.g., III R.T. 127 :12-18 .

starting at the next location.

According to Vice-President Peter Orr, respondent plans its farming and harvesting operations each year in order to try and cut the same amount of lettuce each day, week and month. However market, weather and labor variables don't always cooperate.[14/] With the exception of adding more wrap machines during the past three years, there has been little change in respondent's farming and harvesting operations.[15/]

The parties stipulated that the information set forth below shows the foremen, crew designation and harvesting dates during the relevant period herein;

1979 J.R. NORTON LETTUCE HARVESTING FORMEN[15A/]

I. SALINAS

START	FINISH	NAME	CREW	
4/24/79	10/5/79	Obdulio Magdalena - Pedro Flores	O	Ground crew
5/1/79	9/20/79	Roberto Santemarie - Velazquez	A	Ground crew
5/8/79	5/29/79	Jesus Enriquez	Y	Ground crew
5/8/79	10/5/79	Pedro Juarez	J	Ground crew
9/11/79	9/17/79	Francisco Linon	L	Ground crew
9/15/79	10/8/79	Domingdo Ignacio	Q	Ground crew
5/3/79	10/2/79	Antonio Posillo Maria	E	Wrap machine
5/3/79	9/17/79	Sagrario Perez	R	Wrap machine
5/7/79	5/23/79	Don Jose Ramirez	W	Wrap machine

14/ III R.T. 104:27-8. References to the reporters transcript will be to the volume followed by the page and line, if applicable, e.g. Ill R.T. 104:27-8. For convenience, volume references to the (testimony given at the reopened hearing in October will continue sequentially as Volumes XXV-XXVII.

15/ III R.T. 98:1-6. I have taken administrative notice of and considered relevant findings regarding respondent's operatic during 1976-1977 that are set forth on pages 3-6 of the Administrative Law Officer's decision incorporated into J.R. Norton Cc. 3 ALRB No. 66 (August 10, 1977) pursuant to Sunnyside Nurseries, Inc. 4 ALR3 No. 88, p. 3, fn. 4 (1978).

15A/ See Page 9.

7/11/79	7/17/79	Jose Casimiro Lopez	C	Wrap machine
8/21/79	10/5/79	Jose Casimiro Lopez	B	Wrap machine
8/23/79	9/21/79	Sara Favila	D	Wrap machine
II. HATCH , NEW MEXICO				
10/4/79	11/2/79	Jesus Enriquez	Y	Ground crew
10/4/79	11/2/79	Roberto Santemarie	A	Ground crew
10/10/79	11/1/79	Pedro Juarez	J	Ground crew
10/16/79	11/1/79	Pedro Flores	K	Ground crew
10/4/79	11/2/79	Jose Ramirez	W	Wrap machine
10/4/79	11/2/79	Sara Favila	D	Wrap machine
10/4/79	11/2/79	Maria Sagrario Perez	R	Wrap machine
10/8/79	11/2/79	Jose C. Lopez	B	Wrap machine
10/11/79	11/2/79	Francisco Limon	C	Wrap machine
10/15/79	11/2/79	Bernardo Villa Pudia	E	Wrap machine
	CHANDLER, ARIZONA			
11/9/79	11/16/79	Pedro Flores	K	Ground crew
11/9/79	11/21/79	Jesus Enriquez	Y	Ground crew
11/12/79	11/26/79	Sara Favila	D	Wrap machine
11/12/79	11/26/79	Maria Sagrario Perez	R	Wrap machine
11/13/79	11/26/79	Jose C. Lopez	B	Wrap machine
	BLYTHE , CALIFORNIA			
11/15/79	12/17/79	Roberto Santemarie	A	Ground crew
11/15/79	12/18/79	Pedro Juarez	J	Ground crew
12/4/79	12/17/79	Pedro Flores	K	Ground crew
11/19/79	12/17/79	Francisco Limon	C	Wrap machine
11/19/79	12/7/79	Jose Ramirez	W	Wrap machine
11/25/79	12/17//9	Antonio Posillo	E	Wrap machine
12/4/79	12/17/79	Sara Favila	D	Wrap machine
12/4/79	12/17/79	Maria Sagrario Perez	R	Wrap machine
	BRAWLEY (IMPERIAL VALLEY) , CALIFORNIA			
12/19/79	Jose C. Lopez		B	Wrap machine
12/19/79	Francisco Limon		C	Wrap machine
12/19/79	Sara Favila		D	Wrap machine
12/19/79	Antonio Posilla		E	Wrap machine
12/19/79	Marie Sagrario Perez		R	Wrap machine
1/4/80	Pedro Flores		K	Ground crew
1/4/80	Pedro Juarez		J	Ground crew

* The Imperial Valley harvesting had not been finished by the end of the hearing .

While respondent's cooling plant employees and driver-stitchers have been covered by other union contracts for a number

15A/ from page 8: This stipulation is not entirely accurate. See, e.g., Warden testimony, XV R.T. 40:19-25, that there were 4 machines [1] in operation most of the Salinas harvest and Pena testimony, XV R.T. 59 that 4 machines started in Salinas.

of years, the harvesting employees were not until the UFW sought certification as their bargaining agent. The UFW was certified as the exclusive bargaining agent for respondent's Salinas-Watsonville area agricultural employees on November 24, 1975 (the "Northern" certification). Following an election on February 6,1976 1976, won by the UFW by a substantial majority,[16] the UFW was certified as exclusive bargaining agent for respondent's Imperial and Palo Verdes Valleys agricultural employees (the "Southern" certification) in August, 1977.[17] Thereafter, respondent stipulate that it had refused to bargain in order to challenge this certification and the Executive Secretary's election challenge procedure and regulations. The Board found that respondent had intentionally violated Sections 1153 (e) and (c) of the Act subjecting it to a make-whole remedy and ordered it to commence good faith bargaining Respondent's appeal to the California Supreme Court resulted in a decision in which the Court upheld the Board's election challenge procedure and regulations. The Court remanded to the Board to determine from a totality of respondent's conduct whether its election contest was a pretense or had a reasonable good faith basis that the challenged procedure or violations would have affected the outcome of the election, thereby obviating make-whole sanctions.[19]

16/ The vote was UFW 155, No Union 41, Void 1, challenged ballots 15.

17/ 3 ALRB No. 66 (August 10, 1977).

18/ 4 ALRB No. 39 (June 22, 1978),

19/ J. R. Norton Co. v. ALRB, 26 C. 3d 1 (December 12, 1979).

On remand, the Board in accord with the standards set forth in the Supreme Court decision, reviewed, reconsidered and reaffirmed its findings and appropriateness for imposition of the make-whole remedy against respondent.[20/]

IV . THE UNFAIR LABOUR PRACTICE ALLEGATIONS.

1. The Late-May 1979 lay off.

a) Facts

It is not disputed that foreman Don Jose Ramirez' wrap machine started in Salinas on May 7[21/] and was stopped three weeks later on May 23. According to foreman Ramirez, the sole reason the machine was stopped was due to mechanical problems. He took down the names and telephone numbers of the 30-35 crew members and advised them they would be called back to work as soon machine was repaired. Each member of his crew, as far as knew, was then laid off.[22/] Ramirez was then transferred to for the remainder of the Salinas harvest and did not call any of the workers back thereafter.

According to Joe Warden, respondent's equipment supervisor, the company had four wrap machines operating at the beginning of the Salinas harvest.[23/] Two more were ordered in

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20/ 6 ALRB No. 26 (May 30, 1980).

21/ All dates are to 1979 unless otherwise indicated.

22/ XXIII R.T. 112:27-28.

23/ XV R.T. 22.

February and arrived in May and June, one of which was assigned to Maria Sagrario Perez. After the machine breakdown a decision was made to rewire and repaint the two older machines, one of which was Ramirez. The repairs were apparently not completed until later in the harvest. Two wrap machines, with Jose C. Lopez and Sara Favila as foremen, were started in August (Lopez was also foreman of a wrap machine for one week in July).[24/] It was not made clear which wrap machines were being used at this point, but it was clear that most of Jose Ramirez' crew were not recalled to work when additional wrap machines were started.

Maria Ramirez (no relation to the foreman), Ramona Lujan and Maria Soila Lerma each testified to the circumstances of their layoff.[25/] Approximately four to five days after work started in May, UFW representatives started visiting the machine crews. Some of Ramirez crew including Soila started wearing UFW pins or insignia on their clothing which Ramirez noted.[26/] Theirs was apparently the first and only wrap machine crew to so indicate their union support at that time. Approximately a week prior to the machine shutdown, Ramirez' crew held an election for crew/ representatives during a lunch break. With all but five or six[27/] voting, the crew elected Maria Raquel Ramirez crew representative

24/ See pages 8-9 supra,
25/ See e.g., III R.T. PP., 124-126, 134-139, 155-159; VIII R.T. 67-64 and IV R.T.6-16, respectively.

26/ IV R.T. 7:18-28; III R.T. 125:24-

27/ Ibid. 7:1-2

and Ramona Lujan alternate.[28/] According to Raquel Ramirez, Ramona Lujan and Maria Soila this was done openly with the UFW representatives there and Don Jose Ramirez standing nearby in view.[29/]

Both Maria Ramirez and Lujan testified credibly that after their selection as crew representatives they had conversations with various supervisors about their union activities Ramona Lujan credibly testified that both before and after the crew representative election foreman Ramirez told her and other workers on the wrap machine that he did not want the union, that the company was not goi sign with the union or admit the union there.[30/] On another occasion when workers from his wrap machine were all in the bus ready to go home, Ramir stood up front in the bus and said to them that, "All persons that wantec union were going to get out", and he snapped his fingers. Maria Soila L credibly testified that Ramirez said to her one day when he noticed her UF pin, "You belong to the union, huh?"[32/]

28/ Ibid. 6:26.

29/ XIII R.T. 69-71; Ramirez acknowledged knowing the UFW representative was there the day of the election because he was asked permission by the UFW representative to talk to the workers. Ramirez also acknowledged being present at the end of the meeting because he asked the UFW representative to leave. XXIII R.T. 114. However, he made blanket denials that he knew that crew representatives were elected, who they were or ever speaking to anyone about the Union, ibid. p. 117. As set forth in more detail in the discussion section, infra, foreman Ramirez was not a very credible witness.

30/ XIII R.T. 72-73.

31/ Ibid. 73:6-9.

32/ IV R.T. 7:24-27.

Another time while he was working nearby her Ramirez said, "Don't you believe the union; we don't want the union here. There's no union here. The company is not negotiating with anyone. You work in peace, and those of you that don't . . . " at which point Ramire snapped his fingers.[33/]

Maria Raquel Ramirez was a particularly credible witness who testified about several conversations she had that afternoon with her foreman Jose after she was elected crew representative :

Jose: "Maria, do you know what you did?"

Maria: "Yes".

Jose" "Aren't you afraid to die?"

Maria: "No".

Jose: "Why do you get yourself involved in these problem

Maria: "Because we want the union to help us".

Jose: "Aren't you afraid to die?"

Maria: "No, that's why I did it, because I am not afraid"[3]

Then, when Maria got up on the machine to start wrapping Jose told I her, "No, get down and cut. This is what you look for and this is what you're going to find."[35/] Maria asked Jose, "Why are you

33/ Ibid. 9-10.

34/ III R.T. 134:16-24.

35/ On another occasion Jose told her that, "Those who want a union would go out." When Maria said, "Give us a slip so we can get unemployment", Jose responded he would not fire them, but would give them such hard times that they would leave on their own. III R. T.137:15-38 —138:1-8. After her selection as alternate, Jose moved Ramona Lujan from sacker to the lower paying job of cutter. XIII R.T. 75-76.

asking me if I'm not afraid to die?" Jose responded, "Because of the problems that you're going to get into with the union, because you accepted to be a representative".[36/] Later, Jose told her "Get out of the union, don't get involved in that problem with the union".[37/]

After work that same day, as Maria was getting on the bus, forewoman Maria Sagradio Perez spoke to her. Perez said, "You've done fine with us. Why did you do that? Aren't you afraid to die? Don't you see how the union is? Why did you do this to
"
us?"[38/] On another day, Maria was passing out fliers to the workers which told them where and when a UFW general meeting was to be held. Maria, while on Perez' bus passing out the fliers, was asked by Perez, "Why are you continuing with that? Why don't you get sister[39/] threw a wadded up flier in Maria's face.[40/]

The day after her election as crew representative Pena[41/] talked to Maria as well. While up on a wrap machine wrapping

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36/ III R.T. 134-135:6-10.

37/ Ibid: 18-24.

38/ Ibid. 136.

39/ Ibid. 137.

40/ Rosalva Lopez, wife of foreman Jose C. Lopez, is Maria Sagradio Perez' sister and worked on Perez' wrap machine as did Perez' mother and father.

41/ Pena was the name the workers called the Aldaberto Pena Ventura, the harvesting superintendet.

Pena pulled on her pant leg and moved close to her to talk.

Pena: "Why are you doing this? Why did you do this to us?"

Maria: "What did I do?"

Pena: "Why did you accept being a representative?"

Maria: "Because the people accepted me".

Pena: "Get out of this. Aren't you afraid that they might kill you or you might die?"

"If you get out of this you can contiue working here, and you may be able to get a machine because you have skill to do this?" 42/

On the day the machine broke down Ramona Lujan testified she had worked briefly on the machine as a wrapper and the machine worked well. According to Lujan, three UFW flags had been placed on her machine, one on the top and one on each wing, by Maria Raquel, Soila and herself. Jose did not say anything about the flags but Maria Sagradia Perez' crew were yelling obscenities to them.[43/] A short time later Pena and a young American from them company came to the field and took down the flags and folded then and put them in a space underneath the machines."[44/] Thereafter, according to Lujan a mechanic got up on the machine, moved something and afterwards neither the presses nor the belt worked. The fore-

42/ III R.T. 138-139.

43/ XIII R.T. 79-81.

44/ Pena testified to ordering flags taken down from the machines one day but didn't recall when or whether he personally took down a flag. XV R.T. 73. From his testimony on cross-examination it appears he was testifying to another occasion at the time of the work stoppages in late August. XV R.T. 88.

man took down their names and phone numbers and said they would be called when the machine was repaired.

Elisa Covarrubias and her sister Maria Montiel credibly testified that shortly before the machine breakdown occurred their forewoman Maria Sagradia Perez was talking to some of the workers in the field. Pointing to the wrap machine that was working near them, Perez said, "That machine is going to be stooped because all those people were Chavistas."[45/]

Each of the three workers also testified concerning their efforts subsequent to their layoff to determine when they would resume work. Shortly after their layoff Soila Lerma noted that five or six workers from Jose's wrap machine were transferred to another machine and Soila went and asked Jose why. Jose told her, "Because they had seniority".[46/] Soila, Maria Raquel and Ramona each went to respondent's office or spoke to Jose asking for work on a number of occasions during the following weeks. Each time they were told the machine was not repaired yet and they would be notified when it was. During this same period, Soila saw four wrap machines, including a new one, operating in respondent's

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45/ VIII R.T. 6-7, 82:6-7. Perez was not examined further by anyone concerning this statement when she originally testified. XX R.T. 75-155. However, when she testified at the reopened hearing, she was asked and corroborated Montiel and Covarrubias' testimony that she had made such a statement to them. XXV R.T. 48.

46/ IV R.T. 15. It was not clarified whether the five or six transferred to another machine were the same five or six who did not vote for the UFW crew representative. The workers' understanding of how respondent's seniority worked is discussed hereinafter. The company, as part of its defense, claims they had no seniority system.

fields.[47/] As indicated previously, no one laid off from Jose's wrap machine was recalled for work again.[48/]

b) Discussion And Conclusions

Discriminatory layoffs with the object of discouraging union membership violates Sections 8(a)(1) and 8(a)(3), the NLRA analogs to Sections 1153(a) and (c) of the Act. N.L.R.B v. Tidelands Marine Service, Inc., 338 F. 2d 44 (5th Cir., 1964).

Respondent's contentions notwithstanding, foreman Jose Ramirez' crew had become, during the two and a half week period prior to the machine breakdown, the first and only machine crew to penly manifest union support. Respondent's contrary assertions in its brief and references to the record that "most of the displaced employees found work in the other crews",[49/] and "crew 'W' was [not] significantly more union oriented than the other crews" [50/] are inerror and contrary to the record evidence.[51/]

Moreover, in contrast to the evasiveness, lack of candor and general denials which pervaded foreman Jose Ramirez'

47/ IV R.T. 14:16-27. This corroborates machine supervisor Warden's testimony that the company generally operated with at least four machines throughout the harvest.

