Carlsbad, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UKEGAWA BROTHERS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 80-CE-44-SD, 80-CE-45-SD, 80-CE-46-SD, 80-CE-47-SD, 80-CE-48-SD, 80-CE-49-SD, 80-CE-50-SD, 80-CE-58-SD, 80-CE-59-SD, 80-CE-60-SD, 80-CE-62-SD, 80-CE-63-SD	9 ALRB No. 26

DECISION AND ORDER

On March 11, 1982 Administrative Law Judge (ALJ)[1/] Robert LeProhn issued his attached Decision in this proceeding. Thereafter, Ukegawa Brothers, Inc. (Respondent), General Counsel, and the United Farm Workers of America, AFL-CIO (UFW or Charging Party) each timely filed exceptions to the ALJ's Decision, with a supporting brief. Respondent, General Counsel, and Charging Party each filed a reply brief.[2/]

Pursuant to the provision of California Labor Code section 1146,[3/] the Agricultural Labor Relations Board (Board) has delegated its authority in this proceeding to a three-member panel.

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

[2/] Charging Party's motion to strike the pages of Respondent's combined brief in response to exceptions of the General Counsel and the UFW in excess of 80 pages is granted.

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

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings[4/] and conclusions as modified herein and to adopt his recommended Order with modifications.

We affirm the ALJ's finding that the prepared speech made to Respondent's workers by Felix Estrada, an employee of Respondent's labor consultant, did not contain threats, promises of benefit, or coercive statements. However, the ALJ failed to consider evidence concerning comments that Estrada made to the workers after Estrada completed reading the prepared speech.

We find that additional comments and/or discussions occurred after the prepared text was read.[5/] Two agricultural employees, Roberto Tenorio and Manuel Moreno, testified that Estrada told them after he gave the speech that the Union (referring to the UFW) was going to send them "to the immigration." Estrada denied using the word "migra" or

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[4/] We affirm the ALJ's finding that Respondent violated section 1153(a) of the Act, by engaging in surveillance on two separate occasions: (1) by its agent refusing to leave the area when asked to do so by a UFW organizer who was attempting to talk to workers; (2) by its supervisor watching UFW organizers through binoculars as they were delivering water to workers in their living area; and (3) by depriving UFW organizers access to workers' living area.

[5/] Roberto Tenorio and Manuel Moreno testified that the "speech" lasted 20 minutes and a half hour respectively. Peter G. Mackauf testified that at one or two of the five sessions he attended there were questions after Estrada read the prepared text. Estrada testified that it took him 10 to 15 minutes to deliver the speech and also that workers made comments during the speech. The prepared text itself is relatively short and thus some of the employees' comments must have been made or discussed after it was read.

"immigration service" in his presentation. But the testimonies of Tenorio and Moreno are corroborative on this point and we therefore credit them. We find that Respondent violated section 1153(a) by telling its agricultural employees that the Union (UFW) was going to send them to the immigration service.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Ukegawa Brothers, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of its employees' union activities or other protected concerted activities.

(b) Threatening employees by telling them the Union was going to send them to the immigration authorities;

(c) Refusing to allow union organizers access to its employees at their living quarters.

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

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

(a) 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 below.

(b) 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.

(c) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between July 1, 1980 and August 31, 1980.

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

(e) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps

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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 18, 1983

JORGE CARRILLO, Member

MEMBER McCARTHY, dissenting in part:

I join in all aspects of the decision except as to the finding that extra-textual remarks made by Estrada, during or after reading the text of the prepared speech, constituted a violation of Labor Code section 1153(a). I would adopt the ALJ's recommendation to dismiss that allegation of the complaint (paragraph 22) in its entirety for the reasons set forth at pages 65-72 of his Decision.

Dated: May 18, 1983

JOHN P. McCARTHY, Member

MEMBER WALDIE, Concurring and Dissenting in part.

I disagree with the majority's finding that the prepared speech made to Respondent's workers by Respondent's labor consultant Felix Estrada did not contain threats. I would find, to the contrary, that by referring repeatedly to the "government" and "hassles from outsiders," Respondent threatened its workers with deportation if they signed Union authorization cards. I would therefore conclude that Respondent violated Labor Code section 1153(a) on the basis of the prepared speech alone, as well as by the more direct references to the "the immigration" made by Estrada after the prepared speech.

We have noted, in past cases, that many farmworkers are undocumented aliens living in constant fear of deportation. (See Guimarra Vineyards (1981) 7 ALRB No. 24; Mini Ranch Farms (1981) 7 ALRB No. 48.) This fear makes the undocumented worker particularly susceptible to coercion and, therefore, even the most subtle references to deportation must be prohibited.

Respondent here has artfully exploited that fear in a manner which tended to interfere with employee rights protected under Labor Code section 1152.

Dated: May 18, 1983

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego Field Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by telling employees that the United Farm Workers of America, AFL-CIO (UFW) would send them to the Immigration officials, by engaging in surveillance of employees who were talking to UFW organizers, and by refusing to allow UFW organizers to contact employees at their living quarters.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

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

WE WILL NOT do anything in the future that interferes with your rights under the Act, or forces you to do, or stop doing, any of the things listed above.

WE WILL NOT engage in surveillance of employees, or prevent UFW agents from lawfully contacting them, or otherwise interfere with, restrain or coerce any employee(s) because they have exercised any of the above rights.

WE WILL NOT deny union organizers access to employees at their living areas.

Dated: UKEGAWA BROTHERS, INC.

By: _____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. 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

Ukegawa Brothers, Inc.

9 ALRB No. 26
Case No. 80-CE-44-SD, et al.

ALJ DECISION

The ALJ found that Respondent's subforemen were not supervisors within the meaning of Labor Code section 1140.4(j).

The ALJ found that on one occasion Respondent violated Labor Code section 1153(a) by denying living area access to a UFW organizer; Respondent's defense of crop protection did not overcome the right of organizer-worker communication. Respondent's interference with workers' access to the UFW food service was not a violation, as ALRA section 1152 did not grant workers a right to be served by the UFW co-op.

The presence of two supervisors during lunchtime when UFW organizers were attempting to speak to workers did not violate section 1153(a); there was no interference or denial of access. A third supervisor who refused to leave when requested to do so and placed himself at the center of the workers violated section 1153(a) because his action interfered with the right of the workers to talk to union organizers and with the union organizers' right to take access.

Respondent did not violate the Act by its presentation of an anti-union speech to workers because the speech did not contain any threat, promise of benefit, or coercive statement.

The ALJ found that Respondent violated section 1153(a) by engaging in unlawful surveillance in two separate incidents (1) spying by a foreman on UFW water deliveries; and (2) the presence of a foreman near the UFW food co-op, without plausible explanation, in a non-work area during non-work time.

The ALJ dismissed the following allegations because General Counsel failed to establish a prima facie case: (1) that Respondent constructively discharged or discharged three employees who refused to transfer to another work site because they engaged in union activities; (2) that Respondent discharged two other employees because of their union activities; (3) that Respondent refused to rehire an employee because of his union activity; and (4) that Respondent constructively discharged an employee by assigning him work he was not qualified to do and later discharged him when he could not perform the work satisfactorily and that this was done because the employee engaged in union activity.

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BOARD DECISION

The Board adopted the rulings, findings and conclusions of the ALJ with one exception. With regard to Respondent's speech to employees, the Board found that extra-textual remarks by an employee of Respondent's labor consultant contained threats that employee support for the union would lead to the union's reporting the employees to the immigration service.

DISSENTING OPINIONS

Member McCarthy dissented from the above finding by the Board and would affirm the ALJ's dismissal of that allegation of the complaint.

Member Waldie dissented regarding the text of the employer's speech. He would find that the text threatened employees that they would be deported if they signed union authorization cards.

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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

Agricultural Labor Relations Board
MAR 1 1 1982
RECEIVED

UKEGAWA BROTHERS, INC.,	)	
	)	Case Nos. 80-CE-44-SD
Respondent,	)	80-CE-45-SD
	)	80-CE-46-SD
and	)	80-CE-47-SD
	)	80-CE-48-SD
UNITED FARM WORKERS OF	)	80-CE-49-SD
AMERICA, AFL-CIO,	)	80-CE-50-SD
	)	80-CE-58-SD
Charging Party.	)	80-CE-59-SD
	)	80-CE-60-SD
	)	80-CE-62-SD
		80-CE-63-SD

Appearances

For the General Counsel of the
Agricultural Labor Relations Board:

Michael Lee
Agricultural Labor Relations Board
915 Capitol Mall
Sacramento, California 95814

For the Respondent:

Gray, Cary, Ames & Fry
By: Richard A. Paul
2100 Union Bank Building
San Diego, California 92101

DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer;

This case was heard before me on June 16, 22, 23, 24, 25, 26 and on July 6, 7, 8, 10, 13, 14, 1981, in San Diego, California.

Complaint issued in Case No. 80-CE-49-SD on August 13, 1980, alleging a violation of Lab. Code Section 1153(a) in that Respondent denied home access to UFW organizers. There is no indication in the record that Respondent filed an Answer to this Complaint.

On October 27, 1980, Notice of Hearing and Amended Consolidated Complaint issued alleging violations of Lab. Code Sections 1153(a) and (c). The Amended Consolidated Complaint covered Cases Number 80-CE-44-SD, 80-CE-45-SD, 80-CE-46-SD, 80-CE-47-SD, 80-CE-48-SD, 80-CE-49-SD, 80-CE-50-SD, 80-CE-58-SD, 80-CE-59-SD, 80-CE-60-SD, 80-CE-62-SD and 80-CE-63-SD.[1] On November 7, 1980, Respondent filed and duly served its Answer to the Amended Conslidated Complaint.

A First Amended Complaint was filed and duly served June 15, 1981. A Second Amended Complaint was filed June 19, 1981, and duly served on June 22, 1981. Pursuant to 8 Cal. Admin. Code Section 20230 Respondent is deemed to have denied allegations in the amended complaints filed subsequent to its answer except as to matters admitted in the answer which were unchanged in subsequent amended complaints.

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1. There is nothing in the record to indicate that a consolidated complaint preceded issuance of the Amended Consolidated Complaint.

The following issues raised in the Complaint remain to be resolved.[2/]

(1) Whether Respondent violated Sections 1153(a) and (c) by constructively discharging Manuel Vargas, Jesus Vargas and Juvenal Puentes on or about August 7, 1980;

(2) Whether Respondent violated Sections 1153(a) and (c) by discharging Manuel Moreno and Roberto Tenorio on or about August 11, 1980;

(3) Whether Respondent violated Sections 1153(a) and (c) by refusing to rehire Vicente Vargas during March and June 1981;[3/]

(4) Whether Respondent committed independent violations of Section 1153(a) by threatening its employees with loss of jobs and deportation during the course of captive audience meetings held on August 8, 9 and 10, 1980; by denying UFW organizers Regulation and home site access to Respondent's employees from on or about August 5, 1980 until the present; and by engaging in surveillance, hiring security guards and interrupting union meetings.

(5) Also at issue is the supervisorial status of certain subforemen employed by Respondent.

Placed in issue by Respondent are the following affirmative defenses;

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2. When complaint is used herein, the reference is to the Second Amended Complaint.

3. As framed the complaint alleged the constructive discharge of Jose Alfudo Gomez on or about August 10, 1980. Following the close of General Counsel's case, Respondent's motion to dismiss this allegation was granted.

(1) The complaint fails to state a cause of action;

(2) The complaint is defective in that it lacks the specificity required by 8 Cal. Admin. Code Section 20220;

(3) The complaint is defective and should be stricken because the Regional Director failed to investigate (prior to issuing complaint) nine of the eleven charges upon which the complaint rests, thus violating 8 Cal. Admin. Code Section 20216; and

(4) The relief requested in the complaint is over-broad, punitive and unwarranted.

Each party was given full opportunity to participate in the hearing; post-hearing briefs were filed by General Counsel and Respondent.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction

Ukegawa Brothers, Inc., Respondent herein, is a California corporation and was at all times material an agricultural employer within the meaning of Section 1140.4(c) and was engaged in agriculture within the meaning of Section 1140.4(a) in San Diego County, California.[4/]

The United Farm Workers of America (AFL-CIO) is an organization in which agricultural employees participate. It

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4. Unless of otherwise stated all statutory references are to the California Labor Code.

represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The UFW is a labor organization within the meaning of Section 1140.4(b).

II. Respondent's Operations

In 1980, Respondent farmed at three locations in San Diego County. The events with which we are concerned all occurred at its Del Mar Ranch where the primary crop was tomatoes. Chili peppers were also grown at Del Mar. Respondent farmed strawberries at its San Luis Rey Ranch located about 45 miles north of Del Mar. Both strawberries and tomatoes were farmed at Respondent's Carlsbad ranch midway between Del Mar and San Luis Rey. Respondent's offices are located at the Carlsbad Ranch.

Control and ownership of Respondent rests with the Ukegawa brothers, Hiroshi and Joe and their respective wives.

