STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TEAMSTERS UNION LOCAL 865, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	No. 75-CL-109-M 3 ALRB No. 60

On February 9, 1977, Administrative Law Officer Jennie Rhine issued her decision in this case. She recommended that the Board grant the general counsel's motion for summary judgment and that certain remedies be awarded. The general counsel and the respondent filed timely exceptions.

Upon consideration of the ALO's decision and the record in the case, we adopt the findings, conclusions and recommendations of the Administrative Law Officer, except as modified herein.

The complaint charges that on September 4, 1975, respondent by and through its agents assaulted and battered two organizers in the presence of the celery thinning crew at Phelan & Taylor Produce Co.

These events were at issue in a prior representation case, Phelan & Taylor Produce Co., 2 ALRB No. 22. In that case, the Board made factual findings and issued a decision. The ALO in the instant case made the following findings:

> The issue at the prior hearing was two-fold: whether the misconduct occurred, and if so whether it affected the results of the election...The Board's decision, relying on the assault in issue in this proceeding, necessarily answered both questions affirmatively.

Based on the earlier decision and on the transcript of the earlier hearing, the general counsel moved for "summary judgment". Respondent offered no evidence in opposition to the general counsel's motion either at the hearing on the motion or thereafter, although it was given an additional ten days to do so.[1/] The ALO concluded that in the absence of new or additional evidence, there was no basis to alter our findings of fact in the representation case. Accordingly, she decided the legal question, finding that respondent engaged in the conduct alleged in the complaint.

We agree with the ALO that an evidentiary hearing was unnecessary here. 8 Cal. Admin. Code § 20260 (1976). [2/]

We do not agree that the doctrines of res judicata or collateral estoppel apply in this sort of case, in part because representation and unfair labor practice hearings have different standards for the admission of evidence.[3/] However, the representation decision and transcript in this case provided sufficient evi-

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[1/] The only issue raised by the Teamsters at the hearing was whether it should be held responsible for the actions of its business agent (the alleged assailant), but no evidence was submitted on this issue.

[2/] 8 Cal. Admin. Code § 20260 (1976) provides that an evidentiary hearing will be held "if there is a conflict in evidence on which an unfair labor practice charge is based."

[3/] Normally, the two hearings would be consolidated, in which case the rules of procedure for unfair labor practice cases would prevail. 8 Cal. Admin. Code § 20335 (c) (1976).

dentiary basis for the general counsel's summary judgment motion and the respondent offered no conflicting evidence.

We therefore uphold the ALO's ruling and adopt the recommended remedy in its entirety.[4/]

Dated: July 28, 1977

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

[4/] The general counsel's request to reopen the record for submission of an itemization of expenses is denied.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

TEAMSTERS UNION LOCAL 865,

Respondent, No.75-CL-109-M

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Charging Party.

DECISION OF ADMINISTRATIVE LAW OFFICER

I. Statement of the Case

Jennie Rhine, Administrative Law Officer: This proceeding arises from an unfair labor practice charged by the United Farm Workers of America, AFL-CIO ("UFW"), against Teamsters Union Local 865 ("Teamsters"). On 20 November 1975 a complaint was filed and served by the Salinas Regional Office of the Agricultural Labor Relations Board on behalf of the General Counsel ("General Counsel"). The complaint alleged that the Teamsters engaged in an unfair labor practice under Section 1154(a)(l) of the Agricultural Labor Relations Act ("the Act")[1] in that Arturo de la Garza

[1]The Act is contained in Part 3.5 (commencing with Section 1140) of Division 2 of the Labor Code. All statutory citations herein are to the Labor Code, unless otherwise indicated.

The pertinent portion of Section 1154 states:

> It shall be an unfair labor practice for a labor organization or its agents . . . (a) [t]o restrain or coerce: (l)[a]gricultural employees in the exercise of the rights guaranteed in Section 1152. . . .

and two other unidentified Teamster agents assaulted and battered two UFW organizers on 4 September 1975 in the presence of a celery thinning crew working on the San Luis Obispo County premises of agricultural employer Phelan & Taylor Produce Company.[2] The complaint further alleged that said conduct did then and continues to interfere with, restrain and coerce agricultural employees in the exercise of the rights guaranteed in Section 1152 of the Act.[3]

After a year's delay due to the lack of funds for the Agricultural Labor Relations Board ("the Board"), a hearing was set for 12 January 1977 at Santa Maria, California. On 3 January 1977 the General Counsel filed and served by mail a motion for summary judgment noticed for hearing at the same time as the scheduled evidentiary hearing. On 12 January 1977,all parties

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[2]Phelan & Taylor Produce Co., although named in the caption on many of the documents filed in this proceeding, was not charged in the complaint and is not a party.