48/ III R.T. 126, 144; IV R.T. 8-9; XIII R.T. 82.

49/ Respondent's Brief, p. 36, lines 16-17, citing to XXIII R.T. 101-102, 112; XVI R.T. 135.

50/ Respondent's Brief, p. 37, no record citation.

51/ Respondent's recurrent references in its brief to record evidence which are not supportive of its assertions undoubtedly resulted, in part, because another attorney other than Wayne Hersh respondent's attorney throughout the six week hearing, reviewed the voluminous record and wrote the post-hearing brief.

testimony, General Counsel's witnesses' testimony (of Maria Raquel Ramirez, Ramona Lujon, Maria Soila Lerma, Maria Montiel and Elisa Covarrubias) on this issue were consistent, specific, detailed and clear. I credit their version of the events and conversations with respondent's supervisors.

The evidence herein clearly establishes respondent's knowledge of the union activity of members of Jose's crew and supports the inference and corroborates a finding that anti-union animus was respondent's true reason and motiviation for crew 'W's layoff. Respondent's defense that the workers were laid off solely because the machine broke down and not recalled solely because the machine was not put back into operation does not withstand analysis. First, whether Jose Ramirez' wrap machine breakdown was planned or not, it was clear that an additional wrap machine was put into operation in June and other wrap machines put into operation in July and August. It is undisputed that most of Ramirez' crew was not recalled, yet it was not an uncommon practice for a foreman, in hiring a crew for his or her machine, to fill it with workers hired and/or previously working for another foreman.[52/] Joe Warden's testimony was unclear whether the decision to rewire Jose's machine was made before or after the breakdown. In either case, it simply strains credulity that none of Jose's crew (whose names, phone numbers and interest respondent was aware of) would be recalled to work although there is an

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[52/] XXIII R.T. 101:17-22.

admitted turnover of wrap machine crew members and additional machines were needed and used throughout the summer harvest.

Coupling the evidence of employer knowledge of union activities with the employer's agents demonstrated animus towards the UFW, the General Counsel made a prima facie case for finding crew 'W's layoff violative of Sections 1153(c) and (a) of the Act. Respondent's preferred defense moreover, considered in the context of the workers' expressed pro-union sentiment and activity, reveals that the layoff was a pretext, in effect, to terminte these workers. I accordingly find that the layoff of crew 'W violated Sections 1153(a) and (c) of the Act.

2. Denial Of Work To Ramon Diaz On August: 14.

a) Facts

Ramon Diaz was rehired by J. R. Norton Co. as a stapler or closer (one of the three or four persons who followed the lettuce cutters and packers of a ground crew and closed each box with a staple gun) in December, 1977.

He had returned to work for respondent at the suggestion of Pedro Juarez, whom Diaz had worked with at another company and who was foreman Robert Santa Maria's second.[53/] In 1978 Juarez was made a foreman of his own ground crew and Diaz worked in his crew thereafter.[54/]

In June or July, 1979, during the Salinas harvest,

53/ Diaz had also worked for respondent during 1971 and 1972 but had worked elsewhere in the intervening five years. II R.T. 36.

54/ II R.T. 40.

Diaz was elected a member of the ranch committee by the ground crews.[55/] As a committee member Diaz responsibility was to communicate worker grievances to the foreman and supervisors and to assist in resolving problems that arose between the company and the workers. According to Diaz his (and the other members) selection was done openly and was well known to the company. As a committee member Diaz spoke to foremen about work problems that arose. He specifically recalled discussing on two separate occasions problems that Pedro Juarez raised concerning two workers who were working inadequately.[56/]

On or about August 8, Peter Orr decided that due to the poor quality of lettuce and the then low market price, the harvesting crews would be laid off until August 15. This was communicated to the crews on August 9 and many then left Salinas to visit their families.[57/] Over that weekend, however, the market started to pick up and Orr told his supervisors to notify as many workers as possible to return instead on Monday, August 15.[58/]

Obdulio Magdaleno[59/] came to the company's labor

55/ Two other ranch committee members mentioned were Diego de la Fuente and Rosendo Casillos.

56/ II R.T. 108, III R.T. 81-83. Juarez and the company denied knowledge of Diaz' union activities, ranch committee membership or discussing worker problems with him.

57/ The majority of ground crew workers apparently lived in Mexicali and environs.

58/ XVI R.T. 36:15-22.

59/ Magdeleno was referred to by his nickname Palatos"or "Palafox" (the coughing one) by the workers.

camp at about 7-7:30 a.m. on August 13 and told the 15 or so worker who were still there,[60] including Diaz, that there would be work for everyone starting that Monday rather than Wednesday. Diaz informed Magdaleno that he had not expected to work that day and was too tired and declined to do so.[61] Other workers, however, agreed to, although one (or more) asked Diaz if it would be okay to work. Diaz told them that, "Whoever wants to go can go". He did not discourage any of the workers from working that day.[62] On the following day the foremen arrived at 5:30 to pick up the workers at the camp to drive them to the field. Pedro Juarez informed the workers including Diaz that there was work for everyone who wanted it.[63] Juarez, according to Diaz, referred to him as an agitator because Diaz told people not to work the previous day. Diaz told Juarez he was lying.[64] When Diaz went out to the company bus to go to work he was told by foreman Pedro Floras that he was going to have only 12 lines, that he was full and already had three stapler[65] Diaz did not work that day. Diaz also testified that during summer in Salinas he cut or packed lettuce approximately 5-10 times instead of closing because he had less seniority than some of the

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60/ The great majority of the 60-70 workers who normally live at the camp are ground crew members.

61/ Diaz had participated in the march and convention sponsored by the UFW over that weekend in Salinas. II R.T. 63.

62/ Ibid.

63/ Ibid. 63-64 (Diaz); XXIII R.T. 78:12-18 (Juarez).

64/ Juarez recalls no such conversations with Diaz or that Diaz pad caused any problems during this time. Ibid.

65/ II R.T. 64.

other staplers and would have cut or racked that day as well if that was all that was available.

It is noteworthy that Flores testified that he *was* foreman of the one crew that worked on August 14 which consisted of more than 20 trios.[67/]

b) Discussion And Conclusions.

Discriminatory interference with or modification of the working conditions of an employee with the object of discouraging union membership violates Section 1153(c) of the Act. When illicitly motivated, modification of an employee's work situation by preventing him from working the same hours as his fellow workers violates Section 1153 (c) as well. See, e.g., Star Mfg., Co., Div. of Star Forge, Inc., 220 NLRB 582, 90 LRRM 1361 (1975)

By mid-August, 1979, Diaz, along with Diego de la Fuente and Rosenda Casillos, were among the leaders of the UFW' and workers' campaign to get the company to negotiate and sign a contract. While both respondent and Juarez denied any knowledge of Diaz' union activities, the credible evidence in the record is substantial that they were fully aware of Diaz and the UFW's on-going union activities commencing in May. As indicated previously. UFW representatives were frequently visiting the ground and machine crews to organize them and keep them abreast of information on the

66/ II R.T. 67.

67/ XVII R.T. 66.

expected contract negotiations. Diaz played a particularly active role in thse activities as a ranch committee member.

Moreover, Juarez' nervous demeanor while testifying cast serious doubt on his veracity. This, coupled with his repeated general denials of any conversations suggesting Juarez' awareness of his workers' union activities or their requests to work in New Mexico combined to discredit his testimony.[68/]

Diaz' credited testimony, on the other hand, was fully consistent with and corroborated by the ongoing union activity at J. R. Norton coupled with the events that were occurring in Salinas in August surrounding the industry negotiations generally.[69/] Moreover, the explanation given Diaz on August 14 that the crew was "full" does not withstand scrutiny. Both Magdalene and Juarez had originally told the remaining workers at the labor camp during the lay-off period that all who wanted to work could do so. Respondent mobilized as many of these remaining workers as it could to harvest on August 14 since more than 20 lines were in "Flores' or

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68/ XXIII R.T. 79-80, 86. Juarez' testimony that not one of his workers asked him for work for New Mexico when the Salinas harvest was winding down is particularly incredulous, contrary to past practice and other credible worker testimony and undermined his entire testimony.

69/ Diaz testified to the UFW strike acitivity, march and convention that apparently were well publicized. Orr alluded to the rumors in mid-August that Sun Harvest and the UFW were close to agreement, including a $5.00 an hour general field rate which was publicly announced about August 30. West Coast Co., Meyer Tomato Co. and Mann Packing Co. had signed agreements with the UFW around mid-August which also established a $5.00 an hour general field rate with retroactivity which also were well publicized. According to Diaz, Fuentes (as well as others, e.g., Steeg and Orr), these events were having an impact on respondent's workers (coupled with their perception of lack of good faith bargaining by respondent) resulting in considerable worker concerted activity which in turn led to the work stoppages.

for that day. Yet Diaz asked for work but was denied it, as either a closer, cutter or packer, purportedly because the crew was full.[70/]

Therefore, I conclude that the reason respondent put forth for not hiring Ramon Diaz on August 14 was pretextual. The General Counsel has proved by a preponderance of the evidence that respondent violated Sections 1153(a) and (c) of the Act when it failed to permit Diaz to work that day.[71/]

3. Alleged Threat To Diego de la Fuente on August 31, 1979.

a) Facts

Diego de la Fuente first worked for respondent in June, 1979. He had been hired by Abel Luna, a "pusher" or assistant foreman, to cut and pack in Roberto Santamarie's crew. Prior to that he had worked in lettuce harvesting for both Royal Packing Co. and the past three years at California Coastal Farms until 1979 when they went on strike there.[72/] Within a short time Diego, who was bilingual, had become one of the principal spokesmen for the workers with the company. For example, in early August, the workers started to harvest in fields that were apparently

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70/ It was not uncommon for the company to add on individual cutters at times rather than only trios. XXIII R.T. 93-94. Moreover, when the company has as many as 20 trios or lines it usually employs four or more closers, not three. Ibid. 97-99.

71/ Respondent's Brief (p. 38) in discussing this charge focuses solely on the events of August 13 and does not address itself to the record testimony of the August 14 events. See footnote 51, supra.

72/ VII R.T. 3-4.

jointly owned or harvested with Green Valley Farms which was then on strike. Some of the Green Valley striking workers came into the fields and spoke to Diego whom they knew, informing him and his co-workers that these fields were Green Valley's whose workers were on strike. Diego spoke to his foreman Santamarie about assured Diego and his co-workers that the fields did not belong to Green Valley. However, when the Green Valley workers showed Diego and his co-workers their maps they were convinced the field was Green alley's. Diego was the spokesman for the worker who told Santamarie and Peter Orr that the workers would harvest elsewhere but would not in these fields. Rather than become embroiled in the disnute further Orr moved the workers to other fields to harvest.[74/] Subsequently, Diego "testified to overhearing Santamarie tell one of his oushers Jose (Ramirez) to trv and fire Diego.[75/]

During the week of August 31 Diego missed some work with permission three times. On August 28 he attended the negotiating session between the company and the UFW as President of the workers negotiating committee. On two other occasions he attended meetings as a member of the workers industry negotiating committee. Permission to attend on two of the occasions was given by Santamarie before he left on vacation for two weeks while Abel Luna, one of the seconds, gave him permission to leave

74/ XVI R.T. 11, 103.

757 VII R.T. 7-8.

work the third time.[76/] When Santamarie left on his vacation Raul Ramirez filled in as foreman. On August 31, Ramirez angrily told Diego in front of many of the workers that Diego had to personally ask Ramirez' persmission to leave work and the next time Diego was late he would be fired.[77/] Ramirez testified and essentially confirmed that the incident occurred. However, he claimed that he merely advised Diego he must notify Ramirez personally when he is going to be absent. Otherwise, Ramirez could not maintain proper control of the crew and know how many trios he would have.[78/] Ramirez further acknowledged that Diaz had replied in their exchange that he had relayed the message of his absence through a co-worker.[79/]

b) Discussion And Conclusions.

A threat to discharge an employee for engaging in protected concerted activity or in union activity violates Section 1153(a) of the Act. Giumarra Vineyards, Inc. 7 ALRB No. 7 (April 3, 1981). Such threats have repeatedly been held violative of Section 8(a)(l) of the National Labor Relations Act (NLRA). See U.S. Chemical and Plaster Div., Alco Standard Corp., 200 NLRB 11335 (1973); Awrey Bakeries, Inc., 197 NLRB 7705 (1972).

76/ VII R.T. 48 Fuente was gone for an hour to an hour and a half each time. Ibid. 50.

77/ VII R.T. 51.

78/ XVIII R.T. 10-11.

79/ Ibid. 11.

It was undisputed that Diego de la Fuente had cleared with his foreman Roberto Santemarie and one of the seconds Abel Luna, permission to be absent from work for part of the day on three occasions. In each instance it was for union activity, once in order to attend a negotiation meeting on August 28 between the company and the UFW. In this context, temporary foreman Raul Ramirez' stated reason for needing to know personally in advance if a worker was going to be absent, i.e., in order to be able to divide his crew equally into trios, is unpersuasive. Diego's testimony was not disputed that he had permission to leave each time from someone in direct authority over him so that it can not be reasonably claimed that Diego's failure to notify Ramirez personally would interfere with Ramirez' ability to supervise the crew. Moreover, both Ramirez and another foreman testified that it is not uncommon to employ singles and duos within a crew as well as the more typical trio.[80]

Regardless of whether respondent intended its warning to Diego to be a discriminatory threat or not, in of Diego and his co-workers the reasonable effect would be to consider the warning a threat to one of the company's most prominent union activists to curtail those activities.[80A/] Ramirez' conduct had the reasonable effect to interfere with the workers' statutory rights assured by Section 1152 of the Act. I accordingly

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80/ XXIII R.T. 93-94; XVIII R.T. 11:11

8OA/ See, German, Basic Text on Labor Law, p. 132 (1975); Munro Enterprises, Inc. 210 NLRB 403, 36 LRRM 1620 "(1974).

find that the General Counsel has sustained its burden by a preponderance of the evidence that respondent violated Section 1153 (a) when Ramirez warned Diego de la Fuente on August 31.

4. The Alleged Assault On Magdalena Cordoza On August 31.

a) Facts.

Magdalena Cordoza was first hired (with her mother) by Maria Sagradia Perez in New Mexico in October, 1978. She followed the harvest thereafter, working in Perez' crew as a wrapper and travelling between harvest locations in a company bus. In Salinas, 1979, she initially started as a water person in the ground crews but switched to Perez' wrap machine when it started several weeks later.[81/] When Cordoza first arrived in Salinas she had little money and no place to stay so Maria Sagradia Perez let Cordoza stay in her home for several weeks. At Perez' suggestion, Cordoza later moved into a hotel room with Maria Luisa Esparza who needed a roommate to help share the rent. When Cordoza initially worked in Salinas she neither supported nor was a member of the UFW. However, as the summer and union activities continued she became a union supporter and activist. This apparently resulted in some strain between Cordoza and Perez who had previously enjoyed a good working relationship. In mid-August, crew representatives, Minerva Koyos and Maria Montiel were elected in Perez' crew. Cordoza was among those who participated. Perez was aware of the election and who the representatives

81/ VI R.T. 85-85.

were. When the initial work stoppages started on August 20 Cordoza supported and participated in them. Approximately a week prior to the August 31st incident, Perez, Perez' sister Rosolva Lopez and Cordoza had a dispute regarding whether Lopez would replace Cordoza in her wrapping position and move Cordoza to another position. Cordoza was transferred shortly thereafter to Jose C. Lopez' wrap machine.

While there is some dispute between the parties regarding which days work stoppages occurred, it was not disputed that on August 31 a work stoppage occurred. After working approximately two hours that day the majority of the crews steppe: working. Jose C. Lopez' machine was one of the machines that stopped. Cordoza, who had a watch, and several other women workers went over to Perez' machine to tell the workers it was time to stop. A majority of Perez' crew apparently also supported the decision and agreed to stop working and got down from the wrap machine. However, Maria Luisa Esparza and some of the wrappers on one wing of Perez' machine stayed on the machine continuing to work.[82/]

When Esparza, who like Cordoza apparently did not have immigration papers, did not get down, Cordoza yelled at her roommate, "There comes the Migra", upsetting her.[83/] Perez' mother

82/ Apparently most of the remaining wrappers were related to Perez (her mother, father and two sisters).

