

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BAKER BROTHERS/)	Case Nos. 83-CE-117-D
SUNKIST PACKING HOUSE,)	84-CE-160-D
)	
Respondents,)	
)	
and)	
)	
)	12 ALRB No. 17
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

On June 11, 1985, Administrative Law Judge (ALJ) James Wolpman issued the attached Decision in this proceeding. There after, General Counsel and Respondent each filed exceptions to the ALJ's Decision with supporting briefs and Respondent submitted a brief in response to General Counsel's exceptions.

Pursuant to the provisions of Labor Code section 1146,^{1/} the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.^{2/}

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings and conclusions, and to adopt

^{1/}All section references herein are to the California Labor Code unless otherwise specified.

^{2/}The signatures of Board Members in all Board decisions appear with the signature of the Chairperson first, if participating", followed by the signatures of the participating Board Members in order of their seniority.

his recommended Order, as modified herein.

Accordingly, we shall order Respondent to cease and desist from permitting labor contractor Conrad Sanchez to deny members of the Barba crew the opportunity to purchase harvest related equipment in accordance with the preelection policy. We shall also direct that Respondent compensate members of the Barba crew for costs they may have incurred over and above those which would have been charged them by the labor contractor for equipment purchases since the election. Respondent objected to a similar cease and desist provision in the ALJ's recommended order on the grounds that the order was too broad insofar as it may be read to apply even if Respondent should change contractors for legitimate business reasons. The present Order only prohibits Respondents from discriminating against its employees because of their protected concerted activities.

ORDER

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

1. Cease and desist from:

(a) Permitting its labor contractor to discriminate against its employees in the Barba crew by depriving them of the opportunity to purchase gloves, clippers, protective sleeves and picking sacks from said contractor, because of their protected concerted activities.

(b) 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 Agricultural Labor Relations Act (Act).

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

(a) Assure members of the Barba crew that they have the opportunity to purchase gloves, clippers, protective sleeves and picking sacks from such contractor in a manner consistent with the preelection practice.

(b) Make whole the members of the Barba crew for all economic losses suffered by them since the election as a result of their having to purchase their gloves, clippers, protective sleeves, and picking sacks elsewhere, together with interest thereon computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, until such time as Respondent has complied with section 2 (a) , above.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records and reports and all other records relevant and necessary to a determination, by the Regional Director, of the economic losses and the period of such losses resulting from the failure to allow the crew supervised by Domingo Barba to purchase the above described equipment from its labor contractor.

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

for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all citrus harvest employees employed by Respondent at any time during the period from March 12, 1983 to March 12, 1984,

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

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

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to

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

Dated: September 25, 1986

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

CHAIRPERSON JAMES-MASSENGALE, Concurring in Part, Dissenting in Part:

The opinion of the Board concludes that there is sufficient evidence to support the finding of the Administrative Law Judge (ALJ) that Respondent' ceased providing Domingo Barba's crew with the opportunity to purchase work-related supplies at discount in retaliation for its union activities in violation of Labor Code section 1153(c) and, derivatively, section 1153(a). Respondent excepts to the ALJ's finding that it discontinued the custom of providing such equipment.

In my view, the evidence does not preponderate in favor of the Board's finding that Conrad Sanchez, Respondent's labor contractor, did in fact revoke the equipment purchase practice in order to discriminate against members of the Barba crew in violation of section 1153(c). Nor am I persuaded that there has been an adequate showing that Respondent's failure to provide its employees with an opportunity to purchase equipment was unlawfully motivated

in violation of section 1153(c). That conclusion, however, does not preclude me from finding Respondent liable on a different theory since facts material to such a finding were fairly and fully litigated. (Superior Farming Company v. Agricultural Labor Relations Board (1984) 151 Cal.App.3d 100 [198 Cal.Rptr. 608].) Accordingly, I agree that Respondent engaged in an unfair labor practice inasmuch as I find that Respondent interfered with its employees' section 1152 rights when Barba, for whatever reason, informed them that they would no longer be able to purchase equipment from the contractor since Barba had apparent authority to make such a statement. As a basis for my finding, I rely solely on section 1153(a) of the Agricultural Labor Relations Act (Act).

The facts are as follows. Both Sanchez and his partner, Joe Diaz, carried a supply of sleeves, cutters, gloves and sacks in their pickups. An employee who requested and received such equipment could choose to pay cash or have the cost deducted from a subsequent payroll voucher. Supplies also were stored in the contractor's office. From time to time, Barba, as apparently did other foremen, took equipment orders to the office where they were filled by Audrey Lugo, Sanchez's bookkeeper, rather than in the field by the contractors. Barba's request for gloves from Lugo shortly after the election was not filled. The dispute herein turns on whether Barba did not receive an allocation at that time because the supply was temporarily depleted, as Respondent asserts, or because the contractor had discontinued the practice of providing equipment in retaliation for the crew's support of the Union, as contended by General Counsel.

The ALJ rejected Respondent's assertion that Barba had misunderstood Lugo and erroneously interpreted the lack of a glove supply on one occasion to signify a finality to the equipment purchase privilege. He based his decision in part on Barba's general demeanor as well as internal inconsistencies in his testimony. While I also perceive apparent shifts in Barba's testimonial statements, when examined in isolation, I also find those statements to be consistent when viewed in the context of his entire testimony. Thus, my disagreement with the ALJ's conclusion does not constitute a reversal of his credibility determinations. However, established or admitted facts lead me to a different result on the basis of the weight of the evidence, inherent probabilities, and reasonable inferences drawn from the record as a whole. Garrett Railroad Car & Equipment, Inc. (1979) 244 NLRB 842 [102 LRRM 1356.].^{1/}

The principle which governs my view of the case is well-settled:

. . . the test of interference, restraint and coercion under Section [1153(a)] of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

^{1/} In my opinion, the gravamen of the problem stems from Barba's repeated references to Sanchez in a manner which suggests that he communicated directly with the labor contractor while at the same time denying categorically that he had ever discussed the matter with the contractor himself. Simply stated, Barba spoke only to Lugo. Thereafter, when appearing to attribute certain statements or conduct to Sanchez, he actually had reference only to the bookkeeper. That he did not speak with the contractor is amply demonstrated by the whole of his testimony.

(American Freightways, Inc. (1959) 124 NLRB 146, 147 [44 LRRM 1302].)

As in Idaho Pacific Steel Warehouse., Inc. (1976) 227 NLRB 326 [94 LRRM 1135], the question before the NLRB was whether the employer's rescission of a long-standing gas purchase privilege for employees during a union organizational campaign violated the National Labor Relations Act (NLRA). Applying the principle set forth in American Freightways, supra, 124 NLRB 146, the NLRB affirmed its trial examiner's finding of a violation since "it need only be shown that under the circumstances existing the employer's conduct may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." (Idaho Pacific, supra, 227 NLRB at p. 331.)

On the basis of the authorities discussed above, the correct legal analysis requires an examination of the likely perception of the affected employees in searching for a reason for the sudden withdrawal of established benefits to them, occurring as it did on the heels of the election. The fundamental question is whether the change likely conveyed a message to employees that they were being penalized or disciplined for having voted for the Union. In all the circumstances of this case, I find that employees could reasonably draw such a conclusion. The key factor is Barba's conduct in failing to carry out the labor contractor's long-standing practice of providing employees with equipment. According to the uncontroverted testimony of crew member Carmen Zacharias, in response to her request for gloves approximately two weeks following the election, Barba told her that "they had taken

equipment away from him and the boys [an apparent reference to Sanchez and Diaz] weren't going to give him anymore."

