

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MAGGIO-TOSTADO, INC. ,)	
)	
Respondent ,)	No. 75-CE-41-R
)	
and)	
)	3 ALRB No. 33
UNITED FARM WORKERS ')	
OF AMERICA, AFL-CIO,)	
)	
Charging Party.)	

On October 8, 1976, Administrative Law Officer Irving Stone issued his decision in the above-entitled proceeding, finding that the Respondent had, as charged in the complaint, violated Sections 1153 (a) and (c) of the Agricultural Labor Relations Act, and recommending that Respondent be ordered to cease and desist therefrom and take certain affirmative action, as set forth in the attached administrative law officer's decision. Thereafter the Respondent, the General Counsel and the Intervenor Charging Party filed exceptions and supporting briefs. Reply briefs were filed by the Respondent and the General Counsel.

Having reviewed the record, we adopt the administrative law officer's findings and conclusions and we adopt his recommended remedy to the extent consistent with this opinion.^{1/}

1. The complaint alleged, and the law officer found, that the Respondent, through its agent, Edward Norte, had unlawfully interrogated a certain employee, Maria de la Luz

^{1/}Member Ruiz took no part in the discussion or decision of this case.

Iniguez, and had made an unlawful threat. These charges arose from a single conversation between the agent and the employee which, according to the latter's testimony, took place on or about October 26, 1975.

Mr. Norte initiated this conversation when the two were walking between rows by asking her what Osvaldo Vargas, a fellow employee and UFW sympathizer, was arguing with her about. She testified her response to Norte's question was, "Nothing, I was only asking him what are the regulations of the union, because I don't know anything." It was at this point she voluntarily told Mr. Norte that, "There is nothing but Chavistas here in your crew." [She subsequently testified she was referring to the larger of the two crews then working under Mr. Norte's supervision.] She testified that Mr. Norte responded, "Yes, I am going to get rid of the bastards." Mr. Norte denied making such a statement. Subsequent to this alleged exchange Mr. Norte asked Mrs. Iniguez about her union membership, to which she responded, "I am Teamsters." There was no further discussion or conversation concerning union membership or union activity between Mr. Norte and Mrs. Iniguez, nor is there any indication of such conversations between Mr. Norte and any other employee. Mr. Norte admitted asking Mrs. Iniguez about her union affiliation but stated that he only asked in order to assure her compliance with the collective bargaining agreement between the Respondent and the Teamsters.

It is clear that interrogation is not per se violative of the Act. Blue Flash Express, 109 MLRB 35, 34 LRRM 1334 (1954). However, an interrogation which tends to restrain or interfere

with the exercise of rights guaranteed by the Act is proscribed. Blue Flash Express, supra. Mr. Norte questioned Mrs. Iniguez immediately after telling her he was going to fire all the UFW "bastards". This conversation was not initiated by the employee as contended by the Respondent but by Mr. Norte, who questioned Mrs. Iniguez about her reasons for talking with a known UFW sympathizer, Osvaldo Vargas. Clearly, an interrogation in this context would tend to restrain or interfere with the exercise of employee rights and we so find.

The law officer also found that Mr. Norte's statement made to Mrs. Iniguez that, ". . . I am going to get rid of the bastards" was a threat in violation of the Act. Mr. Norte denied making such a statement. The law officer credited the testimony of Mrs. Iniguez and found Mr. Norte's denial to lack credibility. Upon review of the pertinent testimony, we agree that Mr. Norte did make such a statement,^{2/} and thus agree with the law officer's conclusion.

2. The complainant alleged, and the administrative law officer found, that the Respondent, through its agent, Edward Norte, had discriminatorily discharged Maria de la Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro, and Armando Nieblas de la Cruz for engaging in protected activity. We concur in the findings of the administrative law officer.^{3/}

^{2/}We note that Mrs. Iniguez' testimony was corroborated by Joel Vargas.

^{3/}We place no reliance upon the law officer's discussion of Norte's supposed animus toward the UFW, which is said to have arisen from an alleged opposition on the part of that organization to the institution of the farm labor contractor. The record supports the law officer's finding of unlawful discharges independent of this analysis and for this reason the finding is accepted by us.

The employer has the burden of proving that it was motivated by legitimate objectives once the General Counsel has shown that the employer engaged in discriminatory conduct which could have adversely affected employee rights. N.L. R. B. v. Great Dane Trailers, Inc., 388 U. S. 26, 65 LRRM 2465 (1967). We adopt the administrative law officer's conclusion as to the Vargases, the Angulos, and Iniguez. The preponderance of the evidence establishes the Respondent's knowledge, through its agents, of the union activities or inclinations of these employees. The administrative law officer's rejection of the Respondent's inconsistent and shifting bases for the selection of these persons for layoff is fully supported by the record. The same is true of his ultimate conclusion that it was the union activity or inclination of these workers which in fact precipitated their layoff. Such employer action is inherently destructive of protected employee interests and constitutes a violation of Section 1153 (a) and (c) of the Act.

The administrative law officer's finding as to Lara, Castro and de la Cruz is more problematic. While the record would support a finding that these individuals were laid off because of their participation in protected concerted activity [protesting the alleged lack of break time, the claimed deficiencies in sanitary facilities] in violation of Section 1153(a) of the Act, we do not find sufficient evidence on the record regarding their relationship to the question of unionization or the Respondent's knowledge of the same. For this reason we do not adopt the administrative law officer's determination that these layoffs violated Section 1153(c) of the statute. However, reinstatement of these individuals, with back pay shall, of course, be ordered

because we find their layoffs to have been in violation of Section 1153(a) of the Act.

3. Remedies. We have reviewed the remedies proposed by the administrative law officer and the exceptions of the General Counsel and the charging party to the recommended remedies. We adopt the remedies recommended by the administrative law officer as modified below and find them as so modified to be adequate.

(a) The regional director shall conduct an investigation to determine the amount of back pay, if any, due the discriminatees and shall calculate the interest thereon, giving full weight to the testimony given at the hearing regarding damages. If it appears that there exists a controversy between the Board and the Respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director shall issue a notice of hearing containing a brief statement of the matter in controversy. The hearing shall be conducted pursuant to the provisions of Section 20370 of the regulations, 8 California Administrative Code Section 20370.

(b) Amend paragraph 2(c) of the proposed order to read, "Give to each employee hired up to and including the harvest season in 1977-78 copies of the notice attached hereto translated into the primary language of the affected employees."

(c) We add the requirements that the proposed notice:

(1) Be mailed to each employee employed by Respondent during October, 1975,

(2) Be posted at the commencement of the 1977-73 harvest season for a period of not less than 60 days at appropriate locations proximate to employee work areas,

including places where notices to employees are customarily posted, and

(3) Be read in English and Spanish to assembled employees at the commencement of the 1977-78 harvest season by a company representative or by a Board agent and accord the Board agent the opportunity to answer questions which employees may have regarding the notice and their rights under Section 1152 of the Act.

Accordingly, it is hereby ORDERED that the Respondent Maggio-Tostado, Inc. , its agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interrogating its employees as to their membership or nonmembership in the union or any other labor organization or by threatening them with loss of employment for joining, assisting or supporting the union or any other labor organization or in any other manner, interfering with, restraining or coercing any of its employees in the exercise of the rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 1153 (c) of the Act.

(b) Discouraging membership of any of its employees in the union, or any other labor organization, by discharging, laying off, or in any other manner discriminating against individuals in regard to their hire or tenure of employment or

any other condition of employment, except as authorized in Section 1153 (c) of the Act.

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

(a) Offer to Maria de la Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas de la Cruz immediate and full reinstatement to their former or substantially equivalent job and make each and every one of them whole for any losses each and every one of them may have suffered as a result of his or her termination in the manner described above in the section entitled "Remedies".

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and any other records necessary to analyze the back pay due.

(c) Give to each employee hired up to and including the harvest season in 1977 a copy of the notice attached hereto, at the time he is hired. Copies of this notice, including an appropriate Spanish translation, shall be furnished by the director of the Coachella Regional Office for distribution by Respondent.