Peter Mackauf has been employed as General Manager since the end of 1978. Mackauf has responsibilities in the following areas: financial management, land leasing for farming purposes, labor relations and diversification of company operations. He is directly responsible to the brothers.

During July, August and September, Bill Tsutagawa, Don Oyama and Hajime Tashiro were employed at Del Mar Ranch as ranch foremen. Each was directly responsible to the brothers. Tashiro was primarily responsible for preparation of new ground, installation of irrigation system and cultivation and planting of a new crop. Tsutagawa was responsible for growing the crop. Oyama

was responsible for the harvest. Each ranch foreman has the authority to hire and fire and is admitted to be a supervisor within the meaning of section 1140.4(j).

The ranch foremen directly supervise workers in the performance of operations such as spraying and horse cultivation.[5] In situations where the work is being performed by larger crews operating in one location at a time, subforemen are utilized to assist the ranch foremen.

III. Supervisorial Status of Subforemen

A. The Facts

The complaint at paragraph 15 alleges that Roberto Medino and Luis Medina are supervisors within the meaning of Lab. Code section 1140.4(j). Felix Estrada is alleged to be an agent. Although not alleged to be a supervisor, testimony was taken regarding the status of Jose Arredondo.

Luis Medina is alleged to have participated in effecting the constructive discharge of three workers; Estrada is alleged to have participated together with admitted supervisors in the conduct of illicit captive audience meetings and is also charged with engaging in unlawful surveillance. Roberto Medina is also charged with unlawful surveillance. Respondent disputes the supervisorial status of the Medinas, and Arredondo.

It contends that each is a subforeman and that subforemen are not statutory supervisors.

A subforeman is used to "supervise" each of the tomato

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5. All foremen speak Spanish.

crews which range in size from 20 to 50 workers.[6] He spends the entire day with the crew; Tsutagawa checks with the subforemen several times a day, each visit is generally 10 to 15 minutes in length. There is also radio contact between Tsutagawa and his subforemen during the course of a day. Customarily the foreman deals with the subforeman rather than crew members.

The subforeman is paid at a higher rate than crew members and does no picking or other work being done by the crew. Mackauf stated: "We primarily want them to supervise the group of people."

The ranch foreman has the responsibility for discipline. He has authority to hire and fire. Subforeman do not impose discipline. Their role is more instructional.[7] A subforeman is expected to follow Tsutagawa's orders and to relay those orders to the workers. The workers have been told that the subforemen's order is Tsutagawa's order. Any need for the imposition of discipline discerned by a subforeman is reported to his ranch foreman who independently investigates the matter.[8]

B. Analysis and Conclusions

As General Counsel asserts, the indicia of a statutory supervisor set forth in Section 1140.4(j) need not all be present in

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6. Mackauf's testimony. Tsutagawa estimated tomato crew size at 50 to 80.

7. Mackauf's testimony on this point is corroborated by that of General Counsel witnesses Jose Perez Gomez and Vicente Vargas.

8. The subforemen during July-September 1980 were Jose Arredondo, Bruce Medina, Martin Medina, Roberto Medina, Jesus Sanchez, Guadalupe Figeroa and Humberto Vega.

order to find an individual to be a supervisor.[9] The section is to be read disjunctively, and the presence of less than all indicia suffices to make one a supervisor.[10] Subforemen do not have authority to hire, fire or otherwise discipline workers; nor do they have authority effectively to recommend hire, fire or other discipline.[11] If they are to be found to be statutory supervisors, it must be on the basis of responsibly directing employees in the performance of their duties.

General Counsel relies upon Dairy Fresh Products Company (1977) 3 ALRB No. 70; Anderson Farms Co. (1977) 3 ALRB No. 67; and Mid-State Horticulture Co. (1978) 4 ALRB No. 101 to support his position regarding the supervisorial status of subforemen. We turn to examine those cases. In Mid-State the Board (on the basis of the following facts) held that the disputed individual (Zendejas) responsibly directed employees in the performance of their job functions; assigning employees to rows of grapes to be picked; being immediately in charge of a crew of 80 workers; telling workers when to begin and stop work and when to start picking grapes; remaining in charge of the same group of workers as they were moved from ranch

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9. Lab. Code section 1140.4(j). "The term 'supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

10. N.L.R.B. v. Pilot Freight Carriers, Inc. (Cir. 4) 558 F.2d 205.

11. cf. Anderson Farms Company (1977) 3 ALRB No. 67, slip op. p. 14.

to ranch although his immediate supervisor might change.[12/] Additionally, his immediate supervisor testified he spent little time with Zendeja's crew because he trusted him.

In summary the record established that Zendejas responsibly directs a large crew of employees and that his exercise of such authority is not merely of a routine or clerical nature.[13/]

The authority exercised by the Ukegawa subforemen is routine. Basically all the subforeman does is to relay Tsutagawa's instructions to the crew members and report back to Tsutagawa any failure by crew members to follow said instructions. Because of Tsutagawa's daily contacts with the subforemen, they are not called upon to exercise discretion with regard to the crew's operation. Unlike Mid-State there is no evidence here that the subforeman directs the crew with respect to where and when to harvest or that the subforeman determines what quality of tomato is to be harvested. These decisions are made by the ranch foreman and given to the subforeman who in turn relays them to the crew.

In Dairy Fresh Products Company (1977) 3 ALRB No. 70, the Board relied upon the following factors in concluding that disputed employees were statutory supervisors: distributed checks, issued warnings for tardiness and absences, adjusted time cards, heard complaints and promised to deal with them, awarded time off, suspended employees, threatened discharge and transferred employees. Moreover, when asked, management either confirmed or failed to deny

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12. The person "may" also have told employees when to return to work after the harvest.

13. Mid-State Horticulture Co., supra at 6.

the disputed persons authority. With the exception of sometime paycheck distribution, the Ukegawa subforeman does none of the things found indicative of supervisorial status in Dairy Fresh.

If subforemen are found not to be supervisors, there will be only three supervisors at Del Mar Ranch where the work force may go as high as 200. While ratio of workers to supervisors is a factor to be considered, it is only relevant as a secondary factor in determining whether responsible direction exists. Standing alone ratio of workers to supervisors is not decisive. The high ratio found herein, without more, does not warrant a conclusion that subforemen are supervisors.

Finally, the fact that subforemen may instruct new workers how to pick tomatoes does not suffice to make them supervisors. Rod McLellan Co. (1978) 4 ALRB No. 22.

Since Respondent's subforemen at Del Mar Ranch do not responsibly direct crew members, and since they possess none of the authorities set forth in section 1140.4(j) evincing supervisorial status, I conclude they are not statutory supervisors.

Alternatively, General Counsel urges employer responsibility for their conduct on the theory "they were so cloaked with responsibility that the company must be held liable for the unlawful acts" in which they engaged, citing Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.3d 307, 316-329.

Luis Medina, a subforeman, is alleged together with Tsutagawa to have constructively discharged Puentes and the Vargases. No evidence of Medina's involvement in their discharge was adduced. Thus, there is no need to consider how Vista Verde

Farms might apply to him.

Felix Estrada is alleged to have participated together with admitted supervisors in the conduct of captive audience meetings violative of the Act. He is a person hired by Mark Roberts, Respondent's labor relations consultant, to serve as Robert's interpreter. He delivered to the workers in Spanish a speech prepared by Roberts. Estrada was not an employee of Respondent. Roberts is an admitted agent of Respondent. If the speech violated the Act, Respondent can be reached through Roberts. It is unnecessary to reach the question of whether Vista Verde applies to the interpreter.[14/]

IV. Constructive Discharges

Paragraph 18 of the complaint alleges that on August 7, 1980, Respondent constructively discharged Manuel Vargas Moreno, Jesus Vargas Moreno and Juvenal Puentes for union and concerted activities.[15/]

A. The Facts

Juvenal Puentes, Jesus Vargas and Manuel Vargas were discharged by Bill Tsutagawa on August 7, 1980, allegedly for

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14. Roberto Medina is alleged to have engaged in unlawful surveillance. He is a subforeman and there is no evidence he has duties or authority distinguishing him from other subforemen. The question of whether Respondent under Vista Verde, supra is responsible for his conduct is discussed below.

15. Paragraph 19, alleging the constructive discharge of Jose Perez Gomez was dismissed on Respondent's motion at the close of General Counsel's case. General Counsel sought reconsideration of that ruling in its post-hearing brief. The evidence and arguments put forth at the hearing have been reviewed. I decline to reconsider the ruling, relying on the reasons set forth on the record.

insubordination.

Kiyoki Doi, the strawberry foreman at San Luis Rey, contacted Tsutagawa and requested that he send two men as a survey crew to set up the rows for the next strawberry crop. Doi also requested some one who could drive tractor. Doi's need for a survey crew arose because his number 2 surveyor, Daniel Ibarra, had been apprehended and deported by the INS. Doi had no experienced person at San Luis Rey to replace him. Doi's surveyor had also functioned as a tractor driver; thus, Doi had need for a new tractor driver.

Tsutagawa contacted Jesus Vargas and Puentes to transfer them to San Luis Rey as the survey team. Earlier that year they worked as a team surveying at Del Mar Ranch for a period of four to six weeks.

Testimony regarding what was said during Tsutagawa's conversations with Jesus, Puentes and Manuel is in dispute. Tsutagawa testified he first contacted Jesus about 1:50 p.m. and told him to report to San Luis Rey; Jesus agreed to go and asked whether he could take Puentes as his helper; they both agreed that because of Puentes' experience, he was the best one to take. Jesus Vargas testified he first spoke with Tsutagawa about 4:30 the afternoon of August 7. Tsutagawa told him he was going to San Luis Rey to measure. When Jesus replied that he had a job at San Luis Rey, Tsutagawa departed without responding.

Jesus testified to a second conversation with Tsutagawa about 5:00 p.m. at the horse corral during which Tsutagawa told him his transportation to San Luis Rey was ready. Jesus' response was again that he had a job at Del Mar; and again according to Jesus,

Tsutagawa departed without saying more. On cross-examination Jesus gave a more expanded version of his conversation with Tsutagawa at the horse corral. Tsutagawa told him that his ride to San Luis was ready; Jesus responded his job was at Del Mar; that he didn't want to go to San Luis. Tsutagawa was upset because Jesus wouldn't go. Jesus admits knowing he was needed at San Luis.

Both Manuel and Puentes were present during the conversation at the corral. After they all told Tsutagawa they didn't want to go, he said there was no work for them if they didn't go. Thereupon he fired them.[16]

After his first conversation with Jesus, Tsutagawa testified he spoke to Puentes, who was working as horsedriver cultivating bell peppers. He told Puentes he was to go to San Luis Rey to help Jesus with the surveying. Puentes agreed to go.

Puentes' testimony regarding the initial conversation is at variance with that of Tsutagawa. According to Puentes, Tsutagawa approached him and told him he was to go to San Luis Ranch to work in a surveying crew. Puentes responded that he had no place to stay

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16. Tsutagawa testified that when he spoke to Jesus at the corral the evening of the 7th, Jesus told him he had changed his mind and did not want to go and when pressed for a reason, he gave none.

at San Luis Rey and that he had no blankets or clothes with him.[17] Puentes was living in Deer Canyon. He testified that Tsutagawa wanted him to go to San Luis straight from work. Puentes had two more conversations with Tsutagawa that day about going to San Luis Ranch. Each merely reiterated what had been said earlier.

Puentes denied having spoken to Jesus and Manuel after his initial conversation with Tsutagawa. He also denied that the three of them agreed that none would go to San Luis.

After work Tsutagawa spoke to Puentes and the others at the corral.[18] Each of them told Tsutagawa, he wanted to work at Del Mar, that he would not go to San Luis.[19]

Tsutagawa responded that if they were not going to San Luis, they were fired, that he was going to give them their checks.[20] Puentes concedes that Tsutagawa ordered him to go, and

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17. Puentes' testimony on cross-examination is inconsistent and contradictory. At one point he conceded that when Tsutagawa first spoke to him about San Luis Ranch, he said he would go if Jesus and Manuel would go, and Tsutagawa said fine. Puentes then denied he made such a response. Thereafter, Puentes testified that he did not remember telling Tsutagawa that he would go if the others went. Finally, he testified that he may have told Tsutagawa he would go if the others went.

18. Tsutagawa places the conversation in the parking lot at the packing shed. The corral is apparently nearby. He also testified that all three workers were present and that Jesus acted as spokesman.

19. With respect to the Manuel's and Jesus' conversations with Tsutagawa, Puentes testimony is entitled to no weight. He concedes he did not hear Manuel speak to Tsutagawa, and that he heard Jesus say only that he would prefer to remain at Del Mar.

20. At another point in his testimony, Puentes denied being told that evening that he was fired.

that he told Tsutagawa he wasn't going to obey this order.[21/]

After talking with Puentes the first time, Tsutagawa testified he spoke to Manuel Vargas about going to San Luis Rey, telling him that Jesus, Puentes and he were going; that he should prepare to go with Jesus; that Martin Godina was going to take them to San Luis. Manuel responded that he didn't want to go. He did not say why. When Manuel repeatedly said he didn't want to go, Tsutagawa told him to talk with Jesus; that he had to go.

