

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

NAMBA FARMS, INC.,	)	
	)	
Respondent,	)	Case No. 88-CE-39-EC(OX)
	)	
and	)	
	)	
UNITED FARM WORKERS	)	16 ALRB No. 4
OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

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DECISION AND ORDER

On October 12, 1989, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent timely filed exceptions to the ALJ's Decision, with a supporting brief, and General Counsel filed a response to Respondent's exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALJ and to adopt her recommended Order, as modified.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent Namba Farms, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from
  - ( a ) Refusing to recall or rehire, or otherwise

discriminating against, agricultural employees in regard to hire or tenure in employment or any term and condition of employment because they engaged in concerted activity protected by section 1152 of the Act;

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

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

( a ) Offer Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights and privileges;

( b ) Make Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas whole for all loss of pay and other economic losses they may have suffered as a result of Respondent's refusing to recall or rehire them in November 1988, such amounts, plus interest thereon, to be computed in accordance with the Board's Decision and Order in E.W. Merritt Farms (1988) 14 ALRB No. 5. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the refusal to recall or rehire;

( c ) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other

records relevant and necessary to a determination by the Regional Director of the backpay period and the amounts of backpay and interest due under the terms of this Order;

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

( e ) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from November 1 1988, to the date of mailing;

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

( g ) Provide a copy of the Notice to each employee hired by Respondent during a twelve month period following issuance of this Order;

( h ) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and places(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 the reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question and answer period;

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

DATED: May 8, 1990

BRUCE J. JANIGIAN, Chairman<sup>1</sup>/

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

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<sup>1</sup>/The signatures of Board Members in all Board decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office of the Agricultural Labor Relations Board [ALRB or Board] by the United Farm Workers of America, AFL-CIO (Union) the General Counsel of the ALRB issued a complaint which alleged that we, Namba Farms, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by refusing to recall or rehire Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas because of their participation in protected concerted activity, namely, asking for a raise in pay. 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 you to know that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organizer yourselves;
2. To form, join, and 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 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 refuse to recall or rehire, or otherwise discriminate against any employee, because he or she has requested an increase in wages or otherwise sought a change in wages, hours or working conditions.

WE WILL offer to reinstate Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas to their previous positions in the lettuce crew and reimburse them, with interest, for any loss in pay or other economic losses they suffered because we refused to rehire them.

Dated:

NAMBA FARMS, INC.

By:

\_\_\_\_\_  
(Representative) (Title)

If you have questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (619)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

Namba Farms, Inc.  
(UFW)

16 ALRB No. 4  
Case No. 88-CE-39-EC(OX)

ALJ Decision

Following a full evidentiary hearing based on an unfair labor practice charge filed by the United Farm Workers of America, AFL-CIO, the ALJ determined that all of Respondent's asserted reasons for its failure to recall a six-member lettuce cutting crew were a pretext. Having disposed of all of Respondent's proposed reasons for its action, and following established precedents of both the National and Agricultural Labor Relations Boards in such matters, she drew an inference that Respondent's true motive was an unlawful one. Accordingly, she concluded that the crew was not recalled because it had attempted to effectuate a change in its terms and conditions of employment and thereby engage in concerted activity protected by the Agricultural Labor Relations Act. She recommended that the crew be offered reinstatement and be compensated for all economic losses it may have suffered as a result of the discriminatory refusal to rehire them at the start of the season for which they otherwise would have been recalled.

Board Decision

The Board affirmed the ALJ's rulings, findings and conclusions and adopted her recommended order.

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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: )

NAMBA FARMS, INC., )

Respondent, )

and )

UNITED FARM WORKERS OF )  
AMERICA, AFL-CIO, )

Charging Party. )

Case No. 88-CE-39-EC-(OX)

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Appearances:

Eugene E. Cardenas, Esq.  
of the El Centro Regional Office  
for the General Counsel

Robert McSorley, Esq.  
of Cohen, England & Whitfield  
Oxnard, California  
for the Respondent

Before: Barbara D. Moore  
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Before: BARBARA D. MOORE, Administrative Law Judge:

This case arises from a complaint<sup>1</sup> based on a charge<sup>2</sup> filed with the Agricultural Labor Relations Board (hereafter "ALRB" or "Board") by the United Farm Workers of America, AFL-CIO (hereafter "UFW" or "Union") alleging that Respondent Namba Farms, Inc. (hereafter "Respondent," "Company" or "Namba Farms") violated section 1153(a) of the Agricultural Labor Relations Act (hereafter "ALRA" or "Act.")<sup>3</sup>

The Complaint alleges that on or about November 8, 1988, Respondent refused to rehire six employees, Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas because they had engaged in protected concerted activity. Respondent filed its Answer to Complaint<sup>4</sup> denying any wrongdoing. All documents were timely filed and properly served.

The matter came to hearing before me on June 13 and 14, 1989, in Oxnard, California. All parties were given full

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<sup>1</sup>General Counsel's Exhibit number 1.2. Hereafter, such exhibits will be identified as GCX number. Respondent's and Joint exhibits will be referred to as RX number and JX number, respectively. References to the official hearing transcript will be denoted: volume: page.

<sup>2</sup>GCX 1.1

<sup>3</sup>All code section references herein are to the California Labor Code unless otherwise specified.

<sup>4</sup>GCX 1.3

opportunity to participate in the hearing.<sup>5</sup> Thereafter, the General Counsel and Respondent filed post-hearing briefs.<sup>6</sup> Upon the entire record, including my observations of the witnesses and their demeanor, and after careful consideration of the parties'

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<sup>5</sup>The UFW did not appear.

<sup>6</sup>Respondent requests that I reconsider my ruling excluding a proffered exhibit, marked for identification as RX 1, because Respondent's counsel did not inform General Counsel of his intention to introduce the exhibit as required by the Prehearing Conference Order. That Order reduced to writing the directive at the Prehearing Conference for all parties to inform opposing counsel by close of business June 9, 1989, of any items the party intended to introduce at hearing. This requirement is clearly set forth in paragraph 8 at page 7 of the Order. Paragraph 17 at pages 9-10 of the Order clearly warns the parties of the consequences of failing to comply with the terms of the Order. It provides in pertinent part:

SANCTIONS FOR NON-COMPLIANCE. THE FAILURE OF A PARTY TO COMPLY WITH THE ORDERS CONTAINED HEREIN IN THE MANNER PRESCRIBED AND WITHIN THE TIME LIMITS SPECIFIED MAY BE GROUNDS...FOR STRIKING OR EXCLUDING EVIDENCE OFFERED BY THE NON-COMPLYING PARTY ON THAT ISSUE AT HEARING, AS MAY BE DETERMINED BY THE ADMINISTRATIVE LAW JUDGE ASSIGNED TO THE HEARING ON THE MATTER. (Emphasis added.)