(d) Mail to each employee employed by Respondent during October 1975 a copy of the notice attached hereto including an appropriate Spanish translation.

(e) Post a copy of the notice attached hereto, including an appropriate Spanish translation, at the commencement of the

1977-78 harvest season for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

(f) Read in English and Spanish a copy of the notice attached hereto to assembled employees at the commencement of the 1977-78 harvest season by a company representative or by a Board agent and accord the Board agent the opportunity to answer questions which employees may have regarding the notice and their rights under Section 1152 of the Act.

(g) Notify the regional director in the Riverside Regional Office within twenty (20) days from receipt of a copy of this decision of the steps Respondent has taken to comply therewith, and to continue to report periodically thereafter until full compliance is achieved.

Dated: April 18, 1977

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Robert B. Hutchinson, Member

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an administrative law officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act, and has ordered us to notify all persons coming to work for us in the next harvest season that we will remedy those violations, and we will respect the rights of all our employees in the future. Therefore, we are now telling each of you, that:

(a) We will reinstate Maria de la Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas de la Cruz to their former jobs and give each and every one of them back pay for any losses each and every one of them had while each one was off work.

(b) We will not question any of our employees about their support of the United Farm Workers of America, or any other labor organization or threaten any of our employees with loss of employment for joining, assisting or supporting the United Farm Workers of America, or any other labor organization.

(c) All our employees are free to support, become or remain members of the United Farm Workers of America, or any other labor organization. Our employees may wear union buttons or pass out and sign union authorization cards or engage in other organizational efforts including passing out literature or talking to their fellow employees about any union -of their own choice provided that this is not done at times or in a manner which will interfere with their doing the job for which they were hired. We will not discharge, lay off, or in any manner interfere with the

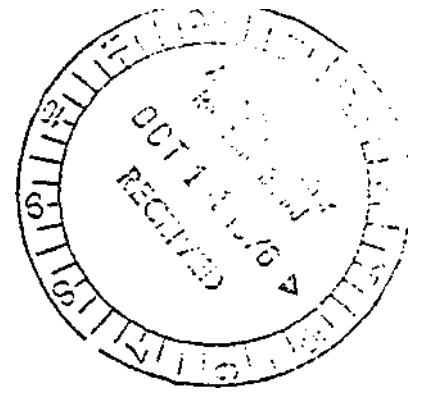
rights of our employees to engage in these and other activities
which are guaranteed them by the Agricultural Labor Relations Act

Dated: _____

MAGGIO-TOSTADO, INC.

By: _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations
Board, an agency of the State of California. DO NOT REMOVE OR
MUTILATE.



STATE OF CALIFORNIA
BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

MAGGIO-TOSTADO, INC. ,

Respondent,

-and-

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Case No. 75-CE-41-R

DECISION

RONALD RUIZ, ESQ. and
ALBERTO Y. BALINGIT, ESQ.
Sacramento, California
For the General Counsel

DAVID E. SMITH, ESQ.
Indio, California For
the Respondent

HENRY GILER, ESQ.
Indio, California For
the Charging Party

STATEMENT OF THE CASE

Irving Stone, Administrative Law Officer: The above case was heard before me in Indio, California, on December 22, December 23, December 30 and December 31.^{1/} The Notice of Hearing and Complaint was issued on December 6. The Complaint alleges violations-of Sections 1153(a) and (c) of the Agricultural Labor Relations Act, herein called the Act, by Maggio-Tostado, Inc., herein called Respondent. The Complaint is based on a charge filed by United Farm Workers of America, AITL-CIO, herein called the Union, on November 3. A copy of said charge was duly served on Respondent on November 5.^{2/}

The General Counsel, Respondent and Union^{3/} were represented at the hearing by counsel. Full opportunity to

1/ All of the above dates and dates hereinafter mentioned are in 1975, unless otherwise stated.

2/ Filing and service of the charge are alleged in the complaint and not denied by Respondent in its answer and are deemed to be admitted by Respondent. [Section 20215.1, Emergency Regulations of the Board.]

3/ At the hearing, the Union moved for leave to intervene in "the proceedings. There was no objection thereto and the motion, was granted. See also Section 1151.3 of the Act.

be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded all parties. After the close of the hearing, briefs were filed by all parties which were "duly considered.

Upon the entire record in the case, from my observation of the demeanor of the witnesses and upon consideration of the briefs, I make following:^{4/}

FINDINGS OF FACT

4/ The testimony of all of the witnesses has been considered. In evaluating the testimony of each witness, inconsistencies and conflicting evidence was considered. The absence of a statement of resolution of a conflict in specific testimony, or an analysis of such testimony does not mean that such did not occur. [See Bishop and Malco, Inc., d/b/a/ Walker's, 159 N.L.R.3. 1159; 1966.] Further, to the extent that a witness is credited only in part, it is done upon the evidentiary rule that it is not uncommon "to believe some and not all of a witness¹ testimony". [N.L.R.B. v. Universal Camera Corporation, 179 F.2d 749 (C.A.2d), vacated and remanded on 340 U.S. 474; 1951.]

I. Jurisdiction.

A. The Employer.

The complaint alleges and the answer does not deny that the Respondent, Maggio-Tostado, Inc., a corporation engaged in agriculture in Riverside County, California, is an agricultural employer within the meaning of Section 1140.4 (c) of the Act and I so find.

B. The Labor Organization.

The complaint alleges and the answer does not deny that United Farm Workers of America, APL-CIO, the Union, is a labor organization within the meaning of Section 1140.4(f) of the Act and I so find.

C. The Employees.

The complaint alleges and the answer does not deny deny that MARIA DE LA LUZ INIGUEZ, JOEL VARGAS, OSVALDO VARGAS, DOLORES ANGULO, TERESITA ANGULO, ENRICO LARA, AURORA CASTRO and ARMANDO NIEBLAS DE LA CRUZ are agricultural employees within the meaning of Section 1140.4(b) of the Act and I so find.

II. The Alleged Unfair Labor Practices.

The complaint alleges that the Respondent violated Section 1153(c) of the Act by the discriminatory discharges of .Maria de la Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas de la Cruz. The complaint further alleges that the Respondent, by conduct which amounted to unlawful interrogation and threats, interfered with, restrained and coerced said employees thereby interfering with the rights guaranteed to them by Section 1152 of the Act, in violation of Section 1153(a) of the Act.

Respondent denies that it engaged in any unlawful interrogation of or that it made any threats to or that it discriminatorily discharged any of the above named employees or that it engaged in any unfair labor practices within the meaning of Section 1153(a) or (c) of the Act.

A. The Relevant Facts.

Respondent is a California corporation engaged in agriculture in Riverside County. It grows a variety of agricultural crops such as lettuce, cabbage, cucumbers, onions

and radishes on various ranches under its control. Edward W. Norte is a duly licensed labor contractor, registered as such with and licensed by the Agriculture and Service Agency of the Department of Industrial Relations of the State of California and the Employment Standards Division of the United States Department of Labor. Norte has worked for the Respondent for six or seven years. He would start sometime in the latter part of August or September, usually the latter, and work until the end of -the harvest season, which would be sometime the following April. Norte testified that in 1975 he started to work for Respondent early in August because of a larger harvest. Norte also testified that although he had always been employed as a supervisor, when he commenced working for Respondent in August of 1975, he found that his duties differed from those which he had performed in previous years. In prior years he had had complete charge of and responsibility for keeping' the work sheets, preparing the payroll, computing payroll taxes, and preparing the pay checks. When he started the 1975 season, he was told that all payroll functions other than the maintenance of the worksheets would no longer be his responsibility. In a signed declaration which Norte had made to a representative of the Board, he explained that this change was due to "the added bookkeeping problem and because of the requirements of the ALRA so that the employees could have

accurate records available". In this connection it is interesting to note that although Norte insisted that he had always been employed by the Respondent as a supervisor and not as a labor contractor, he testified that when he started to work for Respondent in August, he was specifically told by Ron Prosch, the Respondent's bookkeeper, that he was acting as a supervisor and not as a labor contractor.

