Riverside, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

McANALLY ENTERPRISES, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 75-CE-7-R 75-CE-10-R 75-CE-27-A-R 11 ALRB No. 2 (3 ALRB No. 82)

SUPPLEMENTAL DECISION AND MODIFIED ORDER

In accordance with the remand order of the Court of Appeal of the State of California Fourth Appellate District, Division Two, in McAnally Enterprises, Inc. v. Agricultural Labor Relations Board (Feb. 24, 1984) 4 Civ. No. 19624, we have reformulated our remedial Order in McAnally Enterprises, Inc. (1977) 3 ALRB No. 82 and reconsidered our finding that Respondent increased wages and benefits on August 29, 1975 in violation of Labor Code section 1153(a).[1/]

In McAnally Enterprises, Inc., supra, 3 ALRB No. 82, we adopted without comment the Administrative Law Judge's (ALJ)[2/] recommended finding that Respondent violated section by increasing wages and benefits on August 27, 1975 because the

[1/] All code sections herein are to the California Labor Code unless otherwise specified.

[2/] At the time of issuance of the Decision in this case Administrative Law Judges were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

increases were "influenced by the organizing activities of the union and ... implemented with the hope of thwarting the union's organizing activity." The Court of Appeal rejected the ALJ's legal standard while expressly declining to reach the question of whether the Board's finding was supported by substantial evidence on the whole record.

National Labor Relations Act (NLRA) precedent sets forth a presumption that wage or benefit increases implemented or announced in the period between the filing of a representation petition and the holding of an election are timed to interfere with employees' free choice in violation of section 8(a)(l) (Idaho Candy Company (1975) 218 NLRB 352, 355 [89 LRRM 1342]), under the rationale that such increases operate coercively as a "fist inside a velvet glove." (NLRB v. Exchange Parts Company (1964) 375 U.S. 405 [55 LRRM 2098].) Even absent a representation petition or election, the National Labor Relations Board (NLRB or national board) has inferred illegal motive from the timing and magnitude of pay raises instituted after commencement of a union organizing drive or the threat thereof. (See TLC Lines, Inc. (1983) 265 NLRB 1200, 1205 [115 LRRM 1414].) Although no representation election resulted, the United Farm Workers of America AFL-CIO (UFW or Union) commenced organizing at Respondent's Lakeview poultry operation in early August of 1975, and employer knowledge of the organizing is established by at least mid-August.[3/]

[3/] The earliest evidence of employer knowledge of union organizing was Personnel Manager Petersen's testimony that he learned of the organizing on August 9, 1975.

To overcome the presumption, the employer must show that "the conferral and announcement of the benefit was consistent with established company practice or planned and settled upon prior to the initiation of the union's organizing campaign." (NLRB v. Hasbro Industries, Inc. (1st Cir. 1982) 672 F.2d 978, 988-989 [109 LRRM 2911].)

The evidence indicates that Respondent's plans and promises to employees to increase wages pre-date the Union organizing by several months.[4/] The egg industry had recently undergone a prolonged period of depressed prices and escalating costs. As early as January 1975 Respondent's employees' requests for wage increases were met with company promises to implement increases when, egg prices improved. Foremen had also been requesting institution of a uniform wage scale. Respondent's Personnel Manager testified to having made several specific across-the-board increase proposals to Executive Committee members between late June and August. His benefit increase proposals were generated from his research into practices of other poultry producers as well as concerns arising from defects in Respondent's pre-existing health insurance plan. The increase plans crystallized into decisions during August, when, according to Respondent, market conditions improved to the point that egg prices actually approached expenses for the first time in an

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[4/] The June 2, 1975 minutes of the annual meeting of Respondent's Board of Directors reported that the Board had directed the Executive Committee to "examine the possibility of giving raises and possibly changing the benefit structure when and if egg prices should move up to a profit situation."

extended period of time. General Counsel did not attempt to disprove Respondent's market analysis.

On August 1, 1975, Executive Committee minutes[5/] report: "now egg prices are within 2 ¢ of covering costs, and as promised, McAnally Enterprises, Inc. will be issuing considerable raises." The minutes indicate that the "cost plus 12" formula analysis,[6/] which Respondent claims resulted in a "profit picture" in late August, was being used as early as August 1 as an indicator of when the raises should be made.