Since Barba was the conduit through which employees traditionally requested and received such equipment, he would be perceived by them as speaking and acting for the labor contractor, their immediate employer, who had implemented and controlled the equipment provisions. (See, generally, I.A. of M. v. Labor Board (1940) 311 U.S. 72 [7 LRRM 282]; Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.Sd. 307.)^{2/} Barba's conduct, as Sanchez's agent, was such that it would tend to interfere, restrain and coerce employees in the exercise of their statutory right to engage in union activity and thus constitutes an independent violation of section 1153(a).^{3/}

In assigning ultimate responsibility to Respondent for the misconduct of the labor contractor, the Board is governed by

^{2/} Absent a finding that Barba is other than a rank and file employee, the applicable legal precedent holds that where an employer places a nonsupervisory employee in a position where employees could reasonably believe that the employee speaks on behalf of management, the employee's actions are attributable to the employer. (Helena Laboratories v. ALRB (5th Cir. 1977) 557 F.2d 1183 [96 LRRM 2101]; NLRB v. Broyhill Company (8th Cir. 1975) 514 F.2d 655 [89 LRRM 2203].) That principle, as particularly suited to the facts here, was approved by the Ninth Circuit Court of Appeals in NLRB v. Donkin's Inn, Inc. (1976) 532 F.2d 138 [91 LRRM 3015], cert. den. (1976) 429 U.S. 895 [93 LRRM 2512] in this manner:

The principal's manifestations giving rise to apparent authority may consist of . . . the granting of permission to the agent to perform acts under the circumstances which create in him the reputation of authority in the area in which the agent acts

^{3/} I note, parenthetically, that the remedy will be the same whether the violation is based on section 1153(c) and (a) or is deemed violative of only section 1153(a).

section 1140.4(c) which expressly excludes labor contractors from the definition of "agricultural employer" but quite clearly specifies that, "The employer engaging such labor contractor ... shall be deemed the employer for all purposes under this part," including unfair labor practices engaged in by the contractor. By virtue of section 1165.4, Respondent here may be held principally liable for the coercive effects of its labor contractor's conduct irrespective of whether Respondent had authorized or ratified the improper conduct, "in order to prevent any repetition of such activities and to remove the consequences of [such activity] upon the employees' right of self-organization, quite as much as if [Respondent] had directed them." (H. J. Heinz Co. v. Labor Board (1941) 311 U.S. 514, 521 [7 LRRM 291].)

Thus, for the foregoing reasons, I concur in my colleagues' finding that Respondent engaged in an unfair labor practice. I depart from the majority opinion only insofar as I would premise liability on section 1153(a) rather than section 1153(c) of the Act.

Dated: September 25, 1986

JYRL JAMES-MASSENGALE, Chairperson

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Baker Brothers, 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 depriving the members of the labor contractor crew supervised by Domingo Barba of the right to purchase certain equipment from the contractor because of the union sympathies and activities of the crew. The Board has told us to post and publish this Notice and to mail it to the citrus harvest employees who worked for us between March 12, 1983 and March 12, 1984. 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 forces you to do, or stops you from doing, any of the things listed above.

WE WILL reimburse those workers in the Barba crew who suffered economic losses as a result of our labor contractor's failure to allow them to purchase such equipment from him.

WE WILL assure members of the Barba crew that they have the opportunity to purchase such equipment in a manner consistent with our preelection practice.

DATED:

BAKER BROTHERS

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 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

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

BAKER BROTHERS/SUNKIST
PACKING HOUSE
(UFW)

12 ALRB No. 17
Case Nos. 83-CE-117-D,
84-CE-160-D

ALJ'S DECISION

The ALJ found that Respondent had violated the Act when its labor contractor deprived the employees in one citrus harvesting crew of the opportunity to continue purchasing work-related equipment at discount in retaliation for their having supported the United Farm Workers of America, AFL-CIO in an election which was held on March 11, 1983. (The UFW was certified by the Board as the exclusive bargaining representative of all agricultural employees of Baker Brothers on September 30, 1985, in 11 ALRB No. 23.) He dismissed all other allegations in the complaint.

BOARD'S DECISION

The Board affirmed the ALJ's Decision in its entirety and directed that Respondent assure the affected crew members that they have the opportunity to purchase equipment in a manner consistent with the preelection practice and compensate employees in the event that they incurred an increase in the cost of equipment purchased elsewhere over and above what they would otherwise have paid the labor contractor for the same equipment.

Concurring Opinion

In a separate opinion, Chairperson James-Massengale expressed agreement insofar as she also would find a violation of the Act as a result of the labor contractor's post-election failure to fill employees' requests for work-related supplies. However, unlike her colleagues, she was not persuaded that the evidence preponderated in support of finding that Respondent terminated the established past practice for discriminatory reasons in violation of Labor Code section 1153(c). She would premise liability solely on section 1153(a) on the basis of a statement to employees by the contractor's agent which indicated an end to the equipment purchase privilege. Such a statement, immediately following the election would, by an objective standard, reasonably lead employees to believe that the action was a response to their having voted for the Union. Interference, restraint or coercion of employees in the exercise of their section 1152 rights does not require a showing of unlawful motivation in order to constitute an independent violation of section 1153(a).

* * *

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

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
BAKER BROTHERS,) Case Nos. 83-CE-117-D
) 84-CE-160-D
Respondent,)
)
and)
)
UNITED FARM WORKERS OF)
AMERICA, AFL-CIO,)
)
Charging Party.)
_____)

Appearances:

Susan Adams
ALRB Delano Regional Office
for General Counsel

Carl G. Borden
Sacramento, California
for Respondent

Ned Dunphy Keene,
California for
Charging Party

Before: James Wolpman
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN, Administrative Law Judge:

This case was heard by me on March 6, 7, 8, 1985, in Visalia, California. It arose out of two charges filed against the respondent by the United Farm Workers of America, AFL-CIO (UFW). Those charges led to the issuance of a complaint which, as amended, alleged that Baker Brothers violated section 1153(a) & (c) of the Agricultural Labor Relations Act (Act) by refusing to issue equipment and by delaying the distribution of bins to one of its labor contractor crews in order to punish the crew for its union and concerted activities. In addition, the amended complaint alleged that the crew was later refused recall because of its union and concerted activities and because some of its members utilized the processes of the Agricultural Labor Relations Board, all in violation of section 1153(a), (c) & (d) of the Act. Respondent answered denying each of the allegations. During the hearing the General Counsel introduced evidence of additional incidents which, if fully litigated and proven, would constitute additional violations of the Act. One of the incidents involved working the crew in a field that was contaminated with pesticide. At the conclusion of the hearing General Counsel moved to amend the complaint to allege that this was done to penalize the crew for its union activities. I denied the motion to amend as untimely and because evidence of the incident had been introduced as background without being fully litigated.

I. JURISDICTION

Based on the admissions in its answer to the complaint, I find that the respondent is an agricultural employer, that the UFW

is a labor organization, and that the members of Domingo Barba's crew are agricultural employees, all as defined in section 1140.4 of the Act. On the same basis, I find that the charges were filed and served in a timely manner.