During the off-season in the Coachella Valley when Norte was not working for Respondent, he worked in Mexico for another California grower named Duke Wilson.^{5/}

Assisting Norte and acting in the capacity of assistant foremen were Willie Vela and Miguel Avina.^{6/} Vela testified that he has been working with Norte for about eight or nine years, not only in the Coachella Valley, but Mexico as well.

Norte testified that at the start of the season he would assemble his work crew. Having worked in the Coachella Valley for many years there are "a certain amount of people" who work for him "at certain times of the year". They are his

5/ The record does not indicate the nature of the working relationship between Norte and Duke Wilson. However, this relationship has no bearing upon the issues herein.

6/ Norte denied that Avina was a foreman and insisted that he was a "pusher". The nature of Avina's status is not relevant to any of the issues herein.

"regulars". They know when the season is to begin and report for work to him at that time. At the start of the season the work usually consists of hoeing and thinning cabbage. As the season progresses, Norte will add to his crew. At such times, Norte would recruit by word of mouth through the members of his crew, their friends, and by telephone.

The 1975 season differed, as we have seen, from prior seasons in that it began early in August because of a larger harvest and his duties and responsibilities had been changed. However, Norte assembled his crew of "regulars", about eight in number, and continued to add additional workers as the season wore on. By October 30,^{7/} there were about fifty farm workers employed by the Respondent.

Norte divided his work force into two crews, one working under Vela's supervision and the other under Avina. The "regulars" were assigned to work with Avina and they were primarily engaged in picking cucumbers. Vela's crew consisted, in large part, of those who had been added as the season wore on. They were primarily engaged in hoeing and thinning cabbage. Norte was responsible for the entire operation with Vela and Avina reporting to him. Vela testified that Norte spent about

7/ The date of the discharges

ninety percent of his time with his, Vela's, crew "because it is a bigger crew. The type of work involved is more critical." There was little or no affinity between the workers in Avina's crew and the majority of the members of Vela's crew.^{8/}

The tempo of hiring of additional workers increased and during the period from October 3 to about October 21 about twenty-five workers were hired to augment Vela's crew. During this period all of the dischargees were hired, as follows: Dolores and Teresita Angulo and Armando Nieblas on October 9; Aurora Castro on October 10; Osvaldo and Joel Vargas on October 15; Enrico Lara on October 17; and Maria Iniguez on October 21. During the same period the size of Vela's crew ranged from 30 to 35 workers.

During the 1975 harvest season Respondent was under contract with the Western Conference of Teamsters, Agricultural Workers Organizing Committee and its affiliate, Local Union No. 166.^{9/}

8/ Maria Iniguez testified that when the Union's representative came onto the field, the workers in Avina's crew "would turn their faces away from him".

9/ The agreement is dated March 19 and was modified by a supplemental agreement dated September 3 to conform with applicable provisions of the Act.

Beginning three or four days prior to October 30, a series of events transpired reaching its climax with the layoff of fifteen workers on that day.

Oswaldo Vargas had testified that he was a member of the Union and that he had spoken to other members of his crew informing them of the benefits to be derived from membership in the Union and urging them to join. He also testified that he had told Norte personally "that this union was better than the Teamsters". Norte had testified that he had seen Vargas wearing a union button.

About three or four days before the lay-offs on October 30, Danny Olegario, a representative of the Teamsters Union, and a fellow organizer came onto the field where Vela's crew was working. Olegario began to explain to the workers the benefits that they would receive under the terms of the Teamsters contract, making specific reference to the "break" as one of the benefits. Vargas told Olegario that this was a lie; that they were not getting a "break". Vargas told Olegario that the only "break" that they would get would be an order from Norte to various workers at different times to "go out, have some coffee and taco and come back to work". Vargas voiced his objections to this procedure and told Olegario that the workers

wanted their "break" simultaneously as a group and not when so

ordered by Norte or Vela.^{10/} Other members of the crew joined in voicing similar complaints and supporting Vargas. Enrico Lara also complained of the failure on the part of Norte or Vela to give the workers their "break" at the same time. Teresita and Dolores Angulo not only complained of the fact that they were not getting a proper "break" but Dolores Angulo further complained bitterly about the failure on Norte's part to provide proper and adequate bathroom facilities. Dolores Angulo told Olegario that the women's toilet had a broken latch and would not stay shut when in use. Consequently the women had to go to the bathroom in pairs with one standing watch. She also complained to Olegario of the fact that Norte had told the women workers to use the men's toilet when the women's toilet was in use resulting in some very embarrassing situations for the women. She also objected to this practice because she was afraid of being exposed to the "germs" that men had.

Olegario listened to all of these complaints and then told Vargas and the others that "I'm going to bring Eddie [Norte]

10/ Norte testified that the workers would start to work at 6:30 a.m. and work until 11:30 a.m. or 12:00 noon. The payroll records indicate that the work day generally consisted of 6-1/2 hours with usual variations from 6 to 7 hours per day. The contract with the Teamsters provides that "rest periods shall be taken insofar as practical in the middle of each work period. Rest periods shall be provided at the rate of 10 minutes per four (4) hours work Rest period time shall be counted as hours worked." (Section XIII--Rest Periods.)

so you can tell me in front of him." Olegario left and returned with Vela and not Norte. Olegario confronted Vela with the workers' complaint that they were not getting a "break". Vela insisted that they were getting a "break". Vargas told Vela that this was a lie and he was joined in his accusation by the confirming shouts of the other workers. Vela then left. Olegario continued talking to the crew members for about twenty minutes. He then went to Vela and informed Vela that the crew had voted for a ten minute "break" to be given simultaneously to all of the workers. He told Vela to put it into effect at once and Vela agreed to do so.

Vela testified that he told Norte later in the day what had taken place between the workers, Olegario and himself. He told Norte that Olegario had told him that all of the workers were to get a ten minute "break" at the same time. Osvaldo Vargas happened to be passing by and Vela, pointing to Vargas, told Norte that "he was the one that talked to the representative about the break". Vargas, overhearing this, walked over and affirmed that he had told Olegario that the workers were not getting any "break" and that it was the truth. Norte and Vargas then got into a heated discussion in the course of which Norte accused Vargas of being "one of them that is always behind and yet you are complaining that I don't give you a break". Vargas told Norte that this was a lie and that he worked right along at the same tempo as the rest of the group.

The following day, Norte observed Osvaldo Vargas talking to Mario Iniguez. After Vargas left, Norte went to Maria Iniguez and asked her "what that bastard was arguing with you about?" She replied "Nothing. I was only asking him what are the regulations of the union, because I don't know anything." She then told Norte "There is nothing but chavistas here in your crew." Norte replied "Yes. I am going to get rid of those 'cabrones'.^{11/} Chase them, make them leave off the job, get rid of them." Norte then asked Maria Iniguez "What union do you belong to?" She replied "I am Teamsters". Norte made no comment and walked away. Joel Vargas testified that he happened to be walking by and heard Norte tell Maria Iniguez "I am going to chase those 'cabrones'¹".

Later in the day Norte met with Mike Nicholson, the field manager. Norte told Nicholson that he had caught up in the work and was going to have to "slack off", that is layoff some of the workers. Nicholson agreed with Norte and told Norte to go ahead with the lay-off. Norte testified that he was the one who made the decision as to which individuals were going to be laid off. Norte also testified that this lay-off was unusual and not the regular annual procedure. He said that this year there was more to harvest and more thinning to

do. Consequently they had hired more people to do the work. Norte then explained that "as we got over the peak then we had to lay them off because we had to wait for the rest of the planting. We weren't ready for the rest of the planting."