Respondent's counsel gave no reason for his failure to notify General Counsel as required but simply objected to the Order being enforced seeking to minimize his failure to comply by calling the timelines "technicalities." His argument that the proffered document should be admitted because General Counsel knew the document existed is beside the point. The purpose of such an Order is to identify among all the documents relevant to a case which ones are expected to be introduced. This is not a situation where the obligation was unclear or where there was a good reason for the failure to comply. It is simply a case where Respondent's counsel neglected to meet the timelines and does not wish to be held accountable. In such circumstances, to fail to enforce the Order would undermine the pre-hearing process and conveys the message that the Board is not committed to enforcing its own orders. I find no reason to exculpate Respondent's counsel from his failure to comply with a clear directive.

arguments and briefs, I make the following findings of fact and conclusions of law.

I. JURISDICTION

At all times material, Respondent was an agricultural employer, and the individuals named above as alleged discriminatees were agricultural employees within the meaning of sections 1140.4 ( c ) and 1140.4 ( b ) of the Act , respectively. Yoshio R. Namba, Jose Hernandez and Silvestre Gaeta were supervisors within the meaning of section 1140.4 ( j ) of the Act.<sup>7</sup>

II. THE ALLEGED UNFAIR LABOR PRACTICES

General Counsel claims that Respondent violated section 1153( a ) of the Act by refusing to rehire the above named six employees who comprised the lettuce crew<sup>8</sup> because they engaged in

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<sup>7</sup>Respondent initially denied Mr. Gaeta's supervisory status. Employee Juan Escalante testified that Jose Hernandez, an admitted foreman, told the alleged discriminatees that Mr. Gaeta was also a foreman and that when Hernandez was not present, the crew should obey Gaeta. ( I : 18 - 19 . ) Mr. Hernandez did not refute this testimony and, while testifying, referred to himself and Gaeta as supervisors with regard to directing the work of the lettuce crew. ( II : 216 . ) Mr. Namba testified that at some point he demoted Mr. Gaeta to subforeman but acknowledged that at times material to the instant proceeding Mr. Gaeta remained in charge of the lettuce crew when Mr. Hernandez was not present. ( II : 244 . ) The unrebutted testimony of employees Marcelino Gonzalez and Ricardo Barajas Vega also establishes that Mr. Gaeta directed the work of the lettuce crew. ( I : 18 - 10 ; 64 . ) Based on the foregoing, I conclude Mr. Gaeta was a foreman who directed the work of the crew and was a supervisor within the meaning of section 1140.4 ( j ) of the Act.

<sup>8</sup>A seventh worker in the crew, Hector Dominguez, voluntarily quit work on March 23, 1988, and is not an alleged discriminatee. ( II : 113 . )

protected concerted activity, namely, requesting a pay raise in March 1988.<sup>9</sup> Following this request, Mr. Hernandez allegedly treated the crew more harshly and threatened them with unspecified future adverse consequences.

The defenses now asserted by Respondent differ in several respects from the position it originally asserted. These differences will be discussed subsequently. Broadly stated, Respondent's defenses are that the six members of the lettuce crew were not rehired because they were not good workers. General Counsel claims Respondent's asserted reasons for not rehiring the crew are pretextual.

### III. BACKGROUND

Namba Farms is a California corporation. Yoshio R. Namba is its president and chief executive officer, and he and his wife are the sole shareholders. The company has one location which is in Oxnard, California, where it grows various vegetables and mixed lettuce.<sup>10</sup> It does not grow iceberg or head lettuce.

Prior to Respondent beginning farming in the fall of 1980, the land was farmed by a Mr. Watanabe for whom Mr. Namba trucked produce. Mr. Namba has known four of the six alleged

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<sup>9</sup>All dates herein are 1988 unless otherwise stated.

<sup>10</sup>Mixed lettuce consists of: Romaine, red leaf, green leaf, and Boston lettuce. Boston lettuce is also known as butter lettuce.

discriminatees herein for a very long time since they also worked at the ranch when it was owned by Mr. Watanabe.<sup>11</sup> (II:243-244.) The two remaining members of the lettuce crew, Juan Escalante and Ricardo Barajas, began work at Namba Farms in April 1984 and in December 1986, respectively. (I:56.)

The season at Respondent usually begins in early November and ends in late August or early September. (I:55.) At the end of each season, the lettuce crew was laid off and then recalled at the beginning of the next season by foreman Jose Hernandez.

#### IV. THE REQUEST FOR A WAGE INCREASE

In late February or early March, the crew asked Mr. Hernandez if he would ask Mr. Namba to raise their wages. After approximately a week had passed and nothing happened, the entire crew approached Mr. Namba and Mr. Hernandez in the field and asked Mr. Namba for an increase in both the piece rate and the hourly rate.<sup>12</sup> Mr. Namba refused to give them a raise telling them they

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<sup>11</sup>The four are: Marcelino Gonzales, Jose Luis Barajas, J. Cruz Becerra Aguilar and Francisco Esclante. There is a dispute regarding the seniority dates of Marcelino Gonzalez and Jose Barajas which I find unnecessary to resolve since there is no contention their seniority was related to Respondent's refusal to rehire them.

<sup>12</sup>The crew was paid piece rate when it harvested lettuce and by the hour when performing general work such as laying irrigation pipe, thinning, and cleaning the cabbage and lettuce. The hourly rate was \$5.00. The piece rate was 51 cents, 55 cents or 64 cents per box depending on the type of lettuce being harvested. The crew did not ask Namba for a specific increase, but two employees testified they had in mind 20 cents per box as a reasonable increase.

had just received one.<sup>13</sup> ( I : 1 4 . )

From this point, the parties disagree as to what happened. Juan Escalante testified that Mr. Namba became very angry. Namba yelled obscenities, kicked boxes of lettuce and threw several heads of lettuce one of which hit worker Marcelino Gonzalez and another of which hit Cruz Becerra. ( I : 1 3 - 1 4 . ) He also threatened that he would rather close down the ranch than give them a wage increase. ( I : 1 3 . )

According to Mr. Escalante, he told Namba that the crew had not noticed the pay increase but that was no reason for Namba to get angry. ( I : 2 1 - 2 3 . ) Escalante testified that Mr. Namba asked Hernandez if he had told the crew they received a raise in January, and Hernandez said he had not.

The other crew members essentially corroborated Escalante's<sup>1</sup> testimony. Marcelino Gonzalez and Cruz Becerra corroborated that Namba swore, threw lettuce and hit them. Both testified they said nothing to Namba when this happened and simply returned to work. ( I : 3 8 - 4 0 ; 5 3 ; 1 0 1 - 1 0 4 . )

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<sup>13</sup>The parties stipulated that in January the crew received a pay raise per box for various types of lettuce from 51 to 53 cents, from 55 to 57 cents and from 64 to 66 cents. ( I : 5 . ) Approximately a month before, in December 1987, Namba had given the bunching crew a raise. The bunching crew works in crops such as spinach--known as bunching items. Cutting items such as lettuce contrast with bunching items because the latter are banded or tied in bunches whereas heads of lettuce are not bound but are simply packed in cartons, usually 24 heads in each carton or box.

