STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MERZOIAN BROTHERS FARM MANAGEMENT COMPANY, INC., POPLAR GRAPE GROWERS, ST. AGNES VINEYARDS, INC., ELMCO VINEYARDS, INC., Employer - Respondent, and WESTERN CONFERENCE OF TEAMSTERS, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Intervenor - Charging Party.	Case Nos. 75-RC-10-F 75-CE-35-F 3 ALRB No. 62

On January 19, 1977, administrative law officer Gerry L. Fellman (ALO or law officer) issued his decision in the above entitled proceeding. He found that the respondent had engaged in certain unfair labor practices. He found further merit in the objections filed by the United Farm Workers of America, AFL-CIO (UFW), to the conduct of the election held on September 9, 1975.[1/] He recommended that the results of the election not be certified. The respondent, general counsel and charging party filed timely

[1/]The tally of ballots showed the following results:

Teamsters	304
UFW	201
No Union	19
Challenged Ballots	76
Void	21

The number of unresolved challenged ballots are too few in number to be determinative.

exceptions to the ALO's decision and order on the unfair labor practices and the respondent filed timely exception to the ALO's recommendation not to certify the election results.

Pursuant to Labor Code § 1146[2/] this decision has been delegated to a three-member panel.[3/]

Upon review of the entire record, we adopt the ALO's findings, conclusions, and recommendations except as modified herein.

1. The ALO has declined to reach a decision as to a number of issues in this case, preferring instead to let the Board come to an initial decision as to whether the conduct amounted to violations of the Act. We recognize that ALO's are often confronted with complicated or novel issues of law and fact. In such a case it is only fair to the parties and helpful to the Board if the ALO comes to a conclusion based on his understanding of the issues and law.

Our review of the record shows, in regard to the issues left undecided by the ALO, that there was insufficient evidence on the issues of wage increases on which to support finding a violation of the Act. Further, as we find that there is other evidence sufficient to overturn the election, it is not necessary to examine the alleged prejudicial wage increases or conduct of supervisors on the day of the election.

[2/]All references, unless otherwise indicated, are to the California Labor Code.

[3/]The respondent made a post-hearing motion to disqualify Board member Ruiz and two Board staff members from participation in the formulation of this decision. Neither member Ruiz nor the persons specified worked on or participated in this decision.

2. The ALO concluded that surveillance by a supervisor of the employer on August 28[4/] constituted an unfair labor practice. We agree that surveillance of employee activities which has a reasonable tendency to affect employee exercise of statutory rights violates § 1153(a). Proof that the surveillance in fact interfered with employees union activities, however, is not necessary to such a finding.

3. We find that the respondent interfered with its employees' rights and violated § 1153 (a) by denying UFW organizers entry to the labor camp under the control of Supervisor Mohammed H. Ghaleb (Fresno) on the morning of September 9, 1975. Our conclusion is in conformity with the ALO's findings.[5/]

In Silver Creek Packing Company, 3 ALRB No. 13 (1977), we stated emphatically that "communication at the homes of employees is not only legitimate, but crucial to the proper functioning of the Act. (Citations omitted.)" The record reveals that the camp was under control of the respondent's supervisor Fresno. The gates were shut and locked at night. They were not unlocked until employees left for work in the morning. Only four of approximately 60-65 residents had keys. (One was Fresno and the other three were his assistants.) The refusal by the camp supervisor to let

[4/]All dates unless otherwise indicated are in 1975.

[5/]Despite comments of the ALO to the contrary, the access rule, 8 Cal. Admin. Code § 20900 (1975), revised and amended 1976, deals only with access to workers before, during, and after the working day at the job site. It is not applicable to visits by union organizers to labor camps. Consequently, the fact that the access rule was enjoined during the period in question has no bearing on the issue of whether or not the respondent's conduct at the labor camp violated § 1153(a).

organizers (including the union president) into the camp early on the morning of the election day, even though workers wanted to talk to the visitors, clearly contravened the workers' rights guaranteed under § 1152 and constituted a violation of § 1153(a) .

Our dissenting colleague writes of the employer's "liberal policy" of access to its job sites and labor camps. First, the employer's policy toward access at the job site is irrelevant. Second, we can see very little that is liberal in the employer's locked gate policy. Distributing keys only to the supervisor and his assistant not only permits the employer to restrict at its pleasure when union organizers can enter the premises, but reduces the resident to the status of a prisoner, locked behind barbed wire topped fences, unable to leave or have visitors without permission of the supervisor.