The following day Olegario and another Teamster representative came onto the field where Vela's crew was working. He began handing out fliers. Osvaldo Vargas took one of the fliers and told Olegario "Give me the papers and see what lies you say in them." At that time a Union organizer came onto the field and approached the workers in Vela's crew. The representatives of the two unions confronted one another in the middle of the field. Olegario told Vela "Take them out. Don't let them be wasting time." Some of the workers in Vela's crew started to protest, lifting up their hoes, chanting pro-union slogans and shouting "Let them come in too. You have already made us lose time. Let us lose time with him too." As they shook their raised hoes they shouted "Arribe Chavez", "Si Se Puede". At that juncture Vela, fearing that the situation was getting out of control, told the representatives of both unions "all right, all of you get out of here". Vela testified that he later related all that had happened to Norte giving Norte full particulars as to what had taken place and who had taken part in the disturbance. Vela also testified that Osvaldo Vargas "was the one doing the talking".

12/ Although Vela testified that he had told Norte about this incident, Norte denied that Vela had done so.

At about 10:00 a.m. on October 30, Norte told Vela that he had "got an order from the company he was going to lay some people off". Norte testified that he had drawn up a list containing the names of those who were to be laid off the morning of October 30 before leaving for work. At the end of the day Norte called the workers together and read the names of those who were being laid off, fifteen in number. He told them that there was not enough work and that he "was going to leave the work for those who came in before . . .". Some of the workers in the group began to shout "Viva Chavez", "Arribe Chavez", "Chavez Reza" and "Si Se Puedo" as they left the field.

On October 30, the Union filed a petition with the Board and an election was held on November 5.^{13/}

Betty Wray, a general secretary employed by the Respondent, testified that on October 30 Norte came to the office and asked her to make out checks for certain people who were to

^{13/} None of the parties offered any testimony as to the results of the election. From observations made during the course of the hearings one could surmise that the Union was not the successful party. However, the outcome of the election is not pertinent to a resolution of the issues herein.

be laid off and that to the best of her recollection he told her that they were being laid off because they did not want to join the Union.

B. The Unlawful Interrogation.

The complaint alleges that on or about October 28, Respondent, by and through its agent, Edward Winslow Norte, interrogated Maria De La Luz Iniguez regarding her Union membership, activities and sympathies and in so doing interfered with, restrained and coerced said employee in the exercise of rights guaranteed in Section 1152 of the Act, thereby violating Section 1153(a) of the Act.

Respondent in its answer denied that Norte interrogated any of its employees including Maria De La Luz Iniguez.

Maria Iniguez testified that she started to work for Norte on October 21. She had asked her sister who was already working for Norte to find out whether there was any work for her. Norte sent word to her through her sister that he did and that she was to report for work. She did so and was put to work thinning cabbage and lettuce. Maria Iniguez had known Norte for nine years and had worked for him during

previous seasons. She testified that three or four days prior to October 30, when she was laid off, while working in the field, she asked Osvaldo Vargas to explain the contents of a brochure put out by the Union. Shortly thereafter Norte approached her and asked her "What was that bastard arguing with you about?" She told Norte that she had only asked Vargas to explain the regulations of the Union because she was not familiar with them. She then told Norte "There is nothing but Chavistas in your crew". Norte told her "Yes I know and I am going to get rid of all those bastards". Norte then asked her what union she belonged to and she told him "I am Teamsters".

Norte denied that Maria Iniguez had told him that there were nothing but Chavistas in Vela's crew or that he had told her that he was going to "get rid of all those bastards". He did admit asking her if she was a member of the Teamsters Union and that she told him that she thought she was. Norte testified that he asked her because if she were not she would have to join in order to work there. Respondent denies that there was anything improper in this inquiry by Norte. The contract with the Teamsters has a union stop clause requiring every employee to become a member on the fifth day after starting to work. Respondent contends that the purpose of this inquiry by Norte was simply to make sure that she had signed up with the Teamsters as required by the terms of the collective bargaining

agreement. Respondent points to the fact that Maria Iniguez testified that when she told him that she was "Teamsters", Norte simply said "um" and did not question her further about unions.

Maria Iniguez admitted that she volunteered the information that there were nothing but Chavistas in Vela's crew and when asked on cross-examination why she had told this to Norte, she replied "Because I know him for nine years and I had confidence in him".

I credit the testimony of Maria Iniguez that she had told Norte that there were nothing but Chavistas in Vela's crew and that he had threatened to get rid of those "cabrones", and I so find. I also credit her testimony that Norte asked her what union she belonged to and she answered "I am Teamsters", and I so find. Her testimony is far more convincing than the explanation given by Norte. Norte testified that he asked Maria Iniguez if she was "Teamsters" and that he had done so only to make certain that she was complying with the Union shop requirements of the contract with the Teamsters. He then testified that Maria Iniguez answered that "she thought she was". Given such an inconclusive answer Norte simply answers "Um". Logic would seem to dictate that given the answer that he said Maria

Iniguez made he would have pressed her to make certain that she had signed up with the Teamsters so that she could continue to work for him.

Maria Iniguez' testimony is far more credible. Coming after Norte's questioning concerning her conversation with Vargas; ascertaining that she had been talking to Vargas about the Union; faced with her statement that there were nothing but Chavistas in Vela's crew and his explosive and threatening reply, it is reasonable that within this framework of suspicion and anger Norte would then ask Maria Iniguez, not as he claims, whether she was "Teamsters" but "what union" she belonged to; an interrogation directed towards ascertaining her union membership and sympathies and not to insure compliance with the Union shop clause of the Teamsters' contract as Norte contends. The inescapable conclusion must be that Norte sought to and did interrogate Maria Iniguez about her Union membership and activities and that such interrogation constituted a violation of Section 1153(a) of the Act. The fact that a cordial relationship existed between Norte and Maria Iniguez is not controlling. The test as to what constitutes unlawful conduct within the purview of Section 1153(a) of the Act does not turn on Norte's friendliness or courtesy or the friendly nature of the discussion. The test is whether Norte's conduct reasonably tended to interfere with Maria Iniguez' rights under

the Act. [Hanes Hosiery, Inc. 219 N.L.R.B. 47 (1975); 90 L.R.R.M. 1027.] Interrogation which is otherwise unlawful is not made lawful because it is conducted in a friendly, pleasant or courteous manner. [Monroe Manufacturing Company, Inc. , 200 N.L.R.B. 62 (1972); 82 L.R.R.M. 1042.] It is the fact of and not the manner of the interrogation which interferes with or coerces the employee in the exercise of her rights. [Standard Knitting Mills, Inc., 172 N.L.R.B. 1122 (1968)? 68 L.R.R.M. 1412.] The fact that the interrogation may be of an isolated nature is also not controlling. The function of the Board is to determine the significance of each particular act in the light of the entire record in the case. [NLRB v. Volkswagen, Inc., 487 F.2d 1398 (C.A.4) (1973); 85 L.R.R.M. 2112.] Although the N.L.R.B. has ruled that interrogation is not per se unlawful,⁴ in setting down the parameters for determination of permissible limits of interrogation it stated as follows:

"In our view, the test is whether under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act . . ."

To avoid any taint of restraint or interference, the

¹⁴/ Blue Flash Express, Inc. [109 N.L.R.B. 85; 1954].

N.L.R.B. in the Blue Flash case said that it would be necessary to establish (a) that the purpose for the questioning was legitimate; (b) that the employer communicated to the employees its purpose in questioning them; (c) that the employer had assured the employees that no reprisals would take place; and (d) that the questioning took place in a background free of employee hostility to union organization. In that case the employer, following a claim of representation, interrogated the employees as to whether or not they were members of the union for the purpose of ascertaining the validity of the union's claim.

In the instant case, the credible evidence clearly establishes that the pre-conditions set forth by the N.L.R.B. are not present. Accordingly, I find that Norte's interrogator of Maria Iniguez did constitute such interference, restraint and coercion as to interfere with the rights guaranteed in Section 1152 and to be in violation of the provisions of Section 1153(a) of the Act.

C. The Unlawful Threat.

The complaint alleges that on or about October 28, Respondent, by and through its agent, Edward Winslow Norte, threatened its employees with loss of employment for joining,

assisting or supporting the Union and in so doing interfered with/restrained and coerced its employees in the exercise of their rights guaranteed in Section 1152 and in violation of Section 1153(a) of the Act.

Respondent in its answer denies that it threatened any of its employees with loss of employment for joining, assisting or supporting the Union.

