Chino, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SILAS KOOPAL DAIRY, Respondent, and JOSE GUTIERREZ, Charging Party.	)	Case No. 81-CE-28-SD 9 ALRB No. 2

DECISION AND ORDER

On March 3, 1982, Administrative Law Officer (ALO) Joe H. Henderson, issued the attached Decision in this proceeding. Thereafter, Counsel for the General Counsel timely filed exceptions, incorporating by reference her post-hearing brief to the ALO.

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

The Board has considered the record and the attached ALO's Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent consistent herewith.

Pleadings, Admissions and Preliminary Findings

The First Amended Complaint alleged that: (1) on or about January 20, 1981, Respondent, by Clarence Koopal,[1/] violated

[1/] Clarence Koopal, a one-third owner of Respondent's dairy, is referred to in the pleadings and in the record by his nickname, Clare.

section 1153(a) of the Agricultural Labor Relations Act (Act) by threatening to lay off employees Jose Gutierrez and David Marquez because of their support for the Dairy Employees Union, Local 17, Christian Labor Association (Union); (2) on or about January 20, 1981, Respondent terminated the employment of employee Amancio Perez because he supported and voted for the Union; and (3) on or about April 14, 1981, Respondent discharged employee Jose Gutierrez because of his union activities.

On the basis of the record evidence, and in view of Respondent's answer to the original complaint,[2/] which admitted the following facts, we find as follows: (1) A true and correct copy of the original charge in Case No. 81-CE-28-SD was filed by Jose Gutierrez on May 11, 1981, and was duly served on Respondent by Gutierrez on July 8, 1981; (2) Respondent Koopal Dairy is now, and at all time material herein, has been an agricultural employer, within the meaning of section 1140.4(c) of the Act, doing business in the County of San Bernardino in the State of California; (3) Clarence Koopal is now, and at all times material herein, has been a supervisor within the meaning of section 1140.4(j) of the Act; (4) Jose Gutierrez, the Charging Party, is now, and at all times material herein, has been an agricultural employee within the meaning of section 1140.4(b) of the Act; (5) During the first two or three weeks of January 1981, Jose Gutierrez led his co-workers, Perez and Marquez in seeking representation by the Union; and (6) an ALRB representation election was held among the employees

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[2/] Respondent filed no answer to the First Amended Complaint.

of Koopal Dairy on January 20, 1981, which resulted in a unanimous 3-0 vote in favor of the Union.

We also find, on the basis of the record evidence, and in the absence of any contention to the contrary, that the Union is a labor organization as defined in section 1140.4(f) of the Act, that Silas Koopal is an owner and supervisor of Respondent, and that Amancio Perez and David Marquez at all times material herein have been agricultural employees within the meaning of section 1140.4(b) of the Act. At times material herein, these two employees were performing the same agricultural tasks as Gutierrez. As to Perez, regardless of whether he was hired and/or paid by the two milkers or by Respondent, it is clear that, during the relevant period herein, he was an agricultural employee performing agricultural services on behalf of Respondent, an agricultural employer, with the knowledge and consent, at least tacit, of Respondent. We so find. We also find that Respondent exercised managerial authority over Perez, through day-to-day supervision of his work and by directing and effecting his discharge on January 20, 1981.

Based on the above, we reject the ALO's finding that Amancio Perez was not an employee of Respondent, and his implied conclusion that if Perez were not Respondent's employee, Respondent could not be found liable for his discriminatory discharge. The record evidence clearly establishes that Perez performed agricultural services for Respondent and was paid for such services by Respondent, knowingly albiet indirectly, i.e., through the two regular milkers. We therefore conclude that there was an

employer-employee relationship between Respondent and Perez, and that, for the reasons set forth below, Respondent violated the Act by directing and effecting the discharge of its employee Perez because he supported and voted for the Union.