Manuel testified that Tsutagawa spoke to him twice the day he was fired. The first time, Manuel was working in the field; Tsutagawa told him he was to go to San Luis Rey to work and that Jesus and Puentes were also going. Manuel said he didn't want to go; that he had a job at Del Mar; there was plenty of work for him to do there. Tsutagawa said, no; that it was necessary to go to San Luis. Vargas said he wouldn't do it. Tsutagawa wanted him to leave immediately; Manuel told him he didn't have any clothes with him; that it would be late at night when he got to San Luis. Manuel also testified he showed Tsutagawa his Union card and told him that if he wanted to send him to San Luis then to fire him, because he belonged to the Union. Tsutagawa tore up the card. Tenorio was present during this conversation.[22/] The conversation occurred at 6:00 p.m. in the corral.

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21. Puentes also testified that he told Tsutagawa at the corral that he wanted to think about going overnight.

22. There is no mention of Jesus and Puentes being present. It is not possible to discern from the record what was said at which conversation.

(1) Union Activity

Each of the alleged discriminatees testified he wore a union button at work and was observed doing so by one or more management persons.

On direct examination Jesus testified he wore his button to work every day commencing about the middle of July and that Tsutagawa saw the button and asked where he obtained it. However, on cross-examination Jesus said he obtained his UFW button from Paco (a UFW representative) and began to wear it only after having been discharged. He changed his story on redirect; he asserted he was still an employee at the time Paco told him to wear a button.

In addition to recanting his cross-examination, Jesus' testimony regarding when Tsutagawa saw the button is inconsistent with other evidence. According to Jesus, it was during the period when Jesus was surveying. Puentes worked as Jesus' rodman during this period. From Puentes' testimony it would appear that they were finished surveying well before Jesus contends Tsutagawa saw the button.

Puentes testified he wore a UFW button to work almost every day after receiving it, and that on August 3rd and 4th Tsutagawa observed him doing so.[23/] Admittedly neither Tsutagawa nor anyone else commented about the button. As was the case with Jesus, Puentes was unable to produce his button. It was in Mexico. Puentes described the occasion on which Tsutagawa saw his button as follows. He was cultivating when Tsutagawa came by in his pickup.

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23. The date upon which Puentes began wearing a button was not established.

He stopped to see how Puentes was working, but did not come over to talk to him. He returned to his truck and drove off. Tsutagawa did not get out of his truck until Puentes had turned around and started down a new row with his back to Tsutagawa.

Manuel Vargas contradicted the testimony of Jesus and Puentes; he testified that Manuel Moreno and he were the only Ukegawa workers who wore buttons.[24]

Manuel Vargas purportedly wore his button for about six days beginning August 1st. Tsutagawa saw the button on an occasion when the two of them were face to face talking. Manuel also testified that he showed his UFW card to Tsutagawa who took it from him and tore it up.[25] He admits he was not wearing a UFW button the day Tsutagawa told him he was being sent to San Luis Rey. During July and August 1980, Vargas worked planting tomatoes, tying strings, cultivating and spraying. It is uncontroverted that when spraying one wears protective clothing which covers the entire body.

Tsutagawa denied ever seeing anyone wear a UFW button at work.

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24. According to Manuel the UFW distributed buttons at the food co-op and a lot of workers accepted them.

25. Manuel conceded on cross-examination that he never mentioned this incident to any UFW representative. Nor did he tell Ellen Sward, an ALRB Field Examiner about the incident when she interviewed him shortly after the charge was filed. Manuel testified he related the facts to David Arizmendi, another ALRB agent shortly after his discharge. Arizmendi denied interviewing Manuel in 1980. Manuel's testimony regarding this incident is not credited. It is highly unlikely that he would have failed to mention such an incident to any UFW representative or to the ALRB representative who interviewed him shortly after his dicharge. It is equally unlikely that he would have forgotten the incident.

In addition to button wearing, Puentes testified he was interrogated by Tsutagawa two or three days prior to his discharge regarding the union activities of Manuel Vargas.[26/] Puentes also testified that he was present with UFW representative Rivera on an occasion around the end of July when they encountered Mackauf and Hajime Tashiro preventing UFW representatives from bringing food onto the premises. He, Jesus Vargas and Rivera were inside the gate. The food was passed through the gate to them, and Vargas, Rivera and Puentes delivered it to the workers. They were observed by Mackauf.

Jesus Vargas also testified regarding this incident. Unlike Puentes, Jesus places Tsutagawa as among those present in addition to Mackauf and Tashiro. He also testified the incident occurred late in the evening and that there were quite a few workers present. More significantly, Jesus testified the incident occurred after he was discharged. His testimony on direct examination regarding the timing of this or even another identical incident must be discounted. He placed the occurrence in mid-July, a date totally inconsistent with all other testimony regarding the commencement of UFW Food Service.

B. Analysis and Conclusions

Before Respondent can be held to have terminated Puentes and the Vargas brothers for union or protected concerted activity, General Counsel must establish by a preponderance of the evidence, that Respondent was aware the alleged discriminatees engaged in such

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26. Tsutagawa denied having such a conversation.

conduct.[27] Such proof is part of General Counsel's prima facie case. Such knowledge is as logically an element of the prima facie case when a constructive discharge is alleged. Whether General Counsel has met this burden with respect to Puentes and the Vargas brothers hinges upon credibility resolutions. For the reasons set forth below, I do not credit the testimony of the alleged discriminatees regarding Respondent's knowledge of their union activities.

The initial problems with the testimony of each alleged discriminatee are internal inconsistency, unlikelihood the events occurred as testified and inconsistency with testimony of other alleged discriminatees.

Wearing of a union button is relied upon as an indicia of Respondent's knowledge of the union activity of each alleged discriminatee. In the case of Puentes, his testimony that Manuel Vargas, a discriminatee, saw him wearing his button at work was controverted by Vargas. Moreover, even crediting his testimony regarding the occasion on which Tsutagawa purportedly saw his button, it is highly unlikely that such was the case; he was walking away from Tsutagawa working behind the horse at the time Tsutagawa was outside his pickup and in a position to observe him.

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27. The California Supreme Court's holding in Martori Brothers Distributors v. Agricultural Labor Relations Bd., 29 Cal.3d 721, 730 (1981) that Lab. C. Section 1148 mandates Wright Line, Inc., 251 NLRB No. 150 (1980) and its "but for" test as the applicable NLRB precedent in Section 1153(c) cases does not relieve General Counsel from proving employer knowledge of the alleged discriminatees' union activity.

Jesus Vargas' testimony regarding his button wearing was contradictory. On cross-examination he admitted he didn't wear a UFW button until after he was discharged. Moreover, Manuel controverted Jesus' testimony regarding his wearing a button.

As noted above, the testimony of Jesus and Puentes regarding the food passing incident does not support a finding of employer knowledge of their activities. As Jesus admitted, the incident occurred after they were terminated. This testimony adduced on cross-examination is more reliable than his direct testimony placing the incident at a time before the UFW began supplying food.

A further reason for not crediting Puentes and the Vargas brothers' testimony regarding employer knowledge is the unlikelihood that the events of August 7 occurred as they testified. Everyone agrees that Tsutagawa fired them upon hearing during their interaction after work that no one was going to San Luis Rey. This was Tsutagawa's immediate reaction. Disobey me and you're fired.

His spontaneous reaction at that time supports his testimony regarding what transpired during his conversations with each earlier in the day. If Jesus and Puentes had not, when he initially spoke to them, agreed to go to San Luis why were they not terminated at that time. With respect to Manuel, with whom Tsutagawa spoke after speaking to the others, it is not clear whether he refused to go, as distinguished from stating he didn't want to go, prior to the gathering at which he and the others were discharged.

Testimony from the three that they did not talk among

themselves and agree to refuse to go to San Luis Rey is not credited. Such a meeting and agreement presents the most reasonable explanation for the about face of Jesus and Puentes and the united front presented Tsutagawa.

Having found that General Counsel has failed to establish by credible evidence Respondent had knowledge of the union activities of the Vargas brothers and Puentes, it follows that General Counsel has failed to make a prima facie case that they were constructively discharged in violation of sections 1153(a) and (c) of the Act.

Having so concluded, it is unnecessary to examine Respondent's contention the three were discharged for insubordination. However, if such a determination were essential, the insubordination of each worker coupled with the need for their services at San Luis Rey is uncontroverted and supports a conclusion they were discharged for their failure to go to San Luis Rey and that said discharges were for cause and not for reasons violative of the Act. I recommend that the allegations of Paragraph 18 be dismissed.

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V. Discharge of Roberto Tenorio and Manuel Moreno

Paragraph 20 alleges the discharge of Manuel Moreno and Roberto Tenorio on August 11, 1980, because of union and concerted activities.

A. The Facts

Respondent's explanation for its action is that Tenorio and Moreno were observed by John Ukegawa, son of one of the owners, sitting in the middle of a road flipping coins. Moreno and Tenorio denied playing with coins or otherwise goofing off. Each testified that when observed by young Ukegawa they were resting for a minute while Moreno gave Tenorio a package of cigarettes he had purchased for him during his lunch break together with Tenorio's change.

Young Ukegawa, a college student, rode with Hajime Tashiro during the summer of 1980 to learn about various phases of the ranch operation. On August 11th, Tashiro told Ukegawa to take a tour of the ranch while he completed a welding job. As Ukegawa was beginning his tour. he encountered Moreno and Tenorio. Ukegawa testifed that as he drove over the crest of a hill, he saw Moreno and Tenorio sitting by the side of a road flipping coins. Their horses were faced into the rows some fifteen to twenty feet away.[28/] When they saw Tashiro's pickup approaching, they moved to return to work and were working by the time John passed by on the road. Ukegawa estimated two minutes as the elapsed time from his initial observation of the two workers and their return to work. Ukegawa immediately returned to where Tashiro was working and related what

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28. Both Tenorio and Moreno were cultivators or horse cultivators. Horses were used to pull the cultivator.

he had seen.

Tashiro and Ukegawa proceeded to where Moreno and Tenorio were working. Tashiro asked why they were playing. Both denied doing so. Tenorio said he was resting the horses. He said Moreno had thrown him his cigarettes and his change. Both denied they were sitting down. Ukegawa and Tashiro reported the incident to Tsutagawa.[29/]

Tsutagawa effected the discharges. The men were "goofing off" too much. He testified that Tenorio was "goofing off" every day during early August; and that he had spoken to him about it every day; and that both men would leave their horses unattended and chase each other among the rows or box and spar with each other.[30/] Tsutagawa characterized this conduct as unnatural goofing off as opposed to natural goofing off which he described as talking to fellow horse drivers while resting the horses.

Tsutagawa testified he observed Tenorio goofing off on the day of his discharge, placing the time as early afternoon.[31/] A

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29. Tsutagawa was the immediate supervisor of the cultivators.

30. When called by the General Counsel, Tsutagawa testified Tenorio had been told during the spring about repeatedly goofing off. When called by Respondent, Tsutagawa said he was mistaken, that it was Moreno rather than Tenorio who had been goofing off during the spring.

31. This testimony was elicited from Tsutagawa when he testified as an adverse witness. When questioned by Respondent's counsel, Tsutagawa testified he had not seen the alleged coin flipping; rather that John Ukegawa and Tashiro had observed it. The latter version is more consistent with the testimony of other witnesses. However, the August 11 goofing off appears to have been observed only by John Ukegawa.

notation of the incident made by Tsutagawa makes no mention of his having seen Moreno and Tenorio flipping coins; rather it cites John Ukegawa as the observer. Thus, any conclusion that Tsutagawa saw the incident for which Moreno and Tenorio were discharged is rejected.

Tsutagawa met with Tenorio and Moreno at the packing shed when they came in from work. He asked why they had been playing. Moreno denied the charge and explained about the cigarettes and the change. Tsutagawa responded that they had been seen playing, and he was going to give them their checks.

Moreno's testimony regarding the events of the day was inconsistent and shifting. He initially denied he and Tenorio sat down to rest. When this testimony was contradicted by Tenorio's prior declaration to the effect that both sat down at the edge of the field, Moreno began to equivocate, stating perhaps they sat down for a minute to look at the cultivators. When additional portions of Tenorio's declaration were read contradicting this position, Moreno admitted he sat down to rest for maybe two or three minutes. Their rest was, of course, interrupted by the presence of the boss's son.