83/ VI R.T. 89 - Migra meaning Immigration Officers.

and sister got angry with Cordoza and they exchanged words. Perez decided there were not enough remaining workers to continue the wrap machine and she stopped it. Her crew along with Cordoza, who rides on Perez' bus, walked to her bus. On the bus Perez' sister Rosolva Lopez and Cordoza exchanged words and started to fight. Perez' mother also joined in.[84/] When Perez boarded the bus other workers were attempting to intervene to separate the women. Perez yelled at Cordoza and her sister that if they wanted to fight to get off the bus to do it. Cordoza testified that she saw Perez approaching her but turned her attention back to Rosolva and the mother because they were pulling on her and attempting to bite her. Cordoza said she was hit again and was later told that it was Perez who did it. Maria Estella Mendoza, who was also on the bus and helping to separate the women, testified that she observed Perez hit Cordoza when she approached to assist in separating the women. Perez, while acknowledging that the altercation occurred, testified that her efforts upon boarding the bus were to help separate the, women and she did not hit Cordoza.

b) Discussion And Conclusions.

Respondent's defense to this allegation is that the testimony at the hearing does not support General Counsel's position that Perez assisted in assaulting Cordoza because of

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84/ I have not attempted to resolve the conflicting testimony concerning who started the fight, why and what transpired since General Counsel has not sought to impute Perez' mother and sister's conduct to respondent.

Cordoza's union activities.[85/]

As often happens with "eye-witness" accounts, the testimony by the various percipient witnesses called by the carti differed as to the nature of Perez' involvement in the fight.[86/] Nevertheless, an overall picture does emerge from the testimony. Perez neither instigated nor participated in the immediate under - lying conflict between her sister and Cordoza when the work stoppage occurred which apparently triggered the altercation. All witnesses corroborated that Perez was not on the bus when the fight started and they also conveyed that Perez' principal role was to aid the other workers in separating the combatants and end the confrontation. Thus, resolving the conflicting testimony whether Perez struck Cordoza at all during the separation of the combatants appears to be the less critical determination. Rather the ultimate determination to be made is whether the General Couns has sustained its burden of proof that Perez' conduct even assumin she assaulted Cordoza, was in retaliation for Cordoza's union

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85/ General Counsel did not brief this issue in its post-hearing brief, but the matter was fully litigated and I assumed the omission was inadvertence.

86/ Maria Luisa Esparza, Angelita Medrano and Maria Teresa Garcia were called by respondent to corroborate that Perez did not strike Cordoza. (See XVII R.T. 47, XX R.T. 48, XX R.T. 27., respectively). However, Esparza and Medrano, whose testimony at the hearing was solicited for respondent by Perez, were also recipients of gifts from Perez at the time of their testimony. (XXV R.T. 36). Respondent conceded authorizing S200.00 to Perez for Medrano's "expenses" in coming to testify at the hearing (XXV R.T. 66). While Medrano and Esparza's testimony was significantly undermined and discounted, this nonetheless did not alter my ultimate conclusion herein.

activities. I conclude that the most reasonable inference to be drawn, considering the testimony of all the witnesses, is that General Counsel has not sustained its burden by a preponderance of the evidence that Perez' actions towards Cordoza were in retaliation for Cordoza 's union activities. Rather, the preponderance of the testimony is that Perez acted in a manner consistent with her position as a supervisor by assisting in separating the combatants. Any contact between her and Cordoza is equally, if nor more, consistent with peacemaker rather than retaliator.

Moreover, as a legal proposition, I am unpersuaded that the factual context in which Perez acted was such an egregious one, that the necessary connection between her conduct and Cordoza' exercise of protected rights was established or could reasonably be inferred. See, e.g., George Lucas & Sons, 4 ALRB No. 86, pp. 2-3 (1978).

I accordingly will recommend that this allegation be dismissed.

5. The Wage Increase Instituted Effective September 5, 1979.

a) Facts

On September 5, respondent sent a telegram to the UFW indicating that the company desired to modify its wage proposal to the Union and intended to implement the newly proposed rate unless it heard from the Union to the contrary by September 10, 1979.[87/] Previously, on August 28, the company had made an entire

87/ General Counsel's Exhibit 5. The wage proposed for cutters and packers was $5.10 an hour.

contract proposal which was essentially the June, 1979, "industry" proposal but with some holiday deletions and 54.50 an hour general field wage rate and a $4.60 cutters and packers hourly wage rate.

The following day, September 6, the Union wired back to the company that it rejected the wage offer indicating that all the economic and non-economic issues, not just wages, were cut-standing and needed to be resolved in their negotiations.[88/] On September 7, the company responded by telegram requesting the Union to reconsider its rejection of the company's wage proposal. On September 11, the parties met for a brief bargaining session at Hartnell College in Salinas, with more than half of respondent work force attending. The Union rejected again the company's wage proposal without agreement on an overall contract package including. jail economic and non-economic matters. The Union then proposed the company accept the "Sun-Harvest" contract which had been recently signed by Sun-Harvest and a number of other Salinas area vegetable companies or to bargain from the UFW s June 8 bargaining proposal to the company. The company's negotiator Dick Thornton indicated that he and the company would need to review the Sun-Harvest proposal and would get back to the Union. The meeting ended after 10-15 minutes.

88/ There was testimony from workers that days prior to its August 28th $4.60 hourly wage proposal to the UFW, the company representatives, including Peter Orr, had independently offered the workers that rate. Company witnesses denied this. I have no-considered nor believe it necessary to resolve this disputed testimony in order to resolve the allegation concerning the September 5 wage increase.

89/ General Counsel's Exhibit 6.

On September 12 respondent instituted the pay rates effective with the paychecks for the week ending September 10 (respondent's payroll period runs from Tuesday through Monday, so that pay raise was effective starting with the week of September 4-September 10). The company justified this unilateral action on the basis of its prior notice to the Union on September 5 and two previous wage adjustments in 1977 and 1978 by the company which were acceded to by the Union.[90/]

b) Bargaining History

Respondent's bargaining history regarding the Northern certification differed from the Southern certification.[91/] In 1976 the agreement signed by Inter-Harvest and the UFW became or was treated as the "master agreement" by most of the remaining vegetable industry including respondent and the UFW. Thus, negotiations based on the Inter-Harvest contract during 1976 and 1977 resulted in the company and Union reaching agreement on all substantive issues with a few local issue's still outstanding.[92/] Indeed, by the summer of 1978 the company and Union had for all practical purposes reached agreement and were operating defacto under the Inter-Harvest contract terms, even though the company had not signed a contract. It was in this context then that the Union, according to the testimony of its negotiator Marian Steeg

90/ See, e.g. General Counsel's Exhibit 10.

91/ See pp. 10-11, supra.

92/ Testimony of company negotiator Richard V. Thornton. XXI R.T. 70:12-15; 71:25-28.

agreed to the 1977 and 1978 interim wage adjustments which were an integral part of the Inter-Harvest contract that the parties were operating under defacto.

In 1979 respondent advised the UFW that it was net joining the industry bargaining but would bargain separately while monitoring the industry negotiation.[93/] Apparently no negotiations occurred between the industry group (or respondent) and the UFW from February 28 until June, 1979, because of an industry declared impasse. On-the-record negotiations resumed again in June, 1979, with the Union and industry exchanging proposals. Thornton, respondent's negotiator, was also one of the industry group's principal negotiators who was following the status of these negotiations and presumably reporting them back to respondent.

On August 20 and 21 a majority of respondent's harvesting crews initiated work stoppages for the purpose of convincing respondent to bargain and reach a contract with the UFW. Peter Orr came out to the field on Tuesday morning August 21 and told the workers that the company was agreeable to meeting with the Union to negotiate and provided a phone number for the Union to contact to make the arrangements.[94/]

93/ The "industry" negotiations were actually approximately 28 (primarily) Salinas-based vegetable companies (representing approximately 60-65 percent of the industry production) who were meeting and negotiating as a group and represented by the same negotiators, primarily Andrew Church and Dick Thornton.

94/ Orr had also indicated to the workers that the company had always been ready to sit down with the Union and bargain but were waiting for the Union to call them.

At the August 28 bargaining session the company's proposal was very disappointing to the workers and the Union. Although three or more contracts had already been signed with the UFW calling for a $5.10 hourly rate for cutters and packers, respondent's proposal was for $4.60 an hour. In addition, respondent's proposal, while nearly identical with the industry proposal made two and a half months earlier, had deleted one or more holidays. At the conclusion of the meeting a second one was scheduled two weeks later on September 11 in which the Union would respond.

Commencing on or about August 31 and continuing thereafter for approximately eight or nine work days, the majority of respondent's workers participated in work stoppages to convince respondent to negotiate and reach agreement on a contract.

On September 5 copies of the telegram with the wage proposals sent to the Union were provided to the foreman and supervisors by Orr. Wrap machine supervisor Obdulio Magdaleno went out to the field and told many of the wrap machine workers he was implementing immediately pay raises and read off the amounts. Pena came out to the field shortly thereafter and informed the workers that the pay raises were proposals only and Magdaleno had no authority to raise their wages. The conflicting statements by the two company supervisors left many of the workers confused. Some of them, including Ramon Diaz, Diego de la Fuente and Rosenda Casillos left the field and drove to the company offices to seek clarification.[95/]

95/ VII R.T. 30. Fuente's testimony was not clear what the workers were told at the office on this particular occasion.

Commencing about September 5, according to Orr, respondent started hiring additional harvesting crews who eventual became part of the replacement crews.[96/]

According to Lucretia Gower, respondent's secretary responsible for preparing the weekly payroll, Orr had told her approximately one week prior to the payroll period closing on September 12, to hold up on preparing the final pay rat figures on the pay checks because the company was planning to implement a pay raise. Those figures were given to her on September 12 and implemented for the payroll for the week of September 4-10.[97/]

c) Discussion And Conclusions

While admitting that it unilaterally increased the wages of its workers during the course of negotiations, respondent contends that it nevertheless did not violate its duty to bargain in good faith because the wage raise was "merely a continuation of the company's past practice" and notice to the Union had preceded the implementation.[98/] Respondent acknowledges that under I applicable ALRB decisions, the Board has repeatedly held that unilateral wage increases during negotiations violate Sections 1153(e) and (a) of the Act. O.P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979); Montebello Rose Co., Inc., 5 ALRB Mo. 64 (1979); AS-H-NE Farms, 6 ALRB Mo. 9 (1980) and Eto Farms, 6 ALRB No. 2 (1980). However, respondent seeks to place its conduct within the

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96/ XVI R. T. 66.

97/ XXIV R.T. 94:22. Gower, who had worked for respondent for nearly ten years and was very familiar with respondent's payroll operation, was a particularly credible witness.

98/ Respondent's Brief, pp. 46-52.

exception to that rule which permits wage raises "consistent with the company's long-standing practice", citing to NLRB v. Katz, 369 U.S. 736, 746, 50 LRRM 2177 (1962); NLRB v. Bradley Washfountain Co., 192 F.2d 144, 29 LRRM 2065 (7th Cir., 1951); and NLRB v. Landis Tool Co., 193 F.2d 279, 29 LRRM 2255 (3rd Cir., 1952). In Katz, the Court implied that unilateral wage changes that "in effect, were a mere continuation of the status quo" would not constitute a violation of Section 8(a)(5), the analog to Section 1153(e). Ibid., p. 746, 82 S.Ct. at 1113. However, the availability of this defense is afforded to wage changes that are "in fact simply automatic increases to which the Employer has already committed himself." Ibid. The Supreme Court in fact rejected this defense in Katz because the wages challenged there "were in no sense automatic, but were informed by a large measure of discretion." Ibid.

Consideration of the type of wage increase here, coupled with the manner of its implementation and prior agreed-to wage increases compels the conclusion that respondent's unilaterally instituted wage increase violated their obligation to bargain in good faith. In arriving at this conclusion, I am not unmindful that respondent" carries a heavy burden of proving that such adjustments of wages . . . are purely automatic and pursuant to definite guidelines." NLRB v. Allis Chalmers Corp., 601 F.2d 870, 875, 102 LRRM 2194 (5th Cir., 1979). Respondent's contention that the wage increase instituted in September, 1979, was in line with the increases which were instituted in 1977 and 1978 without Union

objection does not withstand scrutiny. The earlier increases were an integral part of (i.e. automatic/without discretion) and made pursuant to the Inter-Harvest "master" agreement that the parties hereto were de facto operating under. However, by 1979 that agreement had terminated and was no longer in effect. In fact, face-to-face negotiations between the parties had only recently started and then only apparently because of agreements being reach elsewhere in the industry causing, in turn, considerable worker concerted activity and agitation over their perceived lack of bargaining by respondent.[99/] Moreover, in view of the timing of the increase, i.e., during the period respondent was hiring additional workers (who ultimately became replacement workers), and the method it was communicated to the workers, it can hardly be claimed that: the increase was "automatic", but in fact was "informed by a large measure of discretion." Katz, ibid, at p. 746.

In addition, respondent's September 5 notice to the Union, when viewed in the context of" its overall conduce during that entire period, supports the inference that respondent intended to institute the pay raise regardless of the Union's response. This conclusion is further supported by Gower's testimony as to when and how she was preparing to implement the pay raise. The effect of the manner of communicating as well as implementing the

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99/Respondent's negotiator Thorton testified that respondent had expected a negotiation session earlier than August, obtain General Manager Carroll's phone number from Pena during August in order to arrange a negotiating session between the company and Union. II R.T. 83-86, VII R.T. 12, Respondent's brief p. 50/

unilateral pay raise would necessarily undermine at a critical time the Union's bargaining position contrary to the company's obligation to bargain in good faith. See, e.g., C & C Plywood Corp., 163 NLRB No. 136, 64 LRRM 1488 (1967); enf'd. 413 F. 2d 112 (9th Cir., 1969). See, also, N.L.R.B. v. Crystal Springs Shirt Corp. , ___ F.2d ___, 106 LRRM 2709 (5th Cir., 1981); McGraw-Edison Co. v. N.L.R.B. 419 F.2d 67, 72 LRRM 2918 (8th Cir., Cir., 1968) 1968) ; Waycross Sportswear Inc. v. M.L.R.B., 403 F.2d 832, 69 LRRM 2718 (5th/ cir., 1981) ;

Finally, respondent's conduct at the bargaining sessions reinforces the inference that it was not bargaining in good faith but merely going through the motions. By September 11, the date of the second face-to-face negotiation, respondent's negotiator Dick Thornton was also negotiating on behalf of twelve or more other Salinas-based lettuce growers who had already or were in the process of signing contracts with the UFW based on the Sun-Harvest master and local agreements. As their attorney and principal negotiator, Thornton had copies of and/or access to Sun-Harvest-spawned proposals and agreements being utilized in those negotiations. In this context, it is incredulous and disingenuous for Thornton to assert that no further negotiations ensued (for the next five to six months) because the UFW had failed to provide him with yet another copy of the Sun-Harvest agreements in order to review with respondent.[100/]

100/ XXI R.T. 67, 87. Likewise, Thornton's further justification that respondent had not negotiated in previous year once the harvest left Salinas is equally unpersuasive. At best, past history is equivocal as to the reason for negotiations taking place primarily during the Salinas harvest. A more plausible inference is the parties had already reached basic agreement and were operating de facto under the Inter-Harvest "master" agreement}. But regardless or where the harvest moved to, the negotiators were still available in Salinas to meet in 1979 and early 1980.

I conclude that the General Counsel has establish by clear, convincing and substantial evidence that respondent violated Sections 1153(e) and (a) of the Act by its unilateral increase in wages on or about September 5 without bargaining with the UFW[101/] and further by its failure to meet with the UFW for the ensuing five to six months.[101A/]

6. The Replacement Of The Workers On September 13.

a) Introduction

A considerable portion of the record testimony an post-hearing briefs were devoted to this issue, including the preceding work stoppages. Some of the basic facts were not disputed while many details were. However, after considering all of the record testimony and evidence, reviewing the post-hearing briefs and independently researching this issue, I am persuaded that whatever other legal conclusions or characterizations could be made about these events, respondent, by its conduct and agreement demonstrated a "willingness to forgive" its workers for

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101/ General Counsel presented additional direct evidence at the reopened hearing, of respondent's unlawful intention and purpose during the negotiating period through former forewoman Perez. Perez testified that Pena informed her and the other foremen at one of their meetings in September that the company had no intention of negotiating with the Union and the pay raise was introduced as a smokescreen to quiet the workers. XXV R.T. 16-18,74. Respondent's witnesses Pena and Orr denied they said this. However, I credit Perez' version, since it is consistent with and fully corroborated by the earlier record testimony and evidence. Moreover, Orr and Pena' s testimonies were significantly inconsistent, each impeaching the other regarding the "investigation" that purportedly occurred when Perez was fired. As a result their entir testimony was undermined. Cf. XXVI R.T. 100, 103 and XXVII R.T. 22 226.