Mr. Hernandez corroborated several elements of the crew's testimony. He acknowledged at hearing that prior to speaking to Mr. Namba, the crew had previously asked him to ask Mr. Namba for a raise on their behalf. (II:209.) He also corroborated that after Mr. Namba told the crew he had already given them a raise, their response in effect was that they were going to look for the raise because they had not noticed it. (II:210-212.) He also admitted he never told them they were given a raise in January.

(Id.)

Mr. Namba first testified about the pay raise he gave the crew in January. He said he had received a complaint about some lettuce the crew had harvested and went to speak to them. Someone in the crew protested that since they were paid piece rate, they lost money if they spent time cleaning the lettuce, that is removing the leaves from the bottom. (II:230.)

Mr. Namba testified he agreed to give them a raise and, in return, the crew agreed to pack the way he wanted and, if their work was not right, they would repack. (II:231.) The workers denied they asked for a raise in January and denied that there was any such agreement.<sup>14</sup> (II:265; 267.) According to them, their only

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<sup>14</sup>Mr. Hernandez did not corroborate Namba's testimony on this point, In fact, his testimony is more consistent with that of the crew members since he supported their contention that they did not know about the January raise.

request for a wage increase was the one already described which occurred in early or mid-March.

With regard to this request, Mr. Namba first testified he was not sure whether it occurred in June or in March,<sup>15</sup> but later he acknowledged the crew might well have been right that it occurred in March.<sup>16</sup>

(II:231.) He testified that, in any event, it occurred on another day when he had gone out to the crew to talk to them about a complaint about irregular sizing which means packing heads of lettuce that are too small along with regular size heads. (II:231-232; 252.)

Namba denied that, having received the complaint, he was already upset when he went out to speak to the crew or that when

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<sup>15</sup>The charge (GCX 1.1) stated the request occurred in June. Ricardo Barajas explained that the crew was discussing the matter later and realized that since Hector Gonzalez and Juan Escalante had acted as spokesmen for the crew, the request had to predate Mr. Gonzalez<sup>1</sup> departure on March 23. I credit this explanation. The charge was filed in November, and I do not find it odd that the crew might not remember the precise month they asked for the wage increase. Mr. Hernandez and Mr. Namba too had difficulty remembering.

I reject Respondent's assertion that the UFW fabricated the June date so as to bolster its charge by reducing the time between the request and Respondent's failure to recall. There is absolutely no evidence to support this claim.

<sup>16</sup>At this point in his testimony, Mr. Namba's voice broke and he was close to tears. I recessed the hearing to allow him to regain his composure. His emotion was explained later by his testimony that in 1988 his wife was suffering from cancer and recalling events which occurred during this time brought forth memories of her illness.

the crew asked him for a raise, he became angry and began swearing and throwing lettuce at them. (II:232; 252.) He did not specifically deny that he told the crew that he would rather close the ranch than give them a raise.<sup>17</sup>

He testified he told the crew he would not give them a raise, reminding them they had just received one in January but had not improved their workmanship as promised. He testified the crew did not say anything, nor did they act surprised when he mentioned the January raise. (II:253.)

I credit the workers that they made only one request for a wage increase and that it occurred in March. They testified credibly and consistently. I have already accepted their explanation that the June date contained in the charge was merely a mistake.

In addition to finding them credible, Mr. Hernandez's failure to corroborate Mr. Namba regarding the asserted agreement and the January increase and his testimony that in March the crew did not seem to know they had received a raise<sup>18</sup> support the

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<sup>17</sup>Mr. Hernandez supported Mr. Namba's testimony that he did not swear or throw lettuce. (II:210.) He was not asked whether Namba threatened to close the ranch rather than grant a pay raise.

<sup>18</sup>Normally, one would expect a worker to notice a wage increase. Here, however, the increase was small, and there is no evidence whether the workers received any information from which they would be able to determine they had received a raise such as an accounting which would show how many boxes they picked and at what rate of pay.

crew's version. Finally, Respondent's changing stance on this point undermines my faith in Namba's testimony.<sup>19</sup>

Mr. Namba's reaction to the crew's request for a raise is one of those issues that viewed in isolation is difficult to resolve. There is no objective evidence against which to judge the two accounts, and neither version is inherently more or less probable than the other. Each of the witnesses has a vested interest in the case, and I did not find that their demeanor led me to believe one account over the other.

I resolve the issue by crediting the workers because overall I found Mr. Namba and Mr. Hernandez to be less forthright, less consistent and generally less reliable than the workers. Thus, I find Namba reacted angrily as described by the crew and told them he would rather close the ranch than give them a raise.

V. DISCRIMINATORY TREATMENT

The lettuce crew members testified that after they asked for the pay raise, foreman Hernandez began to harass them. He pushed them to work faster telling them they had to "make

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<sup>19</sup>At the Prehearing Conference, Respondent asserted there was no raise sought in March. Later, at hearing, it stipulated there was one request which was in March, and now in its brief it asserts there were at least three such requests (January, March and June).

points."<sup>20</sup> ( I:14;29; 40; 50; 58; 105.) They claimed he also forced them to perform more onerous work. ( I:61; 71-72; 84-85.) Further, throughout the season on almost a daily basis, he would issue veiled threats that they "would see what [would happen]" to the crew at the end of the season. ( I:15; 40; 49; 61: 105.)

Mr. Hernandez was not asked about the specific treatment described by the crew. He merely testified that he treated the crew the same after they asked for the wage increase as he had before. ( II:210.)

I do not credit the workers that Mr. Hernandez engaged in the above described conduct. In most instances, I found the workers credible in that they appeared to answer questions fully, their testimony consisted of specific facts rather than conclusionary statements, and they testified consistently but not by rote as if rehearsed.

In this instance, however, I was struck by how out of character the testimony sounded. Although they provided some factual detail, there was a sameness to the testimony that did not ring true. The witnesses did not sound as if they were describing their own individual experiences.

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<sup>20</sup>Respondent asserts in its brief that "[n]o evidence came from the workers to refute the logical inference that to 'make points' meant to do good work. . . ." (Respondent's brief at p. 13) This contention is patently incorrect. Escalante specifically testified that when Hernandez told them to "make points" he indicated the crew should work faster. ( I:29.) Mr. Hernandez was not asked if he used this phrase and, if so, what it meant.

I was by no means convinced by Mr. Hernandez' pat denial, and I find his failure to respond specifically to the claims suspicious. However, in view of my lack of confidence in the workers' testimony on this issue, I do not credit them that Hernandez harassed or threatened them.