II. BACKGROUND FINDINGS

A. Respondent's Operation

Baker Brothers is a partnership engaged in citrus production in Tulare County. It not only grows and harvests its own citrus, but it provides harvesting services for other growers and operates a packing shed where its citrus and that of other growers is packed and shipped. The partnership has been in existence since 1960. The partners are four brothers; one brother, Leland "Hap" Baker, is the General Manager and another, Tom Baker, is the Field Supervisor.

The harvesting service which respondent operates for itself and most of the growers for whom it packs utilizes the services of a labor contractor. For the past ten years that contractor has been Conrad Sanchez. In recent years, Sanchez and his partner, Joe Diaz, have provided Baker Brothers with two harvest crews. Domingo Barba is the foreman of one and Nickolas Balderas is the foreman of the other. Barba has worked for Sanchez as a crew foreman since 1965 and has been harvesting at Baker Brothers for the past 15 years. Balderas has been a crew foreman for Sanchez since 1976 and he has been harvesting at Baker Brothers since June 29, 1981.

The two crews primarily harvest Navel and Valencia oranges. The Navel season runs from November through March, and the Valencia

season runs from April through October. In 1981 the Barba crew worked 188 days for Baker Brothers while the Balderas crew worked only 30 days. In 1982 the Barba crew worked 152 days while Balderas crew worked only 35 days. However, in 1983 (January 1 to October 29) the Barba crew worked 124 days and the Balderas crew worked 137 days. (G.C. Ex. 3.) During most of this 3 year period there were 30 to 35 workers in each crew. Because oranges need not be harvested as soon as they ripen, crew utilization is more dependent on the condition of the market than the maturity of the crop. However, the operation of normal market forces is circumscribed by Marketing Orders which allocate to each handler a pro rata share of Navel and Valencia production for domestic consumption which may not be exceeded.

The groves in which the crews work are scattered about the packing shed at an average distance of 10 miles. The determination of which groves are to be harvested is made by the shed each evening for the following day. Normally, Tom Baker contacts Conrad Sanchez, and Sanchez, in turn, calls his foremen who then notify their crews of locations and starting times. Work begins early in the morning during the summer so as to avoid the afternoon heat and late in the morning during winter so as to avoid the damp morning fog. Tom Baker also arranges for bins to be trucked to and distributed within the groves so that work can begin promptly and so that each crew will have enough bins on hand to handle its daily pick. Workers are paid a piece rate based on the number of bins they fill each day.

A good picker gives the shed its money's worth by providing a full bin, but no more; overfilling results in fruit being crushed

when the bins are later stacked. Oranges which will be sold whole must be picked so as to avoid decay. Pulling the orange from the tree is bad because if the stem is tight, meat may be torn away from the fruit resulting in decay. Leaving a stem on the fruit is bad because it may pierce other fruit in the bin causing it to decay.

B. The Union Organizational Drive and Election

A union certification election was conducted among the employees of the respondent and its labor contractor on March 11, 1983. Fifty-nine names appeared on the eligibility list; 51 workers voted for the UFW, and 8 voted for no union. Fourteen workers voted subject to challenge (13 of them because their names were not on the list).^{1/}

The dissatisfaction which led to the UFWs organizational drive and its pronounced success in the election began in Domingo Barba's crew. Crew members were unhappy with the uncertainty of the piece rate, the inadequacy of toilet and clean-up facilities, the demand that bins be filled fuller, and the delays experienced in being informed of daily locations and starting times. As a result, crew member Jose Zacarias contacted Barbara Considine of the UFW, and he and his wife, Carmen, met with her in their home to discuss union representation. Considine went on to hold 3 or 4 meetings at the Zacarias¹ home with members of both of the contractor crews. A majority of the Barba crew and a third of the Balderas crew attended. A negotiating/grievance committee made up of three

1. Pursuant to the stipulation of the parties (I : 8 ; II : 50) , I have taken administrative notice of the election proceedings in 83-RC-2-D, including the Tally of Ballots and Challenge List. (I : 8 ; II : 50 .)

members of the Barba crew and two members of the Balderas crew was established. On March 4, 1983, Considine filed a Notice of Intent to Organize, a Notice to take Access, and a Petition for Certification. She then began to visit the crews in the groves where they worked. On her first visit Barba questioned her right to be there, but relented under pressure from the crew. During this and in later visits she spoke with workers and handed out UFW authorization cards and buttons. A majority of the Barba crew began wearing the buttons. She also led the crew in a "union clap" -- clapping slowly and continuously in unison at an increasing rate. Barba was the only supervisor present during Considine's visits.

Baker Brothers retained the Farm Employers Labor Service to help persuade workers to vote against the UFW. Two of the Service's labor consultants, accompanied by Joe Diaz, visited the Barba crew and explained that their employer was concerned for their welfare and wanted to do well by them. When the consultants told the workers that they already had a good medical plan, the Zacarias challenged them, saying that they were unaware of any medical coverage. The consultants said they would be back later that day with specific information. A few days later, they returned with identification cards for some crew members. They also produced a "Explanation of Benefits" form indicating that the plan had paid for chiropractic services rendered to Jose Zacarias in 1978. Zacarias told them that he did not recall the claim.

In the pay envelope distributed to each worker just before the election was a sheet with a drawing of a vulture -- a parody of the UFW eagle -- and a statement that the UFW would take 2% of each

employee's earnings if it were successful.

A number of members of the Barba crew attended the pre-election conference, and a lesser, but still significant number attended from the Balderas crew. (I : 15 .) Hap Baker attended for the respondent.

C. Further Union and Concerted Activity; Involvement in ALRB Processes

In May 1983, a few months after the election, a dozen or so members of the Barba crew went to Sanchez' office to complain about discrepancies between the hours they actually worked and those appearing on their paychecks as having been worked for the purpose of qualifying for medical coverage. Carmen Zacarias acted as spokesperson in relaying the crew's concern to Sanchez¹ bookkeeper, Audrey Lugo, who was responsible for preparing the payroll and calculating hours worked. About the same time, Carmen also complained to Tom Baker that the crew frequently had to wait to begin work because bins arrived late at the groves.

Early in 1984 members of the Barba crew started once again wearing union buttons and hats on the job; and, in February, the crew staged a demonstration of their support for the union by placing UFW flags on their cars. Hap Baker was present at the time, and Sanchez drove by while the demonstration was in progress.

Late in February, Aureliano Rodriguez filed a charge with the ALRB Regional Office in Delano alleging that the respondent was discriminating against the crew by "dividing the work in a fashion that favored another crew which is made up of non-union supporters." The charge was eventually dismissed for failure of proof. [G . C . Ex. 2 .]

In October 1984, a group from the Barba crew twice visited the packing shed to express their concern over not being recalled from layoff. During their second visit they spoke with Hap Baker. The crew was recalled a few days later. In December 1984, about 10 crew members attended the ALRB hearing on the election objections, but none testified.^{2/}

D. The Respondent's Attitude Toward Unionization

Hap Baker freely acknowledged his awareness of the pro-union sympathies of the workers, but when questioned about which crew was the more active, answered:

I don't know one of those guys from another. I don't know who's the most -- they both voted about the same way. . . [t]hey were both union crews. (II:50-51.)