101A/ Additional ALRB cases finding violations of the duty t: bargain in good faith under similar circumstances are Signal Produ; *I* 6 ALRB No. 47 (1980); Sunnyside Nurseries, 6 ALRB No. 52 (1830) and Highland Ranch and San Clemente Ranch, 5 ALRB No. 54 (1979).

their recent concerted activity (whether lawful or not). See, e.g Confectionery & Tobacco Drivers & Warehousemen, Local 805 v. N.L. R.B. (M. Eskin & Sons), 312 F.2d 108, 113, 52 LRRM 2163 (2nd Cir., 1963). The discussion of the applicable facts hereinbelow takes this into account.

b) Facts

Ramon Diaz and Diego de la Fuente credibly testified about their (and Rosendo Casillos) efforts during August to initiate face-to-face bargaining between the company and the UFW. For approximately ten days (from about August 7 to 17) they sought unsuccessfully to contact Art Carroll either directly or through Pena to make initial arrangements.[102/] By Friday, August 17, the workers felt that the company was stalling and decided to hold a meeting at the labor camp to discuss what action to take. With the great majority of ground crew and a number of wrap machine workers present, the workers decided to conduct a work stoppage that following Monday, August 20, in order to persuade the company to meet and start seriously negotiating with the UFW. Accordingly the following Monday the workers appeared and started to work for an hour or so. The ground crews stopped working, advised their supervisors why and then went to notify the wrap machine crews that the work action had started. While the support by the ground

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102/Pena had told the workers, who understood, that he had no authority to discuss wages or negotiate with them. They asked Pena to call Carroll, who did have the authority. Each day for approximately one week Pena, according to the workers, told them he was unable to contact Carroll. When the workers themselves attempted to call Carroll at the number Pena provided there was no answer for several more days.

crew for the work action was virtually unanimous, a majority, but by no means all, of the wrap machine workers supported the stoppage. Thus, although notified, one or two wrap machines continued to work. On the following day the same procedure was generally followed except that Peter Orr came out to the fields at about 10 a.m. He told the workers the company has always beer, agreeable to meeting with the UFW and gave Diego de la Fuente and Ramon Diaz a phone number to call in Phoenix in order to make the arrangements. Diaz and Fuente and a few other workers left the field and drove to the UFW Salinas field office and gave the information and phone number to Marian Steeg. Steeg was successful in arranging a first negotiating session at 10 a.m. on August at the Grower-Shipper & Vegetable Association's Salinas office. Diaz and Fuente returned to the fields that morning and reported to the workers that a negotiating session had been arranged for the next week. The workers held a meeting and agreed to return to work the following day. The workers returned to work the next day and worked the remaining week as well. The workers continued to work the following week, which included the first negotiating session on August 28, without work stoppages until August 31.[103/]

103/ Some of respondent's witnesses indicated that once the work stoppages started they continued uninterrupted for the next three weeks or so. However, Respondent's Exhibit "G" indicates that normal lettuce production occurred between August 22 and August 30 and Peter Orr confirmed that after the meeting date was agreed to a hiatus occurred when there were no work stoppages. XXVI R.T. 131.

A majority of the workers met after work on August 30 at respondent's labor camp. They discussed and concluded that respondent was merely stalling and not bargaining in good faith. They agreed to have a work stoppage the following day, Friday, August 31. As indicated previously, nearly all the ground crews and a significant majority of the wrap machine crews supported the work stoppage and stopped work unannounced after approximately two hours. Prior to the workers leaving that day, Pena asked Ramon Diaz whether the workers were going to work the next day, Saturday. Diaz told Pena that the workers were not as that was the Labor Day weekend.[104/]

After returning from the Labor Day holiday weekend, the majority of the workers met each day at the labor camp and agreed to have a work stoppage the next day.[105/] During the following

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104/ This was the only time the crews were asked and/or announced in advance whether they were going to work that next day. Pena and Orr claimed that the normal work week was six days including Saturday. Diaz testified that crews only worked Saturdays when it was an "emergency", when typically less than full crews worked. The evidence, at least during the 1979 Salinas harvest, seems to corroborate Diaz. Respondent's Exhibit "G" shows harvesting crews worked two out of five Saturdays in June, zero out of four Saturdays in July and one out of five Saturdays in August. Even on those Saturdays the crew did work their production was significantly less than normal indicating that a less than full complement worked.

105/ The evidence was equivocal at best, whether work stoppages occurred on Wednesday, August 29 and Thursday, August 30. According to the workers' testimony no work action was intended and they worked as asked to and cut a normal day's production. According to respondent's supervisors, they wanted the crews to work longer and cut more. In view of the ultimate determination that respondent accepted the workers back condoning their conduct, I have not attempted to resolve this difference. (Probative factors I would take into account in making this determination are the workers normal production those days and none of the conduct manifested on August 31 occurred on August 29 or 30}.

eight work days (between September 4 and 12) the workers arrived at work, worked between one and three hours and then stopped. Although there were one or two machines that still had enough workers to continue for the first day or two of the stoppages, it became clear to the wrap machine foremen that there were insufficient remaining workers willing to continue. Thus, by the second or third day of the work stoppages, the foremen would stop their machines shortly after the announcement of the work action by the crew members.[106/]

Although the testimony was unclear as to when, at some point after the work stoppages persisted, the company decided to fire or replace the workers. Orr testified that the decision was not made until September 13.[107/] However, other credible testimon indicates that replacement workers were being hired on September 11 and 12 and working on the 13th.[108/] In either case, the testimony

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106/ There was testimony from some of respondent's foremen, notably Obdulio Magdaleno, that there was intimidation and threats of violence by some ground crew workers towards some wrap machine workers which caused them to stop working. (It was not disputed that no injuries, property damage or arrests actually occurred). Even if this testimony is taken at face value, it was considered in the context that a substantial majority of wrap machine workers supported the work action from the outset. Moreover, the verbal intimidation referred to was occasional, not pervasive and did nor persist. While not condoning even occasional verbal intimidation, the overall impression gleaned from the testimony was that this work action was not caused or furthered by intimidation. Rather, the work action was effective because it was supported by a substantial majority of the workers. Cf., e.g., XIX R.T. 127:-15-25

107/ XVI R.T. 65.

108/ XV R.T. 83-84.

was undisputed that when the workers sought to report to work on Thursday, September 13, they were stopped by security guards at respondent's field and prevented from entering. The majority of workers returned to their cars and drove to the company's Salinas office to inquire whether they were going to be allowed to work. At some point that morning, according to Diaz, Fuentes and other workers' testimony, Pena came outside and told them they were fired.[109/]

Over that weekend there was considerable contact between Peter Orr and ALRB agent Newman Strawbridge regarding the status of the workers. Discussions ensued between the ALRB agent, Orr and one or more UFW representatives, resulting in an agreement; that the company would continue the employment of the workers if the workers agreed to cease the work stoppages and sign a document to follow their foremen's orders.

On Monday, September 17, the workers reported to the company's office and signed a document (General Counsel's

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109/ A small number of workers upon hearing they were fired left the company's parking lot and went to the labor camp to pick up their belongings. They departed without learning " later they would be able to return to work. Pena testified that he told the workers they were replaced not fired, although his testimony was equivocal. XV R.T. 96. However, the testimony of the workers was consistent that they were initially told they were fired. It was only later that they were told they were only replaced. This version is further corroborated by the telegram sent by the company to the UFW on Friday, September 14, clarifying that the workers were only replaced not fired. See General Counsel's Exhibit 8. See, e.g., III R.T. 42:5-14, 44-45.

110/ Apparently the workers were prevented from working on three days, September 13, 14 and 15.

Exhibit 2) which contained the following statement:

> "Yo estoy agui, A Reportarme para Trabajar en la compania J.R. Norton, Co., Yo entiendo y espero trabajar bajo las order del Mayordomo, y dejar de trabaja hasta que la orden se hoya terminado."

According to the official translation the terms that the workers agreed to and signed were:

> "I am here to report to work in the J. R. Norton Company. I understand and hope to work under the order of the foreman and leave work until the order has been terminated."111/

While not a model of clarity, the meaning to the workers and company was not disputed. The company agreed to continue the employment of the workers and the workers agreed to cease the work stoppages and sign a document in which they signified they would follow the work hours designated by their foremen. Those workers who signed the agreement were then permitted to return to work. Copies of the document were provided to each foreman who utilized it to determine who was permitted to work. Work then continued in Salinas through the rest of September and into the first week of October until harvest ended without further incident.[112/]

(c) Conclusions and Discussion.

111/ XXI R.T. 124

112/ Although Orr testified that the company did not retain the original of the lists of workers after a two week pence because "I didn't ever want to be accused "of having a list of people who participated in work stoppages for use against the people", XVI R.T. 72:23-25, nevertheless, the foremen each testified to retaining their copies.

It Is General Counsel's contention that respondent's replacing its workers on September 13 was an unlawful termination in retaliation for their protected concerted activity. In support General Counsel cites to N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962): N.L.R.B. v. Empire Gas, Inc., 566 F.2d 681 (10th Cir., 1977); and N.L.R.B. v. R.C. Can Co., 320 F.2d 974 (5th Cir., 1964). In the alternative, General Counsel contends that even if the work stoppages were not protected activity, the proper application here of the condonation 10 : doctrine lawfully precluded respondent from retaliating thereafter against its workers, citing to N.L.R.B. v. Colonial Press, Inc., 509 F.2d 850 (3th Cir., 1975), cert, den. 423 U.S. 833.

Respondent, on the other hand, asserts that the workers' repeated work stoppages were unprotected and unlawful concerted activity, citing to Auto Workers v. Wisconsin Employment Relations Board, 336 U.S. 245, 23 LRRM 236 (1949) ; N.L.R.B. v Local 1229 IBEW, 346 U.S. 464, 33 LRRM 2183 (1953); Shelley and Anderson Furniture Co. v. N.L.R.B. 497 F.2d 1200, 86 LRRM 2619 (9th Cir., 1974) and Honolulu Transit Co., 110 NLRB No. 244, 35 LRRM 1305 (1954). Alternatively, respondent contends that it was entitled to replace its striking workers in order to continue its business, citing to N.L.R.B. v. Mackay Radio & Telegraph, 304 U.S. 333, 2 LRRM 610 (1938).[113/]

113/ Mackay Radio has generally been cited for the proposition that an employer during a strike does not lose the right to protect and continue its business by replacing its striking workers. Mackay Radio has an additional application to this case discussed further hereinafter. The Court also ruled that the worker list prepared by Mackay Radio was used discriminatorily against trios-most active in the union in determining which of the striking worker would be reinstated. 304 U.S. at 347.

The broad guaranties embodied in Section 1152 of the Act (and its analog Section 7 of the NLRA) authorize and protect employees who "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .". One such traditional right is to engage in an "economic" strike, i.e., one involving wages, working conditions and other such economic issues. Generally, concerted activities that are a reasonable means' of aiding the union's objectives at tne negotiating table are protected while concerted activities that unreasonably interfere with the employer's right to continue business are not.

Thus, the NLRB has held that two stoppages of short duration do not constitute the type of pattern of recurring stoppages which would deprive the employees of the Act's protect Michael Palumba dba American Hones Sys., 200 NLRB 1151, 32 LRRM 1183 (1972) (one-day strike to protest working in inclement weather Shelly & Anderson Furniture Mfg. Co. v. N.L.R.B., 497 F.2d 1200 86 LRRM 2019 (9th Cir. , 1974), enforcing 199 NLRB 250, 32 LRRM 1152 (1972) (brief one-time protest demonstration against employer's dilatory bargaining tactics); Robertson Indus., 216 NLRB No. 62, 88 LRRM 1280 (1975) (two stoppages involving a total of two days absence from work); Crenlo Div. of G.F. Business Equip., Inc., 215 NLRB No. 151, 88 LRRM 1277 (1975) (two stoppages on two successive days).[114/] Moreover, there is a presumption that a single

114/ I would have considered the workers' concerted action on August 2 and 6 in refusing to work on struck fields and its successful work stoppages on August 20 and 21 in order to induce the company to start face-to-face bargaining as consistent with this precedent.

concerted refusal to work overtime is protected strike activity. Polytech., Inc., 195 NLRB 695, 79 LRRM 1474 (1972). However, partial, intermittent or recurrent work stoppages are not protected, thereby permitting employers to discharge employees who engage in such activity. N.L.R.B. v. Blades Mfg. Corp., 344 F. 2d 998, 59 LRRM 2210 (8th Cir., 1965); N.L.R.B. v. Montgomery Ward & Co., 157 F.2d 486, 19 LRRM 2008 (9th Cir., 1946). Work stoppages which are partial, intermittent or recurrent have been held unprotected because they produce "a condition that [is] neither strike nor work." Valley City Furniture Co., 110 NLRB 1539, 1594-95 (1954), enf'd. 230 F.2d 947 (6th Cir., 1956). This is so because "[s]uch actions disrupt production schedules and impede the employer from using replacement or temporary employees while the protesting employees continue to draw their wages."[115]

However, within a short period after the workers were replaced, it became apparent to the company that the quality'

115/ Shelley & Anderson Furniture Co., supra, 497 F.2d at 1203. Unlike the cases referred to therein, there is no evidence in this case that respondent's employees reported to work and while receiving their usual wages, repeatedly and without warning engaged in work stoppages. Most of the workers were paid on a piece rate basis and were paid only for work actually done. Semble, N.L.R.B. v. Deaton Truck Line, Inc., 389 F.2d 163, 169 (5th Cir., 1968) Nor is there any record evidence that the recurrent work stoppages prevented respondent from hiring replacement workers. Respondent' supervisors conceded that additional workers (who became replacement workers) were hired starting on September 5. The recurrent work stoppages did impede operations and affect production. However, this can be attributed, at least in part, to the quantity and quality of lettuce pack harvested by the replacement workers. XXIV R.T. 42:9-19.

of work by the replacement workers was inadequate.[116/] After entering into an agreement with the workers, signified by execution of General Counsel's Exhibit Mo. 2("The List"), the company returned the workers to their jobs. The following factors clearly emerge from the disputed testimony: First, respondent did not, in fact, terminate its replaced workers;[117/]' second, respondent desired to have its more experienced and qualified harvesting crews return if done pursuant to an acceptable agreement, because of the poor quality of pack by the replacement workers; and third, as a condition of being restored to their former positions, the workers were required to sign the document which acknowledged they could return and would work the hours their foremen told them to.

Did respondent manifest by this conduct an intent to condone the acts of purported misconduct by its workers?[118/]

116/ Vern Smith, respondent's buyer, characterized the quality as "disastrous". Ibid.

117/ Some workers, as indicated earlier, testified they were told they were fired. However, respondent apparently reconsidered or clarified its position on September 13 and/or 14, making it clear to the workers, UFW and ALRB that the workers were only temporarily replaced.

118/ Respondent's alternative theory is that it was entitled to replace its striking workers, even if the workers' conduct is not deemed unlawful. However, this assertion does not take into account the finding that respondent's failure to bargain in good faith was a significant contributing cause to the workers' conduct or strike. (See pages 33-42, supra.) This finding would result in the strike being treated as an unfair labor practice strike entitling strikers to reinstatement whether or not their jobs had been filled or work reduced. See Morris, The Developing Labor Law, pp. 127-128, and cases cited therein in footnotes 73-75.

Condonation is not lightly presumed. Plasti-line, Inc. v. N. L. R. B. 278 F.2d 482, 486 (6th Cir., 1960). The condonation doctrine in the labor relations context is applied where an employee commits act(s) of misconduct lawfully justifying his discharge and thereafter the employer, though fully cognizant of the act(s), continues to employ or rehires the employee. The employer may not thereafter rely on the same misconduct as the basis for discharging or refusing to reinstate the employee. N.L.R.B. v. Colonial Press, Inc. 509 F. 2d 850 (8th Cir., 1975). Thus, to order reinstatement based on the employer's condonation of prior employee misconduct, the courts have required that, "[T]he record contain clear and convincing evidence that the employer has in fact agreed (1) to forgive the misconduct and 'wipe the slate clean', and (2} to resume the former employment relationship with the employee." N.L.R.B. v. Colonial Press, Inc., supra, at pp. 845-855; Packers Hide Association v. N.L.R.B. 360 F.2d 59, 62 (8th Cir., 1966). Moreover, resumption of the employment relationship necessarily rests on a mutual agreement. N.L.R.B. v. Community Motor Bus Co., 439 F.2d 965, 968 (4th Cir., 1971). If the employment relationship was, in fact, terminated before the alleged condonation, some additional indicia or manifestation by the former employee in response to the company's offer is required in order to re-establish their employment relationship. If, as is the typical case (and here as well), the employment relationship has not been severed, then the employer's offer of re-employment may be determinative. N.L.R.B. v. Colonial Press, Inc., supra, at p.855.