The right of employees who are residents of a labor camp to receive visitors is akin to the rights of a person in his own home or apartment. The owner or operator of a labor camp cannot exercise for the worker his right not to receive visits from union organizers. Unlike our dissenting colleague, we recognize that accommodation must be made for the rights of not just the owner and the organizer, but also for the tenant who has a basic right to control his own home life. It is our duty to balance these rights and a heavy burden will lie with the owner or operator of a camp to show that any rule restricting access does not also restrict the rights of the tenant to be visited or have visitors.

4. The law officer found that there was no constructive

discharge in violation of the Act when Safi Mugbil Mohammed (Mohammed)[6/] left the respondent's employ on September 9, 1975. Based on the facts as the ALO found them, we disagree with his conclusions and we find that Mohammed was constructively discharged in violation of § 1153 (a) and (c) as a result of the respondent's supervisors' threats and harrassment of UFW supporters.

A constructive discharge exists when the employer creates or imposes such onerous conditions on the employee's continued employment because of union activities or membership that the employee leaves. See J. P. Stevens & Co. v. NLRB, 461 F. 2d 490 (1972). On the evening of September 1, two days before the election, Mohammed took UFW literature with him on a visit to another part of the labor camp in which he lived that was under the control of Aunalla, a supervisor of the respondent. There he passed out his papers, and in turn received Teamster campaign material from a Teamsters' representative. During the evening, Aunalla burst into the room where Mohammed was visiting and threatened to fight and kill him. Aunalla said he did not want southern and northern Yemenis to mix. Mohammed proceeded to leave Aunalla's part of camp. The record is clear that Arab workers from south Yemen were branded as Communists and linked

[6/] It is impermissible, as the ALO did, to draw inferences about a witness's ability to understand or speak English from the fact that a witness chose to testify through an interpreter. The circumstances surrounding Mohammed's appearance in a court-like setting, and choosing to testify in a language of his choice, are in no manner probative as to his ability to function in an English speaking environment outside the hearing room. Since it is unnecessary to our finding here as to the illegal discharge to determine if Mohammed and the employer in fact had a conversation on September 8, we do not examine the effect the ALO's error had on his conclusions regarding such an alleged conversation.

with the UFW in the minds of many supervisors, Aunalla included.[7/]

On September 9, after ballots had been tallied and the election results had been announced, Mohammed heard supervisors speaking over a loudspeaker located on a truck belonging to one of the supervisors. The supervisors were Aunalla, Fresno, and Abdulla Hesson. Mohammed testified that he heard them say, "We won over the Communists, the Imperialists, and after tomorrow, we will win in Aden." He said further that the supervisors threatened to use their guns against the "Chavistas" (supporters of the UFW).[8/] Earlier, he had said that he had heard guns being fired after the Teamsters' victory was known. Though he did not know who was firing the guns, he knew that some supervisors, including Fresno and Aunalla, carried guns.

Mohammed, after hearing the threat to use guns against UFW supporters, became afraid for his life and left camp. The occurrence and timing of the events described above is sufficient to justify Mohammed's fears and lead us to find that the respondent constructively discharged him from his job. We find that Mohammed's discharge is in violation of § 1153(a) and (c) and we overrule the ALO on this point.

7/The ALO found that Aunalla told workers that "all workers with Chavez and anybody who works with Chave2 are Communists." Other credited testimony also revealed that Aunalla thought the UFW was no good because they were like the "democrats" from South Yemen. (South Yemen is officially called The People's Democratic Republic of Yemen.)

8/The ALO found that Aunalla alone had made these statements. We find only that Mohammed said that the statements were made by a group of three supervisors, Aunalla among them. Two of these three, Hesson and Fresno, testified at the hearing. Neither was interrogated concerning these events. Aunalla, though available, was not called. We credit Mohammed's uncontested version o£ the events.

5. We agree with ALO's conclusion that the results of this election should be set aside. The use of force to drive a supporter of one competing union from a meeting where supervisors of the respondent were campaigning for a rival union would normally be enough by itself for us to find that the employees were denied an opportunity to express their free choice as to a bargaining representative. See Phelan and Taylor Produce, 2 ALRB No. 22 (1976)

Additionally, we find that there was surveillance of employees engaged in protected union activity, threats uttered by a supervisor to employees within three weeks of the election that employees would lose their jobs if they supported the UFW,[9/] and a denial of access to UFW representatives who wanted to speak with employees at their homes on the morning of the election.