VI. THE DECISION NOT TO RECALL THE CREW

Mr. Namba testified that sometime in mid-October he decided not to recall the crew. (II:237.) He denied that his decision had anything to do with the crew's request for a raise. The primary reason he cited for his decision was poor work performance by the crew consisting of both recurrent problems during the preceding two years and a specific incident in September when 70 boxes of lettuce were rejected by a customer.<sup>21</sup>

He further cited drinking on the job and, finally, an incident involving irrigation pipe.

A. The Irrigation Pipe Incident

Near the end of the season in September, according to Namba, he watched the crew spend an hour laying irrigation pipe when, in his view, the job should have taken only twenty minutes. He concluded the crew was simply stretching the work until

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<sup>21</sup>He testified he did not fire the crew because they refused to repack the 70 boxes of lettuce. This testimony conflicts with Respondent's initial position that the crew was not recalled in part because they were insubordinate in that they refused to follow Hernandez' order to repack the lettuce and laughed at him.

quitting time. (II:254.) He testified there were other similar incidents, but he did not give any other examples.

None of the crew members was asked about the irrigation pipe incident. Mr. Namba's account was credible on its face, and, in the absence of any evidence to the contrary, I find the incident occurred as he described.

B. Drinking on the Job

Much of Mr. Namba's testimony regarding this issue is vague and rambling. He was pressed by General Counsel to provide specific evidence after he testified in a conclusionary manner that the entire crew drank on the job and came to work with hangovers. (II:255-257.)

Mr. Namba then estimated that over the past two years he had instructed the crew on more than ten occasions not to drink on the job. (Id.) Yet, he could name only one incident consisting of a single worker who, on one occasion, arrived at work with a hangover. He identified Marcelino Gonzalez as having done so and testified Gonzalez had been laid off for a day in accordance with his standing instructions to Hernandez that this was the appropriate response if a worker came to work drunk or with a hangover.

Mr. Gonzalez testified on rebuttal and specifically denied that he ever drank on the job or was suspended for drinking. (I:48-49; 54.) He testified that in 1984, the time of the incident referred to by Mr. Namba, he was off work for

approximately one month because he and Hernandez had a verbal argument because Hernandez came to work in a bad mood and harassed Gonzalez by pushing him to work faster. (I:47-49.) Mr. Hernandez was not asked about his incident or about any drinking problems of Mr. Gonzalez or anyone else in the crew.

I do not credit Mr. Namba regarding the alleged drinking problem. His testimony was vague and unspecific. Despite his testimony as to the pervasiveness of the problem, he could recall only the one incident, and I do not credit his account of that event.

Mr. Namba gave only a very cursory account of the alleged event. From that account, it appears that he himself did not speak to or see Mr. Gonzalez and that it was Mr. Hernandez who laid off Gonzalez. Mr. Hernandez did not testify about the incident.

Further, according to Mr. Namba, it was standard procedure for an employee to be suspended for a day if he came to work drunk or with a hangover. And, again according to Mr. Namba, this happened frequently in the lettuce crew.

If all this were true, then it is unlikely there would have been a "misunderstanding" such that Mr. Gonzalez would have thought he had lost his job and thus stayed away for a month rather than knowing that he had been suspended for the day only.

Although Mr. Gonzalez' testimony is somewhat lacking in specific facts, he testified credibly, it is a first hand account which more credibly explains his absence than does Namba's

version, and it was not contradicted by Hernandez the only other person who was directly involved. Based on the foregoing, I credit Mr. Gonzalez and find he was not suspended or laid off for drinking.

C. The Crew's Poor Work Performance

1. The 70 Boxes Of Rejected Lettuce

The following facts are undisputed. On the Friday preceding the Labor Day weekend, Sylvestre Gaeta was supervising the lettuce crew while foreman Hernandez was occupied elsewhere on the ranch. Gaeta directed the crew to harvest a field of Boston or butter leaf lettuce which they did. (II:184.)

Ricardo Urbina, a driver employed by Mr. Elio Espino who trucked Respondent's produce to market, delivered the 70 boxes of lettuce the crew had harvested to a customer where it was refused after a few boxes were inspected. (II:171-172.) Mr. Urbina brought the lettuce back to Respondent's ranch.

There is substantial controversy as to who was responsible for the rejection. According to the crew, the lettuce was of poor quality, and they told Gaeta this before they harvested it. (I:17-18: 28; 64; 81; 102; II:44; 64; 70.) Gaeta dismissed their comments and reaffirmed his order to cut the lettuce telling them Hernandez had ordered it, and it was the only field to be harvested. (I:28-29; 44; 61.) Gaeta then left to perform other work, and the crew cut the lettuce.

Gaeta denies the crew told him there was anything wrong with the lettuce and contends he did not see the lettuce until it

was returned to the ranch by Urbina because it had already been packed in boxes by the time he got back to the field. (II:184.) He described the condition of the lettuce when he first saw it as pitted with holes and improperly sized--that is, small heads were mixed with large heads.<sup>22</sup> (II:190-192.)

Several of Respondent's other witnesses testified that the only problem was irregular sizing,<sup>23</sup> and Mr. Namba added that the crew had not cleaned the lettuce, i. e. , the leaves at the base of the stem had not been removed. (II:173-174; 176-177; II:162; 234.) They all denied there was anything else wrong with the lettuce.

The first workday after the lettuce was returned, Mr. Namba told Mr. Hernandez to speak to the crew about the rejection. He said nothing to Hernandez about telling the crew to repack the lettuce for resale but only told him to tell them the work was not done properly.

Mr. Hernandez testified he showed the crew the lettuce and told them they would not be paid for it. He told them to

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<sup>22</sup>Lettuce with holes is unacceptable, and small heads are also unacceptable. Further, mixing heads of different sizes results in them being tossed about in transit as opposed to staying neatly packed in rows.

<sup>23</sup>Juan Escalante acknowledged that some heads of lettuce the crew harvested were small while others were large. It is not clear from his testimony whether the crew had informed Gaeta about this problem as well. (I:28.)

discard the lettuce and left. Mr. Namba, who was not present when Hernandez spoke to the crew, testified that later that same day, he saw the crew walking into the field and asked them "How about going in there and repacking that lettuce?" He said the crew turned around, laughed at him and kept on walking. (II:232.)

The crew's version is substantially different. According to them, Hernandez showed them the lettuce and asked why they had cut it. They told him they had informed Gaeta the lettuce was no good but that he had directed them to cut it anyway.<sup>24</sup>

Hernandez replied they would not be paid for the lettuce and told them to discard it. They said nothing, and Hernandez left. They all denied that Mr. Namba asked them to repack the lettuce, and the only worker who was asked whether Hernandez told them to do so denied it. (I:20;30; 45; 66; 82; 91; 103.)

According to the crew, when Hernandez left, he went over to speak to Gaeta. Although no one heard what was said, from the way they gestured, it appeared they were arguing. (I:65.)

I do not credit Hernandez and Namba that they asked the crew to repack the lettuce. Hernandez was asked on cross-examination why he ordered the lettuce discarded. He had no credible explanation.