As a corollary, where a decision ordering reinstatement is based on the employer's condonation of strikers' conduct, then the issue of the legality of the original conduct is irrelevant. N.L.R.B. v. E.A. Laboratories, Inc., 188 F.2d 885, 886 (2nd Cir., 1951). Moreover, after a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise to discriminate against them, M. Eskin & Son, supra, 312 F.2d at 113, and a subsequent refusal to rehire the workers is a separate and distinct violation of the Act independent of the lawfulness of what had happened before, N.L.R.B. v. E.A. Laboratories, Inc., 188 F.2d at 887.

Applying these applicable NLRB precedents, the conclusion is inescapable that respondent manifested and intended by its conduct, preparation of and requirement of worker signatures to General Counsel's Exhibit 2 that it was (1) "wiping the slate clean", and (2) resuming the former employment relationship with its employees.[119]

I accordingly conclude that a finding that the workers' conduct during the period between August 31 to September 12 was or was not protected is irrelevant, because, in either case, respondent had manifested an intent to condone its workers' (alleged) unprotected concerted activities and resume an employment relationship.

119/ As indicated earlier, respondent's motivation, rather than altruistic, was based on a business need for a quality lettuce pack that its experienced workers provided and further corroborates the condonation finding. It follows that the document signed by the workers was not a "yellow dog" agreement, i.e., one which prohibits the workers from participating in protected concerted activity (see General Counsel's Brief, p. 61), but one manifesting respondent's condonation and the workers' acceptance of the employment terms.

7. Were The Workers Constructively Evicted On Or About September 13?

a) Facts

On September 13 three company supervisors, Celastino Nunez, Raul Ramirez and Abelardo Velasquez drove to the company's labor camp in a company bus accompanied by two Salinas policemen. With the assistance of the cook and Ramirez, Nunez, in the presence of the police, removed most of the pots, pans and kitchen utensils and loaded them in the bus.[120/] In order to take some of the pots, food that was cooking in them was thrown out. According to Nunez, the kitchen utensils and equipment were removed because the camp residents no longer worked for respondent, the utensils were to be transported to set up the New Mexico labor camp, and the residents were losing them.[121/] After the bus was loaded it was driven to the company's shop in Salinas where it remained with the utensils for several weeks. Although the workers were reinstated four days later the utensils and equipment were not returned. There is no record evidence

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120/ Nunez and another foreman had attempted to remove the kitchen equipment from the labor camp the previous day without the police. They had encountered a number of angry workers and decided not to proceed.

121/ XXIII R.T. 39. Respondent's conduct on September 12 and 13 regarding the removal of the kitchen utensils further corroborated my conclusion that respondent initially intended to fire its workers and not merely temporarily replace then on September 13.

122/ XXIII R.T. 25, 27, 36.

that any of the workers were in fact evicted.[123/] However, the company no longer permitted the cook to purchase food on a line of credit in the company's name from several Salinas merchants as had been the past practice. Instead of having the company deduct weekly sums from their paychecks to pay for the cook and food, the workers were now required to establish a line of credit with the merchants themselves and to pay their cook directly.[124/]

b) Discussion and Conclusion

It was not disputed that respondent has historically, as a past practice, provided a labor camp in most of its harvesting locations where those male workers who so desired could live and take meals. In Salinas, respondent provided a leased labor camp for its male workers without charge. In Filics Estate Vineyards, (Oct. 25, 1978) 4 ALRB No. 31, p. 2, the ALRB adopted the NLRB rule concerning company housing:

> "The NLRB has traditionally found company housing to be a 'term or condition of employment' where rental is provided free, or at a nominal rate, or at less than he usual rate in the area, so that such housing constitutes, in effect, a part of the wages remuneration for employment services."

The company additionally provided, as a term or condition of employment, a means whereby food for meals could be purchased initially in the company's name and thereafter paid for through deduction from the workers' wages.

123/ Mauricio Chavez testified that Nunez said they would have to leave, IX R.T. 40. Nunez denied saying this. XXIII R.T. 10-11. However, the testimony was uncontroverted that no one in fact was required to leave.

124/ Pena assisted Diaz in establishing the credit with the merchants.

It is General Counsel's contention that respondent by its conduct in removing the kitchen utensils, had constructively evicted the workers.[125/] In the alternative, General Counsel contends that the failure to return the utensils at the time of the workers reinstatement amounted to a unilateral and significant change, without notice and opportunity to negotiate over, a term and condition of employment.

Respondent, on the other hand, contends that the company was free to remove their kitchen utensils in order to take them to New Mexico and that the workers were either on strike or at least not working for the company at that time. No explanation or justification was given for not returning the needed kitchen utensils after the workers were reinstated on September 17 although the equipment sat in a company bus at their Salinas shop for the next several weeks prior to being taken to New Mexico.

Under California law, a constructive eviction occur when (1) the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purpose they were leased, or (2) there is interference with the beneficial enjoyment of the premises, and if the tenant vacates within a reasonable time Witkin, 3 Summary of California Law, 8th Ed., p. 2123, § 441 and cases cited therein. While it cannot be doubted

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125/ Although the charge and complaint speak in terms of eviction and/or constructive eviction, in view of the uncontroverted testimony that no one was in fact evicted, the discussion hereinafter will be limited to constructive eviction.

that there had been some interference with the workers' beneficial enjoyment of the premises by the removal of the kitchen utensils,[126/] it is difficult to find this interference rising to the "substantial level. Moreover, if California eviction law is the appropriate law to consider and apply herein, it is uncontroverted that none of the workers were required to or in fact vacated the labor came prior to the harvest ending.

Analogously, under ALRB constructive discharge principles, unfavorable changes in work assignments may be treated as a constructive discharge if the effect on the workers' health, pay or work is serious, or substantial. George Arakelian Farms, Inc., (Feb. 14, 1979) 5 ALRB No. 10. However, if the effect on the workers' status does not reach such a level of difficulty or unpleasantness, then the Board has considered the changed working conditions to be a discrirninatorily altered one in violation ofSection 1153 (c) and (a) of the Act, but not a constructive discharge. Ibid. 5 ALRB No. 10, pp. 4-5.[127/] It is my conclusion, considering and applying these analogous constructive discharge principles, that the altered condition of employment

126/ There is considerable dispute between the parties as to which kitchen utensils taken on September 13 belonged to the company and which to the workers. Respondent's reference to its Exhibit S, invoices of kitchen utensils purchased 17 months earlier while probative is not dispositive. In view of my recommended disposition, I believe it unnecessary to attempt to further resolve (if resolvable) this conflict.

127/ A finding of an anti-union animus which is at least a partial motivating factor for the change is also required.

here did not rise to the necessary "substantial" degree or level to be considered a constructive discharge and/or eviction.

However, I do concur with General Counsel's alternative theory that respondent's removal and refusal to return kitchen utensils amounted to a unilateral change in a term and condition of employment. The underlying facts are not in dispute. The company had maintained, as a past practice, and as a term and condition of employment, a labor camp where the workers were provided a means to obtain food and meals for themselves. The company and the workers' exclusive bargaining representatives were purportedly bargaining in good faith regarding their wages and other terms and conditions of employment during this period. Nevertheless, respondent unilaterallv and without notice altered this past practice and refused to return the kitchen utensils.[128/] I conclude that respondent's conduct regarding this issue was a unilateral change in a term and condition of employment that was done contrary to its obligation to bargain in good faith with the workers' bargaining representative,[129/] violating Sections 1153 (e) and (a)

128/ As indicated earlier, respondent's purported rationale that the utensils were removed in order to be transported to New Mexico was entirely contrary to the record evidence, from which can be gleaned and inferred respondent's true unlawful motive.

129/ In a like vein, General Counsel contends in its brief (pp. 39-40) that respondent's refusal to provide bus service from Salinas to Calexico after the 1979 harvest as it had in the past was an unlawful labor practice. However, I decline to consider this issue herein. While conceding this allegation was not alleged in the complaint (General Counsel's motion at the end of the hearing to conform the complaint allegations to the proof was granted), General Counsel contends that the issue was fully litigated. Although there was some testimony elicited from witnesses called by both sides on the matter, I did not understand during the

(fn. 129 cont'd on p. 60.)

8-11 Respondent's Refusal To Rehire Its Workers For Each Of The Subsequent Harvests During October, November and December, 1979 and January, 1980, Because Of Their Union Activities.

a) Introduction

In the following sections I set forth and analyze the evidence using a Kawano-group discrimination approach regarding whether respondent unlawfully refused to rehire its workers in the ensuing harvests. As set forth below, I conclude that a group analysis approach is appropriate and applicable to the facts of this case. Normally, this would suffice, but at the time of the hearing, Kawano, Inc. (Dec. *26,* 1973) 4 ALRB No. 104 was on appeal and the validity of utilizing a group analysis was still unsettled. Accordingly, additional evidence was requested by the ALO and received at the hearing regarding the merits of individual claims for re-employment. The decision by the Court of Appeal subsequent to the close of this hearing reaffirming the validity of using *a* group analysis in appropriate circumstances, see Kawano, Inc. v. A.L.R.B., 106 C.A.3d 937 (1980), hg. den. Sept. 17, 1980, considerably eased my task herein. However, relevant testimony regarding individual claims will be set forth and

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fn. 129 cont'd from p. 59

the hearing, nor presumably did respondent, that such testimony was to be considered as substantive evidence of liability for an unfair labor practice rather than as probative background evidence to the other allegations. (No further amended complaint was filed by the General Counsel at the end of the hearing.) Thus, it is unclear to me that the issue was, in fact, "fully" litigated. Moreover, as a factual matter, the evidence elicited was that at least one (Pedro Juarez) or more foremen did provide rides in 1979 from Salinas to Calexico. I accordingly recommend this allegation be dismissed.

discussed as part of the group discrimination analysis. It will be seen that the re-employment efforts by individual workers varied considerably. By referring to and considering the individual claims, I do not mean to preclude the applicability of he group discrimination to individuals because, for example, some were more easily deterred from seeking re-employment (which to them appeared futile). It is my intent and belief on this issue that the discriminatory refusal to rehire is a continuining one with respect to the entire group of workers who participated in the Salinas work stoppages.

b) Facts:

Hiring Practices. Respondent contends that it traditionally and historically did not hire its workers at succeeding harvests on a seniority or guaranteed basis. Rather, it claims that the workers are told approximately when the next when the company is hiring. Those who timely ask at the succeeding harvest location will be hired. The same practice, harvest will start and to showup in sufficient time to seek work according to respondent, was followed for each of the succeeding New Mexico, Arizona, Blythe and Imperial Harvests during 1979-80. The only reason, according to respondent, that so many workers involved in the Salinas work stoppages were unable to obtain work thereafter was due to their untimely request for work. In order to consider the validity of respondent's defense to General Counsel's contention, a review of respondent's past hiring and harvesting practices is necessary.

Vern Smith, currently a buyer in respondent's sales department and formerly harvesting coordinator, testified that respondent plants its lettuce crops and coordinates its operations in order to commence each harvest at approximately the same time each year (within a seven to ten day period).[130/] Since 1975, when respondent first started to harvest in New Mexico, respondent planted and harvested more lettuce each succeeding year including 1979.[131/] Moreover, the demand and price is generally higher for the new harvesting area lettuce than for the previous harvesting area lettuce.[132/] This held true for early October New Mexico lettuce which was 50¢ to $1.00 a carton higher than the Salinas lettuce.

As the New Mexico harvesting season would approach, the harvesting coordinator would check the condition of the lettute and notify the foremen in Salinas about ten days prior to the date harvesting was expected to start. The foremen would relay and confirm the approximate starting date with their crews. The precise harvesting date, when the crews would be expected to start work in the fields, is usually decided about three to four days

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130/Smith, harvesting coordinator until April, 1979, testified in some detail to respondent's current and past harvesting procedures, particularly in Salinas and New Mexcio. XXIV R.T. 4-69. Celestino Nunez initially coordinated the 1979 New Mexico harvest in Pena's absence, who was ill for part of this period.

131/ XXIV R.T. 10-11.

132/ XXIV R.T. 58, lines 16-19.

before harvesting actually commenced, and relayed to the foremen. According to respondent's witnesses this was true for the 1979 New Mexico harvest as well which started on Thursday, October 4.[133/]

What clearly emerges from the 44 former Norton workers who testified at the hearing was the apparently workable methods established and utilized over the past years by which workers communicated their commitment to follow the harvest to their foreman who would then assure them work. Felix Garcia, a particularly credible witness, testified that he had worked for respondent in Roberto Santemarie's ground crew for nine or ten years. Garcia, like most of the other workers who testified, believed that respondent operated under a seniority system. Thus, he stated that it was incumbent on the worker to tell his foremen whether he was going to follow the harvests. Those who did would be assured a job if they appeared for work. According to Garcia, Santemarie would tell him if he did not notify the company) he would lose his seniority. This was particularly important to Garcia because he did not follow the harvest from Salinas to New Mexico, but would remain to work in the Imperial Valley near his home in Mexicali for the month of October and resume work with the company in Arizona in November. Garcia would tell Santemarie in Salinas when the harvest was winding down of his interest to work in Arizona. Santemarie would assure him of work and would either personally come to Garcia's home in Mexicali or send word

133/ See, e.g., Vern Smith's testimony, XIX R.T. 66:14.

through another worker when work was to start. Garcia would them meet Santemarie's bus on the designated day at either the Standard or Shell station in Calexico if he was going by company bus or elsedrive to Arizona to arrive the date Santemarie had already told him.[134/]

In August, 1979, before the work stoppages started, Garcia testified to asking Santemarie for work in Arizona again. Santemarie agreed to notify Garcia at home when work would start and where because the company was moving its harvesting location (from near Marana approximately 40 miles away to near Chandler).[135/] In 1979 Santemarie did not come by Garcia's home or send a message to him when the Arizona harvest was going to start as in the past. I Not knowing where the company was harvesting, Garcia waited until the Blythe harvest started when he unsuccessfully sought work again person with respondent.

Ramon Diaz' efforts to continue working in subsequent harvests in Pedro Juarez' crew graphically illustrates how the seniority workers, who were involved in the work stoppages in Salinas, were thwarted in those efforts by the foremen.

In the past, Juarez, who was friendly with Diaz, would personally notify Diaz at his home when the next harvest was to start. For 1978 as well as 1979, Diaz asked Juarez for work

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134/ Santemarie's testimony on cross-examination essentiallv corroborates this. See XIX R.T. 127:3-13.

135/ Santemarie denies this. I credit Garcia since his testimony was clear, specific and fully consistent with what he previously had done.

for New Mexico as the Salinas harvest was winding down. In 1978, Juarez left Salinas several days before Diaz but told Diaz when the harvest was to start in New Mexico and that he would notify Diaz at his home in Mexicali when Juarez was leaving. Juarez came to Diaz' home and told him when his bus was leaving. Diaz met Juarez' bus a few days later at the Standard station in Calexico and drove with the rest of the crew on the company bus to New Mexico.[136/] In 1979, Diaz asked Juarez for work in New Mexico during the last week they worked in Salinas (the week ending October 5). Juarez told Diaz he would know in Imperial Valley and to check with him there. On Sunday, October 7, Diaz found juarez at a mechanic's shop in Mexicali and Juarez said he did not know when he was going to start but would check with his second, Abel Luna, to see if Celestino Nunez had told him. Pedro Juarez left the shop and shortly after another worker, Filimon Lozano, arrived. Lozano told Diaz that he had already learned from Juarez that his bus was leaving at 8 a.m. from the Standard gas station in Calexico. That following Monday morning, October 8, Diaz arrived at the gas station in Calexico when Juarez did.

The following conversation ensued:

Diaz: "When are you leaving for Mew Mexico?"

Juarez: "Today."

Diaz: "When are you going to start in New Mexico?"

Juarez: "I don't know, probably on Thursday."

136/ II R.T. 46-48. A majority of Juarez' crew who worked in Salinas also worked in New Mexico in 1978.

Diaz: "I will drive there in my car, to start working on Thursday."

Juarez: "I don't know."

Diaz: (After a new worker arrived and asked Juarez which is the bus and Juarez told the worker, "It's this one right here."); "Why didn't you tell me about the work, being that you are picking up more people?"