Unlike the ALJ, we are not persuaded that a violation was established by Azucena Hernandez' testimony that her supervisor told her that the wage increases were made because "no one at McAnally wanted the union." We note that the ALJ did not explain his resolution of the conflict between Hernandez' testimony and her supervisor's denial that he ever spoke with her about the wage increases and we are unable to make a finding on this record. (See S. Kuramura, Inc. (1977) 3 ALRB No. 49.)

We find that the timing and departure from precedent in announcing the August 29, 1975, increases were adequately explained by Respondent and that Respondent met its burden of

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[5/] Although, like the ALJ, we too find suspicious the fact that the only Executive Committee minutes to have been typed and formalized were the last three meetings leading up to the wage increase, we note that General Counsel failed to make a hearsay objection and expressly waived the best evidence rule as to those minutes. Under these circumstances, we are not inclined to discredit the minutes.

[6/] The "cost plus 12" formula is a rule of thumb developed by owner McAnally by which income can be measured against production costs by comparing the price of a dozen eggs with the cost of feed plus 12 cents.

showing that the increases would have occurred when and as they did even absent the union organizing.[7/] (American Sunroof Corp. (1980) 248 NLRB 748 [104 LRRM 1157]; Cf. NLRB v. Transportation Management Corp. (1983) __ U.S. __, 103 S.Ct. 2469 [113 LRRM 2857].) Since the UFW never filed a certification petition, Respondent could not have delayed the increases until after an election in order to avoid the "tend[ency] to interfere with the free exercise of employee rights" to' organize. (American Freight-Ways Co. (1959) 124 NLRB 146, 147 [44 LRRM 1302].) Moreover, any prolonged delay by Respondent might have appeared retaliatory to employees who were expecting a raise. Accordingly, in our modified Order we shall delete the remedy for an unlawful wage and benefit increase as well as the remedies relating to the other findings of violations annulled by the Court of Appeal. In all other respects, the remedial Order is conformed to the Board's current remedial practice and format pursuant to the Court's broad remand to "reconsider and reformulat[e] an appropriate remedial order" as to the violations which it is affirming. Since issuance of the original Board Decision and Order in this case, we have adjusted our panoply of remedial

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[7/] We do not rely for our finding on the' fact that the same increases were implemented at all of Respondent's California operations since, had an election been ordered under the Agricultural Labor Relations Act (ALRA), all of Respondent's California agricultural employees-or at least those in the same agricultural production area-would have been included in the unit and all those employed during the payroll period prior to the filing of the petition would have been eligible to vote (See section 1156.2.) Thus it would be unreasonable to infer from the instant record that increases at Respondent's other facilities would not have affected its employees' section 1152 rights.

provisions to comport with the changes in the economy, our increased understanding of the practical realities involved in the implementation of remedies, and the increased body of judicial precedent arising from court review of our remedies. Although we appreciate the need for finality of Board findings and decisions, see Abatti Farms, Inc. (1983) 9 ALRB No. 59 (slip opn. pp. 22-23), we are equally concerned that at the time our backpay Orders become enforceable, they fulfill both their remedial and deterrent purposes. Although the seven percent interest rate may have served those purposes in 1977-the time of issuance of the instant Decision and Order-subsequent inflation and escalation of interest rates have substantially weakened the effects of the backpay remedy. Accordingly, without tampering with any of the findings and conclusions reviewed or affirmed by the court, we shall, pursuant to the court's remand directive and national board precedent,[8/] update the obsolete remedial provisions in our original Order and reformulate the interest rate to apply the adjustable rate announced in our Decision in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.[9/] We have also included a provision to remedy Respondent's illegal prohibition of employee distribution of union literature.

[8/] (See Nassau-Suffolk Chapter of NECA (1977) 231 NLRB 1021, ' 1022 footnote 6,[96 LRRM 1303].)

[9/] The adjustable rate shall not be applied to backpay accruing prior to issuance to the Board's original Decision and Order in this case. Rather, pursuant to our Decision in Lu-Ette, the adjustable rate shall be applied only prospectively from August 18, 1982, the issuance date of Lu-Ette. See also Nassau-Suffolk Chapter of NECA, supra, 231 NLRB 1021.

MODIFIED ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (ALRA or Act), the Agricultural Labor Relations Board (Board) orders that the Respondent, McAnally Enterprises, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Preventing or interfering with communication between organizers and employees at the places where employees live.