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<sup>24</sup>Mr. Hernandez never directly refuted the testimony of the crew that they told him they had warned Gaeta about the poor quality of the lettuce. (II:207.)

First, he said he did not know. Then, he said it was because he "thought" the crew would not want to repack. Ultimately, he testified he asked the crew "if we go and repack...." and when pressed as to whether the crew had refused to do so, he stated, "Well, in reality I think so...." (II:213.) He never testified, as claimed by Respondent, that the crew laughed at him.

Namba did not tell Hernandez to have the crew repack the lettuce. Nor did he himself seek them out. Rather, he chanced to see them and then suggested it. I find it improbable that he would have been so casual had he wanted to salvage the lettuce.

From the fact that Respondent made no serious effort to repack the lettuce for resale, I conclude there was more wrong with the lettuce than simply the way it was packed and the irregular sizing. Mr. Gaeta's testimony that, as the crew testified, the lettuce was pitted supports this conclusion.<sup>25</sup>

I credit the crew that Mr. Hernandez and Mr. Gaeta did argue about the lettuce.<sup>26</sup> Neither Mr. Hernandez nor Mr. Gaeta

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<sup>25</sup>There was substantial controversy as to whether the lettuce was rotten. I find it unnecessary to resolve this particular controversy in view of the other evidence as to whether the lettuce was merely improperly packed and sized.

<sup>26</sup>Mr. Namba testified that, although he knew Gaeta had been in charge of the crew the day the rejected lettuce was cut, he did not speak to Gaeta about the situation. (II:244-245.)

were convincing in their denials that they had such a discussion. Mr. Hernandez repeatedly evaded General Counsel's questions on this point although they were clear, direct, and not difficult to comprehend. (II:214.) I concluded from watching Hernandez that he was not confused by the questions but simply did not want to talk about the subject and deliberately avoided answering.

Mr. Gaeta took a different tack. It was evident that he was quite upset about the evidence that Hernandez had criticized his work, so, rather than evade the subject, he himself brought it up and volunteered that it was not true that he and Hernandez argued. In fact, he denied that he was even present when Hernandez spoke to the crew about the lettuce. (II:187-188.)

He also testified Hernandez was not angry with him and did not blame him for the rejection. (II:189; 191.) But, elsewhere he acknowledged that Hernandez told him that he had not properly supervised the crew.

Observing him testify, it was clear that his main concern was to absolve himself of responsibility for the incident. Beyond the above cited testimony, Gaeta further sought to justify his behavior by testifying he told Hernandez that the crew had been working a long time and knew what to do and did not need him to be standing over them to tell them how to do the work properly. (II:186.)

The weight of the testimony I have credited leads me to conclude that Hernandez told Gaeta he had not properly supervised

the crew. Even beyond that, I credit the workers' testimony that they told Gaeta the lettuce was of poor quality and that he ordered them to cut it anyway.<sup>27</sup> I do so because Gaeta testified inconsistently on this and a number of issues as noted, infra, while the crew members, on the other hand, testified consistently and credibly about most issues.

## 2. Recurrent Problems

Respondent contends that in the two years preceding the refusal to rehire ( i . e . , the 1986-87 and 87-88 seasons) the crew's work performance had been dismal and resulted in "lots of Namba lettuce [being] rejected...."<sup>28</sup> (Respondent's brief p. 16 . ). Mr. Hernandez testified he "always" had trouble with the crew, and, when pressed on cross-examination, he reaffirmed that the

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<sup>27</sup>Respondent argues in its brief that it would be "insane" for Gaeta to do such a thing. I find his behavior not at all unusual. His boss had told him to have the crew harvest the field, and it was the only field of lettuce available for harvest. Gaeta was busy driving the tractor from one field to another delivering packing cartons. I find it quite believable that rather than go find Hernandez, he would impatiently tell the crew that he had orders to cut the lettuce, and they should "just do it." Such conduct is all too consistent with human behavior.

<sup>28</sup>According to Mr. Hernandez, the crew would cut heads of lettuce that were too small. Mr. Namba testified that, in addition to this problem, the crew did not clean the leaves from the butt or stem of the lettuce. Later, Namba expanded the problems to include picking lettuce with pitted leaves ( i . e . , leaves with worm holes.) (II:248.)

crew "did bad work every day" for the past two years.<sup>29</sup> (II:220.) Mr. Gaeta estimated that he complained to Mr. Namba about the crew once or twice each week.<sup>30</sup>

Mr. Namba gave varying estimates as to how frequently there were problems. At one point, he testified that it was necessary for him to go to the fields every two or three days to talk to the crew. Then, he changed his testimony and estimated he had to speak to them only every ten days or so. Still later, on cross-examination, he testified he did not deal with the crew on a daily basis because that was Mr. Hernandez' responsibility, and Hernandez came to him (Namba) only when he (Hernandez) could not handle the situation. Even so, Namba declared, he had spoken to the crew "too many times to remember" over the past two years. (II:236; 248.)

As noted previously, there was an incident in September when 70 boxes of lettuce harvested by the crew was rejected. Despite their description of the crew's virtually constant

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<sup>29</sup>Mr. Hernandez testified that he had similar problems with the bunching crew and also warned them every day to do better work. (II:208; 220.) He later explained that he did not mean that the bunching crew did a poor job every day, but only that each day he exhorted them to do a good job. (II:221.) He did not similarly qualify his testimony as to the lettuce crew and opined that overall the bunching crew did better work. (II:223.)

<sup>30</sup>Mr. Namba, however, testified that Gaeta came to him only when the problem was especially acute, perhaps once a month. (II:149-250.)

substandard work, Respondent's witnesses could not recall any other specific instance of lettuce being rejected.

Mr. Hernandez testified generally that "on some occasions" . . . some boxes [had been sent] back . . . ." (II:209; 222.) Similarly, the broker who sold Respondent's produce, Mr. Katsumi (Kats) Tanimura<sup>31</sup> acknowledged he could not recall any other specific instance<sup>32</sup> and testified he had no written records of other rejections even though he keeps such records for five years.<sup>33</sup> (II:140.)

Mr. Tanimura testified that the number of rejections was sufficiently serious that he asked Elio Espino, whose truck company brought Respondent's produce to market, to speak to the lettuce crew in hopes that someone who spoke their own language

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<sup>31</sup>Mr. Tanimura is president of I & T Produce Company, a California corporation, which functions as a wholesale produce dealer. He obtains orders for produce and transmits them to growers such as Mr. Namba who truck their produce to Mr. Tanimura who then resells it to grocers--both chain stores and smaller establishments.

<sup>32</sup>Despite his acknowledgment that he had no specific recall, Mr. Tanimura nonetheless estimated there were 20 to 30 rejections of Respondent's produce in the 1986-87 season and "too many to remember" in the 1987-88 season. (II:133-134.) He testified that, although it was not uncommon to have rejections, he could not recall a problem with any grower other than Respondent in the entire 1986-87 and 87-88 seasons, and he handled produce for 75 to 100 growers and shippers at that time. (II:116; 129; 144.)