[3]Section 1152 states:

> Employees shall have the right 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition ol[7] continued employment as authorized in subdivision (c) of Section 1153.

appearing,[4] argument was heard on the motion. The parties were given ten days to submit additional briefs and affidavits (which subsequently have been received from the General Counsel and the UFW, but not the Teamsters), a decision on the motion was reserved, and the evidentiary hearing was postponed indefinitely pending the ruling. Granting the motion, of course, would eliminate the need for taking evidence.

The ground for the motion for summary judgment is that no material factual issue remains to be determined, all such issues having been either determined in a prior hearing or admitted, and there being no defense.

On 10 September 1975, six days after the incident which gave rise to this unfair labor practice charge, an election was conducted among the agricultural employees of Phelan & Taylor Produce Co. The Teamsters received the majority of votes cast.[5] The UFW objected to the certification of the election results, and, after a 3-day hearing during which testimony and other evidence were taken, the Board refused to certify the results of the election. Phelan and Taylor Produce, 2 ALRB No. 22 (Docket No. 75-RC-4-M), decided 29 January 1976. The Board's decision overturning the

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[4]At the hearing the UFW orally moved to intervene. The motion was granted pursuant to Section 1160.2 of the Act and Section 20268 of the ALRB Regulations, 8 Cal. Admin. Code $ 20268.

[5]The tally showed 50 votes for the Teamsters, 24 for the UFW, 1 for no union, 9 unresolved challenges. Phelan & Taylor Produce, 2 ALRB No. 22, 1 n.l.

election is based upon a finding that the assault complained of here did in fact occur.[6]

In addition to the decision, the transcript of the prior proceeding was introduced into the record, along with declarations of the two assaulted UFW organizers, Paulino Pachecho and Manuel Echavarria, and two witnesses to the incident, Juan Yebra, an employee working in the field, and David Homes, an observer who accompanied the organizers.[8]

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[6]Noting that it did not consider other objections, the Board states in its opening paragraph:

> . . . The United Farm Workers of America, AFL-CIO ("UFW"), thepetitioner objects to our certification ofthe results of the election because six daysbefore the election a Teamster organizer assaulted and injured UFW organizers while organizersfrom both unions were campaigning for votes of theworkers. We overturn the election.

Phelan and Taylor Produce, 2 ALRB No. 22, 1 n.2, 1.

[7]Official Report of Proceedings before the State of California Agricultural Labor Relations Board in the Matter of Phelan and Taylor Produce and Western Conference of Teamsters and United Farm Workers of America, AFL-CIO, Docket No. 75-RC-4-M ("Report").

[8]A copy of a purported Santa Maria Hospital Clinic Record regarding Paulino Pacheco was also submitted, but was not certified or sworn to be an accurate record by any competent custodian, and therefore is not considered here. See Labor Code § 1160.2 and discussion at note 17, below.

The General Counsel also submitted the unfair labor practice complaint and the Teamsters answer, in which the Teamsters admit that it and the UFW are agricultural labor organizations within the meaning of Section 1140.4(f) of the Act, and that Arturo de la Garza, the named alleged assailant, was at all material times a Teamster business agent. The Teamsters deny in their entirety the allegations of the assault and of its constituting an unfair labor practice, but raise no affirmative defenses.

The Teamsters have submitted no memoranda in opposition to the motion and no affidavits or declarations. When asked at the hearing if he had any new evidence to submit, counsel for the Teamsters first replied that he didn't, and later that he didn't know.[9] Primarily arguing the issue of whether the Board or the hearing officer had the jurisdiction or authority to grant a motion for summary judgment, he raised as the only possible new "factual" question whether the Teamsters should be held responsible for the actions of business agent de la Garza. No evidence was submitted on the issue.

Upon the entire record, and after consideration of the briefs filed by the parties, I propose granting the motion for summary judgment, based upon the following discussion of facts, conclusions of law, and reasons therefor, and recommend the following order.

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[9]Counsel appeared unaware that an evidentiary hearing was also set for the same day.