Tsutagawa had each execute a statement which read as follows: "I made a mistake by playing flipping coins during working hours." Tenorio's signature appears on the document; Moreno's signature is by his sign "X." Raul Salgado, a relative of Manuel and Jesus Vargas signed a statement to the effect that he saw Moreno and Tenorio goofing off. He was also working as a cultivator on the

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11th and was in the vicinity of Tenorio and Moreno.[32]

Tsutagawa's testimony that he read the admission aloud to Tenorio and Moreno before asking that it be signed is denied by Moreno who testified he did not know what was on the paper.[33] Moreno says he signed the paper because Tsutagawa told him to do so.[34] When Moreno received his check later that evening, he testified he asked Tsutagawa whether he would be hired next year and that Tsutagawa's response was no more work. "Maybe you work with Chavistas."[35] Tsutagawa denied making any statement in which he mentioned working for the Chavistas or mentioned Chavez. He also denied that Mackauf made such a statement.

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32. Salgado was not called to testify. He was not currently working for Respondent. He did not return for the start of the 1981 season, and Respondent was unaware of how to locate him.

33. Moreno neither reads nor writes English or Spanish.

34. On cross-examination Moreno conceded that Tsutagawa told him he was being fired because he was playing with money. In view of this testimony, Moreno's denial that Tsutagawa read the statement is not credited.

35. On cross-examination Moreno testified that Tsutagawa said nothing about going with the Chavistas. Moreno's declaration taken by a representative of the UFW on August 11th contains no mention of the Chavista statement. The inconsistency of Moreno's testiomny on this point makes it incredible. I find that neither Tsutagawa nor Mackauf made any statement regarding working for Chavistas at the time the discharges were effected. Had Tsutagawa made such a statement, it is unlikely that Moreno would have failed to relate the fact to the UFW person taking his declaration. Certainly had he done so, the "Chavista" reference would have been included in the declaration. The juxtaposition, time wise, of Moreno's discharge and his declaration make it unlikely Moreno would have forgotten about this statement.

B. Union Activity

(1) Wearing of Buttons

Tenorio and Moreno each testified he wore a UFW button to work every day from early August until his discharge. However, on cross-examination Moreno admitted he began wearing his UFW button only after UFW organizer Paco told him to do so and that this occurred subsequent to his discharge. Paco also told him it would help get his job back if he wore the button.[36/]

Tenorio was not asked on cross-examination whether he began to wear a button before his discharge. Thus, his testimony that he wore a button each day commencing in early August is uncontradicted. However, when juxtaposed with the testimony of Moreno, Puentes and the Vargases regarding the timing of Paco's button distribution, it is likely that Tenorio, like the others received his button only after he was terminated.

(2) Leaflets

Tenorio testified that he distributed Union leaflets around the beginning of August and that he was observed doing so by Jose Arredondo. The incident occurred at the horse corral; Tenorio placed a stack of leaflets in a location where they could be picked up by workers going to and from work. From Tenorio's testimony, it appears he had done so by the time Arredondo arrived on the scene,

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36. Moreno's testimony on cross-examination is credited. It is an admission against interest; moreover, it is consistent with the absence of any mention in his previous declaration regarding wearing a button prior to his discharge. Manuel Vargas's testimony that only he and Moreno wore buttons has been accorded no weight in reaching this conclusion in view of Moreno's admission.

i.e., he stated he was feeding the horses breakfast while Arredondo was present.

Arredondo drove up in his car, stopped to speak to Puentes about a radio he was to procure for Puentes, and then drove on. Arredondo did not get out of the car. Puentes was standing near the driver's window alongside the car.[37/] There is no evidence that Arredondo saw the leaflets or was in a position to be able to read them.

Moreno testified he was with Tenorio when they received leaflets from UFW organizer Paco. He and Tenorio placed some of the leaflets on the field and others by bales next to the horse corral. Moreno testified he was present on the occasion when Arredondo had his conversation at the horse corral with Puentes. Moreno stated that Arredondo saw him with the leaflets. As with Tenorio, Moreno places Arredondo approximately three meters away sitting in his car talking to Puentes through the window of the car. Arredondo did not ask for a copy of the leaflet, nor did he ask Moreno what he was doing.

(3) Confrontation

Tenorio testified that on one occasion prior to his discharge, he and Moreno were observed by Mackauf and Tsutagawa at the entrance to the old parking lot in the company of UFW organizer Alejandro Lopez. Mackauf and Tsutagawa would not let them leave the ranch in Alejandro's car. When their egress was prevented, Alejandro turned his car around and proceeded back into the

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37. Arredondo did not testify. There is no evidence regarding his unavailability.

property. Tenorio testified that both Mackauf and Tsutagawa saw him get into Lopez' car and depart with him.[38/] Mackauf did not recall such an incident.

C. Analysis and Conclusions

Essential to proof that an employer has discharged an employee in violation of Section 1153(c) is proof that the discharged employee engaged in union activity and employer knowledge of such conduct. The burden is on General Counsel to establish these elements by a preponderance of credible testimony. For the reason set forth below, I conclude he has failed to do so.

Wearing of union buttons is a traditional method for proving union activity and employer awareness of such activity. General Counsel trod this road without much success. Both Tenorio and Moreno testified to the wearing of buttons. However, Moreno admitted not wearing his until after his termination; post discharge union activity, even if known to the employer, cannot provide the requisite employer knowledge to support an 1153(c) allegation. General Counsel is on slightly better ground with respect to Tenorio; his testimony that he wore his button before discharge is uncontradicted but, for reasons cited above its accuracy is questionable. Moreover, even if one credits Tenorio on this point, there is no evidence of employer knowledge of his activity. Tenorio did not testify that any foreman or other management

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38. Moreno testified at length as part of General Counsel's case; however, no testimony was elicited to corroborate Tenorio's testimony regarding this confrontation. Alejandro was not called by the General Counsel; no evidence was offered to explain this failure.

representative observed his button. In view of General Counsel's pattern of interrogating other witnesses regarding Respondent's observation of their button wearing, one would anticipate that had he thought Tenorio had been seen wearing a button, such testimony would have been elicited with respect to Tenorio. Thus, while Tenorio may have worn a UFW button prior to his discharge, Respondent's knowledge of such conduct has not been established.[39/]

Distribution of union materials in the presence of a supervisor or agent of a respondent is another customary way of establishing employer knowledge. In the instant case, testimony was offered with respect to such an incident. Moreno and Tenorio were given UFW leaflets one morning while taking breakfast at the UFW food facility. They placed some of the leaflets "on the field." There is no evidence this activity was observed. The balance was placed by bales adjacent to the horse corral. This activity, was purportedly observed by Jose Maria Arredondo, alleged to be an agent of Respondent.

From the testimony it would appear that Arredondo's view of what either Tenorio or Moreno were doing was obstructed by Puentes. The conversation was brief, and Arredondo drove off without speaking to either Tenorio or Moreno. There is no testimony that Arredondo either saw the leaflets or could have noted their content. He apparently manifested no interest in either Tenorio or Moreno or

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39. One might infer under some circumstances that button wearing could not but come to the attention of Respondent. However, in view of the isolated nature of Tenorio's work and the absence of continuous supervision, a finding of employer knowledge of his union activity based upon no more than wearing a button would be highly speculative.

in what they were doing. Moreover, it is unclear whether Tenorio was doing anything in connection with the leaflets while Arredondo was present. He was feeding the horses. Although Moreno testified that Arredondo saw him with the leaflets, this conclusion seems unlikely in view of testimony regarding how the incident occurred. The most reasonable conclusion to be drawn from the evidence is that Arredondo was unaware Tenorio or Moreno possessed or were distributing union materials. Thus, it follows General Counsel has failed to prove employer knowledge of Moreno's or Tenorio's union activity through this incident.

Tenorio testified regarding a confrontation between UFW representative Lopez and Tsutagawa and Mackauf at which he and Moreno were present. Moreno did not corroborate Tenorio's testimony, Lopez was not called and Respondent's witnesses had no recall of the incident.

The absence of corroboration is not sufficient unto itself to decline to credit Tenorio. However, there is an inherent unlikelihood that Mackauf would prevent anyone thought to be associated with the UFW from leaving Ukegawa's premises. More significantly, there is no evidence that Mackauf or Tsutagawa were aware at the time that Lopez was a UFW representative.

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In sum, General Counsel has failed to prove employer knowledge of the union activity of either Moreno and Tenorio. This conclusion mandates the recommendation that the allegations of paragraph 20 be dismissed.[40]

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40. Even if one concluded General Counsel had made prima facie case, i.e., proved employer knowledge of union activity, credible testimony establishes the discharges would have occurred even if neither had any involvement with the UFW. Each admitted goofing off. Getting the crop cultivated is an integral and important part of Respondent's operation. A conclusion that the discharges would not have occurred but for union activity would be speculative. It is not essential that the discharge meet the just cause standard required under a collective bargaining agreement. An employer so far as the ALRA is concerned may effect a discharge for any reason or no reason so long as the cause was not union or protected activity. [N.L.R.B. v. McGahey (5th Cir. 1956) 233 F.2d 406] It would be speculative to conclude Moreno or Tenorio were discharged for reasons violative of section 1153(c). Speculation does not suffice to establish a violation [Rod McLellan Company (1977) 3 ALRB No. 71].

VI. Refusal To Rehire Vicente Vargas

Paragraph 21 alleges that Respondent refused during March and June 1981 to rehire Vicente Vargas because of his union and concerted activity.

A. The Facts

Vicente Vargas worked for Ukegawa from 1976 until 1980. In 1976 he worked at San Luis Rey picking and planting strawberries. In December 1976 he was apprehended by the Immigration and Naturalization Service (INS) and deported. He returned in February 1977 but was not hired until March when he began picking strawberries. When the strawberries finished at the end of June, he moved to the Del Mar Ranch where he lived for about a month while waiting for a job. He was hired by Tsutagawa in August to pick tomatoes and worked until December when he returned to Mexico.

In February 1978, Vicente returned to Del Mar and was hired by Tashiro. His foreman was Pancho Vargas, his nephew. Pancho is the brother of Jesus and Manuel Vargas.

During 1979 Vicente worked until December in Arredondo's crew planting tomatoes.

In March 1980 Vicente returned and was hired by Tsutagawa. He again worked in Arredondo's crew picking tomatoes; thereafter he worked for two and a half months spraying. The spraying crew consisted of Vicente and three others, they worked directly under Tsutagawa. He was working in the spray crew at the time he patronized the UFW food co-op. Lunch was provided in a brown paper bag which he took to the fields. Prior to joining the co-op this was not his practice. Tsutagawa ate lunch in the vicinity of the

spray crew and observed Vicente with his lunch bag. Vicente was the only member of the spraying crew who had a bagged lunch.

One unremembered date in August, Vicente wore a UFW button to work.[41] Tsutagawa saw the button. Some days thereafter Tsutagawa asked him his name, where he lived and where he came from.[42] Vicente worked at Del Mar until December 1980.

Vicente returned to Del Mar about the middle of March 1981 and asked Tsutagawa for a job. He was told there was no job at that time, but maybe there would be later on. Tsutagawa told him to wait at the hiring site with the others.

Many other workers returned to Del Mar at the same time as Vargas. The practice was to gather at the site where the hiring was done. Some days more than one hundred workers were seeking jobs; some days more than two hundred. Not everyone was hired. Some people waited four to six months before getting hired. Hiring normally took place around 6:30 in the morning.

In April hiring was done where the catering services sold food. On the day Vargas sought work, he together with more than one hundred other people were directed to form into two lines depending upon whether they had a check stub from the previous year. About one-half the people were in the check stub line. Only those who had a check stub were to be hired. Vicente was one of the first people in the check stub line. He and most of the others in the check stub

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41. This was the only occasion on which Vicente contends he wore a button. He testified he wore it on his shirt.

42. This would appear to have occurred as part of Respondent's attempt to comply with the Regional Office's request for a list of names and addresses of all Ukegawa employees.

line failed to get a job that day.[43] When Vicente asked Tsutagawa for a job, Tsutagawa said he wouldn't hire him, and told him to get out of the line.

This testimony is controverted by Tsutagawa's denial that he ever saw Vicente in one of the shape-up lines and is not corroborated by anyone present. Under Respondent's hiring system, there would be no need for Tsutagawa to verbalize any reason for refusing to hire Vargas. He could simply pass him by as he went through his selection process. The unlikelihood under the circumstances that Tsutagawa would feel called upon to address Vargas, supports the conclusion he did not do so. For this reason and the fact that other portions of Vargas' testimony are inherently unbelievable, I do not credit Vargas' testimony that Tsutagawa made the attributed statement.

Vargas did not again seek work until some time around the end of May. It was about 10:30 in the morning at the edge of a tomato field.[44] Tsutagawa was alone. When he asked Tsutagawa for a job, he responded, "I told you, I'm not going to hire you. And you must leave this ranch as soon as possible."[45]

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43. Tsutagawa corrobrates Vicente's testimony regarding the two lines. His testimony that he had no policy of first in line, first hired, was not controverted.

44. Vicente admits knowing that Tsutagawa hired only in the food serving area because he didn't want non-employees wandering around the fields during the day.

45. Vicente's testimony on this point is uncontroverted and uncorroborated. No contention is made by Vicente that Tsutagawa made any reference to the UFW or Vicente's activities on their behalf.