He appears to have told the crew members who met with him in October 1984, that the shed had lost some growers as a result of the union drive, and he acknowledged that, "[A] lot of growers [for whom Baker Brothers harvested, packed and shipped] didn't like the union. . . . [T]hat's no secret." (II:53.) As noted earlier, Baker Brothers hired a firm of labor consultants in the hope of defeating the union.

Barba likewise acknowledged that his crew was very pro-union at the time of the election. (II:3.)

More revealing of the respondent's attitude toward unionization was the increase it made in the piece rate the week before the election. Up until then, it had been paying a variable

2. These last two incidents occurred after the alleged unfair labor practices, and so could not have been motivating factors.

rate ranging from \$9 per bin in good groves (ones with alot of big oranges) to \$11 per bin in bad groves (one with few, small oranges). (I:21-22, 66.) A week before the election this was increased to a constant \$10 per bin. (I:21-22, 56.) An examination of the payroll records for the two months preceeding the change discloses that the \$10 rate was indeed an increase and not simply an averaging of the variable rates. (G.C. Ex. 3.) Hap Baker testified that he knew of no particular reason why the increase was given, other than that the \$10 rate had become common throughout the area. (II:35-36.)

An increase in wages during a union organizational campaign carries with it a strong inference that the increase came in response to the campaign and was not, as Baker claimed, simply a way of staying abreast of area standards. (Mission Packing Company, Inc. (1982) 8 ALRB No. 14; Alpine Produce (1983) 9 ALRB No. 12 (p. 2 & ALJD pp. 18-19).) To overcome such an inference, a respondent must demonstrate that the increase comported with its customary practice of making periodic wage adjustments, or that it came as a result of a real business necessity. (Karahadian Ranches, Inc. (1979) 5 ALRB No. 37, aff'd on other grounds 38 Cal.3d 1.) Hap Baker's explanation falls short of either justification, and so the increase can be considered as an indication of respondent's background animus towards unionization.^{3/}

3. Had the increase been charged in the complaint or fully litigated at the hearing, a violation of the Act would have been found. That it was neither charged nor fully litigated does not, however, preclude its consideration as background. (Holtville Farms (1981) 7 ALRB No- 15; Julius Goldman's Egg City (1980) 8 ALRB No. 61.)

III. THE FAILURE TO PROVIDE EQUIPMENT

A. Findings of Fact.

For some time Sanchez had maintained a store of gloves, clippers, protective sleeves and picking sacks which crew members could purchase for cash or, more often, by payroll deduction. (I:26-27.) Usually, they would let their foreman know what they needed; then, on his next trip to the office, he would obtain it from the bookkeeper, Audrey Lugo, and provide it to requesting workers, noting the amounts to be deducted from their paychecks on his time records. The procedure was convenient for the workers, and the prices were less than they would pay elsewhere.^{4/}

Immediately after the election, members of the Barba crew were no longer able to obtain equipment in this manner (G.C. Ex 3; I:26-27, 58, 101); instead, they had to purchase it elsewhere on their own time and at additional expense. (I:60-61, 101.)

The General Counsel maintains that the existing arrangement was terminated in swift retaliation for the crew's union sympathy and vote. The respondent acknowledges that crew members no longer received equipment, but attributes it to an unfortunate misunderstanding between Barba and Lugo which supposedly occurred shortly after the election when he asked her for gloves and was told

4. The Table below compares the cost of equipment supplied by Sanchez with its cost when purchased elsewhere:

<u>Item</u>	<u>Sanchez' Price</u>	<u>Price Elsewhere</u>
Gloves	\$1.00	\$1.19 - \$1.39
Sleeves	\$4.50	\$6.00
Clippers	\$8.50	\$11.00 - \$11.50
Sacks	\$16.00 - \$18.00	\$27.00 - \$27.50

that there were no more, meaning that she was temporarily out; he misunderstood and thought she meant that gloves and other equipment would no longer be provided.

B. Analysis and Further Findings of Fact

Respondent's "unfortunate misunderstanding" explanation looks neat enough, but, for a number of reasons, does not wear well.

First of all, there are real problems with Barba's testimony. When called by the General Counsel as an adverse witness, he began by admitting that Sanchez had told him to stop issuing equipment.

(II:4.) He was then asked whether he had admitted to workers that it was done to punish the crew. He denied ever saying that, but added, "We all thought that [was the reason]." ^{5/} (II:7.) Then, in his first, hasty about-face, he denied believing that the crew's pro-union sympathies had anything to do with it. (II:9.) Shortly afterwards, he again reversed earlier testimony and denied that Sanchez had told him that there would be no more equipment. (II:9.) He went on to say that even though the crew repeatedly pressed him, he had not pursued the matter with Sanchez and had never sought an explanation. (II:9.) Under examination by respondent's counsel, he went further still and said that he had never spoken with Sanchez, but had relied entirely upon Lugo's statement that, "There was no longer any more." (II:24.) When asked whether he understood her to mean "for that particular

5. This statement was properly objected to as outside his personal knowledge; it is utilized here only as evidence of his propensity to say one thing, one minute and something contrary the next. It is also revealing of the extent to which he lacked "insider" status with Sanchez. (See infra, pp. 18-19.)

time or forever more," he answered:

She told me that there was no more. That's it. I didn't know if that was for all or what. (II:27.)

But then he testified:

Well, she no longer told me that there was any, so I figured it was forever. (II:28.)

After studying Barba's testimony in the transcript and having observed his demeanor while giving it, I am impelled to conclude that he was vainly striving to present a "line" which he did not fully comprehend, and so could only stumble through. I believe neither him nor it, and I accept Carmen Zacarias' testimony that he admitted to her that Sanchez had told him that equipment would no longer be made available to the crew. (I:27.)

Respondent's "unfortunate misunderstanding" explanation also leaves unexplained a similar change which occurred later on in the other crew. The payroll records -- the best indicator of what happened and when it happened -- show that Balderas' crew continued to obtain pay advances against equipment purchases up until the week ending June 4, 1983, at which point they ceased. (G.C. Ex 3.) Neither Balderas, nor Lugo, nor Sanchez offered any coherent explanation for the sudden halt. The best Balderas could come up with was: "Well, they just ask for it very seldom." (II:91.) Lugo said only: "They haven't been in for quite awhile. I'm not sure how long its been." (III:38.)

Given the convenience and financial savings of purchasing through Sanchez, I cannot believe that the crew simply lost interest in the arrangement. The more persuasive explanation is the General Counsel's; namely, that Balderas' equipment was cut off as a result

of the crew's concerted refusal to pick a grove in April or May. (I:67-69; G.C.'s Post Hearing Brief, p. 10.) The parallel between that and sudden cut off of equipment after the election to the more active Barba crew is obvious.

Furthermore, a witness false in one part of his or her testimony is to be distrusted in others. (BAJI (6th ed.) No. 2.22.) Because I do not accept Lugo's testimony as to what happened with Balderas, I discredit her related testimony about Barba, and the same is true of Sanchez.^{6/}

Hap Baker denied instructing anyone to refuse to provide equipment to the crews (II:44-45), and I have no reason to doubt him. The equipment arrangement was between contractor and crew. There was no reason for Baker to be involved or informed. Baker Brothers' fault, therefore, is confined to the vicarious responsibility which, under the provisions of our Act, is ascribed to employers for the conduct of their contractors. (Labor code section 1140.4(c).)