Juarez: "I have to complete my crew."

Diaz: "Well, then I'll arrive there [in New Mexico' on Thursday."

Juarez: "If you do I can't promise you work."

Diaz: "Why aren't you assuring me the work?"

Juarez: "I don't know."

Diaz: "Why don't you know? Aren't you responsible for what you're doing?"

Juarez: "I have instructions from the higher-ups to not give work to any of those from Salinas."

Diaz" "Is it instructions or orders?"

Juarez: "I have orders from Celestino to not give work 137 to anyone that had been a troublemaker in Salinas."

Diaz thought it would be futile to drive all the way to New Mexico (it was about an 11-12 hour drive from Calexico) and made no further attempt to obtain work during the New Mexico harvest.[138]

137/ III R.T. 62-63.

138/ Many of the former workers called as witnesses credibly testified to similar conversations with other Norton foremen regarding orders that the company would not hire Salinas worker involved in the work stoppages. See, e.g., Diego de la Fuente, VII R.T. 46-47; Jose Farias, VII R.T. 109-113; Pedro Maciel, XI R 35-86, 90 (Maciel was told this by Santemarie in Salinas before he left Salinas and by Pedro Juarez in New Mexico; however, Maciel was hired by Pedro Flores his second day in New Mexico); Jose Alonzo XII R.T. 109-110 (Alonzo had been hired and worked one day for

fn. 138 cont'd on page 67.

The Montiel-Covarrubias group's unsuccessful efforts to work on respondent's wrap machines in the succeeding harvests paralleled the ground crews' unsuccessful efforts. Following the workers return to work on September 17, Maria Sagradio Perez' wrap machine crew was transferred to Jose C. Lopez' wrap machine. Sometime between September 20 and 26, Perez was notified she would start one of the wrap machines in New Mexico. She left about September 26 in order to help set up for the New Mexico harvest. Prior to her

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fn. 138 cont'd from p. 66

Jessie Enriquez in New Mexico but was told the following day by Enriquez he had orders to fire him); Francisco Jiminez, XII R.T. 135-136 (Jiminez was refused work by Juarez in Calexico before New Mexico and in New Mexico as well. It was Abelardo Velasquez, a friend and sometime Norton foreman, who told Jiminez why he wasn't initially hired. However, Velasquez later hired Jiminez on the last day of the New Mexico harvest); Ramon Lozano, XIX R.T. 66 (The Lozano family generally did not follow the harvest to New Mexico, but did in Blythe. They were told by Pedro Juarez in Salinas they would not find work in Blythe and he told then again Mien they came to Blythe, XIX R.T. 70); Octavio Rios, XIX R.T. 97 (Rios was a particularly credible witness and his testimony about the conversation with his friend and assistant foreman, Abel Luna in Juarez, Mexico, was clear, concise and persuasive. It was in sharp contrast to Luna's evasive and prevaricated testimony about the same conversation, XXIII R.T. 133).

Respondent's Brief (pp. 21, 23) asserts that it Would be "incredible" that any of its foremen would make such a statement to a worker (the inference being that in each instance lithe statement was not made). Yet, many of these foremen and workers Jihad worked together for many years. It would not be inconsistent with that working relationship for the foremen to attempt to save these workers a 12-hour drive (20 hours from Salinas) to New Mexico where no work would be offered. Nor would it be inconsistent with the foremen's desire to make it clear that there would be no work in New Mexico (or Arizona or Blythe) in order to avoid having to face telling these workers for the first tine at the new harvest flocation. Finally, the statements would not be inconsistent with the company's desire to avoid having these Salinas workers come to New Mexico where they might have renewed motivation or cause for further coneerted activities.

departing, the Montiel-Covarruhias group asked Perez for work in New Mexico. The workers had been told by Perez and the other foremen that if they stayed with the company from harvest to harvest they would have seniority and would be assured a job at the following harvest. Perez, according to the workers, promised work to the group in her crew in New Mexico. [139/] Lopez' machine worked until October 2. Towards the end of that week while their last pay checks were being handed out at the Monte Mart Drugstore, the group asked Lopez for work in New Mexico. Lopez told them he was going to New Mexico on Monday (October 3) and assured then work in New Mexico although he was not sure when his machine was to start.[140/]

The group drove to New Mexico arriving on either Monday, October 3, or Tuesday, October 9, and went out to the

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139 See e.g. VIII R.T. 15, 80-81. Perez initially denied that she had made any promises of work to her crew before she left Salinas, XX R.T. 81. Respondent called Maria Teresa Garcia who testified that she did not hear anyone in Salinas ask either Perez or Lopez for work in New Mexico, XX R.T. 23-24. Garcia did not make a very credible witness. She was an extremely nervous and uncomfortable witness whose often inaudible testimony was replete with either general denials or poor recollection. Moreover, Perez at the reopened hearing admitted and corroborated that many of her crew members had asked her in Salinas for work in New Mexico. Although initially declining to hire any, she felt very badly and hired several after they had come to the fields for two days, XXV R.T. 31-34. According to Perez, Pena was very caustic to her when he arrived in New Mexico and found several Salinas workers in her crew. Perez' corroborating testimony further undermined Maria Teresa Garcia's.

140/ VIII R.T. 13-15, 17.

fields to report to the foremen.[141/] When the group arrived in the field the machines were already working. They were told by both Perez and Lopez that the crews were full and they had no openings. Three members went to the office to speak to Obdulio Magdaleno, the machine supervisor, and Celestino Nunez, the crew supervisor. Magdaleno 'told the group that since three had worked in New Mexico I before, they had seniority. However, he told the group to wait for Nunez. The group waited for Nunez for several hours. Three waited in the field and three at the office. When they finally talked to Nunez it was after work. They told him they were reporting for work and he replied that the machines were full. He advised them one machine was presently broken but would be started on Wednesday and to come back then.[142/] The group returned to the home of a friend, Virginia Silva, who had let then sleep there. Silva, who worked for Norton for the New Mexico harvest only, had told the group that she had heard talk amongst the workers that none of the Salinas workers were going to be hired in New Mexico because of the troubles they had caused in Salinas. The group had run out of money and Wednesday morning left to return to Calexico. On the way back they

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141/ Some of the group testified they arrived and went to the" field on Monday. Others testified it was Tuesday. Respondent asserts this conflict undermines their entire testimony. I do not concur. The group's testimony on the critical facts and course of events was clear, persuasive and essentially consistent. Moreover, regardless of which day the group appeared, the foremen had already gone out and hired other workers and indicated no intent to employ the group although the foremen and workers repeatedly testified that there is frequent turnover within a crew from week to week.

142/ A wrap machine actually started on Thursday.

met Arturo Hoyos who was driving to the New Nexico harvest. The group told him their difficulties in obtaining work and what had been told to them . Hoyos also then returned to Calexico. Neither Hoyos nor the group made further efforts to seek work in New Mexico.[143/]

Even accepting the testimony of respondent's foreman at face value, it becomes apparent that the contradiction in their testimony undermines respondent's proffered defense.

Each of the foremen testified that they did not know when the Hew Mexico (or subsequent) harvests were to start and/or whether they would have a crew until they arrived at the next location. Thus, Pedro Juarez testifed that he left Salinas on Friday evening, October 5, without knowing when he was to report to New Mexico and whether he would have a crew. As late as Sunday afternoon he had told Ramon Diaz that he still didn't know and would have to check with his second Abel Luna, who was supposed to relay the information from Celestino Nunez. Yet Luna testified that he had arrived in Calexico on Saturday and had told Juarez the when he was to start. Pedro Flores testified he did not know as well when he was to report to New Mexico and whether he was to have a crew. Peter Orr and Pena corroborated this by testifying that Orr had originally requested to keep Pedro Flores' ground crew in Salinas for an extra week to finish the harvest there.[144/] In fact, Floras' crew finished up on October 5 and did not remain in Salinas

143/ VIII R.T. 21-23.

144/ See, e.g., XVI R.T. 76.

the following week. Yet Lucretia Gower testified that she and the rest of the office staff had to work extra hard the week ending October 5 in order to get the checks prepared for those crews finishing up, including Pedro Flores', by October 5. By contrast she did not have to do the same for Domingo Ignacio'screw (one of the replacement crews hired by respondent in September), because they were continuing to work the following week.[145/] Moreover, although Flores testified he did not know whether he had a crew in New Mexico before arriving, nevertheless, he arrived there with at least six workers he had hired from his home in San Luis.

Furthermore, foreman Raul Ramirez testified that it is very difficult to find enough wrap machine workers in New Mexico.[146/]

Although unneeded, additional (and devastating) corroboration was further proffered in Maria Sagradio Perez' testimony at the reopened hearing. Although subject to vigorous cross-examination, including numerous impeachment efforts, Perez persuasively and convincingly testified that the foremen's it thwarting of the Salinas workers re-employment efforts was not accidental. During foremen meetings in September, Perez and the other foremen were told by Pena that the company did not care who they hired for the succeeding harvests, but they could not hire the seniority workers involved in the Salinas work stoppages. They were further told to use the copy of the "lists" provided them

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145/ See, XXIV R.T. 98-99.

146/ XVII R.T. 6-4.

to assist if necessary.[147/]

c) Discussion and Conclusion:

In Kawano Inc. v. ALRB, 106 C.A.3d 937, 165 Cal. Rptr. 492 (1980), hg. den. September 17, 1980, the Court of Appeal affirmed the Board's approval of a group rather than individual discriminatee analysis in appropriate refusal to rehire cases. In Kawano, Inc., 4 ALRB No. 104 (1978), the Board approved the utilization of a group analysis in two areas applicable here: (1) whether the alleged discriminatee made a proper application at the time when there was available work and (2) whether discrimination must be shown towards each individual associated with an identifiable group. In considering these two issues in Kawano it was held that:

> "A discriminatee will not be required to prove that a proper application was made if part of the discriminatory scheme is to prevent such application from being made, Piasecki Aircraft Corp. v. N.L.R.B. 288 F.2d 575, 46 LRRM 2469 (3rd Cir., i960), or if the employer changes the method of application without notice to employees, Ron Nunn Farms, 4 ALRB No. 34
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> 4 ALRB No. 104 at p. 4

> " . . . [I]f a discriminatee is prevented or discouraged from applying, it is impossible to show availability of work at the specific time the non-existent application was made."
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> 4 ALRB 104 at p. 5

> "Where the alleged discrimination is not directed at individuals, but at a group, the burden as to each

147/ XXV R.T. 19, 22-24. According to Perez, Pena told them, "These chauvistas are making us shed tears. We're going 1 to make them shed blood." "I will take great pleasure in the fact that they would arrive [in New Mexico] without any money and 1 that we weren't going to give them jobs."

> named discriminatee may be met by a showing that the group was treated discriminatorily and that the named discriminatee is a member of the group. N.L.R.B. v. Hoosier Veneer, 120 F.2d 574, 8 LRR15. 723 (7th Cir,1941).In such a case, relief may not be denied because no direct evidence is offered of a specific discriminatory intent as to each individual in the group. N.L.R.B.. v. Bedford-Nugent, 379 F.2d 528, 65 LRRM 2476 (7th Cir., 1967).
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> 4 ALRB 104 at p. 8.

The credited testimony and record evidence in this case establishes the following:

1. Over the past three or more years respondent maintained a "seniority" system whereby those workers who followed the harvests would be assured or guaranteed jobs.[148/]

2. The workers would tell their foreman of their

148/ According to Diaz and other workers the seniority system was applicable and utilized regarding layoffs, rehires, job assignments as well as other job related benefits, II R.T. 66-75 There was significant corroborating evidence to this testimony. For instance, Richard Thornton testified that the company and Union had negotiated and agreed to a seniority provision during their (negotiations, although he qualified this by saying it was not implemented" or signed, XXI R.T. 77. Nevertheless, as indicated previously, the company and Union operated de facto under that negotiated agreement. Moreover, since 1978, the company had maintained a roster of its seniority workers, based on 1,000 or more hours work for each year since date of hire (which for a 40-hour week average represents six months work each year). The company offered pins, dinners and similar benefits to two, five and ten year workers. See ALO Exhibits Nos. 1 and 2. In addition, Perez testified at the reopened hearing that she had been told repeatedly by Pena and other supervisors that the company operated under a (seniority system and she would convey this to her workers, particularly the new ones, XXV R.T. 11-14. However, in preparation for her initial testimony at the hearing, Pena instructed Perez and the other foremen to testify that the company did not have a seniority system or that workers would be assured jobs if they followed the company's harvests, XXV R.T. 46.

intention to follow the next harvest as the current harvest was winding down.

3. At the time the worker agreed to follow the next harvest the foreman would assure the worker a job.

4. When the precise harvest starting date was not earlier known, the foreman would visit or send word of the date to the worker's home prior to leaving.

5. For both the convenience of the worker and the company, each foreman had a bus that transported his crew from Calexico to the next harvesting location.

6. The foreman would either come personally or send a message to the worker's home when the bus was to leave. As an alternative, the foreman frequented locations, e.g., the mechanics shop in Mexicali and the drugstore in Calexico, where the workers could learn when the foreman's bus was leaving.

7. As the 1979 Salinas harvest was winding down many of the workers who intended to work in New Mexico (and subsequent harvests), asked ground crew foremen Pedro Flores, Pedro Juarez and Roberto Santemarie and wrap machine foremen Jose C. Lope and Marcia Sagradia Perez for work there.

8. Nevertheless, a significant number of these workers were denied work for the New Mexico (and subsequent) harvest, although they had previously indicated to their foremen their intention to work there and attempted to timely apply and report to

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work as in the past.[149/] Each of these workers had participated in protected concerted activities and work stoppages during the 1979 Salinas harvest and were part of an identifiable group when they signed the agreement (General Counsel's Exhibit 2} on September 17.[150/]

149/ In Kawano, the evidence showed that the workers were prevented, by the company's change in hiring procedure, from making a timely application or any application at all. The evidence here is that most of the affected workers had followed the past practice and made timely applications in Salinas. It was their efforts to learn where and when the harvests were to start and to timely Present themselves that was thwarted.

150/ Clear evidence of the precise numbers and names of affected workers (for each harvest) was neither presented by the General Counsel at the hearing nor in post-hearing briefs. However in view of the substantial evidence for the appropriateness to utilizing the Kawano-group analysis I have not attempted that voluminous task here. Some pertinent data, e.g. respondent's Exhibits P, Q and R, were admitted into evidence as company busines records along with summaries prepared by respondent's office staff. Respondent's summaries were not, however, admitted as business records and without the underlying data and method of calculation (which were not provided) were of limited use. However, I did make some preliminary calculations from the summaries which indicated the following:

Col.	Data Description	1977	1978	1979.
A	Number of workers on Salinas payroll (P/R) also on New Mexico (N.M.) P/R.	108	88	67
B	Average number of workers on Salinas P/R during number of weeks in September	297	217	364*
C	Percentage of A/B	36.4%	40.6%	18.4%
D	Number of workers on N.M. P/R: 1st week	337	245	337
E	Percentage of D	32%	35.9%	19.9%
F	Number of workers on N.M. P/R: 2nd week	538	438	532
G	Percentage of A/F	20.1%	20.1%	12.6%

* This figure represents the average for three rather than four weeks in September. Excluded was the second week when both seniority

fn. 150 cont'd on p. 75.

What clearly emerges from the evidence is that General Counsel has made out a strong prima facie case that respondent discriminatorily refused to rehire its Salinas seniority workers who had participated in concerted activities and work stoppages.

The record as a whole also clearly refutes respondent's proffered reasons for rehiring so few of its Salinas seniority workers. Aside from arguing that none of the Salinas workers made timely application for subsequent work, an argument which I have already rejected in view of the substantial evidence of timely application in Salinas and respondent's past practice of assuring work to those who follow their harvests, respondent argues, supported by Vern Smith's testimony, that the market and demand for lettuce significantly dropped midway through the New thereby affecting their harvest needs. Mexico harvest,/ Respondent's own exhibits flatly rebut this. Exhibits Q and R indicate that respondent initially hired as many for its New Mexico harvest as were employed during the Salinasharvest. By the second week when the New Mexico harvest was approaching its peak, respondent was employing considerably more workers than in Salinas. Whatever affect the market and demand was

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fn. 150 cont'd from p. 74.
and temporary replacement workers were on the payroll for portions of the week which artificially swelled the number.