Vicente testified that on an occasion in August 1980 while he was working as a sprayer, Tsutagawa observed him wearing a UFW button. Tsutagawa denied having done so. Vicente's testimony is not credited. It is uncontroverted that sprayers wear protective clothing covering their entire bodies; thus, a button worn on his shirt would not be visible to Tsutagawa.

B. Analaysis and Conclusions

To establish a prima facie case of discriminatory refusal to rehire, General Counsel must show by a preponderance of the evidence that the individual engaged in protected activity, that Respondent had knowledge of such activity and that there was some causal relationship between the protected activity and the failure to rehire.[46/] If a violation of Section 1153(c) is alleged, General Counsel is additionally charged with showing by a preponderance of the evidence that Respondent's conduct had an object of discouraging membership in a labor organization.[47/] In proving his prima facie case, General Counsel must customarily show that work was available at the time the discriminatee applied and that Respondent's policy was to rehire former employees.[48/] If a

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46. Verde Produce Company (1981) 7 ALRB No. 27.

47. "1153 It shall be an unfair labor practice for an agricultural employer to do any of the following:

* * *

"(c) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

48. Verde Produce Company, supra;

prima facie case is established, the burden shifts to Respondent to prove it would have not rehired the discriminatee in the absence of protected or union activity.[49/]

General Counsel again seeks to prove employer knowledge of union acitivity through employer observation of button wearing. Vargas testified he wore a UFW button on only one occasion and that on that occasion it was observed by Tsutagawa. Two observations are pertinent. Vargas purported to wear the button at a time when he was working in the spray crew. Tsutagawa's testimony that spray crew members wore protective clothing covering his uppoer body which would prevent observation of any button was uncontroverted. Nor is it significant that Tsutagawa sometime thereafter interrogated Vicente regarding his name and address. The information was sought as part of Respondent's obligation to provide the Board's Regional Officer with the names and addresses of its employees. Even if one were to assume that Tsutagawa saw Vincente's UFW button, there is no proof of nexus between that minimal union activity in August 1980 and the failure to hire him in 1981. Vicente worked until December 1980. If his union activity were the basis for Respondent's conduct, one wonders why he wasn't terminated during the 1980 season. There is no contention he wore a button during the period he was seeking work in 1981. It would be sheer conjecture to conclude that Tsutagawa recalled during the 1981 hiring process seeing Vargas wear a button on one occasion some nine or ten months

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49. Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721; Wright Line, Inc. (1980) 251 NLRB No. 150; Nishi Greenhouse (1981) 7 ALRB No. 18.

earlier.

The same observations are appropriate in connection with General Counsel's reliance upon Vargas' patronage of the UFW coop to establish Respondent's knowledge of his union activity. Even conceding Tsutagawa's awareness that Vargas' unmarked brown bag manifested coop patrongage and that such patronage manifested support for the UFW, the conclusion that such patronage was recalled some ten months later is too tenuous to provide the requisite proof of employer knowledge. Buying one's lunch from the coop rather than Camarena is certainly less of an indicia of union activity than wearing a button. One did have to eat lunch, and there were complaints about the quality of Camerena's food. Absent any evidence, circumstantial or otherwise, that Tsutagawa recalled Vicente's August 1980 patronage of the coop, such patronage is too tenuous a circumstance to warrant an inference of employer knowledge ten months later in April 1981. General Counsel, having failed to prove employer knowledge, has failed to make a prima facie case that Respondent's failure to hire Vargas during 1981 violated the Act.

Additionally, General Counsel has failed to establish by a preponderance of the evidence that the failure to hire Vargas was not simply the luck of the draw and his lack of diligence. While applicants were hired on the two occasions when Vargas sought work at a time work was available, it is admitted there were substantially more applicants in the same category as Vargas, i.e., former employees, than were hired. In a context in which at best only minimal and not current union activity existed, there is no basis for concluding the failure to select Vargas had an ilicit

motivation. A more likely reason is his age (58 or 59). Tsutagawa prefers young and strong workers.

While there is evidence Respondent gave preference to former employees,[50] hiring was done on a show-up basis rather than first-come first-served. Vargas sought work on only two occasions when work was available. Admittedly, in prior years he was not hired upon his initial appearances. Workers were hired on days on which he did not present himself.

In sum, General Counsel has failed to establish by a preponderance of the evidence that Respondent violated sections 1153(a) and (c) by failing to hire Vicente Vargas during the 1981 tomato season. I recommend that the allegations of Paragraph 21 be dismissed.

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50. Prohoroff Poultry Farms (1979) 5 ALRB No. 9.

VII. Access Violations

Paragraph 23 of the complaint alleges that Respondent since August 3, 1980, has denied access by UFW organizers to the places of habitation of Respondent's employees.[51] In addition to litigating living area access violations, General Counsel presented evidence regarding violations of Regulation access. Since this issue was fully litigated, the absence of an allegation in the complaint with respect to work site access is not fatal.[52] A substantial amount of time was spent by General Counsel during the course of the hearing presenting evidence dealing with a food co-op established by the UFW and with Respondent's responses thereto. General Counsel asserted that such evidence was offered in support of a contention that Respondent's employees had a section 1152 right to be supplied meals by the UFW, that interference with that right was violative of section 1153(a) just as interference with "habitation" access is a violation of section 1153(a). No such argument is made in General Counsel's brief; rather such evidence is urged in support of the contention that Respondent interfered with "habitation" access. No attempt is made to identify habitation access with access for the purpose of purveying food. Thus, it is appropriate to treat any efforts by Respondent to interdict food service only in the context of whether such conduct prevented UFW access to living areas.

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51. Habitation is taken to mean "place of abode" which is defined as "a dwelling place of home," American Heritage Dictionary.

52. Anderson Farms Co. (1977) 3 ALRB No. 67; Prohoroff Poultry Farms (1977) 3 ALRB No. 87.

A. Living Area Access

(1) The Facts

The UFW's 1980 appearance at Respondent's ranch was triggered by the work connected death of a Ukegawa worker. Scott Washburn, a UFW organizer, received a call from Patricio Rodriguez, a San Diego based organizer, notifying him of the incident. Washburn relayed the information to Cesar Chavez and received instructions to investigate the incident and to ascertain whether an organizational attempt would be fruitful.

Washburn, Francisco Solorza and Ernesto Rivera arrived in the San Diego area during the first or second week of July. After an initial meeting with local UFW representatives, Washburn sent Rivera and Solorza to talk to Ukegawa workers.

(a) Living Areas

Seventy-five percent of Respondent's work force is made of workers having basic field skills. They harvest, tie and prune Respondent's crops. The majority of the field workers are undocumented.

Since at least as early as 1978, Ukegawa has followed a policy of prohibiting either transients or workers from living on property under lease. This policy is communicated to workers at the time they are hired. The policy is enforced by visual inspection of leased properties. Ukegawa provides no housing for its field workers, the majority of whom are undocumented and tend to live in make-shift shelters adjacent to properties leased by Respondent. During 1980 there were four sites on Del Mar Ranch where employees lived.

Deer Canyon, an area immediately south of property under lease to Ukegawa in 1979 and on which fall tomatoes were planted in 1979 housed about 80% of the workers living in the ranch area in 1980.[53] Commencing in mid-July 1980, UFW organizers contacted, met with and lived with Ukegawa workers residing in Deer Canyon.

Access to Deer Canyon was had by way of a dirt road having a terminus on Carmel Valley Road, a County road running between Interstate 5 and Interstate 15, roughly in a south-west to north-east direction.[54]

The access road proceeds from Carmel Valley Road through Del Mar Heights, a small settlement, in an easterly direction to a point of intersection with another dirt road running in a northwesterly direction to a powerline tower located on the south rim of Deer Canyon. The route does not pass over any land owned or leased by Respondent. At no time material herein was access to Deer Canyon over this route interrupted.

Upon their initial visit to Deer Canyon, Solorza and Rodriguez met with members of the Vargas family and about twenty other persons living in the area. They heard complaints regarding the quality of the food served by the vendor and the inadequacy of their water supply. Solorza and other UFW organizers returned on two successive days and met with workers during the evening. Upon returning the third day, the organizers began living with the

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53. Solorza's estimate. UFW organizer Rivera estimated there were 700 people living in Deer Canyon during late July and August 1980.

54. At some undefined point between I 5 and I 15 Carmel Valley Road becomes Black Mountain Road.

workers, a practice which continued for about two weeks. During this period organizing activities were carried on.

During 1980 workers also lived in the vicinity of the packing shed used during the 1979 harvest (old packing shed) on property no longer under lease to Ukegawa. This living area was located between Deer Canyon and an area on which Respondent was growing spring tomatoes.[55/] On one occasion Rivera met with five people living in this area, three of whom identified themselves to him as Ukegawa employees. There is no evidence of other UFW attempted home site access to this area; however, this would appear to be the same area as that to which water deliveries were made during late July (water point 2).

A third living area was located on property under lease to Ukegawa. It was located approximately an eighth of a mile south of Black Mountain Road and was accessible on foot by traversing cleared and sloped terrain. It could also be reached by way of property adjacent to that controlled by Ukegawa without crossing property under the control of Ukegawa.[56/] This area was inaccessible by car. It does not appear that UFW representatives attempted home site access to this area.

A fourth living area was also located south of Black Mountain Road to the west of area number 3. It was also on property leased by Respondent and was accessible from Black Mountain Road by walking over cleared and sloped terrain on property adjacent to that

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55. Rivera estimated 20 people lived in this area.

56. Rivera estimated 75 to 100 people lived in this area.

leased by Respondent.[57]

On or about August 11th, Rivera sought access through the East Gate for the purpose of visiting workers living in areas about a quarter mile south of Black Mountain Road. There was a Wells Fargo guard at the gate who refused to admit him. Around August 19th Rivera again sought living area access to the area through the East Gate from the Wells Fargo guard on duty. Access was again denied. The guard told Rivera he had orders to let no one through and would not let him enter despite Rivera's statement that he wanted to talk to workers where they lived. Rivera made no further attempts at access through the East Gate.

East Gate access to living areas was the only problem which Rivera experienced after the first two days the co-op sought dinner time access at the west gate.

The areas which he wanted to visit were about a quarter of a mile from Black Mountain Road and could be reached on foot in approximately fifteen minutes. Rivera conceded that the East Gate road led directly to fields under cultivation and was the only gate which did so. Vehicular access to the living areas which Rivera desired to visit was available at the time only through the East Gate.

In addition to the locations cited by Mackauf, Rivera designated four additional locations where persons resided. The most sizeable, housing an estimated 100 people was located adjacent

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57. Mackauf estimated this living area was approximately one-quarter mile south of Black Mountain Road. Rivera testified only four or five people lived in this area. He made no attempt to contact them at their home sites.

to the south side of Carmel Valley Road and west of any property cultivated by Ukegawa during 1979 or 1980. There is no evidence any UFW organizer sought access to this living area.

About the third week of July, the UFW began to supply Deer Canyon residents with water. It was brought daily over the Del Mar Heights road to the power line and delivered by hose to workers in the canyon below. Three or four days later a second water delivery point was established to an area at the north-east corner of Deer Canyon adjacent to the old packing shed and the south boundry of fields cultivated in 1979.[58/] Entrance to the area was by way of roads south and east of Deer Canyon.

One afternoon having completed their water delivery at point 2, Washburn and Solorza were confronted as they were leaving Respondent's property. Two people in a small black pickup were tracking them on a road formerly used to pick tomatoes. One man was standing on the bed of the truck with a shotgun waving them to stop. Washburn did so. Joe Ukegawa, driver, got out and came along side Washburn's truck and asked what they were doing on Ukegawa property.[59/] Washburn said he understood that Ukegawa leased only land actually under cultivation and this was not. When Washburn and Solorza left, Ukegawa followed them until they were beyond the formerly cultivated area.

When UFW representatives returned the next day to deliver

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58. Solorza testified they would spend about an hour and a half at tower delivery point and then go to the delivery point 2 and be there for a couple of hours.

59. Son of one of the owners.

water to point 2, the road was cut, approximately at the southeast boundary of the Fall 1980 acreage, adjacent to a site where Rivera testified persons were living. They were able to shovel over the cut and complete the water delivery. The next day there was a new cut in the road, about eight feet deep, making water delivery impossible.[60/] Solorza's testimony regarding the cut is inconsistent with that of UFW representative Rivera who testified as follows: three or four days after they started hauling water, there was a ditch on the road in an area which had been planted in 1979. They were able to fill in enough with shovels to get by the ditch. They continued to use the same road to deliver water, going back the next day. Rivera testified there was no further change in the road, and it remained passable. They were able to get across the ditch on each occasion when water was delivered.

Water delivery ceased when the UFW began a food service to Ukegawa workers at the end of July.