Even if Perez were not an employee of Respondent, we would nevertheless find Respondent liable for effectively directing his unlawful discharge. There is no basis either in the declared policy of the Act or in any applicable National Labor Relations Act (NLRA) precedent construing section 1153(c) or (a) as protecting employees only from the unfair labor practices of their own employer. On the contrary, the specific terms of the Act clearly manifest a legislative purpose to extend the statutory protection of section 1153(c) and (a) beyond the immediate employer-employee relationship. Thus, section 1153 makes it "... an unfair labor practice for an employer... to interfere with, restrain, or coerce, agricultural employees [not "its" agricultural employees]" or "... by discrimination in ... employment, to encourage or discourage ..." union activities of employees [not "its" employees]. The U.S. Supreme Court has affirmed the National Labor Relations Board's (NLRB) consistent holdings that a statutory employer may violate the NLRA with respect to employees other than its own. (Hudgens v. NLRB (1976) 424 U.S. 507, 510 fn.3 [91 LRRM 2489].) See also Lucky Stores, Inc. (1979) 243 NLRB 642 [102 LRRM 1057], where the NLRB noted that it "... has consistently held that an employer may violate section 8(a) of the NLRA [comparable to section 1153(a) of our Act] not only with respect to actions taken affecting its own employees

but also by actions affecting employees who do not stand in such immediate employer-employee relationship." Even if it had been established in the record (which it was not) that Gutierrez and Marquez had functioned as a labor contractor in hiring Perez and paying him for the work he performed at Koopal Dairy, Respondent would still "... be deemed the employer [of Perez] for all purposes ..." of the Act, pursuant to section 1140.4(c) thereof, and therefore liable for his discriminatory discharge.

Background

Respondent, a business owned by Silas Koopal and his son, Clarence Koopal, operates a small dairy. The dairy uses automatic milking equipment and a milk-cooling system that keeps the milk at 50 degrees. During periods of wet weather, the services of two milkers are needed, one to wash down and prepare the cows, and one to perform the milking of some 400 cows. Thus, the two milkers work on the same shifts and assist each other when the weather is wet. When the weather is dry, each of the milkers works one of the two shifts in each day: from about 11:00 a.m. to about 3:00 p.m., and from about 11:00 p.m. to about 3:00 a.m.

At all times material herein, Respondent employed two regular milkers. When Jose Gutierrez was hired, in March 1980, another milker (Silverio Munoz) was already working for Respondent. The two milkers worked together until some date in September 1980, when Respondent discharged Munoz for mistreating the cows and hired David Marquez as a replacement two or three days later. At some date prior to January 1981, Amancio Perez was

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hired[3/] to assist the two regular milkers, i.e., to work as a relief milker.

The three employees continued working for Respondent until Perez was discharged on the day of the election, January 20, 1981, and Gutierrez was discharged on April 14, 1981. Respondent hired a replacement relief milker (named Jose) about three days after it fired Perez, and paid Jose an undisclosed amount for his services, but as of the date of the hearing had not hired a replacement for Gutierrez. Respondent paid $90 per day for the services of its employees whether it had one, two, or three milkers on the job. When there were two milkers, they shared the work and the $90 daily stipend, presumably equally. When Perez was working as a relief milker, Gutierrez and Marquez paid him an undisclosed amount from their own earnings. According to his unrefuted testimony, Gutierrez asked owner Silas Koopal, in early January 1981, to pay Perez directly for his services, presumably so Gutierrez and Marquez could in effect get a raise by retaining more of the $90 daily wage they shared. Silas Koopal refused that request.[4/] After Silas Koopal refused his request, Gutierrez, along with Marquez and Perez, went to the Union's office and spoke to business agent Ben Sybesma about organizing

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[3/] It is not clear from the record whether Perez was hired by Respondent, or by Gutierrez and/or Marquez.

[4/] Gutierrez and Marquez thereafter continued to pay Perez out of their wages until he was fired on January 20, 1981. After Gutierrez was discharged on April 14, 1981, Marquez worked both shifts and received the entire $90, and Respondent continued paying an additional amount as wages to "Jose," the relief milker it had hired to replace Perez.

Respondent's dairy. On January 20, 1981, a representation election was conducted at the dairy by Board agent David Ortiz. The Union won by a unanimous 3-0 vote, and no post-election objections were filed by Respondent. Clarence Koopal admitted in his testimony that he asked Gutierrez and Marquez, before the election whether they "were going to join the Union."[5/]

On January 20, after the counting of the ballots, Clarence Koopal directed Jose Gutierrez to discharge Perez, which he did. On April 14, Respondent discharged Gutierrez. On April 15, Koopal signed a contract with the Union.