We have already noted that Maria Iniguez testified that three or four days prior to October 30, when she was laid off, and while working in the field she had asked Osvaldo Vargas to enlighten her as to the contents of a brochure dealing with the laws of the Union. After Vargas left, Norte approached Maria Iniguez and asked her "What was that bastard arguing with you about?" She explained to Norte that she had asked him about the regulations of the Union because she was not familiar with them. She then told Norte that "there is nothing but Chavistas in your crew" and Norte replied "Yes, I know and I am going to get rid of all those bastards". Norte denied making such a statement to Maria Iniguez although he admitted having a conversation with her at which time he asked her as to which union she belonged. Joel Vargas testified that he happened to be walking by and overheard Norte tell Maria Iniguez

"I am going to chase those cabrones". I credit the testimony of Maria Iniguez and Joel Vargas and to the effect that Norte did threaten to get rid of "all those bastards".

Norte was aware of the fact that Vela's crew was - dissatisfied with the existing, conditions having been informed by Vela as to his confrontation with Olegario, the Teamster representative, the previous day, as a result of which Olegario had directed Vela to give his entire crew a ten minute break at the same time. Vela testified that he told Norte all that had taken place and that Osvaldo Vargas had been the spokesman for the crew. The credible testimony of General Counsel's witnesses disclose that several members of the crew voiced complaints not only about the break but about toilet facilities for the women as well. Norte testified that he was aware of pro-union sympathies of various members of Vela's crew which he had deduced from the fact that they were wearing U.F.W. buttons. Osvaldo Vargas had told him that the U.F.W. was a better union than the Teamsters. Undoubtedly, all of this did not sit well with Norte and it is only logical that when Maria Iniguez told him that there were nothing but Chavistas in Vela's crew all of his resentment and anger would burst forth in an explosive and understandable reaction, to wit, "Yes, I know and I am going to get rid of all those bastards".

Norte does not deny that *Vela*, told him about the confrontation with Olegario but he testified that *Vela* only mentioned Osvaldo Vargas' name as the spokesman for the group. I am not convinced that this is so. *Vela* testified that he told Norte what had taken place. *Vela* said that although other workers in his crew had taken part in the discussion he mentioned only Osvaldo Vargas' name. I find this hard to believe. This was no minor incident; no casual meeting of *Vela*, his crew and the Tearasters representative. It was a serious accusation made to the Teamsters representative by a number of *Vela*'s crew members that the contract was being violated and coming at a time when, as we shall see, Union representatives were challenging the Teamsters' representative position, put the Teamsters and the Respondent in a very unfavorable as well as an embarrassing light. I believe that Norte questioned *Vela* very thoroughly as to what had taken place and who had participated and I believe that *Vela* gave Norte a very detailed description of what had taken place and the role that each member of his crew had played. Norte's anger towards and annoyance with the members of *Vela*'s crew as well as his growing suspicions of increasing pro-Union sympathies would explain why he approached Maria Iniguez after seeing her talking to Osvaldo Vargas to ask about her conversation with Vargas. I believe that Norte did tell Maria Iniguez that he "was going to get

rid of all those bastards".^{15/} I cannot credit Norte's denials that he did not. Accordingly, I find that Respondent, through its supervisor, Edward Winslow Norte, did threaten its employees with loss of employment for joining, assisting and supporting the union in violation of Section 1153 (a) of the Act

D. The October 30th Discharges.

The complaint alleges that Respondent violated Section 1153 (c) of the Act by the discriminatory discharges of Maria De La Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando De La Cruz.

Respondents deny that the discharges of the above named employees were unlawfully motivated or in any way related to any union activities by any of the dischargees.

It is undisputed that at the end of the work day^{16/} on October 30, Norte assembled the workers, read off the names of fifteen, workers from a list that he had prepared that morning, and told those whose names he had read that they were being laid off for the reason that there was not enough work and that

15/ That this was no idle threat is evident from the fact that Norte met with Nicholson, the field manager, later that day and obtained Nicholson's approval to a reduction of the work force.

16/ About 12:30 p.m. [See Note 10, supra.]

whatever work remained to be done would be done by those who came to work before those who were being laid off. All of the discharges were among those being laid off.^{17/}

General Counsel contends that from all of the surrounding circumstances and based upon the credible testimony there is substantial evidence from which Respondent's discriminatory motives can permissibly be inferred. I agree. Upon the record, considered as a whole, I find that there was malice,^{18/} motive and manipulation by the Respondent resulting in conduct violative of the provisions of Section 1153(c) of the Act.

Norte is a licensed labor contractor. Ideologically philosophically and contractually, the Union is opposed to the practice of labor contracting. It seeks to abolish this practice in its entirety. Emotionally as well as economically this must adversely affect the labor contractor in his attitudes towards and feeling for the Union, despite Norte's assertions to the

17/ Joel Vargas was not present when Norte announced the layoff on October 30. He testified that he did not feel well and did not report to work that morning. However, his name was on Norte's list and he testified that he was informed by his brother, Osvaldo, of the fact that he had been laid off.

18/ "Malice is used alliteratively in a synonymic context to indicate "ill will".

contrary. Norte testified that from 1970 to 1972 he worked for Morina and Company as a foreman for the reason that the Union "don't recognize a labor contractor and you could work as a foreman. They told me that I could work as a foreman." Morina and Company was under contract with the Union. Furthermore, pursuant to the terms of the contract between Morina and the Union, Norte had to have workers whom he wanted as members of his crew dispatched through the Union's hiring hall. It is difficult to accept Norte's denial that any extension of the Union's influence among the ranchers would constitute a threat to his economic existence as a labor contractor. I find it hard to believe that this did not affect his feelings and antipathy towards the Union. Furthermore, ranchers under contract with the Union were subject to a more vigorous enforcement of the terms of the contract, more frequent visits by Union representatives to insure compliance by the ranchers and greater restrictions upon the heretofore unquestioned dominance of the labor contractor. Both Norte and Vela testified as to their experiences working with ranchers under contract with the Union and the Teamsters. They testified that the Union representatives would visit the fields more often than those of the Teamsters to see to it that the workers were receiving the benefits provided for by the contract. Norte's and Vela's denials that they were not bothered or disturbed by the Union's continual visits to the fields is hard to accept. Norte testified that he was not at all interested in any of the unions because he was a company man. This is understandable

and given the choice Norte would rather operate on a non-union basis. However, when faced with a conflict between the Union and the Teamsters, it must be apparent that Norte's instincts, reactions and behavior, conditioned by the Union's opposition to the continued existence of the labor contractor, their insistence on hiring through a union hiring hall, their continuous interference in the relationship between the labor contractor or foreman and his crew, must have militated against the Union and in favor of the Teamsters, and despite Norte's and Vela's denials to the contrary notwithstanding, I so find.

When Norte started the 1975-76 season with Respondent he was aware of the existence of the Agricultural Labor Relation Act; that "since August of this year the company has kept the payroll records . . . because of the requirements of the ALRA. . ."; that at that time Ron Prosch, Respondent's bookkeeper told him that he was not "really a labor contractor any more" but that he was "acting as a supervisor". Norte also testified that he was aware of the different attempts by the Union and the Teamsters to organize and conduct elections in the Coachella Valley since the passage of the Act.

Beginning with October 3, Norte increased the tempo of hiring in order to build up the size of his crew. On October 9 he hired the Angulo sisters, Dolores and Teresita. That same day he also hired Ben Vargas, Gloria, his wife, and

Armando Nieblas De La Cruz. On October 10, Aurora Castro was hired. On October 15, Osvaldo and Joel Vargas were hired. On October 17, Enrico Lara was hired. On October 21, Maria De La Luz Iniguez was hired.