II. Discussion of Facts[10]

A. Both unions are "labor organizations" within the meaning of Section 1140.4(f) of the Act.

The General Counsel's complaint alleges that both the charging party, the UFW, and the respondent Teamsters[11] are and at all material times were "labor organizations" within the meaning of Section 1140.4(f) of the Act. The Teamsters admit these allegations in its answer.

B. On 4 September 1975 two UFW organizers were physically attacked without provocation by Arturo de la Garza and another unidentified Teamster organizer in the presence of agricultural employees.

The Teamsters categorically deny this in its answer. However, at the hearing on the objections to the election, two UFW witnesses, Manuel Echavarria and Juan Yebra, testified under oath regarding the incident, and were subject to cross-examination

[10]Findings of fact are inappropriate since summary judgment should be granted only if there is no substantial material fact in dispute. See CCP $ 437(c), discussed later at page 10. What follows is a discussion of the relevant facts as admitted or previously determined.

[11]Respondent is designated as "Western Conference of Teamsters Local 865" in the complaint. According to its answer and its business agent John Miranda at the hearing, it is properly designated as "Teamsters Union Local 865." No issue was raised about the identity of the party charged.

by the Teamsters.[12] Their testimony was consistent with their own declarations and the others submitted with the motion for summary judgment.

The Teamsters have not offered any evidence on the incident in either this proceeding or on the prior one. In fact, as the Board noted, Phelan and Taylor Produce, 2 ALRB No. 22, 2 n. 3, at the prior hearing Arturo de la Garza appeared as a Teamster representative, and was present during Echavarria's and Yebra's testimony describing his actions, yet did not testify. II Report 146, 203, 238.

The entire record amply supports the description of the incident given in the Board's previous decision:

> The evidence is uncontradicted. Early in the morning of September 4, 1975, two days after the UFW filed a Petition for Certification, two UFW organizers, Manuel Echavarria and Paulino Pacheco went to a celery field to talk to workers. Pacheco, age 55, who is one of the head organizers

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[12]Echavarria's testimony is at II Report 236-262, and Yebra's, II Report 197-235. The Teamsters representative declined his opportunity to cross-examine Yebra, II Report 229, and in his cross examination of Echavarria did not question him regarding the facts of the assault. See II Report 245-252.

The Santa Maria Hospital Clinic record referred to in note 8, above, was also admitted into evidence, and an UFW witness testified about its contents, all over the objection of the employer. II Report 269-273. Since the standard of evidence is less strict in an election hearing than in an unfair labor practice hearing, and the evidence would be inadmissable over objection in the latter (see discussion at note 17, following), the report and testimony are not considered here.

> for the UFW in Santa Maria, and Echavarria, were accompanied by David Romes, a graduate student in Sociology at the University of California in Santa Barbara. The organizers talked to some workers who[4] were in the field about the election and announced a meeting.
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> Five or ten minutes after the UFW organizers arrived, three Teamster organizers came to the field. One of the Teamster organizers was Arturo de la Garza [footnote omitted]. The Teamster organizers were wearing Teamster buttons and jackets. As soon as they arrived, de la Garza proceeded to verbally abuse Pacheco. He got no response. He then proceeded to strike Pacheco with his hands and kicked him in the face and shins. Pacheco moved away. Manuel Echavarria attempted to take photographs, but another Teamster organizer aimed a blow at the camera and instead hit Echavarria on the left side of his face. Neither of the UFW organizers offered any resistance. Some workers yelled at the Teamsters who then headed toward their car and left. The workers had celery knives in their hands. Edwin Taylor, the employer and his son, John Taylor, were near the area at the time, but did not see the fight. More than 25 workers were present and did see the fight. Some workers criticized the UFW organizers for taking the physical abuse without fighting back. Pacheco and Echavarria reported the incident to the local sheriff and were treated at the Santa Maria Hospital.

Phelan & Taylor Produce, 2 ALRB No. 22, 2-3.

The fact that the workers in the celery field were "agricultural employees" within the meaning of Sections 1154 (a)(1) and 1140.4(b) and (a) of the Act has not been disputed in either proceeding.

C. Arturo de la Garza and the unidentified Teams-tar organizer were acting as agents of the Teamsters at the time of the assault.

Again, as to this mixed issue of law and fact, the

essential facts are undisputed, The Teamsters admits in its answer that de la Garza is a business agent of the union, and he was present as a representative during the earlier hearing. II Report 146. He was recognized and identified as a Teamster organizer by the witnesses (testimony of Juan Yebra, II Report 203, and testimony of Manuel Echavarria, II Report 238-239) and by Paulino Pacheco, the man he assaulted (Declaration of Paulino Pacheco).