The Alleged Threats to Employees

Gutierrez testified that shortly after the election on January 20, Clarence Koopal spoke to him in the presence of Marquez and Perez. According to Gutierrez, Clarence Koopal angrily asked them why they had "... put the Union in there," i.e., why they had [unanimously] selected the Union as their bargaining representative, and also threatened to fire the employees and to report them to the immigration authorities. In his testimony, Clarence Koopal in effect denied having voiced that interrogation and those threats of reprisal. Marquez testified that the conversation occurred but he was unable to corroborate the testimony of Gutierrez because the conversation was in English and Marquez understands so little English that he could testify only that the conversation "... was about the Union." Counsel for the General Counsel did not call

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[5/] In view of this admission, we conclude that Respondent thereby violated section 1153(a) of the Act by unlawful interrogation of employees concerning their union sympathies. (See, Tom Bengard Ranch, Inc. (1978) 4 ALRB No. 33.)

Perez to corroborate the testimony of Gutierrez, nor did she explain on the record her failure to do so. The ALO did not resolve the conflicting testimony by making credibility resolutions and did not even discuss the incident in his Decision. On the record before us, and not having observed the witnesses, we are in no position to resolve the credibility issue. Accordingly, we find that General Counsel has not established by a preponderance of the evidence that Clarence Koopal made the statements attributed to him in the testimony of Gutierrez, and we hereby dismiss that allegation of the complaint.[6/]

The Discharge of Perez and Gutierrez

In order to establish a prima facie case of discriminatory discharge based on union activity or other concerted activity, the General Counsel must establish that: (1) the employee engaged in the protected activity, e.g., joining or supporting a union; (2) that the employer had knowledge of the employee's protected activity; and (3) that there was a causal connection between that activity and the subsequent discharge. Once the General Counsel has established such a prima facie case, the burden shifts to the employer to prove that it discharged the employee for some lawful, non-discriminatory reason, i.e., that it would have discharged the employee even absent the employee's protected activity.

[6/] We affirm the ALO's conclusion that Respondent did not violate the Act by Clarence Koopal's post-election question to a Board agent ("What if I call up the Immigration right now and have these men deported?"), as there were no employees present and no evidence that the comment was, or was likely to be, transmitted to any employee. We note that Koopal's question was not alleged in the complaint as a violation of the Act.

Perez and Gutierrez were both involved in protected concerted activity from early January 1981, when Gutierrez spoke to Silas Koopal on behalf of himself, Perez and Marquez, seeking to obtain a different manner of payment for Perez which would result in higher net wages for Gutierrez and Marquez. When that request failed, all three employees contacted the Union and took the necessary steps to obtain a Board-conducted election. It is likely that Respondent knew of the three employees' unanimous support for the Union even prior to the election and the fact that Gutierrez was the spokesman and leader of the group would be obvious from the fact, testimony as to which was unrefuted, that he had spoken to Silas Koopal on behalf of the group when he was requesting a wage change, and from the fact that a petition for representation requires the support of at least 50 percent of the eligible employees (in this case that would be two of the three). In any event, Respondent was clearly aware that all three employees had supported and voted for the Union when the ballot count indicated a 3 to 0 victory for the Union.

According to the unrefuted testimony of Gutierrez, shortly after the election on January 20, Clarence Koopal told Gutierrez to notify Perez that there would be no more work for him (Perez) at the dairy because he (Clarence Koopal) was going to serve as the relief milker. It is significant that, in his testimony, Clarence Koopal did not deny having given that instruction and that, despite his purported reason for ordering the discharge of Perez, Clarence Koopal served as a relief milker for only "... a few days until we got another relief milker." Koopal

did not admit having ordered the discharge of Perez. In fact, he testified that he did not know the name of "the relief milker" who had "... stopped working for us" on the day of the election, and then "... got another job." On the basis of Respondent's knowledge of Perez' union support, the timing of his discharge (within hours after the election results were known), the absence of any proof as to a lawful basis for the discharge, and the fact that Clarence Koopal served as a relief milker for only a few days after the discharge and then hired a new relief milker (indicating that Koopal's prior statement that there was no more work for Perez was a pretext), we conclude that Respondent effected the discharge of Perez because he supported and voted for the Union and thereby violated section 1153(c) and (a) of the Act.