C. Conclusions of Law

The convenience and savings available to crew members by purchasing their equipment from Sanchez is a significant term or condition of employment, such that its discriminatory elimination would constitute a violation of the Act. (See: Continental Sales Company (1966) 158 NLRB 1163, 1167-68.) For the elimination to be discriminatory, the General Counsel must establish that: (1) the crew had been involved in union activity; (2) that respondent was

6. Furthermore, Sanchez' demeanor did not impress me. He was guarded, dismissive and, at times, evasive in his testimony.

aware of its involvement; and (3) that there was a causal connection between the elimination of equipment and the union activity of the crew. (Lawrence Scarrone (1981) 7 ALRB No. 13; Jackson and Perkins Rose Company (1979) 5 ALRB No. 20.)

Here, there is no question that the crew had supported the UFW during the election campaign or that the employer was aware of its support. Respondent concedes this, but argues that both crews were active, so that treating one differently than the other would be inconsistent with an anti-union motive. However, there is evidence that Barba's was somewhat more active and that Sanchez, if not Baker, knew it. Then, too, Balderas' crew did not go unscathed; eventually, it too was deprived of equipment, and for an equally illegitimate reason.^{7/}

As for the causal connection between the crew's union activity and the elimination of equipment, there are a number of factors which go to establish it: First is the timing, coming as it did on the heels of the election. Second is respondent's anti-union stance during the campaign, particularly its increase in the piece rate. Third is the absence of any justification which can stand up to careful scrutiny; respondent's "unfortunate misunderstanding" explanation is, for reasons already explained, unacceptable.

I therefore conclude that respondent violated section 1153(c), and derivatively section 1153(a), by terminating the practice of offering equipment for sale to the members of the Barba

7. The failure to provide equipment to the Balderas crew was neither alleged in the complaint or fully litigated during the hearing. It can therefore be used only to establish background animus. (Holtville Farms, supra; Julius Goldman's Egg City, supra.)

crew.^{8/}

IV. DELAYS IN THE DISTRIBUTION OF BINS

The complaint alleges that respondent intentionally delayed the distribution of the bins used by the Barba crew to penalize the crew for its pro-union stance. (G.C. Ex. 1C, paras. 7 & 10.)

Delay in bin distribution means not only that workers must wait to begin work in the morning, but also affects them later in the day: In summer they must continue working on into the hot afternoon (I:28, 101); in winter, when shifts start late to avoid morning fogs, night may fall before they can achieve an adequate pick. (I:62-63.) The adverse consequences of late bin deliveries are not only confined to workers; the packing shed also suffers if crews pick less fruit than anticipated.

The shed, not the contractor, arranges for the bins to be delivered to the groves it has designated for picking. (II:45.) Since 1981 or 1982, Tom Baker's son, Bobby, has driven the truck which delivers the bins to the groves. (II:94.) A second truck had been in service, but its driver left Baker Brothers in Spring 1984, and was not replaced. (II:99.) Since then, Bobby Baker -- with his father occasionally driving the second truck -- has handled all bin deliveries. (II:99.)

The groves are scattered around the shed, the furthest is 30 miles away and the average is 10 miles. (II:97.) An average

8. Should the UFW prevail in the pending objections case in 83-RC-2-D, this unilateral change, as well as those described in VI(F) and (G), might violate section 1153(e). (See W.G. Pack Jr. (1984) 10 ALRB No. 22.) However, because the matters were not consolidated, no consideration can here be given to those possible violations.

delivery takes about an hour -- 10 to 15 minutes to load up at the shed, 15 to 20 minutes to drive to the grove and another 20 minutes to distribute the bins about the grove. (II:97.) No attempt is made to even out delivery times. Instead, nearby groves are served first, and distant ones last; that way the dead time spent returning to the shed for more bins is kept shorter early in the day. (II:45, 94-95.)

According to Carmen Zacarias, before the election workers seldom had to wait for bins, and then no more than 15 minutes or so; but since the election, bins have been arriving late most of the time and workers have frequently waited 1½ to 2 hours. (I:23, 27-28.) Her husband and Aureliano Rodriguez testified in a similar vein. (I:62, 101.) In May 1983, she testified that she spoke to Tom Baker about the problem and matters improved for two months but then deteriorated. (I:28-29.) Carmen also testified that Barba told her: "Well, I guess they're punishing you." (I:29.) He denied the statement (II:32), but did say that the likelihood of bins arriving late had increased since the election. (II:4.) Bobby Baker testified that workers occasionally had to wait, but not for long. (II:95-96.) He also conceded that delays have been more frequent since the second driver left. (II:99.) He denied ever being instructed to delay bin deliveries (II:100), and Hap Baker likewise denied instructing anyone to engage in such delays. (II:45.)

In situations like this, where discrimination is alleged to have arisen out of a course of conduct spanning a significant period of time and involving a large number of occurrences, no one of which

is especially significant, it is dangerous to rely too heavily on the overall impressions of witnesses. (See Mike Yurosek & Sons, Inc. (1982) 8 ALRB No. 37, ALJD p. 4.) Their impressions are too easily clouded or distorted by subjective feelings and personal biases. For this reason, such testimony is -- absent some sort of objective corroboration -- suspect. And that especially so where, as here, the alleged pattern should manifest itself in production and time records, but does not.

The General Counsel introduced weekly payroll summaries covering the periods from December 28, 1982 through June 24, 1983, and from January 5, 1984 through June 12, 1984. (G.C. Exs. 3 & 4.) These summaries show, for each shift, the starting and quitting time, the number of bins harvested, and the number of persons at work in the crew. Had the timing of the distribution of bins undergone the dramatic change described by Rodriguez and the Zacariases, one would expect it to be reflected in the Weekly Summaries in terms of later starting times and decreased production (because of the late starts), but it is not. When starting times from December 28, 1982 to March 5, 1983 (the day after the Petition for election was filed) are compared with starting times for a seasonally analogous period after the election -- January 5 to March 2, 1984 -- it turns out that, by and large, shifts began later before the election than after; just the opposite of what one would expect if bin deliveries had been delayed after the election.

It may be, however, that the starting times listed in the Summaries commence not when work actually began (i.e., after the late arrival of the bins), but when, workers were ready to start (but

could not because the bins had not yet arrived). If that is so, one would expect workers to have a lower per hour productivity during the post election period than they had during the pre-election period (due to the time wasted waiting). But, in fact, productivity per hour per employee was greater in the first three months of 1984 than in the three months which preceded the election.

There are, of course, any number of possible extraneous factors which could distort the above comparisons -- variations in groves, different weather conditions in 1983 than in 1984, and so on. The point of the comparisons, however, is not to prove that bins were distributed in a timely fashion after the election, but to demonstrate that there is no objective corroboration for the workers' impressions that they were delayed. Without that corroboration, or some other kind of reliable evidence, there is insufficient proof to establish the existence of the alleged discriminatory pattern.

An admission by a knowledgeable supervisor that bin deliveries had been delayed to punish workers could fill that gap. But Barba's "guess" that "they're punishing you" (I : 29) cannot be taken as anything more than his own, unsubstantiated belief. His earlier testimony that, "We all thought [that equipment was denied the crew because it was pro-union]" (I I : 7) , is revealing in this regard. Note that he uses "we" in the sense of "we, the crew", not "we, the management". He was an outsider, as much in the dark as the crew; and so his suspicions and beliefs have no more probative value than theirs.