Both assailants were wearing Teamster buttons and jackets (testimony of Manuel Echavarria, II Report 239). The incident occurred during an organizing drive at a field in the presence of some of the workers the Teamsters and the UFW were competing to represent. There is no evidence that the Teamsters disavowed their actions, either at the time or subsequently. Under the circumstances their actions are attributable to the Teamsters. This conclusion is implicit in the earlier decision of the Board, as well.

III. Conclusions of Law

A. The ALRB has the authority to consider and determine motions for summary judgment.

The Board apparently has not previously considered whether it may determine motions for summary judgment. Nothing in the governing statutes or regulations expressly authorizes them, but nothing precludes them. The regulations do authorize both the executive secretary and the administrative law officer assigned to a proceeding to rule on motions generally in unfair labor practice cases, without reference to motions for summary judgment.[13] And Section 20260 of the ALRB Regulations, 8 Admin. C. $ 20260, provides for an evidentiary hearing "[i]f there is a conflict in the evidence upon which an unfair labor practice is based," but not otherwise.

The California Code of Civil Procedure, Section 437(c), sets forth a judicial summary judgment procedure. It is not expressly applicable to administrative proceedings, and research has not produced any decisions so applying it.[14] However, the

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[13]ALRB Regs. $ 20240(d), 20242(b), 8 Admin. C. $$ 20240(d), 20242(b). These two regulations in their entirety set forth a general motion procedure.

[14]By its terms CCP S 437(c) applies to "any action or proceeding." In view of its context in the Code of Civil Procedure, the language of its predecessor referring to "superior and municipal courts," and the absence of any judicial precedent, however, it is not considered here as being directly applicable to ALRB proceedings.

statute is indicative of a state policy favoring such a procedure where appropriate, and suggests guidelines for its use.

The regulations of the National Labor Relations Board provide for summary judgment.[15] The NLRB's summary judgment procedure has been found or assumed to be valid by every circuit that has considered it. NLRB v. Union Bros., Inc., 403 F-2d 883, 887, 69 LRRM 2650 (4th Cir. 1968) (citations omitted). California's Board is to follow precedents of the National Labor Relations Act where applicable, according to Section 1148 of the Act.

Considering the foregoing, it must be concluded that the Board acting through its hearing officers has the authority to grant summary judgment under appropriate circumstances.

B. Summary judgment is appropriate where, as here, an unfair labor practice complaint is based upon issues already determined in an election hearing, in the absence of newly discovered or previously unavailable evidence.

According to Code of Civil Procedure, Section 437(c), a motion for summary judgment shall be granted if there is ". . . no triable issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."

The California Court of Appeals has stated:

The remedy of summary judgment is appropriate when

[15]Section 102.24 of the NLRB Regulations states: "All motions for summary judgment made prior to hearing shall be filed in writing with the Board pursuant to the provisions of section 102.50." 29 CFR 102.24.

> the doctrine of res judicata in its subsidiary form of collateral estoppel can be used to refute all triable issues of fact suggested by the pleadings .... Collateral estoppel may be invoked to conclusively resolve any issue necessarily determined in previous litigation between the same parties or their privies. There are three requirements for its application: (1) the issue decided in a prior adjudication must be identical to the issue presented in the action presently being litigated; (2) there must have been a final judgment on the merits in the previous action; and (3) the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication."

People v. One 1964 Chevrolet Corvette Convertible, 274 C.A. 2d 720, 725-726, 79 C.R. 447 (1969) (citations omitted).

In Clement-Blythe Cos., 168 NLRB No. 24, 66 LRRM 1342 (1967), remanded sub nom. NLRB v. Clement-Blythe Cos., 415 F.2d 78, 72 LRRM 2138 (4th Cir. 1969), the NLRB granted summary judgment in an unfair labor practice proceeding where the employer's refusal to bargain was based on an allegedly invalid election. Commenting that the employer offered no evidence that was not before the Board when it decided the representation case, the Board, citing Harry T. Campbell Sons' Corp., 164 NLRB No. 36, 65 LRRM 1120, noted that "It is well settled that all issues which were or could have been raised in a related representation proceeding may not be relitigated in an unfair labor practice proceeding."