The cumulative effect of these actions can only lead to the conclusion that an atmosphere of threats, surveillance, and force surrounded the election in this case and interfered with the employee's free and uncoerced choice of a bargaining

---

[9/] Two aspects of this incident, which occurred in late August, merit discussion:
1. The law officer is incorrect in stating that pre-Act conduct cannot be evidence of conduct that interfered with the employee's right to a free and uncoerced choice in the representation election. We will review such pre-Act conduct, where as here it is closely connected with an organizational campaign and ensuing election. See K. K. Ito Farms, 2 ALRB No. 51 (1976).
2. The respondent objects to the law officer's inference, taken from the failure of a witness who was at the hearings to testify and refute the General Counsel's testimony, that his testimony would have been unfavorable to the respondent's defense. Such an inference is permissible under NLRB precedent. We find the respondent's objection to be without merit. See Goodyear Tire & Rubber Company, 190 NLRB 84, 86 (Footnote 3), (1971).

agent. Accordingly, we set aside the results of this election.

The Remedy

As we find that respondents have engaged in unfair labor practices, we order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

By unlawfully and constructively discharging Safi Mugbil Mohammed, respondents violated § 1153(a) and (c) of the Act. We order that respondents offer to him immediate and full reinstatement to former or substantially equivalent position without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of such discrimination.

We also order that respondents post, mail, and read the attached NOTICE TO WORKERS in the manner set forth below. We have found such remedies to be necessary and warranted in the agricultural context. See Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

Accordingly, IT IS HEREBY ORDERED that the respondents, Merzoian Brothers Farm Management Company, Inc., Poplar Grape Growers, St. Agnes Vineyards, Inc., Elmco Vineyards, Inc., its officers, agents, successors, and assigns shall:

1. Cease and Desist from:

a) Discouraging membership of employees in the UFW or any other labor organization by unlawfully discharging or laying off employees, or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code Section 1153(c).

b) Surveilling employees when they engage in protected activities.

c) Using force or violence against union organizers who are attempting to communicate with employees.

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

e) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Labor Code Section 1152.

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

a) Immediately offer Safi Mugbil Mohammed reinstatement to his former job without prejudice to his seniority or other rights and privileges, and make him whole for any losses he may have suffered as a result of his termination.

b) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of hack pay due and the rights of reinstatement under the terms of this Order.

c) Post copies of the attached notice at times and places to be determined by the regional director. The notices shall remain posted throughout the 1977 summer-fall harvest. Copies of the notice shall be furnished by the regional director in appropriate languages. The respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

d) Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this order, to all of the employees listed on its master payroll for the payroll period immediately preceding the filing of the petition for certification in October, 1975.

e) *A* representative of the respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of the respondent on company time. The reading or readings shall be at such times and places as are specified by the regional director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the notice or their rights under the Act. The regional director shall determine a reasonable rate of compensation to be paid by the respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

f) Hand out the attached notice to all present employees and to all employees hired through the 1977 summer-fall harvest.

g) Notify the regional director in writing, within 20 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the regional director, the respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ORDERED that the results of the election in case 75-RC-10-F are set aside.

It is further ORDERED that all allegations contained in the complaint and not found herein are dismissed.

Dated: July 29, 1977

Gerald A. Brown, Chairman

Robert B. Hutchinson, Member

WE WILL NOT fire or do anything against you because of the union;

WE WILL NOT prevent union organizers from coming into our labor camps to tell you about the union when the law allows it;

WE WILL NOT interfere with your rights to get and keep union papers and pamphlets.

WE WILL NOT assault union organizers who are trying to talk with you;

WE WILL OFFER Safi Mugbil Mohammed his old job back if he wants it, beginning in this harvest and we will pay him any money he lost because we laid him off.

MERZOIAN BROTHERS FARM MANAGEMENT COMPANY, INC., POPLAR GRAPE GROWERS, ST. AGNES VINEYARDS, INC., ELWCO VINEYARDS, 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.

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to send out and pest this Notice.

We will do what the Board has ordered, and also tell you that:

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

(1) to organize themselves;

(2) to form, join, or help unions;

(3) to bargain as a group and choose whom they want to speak for them;

(4) to act together with other workers to try to get a contract or to help or protect one another;

(5) to decide not to do any of these things.