The closest thing to objective corroboration is the decline

in productivity per employee per hour during April, May and June 1983. There are no figures for July through December, but by 1984 it had once again risen. The decline is consistent with Carmen Zacarias' testimony that bins came late after the election, taut the 1984 increase fails to substantiate her claim that the situation deteriorated again after the improvement which followed her conversation with Tom Baker in May. Rather, it tends to indicate that Respondent took her complaint to heart and succeeded in ameliorating the problem, thus demonstrating a receptivity to worker criticism at odds with any alleged causal connection between protected activity and discriminatory treatment. (See Hansen Farms (1981) 7 ALRB No. 2, p. 11.)

I conclude, therefore, that General Counsel has failed to establish that respondent deliberately slowed the distribution of bins to the Barba crew in order to punish the crew for its union sympathies and activities. I therefore recommend that paragraph 7 and the applicable portion of paragraph 10 of the complaint be dismissed.

V. THE FAILURE TO RECALL THE BARBA CREW

A. Introductory Findings and Positions of the Parties

Both crews were laid off June 2, 1984. The Balderas crew was recalled to work August 3, but the Barba crew was not. It continued on layoff status until October 27, 1984, when it, too, was recalled.

The General Counsel and the Charging Party contend that Respondent held off recalling the crew because of the union sympathies and protected activities of its members and because one

of them filed a charge with the ALRB over the treatment of the crew. In support of its contention, General Counsel points out that Baker Brothers began using the Barba crew 12 years before the Balderas crew and that the Barba crew was utilized much more frequently than the Balderas crew during the two years preceding the election.

For its part, the respondent contends that due to a down turn in the market there was not enough work for both crews, and that Hap Baker chose the Balderas crew for recall because there had been a recent history of problems with the quality of the Barba crew's pick: fruit improperly pulled, stems left on, and bins not filled to capacity. (II:49.)

In pursuing its contention that the failure to recall was discriminatory, the General Counsel takes two, distinct tacks, either of which, if accepted, would be indicative of a violation. The first is to argue that there was no valid reason for not recalling both crews in August. The second is to maintain that, even if only one crew was needed, that crew should have been Barba's and not Balderas'.

B. The Need for Only One Crew

Resolution of General Counsel's first approach turns on the economics of the Valencia harvest. Hap Baker testified that the 1984 Valencia season (April through October) started well, but demand dropped substantially in June and July and did not recover. In his words, "The market died . . . and never came back." (II:71.) His testimony is confirmed by the Payroll Summaries for April and May 1984, and by the Contractor's Daily Time Sheets from August through October. (G.C. Ex 4; Resp. Exs. K & L.) In April and May

7,428 bins were harvested as compared with 6,248 bins the previous year; while, from August through October, only 3,519 bins were picked, far less than the 7,724 bins picked during the same period in 1983. (Compare G.C. Ex 4 and Resp. Exs K & L, with G.C. Ex. 3 and Resp. Exs. I & J.)^{9/}

To suggest that Baker Brothers deliberately curtailed production in August to rid itself of a pro-union crew ignores financial reality. Had the market been strong, respondent would have been foolish not to take advantage of it. I do not believe that Respondent bit its nose to spite its face.

Nor is there anything unusual in cutting back to a single crew. It had been done in both 1981 and 1982, and for longer periods of time. (I:4-5.) Furthermore, Hap Baker's testimony that the shed had lost growers and, consequently, had less fruit to harvest went uncontradicted. (II:65.)

General Counsel's alternative suggestion that the smaller amount of work should have been spread equally among the two crews not only ignores the practice in previous years, but involves "second guessing" management in an area where it has legitimate discretion.

I therefore conclude that there was good reason to recall only one contractor crew for the period from August to October 1984.

9. In other testimony he stated that there was a 40% drop in Valencia production. (II:48.) While this may be true of production covered by the Valencia Marketing Order, the Order does not apply to production for export. (See Resp. Exs. B & C; II:63.) When that is taken into account, the overall drop was 33%; however, it must be remembered that the 33% came in the form of a 19% increase followed by a 54% decrease; and the period in question occurred during the decrease. (See: Resp Exs. I, J, K & L.)

C. The Choice of the Balderas Crew over the Barba Crew
for Recall

The General Counsel points to two factors which suggest that the Barba crew had reason to expect precedence in the August 1984 recall: First, it had been working at Baker Brothers for 15 years, compared to three years for the Balderas crew. (II:3, 66 & 84; III:1.) Second, in 1981 and 1982, it had worked 188 and 152 shifts, respectively, as compared with 30 and 35 shifts for the Balderas crew. (I:4-5.)

There was, however, no announced policy of according precedence to the crew with the longer work history; and, in 1983, when there was enough work to keep both crews busy, the Balderas crew achieved parity with the Barba crew in work assignments: It received 92 shifts from January to June and 42 shifts from August to October, while the Barba crew received 82 and 42 shifts during the same periods.^{10/} (G.C. Ex 3; Resp. Ex. I & J.)

Then, too, there was the long time lapse between the election and the failure to recall -- a full year and a half. General Counsel points out that the period was not entirely barren of union and concerted activity and that, throughout, the outcome of the election remained uncertain. (See: Pages 7 & 8, supra, and Proceedings in Case No. 83-RC-2-D.) Still and all, the passage of so much time between the critical period of protected activity and the alleged discrimination does serve to weaken the inference of a

10. Moreover, this parity had begun to take shape even before the election campaign. Between December 28 and March 5, Barba had put in 28 shifts and Balderas 35. (G.C. Ex. 3.)

causal connection between the two.^{11/}

Respondent points out another, even more serious difficulty with the General Counsel's theory. Here -- unlike the failure to provide equipment or the alleged delay in bin deliveries -- one crew's loss was the other crew's gain. Given that trade-off, the General Counsel's theory makes sense only to the extent that the advantaged crew is non- or anti-union and the disadvantaged crew is pro-union; it explains little or nothing where both have a pro-union orientation.

Here, both crews were active in the campaign, and both must have voted overwhelmingly for the UFW in the election. During the post-election period, there is a definite problem in comparing the two crews because, although General Counsel introduced evidence of the union and protected activity of the Barba crew during that period, it failed to carry its burden of proving a comparative lack of post-election activity on the part of the Balderas crew. Without that proof, it is impossible to find a disparate level of post-election activity. That being so, that only distinction that can legitimately be made between the crews during the long hiatus between the election and the failure to recall is the filing of an unfair labor practice charge in February 1984 by Aureliano Rodriguez alleging discrimination in the assignment of work to the Barba crew.

11. The General Counsel cites Sahara Packing Company (1979) 4 ALRB No. 40. There an inference of discrimination was drawn despite a nine-month hiatus between the union activity and the failure to rehire. The theory was that not until the beginning of the next harvest was the employer in a position to act without the certainty of being caught. Here, the period was twice as long--13 months--and there were three intervening seasons. Because of this, the inference is that much weaker.

(G.C. Ex. 2.) That, taken together with the slight edge the crew had in pre-election union activity, permits, at best, only a weak inference of a causal connection between the union sympathies of the Barba crew and its failure to be recalled. The same is true of any alleged link between the unfair labor practice charge and the recall. (Bruce Church; Inc. (1983) 9 ALRB No. 75.)