During the latter part of July Washburn and other UFW representatives met six or seven times with people living in Deer Canyon to discuss establishing a food cooperative to compete with Camarena, a purveyor authorized by Ukegawa to provide food services. There was purportedly wide-spread dissatisfaction with the quality of the Camarena meals. The discussion led to the establishment of a UFW operated co-op. Its eligibility requirements were employment by Ukegawa and prompt payment. The initial cost of $7.00 per day was

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60. Washburn's estimate. He was not asked whether it was possible to effect delivery despite the cut. Washburn corroborated Solorza's testimony regarding the size of the second cut.

later lowered to $5.00 when participation reached the 125 to 130 level. A hot breakfast, a bag lunch and a hot dinner were provided.

A list of those having subscribed to the service was maintained by the UFW, and names were checked off as the members arrived for breakfast. Execution of an UFW authorization card was not a prerequisite to participation. Ultimately, the UFW augmented its food service with free TV and a check cashing service.

Food service began July 31st; the UFW ceased supplying water to Deer Canyon with the advent of food service. It is undenied that authorization cards were solicited during and after the evening meal.

A caravan of four vehicles was customarily used to bring the food and tables to the ranch -- a cream and brown colored van; two white passenger cars, one bearing an aged UFW bumper sticker and the other an aged UFW window decal and Solorza's red pickup.

A site known to workers as the basketball court was the initial point of co-op food distribution. It is located about midway on the north rim of Deer Canyon. The site was selected to accomodate the workers' wishes. It became necessary after three or four days to shift to a new site because the road providing access to the area was blocked at a point west of the old packing shed.[61/]

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61. The access route to the basketball court began on Black Mountain Road across from Evergreen Nursery ran south to a road paralleling Black Mountain Road then proceeding east to a point south of the East Gate and then proceeded in a southeasterly, southerly (on this leg the road was contiguous to tomato fields under cultivation) and southwesterly direction to reach the old packing shed, then in a generally southwesterly direction to the basketball court. Food was brought at 5:00 a.m. and about 5:30 p.m.

This occurred one or two days after Roberto Medina, a subforeman, had visited the basketball court at a time dinner was being served. He and UFW representative Solorza had a conversation regarding Medina's eligibility to participate in the co-op.

The second meal distribution site was the old packing shed area, a location used by all other vendors having access to Del Mar Ranch. The old packing shed is located northeast of Deer Canyon, a few hundred feet from the canyon rim. This location was used to serve one evening meal and to serve breakfast the following morning. Thereafter, the co-op served meals at an area designated the old parking lot. The move was made because the UFW wanted to separate its operation from that of other vendors.

After the move to the old parking lot, the UFW continued to gain access by a powerline road opposite Evergreen Nursery for a period of a day or two, at which time the road south of and parallel to Black Mountain Road was cut at a point west of a direct north-south road from the west gate to the old parking lot.[62/] Thereafter, the UFW used a more direct access route, entering at the West Gate and proceeding directly south to the old parking lot.

On August 5, the first occasion when the UFW sought access through the West Gate to serve dinner the gate was locked. After the group waited ten or fifteen minutes, Solorza cut the lock and the food was taken to the old parking lot and dinner was served.

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62. Rivera testified that four or five days after food service started (August 4th or 5th) he and a UFW paralegal, Chris Schneider, were driving along Carmel Valley Road (Black Mountain Road) when they observed Respondent's foreman, Borrego, overseeing two caterpillar tractors making the road cut.

After delivering the food, Washburn returned to the gate to speak to workers gathered there. Shortly thereafter Mackauf arrived. Washburn told Mackauf the UFW wanted him to open the roads so the Union could reach the basketball court and the old parking lot. Mackauf denied having any knowledge regarding either of the road cuts. He also refused to provide the UFW with a key to the West Gate, citing experienced vandalism as the reason. Washburn responded that the vendors had keys, and it was only fair the UFW be given one. Mackauf still refused, even when Washburn said he would personally be responsible for UFW conduct.

The Union had no difficulty with access to serve breakfast the morning of the 6th. However, when the UFW food caravan arrived to provide the evening meal, there were two Camarena vehicles outside the West Gate. As the UFW vehicles approached, the gate was unlocked, one truck was entering the premises; the other truck moved into a position blocking access.[63/] Washburn asked one of the Camarena dirvers if he could borrow his key so the UFW could make its food delivery. The request was refused. Solorza cut the chain and the UFW group entered the premises; one of the Camerena trucks left the scene.

When Washburn returned from delivering the food, Mackauf was at the gate. Washburn said the UFW wanted the road to the basketball court opened; they didn't want to continue food service at the old parking lot. Mackauf responded that he was unaware the

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63. Solorza places the occasion on which Camarena trucks were present as the first day at West Gate rather then the second day. No purpose would be served in laboring to resolve this contradiction.

UFW wanted to get to the basketball court.

UFW representative Rivera testified that after the first two days, the UFW had no further problems serving food at the old parking lot.[64] In addition on August 8th or 9th the UFW stationed a gray school bus at the old parking lot. It was there 24 hours a day for approximately a week and was used as living quarters and an office for the organizers. Washburn admitted on cross-examination that there was no occasion when the co-op kitchen was unable to get onto the premises to serve the workers.

On August 10, Marc Roberts came to the area where the school bus was located and spoke with Washburn.[65] Washburn told Roberts he was angry because the company had prevented the UFW from taking food to the workers by cutting the roads.[66] Roberts said he would check out Washburn's assertion. On the 11th or 12th Roberts came by the old parking lot in his car and proceeded south over the hill. He returned shortly to announce the road was clear. Thereafter, it was possible to reach the basketball court from the old parking lot. It was also possible to get to within 200 meters of the old packing shed. Notwithstanding the ability to reach the basketball court, the co-op remained at the old parking lot.

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64. Washburn's testimony is at varience with that of Rivera on this point, setting August 11th as the date after which had no problems between the hours of 5:00 a.m. and 9:30 p.m. getting food to where the workers were located.

65. Roberts, a former Regional Director for the ALRB, was representing Ukegawa in labor relations matters.

66. Roberts testified that Washburn wanted the road repaired so the UFW could get to the Deer Canyon area where workers lived.

(b) Respondent's Explanation for the Road Cuts and Roadblocks

In July 1979, Respondent developed problems with regard to trash accumulation in the vicinity of the Deer Canyon area. A County Health Department inspection in July 1979 resulted in a citation for trash accumulation in the area.

During 1979, Respondent also received adverse publicity in the Del Mar Press concerning the deplorable living conditions of the workers living in the area surrounding its ranches. There were daily intrusions by members of the media for almost a month, and Respondent received national TV publicity regarding the living conditions of its workers.

As a result of the general problem, Respondent reached agreement with Health Department that two measures were required to clean up the trash: the one relevant here is its agreement to hand remove the accumulated trash from Deer Canyon.

During the first half of 1980, vendors acquired access to the area adjacent to Deer Canyon by a number of routes. Either by driving in through the east gate, past the old packing shed and across farm roads to the rim of Deer Canyon, or by entering at the west gate and proceeding south to the rim of Deer Canyon. Entry was achieved despite the fact the gates were locked.[67/] Gates or the fences adjacent thereto were knocked down by the vendors and used as a point of entry.

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67. The UFW contends vendors, other than it, had keys to the gates. There is evidence Camarena's drivers had keys to the West Gate.

Also by way of further explaining the road cuts, Mackauf testified that Ukegawa on many occasions had experienced vandalism in the area south of Black Mountain Road and west of its spring tomato acreage. Fences were knocked down, windows broken, equipment vandalized, irrigation system filters vandalized and water was put into diesel tanks.

In July 1980 Respondent's property was again inspected by the Health Department; no citation was issued. Following the 1980 inspection, Mackauf and the inspector discussed a plan aimed at keeping the property clean. Mackauf felt Respondent needed to confine food service and other vendors to a particular area and that such confinement would limit trash accumulation to particular areas rather than having it spread all across Deer Canyon. The County Inspector agreed with the concept.

Within a day or so after the Health Department's visit, Mackauf told Camarena he wanted no trash and debris to accumulate in Deer Canyon, and that his food service was to be restricted to the area of the old packing shed. Mackauf told Camarena that he was going to confine vendors to the old packing shed area by cutting off the road leading west from it. This was done two or three days after his conversation with Camarena. In addition, Mackauf directed that a cut be made immediately south of the old parking lot on a route commonly used by vendors.

These were the only cuts made after the Health Department inspection. The cut west of the old packing shed consisted of dirt piled up by a caterpillar; the cut south of the old parking lot was made with a backhoe. A trench two feet deep was cut across the

road. The cuts were only partially successful in excluding vendor vehicles from the Deer Canyon area. The vendors bypassed the cuts; therefore Mackauf directed that additional roadblocks be established. He had a caterpillar bulldoze a pile of dirt at the bottom of a ravine in the vicinity of the cut south of the old parking lot. He added two additional piles of earth at the barricade just west of the old packing shed. Another barricade was established east of the old packing shed to block a road from the north being used to connect with a westerly road around the barricade to the west of the old packing shed. The later barricades were established near the end of July or the early part of August.

Mackauf denies seeing any vehicles otherwise identified as UFW vehicles on the premises prior to the time he directed the additional roadblock.

The day Mackauf initially discovered the UFW food wagon on Respondent's property, he drove west on Black Mountain Road to ascertain how the UFW vehicle gained access in view of the locked gates. He found a break in the barbed wire fence under the powerline across the street from the Evergreen Nursery. He turned off Black Mountain Road followed the path form the break and picked up the waterline road and drove along it until he reached the old parking lot. As he was driving along the road, he noticed some old drainage pipe had been left at the bottom of a little canyon. He decided to remove the pipe and to leave the cut open to prevent further use of the road for access to the old parking lot. This occurred on August 6. The break in the fence opposite the Evergreen Nursery was also fixed that day.

On August 7 or 8 when Mackauf ascertained that the old parking lot was to be a major staging area for UFW activity, he ordered two additional cuts made so that UFW representatives could not travel from the old parking lot beyond the east gate to areas under cultivation. When these cuts were made, the east gate provided the only access to the cultivated area at the east end of Del Mar Ranch. The east gate was kept open for an hour before work, an hour around noon and an hour after work. The UFW never sought home site or food co-op access through this gate. The main gate which provided access to cultivated areas north of Black Mountain Road was kept open during periods required by 8 Cal. Admin. Code 2900.

(2) Analysis and Conclusions

The right of a worker to be visited at his place of residence by a union organizer during an organizational campaign is too well established under the Act to require extensive discussion. The Board has repeatedly held that denial of such access violates section 1153(a).[68/] Moreover, it is clear that it is the worker who is entitled to decide whether he wishes to be visited. The employer cannot make this decision for him.[69/]

The primary object of habitation access was Deer Canyon. The UFW had uninterrupted access to this area for not less than two weeks twenty-four hours a day. No attempt was made to impede or

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68. Nagata Brothers Farms (1979) 5 ALRB No. 39; Whitney Farms, et al. (1977) 3 ALRB No. 68; Sam Andrews (1977) 3 ALRB No. 45; Silver Creek Packing Company (1977) 3 ALRB No. 13.

69. Whitney Farms, et al., Ibid; Merzoian Bros. Farm Management Co. (1977) 3 ALRB No. 62.

interdict their organizational efforts in the area. It does not appear, perhaps because of the minimal number of workers involved, that any sustained effort was made to visit the other living areas adjacent to Ukegawa's fields.[70]

B. Food Service Access

(1) The Facts

As the Board cases make clear, the crucial question in living area access cases is whether a worker's right to be visited by union representatives has been prohibited by employer action. Employees' rights to be visited must be protected in a manner which is "realisticly reponsive to the setting in which they are exercised."[71] In Nagata the Board concluded that vehicular access was necessary if the employees' right to receive visitors was to have substance.

Turning first to Deer Canyon, the evidence is uncontroverted that all times material UFW organizers had unimpeded vehicular access to the south rim of the canyon. This access route was used for the workers initial 1980 contact with union organizers and provided them with the opportunity for day and night contact with such organizers. As the record shows the south rim access route traversed property not under Ukegawa's control. The evidence also establishes that routes to the north rim of Deer Canyon traversing the Del Mar ranch area were cut or barricaded by

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70. Nor, beyond the demands of Rivera noted above does there appear to have been any demand for living area access to areas other than Deer Canyon.

71. Nagata Brothers Farms, supra.

Respondent in a manner which for a few days in early August prevented vehicular access to the north rim of the canyon. When the Union expressed a desire to reach the basketball court on the north rim, the obstacles to such access were removed.[72] The basketball court was not a home site, but rather a location where the UFW co-op had initially served food. It manifested a desire to return to the area. There is no evidence it did so after Respondent repaired the roads. Nor is there evidence that home visits to Deer Canyon were made over the repaired roads.[73]

Unless there is authority for the proposition that workers are entitled to specific routes over which their visitors may travel, no case can be made for finding a home access violation with respect to Deer Canyon residents. The closest case and one upon which General Counsel relies is Nagata Brothers Farms, supra. However, Nagata does not go beyond requiring vehicular access as opposed to foot access in a situation in which vehicular transportation was customary on Nagata's property. The Board concluded that to deny employees' visitors vehicular access when such was the customary manner of providing access to the employees' place of abode was not realistically responsive to the setting in which the access right was exercised.