At or about this time Norte became aware of increased activities on the part of the Union and the Teamsters, Norte testified that he saw organizers from the Union and the

Teamsters in the fields.^{19/} He knew that Osvaldo Vargas was a Union sympathizer. He testified that he had seen Vargas wear a Union button and that Vargas had told him that the Union was better than the Teamsters. Joel Vargas was very

close with Osvaldo and were referred to as the "cuates".^{20/} They were constantly together doing things together. Enrico Lara, Aurora Castro and Armando Nieblas had in prior seasons worked with the Vargases, father and sons, at the Freedman Ranch which was under contract with the Union. During the confrontation with Danny Olegario, three or four days before the lay-off, Osvaldo Vargas acted as the leader of the protestors. Lara had joined in the accusations. Dolores

Angulo had complained bitterly about the sanitary facilities

19/ Norte stated that he did not know why they were there. However, Osvaldo Vargas testified on cross-examination that the Union had held many rallies in Coachella Park. It is reasonable to infer that there was considerable activity on the part of both unions to sign up the farm workers in the region and that most every one in the Valley was aware of what was taking place.

20/ Twins.

and with her sister joined in the complaints about the "break". Several other members of the crew also joined in the shouting. Vela testified that he told Norte what had taken place and that Norte had questioned him concerning the confrontation. The next day Norte saw Maria Iniguez talking to Osvaldo Vargas and in reply to the question was told that she had asked Vargas about the rules of the Union. Norte's anger and irritation is evident by his outburst when told by Maria Iniguez that there is nothing but Chavistas in Vela's crew and his threat that he was going to get rid of those "cabrones".

With these events still rankling in his mind, Norte met with Nicholson, the field manager, and told Nicholson that he was caught up in his work and "was going to have to slack off". Nicholson gave Norte his approval to the lay-off. Norte testified that the decision as to whom to lay off was his and his alone. The credible testimony leads me to believe that in formulating the list of those to be laid off Norte made sure that the list would contain the names of the "cabrones". By thus striking out against the "troublemakers", Respondent was guilty of conduct violative of Section 1153(a) of the Act. The conduct of the discharges in protesting contract violations, actual or imagined, to the Teamsters' representative is protected concerted, activity under the Act. [Stone and Webster

Engineering Corp., 209 N.L.R.B. 119, 1972.] Discriminating against the discharges for having engaged in such protected activities would constitute a violation of the Act. (N.L.R.B. v. Kenmetal Inc., 182 F.2d 817, (CA 3) 1950; 26 L.R.R.M. 2203.] Furthermore, the credible testimony of the witnesses leads me to conclude that from the increased tempo of activities by the organizers of both unions Norte feared that a petition for an election and an election would soon be filed by the Union^{21/} and that it would be desirable to weed out known or suspected Union sympathizers.^{22/} The General Counsel has adduced sufficient relevant evidence which a reasonable mind could accept as adequate to support such conclusions and I so find. [N.L.R.B. v. Oerte Brewing Company, 197 F.2d 59 (6th Cir.), 1952.]

Respondent denies that the lay-off was improperly or illegally motivated and insists that the lay-off was dictated because of lack of work. In this connection it should be noted that Respondent introduced no evidence to support Norte's bald assertion that he was caught up in his work and that a lay-off had to be made. Furthermore, no evidence was

21/ Obviously, since the Teamsters, already had a contract with the Respondent which would continue to be effective until expiration or earlier certification of a rival union, they would not file any petition for an election. [See Section 1.5 of the **Act**.

22/ That such fears were real and not imagined is evident by the fact that the Union did file a petition for an election on October 30. No evidence was adduced by any of the parties as to whether or not Respondent knew of the filing of the petition prior to the lay-off.

introduced by Respondent to show that a lay-off of fifteen workers was necessary. Respondent's counsel in his well thought out brief asserts that no evidence was introduced by the General Counsel to contradict Norte's testimony that the lay-off was necessitated by virtue of the fact that the thinning of the cabbage crop grown by the Respondent was completed on or about October 30. I cannot agree with Respondent's counsel's contention that the burden of proof rested upon General Counsel to come forward with rebuttal evidence. Once the General Counsel has made out a prima facie case showing a discharge for unlawful reasons, it can be overcome only by a preponderance of credible rebutting evidence. [National Automotive and Casualty Co. , 199 N.L.R.B. 1 .] I do not believe that Respondent has sustained its burden of going forward to adduce such proof. Respondent, in seeking to sustain its contention that the lay-off was motivated by an economic determination to reduce the work force has merely introduced self-serving testimony without any documentary or other evidence to support its claim of economic necessity as justifying the lay-off. [Central Press of California, 210 N.L.R.B. 765, 1974.]

Norte testified that Nicholson and he had decided upon the lay-off about three days prior to the lay-off. This would be about October 27. Yet on October 27 two additional employees were hired and on October 29 three additional employee"

were hired.^{23/} Following the lay-off and on November 3 two employees were hired and on November 6 three employees were hired. At the time of the lay-off Norte told those being laid off that the lay-off was based on a last hired-first fired basis, and that those with least seniority were the ones being laid off. Under examination by General Counsel, Norte re-affirmed that this was the method he used in deciding who should be laid off saying, "that's the only way I could go". When Norte was confronted with the hirings of October 27 and October 30, Norte offered the explanation that one of the hirees was "an old worker" and that another one "came with her". As to the hiring of the three Cardenases,. Norte explained that they were hired because they were "willing to work in the cukes", When pressed to identify those of the dischargees who had been asked to work in the "cukes" and had refused, Norte admitted not knowing whether, he had ever asked five of those to work in the cucumbers and that he was not certain whether six others had refused. Only as to the "cuates", Osvaldo and Joel Vargas, was Norte certain that he had asked them to work in "cukes" and that they had refused. Osvaldo Vargas testified that he had worked in cucumbers at Norte 's request and that he had never refused such work. Maria Iniguez testified that she had worked.

23/ Porfirio Hernandez, one of these five employees, was among those laid off on October 30.

for Norte in prior years and that she had picked cucumbers as well as doing other kinds of work. Aurora Castro testified that she had worked in cucumbers for Norte and had never refused to do such work. Armando De La Cruz testified that he had worked in cucumbers for three days and had never refused to work in., cucumbers. As to Enrico Lara, Norte thought that Lara had worked in cucumbers for a day, but did not want to work there any more. Lara testified that he was never asked to and had never refused to work in cucumbers. I find their testimony to be more credible and worthy of belief than that of Norte.

Norte at first insisted that seniority was the basis for his decision as to who was to be laid off. When confronted with the hirings of October 27 and October 30, Norte finally conceded that seniority was not the only basis used for determining who was to be laid off; that "I laid off the ones that were not willing to work where I needed them. . . ." General Counsel then elicited from Norte the fact that in a statement made to an ALRB agent Norte had said "I attempted to save the core of my crew. That is those who have been with me for some time as much as eight or nine years. I did not choose those to be laid off on the basis of pro-union or anti-union sentiment." Norte also admitted that he had never asserted refusals to work in the cucumbers or not

wanting to work in other places as a factor in his decision as to whom to lay off until his testimony at the hearing on December 23. Betty Wray, working for Respondent as a secretary, had testified that when Norte had asked her to prepare the termination checks for those to be laid off, he told her . , that they were being laid off because they did not want to join the Teamsters. Again when Norte was confronted with the hirings of November 3 and November 6, he ascribed various reasons for so doing such as either being an "old worker", or "she was sick" or that they are "old people who come and go. They are in Mexico right now." All of these reasons are unconvincing and unacceptable. I believe that these reasons are merely pretextual and not the true reasons for Norte¹'s acts and I so find.