Because this is true we promise that:

WE WILL HOT do anything in the future that forces you to do, or stops you from doing any of the things listed above.

Especially:

WE WILL NOT conduct surveillance while you are engaging in union activity.

WE WILL NOT threaten you with being fired, laid off, or getting less work because of your feelings about, actions for, or membership in any union.

WE WILL NOT fire or do anything against you because of the union;

WE WILL NOT prevent union organizers from coming into our labor camps to tell you about the union when the law allows it;

WE WILL NOT interfere with your rights to get and keep union papers and pamphlets.

WE WILL NOT assault union organizers who are trying to talk with you;

WE WILL OFFER Safi Mugbil Mohammed his old job back if he wants it, beginning in this harvest and we will pay him any money he lost because we laid him off.

MERZOIAN BROTHERS FARM MANAGEMENT COMPANY , INC . , POPLAR GRAPE GROWERS, ST. AGNES VINEYARDS, INC., ELMCO VINEYARDS, 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.

MEMBER JOHNSEN, Concurring in Part and Dissenting in Part:

Considering the totality of the alleged misconduct affecting the election, I concur in the majority's decision to set the election aside. However, I am in disagreement with the majority's conclusions as to certain unfair labor practice charges in this case.

The majority concludes that the respondent violated Section 1153 (a) of the Act by denying UFW organizers entry to one of its labor camps on the morning of the September 9 election, between the hours of 5:15 a.m. and 6:00 a.m. The denial of access occurred when it was still dark and at a time when the camp gates were normally locked. The labor camp was inhabited by 55 to 60 workers while the organizers seeking entry numbered between 10 and 20 including the UFW president, Cesar Chavez.

The record reveals that the denial of access was an isolated incident. In fact, the law officer found that more

than four weeks prior to the effective date of the ALRA, the respondent had instituted, voluntarily, a liberal policy of union access to its work sites and labor camps.[1/] This policy was communicated to the UFW and Teamster representatives on August 4 and 5. The administrative law officer's decision is replete with indications that both unions had, in fact, taken access into the labor camps to organize many times during the election campaign.

It is undisputed that union organizers possess a constitutional right of access to private farm labor housing. United Farm Workers of America v. Superior Court (William Buak Fruit Company, Inc.), 14 C. 3d 902, 122 Cal. Rptr 877, 537 P. 2d 1237 (1975). Despite this constitutional mandate, many cases have held that such access is subject to reasonable restrictions imposed by the camp owner which are designed to prevent unnecessary interference with the owner's business activity. Petersen v. Talisman Sugar Corp., 478 F. 2d 73 (5th Cir. 1973), 84 LRRM 2061; Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974), 85 LRRM 2758 (where the court balanced "the three competing and conflicting interests" of the camp owner, the visitor, and the camp resident in favor of reasonably restricted access); United Farm Workers Union, AFL-C10 v. Mel

---

[1/]The respondent's policy as of July 29, 1975 was described by the administrative law officer as follows:

> (1) complete neutrality;
> (2) allowing UFW and Teamster representatives the right to enter its fields to talk to crews during lunch break and to enter its six camps after working hours; and
> (3) noninterference by management with either union so long as they abide by the guidelines set by the Board. [See A.L.O.D., p. 9.]

Finerman Co., 364 F. Supp. 326 (D. Colo. 1973), 84 LRRM 2081. In the Buak case, supra at p. 910, fn. 8, the California Supreme Court also intimated that less than a total prohibition of access would not be objectionable if it was demonstrated that there was "reasonable access" to the labor camp.

In light of the foregoing precedents, it is clear that the respondent in this case could have legitimately denied access to the organizers that morning due to the potential for disruption of the employees' working schedule. The respondent-employer, however, has failed to justify its denial on the basis of the potential for interference with its business activity. Even though the employer has failed in this respect, it is my opinion that this isolated denial of access is not of sufficient gravity to warrant the finding of an unfair labor practice.

I wish to emphasize that an accommodation must be drawn between the parties' respective constitutional rights; the right of access, like the incidents of property ownership, is not absolute and must be appropriately adjusted to the facts of each case.

The majority holds that Safi Mugbil Mohammed[2/] was constructively discharged in violation of Sections 1153(a) and (c) of the Act; I respectfully dissent.