Nothing in the present record warrants a conclusion the access to Deer Canyon worker abodes fails to meet the Nagata test.

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72. Removal occurred on or about August 11th.

73. ALRB agent Arizimendi testified that access to Deer Canyon by the Del Mar Mesa road is much shorter than a route through the west gate and south across the ranch to the basketball court.

Initially, it should be noted daily worker ingress-egress between abode and worksite was on foot. There is no evidence of a customary visitor access to Deer Canyon beyond that of the UFW organizer who came in unimpeded over the Del Mar mesa road. Assuming, though it is by no means clear, that UFW organizer Washburn's demand that the road block south of the old parking lot be removed was a request for abode access, the request was honored. The road was made passable to the basketball court. Washburn's demand the road be opened was the initial UFW request for abode access over the road in question. Certainly a request for access over a particular route is prerequisite to a finding that such access has been denied, especially in a context of unobstructed and well used access over another route.

The rationale of abode access is the need and right of a worker to communicate with labor organizations regarding the merits of self-organization.[74/]

With the exception of Nagata Brothers, it is in situations in which abode access has been proscribed that the Board has found section 1153(a) violation. In Nagata it was the disparate treatment of the UFW, foot access rather than vehicular access, which the Board and the ALO found objectionable. Neither circumstance is present in the instant case.

Deer Canyon residents had ample opportunity at their residences to communicate with UFW representatives. So far as such residents are concerned, Respondent did not violate their section

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74. Silver Creek Packing Company, supra.

1152 right to communicate with UFW organizers at their abodes.

With respect to the three remaining living areas on Del Mar Ranch, access was, on two occasions, denied organizer Rivera during the first half of August. Respondent's defense to said denials is that the gate and road which Rivera sought to use passed next to fields under cultivation. There is no denial that the events occurred as described by Rivera.[75/] Respondent's defense does not suffice to overcome the need for and its prohibition of organizer-worker communication. Its denial of living area access stands as a violation of section 1153(a).

Testimony was also offered regarding a road cut or barricade on a road over which the UFW was delivering water to a living area east of Deer Canyon in the vicinity of the old packing shed. General Counsel's witnesses contradicted each other regarding the effectiveness of Respondent's efforts. Rivera testified unequivocally that he and Solorza were able to shovel over the cut and make their water delivery without interruption.[76/]

Solorza, also a UFW organizer at the time, testified they were able to shovel in the first cut and make their delivery; however, the next day the cut was so large water delivery was no longer possible. The record does not make clear for whom the water delivered to this point was intended, presumably it was for those persons residing in the area of the old packing shed and the east

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75. The Wells Fargo guard was not called by Respondent nor was any explanation offered for its failure to do so.

76. Rivera is no longer employed by the UFW. At the time of hearing, he was working in the construction industry.

end of Deer Canyon. The evidentiary conflict on this point in the testimony of two credible witnesses, both presented by General Counsel, leads to the conclusion the General Counsel has failed to prove by a preponderance of the evidence that access was interdicted by the road cut.[77/]

Despite having put in substantial evidence going to the UFW's operation of a food service for Respondent's employees and despite having asserted during the course of the hearing that workers have a section 1152 right to have the UFW provide them with a food service, no argument is made in the brief regarding such rights. Rather, General Counsel has treated the evidence relating to road cuts and road blocks as going to the issue of interdiction of living area access.

The difficulty with such an argument is that the road cuts and road blocks established by Respondent did not have the effect of interfering with access to living areas. It is clear the Union had effective access to the area where the overwhelming majority of workers lived, i.e. Deer Canyon and that this access was unaffected by any action of Respondent. It is also clear the UFW's complaints regarding the interruption of access were directed toward a desire to serve food at locations of its choosing, rather than any inability to meet with the workers at their abodes.

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77. Washburn also testified about the incident. His testimony is not credited. His description of the second cut is not even consistent with that of Solorza. It should also be noted that Rivera visited the residents of this area on one occasion and spoke to Ukegawa workers.

Unquestionably, Respondent interfered for a few days with the ability of the UFW to distribute food at places of its choosing; however, absent some section 1152 right of Ukegawa workers to be served by the UFW co-op, Respondent's interference with food service doesn't violate section 1153(a).[78]

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78. In this regard it is to be noted the Union made no effort to resume food service at the basketball court after Respondent repaired the roads. It also appears that food service ceased shortly after all complained of road obstacles had been removed. Additionally General Counsel's UFW witnesses testified they were never prevented from providing food for Ukegawa's employees.

C. Regulation Access[79]

(1) The Facts

Beginning with the first week of August there were five occasions on which Ernesto Rivera together with other UFW organizers sought access pursuant to the Access Regulation.[80] On the first occasion Rivera and Solorza entered Respondent's field through the Main Gate about 11:30 a.m.[81] Roberto Medina, a subforeman and Tashiro were in the area when the organizers reached the workers to whom they wished to speak. Oyama was parked on a hill overlooking the scene. He withdrew when the workers began eating.[82] Work continued for another three or four minutes following the arrival of Rivera and Solorza.

Rivera asked Medina to leave the area. He did so. Solorza asked Tashiro to leave; he remained in the area for approximately fifteen minutes before leaving.[83] While Solorza was talking with Tashiro, the crew was obtaining lunch from a Camarena lunch wagon some ten to fifteen meters in the distance. Rivera and Solorza spoke with the workers as they were eating lunch.

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79. The complaint does not allege a violation of Regulation Access; however, the matter was fully litigated, and finding and conclusions with respect to Regulation Access are appropriate.

80. 8 Cal. Admin. Code 209000, et seq.

81. This was the first time Rivera attempted noontime access. He never attempted noontime access through the East Gate.

82. Immediately after so testifying Rivera testified that Oyama departed at the same time as Tashiro which would mean he remained observing the scene for about 15 minutes and did not leave until after the workers commenced eating.

83. Rivera identified himself as a UFW representative.

Solorza's testimony regarding this incident was as follows: he and Rivera entered the ranch through the main gate about four minutes before noon. When they stopped at the situs of the workers, young Joe Ukegawa was right behind them in a pickup truck. As the workers were walking to buy their lunches from Camarena, Solorza spoke to Ukegawa for a couple of minutes asking him to leave the area. Rivera joined the workers where they were eating. Solorza did the same and then returned to ask Ukegawa to leave the area. He did not do so.

General Counsel suggests that Solorza is in error in identifying the person to whom he spoke as Ukegawa. Rather says General Counsel the person was Tashiro; thus, General Counsel says that Solorza is testifying about the first occasion he and Rivera took noontime access.[84/] Solorza was quite definite in his testimony that young Joe Ukegawa was the person to whom he spoke, noting that it was the same person who was driving a pickup on an occasion when he and Scott Washburn were stopped after completing a water delivery to the east end of Deer Canyon, that person was admittedly young Joe. I am inclined to conclude that Solorza's testimony is incorrect and that it was Tashiro who was present rather than Ukegawa. Solorza also testified that the person to whom he spoke was the person who did the soldering. From other witnesses we know that Tashiro is the one who generally does this work. Allowing for possible imprecision in translation, this testimony

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84. Respondent suggests the alternative of discrediting Solorza's testimony because it was not corroborated by Rivera whom Solorza asserts was present.

would support the conclusion that Tashiro is the one to whom Solorza spoke. Such a conclusion is consistent with credible testimony of Rivera regarding the incident. Thus, the conclusion that Solorza and Rivera were testifying to the same incident is appropriate. To the extent that Solorza's testimony regarding what transpired is inconsistent with that of Rivera, it is Rivera rather than Solorza who is credited.[85/] Rivera was a straightforward witness. His testimony rgarding the incident was less favorable to General Counsel's case than Solorza's. The foregoing incident is the only occasion on which Solorza had any problem in connection with noontime access.

Rivera returned the next day as the workers were leaving for lunch. Chris Schneider another UFW representative accompanied him. They entered the Main Gate and drove about 100 meters to where the workers were located.[86/] A foreman named Benito Mendoza was present when they arrived.[87/] They asked him to leave; he refused, and going to where the crew was eating, he sat among them and ate his lunch. Nonetheless, Rivera and Schneider spoke to the workers.

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85. Tashiro testified he encountered two Mexicans on one occasion, one of whom fits the description of Rivera. His testimony is so divergent from that of Solorza and Rivera that it does not appear they are testifying about the same incident.

86. Rivera's notes show he was there from 11:05-11:35 a.m.

87. Mendoza was not called to testify. Rivera's testimony regarding the incident is uncontroverted and is credited. Respondent offered no explanation for its failure to call Mendoza. One can assume reliance was placed on the contention that subforemen and not statutory supervisors.

The next occasion on which Rivera encountered a noontime problem was August 26th. He was alone and came on the premises through the Main Gate, went past the area of the new packing shed and up some hills to locate the workers. On route he encountered Tsutagawa. Rivera was looking for the horse cultivators; he had been told they would be in that area and that they took lunch at noon.

Tsutagawa's truck blocked the road and a young "North American" got out and approached Rivera's vehicle. Rivera produced his UFW credentials and explained the purpose of his visit. After talking with Tsutagawa, the young man told Rivera there were no workers up the hill. Rivera turned around and made his way to the Main Gate. Tsutagawa followed in his pickup.[88/]

On the other two occasions on which Rivera took noontime access he encountered no problem. It would appear from the record that no "Regulation Access" was attempted other than that described above.[89/]

(2) Analysis and Conclusions

A denial of access violative of the Regulation and thus section 1153(a) can occur even if union organizers are not physically prevented from coming upon an employers property. Compliance with the access rule is not achieved when the employer thwarts free communication between union representative and the

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88. There is no evidence that horse cultivators were in the area to which Rivera sought access. Tsutagawa had no recollection of the events described by Rivera.

89. Access to serve breakfast and dinner could arguably be treated as Regulation Access. General Counsel does not so argue.

employees.[90] Here, there is uncontroverted evidence a subforeman refused to remove himself from among a crew of workers to whom a UFW organizer wished to speak during their lunch break. Although Respondent's subforemen have been found not to be statutory supervisors, they are persons who the workers have just cause to believe were acting for and on behalf of management and whose presence would impede free worker communication with UFW organizers. Thus, Respondent is chargeable with Mendoza's failure to remove himself in response to Rivera's request from the area where the crew was taking lunch.[91] It is also chargeable with the failure of Tashiro to leave upon request when Rivera and Solorza sought to speak with the crew during the lunch break.

However, the mere presence of the subforemen and Tashiro does not suffice to constitute interference with communication between workers and organizers. Unless the conduct of Medina, Tashiro and Mendoza amounted to unlawful surveillance, there is no basis for concluding there was wrongful interference with worker-organizer communication. Clearly, Belridge Farms, supra is distinguishable on its facts.

Illegal surveillance must be based upon more than a showing that a supervisor was in an area where he had a right to be during the time organizers are attempting to speak to workers in the

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90. Belridge Farms, (1978) 4 ALRB No. 30.

91. Vista Verde Farms v. Agricultural Labor Relations Board, (1981) 20 Cal.3d 307.

area.[92] With respect to the presence of supervisors during the lunch period, the evidence establishes no more than their presence for portions of, and in one instance, the entire lunch period. The record does not support a conclusion that Medina or Tashiro were present for the purpose of surveillance; nor can it be said that either of them interjected himself and listened to the conversations between the organizers and the workers.[93] Thus, the presence of Medina and Tashiro was not surveillance violative of section 1153(a) and their presence was not a denial of regulation access.

Mendoza's conduct is distinguishable. Upon being asked to leave, he not only refused to do so, but placed himself at the center of the workers to whom the organizers wished to speak. His presence could be expected to chill any worker enthusiasm for contact from the union organizers. His conduct amounted to surveillance or the impression thereof as well as interference with Regulation Access, thereby violating the Act.

VIII. Captive Audience Meetings

Paragraph 22 of the complaint alleges that Ukegawa conducted captive audience meetings in early August at which workers were threatened with loss of their jobs and deportation if they continued to engage in union or protected concerted activity.

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92. Tomooka Brothers (1976) 2 ALRB No. 52.

93. cf. Belridge Farms (1978) 4 ALRB No. 30, ALO Op. 11,12; Rev. den. by Ct. App., 5th Dist., January 4, 1980; hg. den. January 30, 1980.

A. The Facts

On or about August 8th, Felix Estrada delivered a speech to assembled groups of Respondent's employees. He was employed by Respondent's labor relations consultant for this purpose.[94] The same speech was delivered seven or eight times. For the past five years Estrada has been a labor relations consultant in the Delano area.