In view of the hirings by Norte of additional workers after having decided on the lay-off, both prior to and after the lay-off, and the unconvincing explanations offered by Norte, a serious doubt appears to exist as to whether there really was any economic justification for the lay-off or whether it was simply a pretext to get rid of "troublemakers"; pro-union sympathizers who were complaining of violations of the contract with the Teamsters about the lack of proper sanitary facilities and also creating disturbances when union organizers

appeared in the field. Although General Counsel produced no direct evidence to support such a conclusion, direct evidence is not required to support a finding to that effect by the Board. The Board's function is to determine the real reasons for the lay-offs and whether or not the reasons given by the " Respondent were pretextual. In so doing, the Board not only has the right but the duty to consider circumstantial evidence and draw inferences therefrom inasmuch as direct evidence is not always obtainable. [N.L.R.B. v. Putnam Tool Co. , 290 F.2d 663 , (C.A.6) , 1961; 4S L.R.R.M. 2263.] In Radio Officers Union v. N.L.R.B. ,^{24/} the U.S. Supreme Court, in referring to the Federal Labor Act, stated that "it is also clear specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of Sec. 8(a) (3)" I do not believe that Respondent has adduced sufficient evidence to sustain its contention that the October 30 lay-offs were motivated solely by the necessities of the harvesting situation prevailing at the time.^{25/} On the contrary, the credible evidence leads me to conclude otherwise; that the lawful concerted activities of the discharges was the motivating cause for the October 30 lay-offs and I so find. I further find that in so doing Respondent discriminated against the discharges in violation of Section 1153(c) of the Act.

^{24/} 347 U.S. 17.

^{25/} It should also be noted in this connection that Norte testified that the lay-off of October 30 was a kind of unusual lay-off and not the normal up and down situation.

Even assuming arguendo that an economic need for the lay-off existed, it seems to me that the credible evidence would indicate that Respondent utilized the economic reduction in the work force as an opportunity for eliminating those workers whom Norte knew or suspected to be "troublemakers" and/or Union sympathizers and that Norte's selection was made for that reason and not for the reasons given by him, which I discredit. [Howard Johnson Company, 209 N.L.R.B. 1122, 1973; 86 L.R.R.M. 1148.] Norte's testimony regarding the method and the manner in which ha decided who was to be laid off and who was to be retained was evasive, contradictory and not convincing.^{26/} The hirings of additional workers by Norte after he had decided on the lay-offs and after, the layoffs casts a deep shadow of doubt as to the alleged economic

26/ The testimony of Vela and Norte with respect to two essential and relevant matters, namely, the confrontation between Olegario, the Teamsters organizer, Vela and his crew members, and also the subsequent confrontation of the organizers of both unions in the field at which time Vela summarily ordered all of the organizers off the field was contradictory. With respect to the latter incident, Vela testified that he had told Norte what had taken place. Norte testified that Vela had not told him of this incident. I find it difficult to believe that this was so. This was an incident of serious proportions. Vela testified that it was getting out of control. Maria Iniguez testified that she was "trembling because I was afraid that they would hurt each other with the hoes. . . ." Vela's testimony that he told Norte of this incident is more credible and I believe that ha did so.

justification and Norte's explanations do very, very little

to dispel such doubts.^{27/} While it is true that the Act does not give the Board license to dictate the method by which an employer chooses to reduce its work force, the Board may consider the method selected in the same way that it does any employer's action affecting employees where it finds that the action was taken for a prohibited purpose. The method selected for the reduction in the work force may itself be evidence of a discriminatory purpose when considered in light of the surrounding circumstances. (N.L.R.B. v. Midwest Hangar Co., 82 L.R.R.M. 2693 (C.A.8), 1973.) The Act protects employees' rights to organize and bargain collectively and any action taken by an employer to thwart that right is violative of the Act. It is for that reason that I have concluded that even assuming arguendo that there existed an economic need for the lay-off, that the credible evidence would support a finding that the Respondent had so manipulated the choice as to who was to be laid off to achieve a prohibited purpose. I would,

27/ Norte was asked by General Counsel, "Now, having already decided that you are going to make this big lay off of some 15 people--and it's an unusual one--you told us this was an unusual one--why did you suddenly decide to hire another five?" Norte's significant reply was, "Well, when I' dropped it down I had to have an adequate crew." Norte's testimony seeking to explain why he hired additional workers despite the lay-off was to the effect that those being laid off would not work where he had to have them work. However, his "testimony with regard to specific workers was contradictory and confusing. Several of the discharges testified that they had never refused any work assignment and I credit their testimony.

based upon the credible testimony and all of the surrounding circumstances, find that there is substantial evidence from which I could properly infer discriminatory motive and would find that the Respondent had discriminated against the dischargees because of their lawful concerted activities in violation of Section 1153(c) of the Act.

Respondent's counsel in his brief seeks to justify the lay-off by stating that Norte, in determining who should be laid off on October 30, used several criteria, such as seniority; willingness of workers to do all work and complete the job; retention of workers who worked for him in the past and were capable of working in the green onion and radish harvest. No evidence at all was adduced by Respondent as to the willingness of those retained to do all work and complete the job and the unwillingness of those being laid off to do all work and complete the job. Norte's testimony in this regard was conflicting and uncertain while those of the dischargees who testified stated that they had never refused to do any work which they had been asked to do. Furthermore, no evidence was adduced by Respondent to establish or support the contention that those workers being retained were capable of working in the green onion and radish harvest and that those being discharged were not capable of so doing. Insofar as the claim of seniority is concerned, the analysis of the payrolls by

Respondent's counsel fails to satisfactorily explain the hirings after the lay-off decision on October 27 and after the lay-off on October 30. I believe that it is a post-hoc rationalization and not at all representative or indicative as to the motivations that prompted Norte to act as he did in selecting those who were to be laid off on October 30. Respondent's defense is not at all responsive to the facts as disclosed by the credible testimony and does not stand up to a careful scrutiny of the evidence in the record considered as a whole and I find that General Counsel has sustained his burden in establishing that the lay-off of the discharges on October 30 was intended to discourage their union activities and interfere with, restrain and coerce them in the exercise of rights guaranteed in Section 1152 of the Act, in violation of Section 1153(c) of the Act.

In the course of the hearing, counsel for the Respondent sought to elicit from the testimony of the witnesses that Benjamin Vargas and his wife, Gloria, and Osvaldo and Joel Vargas were professional organizers within the meaning of Section 1154.6 of the Act.^{28/} Respondent sought to show that

^{28/} Section 1154.6 of the Act reads as follows:

"It shall be an unfair labor practice for an employer or labor organization, or their agents, wilfully to arrange for persons to become employees for the primary purpose of voting in elections."

the Vargas family, together with Armando De La Cruz had prematurely terminated their employment at David Freedman Company^{29/} during the 1975 harvest to go to work for Herota Bros. in Yuba City for the purpose of voting in an election that was subsequently held among the employees of Herota Bros. That there-after, they engaged in a similar pattern of employment with Respondent. First, Benjamin and Gloria Vargas obtained employment and then arranged for Respondent to hire Osvaldo and Joel Vargas Armando De La Cruz, Aurora Castro and Maria Iniguez. That shortly thereafter a petition for an election was hired by the Union. While it is true that Osvaldo Vargas and Joel Vargas were ardent Union sympathizers and sought to persuade their co-employees to support the Union, there is no evidence in the record to indicate that in so doing they were acting as "agents" of the Union or that the Union had "wilfully" arranged for them to become employees "for the primary purpose of voting in elections". The migratory pattern of the Vargas family in 1975 was similar to that of 1974. Osvaldo Vargas testified that although they did not work for Herota Bros. in 1974, they had gone to Yuba City that year "to work in the tomatoes". As in previous years they had worked in the grapes for David Freedman before going North. Also, it was Ben Vargas,

29/ At that time there was a collective bargaining agreement in effect between the Union and David Freedman Company.

the father, and not Osvaldo or Joel, who was instrumental in obtaining employment for the others but that again is not pertinent to the issue nor is it unusual. In the first place, Vela testified that when Norte needed additional workers to work in the field he would ask his crew members to recruit such help for him. Again, farm workers tend to work together as a group forming what may be characterised as "surrogate families" and in doing so will seek to gain employment for the other members of the group at the ranch where they are then employed. Maria Iniguez testified that she obtained her job that year through the efforts of her sister who was already working for Norte. In any event, whatever reasons might have motivated the Vargas family to leave Freedman for Herota Bros. when they did or to leave Herota Bros. to work for Respondent when they did, there is nothing in the record to indicate or even suggest that they did so as "agents" of the Union for the "primary purpose of voting in elections". Employee partisanship in favor of one union as against another is not prohibited by the Act. To the contrary, such conduct is protected and discrimination against employees who may so conduct themselves is prohibited. Attending union meetings, being present at and even participating in union rallies, proselytizing in the fields do not make one an "agent" of any labor organization. Neither was there a scintilla of evidence adduced to show any "wilful"

arrangement between the Union and the Vargas brothers to have them become employees of the Respondent "for the primary purpose of voting in elections" or for that matter for any purpose. Respondent has failed to submit evidence sufficient to support its contention that the Vargas brothers or any of the other dischargees were "professional organizers" within the meaning of Section 1154.6 of the Act and I so find.