Clement-Blythe Cos., supra., 66 LRRM at 1343, 1343 n.4. The Fourth Circuit denied enforcement and remanded because the Board failed to explain why the facts found at the representation

hearing sustained the complaint of an unfair labor practice, NLRB v. Clement-Blythe Cos., supra, 72 LRRM at 2140. But the court expressly declined to disapprove of the summary judgment procedure, and stated that the Board need not conduct a de novo hearing in every unfair labor practice case, citing Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 8 LRRM 425 (1941); NLRB v. Union Bros. Inc., 403 F.2d 883, 69 LRRM 2650 (4th Cir. 1968); NLRB v. Bata Shoe Co., 377 F.2d 821, 65 LRRM 2318 (4th Cir.), cert, denied, 389 U.S. 917, 66 LRRM 2370 (1967).

In NLRB v. Union Bros, Inc., supra, the court upheld the granting of summary judgment and enforced the NLRB's order to bargain in an unfair labor practice proceeding. The employer's refusal to bargain was based on the allegedly improper certification of an election after a hearing on the determining challenged ballot. "In the absence of newly discovered or previously unavailable evidence, the company was not entitled to relitigate. . . . A single trial of the issue was enough." Id., 403 F.2d at 887, quoting the Supreme Court in Pittsburgh Plate Glass Co. v. NLRB, supra, 313 U.S. at 162.

The summary judgment procedure in no way impairs the right to judicial review because the record of any election investigation or hearing must be filed with the court along with the record of the unfair labor practice procedure. NLRB v. Union Bros, Inc., supra, 403 F.2d at 887, citing 29 U.S.C. $ 159(d) which is substantially identical to Section 1158 of the ALRA. Thus, as

another court said,, in court as in the summary judgment process, the election hearing record is "relied on as a verity in the unfair labor practice proceeding." Macomb Pottery Co. v. NLRB, 376 F.2d 450, 65 LRRM 2055, 2056 (7th Cir. 1967).

The Macomb Pottery court also upheld summary judgment granted when an employer did not produce any evidence newly discovered or not available in a representation proceeding. The court stated that Section 10(b) of the NLRA, 29 U.S.C. $ 160(b), giving the respondent in an unfair labor practice proceeding the right to appear and give testimony, "cannot logically mean that an evidentiary hearing must be held in a case where there is no issue of fact." Id., 65 LRR.M at 2056. The Section 10(b) rights are identical to those in the analogous Section 1160.2 of the California Act.[16] See also ALRB Regulation Section 20260, 8 Admin. C. $ 20260, discussed above at page 10.

Although given an opportunity to do so both at the 12 January hearing and during the ten days following, respondent has not offered any newly discovered or previously unavailable evidence. Thus, summary judgment is appropriate if the facts as previously determined sustain the unfair labor practice charge.

C. Respondent has not been prejudiced nor denied due process of law by being given insufficient notice of the motion

[16]The pertinent portion of both statutes states: ". . The person so complained against shall have the right to file an answer to the original or amended [unfair labor practice] complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. . . ."

for summary judgment.

At the hearing the Teamsters contended that it was denied due process of law by not having ten days notice of the hearing on the motion for summary judgment as required by Code of Civil Procedure, Section 437(c). The moving papers were filed and served by mail on 3 January; the hearing was set for 12 January 1977.

As noted above, no authority has been cited for the proposition that Section 437(c) is applicable to administrative hearings. The ALRB regulations and statutes do not set any time limits for the filing of motions. Nor do the NLRB's regulations provide a time limit for the filing of a motion for summary judgment. It may be filed any time prior to the issuance of a decision by the trial examiner. Clement-Blythe Cos., supra. 66 LRRM at 1343.

The parties here were given an additional ten days after the hearing to submit briefs and affidavits, with the decision on the motion for summary judgment being reserved for that period. Respondent was therefore not prejudiced nor denied due process by insufficient notice.

D. The previous findings of the Board sustain a determination that the Teamsters committed the unfair labor practice charged.

As discussed above, the only issues not fully admitted by the Teamsters in its answer to the unfair labor practice complaint were the fact of the assault itself and the Teamsters'

responsibility for it.

The Teamsters were a party to the prior hearing and had the right and opportunity to present evidence and cross-examine witnesses with substantially identical motive and interest as in the present case. [17] It had won the election and unquestionably was

[17]See Evid. C. $ 1291 (a) (2), which makes an exception to the hearsay rule of testimony given at a prior hearing by a presently unavailable witness where the party against whom the former testimony is offered was a party to the prior proceeding and had the right and opportunity to cross-examine with an interest and motive similar to that which it has in the present proceeding.