<sup>33</sup>There is documentary evidence of the rejection of the 70 boxes namely, an invoice with "70 boxes" lined out (JX 1) and also an accounting (JX 2) showing a reduction in the amount due Respondent from I & T Produce for produce delivered by Respondent.

might be able to persuade them to improve. (II:124.) Mr. Espino confirmed that Mr. Tanimura asked him to appeal to the crew which he did on two occasions both of which he believed were in 1988. (II:150; 153-157.)

The crew denies that Espino ever spoke to them about improving their work. They contend they never received any written warnings nor in 1988--the only year they were asked about--any oral warnings about their work. (I:19: 28; 46; 53-54; 65-66; 74; 82; 85; 93; 104; II:264.)

None of Respondent's witnesses could recall any specific instance when lettuce was rejected except for the 70 boxes. Mr. Tanimura's attempts to reconstruct other incidents were not convincing. He would begin to describe a specific occasion and when pressed for details it was obvious he did not really recall any other particular instance. (II:133-134.) No other witnesses even attempted to recount other incidents or to provide specific facts. Such conclusionary statements count for little. (Paul Bertuccio (1984) 10 ALRB No. 10.)

A further reason I do not credit the claim of extensive rejections is the testimony of Ricardo Urbina. Mr. Urbino testified that although he had worked for Espino for over a year, the only rejection of Respondent's produce he had experienced was the 70 boxes. (I:178-179) Since he was one of only five drivers, I find it unlikely that this would have been the only instance had the problem been of the magnitude described by Respondent's other witnesses.

I also find it highly significant that Respondent produced only one rejection slip despite Mr. Tanimura's testimony that there had been "too many rejections to remember." Since he testified he kept all such records for five years, I find it unbelievable that if the rejections were as numerous as he indicated that there is documentary evidence of only one.

Thus, the only objective evidence does not substantiate the testimony claiming chronic rejections caused by substandard work by the crew. For the reasons set forth below, I find the remaining testimony describing perpetually sloppy work by the crew similarly unbelievable.

Mr. Namba's and Mr. Gaeta's was internally inconsistent, and they also contradicted one another as to the extent of the problem. The clear sense I developed from observing them is that they would exaggerate and then retreat under further questioning. Similarly, I view Mr. Hernandez' testimony that the crew did poor work virtually every day for two years as a gross exaggeration.

Finally, I note that although Mr. Gaeta backed up Namba and Hernandez as to the crew's chronic substandard performance, when he was focused on defending his responsibility for the rejected lettuce, he testified he told Hernandez the crew knew how to do the work, and it was not necessary for him to stand over them. This is an odd statement for him to have made to Hernandez if the crew's performance was as consistently unacceptable as described.

I also do not credit Espino and Tanimura that Espino spoke to the crew to improve their work because I have rejected the testimony regarding the alleged numerous rejections and, without them, there is no rational to support this testimony. I note that neither Mr. Espino nor Mr. Tanimura can be described as disinterested witnesses. Mr. Espino has been doing business with Respondent for some three years, and Espino has only three customers besides Respondent. ( II:146. ) Approximately 10 percent of Mr. Tanimura's business comes from Respondent. Moreover, Mr. Tanimura and Mr. Namba have been close personal friends for more than 40 years. These connections give both men a vested interest in supporting Mr. Namba.

In view of their demeanor, the exaggerations and inconsistencies, the inherent improbability that Respondent would tolerate such constant poor work,<sup>34</sup> and the absence of documentary evidence of other than one rejection of lettuce, I do not credit Respondent's witnesses that the crew did poor work virtually every day for two years and that, as a result, substantial amounts of Respondent's lettuce was rejected.

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<sup>34</sup>On an economic basis alone, it is unbelievable that Respondent could tolerate work that was so poor that it resulted in so many rejections. Further, even in view of their long friendship, I find it implausible that Mr. Tanimura would continue to handle Respondent's lettuce if he were experiencing the number of rejections claimed when it is so out of proportion to the experience of Tanimura's other clients. Again, it is not believable that economically he could sustain the relationship.

VII. THE FAILURE TO REHIRE

It is undisputed that the workers were laid off as usual at the end of the season in September but were not recalled in November. Both Mr. Namba and Mr. Hernandez acknowledged that they did not notify the six members of the crew that they would not be rehired.

Rather, Marcelino Gonzalez learned from a friend who worked in Respondent's spinach crew that a labor contractor had been hired by Respondent to do the work previously performed by the lettuce crew. Gonzalez notified his fellow crew members of this fact.

The entire crew then went to the ranch to speak to Mr. Namba. Mr. Namba and Elio Espino, an independent truck driver whose company hauls Respondent's produce to market, were in the trailer which serves as an office.

Mr. Espino is fluent in English and Spanish, and the crew asked him if he would translate for them to Mr. Namba. Espino translated the crew's question as to whether they were going to be rehired and also Namba's response which was "No" that he had a complaint against them.<sup>35</sup>

The workers testified that they could not ask Namba what he meant by "a complaint" because he turned on his heels and went

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<sup>35</sup>At the Prehearing Conference, Respondent indicated that the complaint to which Mr. Namba referred was the 70 boxes of rejected lettuce. (Prehearing Conference Order, p. 4 . )

back into the trailer. ( I:16; 42-43; 63; 90; 101.) Namba, on the other hand, testified he was about to explain why he would not rehire them, but they turned around, said something in Spanish that he recognized as a bad word, started to laugh and left. (II:238-239.) Mr. Espino confirmed that after he translated Namba's response, the crew walked away laughing. (II:151.) The workers deny they laughed and testified that since Mr. Namba had gone back into the trailer, they simply left. (II:264.)

I credit the workers. Mr. Espino's testimony differs from his declaration (GCX 3) wherein he stated:

"When I translated to them what Mr. Namba said they acknowledged and left. Nothing more was said. They did not deny or reply to Mr. Nambas (sic) reason for not recalling them."

Nowhere does the declaration state that the workers laughed. His only explanation for the inconsistency is that the Board agent did not ask that question. I find it improbable that he would not have included such a fact, if it had occurred, even absent a specific question, especially since the logical conclusion to be drawn from his declaration is that the workers did not respond to Namba at all.<sup>36</sup>

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<sup>36</sup>I note further that neither in his declaration nor in his testimony did Mr. Espino corroborate Namba that the crew said a "bad word" in Spanish.