The figures reflect a noticeable change in 1979 in both absolute and percent differences between the number of workers on the payroll in Salinas and New Mexico. However, I have not considered or utilized these statistics because statistical tests such as chi square and standard deviation, have not been performed on the data to determine its statistical significance and relevance(if any). More importantly the direct and other circumstantial evidence was so overwhelming as to respondent's unlawful refusals to rehire that it was unnecessary to resort to statistical inferences.

having on respondent's sales, it was not affecting the size of the workforce in New Mexico.

Respondent further argues that it hired a sizeable number of its Salinas workers in New Mexico and subsequent harvests thereby negating any inference that Salinas workers were being discriminated against for their previous concerted activities.[151/] But as the Board stated in Kawano in response to a similar argument raised by the employer there, the NLRB does not require a showing of complete or absolute exclusion of the group from the workforce in the face of otherwise satisfactory showing of discrimination of the group. 4 ALRB Ho. 104 at p. 12. Moreover, the periodic hiring of some of the Salinas seniority workers appeared to be more a function of respondent's foremen's difficulty finding other workers to fill their crews, than of a willingness to hire them because of their prior application and seniority right's[152/]

151/ The summary to respondent's Exhibit Q states that 67 workers on the 1979 Salinas payroll were on the 1979 New Mexico payroll. Yet there was no readily apparent way to verify the figure I do not know whether this figure includes, for instance, foremen, I seconds and cooks. By comparison, in 1977 and 1978 the comparable figures were 108 and 88 workers respectively. Approximately 129 individuals signed the "list" or "agreementy"'establishing them as the presumptive number of the identifiable group who were subject to the discriminatory refusal to rehire. Necessarily a subsequent backpay compliance hearing will be needed in order to ascertain the specific discriminatees and their respective damages for each harvest.

152/ Ramirez testified to the difficulty of finding workers for the New Mexico harvest. It is undisputed that there is some worker turnover from week to week. Perez testified to hiring Salinas workers involved in the work stoppages contrary to Pena's instructions because openings developed and she felt badly (she also employed her mother and father, who were involved in the work stoppages, in her crew as well), in that these workers had come all the way to New Mexico and were present when she was hiring. Other ' Salinas workers were similarly hired by their foremen as well. See, e.g., footnote 138 supra.

Respondent also argues that the continuing declining market price and reduced harvest in the succeeding Arizona, Blythe and Imperial Valley harvests resulting in a reduced workforce caused a declining number of Salinas workers to be hired. Yet respondent does not dispute that new workers were hired for each succeeding harvest.[153/]

Even if respondent did at times have fewer jobs than the number of discriminatees, the record evidence is overwhelming that it discriminated against its Salinas seniority worker as a group for the succeeding harvests and is therefore liable to all.[154/] Respondent' failure to offer jobs to employees for whom it did have openings did not discharge its obligation to the others, and each is entitled to some backpay award. New England Tank Industries, 147 NLRB 598, 56 LRRM 1253 (1964); Kawano, Inc., 4 ALRB No. 104 at p. 19.

I conclude that respondent has engaged in a policy of not rehiring its Salinas seniority workers because of their

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153/ It is not clear from the record what number of workers hired for each of the succeeding harvests were new hires, but the number was significant. Flores, Santemarie and Juarez each testified to hiring considerable numbers of new workers once they learned of the harvest date. Raul Ramirez further testified that during the 1979 Chandler (Arizona) harvest he was told to hire an entire crew,/none of Salinas seniority workers were notified in order to make application. In Imperial Valley, Ramirez testified to handing out six hiring slips out in the field on January 4, 1980, to new hires, XXVIII R.T. 15-20.

154/ Maria Sagradio Perez confirmed and corroborated at the reopened hearing that Pena's instructions not to hire the Salinas seniority workers was in effect at each of the succeeding harvests, XXV R.T. 47.

concerted and union activities as well as their participation in work stoppages and in order to discourage such activities in violation of Sections 1153 (a) and (c) of the Act.

I further find that the persons who signed the agreement or list (General Counsel's Exhibit 2) on or about September 17, most of whom are also listed in Appendix III hereto. were part of the identifiable group that were discriminated against. Most of the persons desired and were available to work for respondent in one or more of the subsequent harvests and would have been re-hired but for respondent's unlawful discrimination.

12. Maria Sagradio Perez' Recanted Testimony.

As set forth in each of the secions hereinabove, my findings and conclusions in this decision were not otherwise altered by former forewoman Maria Sagradio Perez' dramatic and devastating testimony at the reopened hearing in October. Her testimony did confirm and corroborate findings I would have otherwise made absent her recanted testimony.

This testimony, although subject to vigorous cross-examination including several impeachment efforts, held up well. particularly in providing direct evidence of the ongoing nature of respondent' s discriminatory motive and conduct.

Two other matters raised in her testimony bear further mention. The first is the gifts made by Perez to two of the Witnesses she solicited to testify for respondent. For one, Maria Luisa Esparza, Perez bought a dress which Perez paid for. According to Perez, she could not find the receipt and was not reimbursed.

To Angelita Medrano, Perez paid $300.00 in cash for "expenses". Respondent concedes Perez was reimbursed $200.00 for the payment to Medrano (see Respondent's Exhibit U). The parties stipulated that Medrano, pursuant to Government Code, Sections 68093 and 68096, would have been entitled to a $12.00 witness fee plus mileage of 20¢ a mile. The General Counsel further stipulated that the authorized mileage between Salinas and El Centro is 550miles The General Counsel further indicated that it has discretion to pay a witness another $12.00 witness fee if the witness, as Medrano, was required to return a second day. Thus, an authorize payment to Medrano would have been $134.00 [550 x .20 = $110.00 - $12.00 = $12.00]. Respondent in its supplemental post-hearing brief suggests inexperience in these matters as causing the higher amount to be paid. The proffered reason is unconvincing. No satisfactory explanation was ever given by respondent as to why it used a foreman to pay cash to a worker to testify. Surely a litigant involved in a contested hearing who solicits a witness to testify would take even common sense precuations (paying cash certainly isn't one of them) to prevent such an obvious inference of improper motive. See, e.g., Witkin, California Evidence, §§ 513, 755, 758 at p.708; Crutchfield v. Davidson Brick Co., 55 C.A.2d 34, 37 (1942).

Second, Perez' testimony coupled with respondent' payment of extra compensation to at least one witness reveals a callousness towards the law, workers' rights and this Board's processes that rarely is directly observed. In fashioning a

a remedy under these circumstances, it would seem to be unfair to penalize those workers who apparently made little or no effort to seek re-employment with respondent because it appeared futile to do so. The Board has already indicated in Kawano, p. 19, to accepting this approach. The particularly egregious nature of respondent's conduct herein would call for no less a burden on respondent here.

THE REMEDY

1. Having found that respondent unlawfully laid off all but five or six of foreman Don Jose Ramirez' wrap machine crew on or about May 23, 1979, because of their support of the UFW, I shall recommend that respondent be ordered to offer each member of Crew "W" full reinstatement to their former or substantially equivalent jobs, effective immediately.

2. As to Ramon Diaz, having found a violation of Sections 22 |1153(a) and (c) of the Act, concerning respondent's refusal to

153/ A complete list of the members of Crew "W" was not provided by either General Counsel or respondent at the hearing. Presumably respondent has retained payroll records for 1979 from which this I information can be obtained.

permit Diaz to work on August 14, 1979 because of his union activities, I will recommend that respondent be ordered to make him whole for any losses that were incurred from Diaz' denial of work as a closer that day.

3. As to Diego de la Fuente, having found that respondent threatening to discharge Fuente for his union activities was a violation of Sections 1153 (a) and (c) of the Act, I will recommend that respondent be ordered to cease and desist from infringing in such manner against its employees.

4. Having found that respondent failed to bargain in good faith in violation of its duty pursuant to Section 1153(e) of the Act, I shall recommend that respondent be ordered to cease and desist from unilaterally raising its workers wage and/or refusing to meet and negotiate with the UFW. I will further recommend that respondent be ordered to cease and desist from unilaterally changing terms and conditions of employment, which are subject to bargaining with its workers' certified bargaining agent.

5. Having found that respondent unlawfully refused to Irehire its Salinas seniority workers in the subsequent New Mexico, Arizona, Blythe and Imperial Valley harvests because of their concerted activities, participation in work stoppages and support for the UFW, violations which go to the very heart of the Act, I will recommend that respondent cease and desist from infringing in any like or related manner upon the rights guaranteed to employees by Section 1152 of the Act.

I shall further recommend that respondent be ordered to offer reinstatement to their former or equivalent jobs to those persons listed either in Appendix III herein, General Counsel's Exhibit 2, or were part of Crew "W" that was unlawfully laid off.[154/]

I will further recommend that respondent make whole each of the entitled claimants, as well as members of Crew "W", by payment to them of a sum of money equal to the wages they would have earned but for respondent's unlawful refusal to rehire them, less their respective net interim earnings, together with interest thereon at seven percent per annum. Backpay shall be computed in accordance with the formula established in J. _& L. Farms, 6 ALRB No. 43 (August 12, 1980).

If there are not sufficient jobs available to hire each of the claimants immediately or at the succeeding harvest they would otherwise have worked, their names shall be placed on a preferential hiring list and they shall be hired as soon as jobs become available. The order of names on the preferential list shall be determined by company seniority or pursuant to some other non-discriminatory method.

154/ Appendix III lists 100 names, most of whom signed General Counsel's Exhibit 2 which contains approximately 129 names. Some of these signatories follow all respondent's harvests while others less than all. There are also non-applicants, friends or relations of past or present Norton workers who were deterred from " making applications. Finally many members of foreman Jose Ramirez' 25 Crew "W" would have continued to follow respondent's harvests had they not been unlawfully laid off and not notified thereafter. Each of these claimants should be considered presumptive discriminatees entitled to some make-whole, reinstatement, preferential seniority or some combination of all three.

The Board in Kawano, Inc., supra, has established that the presumptive claimants as well as non-applicants are entitled to a rebuttable presumption that they would have worked the same harvests and numbers of hours as they had in the past years. The parties may then present further evidence at a subsequent backpay hearing, tending to prove that a claimant would have worked a greater or lesser amount in 1979 and 1980.

I will not, however, recommend that respondent be ordered to reimburse its workers for backpay for the four days, September 13', 14, 15 and 17, that its harvesting workforce was replaced. On two of those dates, September 13 and 17, there was virtually no production, September 15 was a Saturday and as indicated earlier, respondent's past practice, at least regarding its Aslinas harvest, was either not to work on Saturday or to work on a reduced basis. In sum, I do not believe it would effectuate the policies of the Act to order respondent to make whole its employees for the wages they missed on those four days they were replaced.

6. Respondent's pervasive unlawful conduct during the past year or more, including the discriminatory layoffs, refusals to rehire, threats of discharge and unilateral changes in terms and conditions of employment strikes at the heart of the rights guaranteed to employees by Section 1152 of the Act. The inference is warranted that respondent maintains a pervasive attitude of opposition to the purposes of the Act with respect to justice, fair play, and the protection of employee rights. After

consideration of Hickmott Foods, Inc., 242 NLRB No. 177, 101 LRRM 1342 (1979) and M. Caratan, Inc., 6 ALRB 14 (1980), I find this case an appropriate one to issue a broad cease and desist order. Therefore, I recommend that respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

7. Finally, I will recommend that the attached Notice To Workers be posted, read and mailed to its employees in accordance with current Board practice.

O R D E R

Upon the basis of the entire record and by authority of Labor Code Section 1160.3, I hereby issue the following recommended order that respondent J. R. NORTON CO., its officers, agents, successors and assigns, shall:

A. Cease and desist from:

1. Discouraging membership of its employees in the UFW or any other labor organization by unlawfully discharging, refusing to rehire or laying off employees, or in any other like manner discriminating against employees in regard to their hire, tenure of employment or any term or condition of employment, except as authorized by Labor Code Section 1153(c).

2. Threatening employees with loss of employment for participating in union activities or for supporting the UFW.

3. Changing the terms or conditions of employment: of any employee including working fewer hours because of the employee' union activities or support of the UFW.

4. Refusing to bargain collectively in good faith wit: the UFW as the exclusive representative of its agricultural employee as required by Section 1153(e) of the Act and in particular (a) unilaterally raising wages or changing other terms and conditions of employment without notice to and good faith bargaining with the UFW, and (b) refusing to meet at reasonable times and confer in good faith without regard to whether the harvest is located in Salinas at the time.

B. Take the following affirmative actions which are

necessary to effectuate the policies of the Act:

1. Offer foreman Don Jose Ramirez' Crew "W" immediately or during the next period when these employees would normally work, reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges Make them whole for any losses they may have suffered as a result of the unlawful refusal to rehire them pursuant to the formula set forth in J. & L. Farms, 6 ALRB No. 43 (August 12, 1980) plus interest at seven percent per annum.

2. Offer claimant-discriminatees set forth in Appendix III, General Counsel's Exhibit 2, Crew "W" members as well as non-applicant claimant-discriminatees immediately or during the next period when these employees would normally work, reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges. Make them whole for any losses they may have suffered as a result of the unlawful refusal to rehire them pursuant to J. & L. Farms, supra plus interest at seven percent per annum.

3. Make whole Ramon Diaz for any loss of pay incurred because of the discriminatory refusal to permit him to work on August 14, 1979, together with interest thereon at seven percent per annum.

4. Upon request, bargain collectively in good faith with the UFW as the exclusive representative of its agricultural employees, and, if an understanding is reached, embody such understanding in a signed agreement.

5. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reinstatement under the terms of this Order.

6. Execute the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, respondent shall reproduce sufficient copies in each language for the purposes set forth hereafter.

7. Post copies of the attached Notice at tines and places to be determined by the Regional Director. The Notices shall remain for a period of sixty (60) days. The respondent shall execute due care to replace any Notices which have been altered, defaced, covered or removed.

8. Mail copies of the attached Notice in all appropriate languages, within thirty (30)days after the date of issuance. of this Order, to all employees employed by respondent at any time between May 7, 1979 and the time such Notice is mailed.

9. Arrange for a representative of the respondent or a Board agent to distribute copies of and read the attached Notice in appropriate languages to its agricultural employees on company time and property. The reading or readings shall be at such time(s) land place(s) as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The workers are to be compensated at their hourly

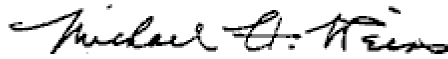
rate for time lost at this reading and the question-and-answer period. The Regional Director is also to determine any additional amounts due workers under respondent's incentive system as well as rate of compensation for any non-hourly employees.

10. Notify the Regional Director in writing within. thirty (30) days from the date of issuance of this Order of the steps respondent has taken to comply with the terms thereof. Upon request, and periodically thereafter, the respondent shall notify the Regional Director until full compliance is achieved.

AND, IT IS FURTHER ORDERED that all allegations contained in the Complaint and not found herein to be violations of the Act are dismissed .

DATED: June 5, 1981.

AGRICULTURAL LABOR RELATIONS BOARD



MICHAEL H. WEISS
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which each side had an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have interfered with the rights of our agricultural workers by refusing to rehire our Salinas seniority workers during 1979 and 1980. The Board has ordered us to distribute and post this Notice.

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

The Agricultural Labor Relations Act is a law that gives 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 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 try to get a contract or to help or protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise that:

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

Especially:

WE WILL NOT refuse to hire or rehire, or layoff or threaten or otherwise discriminate against any empoyee because he or she exercises any of these rights.

WE WILL NOT fail or refuse to bargain in good faith with the UFW by unilaterally instituting wage increases, changing any other condition or term of employment without first giving notice and meeting with the UFW in order to negotiate over it.

WE WILL OFFER reinstatement to those persons listed on the attached list who sought to or were deterred from seeking re-employment with us in our 1979 New Mexico, Arizona, Blythe and Imperial Valley harvests and will pay each of them any money they lost because we refused to rehire them.

WE WILL OFFER reinstatement to those members of foreman Don Jose Raminre: Crew "W" who were laid off on May 23, 1979, and will pay each of then any money they lost because we laid them off.

WE WILL pay Ramon Diaz any money he lost because we refused to allow him to work as a closer on August 14, 1979.