In summary, the long hiatus between the election and the failure to recall, the absence of any avowed policy of according precedence in recall to the senior crew, the parity which the Balderas crew achieved in work assignments during 1983, and the failure to prove a lack of post-election union activity by the Balderas crew all serve to undermine inferences which might have been drawn from the Barba crew's longer work record, the preference it enjoyed in 1981 and 1982, and the employer's conduct during the 1983 election campaign.^{12/}

Given the state of the evidence, the only way for the General Counsel to satisfy its burden of proving a causal connection would be to demonstrate that Respondent's asserted justification for the failure to recall was false and pretextual, thereby giving rise to the inference of an undisclosed, forbidden motive. (Dyer v.

12. I do not rely on the failure to supply equipment as a basis for inferring illegal motivation because that failure is attributable to Baker Brothers solely under the provision for vicarious liability in Labor Code section 1140.4(c). It would therefore be improper to treat it as an actual motivating force in a separate allegation in which the culpable contractor played no role.

Nor do I rely on the statement which Jose Zacarias attributes "to Barba -- "I think they're punishing us." (I:76.) It is subject to the same criticism as his earlier "guess" that the crew was deprived of equipment to punish it. (See page 18, supra.)

MacDougall (2d Cir. 1952) 201 F.2d 265, 269; A to Z Portion Meats Inc. (1978) 238 NLRB 1099; First National Bank of Pueblo (1979) 240 NLRB 184.)

The case therefore turns on the legitimacy of the claim that the Barfoa crew was inferior to the Balderas crew -- that it pulled more fruit, left more stems, and underfilled more bins. The testimony is, as one would expect, contradictory. The crew members who testified on the issue both maintained that the crew picked well and filled its bins,^{13/} and that they personally had never been disciplined or reprimanded for poor work. (I:29-30, 35-36, 78.) Sanchez, Diaz, and Baker all testified to repeated problems with the crew and to the comparative superiority of the Balderas crew. (II:49, 114-115, 121-122.)

The testimony on both sides suffers from the same defect as that concerned with the delay in bin deliveries. Most of it comes in the form of overall impressions purportedly derived from a large number of individual incidents; as such, it is easily distorted by bias and self-interest. Some testimony, however, is more concrete. One member of the Barba crew was discharged for poor work (I:36, 80), and Jose Zacarias described a specific incident which took place after the crew's recall in October 1984 in which Tom Baker confronted the crew with improperly picked oranges. (I:79.)^{14/}

13. They admitted being directed to put more fruit in each bin, but contended that was a request to "overfill." I cannot accept their contention because overfilling would not be in the respondent's interest; it results in crushed fruit.

14. Since it happened after the August layoff, it could not have been a motivating factor; it is, however, indicative of earlier problems with the crew.

Beyond that, there is the testimony of Domingo Barba. As crew foreman he was best situated to observe and judge the work of his crew. For him to debunk its performance would be to concede his own shortcomings as a supervisor; while to praise its work too highly would be to flout his superiors. These conflicting pressures, I believe, serve to moderate his testimony and make it more reliable than that of the other witnesses.^{15/}

What emerges is this: (1) From time to time, there had been problems with the crew's work, and Tom Baker had brought them to his attention. (II:4, 16.) (2) He believed that crew members did "the best they could". (II:4.) (3) Overall, he thought they were "good workers", but there were individual problems, for instance, the one with Jose Zacarias' sister-in-law, Guadalupe. (II:3, 6.)

But, the issue here is not so much whether the Barba crew did good, bad or indifferent work, as it is whether the crew's work was better or worse than that of the Balderas crew. The testimony comparing the two crews comes entirely from respondent's witnesses, is almost entirely impressionistic,^{16/} and, as one would expect, uniformly favors Balderas. But that is all there is. Since the burden of establishing that the Balderas crew was inferior to the

15. These countervailing forces were not at play in the testimony which he gave and I discredited about providing the crew with equipment.

16. The one exception being the instance when Balderas had to repick a grove in 1984. (II:121.) Balderas, however, accounted for this by explaining that he had to return to the grove because the ladders he had originally used were not long enough to pick the tops of the trees. (II:92.) His explanation was not rebutted.

Barba crew is -- at this juncture -- with the General Counsel,^{17/} I cannot find that the respondent's proffered justification for the failure to recall was false. Without such a finding there is, as I said earlier, no prima facie case.

I therefore conclude that General Counsel has failed to prove that the failure to recall the Barba crew in August 1984 was due to its union or protected activity or to the filing of an unfair labor practice charge on its behalf in February 1984. I therefore recommend that paragraphs 9 and 11 of the complaint be dismissed.

VI. CONDUCT NOT ALLEGED IN THE COMPLAINT

During the course of the hearing, evidence was introduced of other possible violations on the part of respondent. None of the violations had been alleged in the complaint and, with one exception, no attempt was made to amend it to include them. The failure to do so does not, however, preclude finding a violation so long as the underlying conduct was fully litigated and proven at hearing. (George A. Lucas & Sons (1981) 7 ALRB No. 47.) Furthermore, even without being fully litigated, the conduct could be used to establish background animus. (Holtville Farms, supra; Julius Goldman's Egg city, supra.) It is therefore necessary to

17. The situation would be otherwise if the General Counsel had made out a prima facie case, and the crew's poor work record were presented by way of defense. (N.L.R.B. v. Transportation Management Corp. (1983) 459 U.S. 1014; Wright Line, Inc. (1980) 251 NLRB 1083; Royal packing Company (1982) 8 ALRB No. 74.) Here, however, inquiry into the legitimacy of the respondent's justification was initiated as the one remaining possibility for making out a causal connection. The idea being that had the General Counsel succeeded in proving that the Respondent lied about its motive, that lie would have been enough to infer an undisclosed and prohibited motive. (Dyer v. MacDougall, supra.)

consider each incident.

A. The Granting of a Medical Plan During the Election Campaign

Based on the evidence presented, particularly the December 14, 1982 letter from the Trust Fund (Resp. Ex. E) and the monthly Statement submitted to the Fund dated January 1, 1983 (Resp. Ex. D), I am satisfied that the Medical Plan was in place before the election campaign began. Nor do I have reason to doubt the testimony of Audrey Lugo and others that it had been in existence for a number of years. (III:7.) That being so, there can be no finding that it was adopted in response to the UFW¹'s organizational efforts.

B. Delays in Notifying Members of the Barba Crew of their Work Assignments

Carmen Zacarias testified on direct examination that, before the election, crew members were notified of their next assignment either the night before or early the following morning; whereas, after the election, they were frequently not contacted until much later in the morning, thus creating problems similar to those caused by the late delivery of bins. (I:24.) On cross-examination, however, she conceded that the problem had begun a month before the election and was, it would appear, one of the matters she discussed with the UFW organizer during their first, private meeting. (I:38-39.)

Given that sequence of events, there can be no finding that the respondent or its contractor was aware of union activity at the time of the change or that the change came in response to it. Absent such a showing, there is no basis for finding either a

violation or for establishing background animus.

C. Providing the Barba Crew with Fewer Bins

Aureliano Rodriguez, while testifying about delays in bin delivery, also indicated that after the election only 60 to 80 bins would be delivered to a grove, as compared to 80 to 100 bins before the election. (I:102.)