### ANALYSIS AND CONCLUSIONS

In order to prove a case of discriminatory refusal to rehire, the General Counsel ordinarily must prove that: ( 1 ) the employees who were not rehired engaged in protected concerted activity; ( 2 ) the employer knew or believed the employees had engaged in such activity; ( 3 ) the employer had a policy of rehiring former employees; ( 4 ) the employees applied for work when work was available; and ( 5 ) there is a causal connection between the refusal to rehire and the employees' protected concerted activity. (Anton Caratan & Son (hereafter Caratan) (1982) 8 ALRB No. 83. Once the General Counsel has established a prima facie case by showing the protected activity was a motivating factor in the refusal to rehire, the burden shifts to the employer to prove it would have refused rehire even if the employees had not engaged in the protected activity. (Caratan, supra.)

Here, there is no dispute but that the six workers' request for a pay raise was protected concerted activity. Similarly, there is no dispute as to Respondent's knowledge. Respondent also agrees that its practice was to recall the crew each season, that it did not do so for the 1988-89 season, and that there was work available for the crew at that time.<sup>37</sup>

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<sup>37</sup>Although the crew members applied for work, under the circumstances present here, it was not necessary for them to do so. If Respondent's reason for not rehiring the crew was discriminatory, the violation occurred when it failed to recall the crew at the start of the season. (Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98.)

Thus, the only issue is whether Mr. Namba did not recall the crew members because of their request for a raise. As is typically the case, the reason for Respondent's action must be inferred.

Where, as here, the discriminatory motive is not apparent from direct evidence, there are a variety of factors that the ALRB, the National Labor Relations Board (hereafter "NLRB" or "national board") and the courts traditionally look to consider in order to infer the true motive for the employer's action.

Such factors include: (1) timing--the proximity of the adverse action to the protected activity; (2) the assertion of false or inconsistent reasons, or the belated addition of reasons, for the action; (3) whether the employer has tolerated conduct similar to that which assertedly occasioned the adverse conduct; (4) the employer's failure to warn the employees of the seriousness of the conduct for which the employees were allegedly refused rehire; and (5) the employer's failure to investigate the incidents upon which the employer relied in taking the adverse action. (Morris, The Developing Labor Law (2d ed. 1983) Vol. 1, pp. 215-217; Ranch No. 1 (1986) 12 ALRB No. 21.)

Traditionally, the severity of the discipline is also a significant factor. Firing an employee has been characterized as "the industrial equivalent of capital punishment." (Griffin v. Automobile Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485].) A refusal to rehire is equivalent to discharge. The imposition of

the most extreme form of discipline, especially without warning, may give rise to an inference that the reason for the action was unlawful.

Applying these basic legal principles to the specific facts of this case, I turn first to the issue of timing. Respondent argues that the substantial time lag between the wage request and the failure to rehire negates an inference that the two events are related.

Respondent's argument has merit. There is a gap of some eight months between these two events, and some six months from March until the end of the season. I have not credited the crew's testimony that Hernandez harassed and threatened them throughout this time which conduct would bridge the gap.

On the other hand, allowing the crew to finish the season may reflect no more than an effort to exercise some subtlety in getting rid of them. In Sahara Packing Co. (hereafter Sahara) (1978) 4 ALRB No. 40, this Board found a violation where employees were not rehired the season following an election in which they were active on behalf of the petitioning union. The Board noted that the beginning of the next season was "the first real opportunity to react without seeming blatantly discriminatory."<sup>38</sup>

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<sup>38</sup>In Sahara, the discriminatees also worked for several months from the time they began supporting the union's organizing efforts in late 1975 until the end of the lettuce season which in the Imperial Valley, where they were working, is typically late February or early March. Although the workers in Sahara engaged in ongoing protected activity, the principles in that case are still applicable here.

(Sahara, ALOD, p. 15.)

I find the element of timing relatively weak and do not rely on it as indicating unlawful motive.

A strong element in establishing General Counsel's case is that Respondent's asserted reasons for not rehiring the crew have shifted over the course of this proceeding, and I have discredited the evidence supporting many of those reasons. Respondent initially claimed the crew was not recalled principally because of the 70 boxes of lettuce which was rejected and because they were insubordinate because they refused Mr. Hernandez' instructions to repack the lettuce and also laughed at him. The significance of the 70 boxes was apparent in Respondent's claim that when Namba told the crew he was not rehiring them because he had a complaint against them, the complaint to which he referred was the rejected lettuce.

Now, Respondent characterizes this incident as "unimportant in itself," and merely illustrative of the problem of virtually continuous sloppy work for the two years preceding the refusal to rehire. (Respondent brief, pp. 15-16.) The important fact, Respondent now claims, is that as a result of this perpetual substandard work, "lots of Namba lettuce was rejected...." (Id.)

Respondent has also abandoned its claim that the crew was fired because it refused to repack the lettuce since Mr. Namba

testified that was not a factor in his decision.<sup>39</sup> There is no evidence to support the original claim that the crew laughed at Hernandez.

In yet another shift in position, Respondent originally asserted that a significant element in the decision not to rehire was the fact that the crew drank on the job which contributed to the crew's poor performance. This factor now rates only a passing reference in its brief. (Respondent's brief, p. 8.)

As set forth above, I did not find the evidence supporting this claim credible. Moreover, even if I had credited Namba's account as to the one incident which he described, it occurred in 1984, some four years prior to the refusal to rehire, and during a time when Respondent concedes the crew performed satisfactorily. It is only the past two seasons that Respondent claims were problematic.

Following the shifts in position, Respondent's asserted reasons for its action are reduced to the ongoing poor work, the numerous rejections of lettuce, drinking on the job and the irrigation pipe incident. As set forth in the preceding section, I have discredited the evidence supporting the first three elements and, from observing Mr. Namba's demeanor, I am convinced

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<sup>39</sup>woreover, I have not credited Namba and Hernandez that they told the crew to repack.

that the irrigation pipe incident is an afterthought belatedly added in order to provide justification for Namba's action and that it was not truly a factor in his decision.

Thus, Respondent has asserted both false and shifting reasons for its failure to rehire the lettuce crew. I find this conduct supports an inference that the true reason is unlawful. (The Garin Company (1985) 11 ALRB No. 18.)

Another factor which supports General Counsel's case is the fact that although Respondent originally claimed that the 70 boxes of lettuce was a major reason it did not rehire the crew, Namba made no investigation of the incident. He did not discuss it with Gaeta despite the fact that he knew Gaeta was in charge of the crew that day. Nor did he question Hernandez as to what had happened. His failure to investigate supports an inference that this incident was not the true reason he refused to rehire the crew. (Monrovia Nursery Company (1983) 9 ALRB No. 15.)

I have already noted the severity of the action taken. Even under Respondent's version of the facts, there is no evidence the crew was ever warned that they were in jeopardy of being disciplined, much less that they were in danger of losing their jobs, if their work did not improve. In fact, except for the refusal to pay them for the 70 boxes of lettuce, there is no evidence Respondent ever took any form of disciplinary action

against the crew<sup>40</sup> during the entire two years they allegedly "did bad work virtually every day."