The Discharge of Gutierrez

As set forth above, Silas Koopal had knowledge that Gutierrez was the leader and spokesman of the employees when he requested a change in their working conditions (wages), clearly a protected concerted activity, and it is likely that Respondent knew that Gutierrez was also the leader and spokesman in contacting the Union and obtaining a Board election. Respondent of course knew from the 3-0 vote that Gutierrez had voted for the Union. However, he was not discharged immediately after the election. Rather, Respondent waited until April 14, 1981, the day before it signed a contract with the Union, and then summarily discharged him at 11:00 a.m., without prior notice or warning. According to the testimony of Union business agent Ben Sybesma, because Gutierrez was discharged before the contract was signed, he would thereby be

denied any contractual remedy to challenge Respondent's action, e.g., a grievance and/or arbitration procedure.

From the above facts, we find that General Counsel has established a prima facie case that Respondent discharged Gutierrez because of his known union activities and his other protected concerted activity. Since Gutierrez was the senior employee at the time of his discharge, and because he was summarily discharged without prior notice the day before the Union contract was signed, and as Respondent gained no financial benefit from his discharge (Marquez thereafter drew $90 per day for himself instead of sharing the job and the pay with Gutierrez), and as the reasons Respondent gave him at the time he was fired[7/] are not consistent with Respondent's explanation at the hearing, we consider General Counsel has established a strong prima facie case.

Respondent seeks to rebut the prima facie case of the General Counsel by asserting a business justification for the discharge of Gutierrez. At the hearing, Respondent's witnesses testified that Gutierrez was discharged because the wet season had ended and only one milker was required. Silas Koopal admitted in his testimony that there was no economic advantage to him resulting from Gutierrez' discharge because two milkers received the same pay as one milker. In fact, one milker was all that he used from the date of Guiterrez' discharge until the date of hearing. The record indicates that Gutierrez and one other milker (first Munoz and

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[7/] Gutierrez testified Clarence Koopal told him on April 14 that he was being fired for raising his voice to Silas Koopal and for using too much iodine in treating the cows' teats.

then Marquez) were employed continuously from March 1980, until April 1981, a continuous period of over 12 months including both wet and dry seasons.

There was considerable testimony offered by Respondent that the cooling system of the dairy could not handle the product of two milkers at one time. The record reveals it did not have to. When two milkers were employed, they generally worked on separate half-day shifts except for the wet season when one milker was used to bring in the cows from the muddy corrals and to clean them while the other milker did the milking. There does not appear to have been any change in the cooling system capacity that provided a business justification for the discharge of Gutierrez. On the basis of the record evidence, we find that Gutierrez' leadership in bringing in the Union and his previous concerted activities were the principal bases for his discharge the day before the Union contract was signed, and that Respondent has not rebutted the prima facie case of the General Counsel. Accordingly, we conclude that by its discharge of Gutierrez, Respondent violated section 1153(c) and (a) of the Act.

The Remedy

Our remedial Order will provide, inter alia, reinstatement and backpay, plus interest, for the two dischargees. The computation of the backpay for Perez for the period from the date of his discharge to the date a few days later, on which Respondent

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hired a relief milker[8/] (Jose) to replace him, shall be based on the amount Perez had been receiving, through Gutierrez and/or Marquez. For the period from the latter date through the date on which Respondent offers Perez reinstatement as a relief milker, the backpay for Perez shall be based on the actual earnings of the relief milker who replaced him.[9/] The gross backpay for Gutierrez shall be based on the amount he would have earned during the backpay period had he not been discriminatorily discharged.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Silas Koopal Dairy, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging 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 any union activity or other concerted activity protected by section 1152 of the Act.