His testimony is, if anything, more impressionistic than that concerned with the late delivery of bins. Because it lacks corroboration and because there is no evidence of what, if any, impact the delivery of fewer bins had on the crew, it cannot furnish a basis for the finding of a violation; nor can it be used to establish background animus.

D. Giving the Barba Crew Less Good Groves to Pick

Jose Zacarias testified that toward the end of 1983 and throughout 1984, the crew received more bad groves -- ones with less and smaller oranges -- to pick. (I:67, 86.)

Again, there is no corroboration for his testimony. In fact, the Payroll Summaries indicate that the crew picked more oranges per employee per hour in the first 3 months of 1984 than it did during the same period before the election. (Compare G.C. Ex. 3 with G.C. Ex. 4.) Consequently, there is no basis for finding a violation, or for the using of his testimony to establish background animus.

E. Assigning the Barba Crew to a Contaminated Field

The Zacariases both testified that in June 1983 their crew was assigned to pick a grove which had recently been sprayed with a pesticide. (I:25, 70-71.) As a result, a number of crew members

developed burns and rashes. (I:32, 70.) They were examined and treated at the Woodlake Family Clinic. (I:25-26, 43.) Carmen filed a Workers Compensation claim, but her rash had cleared up by then and so nothing appears to have come of it. (I:43-44.) Hap Baker testified that the Tulare County Agricultural Commissioner looked into the matter but found no violation of law. (II:38-39.)

A claim that workers were deliberately assigned to a contaminated area is quite serious; it amounts to the accusation of the commission of a felony. When this was pointed out at hearing, the General Counsel indicated that the incident was being introduced only as background, but that the complaint might later be amended to include it. (I:44-45.) It was not until the close of hearing that an oral motion to amend was made. (III:50.) I denied it based on my view that general counsel had introduced the incident as background and the respondent had defended on that basis and chosen, for instance, not to call witnesses from the County Agriculture Commission. (III:50-52.)

Aside from the fairness/due process considerations which led to my ruling, there is, on the merits, insufficient evidence to establish a causal nexus between the union activity of the crew and its assignment to work in a contaminated grove. The assignment was unfortunate and regrettable, but there exists no adequate basis upon which to conclude that it was deliberate.

F. Reducing the Size of the Barba Crew

Prior to the election and extending back for a considerable period, the average size of each crew was about 30 workers. Both crews maintained that complement through June 1983. (G.C. Ex. 3.)

However, by January 1984 and continuing on through June of that year, the crews had been reduced to a point where Barba's averaged 19 members and Balderas', 26. (G.C. Ex. 4.) By October 24, 1984, the Barba crew had been reduced to 13 and the Balderas crew to 23. (III:1.)

There are two possible explanations for the disparity which developed in the size of the crews: (1) Sanchez told both foremen not to hire additional workers, and normal attrition had a more pronounced effect on the Barba crew than on the Balderas crew; or (2) Sanchez told Balderas to maintain his crew at 25 (even if that meant hiring new workers), but told Barba not to hire replacements for those who left his crew.

The first possibility would not support an inference of discrimination because there is no disparate treatment and because there is some legitimacy to Sanchez and Baker's claims that smaller crews are more economical. (II:49, 106.) It does conflict with Sanchez' testimony that he told both foremen to keep their crews at 25 (II:106), but it is consistent with Barba's testimony that he was told not to replace those who left. (II:15.) Unfortunately, Balderas was not questioned about the matter.

The second possibility would be suspect; especially given Sanchez' prior conduct in depriving the Barba crew of the right to purchase equipment. However, by June 1983, the Balderas crew was also in disfavor with Sanchez, and had likewise been deprived of the right to purchase equipment. (Supra, p. 12-13.)

The state of the evidence is such that it is not possible to say that one explanation is more plausible than the other. That

being so, there can be no finding of a violation or of background animus because, when a guilty inference is equally balanced by an innocent one, there is no preponderance of the evidence.

G. Instructing Balderas Not to Hire Members of the Barba Crew

Aureliano Rodriguez testified that Balderas told him Sanchez had instructed him not to hire members of the Barba crew. (I:104-105.) Balderas denied being so instructed. (I:104-105.)

Assuming the statement to have been made, it can be read either as a corollary of the instruction not to hire any more replacements (i . e . , if he could hire no one, he obviously could not hire Rodriguez or any other member of the Barba crew), or as an admission that he could hire other replacements, but not those who had worked for Barba. The first possibility would not support in inference of discrimination; but the second would.

For the reasons explained in the previous section, there is, on this record, insufficient evidence to chose one possibility over the other. That being so, there can be no finding of a violation or of background animus.

REMEDY

Having found that Respondent violated section 1153(a) and (c) of the Act, by allowing the members of the labor contractor crew supervised by Domingo Barba to be deprived of the right to purchase equipment from the contractor, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. In fashioning the affirmative relief delineated in the following order, I have taken into account the entire record of the proceedings, the character of the violations

found, the nature of Respondent's operation, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14.

I recommend dismissal of the complaint with respect to all allegations thereof in which the Respondent has been found not 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

Pursuant to Labor Code section 1160.3, Respondent Baker Brothers, its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist:

(a) Permitting its labor contractor to deprive its crews of the opportunity to purchase gloves, clippers, protective sleeves and packing sacks from said contractor.

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

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

(a) Insure that the members of its labor contractor crews are afforded the opportunity to purchase gloves, clippers, protective sleeves and picking sacks from such contractor.

(b) Make whole the members of the contractor crew supervised by Domingo Barba for all economic losses suffered by

having to purchase their gloves, clippers, protective sleeves, and picking sacks elsewhere, together with interest thereon computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, such records and reports as may be relevant or necessary to a determination, by the Regional Director, of the economic losses and the period of such losses resulting from the failure to allow the crew supervised by Domingo Barba to purchase the above described equipment from its labor contractor.

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from March 1, 1983 to the date of mailing.

(f) Provide a copy of the attached notice, in the appropriate language, to each employee hired by respondent during the six-month period following a remedial order.

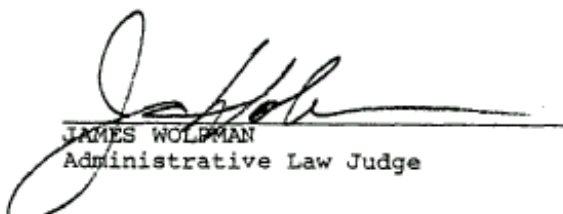
(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which

has been altered, defaced, covered, or removed.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice 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.

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

DATED: June 11, 1985


JAMES WOLFMAN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional 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 in which each side had a chance to present evidence, the Board found that we violated the Agricultural Labor Relations Act (Act) by depriving the members of the labor contractor crew supervised by Domingo Barba of the right to purchase certain equipment from the contractor because of the union sympathies and activities of the crew. The Board told us to post and publish this Notice and to mail it to certain of those who worked for us between March 1, 1983 and the present. 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 and other workers to help and protect one another; and
6. To decide not to do any of these things.

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

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

WE WILL reimburse those workers who suffered economic losses as a result of our labor contractor's failure to allow them to purchase such equipment from him.

WE WILL see to it that henceforth members of contractor crews are given the opportunity to purchase such equipment from our contractor.

DATED:

BAKER BROTHERS

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 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.