The absence of warnings<sup>41</sup> and the lack of any immediate precipitating event<sup>42</sup> also support an inference of unlawful motive.

(NLRB v. Trumbull Asphalt Co. (8th Cir. 1964) 327 F.2d 841 [55 LRRM 2435]). The first is significant because it suggests that the conduct for which the employees were allegedly refused rehire may not in fact have occurred. The latter is relevant because common experience teaches that there is usually some occurrence--the proverbial straw which breaks the camel's back--which explains why action was taken.<sup>43</sup>

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<sup>40</sup>I do not count the alleged incident involving Marcelino Gonzalez not only because I did not credit Namba's testimony, but also because it occurred two years before the two seasons Respondent complains of.

<sup>41</sup>In the absence of any evidence that Respondent had a formalized disciplinary system, I accord no weight to the fact there were no written warnings. (Monrovia, supra.) Rather, it is the absence of any warnings of any type which is significant. Even if I had credited Espino's testimony that he talked to the workers, there is no evidence Respondent knew of these conversations or that Espino was Respondent's agent. Further, his testimony reveals not a warning of potential discipline by Respondent but simply that they would all lose business unless the crew did good work.

<sup>42</sup>The 70 boxes does not qualify since Respondent's position is that it was unimportant in itself and was merely one of innumerable rejections and reflective of the crew's chronic sloppy work.

<sup>43</sup>Related to this concept is the fact that prior tolerance of the conduct for which the employees were allegedly refused rehire also supports an inference that the conduct was not the true motivating factor. (NLRB v. Princeton Inn Co. (3d Cir. 1970 424 F.2d 264 [73 LRRM 3002].)

Based on the foregoing, I find that General Counsel has established a prima facie case. The burden now shifts to Respondent to prove by a preponderance of the evidence that it would have refused to rehire the crew even absent its request for a pay raise.

After taking into account the numerous shifts in position set forth above, Respondent's current claims may be summarized as follows. Mr. Namba granted the crew's request for a pay raise in January in return for their promise to improve their work performance which had deteriorated the preceding season and continued to be substandard. He refused their requests for another pay increase of which there were at least two<sup>44</sup> telling them they had not improved their work as promised.

Respondent asserts these requests for a pay raise played no part in Namba's decision not to recall the crew. Rather, he was motivated by four things: ( 1 ) the continued sloppy work, ( 2 ) the numerous rejections of lettuce occasioned thereby, ( 3 ) the fact that, in spite of his repeated instructions not to do so, the crew frequently drank on the job which contributed to their poor

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<sup>44</sup>in its brief, Respondent claims there were wage demands in January, March, June "... and, probably, several others which may not have been communicated to Mr. Namba directly...." (at p. 14.) As noted, supra, at fn. 19, this claim contrasts with Respondent's initial stance that there was only one wage demand which occurred in January. (Prehearing Conference Order, p. 4.)

work and ( 4 ) they dawdled at laying irrigation pipe stretching a 20 minute task into an hour in order to stretch the job until quitting time.

I have previously discredited the evidence presented by Respondent to establish the first three bases and have determined that the fourth ground is mere "make weight." Thus, I find none of Respondent's asserted reasons stand up.

This does not end the inquiry because an employer may fire or refuse to rehire an employee for "good cause, bad cause or no cause" so long as the motivation is not because the employee engaged in activity protected by the Act. (L' Eggs Products, Inc. v. NLRB (9th Cir. 1980) 619 F.2d 337 [104 LRRM 2674]). In this instance, I find that despite the time lag between the March request and the refusal to rehire in November that Mr. Namba decided not to rehire the crew because of the wage demand.

I reach this conclusion primarily because although the legal rubric is that one may fire (or not rehire) an employee for no reason, in real life we do not do so without some reason or motivation. Most of the employees in the lettuce crew had worked for Respondent for several years and had performed well. Two thirds of them had worked for Respondent's predecessor where Mr. Namba had contact with them. The alleged deterioration in their work habits after years of satisfactory employment is unexplained. Such an unexplained change causes me to question whether it occurred.

Moreover, Respondent put forth one reason after another, adding one and withdrawing others, in an attempt to answer why Namba did not recall the crew. Its witnesses, exaggerated and they testified inconsistently and often contradicted one another and even themselves. These factors convince me that Respondent was casting about for a reason which would withstand scrutiny because it could not divulge the true motive which was the wage request which had so incensed Mr. Namba at the time.

I find that the rejection of the 70 boxes of lettuce which Respondent originally advanced as a colorable reason designed to present a lawful motive was a pretext for its true, unlawful motive.

I therefore find that by virtue of its discriminatory refusal to rehire the lettuce crew, Respondent has violated section 1153(a) of the Act. I hereby issue the following recommended order:

RECOMMENDED ORDER

Pursuant to Labor Code §1160.3, Respondent Namba Farms, Inc., its partners, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recall or rehire, or otherwise discriminating against, agricultural employees in regard to hire or tenure in employment or any term and condition of employment because they engaged in concerted activity protected by section 1152 of the Act;

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

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

( a ) Offer Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other employment rights and privileges;

( b ) Make Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas whole for all loss of pay and other economic losses they have suffered as a result of Respondent's refusing to recall or rehire them in November 1988, such amounts, plus interest thereon, to be computed in accordance with the Board's Decision and Order in E.W. Merritt Farms (1988) 14 ALRB No. 5. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the refusal to recall or rehire;

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

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

( e ) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent from November 1 1988, to the date of mailing;

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

( g ) Provide a copy of the Notice to each employee hired by Respondent during a twelve month period following issuance of this Order;

( h ) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and places(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 the reasonable rate of compensation to be

paid by Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question and answer period;

( i ) Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have already begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when its present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of its next peak season;

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

DATED: October 12, 1989

  
\_\_\_\_\_  
BARBARA D. MOORE  
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYERS

After investigating charges that were filed in the El Centro Regional Office of the Agricultural Labor Relations Board [ALRB or Board] by the United Farm Workers of America, AFL-CIO (Union) the General Counsel of the ALRB issued a complaint which alleged that we, Namba Farms, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by refusing to recall or rehire Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas because of their participation in protected concerted activity, namely, asking for a raise in pay. 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 you to know that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organizer yourselves;
2. To form, join, and 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 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 refuse to recall or rehire, or otherwise discriminate against any employee, because he or she has requested an increase in wages or otherwise sought a change in wages, hours or working conditions.

WE WILL offer to reinstate Marcelino Gonzalez, Francisco Escalante, Juan Escalante, J. Cruz Becerra, Jose Luis Barajas and Ricardo Barajas to their previous positions in the lettuce crew and reimburse them, with interest, for any loss in pay or other economic losses they suffered because we refused to rehire them.

**Dated:**

NAMBA FARMS, INC.

By:

\_\_\_\_\_  
(Representative) (Title)

If you have questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (619)353-2130.

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

DO NOT REMOVE OR MULTILATE