(b) Interrogating any agricultural employees about their union sympathies, or in any like or related manner

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[8/] The pay of the relief milker was in addition to the $90.00 per day paid by Respondent to Marquez after the discharge of Perez and Gutierrez.

[9/] The earnings of a specific employee who replaced the discriminatee is one of the "Four basic gross backpay formulas ... used by the [National Labor Relations] Board and approved by the courts through the years...." NLRB Casehandling Manual, Part 3 (Compliance), sections 10536 and 10544 et seq. It is also one of the basic backpay formulas consistently used by this Board.

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

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

(a) Immediately offer Jose Gutierrez and Amancio Perez reinstatement to their former jobs at Respondent's dairy, or to substantially equivalent employment, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Jose Gutierrez and Amancio Perez for all losses of pay and other economic losses they have suffered as a result of their discharge, the makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records and reports, and all other records relevant and necessary to a determination by the Regional Director of the backpay period and the amount 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 employees employed by Respondent at any time during the period from January 20, 1981, until the date on which the said Notice is mailed.

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

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

(h) 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

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continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: January 25, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego Regional Office, the General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint which alleged that we, Silas Koopal Dairy, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging employees Amancio Perez and Jose Gutierrez because of their union activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

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

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

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

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

SPECIFICALLY, the Board found that it was unlawful for us to discharge Jose Gutierrez and Amancio Perez. WE WILL NOT hereafter discharge or otherwise discriminate against any employees for engaging in union activities.

WE WILL reinstate Jose Gutierrez and Amancio Perez to their former jobs or substantially equivalent positions, without loss of seniority or other privileges, and will reimburse them for all pay and other money they have lost because of their discharge, plus interest.

Dated: SILAS KOOPAL DAIRY

By: _____
Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1350 Front Street, Room 2062, San Diego, California. The telephone number is (714) 237-7119.

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

Silas Koopal Dairy
(Jose Gutierrez)

9 ALRB No. 2
Case No. 81-CE-28-SD

ALO DECISION

The ALO recommended dismissal of the allegations that Respondent fired Amancio Perez and Jose Gutierrez for having engaged in union activity. The union activity on the part of Gutierrez consisted of having contacted the Christian Labor Association for assistance in having an election at the Koopal Dairy and having voted for the Union. The Respondent asserted a business justification for the discharge of Gutierrez, i.e., that only one milker was required at the dairy at the time of his discharge.

The ALO recommended dismissal of the allegation that Respondent discriminatorily discharged Perez, finding that since Respondent was not the employer of Perez, his actions bringing about the latter's discharge were not a violation of Labor Code section 1153(a).

BOARD DECISION

The Board reversed the ALO's conclusions and recommendations, and found that Respondent was the employer of Perez, that both Perez and Gutierrez were discriminatorily discharged for having engaged in union activities, and that Respondent had also unlawfully interrogated employees about their union sympathies. Board noted that an employer may violate 1153(c) and/or (a) with respect to employees other than its own. Backpay and reinstatement ordered.

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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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Agricultural Labor Relations Board
MAR 16 1982
RECEIVED

STATE OF CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: SILAS KOOPAL DAIRY -and- JOSE GUTIERREZ	Case No. 81-CE-28-SD Hearing Officer's Report

Appearances:

Hearing Officer: JOE H. HENDERSON
P.O. Box 463
Santa Rosa, CA 95402

Respondent: RICHARD G. ANDERSON
Anderson, Taves & Reever
P.O. Box 1357
Upland, CA 91786

A.L.R.B.: SYLVIA LOPEZ
ALRB General Counsel
528 South "A" Street
Oxnard, CA 93030

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ARBITRATOR
P. O. BOX 463
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This hearing was held on December 1 and 2, 1981 in the City of Ontario, California.

The Complaint filed by the general counsel is set forth in its entirety:

COMPLAINT

It has been charged by Jose Gutierrez, herein called the Charging Party, that Silas Koopal Dairy, herein called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting agriculture as set forth and defined in the Agricultural Labor Relations Act, Labor Code Section 1140, et seq., herein called the Act. The General Counsel of the Agricultural Labor Relations Board, herein called the Board, on behalf of the Board, by the

undersigned Regional Director for the Oxnard Regional Office pursuant to section 20220, contained in Part II of Title 8 of the California Administrative Code, herein issues this Complaint as follows:

1. A true and correct copy of the original charge in Case No. 81-CE-28 SD was filed by Jose Gutierrez on May 11, 1981, and was duly served on Respondent by Gutierrez on July 8, 1981.