(b) Interrogating employees concerning their union affiliations or sympathies or that of any other employee[s].

(c) Surveilling employees when they are engaged in protected activities.

(d) Preventing employees who live in company housing and their families from freely entering and leaving the property.

(e) Discharging, laying off, transferring or otherwise discriminating against any of its agricultural employees because of their participation in union or other protected activities.

(f) Threatening employees with layoff or other loss of employment, or with an adverse change in working conditions, because of their union or other protected activites.

(g) Prohibiting employees from distributing, during their nonworking hours and in nonworking areas, literature not shown to have been exposed to potential contamination at other

poultry farms.

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

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Azucena Hernandez and Concepcion Diaz immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any losses of pay and other economic losses they may have suffered as a result of their respective termination and transfer, such backpay award to be computed in accordance with established Board precedents, together with interest thereon, computed at seven percent per annum until August 18, 1982 and thereafter interest to be computed as provided in our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(b) Preserve and upon request make available to the Board or its agents, for examination photocopying and otherwise copying, all records relevant and necessary to a determination of the amount of backpay and interest due the affected employees under the terms of this Order.

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

(d) Post copies of the attached Notice in

conspicuous places on its property for sixty 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.

(e) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days from issuance of this Order, to all employees employed by Respondent during the period from September 15, 1975 to September 15, 1976.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time and property at times and places 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 employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her

periodically thereafter in writing of further actions taken to comply with this Order.

Dated: February 28, 1985

JYRL JAMES-MASSENGALE,[10/] Chairperson

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

[10/] Board members' names are listed in the following order: Chairperson Massengale first, and, thereafter, in order of Board seniority.

NOTICE TO AGRICULTURAL WORKERS

After investigating charges that were filed with the Agricultural Labor Relations Board (ALRB) the General Counsel of the ALRB issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by threatening, interrogating and subjecting employees to surveillance on account of their support for the United Farm Workers of America, AFL-CIO, (UFW) prohibiting employees from distributing UFW literature during nonworking hours at our facility, and falsely imprisoning and eventually discharging Azucena Hernandez and transferring Concepcion Diaz in retaliation for their UFW support.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

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

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

Because this is true, we promise you that:

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

Especially, WE WILL NOT do any of these things:

1. Ask our employees how they feel about the union.
2. Watch workers while they talk with union organizers.
3. Prevent workers from distributing union literature during nonworktime at our facilities.
4. Keep workers who live on our property and their families and visitors from coming in and going out of the property as they wish.
5. Discharge, transfer, or lay off employees in order to discourage membership in the UFW or any other union.
6. Threaten to fire or lay off employees who are engaged in activities protected by the Agricultural Labor Relations Act.

WE WILL offer Azucena Hernandez her old job back if she wants it and we will pay her any money she lost because we unlawfully discharged her.

WE WILL offer to Concepcion Diaz her old job back if she wants it and will pay her any money she lost because we unlawfully transferred her.

Dated: McANALLY ENTERPRISES, 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

McANALLY ENTERPRISES, INC.

11 ALRB No. 2
(3 ALRB No. 82)
Case Nos. 75-CE-7-R
75-CE-10-R
75-CE-27-A-R

Court Remand

The Fourth District Court of Appeal affirmed some of the Board's findings and annulled others. With respect to the findings which it affirmed (discriminatory discharge of Azucena Hernandez, discriminatory transfer of Concepcion Diaz, illegal interrogation, threats and prohibition against employee distribution of union literature), the Court ordered the Board to reformulate the remedy. The Court rejected the standard used by the ALJ and approved by the Board for finding Respondent's August 27, 1975 wage and benefit increases violated section 1153(a). The Court remanded the increase issue to the Board for reconsideration of the evidence in light of the standard enunciated by the Court.

Board Decision

The Board found that the evidence did not support a finding that the wage and benefit increases were primarily motivated by antiunion purposes or tended to interfere with the employees' section 1152 rights. Accordingly, the Board deleted from its original Order remedies relating to the August 27 increases and other violations annulled by the Court. In reformulating its Order to remedy the violations affirmed by the Court, the Board applied the adjustable interest rate from the date of issuance of Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, adjusted the mailing and posting provisions to comport with present practice and format, and included a provision remedying Respondent's illegal prohibition of employee distribution of union literature.

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