The evidentiary standard in an unfair labor practice hearing differs from that in a hearing of election objections. Section 1160.2 of the Act states, regarding the former, that "[a]ny such proceeding shall, so far as practicable, be conducted in accordance with the Evidence Code," while ALRB Regulation 20370(c), 8 Admin. C. $ 20370(c), referring to the latter, states in part:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted, if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admissions of such evidence over objection in civil actions. Hearsay evidence nay be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible in civil actions. . .

In determining whether a matter is res judicata a reporter transcript is admissible to show what matters provable under the issues of the case were submitted in the former action. 29 Cal. Jur. 2d $ 281, citing United Bank & Trust Co., v. Hunt, 1 C.2d 340, 34 P.2d 1001; Olwell v. Hopkins, 28 C.2d 147, 168 P. 2d 972; Hall v. Coyle, 38 C.2d 543, 241 P.2d 236.

interested in preserving its victory. Doing so required that allegations of this misconduct not be sustained.

The issue at the prior hearing was two-fold: whether the misconduct occurred, and if so whether it affected the results of the election. See Section 1156.3(c) of the Act. The Board's decision, relying on the assault in issue in this proceeding, necessarily answered both questions affirmatively. The issue in the present case is also two-fold: whether the same misconduct occurred, and if so whether it restrained or coerced agricultural employees in the exercise of their right to organize, guaranteed in Section 1152.[18]

The conclusion that the assault constitutes a violation of Section 1154(a)(1) is inescapable. As the Board said in the election proceeding:

> . . . The right to organize is meaningless if organizers are not protected from violence by representatives of rival parties who also have the right and opportunity to campaign for the votes of the workers.
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> Violence or threats of violence by representatives of the parties, is objectionable for several reasons. The acts may improperly influence an employee to vote for the party associated

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[17](cont.) a review of the testimony about the incident by the two witnesses at the prior hearing (testimony of Juan Yebra, II Report 197-235, and of Manuel Echavarria, II Report 236-262) reveals nothing that would be objectionable under the stricter standard. They testified about matters within their personal knowledge. See Evid. C. $ 702.

[18]The full text of Section 1152 is set forth in note 3, above. Such restraint or coercion is an unfair labor practice under Section 1154(a)(l), quoted in note 1, above.

> with, the violence out of fear of retaliation. Representatives of the other parties, including other unions, may be deterred from campaigning for fear of the safety of their representatives or fear that the employees and others may unwillingly get involved in a dangerous or threatening scene. Violent acts may provoke retaliation by counterviolence.
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> . . .
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> In this case, a representative of the Teamsters committed unprovoked violence in the presence of workers. We have concluded that in order to insure that the employees have an opportunity to express their choice of a bargaining agent free of intimidation, and in order to deter future threats and attacks upon persons involved in election campaigns, we must set aside the election.

Phelan and Taylor Produce, 2 ALRB No. 22, 3-4.

The assault occurred during an election campaign, at the employer's field in the presence of some of its employees. One assailant was a Teamster business agent. Both wore Teamster insignia and were identified as Teamster organizers. Under these circumstances the assault is attributable to respondent as a matter of law.

As the Second Circuit said in NLRB v. IBEW, Local 3, 467 F.2d 1158, 81 LRRM 2483 (1972) (a secondary boycott case), actual authorization or subsequent ratification is not required to hold the union responsible for the acts of its agent. The fact that an agent in carrying out the union's policy used means proscribed by the union would not necessarily excuse the union from responsibility. Common law rules of agency govern, and authority may be implied or apparent as well as express.

The courts and the NLRB have found no difficulty in holding the respondent unions responsible for the unfair labor practices of their agents in section 8(b)(l)(a) cases involving violence and threats of violence. (Section 8(b)(l)(a) of the NLRA, 29 U.S.C. $ 158(b)(1)(a), is essentially identical to Section 1154(a)(l) of the ALRA.) See, e.g., NLRB v. United Mine Workers, 429 F.2d 141, 74 LRRM 2938 (3rd Cir. 1970) (threats, intimidation and physical abuse by members of one union against the vice-president of a rival union); General Truck Drivers, Chauffers, Warehousemen and Helpers v. NLRB, 410 F.2d 1344, 71 LRRM 2311 (5th Cir. 1969) (display of gun and threatening statements by union business agent against agent of rival union at a meeting of striking employees); NLRB v. United Brotherhood of Carpenters & Joiners, 205 F.2d 505 (10th Cir. 1953) (union steward hitting a non-union employee and threatening non-union employees with loss of work); Checker Taxi Co., 131 NLRB No. 96, 48 LRRM 1110 (1961) (assault by Teamster organizers against rival union organizers).