2. Silas Koopal is now, and at all times material herein has been an agricultural employer within the meaning of Labor Code section 1140.4(c) doing business in the County of San Bernardino in the State of California.

3. Clare Koopal is now, and at all times material herein, has been a supervisor within the meaning of Labor Code section 1140.4(j).

4. Charging Party is now, and at all times material herein, has been an agricultural employee within the meaning of Labor Code section 1140(b).

5. On or about the month of January, 1981, Jose Gutierrez and his fellow co-workers, including David Marquez and Amancio Perez, began to actively seek union representation. Gutierrez was the spokesperson for said group.

6. An election was held at Silas Koopal Dairy on January 20, 1981, which resulted in a unanimous decision in favor of the union (Dairy Employees Union, Local #17, Christian Labor Association).

7. On or about January 20, 1981, Amancio Perez

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was terminated from his employment because he supported, and voted for, the union.

8. On or about January 20, 1981, Clare Koopal threatened Jose Gutierrez and David Marquez with layoffs because of their support for the union.

9. On or about April 14, 1981, Jose Gutierrez was terminated from his employment in retaliation for his union activities described in paragraph 5 above.

10. By the acts described in paragraphs 7, 8, and 9, above, Respondent has interfered with, restrained and coerced agricultural employees in the exercise of rights guaranteed by section 1152 of the Act in violation of Labor Code section 1153(a).

11. By the acts described in paragraphs 7, 8, and 9, above, Respondent has discriminated against agricultural employees in regard to tenure and conditions of employment to discourage membership in a labor organization in violation of section 1153(c) of the Act.

WHEREFORE, relief including but not limited to the following is prayed for:

1. An Order requiring Respondent, its agents, representatives, or anyone acting on its behalf to cease and desist from:

a. Restraining or coercing its agricultural employees from exercising their rights to self-organization or from engaging in other concerted activities or protected activity for the purpose of collective bargaining or other mutual aid or protection; specifically from restraining or

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coercing its agricultural employees from actively supporting the union;

b. Discriminating against agricultural employees in regard to the tenure or conditions of employment to discourage membership in a labor organization; specifically from discharging its agricultural employees in order to discourage membership in a union.

2. An Order requiring Respondent, its agents, representatives, or anyone acting in its behalf to take the following affirmative action:

a. Offer to Amancio Perez and Jose Gutierrez immediate and full reinstatement to their former positions or to substantially equivalent positions without prejudice to their seniority or other rights and privileges of employment;

b. Make Amancio Perez and Jose Gutierrez whole for all wage losses or other economic losses they have suffered as a result of Respondent's illegal conduct herein. Loss of pay is to be determined by multiplying the number of days the employees were out of work by the amount the employees would have earned per day. If on any day the employees were employed elsewhere, the net earnings of that day shall be subtracted from the amount the employees would have earned at Silas Koopal Dairy for that day only. The award shall also include an inflation factor based on the California Consumer Price Index published bi-monthly by the Division of Labor Statistics and Research of the Department of Industrial Relations, plus interest at the rate of seven

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per cent per annum, or, in the alternative, interest, without an inflation factor, determined in the manner set forth in Florida Steel Corporation, 231 NLRB 651 (1977);

c. Post copies of a Notice, in Spanish and English, reflecting the terms of the Board's Order, in conspicuous places on Respondent's property, the locations and duration of the Notice to be determined by the Oxnard Regional Director of the Agricultural Labor Relations Board or agents designated by him/her;

d. Mail the Notice, in Spanish and English, to all of its 1981 agricultural employees, at their last home addresses;

e. Assemble its agricultural employees during work time in the peak season, during which time agents of the Board shall read, explain and respond to questions concerning the Board's Official Notice, for which time Respondent's employees will be compensated by Respondent. During said presentation, a representative of both the Charging Party and Respondent can be present during the actual reading; however, during the question and answer period, Respondent's representative must leave the premises;

f. Report in writing, under penalty of perjury, what steps have been taken to comply with the Order of the Board;

g. Such other and further relief as will effectuate the policies of the Act as the Board deems just and proper, including additional orders that Respondent cease and desist from the conduct complained of in this

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Complaint.