For all of the foregoing reasons, I find that Maria De La Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas De La Luz were discriminatorily discharged for engaging in lawful concerted activities and that by such discharge Respondent discriminated against said employees in violation of Section 1153(c) of the Act.

III. The Remedy.

Having found that Respondent engaged in certain unfair labor practices within the meaning of Sections 1153(a) and (c) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Maria De La Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo,^{30/} Teresita Angulo,^{31/} Enrico Lara, Aurora Castro And Armando Nieblas De La Luz, I will recommend that Respondent be ordered to offer them immediate and full reinstatement to their former or substantially equivalent job. I shall further recommend that Respondent make each and every one of the dischargees whole for any losses each of them may have incurred as a result of its unlawful discriminatory action by paying each of them a sum of money each would have earned from the date of their discharge to the date that each one is reinstated or offered reinstatement, less the net earnings of each one, together with interest at the rate of seven percent per annum, and that loss of pay and interest be computed in accordance with the formula used by the N.L.R.B. in F. W. Woolworth Company [90 N.L.R.B. 289; 26 L.R.R.M. 1185] and in Isis Plumbing and Heating Co. [138 N.L.R.B. 716, 1962.]

30/ Respondent contends that no relief be granted to this employee because of her failure to appear or testify at the hearing. This position is not well taken. The N.L.R.B. has held that "if the record sustains allegations of unlawful discrimination against discharged employees, their testimony is not a *sine qua non* for relief under the Act". [Riley Stoker Corp., 223 N.L.R.B. 173, April'29, 1975.] See also National Licorice Co. [309 U.S. 362] cited therein.

31/ See note 30 above.

In order to further effectuate the purposes of the Act and to insure to the employees the enjoyment of the rights guaranteed to them in Section 1152 of the Act, I shall further recommend that Respondent cease and desist from engaging in any acts which shall in any manner infringe upon those rights.

The General Counsel urges a combination of mailing, posting, hand delivery of notices, and newspaper and radio advertising to achieve the desired objective of informing the employees that the employer had been found to have engaged in unfair labor practices, has remedied such violations and will not engage in further violations with respect to them. I do not feel that these remedies sought by the General Counsel would effectively do so. The California Supreme Court in commenting on the problems of communicating with the farm worker, in the case of Pandol & Sons,^{32/} concluded that "efforts to communicate with such persons by advertising or broadcasting in the local media are futile" and further that "printed messages in hand bills, mailing or local newspapers are equally incomprehensible", Accordingly, I shall recommend that Respondent give to each employee hired up to and including-next year's harvest season a copy of the notice attached, at the time he is hired. Such

32/ Agricultural Labor Relations Board v. Pandol & Son [Cal. Sup.Ct., March 1, 1975]; see also Valley Farms, et al [2 A.L.R.B.. 41] .

notice shall be given both in English and in Spanish.

Simultaneously with handing out such notices, Respondent shall advise each employee that it is important that he or she understand its contents, and to offer, if the employee so desires, to read the notice to such person in either English or Spanish.

The General Counsel also urges that Respondent be ordered to award costs to the General Counsel and the charging party. In the first place, I believe it important to bear, in mind that Board action, in seeking to effectuate the purposes of the Act, should primarily be remedial and not punitive, insuring against any future violation and making whole those employees for any loss they may have sustained by reason of the unlawful conduct.^{33/} I do not feel that the circumstances of the within charge are such as to warrant an award of costs. The N.L.R.B. has awarded attorney's fees and expenses incurred in litigating an unfair labor practice charge where it found a "flagrant, repetition of conduct violative of the National Labor Relations Act" and then only to the charging union and not to the Board.³⁴ Where the acts complained of involved "clearly

33/ N.L.R.B. v. Seven-Up Bottling Company of Miami [344 U.S. 344].

34/ Tidee Products, Inc. [194 N.L.R.B. 1234; 79 L.R.R.M. 1175 modified 79 L.R.R.M. 1692; enforced as modified 502 F.2d 349 (D.C. Cir)].

aggravated and pervasive misconduct by the employer because of conduct previously found unlawful at the other stores", the N.L.R.B. reimbursed both the charging union and the Board for legal expenses incurred in the litigation.^{35/} Such is not the situation that is present in the matter before me. I cannot characterize Respondent's defense being "patently frivolous". I would therefore not recommend that the Board award costs either to the General Counsel or the charging party.^{36/}

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

ORDER

Respondent, its officers, agents and representatives shall

35/ Food Store Employees Union, No. 347, Amalgamated Meat Cutters v. N.L.R.B. [476 F.2d 546; cert. granted 414 U.S. 1062; 1973].

36/ Valley Farms, et ano; supra note 32.

1. Cease and desist from

(a) Interfering with, restraining or coercing any of its employees in the exercise of the rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, by interrogating its employees as to their membership or non-membership in the Union or any other labor organization or by threatening them with loss of employment for joining, assisting or supporting the Union or any other labor organization or in any other manner, or to refrain from any and all such activities except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 1153 (c) of the Act.

(b) Discouraging membership of any of its employees in the Union, or any other labor organization, by discharging, laying off, or in any other manner discriminating against individuals in regard to their

hire or tenure of employment or any other condition of employment, except as authorized in Section 1153 (c) of the Act.

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

(a) Offer to Maria De La Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas De La Cruz immediate and full reinstatement to their former or substantially equivalent job and make each and every one of them whole for any losses each and everyone of them may have suffered as a result of his or her termination in the manner described above in the section entitled "The Remedy".

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, Social Security payment records, time cards, personnel records and reports, and any other records necessary to analyze the back pay due.

(c) Give to each employee hired up to and including the harvest season in 1976 copies of the notice attached hereto and marked "Appendix". Copies of this notice, including an appropriate Spanish translation, shall be furnished by Respondent for distribution by the Regional Director for the Riverside Regional Office. Respondent is required to explain to each employee at the time the notice is given to him or her that it is important that he or she understands its contents, and Respondent is further required to offer to read the notice to each employee if the employee so desires.

(d) Notify the Regional Director in the Riverside Regional Office within twenty (20) days from receipt of a copy of this. Decision and of steps Respondent has taken to comply therewith, and to continue to report periodically thereafter until full compliance is achieved.

Dated: October 8, 1976

A handwritten signature in black ink, appearing to read 'IRVING STONE', written over a horizontal line.

IRVING STONE
ADMINISTRATIVE LAW OFFICER

"APPENDIX"

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act, and has ordered us to notify all persons coming to work for us in the next harvest season that we will remedy those violations, and we will respect the rights of all our employees in the future. Therefore, we are now telling each of you, that:

- (a) We will reinstate Maria De La Luz Iniguez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas De La Cruz to their former jobs and give each and every one of them back pay for any losses each and every one of them had while each one was off work.

(b) We will not question any of our employees about their support of the United Farm Workers of America, or any other labor organization or threaten any of our employees with loss of employment for joining, assisting or supporting the United Farm Workers of America, or any other labor organization.

(c) All our employees are free to support, become or remain members of the United Farm Workers of America, or any other labor organization. Our employees may wear union buttons or pass out and sign union authorization cards or engage in other organizational efforts including passing out literature or talking to their fellow employees about any union of their own choice provided that this is not done at times or in a manner which will interfere with their doing the job for which they were hired. We will not discharge, lay off, or in any manner interfere with the rights of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

Dated:

Signed:

MAGGIO-TOSTADO, INC.

By _____
(title)