The evidence introduced at the election hearing and the Board's findings based thereon sustain a determination that the Teamsters committed the unfair labor practice charged. Summary judgment should therefore be granted.

IV. The Remedy

Having found that the Teamsters committed an unfair labor practice within the ceasing of Section 1154(a)(l) of the ALRA, I recommend that respondent be ordered to cease and desist therefrom and to take certain affirmative actions as will effectuate the policies of the Act.

The General Counsel and the UFW have requested that a notice advising Phelan & Taylor Produce Co. employees of the determination and the Board's order be posted on respondent's and Phelan & Taylor's premises, and be mailed and distributed to employees during the 1977 peak season. They have also requested that the Teamsters make a public apology or statement, the UFW wanting it made personally by Bart Curto, Secretary-Treasurer of Local 865. The UFW has proposed a text for the notice.

It is important that workers who may have been affected by the incident, either by witnessing it or by having heard about it, be notified of the outcome of these proceedings. The workers are the interested parties, and informing them may encourage their voluntary participation in elections and other Board proceedings. See Valley Farms 2 ALRB No. 41, 4-5.

Taking into consideration the UFW's proposal, I have drafted a notice which is appended hereto. Notices posted at the premises of both Phelan & Taylor and the Teamsters will reach some current workers, net necessarily limited to Phelan & Taylor employees, who know about the incident. Notices should also be sailed to the workers employed at the time, since they may very well not work for the same employer one and a half years

later.

The UFW may also, of course, distribute additional copies as it chooses. However, requiring Phelan & Taylor to distribute copies to its 1977 peak season employees would impose too great a burden on the employer, who was not a party to the proceeding or the assault. The peak season employees can be reached effectively by having a Teamster official read the notice to them on the premises during a work day. Such a remedy is especially appropriate here because of the flagrant conduct of the Teamster agents.

Both the General Counsel and the UFW have requested reimbursement for attorneys' fees and costs. Although invited to do so, the General Counsel has not submitted any itemization or substantiation of its expenses. The UFW has submitted declarations supporting a claim of $700. Nothing has been submitted regarding expenses, if any, incurred by the two assaulted UFW organizers.

Attorneys' fees and costs have not yet been ordered by the Board in any reported unfair labor practice case. The Board considered the question in Its one unfair labor practice decision, Valley Farms. 2 ALHB No. 41, where it acknowledged it had the discretion to order such expenses but declined to do so, adopting the hearing officer's recommendation. That case did not involve any violence or any semblance of frivolous litigation.

NLRB precedent, allowing expenses but only when a respondent has engaged in clearly frivolous litigation,

see, e.g., Tiidee Products. Inc., 194 NLRB No. 198, 79 LRRM 1175, and 196 NLHB No. 27, 79 LRRM 1692, enf'd, 502 F.2d 349, 86 LRRM 1175 (D.C. Cir. 1974) may not be strictly applicable in this instance to the situation in California agriculture and the ALRB. See ALRA Section 1148.

In any event, there appear to be circumstances in the present case that warrant an award of attorneys' fees and costs. One is the nature of the unfair labor practice itself. An unprovoked assault on rival union organizers in the presence of workers is an extreme form of restraint and coercion of agricultural workers in the exercise of their right to organize. The Board spoke emphatically about the possible adverse effects of this particular incident. Phelan and Taylor Produce, 2 ALRB No. 22, 3-4 quoted above at pages 17-18.

Another consideration is the course pursued by the Teamsters in defending against the charge. In the election case the Teamsters presented no defense, not even cross-examination of adverse witnesses, on the issue of this assault. Yet it persisted in litigating the unfair labor practice charge. Its only claim was that its business agent was acting outside the scope of his employment. It offered no evidence, newly discovered or otherwise, yet contested the authority of the Board to grant summary judgment. It argued that it had insufficient notice, yet submitted no brief when given additional time. This course of conduct amounts to clearly frivolous litigation.