The Answer to Complaint filed by the Respondent's counsel is set forth herein in its entirety:

ANSWER TO COMPLAINT

Respondent, SILAS KOOPAL DAIRY, answers the complaint on file in this matter as follows:

1. Answering paragraphs 1 through 6, inclusive, of the complaint, respondent admits the allegations contained therein.

2. Answering paragraph 7 of the complaint, respondent specifically denies that JOSE GUTIERREZ was terminated from his employment in retaliation for his union activities.

3. Answering paragraph 8 of the complaint, respondent specifically denies that he ever engaged in any acts whatsoever which interfered with, restrained and/or coerced any agricultural employee in the exercise of rights guaranteed by Section 1152 of the Act; in violation of Labor Code, Section 1153(a).

4. Answering paragraph 9 of the complaint, Respondent specifically denies that he ever engaged in any practice or activity which discriminated against agricultural employees in order to discourage membership in a labor organization; in violation of Section 1153(c) of the Act.

WHEREFORE, Respondent prays as follows:

1. That the charging party take nothing by way of

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his complaint;

2. For a ruling establishing respondent's acts as proper and not violative of any provision of the Labor Code; and

3. For such other and further relief as the Board deems just and proper.

GENERAL COUNSEL STATEMENT:

The Silas Koopal Dairy hired two and a half employees in January, 1981. The employees decided that they were interested in union representation. The employees filed for an election, the election took place on January 20th, 1981. The day of the election there were certain threats made by Clarence Koopal, the son of Mr. Silas Koopal. The employees were threatened with layoff and being reported to the immigration authorities if the Union was voted in.

The Koopal's became very attuned to any little mistake made by the employees. The Koopal's relationship and their attitude towards the employees was very cold.

Approximately four months later the same attitude prevailed. A drain was plugged and Silas Koopal asked Jose Gutierrez to unplug it. Mr. Gutierrez attempted a number of times and couldn't unplug the drain. He said in prior times whenever that drain was plugged a company was called to come in and unplug the drain. The next day, Clare Koopal came to Jose and said that Jose had been very disrespectful to his father and that he was going to be fired.

There are other factors that come into play. Basically Jose

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Gutierrez was the spokesperson during the union campaign. He's the one who knows a little more English than the others. He and Amancio Perez, which were two out of the three workers who voted that day and ended up not working there anymore. All three of the workers voted for the Union.

EMPLOYER STATEMENT:

The alleged threats took place in January, it was some four months before there was a termination of an employee.

The termination was a matter of economic practicality. This is a small dairy and it's a dairy which normally requires only one milker. Only one milker is required unless there is severe wet weather at which time they sometimes retain two milkers, one milker to bring the cows in the barn, and wash them off, the other milker milks the cows.

The type of equipment used and the size of the dairy it would be unreasonable for there to be two milkers. The equipment cannot accommodate two milkers under normal dry season conditions.

When the rains quit there was no longer a requirement of two milkers. The termination was a matter of selecting the milker who had the greatest skills and showed the best ability to get the job done. One of the milkers was terminated on April 14, 1981. There was no reference to the Union.

The Union contract has been signed. There has never been a replacement of that employee because there has been no need for that additional employee.

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FINDINGS OF THE HEARING OFFICER:

The administrative hearing officer finds:

1. Silas Koopal is now and at all times herein mentioned was an agricultural employer.

2. That Clare Koopal is now and at all times herein mentioned was a supervisor within the meaning of the Labor Code Section 1140.4(j).

3. That the allegations of paragraphs 4 and 6 of the complaint are found to be true.

4. As to paragraphs 5 and 7, it is found that Amancio Perez was hired by his co-workers as a relief milker. During the hearing it was shown that Mr. Perez was paid by the co-workers. This was through the testimony of his co-workers. Silas Koopal did not employ Mr. Perez at the dairy. Mr. Perez was paid by his co-workers as a relief milker.