Dated:__________________ J. R. NORTON COMPANY

By: ______________________________

Respresentative 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) 443-3145

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

DO NOT REMOVE OR MUTILATE

APPENDIX I - WITNESSES

	A. WITNESSES CALLED BY GENERAL COUNSEL NAME	IDENTIFICATION	DATES TESTIFIED	VOL. & PC
1.	Ramon Diaz	Former JRN worker, alleged discriminatee	1/16/80 1/17/80 1/21/80	11:16-11 111:1-87 V:2-44
2.	Peter Orr	JRN Vice President (Called by ALO re Company operations)	1/17/80	111:83-1
3.	Maria Raquel Ramirez	Former JRN worker, alleged discriminatee	1/17/80	111:122-:
4.	Maria Soila Lerma	Former JRN worker, alleged discriminatee	1/18/80	IV:4-25
5.	Felix Garcia	Former JRN worker, alleged discriminatee	1/21/80	V:45-34
6.	Maria Estella Mendoza	Former JRN worker, alleged discriminatee (re Ck. Stubs; G.C. #9)	1/22/80 2/ 1/30	VI: 2-32 XIV: 2-15
7.	Magdalena Cardoza	Former JRN worker, alleged discriminatee	1/22/80	VI: 32-14
8.	Arturo Hoyos	Former JRN worker, alleged discriminatee	1/22/30	VI: 140-15
9.	Diego De La Fuentes	Former JRN worker, alleged discriminatee	1/23/80	VII: 2-24
10.	Jose Farias	JRN cook	1/23/80	VII:35-1I
11.	Elisa Montiel Covarrubias	Former JRN worker, alleged discriminate	1/24/80	VIII:2-3.
12.	Jose Angel Covarrubias	Former JRN Worker, alleged discriminate	1/24/80	VII:54-7
13.	Maria de Jesus Montiel	Former JRN worker, discriminatee alleged (Elisa's sister)	1/24/80	VIII:78-1
14.	Ernesto Montiel	Former JRN worker, alleged discriminate	1/24/80	VIII:102-130

	NAME	IDENTIFICATION	DATES TESTIFIED	VOL. & PG.
15.	Maria de la Luz Chairez	Former JRN worker, alleged discriminatee	1/25/30	IX:4-20
16.	Ana Luisa Chairez	Former JRN worker, alleged discriminatee	1/25/80	IX:21-34
17.	Mauricio Chairez	Former JRN worker, alleged discriminatee	1/25/80	IX:-35-69
18.	Mario Manual Chairez (son)	Former JRN worker, alleged discriminatee	1/28/80	X:2-12
19.	Abelarado Chairez Fernandez, Jr. (son)	Former JRN worker, alleged discriminatee	1/28/80	X:13-34
20.	Abelarado Chairez Fernandez, Sr. (father)	Former JRN worker, alleged discriminatee	1/28/80	X:34-48
21.	Atonacio Chairez (uncle)	Former JRN worker, alleged discriminatee	1/28/80	X:48-67
22.	Adalberto Pena Ventura	JRN harvesting super-intendent	1/28/80 1/29/80	X:67-107 XI:58-65
23.	Prime Ruiz (Perez)	Current JRN worker	1/29/80	XI:1-29
24.	Mirta Garcia	Former JRN worker	1/29/80	XI:30-54
25.	Pedro Maciel	Current JRN worker	1/29/80	XI:66-90
26.	Juan Quintero	Current JRN worker	1/29/80	XI:91-114
27.	Jose Miranda	Current JRN worker	1/29/80	XI:115-124
28.	Rosendo Casillas	Former JRN worker, alleged discriminatee	1/30/80	XII:1-34
29.	Pedro Naranjo	Former JRN worker, alleged discriminatee	1/30/80	XII: 36-46
30.	Juan Zavala	Former JRN worker, alleged discriminatee	1/30/80	XII:47-59
31.	Luz Montiel	Former JRN worker, alleged discriminatee	1/30/80	XII:60-82
32.	Eduardo Gomez	Former JRN worker, alleged discriminatee	1/30/80	XII:83-103
33.	Jose Alonzo	Former JRN worker, alleged discriminatee	1/30/80	XII:104-123

	NAME	IDENTIFICATION	DATES TESTIFIED	VOL. & PG.
34.	Baldomero Jimenez (father)	Former JRN worker, alleged discriminatee	1/30/80	XII:124-13
35.	Francisco Jimenez (son)	Former JRN worker, alleged discriminatee	1/30/80	XII:131-14
36.	Marian Steeg	UFW Negotiator	1/31/80	XIII:1-63
37.	Romana Lujan	Former JRN worker, alleged discriminatee	1/31/80	XIII:65-99
38.	J. Refugio Chairez	Former JRN worker, alleged discriminatee	1/31/80	XIII:-100-1
39.	Atanacio Magana	Former JRN worker, alleged discriminatee	2/12/80	XIX:6-12
40.	Manuel Estrada	Former JRN worker, alleged discriminatee	2/12/80	XIX:13-26
41.	Primitino Leyva	Former JRN worker, alleged discriminatee	2/12/80	XIX:27-33
42.	Ramon Serna	Former JRN worker, alleged discriminatee	2/12/80	XIX:34-41 62-64
43.	Francisco Arellano	Former JRN worker, alleged discriminatee	2/12/80	XIX:42-61
44.	Ramon Lozano	Former JRN worker, alleged discriminatee	2/12/30	XIX:65-81
45.	Isaac Lozano	Former JRN worker, alleged discriminatee	2/12/80	XIX:82-87
46.	Jose Refugio Camarillo	Former JRN worker, alleged discriminatee	2/12/80	XIX:87-90
47.	Octavio Rios	Former JRN worker, alleged discriminatee	2/12/80	XIX:91-110

B. RESPONDENT'S WITNESSES

	NAME	IDENTIFICATION	DATES TESTIFIED	VOL. & PG.
1.	Joe Warden	JRN Equipment Supervisor	2/ 4/30	XV:19-43
2.	Aldaberto Pena Ventura	JRN Harvesting Super-intendent	2/ 4/80 2/21/80	XV:46-115 XXIV:77-87

	NAME	IDENTIFICATION	DATES TESTIFIED	VOL. & PG.
3.	Peter Orr	JRN Vice President (Re ALO # 1)	2/ 5/80 2/25/80 2/26/80	XVI:6-139 XXIII:2-13 XXIV:1-2
4.	Ray Ortiz	JRN Bookkeeper in Phoenix re Company records	2/ 5/80 2/ 6/80	XVI:140-160 XVII:3-42
5.	Maria Luisa Esperza	Former JRN worker re fight on Bus	2/ 6/80	XVII:43-62
6.	Pedro Floras	JRN foreman	2/ 6/80	XVII:63-144
7.	Raul Ramirez	JRN foreman	2/11/80	XVIII:4-29 45-48
8.	Jesus Enriquez	JRN foreman	2/11/80	XVIII:31-44
9.	Roberto Santa Marie	JRN foreman (now JRN Machine Supervisor)	2/12/80	XVIII:111-136
10.	Marie Teresea Garcia	Current JRN worker (Re fight on bus and work stoppages)	2/13/80	XX:14-38
11.	Angelita Medrano	Current JRN worker	2/13/80	XX:39-50
12.	Rosalva Lopez	Current JRN worker (Foreman Jose C. Lopez' wife/Maria Sagradio Perez' sister)	2/13/80	XX:51-74
13.	Maria Sagradio Perez	JRN forewoman (Fired 5/19/80 - see later testimony 10/15/80)	2/13/80	XX:75-155
14.	Jose C. Lopez	JRN foreman	2/14/80	XXI:1-41
15.	Obdulio ("Palatos"; Magdaleno	JRN foreman Machine Supervisor (Fired 3/80)	2/14/80	XXI:52-56; 95-130
16.	Richard V. Thornton	Executive Vice President Grower-Shipper Vegetable Assoc./JRN negotiator	2/14/80	XXI:56-94
17.	Celastino Nunez	Supervisor (Ass't to Harvesting Supervisor)	2/15/80	XXII:2-49
18.	Aurelio Saldaria	("Pusher" or second to Pedro Flores)	2/15/80	XXII:50-67

	NAME	IDENTIFICATION	DATES TESTIFIED	VOL. & PG.
19.	Abelardo Velasquez	JRN foreman and/or Pusher	2/25/80	XXIII:14-39
20.	Pedro Juarez	JRN foreman	2/25/80	XXIII:40-1
21.	Don Jose Ramirez	JRN foreman	2/25/80	XXIIIrlQl-119
22.	Abel Luna	JRN Pusher	2/25/80	XXIII:120-153
23.	Vern Smith	JRN Lettuce Buyer	2/26/80	XXIV-.3-7 6
24.	Lucretia Gowen	JRN Secretary	2/26/80	XXIV: 88-101

C. GENERAL COUNSEL REBUTTAL WITNESS

1.	Carlos Bowker	ALRB Field Examiner	2/26/80	XXIV: 105-120

D. GENERAL COUNSEL WITNESS CALLED AT RECONVENED HEARING

1.	Maria Sagradio Perez	Former JRN forewoman	10/15/80	XXV :

E. RESPONDENT'S WITNESSES CALLED AT RECONVENED HEARING

1.	Peter Orr	JRN Vice President	10/20/80	XXVI:
2.	Aldafaerto Pena Ventura	Harvesting Superintendent	10/27/80	XXVII:

APPENDIX II

EXHIBIT WORKSHEET

CASE NAME: J. R. NORTON CASE NO; 79-CE-78rEC, et al.

G.C	RESP.	C.P.	OTHER	IDENT.	ADMIT or REJECT.	DESCRIPTION
1-1A-23A				1/16/80	1/16/80	General Counsel ' s Moving Papers
	A			1/17/80	NO	5/12/79 Decl. of Maria Ramirez Not received.
	B.			1/18/80	NO	Maria Larma Decl. 5/19/79 Not recived.
	C- 1 C- 2			1/21/80 "	1/21/80 "	Diaz Hiring Slid- J.R.Norton 12/22/79 Diaz Hiring Slid-J.R.Norton 1/3/78
	C- 3 C- 4			1/21/80 "	1/21/80 "	Diaz Hiring Slid- J.R.Norton 2/7/78 Diaz Hiring Slid-J.R.Norton 10/3/78
	D			1/21/80	NO	Maria Estela Mendoza Decl. Dec. _, '79 Not received.
	E			1/23/80	NO	Diego De la Fuente Decl. 9/7/79 Not received
	F			1/23/80	NO	Losano Joint Decl. Nov. 15, '79 Not received.
2				1/29/80	1/29/80	List signed by workers in order to return to work - 9/17/79
3				1/29/80	1/29/80	Daily labor reports JRN Co. 9/5-9/11/79 SAL - various crews
4				1/29/80	1/29/80	Daily labor reports JRN Co. 10/10-10/18 N. Mex
5				1/31/80	1/31/80	Telegram 9/5/79 - Co. to Steeg Re new wage proposal
6				1/31/80	1/31/80	Telegram 9/6/79 - UFW to Co. Rejecting proposal
7				1/31/80	1/31/80	Telegram 9/7/79 - to UFW from Co. Unhappy about rejection
8				1/31/80	1/31/80	Telegram 9/14/79 to Steeg Re work stoppage
9				2/1/80	2/1/80	Marica Estella yendoza check stubs 8/27/79(2) 9/3 9/10 9/17
	G			2/5/80	2/5/80	Salinas 1979 pack out sheet

APPENDIX II
EXHIBIT WORKSHEET

CASE NAME: J.R. NORTON

CASE NO: 79-CE-78-EC.et a.

G.c.	RESP.	C.P.	OTHER	IDENT.	ADMIT or REJECT.	DESCRIPTION
	H			2/5/80	2/5/80	Letter to UFW 12/1/77 from JRN re interim wages
	I			2/5/80	2/5/80	Letter to UFW 7/18/78 from JRN re interim wages
	J			2/5/80	2/5/80	Summary of wages Paid to JRN workers 7/75 - 9/79
10				2/5/80	2/5/80	Letter 7/27/77 Orr to J.V.Thomon
	K			2/5/80	2/5/80	Field pack out for New Mexico Fall '79
	L			2/5/80	2/5/80	Fall '79 Chandler, Az. Field pack out.
	M			2/5/80	2/5/80	Fall '79 Blythe, Ca. Field pack out.
	N			2/5/80	2/5/80	1980 - field packout, Brauley.
	0			2/5/80	2/5/80	Worker summary - Harvest movement 1977
	P			2/5/80	2/5/80	Worker summary - Harvest movement 1978
	Q			2/5/80	2/5/80	Worker summary - Harvest rrcvement 1979
	R			2/5/80	2/5/80	Summary from payroll summary Aug. # of crew positions filled -'77-'
	S			2/5/80	2/5/80	Invoices - replace kitchen ecuip. in 1978
			AID #1	2/25/80	2/25/80	Co. list of seniority pins as of 12/31/78
	1 2 T-3 4			2/26/80	2/26/80	Payroll records, last wk.SAL'7.9, 1st NM'79, last wk. SAL'78, 1st wk. SAL'78
11				2/26/80	2/26/80	Daily labor report - Crew "R" Maria Sagradio Perez - 9/17/79
			ALO #2	2/26/80	Part of rasp brief.	Co. list of'Ees' 'Elig.Fcr 2,5 & 10 Fr. pins as of 12/31/79

Agricultural Labor Relations Board.

APPENDIX II
EXHIBIT WORKSHEET

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CASE NAME: J.R. NORTON

CASE NO: 79-CE-78-EC.et a.

G.C.	RES P.	C.F.	OTHER	IDENT.	ADMIT or REJECT.	DESCRIPTION
2-A				2/26/80	2/26/80	Crew "0" list.
	U			10/27/80	10/27/80	5/19/80 check to Maria Sagradio Perez w/respondent ' s authorization.

APPENDIX III

ATTACHMENT 1

ATANAC10 CHAVEZ
JOSE REFUGIO CAMARILLO
IZAC LOZANO
LADISLAO MIRANDA
GUADALUPE GUILLEN
JAIME CEDILLO
JOSE ANGEL COVARRUBIAS
ALFONSO BERBER
MARGARITO MARTINEZ G.
GONZALO VARGAS GOMEZ
ENRIQUE SANDOVAL
MARIA ESTELA MENDOZA
ERNESTO MONTIEL
RAMON LOZANO
JUAN ZAVALA TAPIA
MANUEL A VASQUEZ
TELESFIRO ESPINOZA
MARTHA GUZMAN CHAVEZ
ROMELIO FONSECA
ARTEMIO GARCIA
MAGDALENA CARDOZA
MARINA M. MUNOZ
EDUARDO MELAZA
ARTURO RAMIREZ
JUAN QUINTERO
ROSENDO CASIILAS R.
MARIA GARCIA
MIRTHA GARCIA
DONACIANO GUTIERREZ
VICENTE CORTEA
JUAN RAJINA
DAVID RAMIREZ
MAURICIO CHAIREZ
MARIANO ESPINOZA
ANGELITA MEDRANO
MARIA MORENO
PEDRO AMAYA
ARNULFO 0. MORENO
J. REFUGIO CHAIREZ
MANUEL ESTRADA
ROSA SALINAS
RAUL C. GONZALEZ
BALTAZAR ZAVALA
ERIBERTO OCHOA
CELESTINO RENTERIA H.
SALVADOR PLACENCIA
ALBNO MARES
AHELABDO CHAIREZ
MARIA DE LA LUZ CHAIREZ H.
ANA LUTSA CHAIREZ H.
JOSE BEDOLLA
ABELARDO CHATREZ

SOCORRO RUTZ
ROSALIA PEREA
JOSE RODRIGUEZ
ROGELIO LOPEZ A.
PRIMO RUIZ P.
JOSE FARIAS
FELIX GARCIA
JOSE H. MIRANDA
MANUEL SALDANO
JOSE P. GUTIERREZ
PEDRO NARANJO
JOSE LOZANO
PRIMITIVO LEYVA
GRACIANO QUEZADA
A. VARELA
JORGE RIOS
JOSE ALAMO
FILOMON LOZANO
EDUARDO GOMEZ
MOISES VARGAS
JOSE ROBLES
JOSE JUAN DUARTE
MAGDALENA MAGAS
FERNANDO CASTELLANOS
GUADALUPE MOLINAR
OFELIA PADILLA
JUAN C. LOPEZ
AGUSTIN D. ROLDAN
RAUL GONZALEZ
RAMON DIAZ
JACINTO FLORES
JOSE VALLARINES
S. MAGAS
ROBERTO LOPEZ
ELISA M. COVARRUBIAS
FRANCISCO GOMEZ
CANDIDO ROCHA
LUZ MONTIEL
MARIA DE JESUS MONTIEL
MINERVA CARRF.RA
MARIO VARGAS
JOSE RUBIO
DIEGO DE LA FUENTE
FRANK ART.LLANO
RAMON Z FIRM A
ARMANDO HFIRMANDEZ
CARLOS ACUIRRK

DOES 1 THROUGH 300