Ordering payment of attorneys' fees and costs will encourage settlement of nonmeritorious cases, thereby clearing the Board's crowded docket. Preventing diversion of resources

from meritorious cases is a proper use of extraordinary relief. Tiidee Products, Inc., supra. 503 F.2d at 356.

Finally, the ALRA encourages deterrence of unfair labor practices. Section 1160 states: The board is empowered, as provided in this chapter, to prevent any person from engaging in any unfair labor practice, . . ." Ordering reimbursement will tend to deter similar future Infringements upon employees' exercise of Section 1152 rights by respondent and others. Tildee Products. Inc., supra. 79 LRRM at 1693.

The Teamsters should reimburse the UFW, the only party substantiating its expenses, a reasonable amount for its attorneys[1] fees and costs.

For the foregoing reasons, and pursuant to Section 1160.3 of the Act, I recommend the following:

ORDER

1. Respondent and its officers, agents, and representatives, shall cease and desist from restraining or coercing agricultural employees in the exercise of the rights guaranteed in Section 1152 of the ALRA by threatening or committing any acts of violence or by any other means.

2. Respondent shall, by an authorized official, execute the notice appended hereto. Upon its translation by a Board agent into Spanish, respondent shall reproduce enough copies in both English and Spanish for the purposes set forth hereafter.

3. Respondent shall send copies of said notice in both English and Spanish by first class mail, postage prepaid, to all employees of Phelan & Taylor Produce Co. employed during the

payroll week which included 4 September 1975 at their last known addresses. Mailing notices to all employees who were eligible to vote in the election held at Phelan & Taylor on 10 September 1975 will satisfy this requirement.

4. Respondent shall post copies of said notice in both English and Spanish, and replace copies that are removed, defaced or covered, in conspicuous locations, not less than six each, on or about its own premises and the San Luis Obispo County premises of Phelan & Taylor Produce Co. The notices shall be posted and remain posted for a period of six consecutive months, which shall include the 1977 peak season at Phelan & Taylor, The Regional Director for the Salinas Regional Office of the Agricultural Labor Relations Board, or his or her agent, shall determine the precise number, locations and period of postings.

5. An official of respondent, authorized to speak on its behalf, shall read said notice in both English and Spanish to such agricultural employees of Phelan & Taylor Produce Co. as may be assembled on a workday during the 1977 peak season. The Regional Director for the Salinas Regional Office of the ALRB, or his or her agent, shall select the date and time, make arrangements for the reading of the notice, give the UFW advance notice of the date and time so that it may have two agents present, and have two Board agents present, including one Spanish-English interpreter.

6. Respondent shall pay to the UFW the sum of 6500 for attorneys' fees and costs.

7. Within thirty days of receiving a copy of this

decision, respondent shall report in writing to the Regional Director for the Salinas Regional Office of the ALR3 and to the UPW the steps it has taken to comply with this order, and sha3,l continue to report in writing every sixty days thereafter until it has fully complied.

Dated: 9 February 1977

Jennie Rhine
Administrative Law Officer

NOTICE

As a result of charges being filed against us by the United Farm Workers of America, AFL-CIO, the Agricultural Labor Relations Board for the State of California has determined that we violated the Agricultural Labor Relations Act when on 4 September 1975, agents of Teamsters Union Local 865, including Arturo de la Garza, physically attacked two organizers for the United Farm Workers, Paulino Pacheco and Manual Echavarria, in the presence of a Phelan & Taylor celery thinning crew.

On behalf of Local 865 I hereby apologize to the two organizers, to the United Farm Workers, and to the employees of Phelan & Taylor Produce Co, for this incident, and promise that this type of conduct will not occur in the future.

We at Local 865 intend to fully comply with the Agricultural Labor Relations Act. Accordingly, we will not threaten or commit any acts of violence, nor will we in any other way restrain or coerce any agricultural employees in the exercise of their rights to organize themselves or to form, join, or assist any labor organization, Including the United Farm Workers.

Signed:

Dated: TEAMSTERS UNION LOCAL 865

by _____
(Title)

This Notice must remain posted for six consecutive beginning on _____, and must not be altered, defaced or covered.

If anyone has questions concerning this Notice, he or-she may contact the Salinas Regional Office of the Agricultural Labor Relations Board, 21 West Laurel Drive, Salinas, California 93901 Telephone: (408) 449-5441.