5. There was no testimony that any member or agent of the Koopal Dairy had ever had any contact or conversation with Mr. Perez regarding the Union. He was permitted to vote in the election.

I find that Amancio Perez was not an employee of the Koopal Dairy.

The hearing officer recommends that paragraph 7 be dismissed.

6. As to paragraph 8 the allegation is that Clarence Koopal threatened Jose Gutierrez and David Marquez with layoff because of their support for the Union. The threat allegedly took place on or about January 20, 1981. The testimony offered to support this contention was given by David Ortiz, Field Examiner for the

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Agricultural Labor Relations Board. Mr. Ortiz stated that Mr. Koopal said, "What if I called up the immigration right now and have these men deported?". At the time the comment was made by Clarence Koopal to Mr. Ortiz there were no employees present according to Mr. Ortiz's testimony. The statement at best was a passing comment to Mr. Ortiz out of the presence of any employees. The comment could not be construed as a threat against the employees if it were not communicated to them.

The hearing officer recommends that paragraph 8 of the complaint be dismissed.

7. As to paragraph 9, on or about April 14, 1981, Jose Gutierrez was terminated from his employment in retaliation for his union activity described in paragraph 5.

It is pointed out that the termination was three months after the election. The significant testimony regarding the dismissal came from Dean, the business agent for Christian Labor Association, the union that represents the employees, and for which the election was held in January. The agent along with Silas Koopal, Clarence Koopal, and David Marquez, the remaining milker who voted for the Union, testified that retaining only one milker is the custom and a prevailing procedure within the dairy industry during the dry season. The parties described the Koopal Dairy as a one man (milker) dairy operation. The dairy was described in that manner for a number of reasons: 1) The size of the dairy. The Koopal dairy averages about 400 cows for milking purposes and has been at that level for a number of years. Under normal circumstances only one milker is required to handle the milking of 400 cows. For several years prior to the union

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election, the dairy operated as a one-milker dairy and for the past ten months the dairy has continued to operate as a one-milker dairy. 2) The equipment at the Koopal Dairy, because of its age and inherent capacity limitations cannot handle the milk flow if the cows are being milked by two milkers. The testimony concerning this was that if more than one man milks, the flow of milk comes at a rate which exceeds the capacity of the icing machine to maintain the milk below 50 degrees.

The testimony regarding the Koopal Dairy and practice in the industry was supported by the business agent for the Union, Ben Sybesma. Mr. Sybesma testified that during the wet and rainy season two milkers are required; One to wash down and prepare the animals and another person to milk. When the rains quit and the field dry up it is customary in the dairy business to dismiss one of the milkers and go back to a one-milker operation. Mr. Sybesma said, "there is no longer the need for two milkers."

The Union representative testified that the union was satisfied with their findings in investigating the matter that the dairy was going back to a one man operation after the conclusion of the wet season and, therefore, did not pursue the matter on behalf of the employee.

The hearing officer based upon the above recommends that paragraph 9 be dismissed.

8. As to paragraph 10, the hearing officer finds that the acts described in paragraph 7, 8, and 9 alleging that the Respondent had interfered with restrained and coerced agricultural employees in the exercise of their rights guaranteed in section 1152 of the Act in violation of the Labor Code Section

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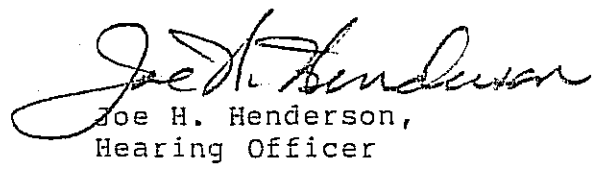
1153(a) are without foundation. The Koopal Dairy did not violate the act and did not interfere with, restrain, or coerce the agricultural employees in the exercise of their guaranteed rights.

RECOMMENDATION:

It is recommended that the relief sought by the general counsel be denied and the matter be dismissed.

DATED: 3/3/82

Respectfully submitted,



Joe H. Henderson,
Hearing Officer

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