The majority's conclusion[3/] is based upon several assumptions, one of which is that the political and philosophical

---

[2/]Hereinafter referred to as Mohammed.

[3/]That Mohammed was constructively discharged in reprisal for his union activities protected under Section 1152 of the Act.

chasm which divides North and South Yemen can be closely identified with the Teamster-UFW disputes extant in the California labor movement in late 1975. This approach oversimplifies a complex and deep-seated conflict. It is not uncommon for farm labor camps in California to be divided into rival factions because of cultural incompatibility and hostility and not because of Teamster, UFW or no union affiliations.

The events of September 7,[4/] reveal that Mohammed was the subject of supervisor Aunalla's wrath because "Aunalla did not want Southern Yemenese to be with North Yemenese". [A.L.O.D., p. 21] The record is barren of any evidence which demonstrates that Aunalla knew that Mohammed was a "Chavista" or that he had without incident distributed UFW literature earlier that evening. In fact, Teamster literature had also been distributed that night which would have rendered it virtually impossible for Aunalla to determine that Mohammed, among the others present in the room, was pro-UFW, Aunalla was unaware of Mohammed's union allegiance, and the threats of violence occasioned upon Mohammed on September 7 were, *I* conclude, motivated solely by Aunalla's hatred and resentment of the South Yemenese.

The NLRB has made it clear that in order for an employee's quit to constitute an unlawful discharge it must be capable of positive proof that the employee "had been subjected to harassment or on-the-job reprisals for union activity". Central Casket Company, 225 HLRB No. 37, 92 LRRM 1547 (1976). In the instant case, Mohammed was threatened with violence for

[4/] The administrative law officer credited Mohammed's testimony concerning the events occuring on this date. The majority accepts this determination.

crossing into the portion of the employer's camp occupied by the North Yemenese, not for his union activism. I agree with the majority that .it is implicit in the doctrine of constructive discharge that the employer must "deliberately make an employee's working conditions intolerable ... because of union activities or union membership". J. P. Stevens & Co., Inc. v. NLRD, 461 P. 2d 490, 494 (4th Cir. 1972), 80 LRRM 2609. *I* disagree with the majority's stretching of this doctrine to include political philosophies in the minds of supervisors.

The administrative law officer found that on September 9,[5/] one or more of the company supervisors[6/] broadcast over a sound amplification device that they won over the Communists and Imperialists and mentioned using their guns against the Chavistas. [A.L.O.D., p. 23] Mohammed also testified that he heard gunfire at this time, although he was unsure of its source.

The majority concludes, contrary to the law officer, that the timing and sequence of these events ware sufficient to support the allegations of constructive discharge in violation of the Act. Such a deduction, however, is logically

---

[5/]The administrative law officer credited Robert Merzoian's testimony and concluded that Mohammed and Merzoian did not have a conversation on September 8, 1975. The majority found that it was unnecessary to determine if a conversation did, in fact, take place on this date since their finding of an illegal discharge rested upon the events occurring on September 7 and September 9. My analysis also includes the events of September 8 in accordance with the administrative law officer's evaluation.

[6/]The administrative law officer determined that Aunalla. a] one made these statements. The majority finds that Mohammed testified that a group of three supervisors, including Aunalla, made the statements. Whether Hesson and Presno, the other supervisors, also participated in the broadcast is not crucial to my analysis.

defective in light of management's ignorance of Mohammed's union inclinations.

In Central Casket, supra, the KLRB was also confronted with a sequence of events culminating with the employee's departure from his job. The Board, however, refused to "speculate" that the worker's quit was the result of the employer's conduct, despite the employer's "clear anti-union proclivities". The employee's fears "rested on no objective basis but wore simply the product of his subjective misgivings". Notwithstanding the factual differences between the foregoing case and the one at bar, the NLRB's analysis is appropriate here because Mohammed also harbored subjective fears which are not fairly attributable to the employer's conduct.

I do not condone the alleged activities of Aunalla on the dates material herein. I cannot, however, construe such actions as legally sufficient to support a violation of the Act absent proof of the imposition of intolerable working conditions in reprisal for Mohammed's conduct protected under Section 1152.

Finding no constructive discharge and, at the most, a de minimus violation of the Act with regard to surveillance, I would impose no remedy in this case beyond a simple cease and desist order.

Dated: July 29, 1977

RICHARD JOHNSEN, JR., Member