The speech was drafted in English by Roberts and translated into Spanish by Estrada. In substance its content expressed awareness that the workers had been asked to sign UFW authorization cards; that some workers erroneously thought the card was for the purpose of obtaining a discount on hot meals; that the real purpose of the card was to authorize the UFW to be their bargaining agent;[95] that the UFW had turned the cards over to the government which was requiring Respondent to obtain the names and addresses of all workers;[96] that the union had lied if they said the only purpose of the card was to get a hot meal. The speech also directed the following words to those who had not yet signed cards. "[I]t is our feeling that the cards are not good for you, and that by

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94. Marc Roberts former Regional Director of the Board's San Diego office.

95. Gomez corroborates the fact Estrada stated workers had been asked to sign cards; that some workers didn't know what they had signed; and that the real purpose of the cards was to show support for the UFW. Moreno also testified that Estrada spoke of the real purpose of the cards.

96. Moreno's testimony on cross-examination corroborates the fact that Estrada stated the cards they had signed had been turned over to the government and that, as a result, Respondent was now required to obtain their names and addresses.

signing you will have more hassels from outsiders."[97]

Estrada testified that he did not vary from the text in delivering the speech. Roberts was present on only the first occasion when Estrada delivered the speech. It was the morning of August 8; there were no foremen present. However, there were apparently one or more foremen in the immediate area on other occasions on which the speech was delivered. Roberts told Estrada to deliver the speech literally, and he did so on the occasion when Roberts was present. As Estrada repeated the speech to other crews, he would only glance at the text from time to time while making his delivery.[98]

Worker witnesses Moreno, Tenorio and Gomez each testified that Estrada said the union was going to send those who had signed cards to the government or to immigration. Estrada denied mentioning migra or the immigration service. It is unlikely he would have done so. There is no mention of the immigration service in the prepared text.

B. Analysis and Conclusions

Section 1155 states:

> The expressing of any views, arguments or opinions, or the dissemination thereof . . . shall not constitute evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force, or promise of benefit.

In Anderson Farms Company (1977) 3 ALRB No. 67, the Board found the following statements of an Anderson labor contractor

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97. General Counsel Exhibit No. 26.

98. Gomez's testimony on cross-examination and also Mackauf's testimony.

violative of section 1153(a): telling workers that if the union won the election, the rancher would bring in electric machines and 90 percent of the workers would be without jobs. He stated: "'the rancher is the one who gives us everything. The ones that gives us something to eat. The ones that give us work.'" A further violation of section 1153(a) was found in the following utterances to the workers as they were being transported to the polls. "'[T]hink about what they were going to do' and to 'pay attention.'"

In a situation in which the employer inferentially stated a preference for the Teamsters as against the UFW in an upcoming election, the Board held the employer's statement that a UFW victory in the forthcoming election would have the effect of requiring the destruction of boxes carrying the Teamster label to be protected by section 1155, citing N.L.R.B. v. Gissel Packing Co. (1969) 396 U.S. 804.[99/] On the other hand, statements inferring the employer would not negotiate with the UFW or would have to pull his vines were held to be threats violative of section 1153(a) and thus beyond the ambit of section 1155.

In evaluating whether employer speech is protected under section 1155, the employees subjective reaction is irrelevant. The test is whether the employer's statements could reasonably be construed to threaten, restrain or coerce employees in the exercise of the section 1152 rights.[100/]

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99. Jasmine Vineyards, Inc. (1977) 3 ALRB No. 74.

100. Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 18; Rod McLellan Co. (1977) 3 ALRB No. 71.

Neither counsel has pointed to any Board decision regarding the inherent impropriety of an employer speech on company time. In Livingston Shirt Corporation, (1953) 107 NLRB No. 400 the National Labor Relations Board recognized that Section 8(c) of the National Labor Relations Act precluded it from finding an employer's uncoercive speech on company time violative of section 8(a)(1) of the act. Since ALRA section 1155 tracks NLRA section 8(c), the Livingston Shirt rule is appropriately applied to Respondent's "stop work" speech.[101]

In juxtaposing the facts herein to controlling authorities. Step one is to look at the drafted text of the speech on the assumption it was rendered substantially as drafted. If so, the content of the speech was protected by section 1155. Nothing in the drafted text can reasonably be said to interfer with restrain or coerce employees in the exercise of section 1152 rights. One might infer that Respondent's preference was that its employees not support the UFW and refrain from signing authorization cards, but if an employer may express a preference for one union as against another without violating 1153(a), certainly it may state a preference that its employees remain unorganized.[102]

Step two requires ascertaining whether Estrada made extra textual remarks amounting to threats or remarks inferentially threatening. Resolution of this question requires a determination of the credibility of General Counsel's witnesses. Initially, it

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101. See Lab. Code section 1148.

102. Jasmine Vineyards, Inc., supra.

must be noted that inconsistencies between direct and cross-examination in the testimony of General Counsel's worker witnesses tends to undermine the likelihood their direct testimony accurately reflects what transpired and what was said during the course of the meetings.

On cross-examination Moreno testified that Estrada stated the workers did not know what they had signed for the union; that he said some workers had been asked to sign something for the union, and he said something about the real purpose of the cards; that the union had turned the cards over to the government; that the government required Ukegawa to obtain and turn over their addresses and that the union was the cause for this requirement.[103/] This testimony regarding what Estrada said is substantially in accord with the written text and at odds with Moreno's direct testimony in which he stated the union was going to throw the workers to immigration or the govenment to kick us out of there; that Ukegawa would resolve any complaints about Camarena and that it was time to leave the union.[104/] Estrada testified credibly that he did not use the term immigration during the course of presenting the speech. The term government was used and it is reasonable to conclude that even absent mention of migra or immigration that his use of the term government was heard by Moreno as the immigration service, thus explaining his testimony on direct examination. Where his testimony on direct conflicts with that adduced on cross, the

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103. Tr. V. 80-81.

104. Tr. V. 13.

cross-examination is credited. The questions were precise, and the answers unequivocal.[105/]

Tenorio attended the same meeting as Moreno. His testimony, particularly on cross-examination, was less clear then Moreno's and was not generally corroborated by Moreno. Tenorio denied Estrada said that the workers had been asked to sign UFW authorization cards and that maybe some had done so; that some workers did not understand what they had signed or thought the purpose of the card was to get a hot meal at a discount; that the union had turned the cards over to the ALRB, a branch of the government. He did not remember Estrada saying that the government was requiring a list of the names and addresses of all employees. So far as Tenorio's testimony regarding the meeting is inconsistent with that of Moreno it is not credited. Moreno's testimony being more adverse to his interest and that of his fellow workers is more likely to be accurate.

The testimony of General Counsel's witness Gomez generally confirms that Estrada limited himself to the written text. Gomez testified that Estrada stated that many of them had been asked to sign authorization cards; that maybe some had already signed cards; that some people did not understand what they were signing; and that their real purpose was to indicate support for the union. He denied that Estrada said the union had turned the cards over to the government; he denied that Estrada said the company was required to

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105. Moreno's direct testimony contained some reference to Camarena and the quality of the food. It is likely he confused the stop work meeting with another meeting at which Camarena addressed the workers.

give the government a list of the names and addresses of its employees. Gomez did not remember whether Estrada stated the union had lied about the purpose of the cards or whether he stated that if they signed cards, they would have more hassel from outsiders.

In sum, credible testimony offered by the General Counsel fails to establish that Estrada's speech contained threats, promises of benefits or coercive statements; thus, supporting the conclusion its content was unprotected by section 1155 and not evidence of a violation of section 1153(a). I recommend that the allegations of paragraph 22 be dismissed.[106]

IX. Unlawful Surveillance

Paragraph 24 of the complaint alleges that Respondent since late July 1980 hired security guards and engaged in unlawful surveillance.

A. The Facts

On one occasion as he returned from work, Manuel Vargas found subforeman Roberto Medina in the vicinity of his living area picking up cans. UFW representatives were making a water delivery at the time. Medina asked Vargas who was delivering the water. Vargas responded that he didn't know, but possibly it was the union. Medina remained in the area for approximately fifteen minutes. This was the only time Vargas encountered Medina in the Deer Canyon

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106. During the course of the hearing General Counsel presented evidence regarding a speech made by Respondent's contract food purveyor who was alleged to be Respondent's agent. No argument is made in General Counsel's brief regarding Camarena's (the food purveyor) status. Similarly, some evidence was adduced regarding a Camarena speech. No argument is made that the speech violated section 1153(a). In view of General Counsel's abandonment of these contentions, no findings and conclusions are necessary.

living area.[107]

Approximately three days later Manuel and Jesus Vargas saw Tashiro observing from a distance of 150 meters what was transpiring at the water tank.[108] Tashiro was using binoculars.[109] There were three cars bearing UFW insignia at the water tank.

During the period the UFW served food at the basketball court, Roberto Medina arrived, parked and began talking to some of the workers. While he was there, Medina asked UFW representative Solorza whether he could join the co-op. Solorza replied that if he would pay, he could eat. This interchange was all that Solorza remembered of their conversation. Solorza testified there were several occasions during the period food was served at the basketball court that foremen's trucks were parked in the area while the workers were eating.

B. Analysis and Conclusions

It is not all surveillance which violates the Act; only that which interferes with and employees section 1152 rights is interdicted.[110] Tashiro's covert observation of the activities of

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107. Puentes and Jesus Vargas also testified to Medina's presence.

108. Jesus placed Tashiro 300 meters from the water tank. According to Jesus, Tenorio was also present.

109. Tashiro denied the incident. Notwithstanding the denial, the testimony of Manuel and Jesus Vargas on this point is credited. There testimony is generally mutually consistent, and it is unlikely it is the kind of occurrence which they would contrive. In crediting their account, I am cognizant of the fact they spoke together many times in preparing to testify.

110. e.g. M. Caratan, Inc. (1979) 5 ALBR No. 13; Kawano, Inc. (1977) 3 ALRB No. 54.

UFW organizers is such surveillance. The discovery by the Vargases that Tashiro was spying upon the UFW's water supply operation would obviously have a chilling effect upon their willingness to associate with UFW organizers or otherwise engage in union or concerted activity.[111] Knowing that supervisors were engaged in off hour covert surveillance, one could never be sure that ones contacts with union organizers would not be observed and noted; thus inhibiting ones willingness to interact and communicate regarding organizing matters.[112] No reason was advanced by Respondent to explain Tashiro's presence in the Deer Canyon area after work hours. Having not credited his denial of the incident for the reasons set forth above, it follows that his surveillance was illicit and violative of section 1153(a).

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111. Proof that Respondent's surveillance did interfere with employees section 1152 rights is not a requisite for finding section 1152 rights were violated. See Merzoian Bros. (1977) 3 ALRB No. 62.

112. It is not necessary that those under surveillance be aware of the surveillance for such conduct to violate the Act. N.L.R.B. v. Grower-Shipper Vegetable Ass'n (Cir. 9) 122 F.2d 368.

Similarly, Medina's presence in the Deer Canyon area during non-work time and in the area where the UFW food co-op was serving food was unlawful surveillance. In each instance he was in a non-work area during non-work time without plausible explanation or without any evidence that these were areas which he customarily frequented during off hours.[113] It is reasonable to conclude that his purpose was to get what information he could relative to the participation of Ukegawa's employees in union activities, a purpose violative of section 1153(a).

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113. cf. M. Caratan, Inc., supra.

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of section 1153(a) of the Act, I recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

In order to remedy more fully Respondent's unlawful conduct, I recommend that Respondent make known to all its current employees that it has been found to have violated the Agricultural Labor Relations Act and that it has been ordered to cease violating the Act and not to engage in future violations.

To this end I recommend:

1. That Respondent be ordered to sign the attached Notice and post copies of it at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 60 days. Copies of the Notice, after translation by the Regional Director into appropriate languages, shall be furnished Respondent in sufficient numbers for the purposes described above.

2. That Respondent be ordered to distribute a copy of the Notice to each of its current employees.

3. I recommend dismissal of all allegations regarding which Respondent is not found to have violated the Act.

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

ORDER

Respondent, its officers, agents, supervisors and

representatives shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed by section 1152 of the Act.

2. Take the following affirmative action which will effectuate the purposes of the Act.

(a) Sign the attached Notice and post copies of it at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 60 days. Copies of the Notice, after translation by the Regional Director into appropriate languages, shall be furnished Respondent in sufficient numbers for the purposes described herein. Respondent shall exercise due care to replace any Notice which has been altered, defaced or removed.

(b) Hand out the attached Notice to all current employees.

(c) Notify the Regional Director in writing, within 31 days of receipt of the Order, what steps have been taken to comply with it.

DATED: March 11, 1982

ROBERT LePROHN
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

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

1. To organize themselves;

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

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

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

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

Because this is true, we promise you that;

WE WILL NOT engage in surveillance of or otherwise interfere with, restrain or coerce any employee because he or she exercised any of these rights.

WE WILL NOT interfere with employee access to union organizers as provided by 8 Cal. Admin. Code 20900 or at the living sites of employees.

UKEGAWA BROTHERS, INC.

DATED:

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE