STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROD McLELLAN COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Nos. 75-CE-151-M 75-CE-227-M 75-CE-232-M 75-CE-264-M 3 ALRB No. 71

On February 11, 1977, Administrative Law Officer Michael H. Weiss issued his decision in this case. Timely exceptions were filed by the respondent, the charging party and the general counsel. Having reviewed the record, we adopt the law officer's findings, conclusions and recommendations to the extent consistent with this opinion.

The general counsel and charging party except to the administrative law officer's determination that the interrogation of employee organizer Sandoval by the respondent's general manager was not violative of the Act. The administrative law officer found that Eddings, the general manager, initiated a conversation with Sandoval in which Eddings asked Sandoval if he was involved in organizational activities. Questioning an employee as to his/her views, sympathies, or activities with the union tends to restrain or interfere with the collective rights guaranteed by the Act. We therefore find a violation of § 1153 (a).

The respondent excepted inter alia to the administrative law officer's finding that changing the work schedules of Angel

Sandoval and Jose C. Hernandez constituted a violation of SS 1153(a) and (c) of the Act. We find the respondent's exception to have merit.

Prior to October 9, 1975 Sandoval and Hernandez, as truck drivers for respondent, would arrive at work at approximately 7:30 a.m. The first truck would be loaded and leave the McLellan property sometime during the morning and the second truck would usually leave in the early afternoon. In accordance with a scheduling change instituted on October 9, the first driver would arrive at work at his usual time but was required to depart by 9:00 a.m. The second driver was required to arrive at 11:00 a.m. or 12 noon[1/] and depart upon completion of the loading procedures.

The administrative law officer found that the scheduling change instituted by the company was designed to separate the two truck drivers (who were known to be active union organizers) and to interfere with, discourage and restrain their union organizing efforts. The company, on the other hand, denies that the change was the product of an illicit motive and has cited business justification in an effort to satisfy its burden of proof under NLRB v. Great Dane Trailers, Inc., 388 U. S. 26, 87 S. Ct. 1792 (1967).

At the outset we note that an employer has a fundamental right to assign duties and arrange work schedules in accordance with its best judgment. Absent contractual restrictions, the time, place, and manner of employment are

---

[1/] This was subsequently changed so that the second driver would arrive by 10:00 a.m.

employer decisions. Macy's, Missouri-Kansas Div. v. NLRB, 389 F. 2d 835, 67 LRRM 2563 (8th Cir. 1968). It is not within our province to disturb such employer decisions absent proof that the assignment was intended to inhibit the exercise of § 1152 rights or that the adverse effect of the change on employee rights outweighed the employer's business justifications. NLRB v. Great Dane Trailers, Inc., supra.

We recognize that the change of schedule in this case was effectuated prior to the election, and during the employer's anti-union campaign. It is clear, as we said in S. Kuramura, Inc., 3 ALRB No. 49 (1977) that the Board may draw inferences from the facts of the case in an effort to establish the employer's true motive; however, circumstances which merely raise a suspicion do not-establish a violation. NLRB v. Citizen News Company, 134 F. 2d 970, 12 LRRM 637 (9th Cir. 1943). The record in this case is devoid of other evidence which supports the contention that the employer's motive was illicit.[2/]

The employer asserts that the changes in Sandoval's and Hernandez' schedules were instituted to remedy customer complaints concerning irregular delivery times[3/] and to eliminate the inefficient overlap periods when both vehicles remained idle. There was also testimony to the effect that plans to make these changes had been considered several months earlier. These contentions are uncontroverted.

[2/]We qualify this statement by acknowledging that the alleged discriminatees testified that the employer's motive was to discriminate.

[3/]Angel Sandoval, himself, testified that there were complaints concerning irregular delivery times.

Contrary to the law officer's conclusions, we do not find that the schedule change served to isolate Sandoval and Hernandez from the other employees in any material way. Although the change impaired their ability to meet together at certain times in the mornings to plan their organizing strategies, we find that this was, at most, a personal inconvenience.

Accordingly, we decline to find that the company has violated § 1153 with respect to changes in work schedules.

The administrative law officer has recommended the remedy of expanded access to the retail store on respondent's premises. There is insufficient evidence to establish that the retail clerks were "agricultural employees" as defined in Labor Code Section 1140.4(b). We therefore modify the administrative law officer's order to exclude the employer's retail store from the expanded access remedy.

We modify the administrative law officer's order to provide for computation of back pay and interest for Jose Barretos in accordance with the formula used in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977). We also amend the administrative law officer's order to provide for the standard reading of the attached notice to the employees in lieu of distribution of the notice by hand.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the respondent, Rod McLellan Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the union, or any other labor organization, by unlawful interrogations or by telling them not to vote in an employee election, or by discharging, laying off, or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any term or condition of employment except as authorized in § 1153(c) of the Act.

(b) In any other manner interfering with, restraining and coercing employees in the exercise of their 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, or to refrain from any and 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 of continued employment as authorized in § 1153(c) of the Act.

(c) Denying access to or engaging in surveillance of any union representative who is lawfully present and engaging in protected and concerted activities, except to the extent such denial is expressly authorized by 8 Cal. Admin. Code § 20900 et seg. (1976).

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

(a) Offer to Jose Barretos immediate and full reinstatement to his former or substantially equivalent 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 the refusal of reinstatement pursuant to the formula used in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

(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 other records necessary to analyze the back pay due.

(c) 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 nonhourly wage employees to compensate them for the time lost at this reading and the question and answer period.

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

(e) Provide additional limited access to representatives of the union as follows: In addition to one hour before and after work and one hour during lunch periods,

organizers shall also have access during extended breaks for a period of three (3) days. Organizers shall also have access to the old and new packing sheds for the same period of time.

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

Dated: August 30, 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, 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 planting, cutting, and harvesting seasons, that we will respect the rights of all our employees in the future. Therefore we are now telling each of you:

(1) We will reinstate Jose Barretos to his former job and give him back pay for any losses he had while he was off work.

(2) We will not question any of our employees about their support of the United Farm Workers of America, or any other labor organization, and we will not tell them not to vote or how they should vote in any election which may be ordered among our employees.

(3) We will not observe or watch any of our employees while they are in the presence of or talking to representatives of the United Farm Workers.

(4) All our employees are free to support, become or remain members of the United Farm Workers of America, or of any other union. 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 choice provided this is not done at times or in a manner that it interferes with their doing the job for which they were hired. We will not discharge, lay off, or in any other 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:

ROD McLELLAN COMPANY

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.

MEMBERS RUIZ and PERRY, Dissenting:

By the adoption of the ALO's conclusion that the respondent is not liable for the actions of its employee Angie Aguirre, the majority has ignored a well-established line of federal cases which, in our view, support a different conclusion.

Aguirre was a long-time employee of the company, having worked there for some 10 years. While her supervisory status is a very close question, it is clear that she was a "lead person," able to exercise general authority over a crew which packed orchids for shipment. The ALO found that she directed the employees in the crew in the filling of shipping orders and occupied a position of some influence regarding hiring, firing, disciplining and the adjustment of grievances within that crew. During the company's anti-union campaign Aguirre was utilized by David Jacobs, an acknowledged supervisor, as a translator on an occasion when Jacobs uttered coercive statements. At the same meeting and in Jacobs' presence Aguirre herself uttered statements which, in their essence, the ALO finds to constitute coercion or interference with employee rights. On at least one other occasion Aguirre spoke independently to workers on company time and in terms characterized by

the ALO as unlawful. Despite Aguirre's denial of the fact, the respondent's General Manager Eddings testified that she had told him about her intention to speak to the workers about the union. The only reasonable inference to be drawn from the facts is that Eddings knew these speeches would be anti-union in nature. After his limited observation of Aguirre on the witness stand, the ALO could conclude that Aguirre "... was extremely antagonistic and hostile towerds [sic] the UFW and made no secret of it." (Emphasis in original.) In the person of supervisor Jacobs, the company had knowledge of one speech she actually gave. The company did not disavow any of Aguirre's statements.

The totality of the above evidence establishes the respondent's liability for Aguirre's activities. In a series of cases presenting similar facts, violations of § 8 (a)(1) of the NLRA have been found. See, e.g., International Association of Machinists v. NLRB, 311 U. S. 72, 7 LRRM 282 (1940); Harrison Sheet Steel Co., 94 NLRB 81, 82, 28 LRRM 1012, 1014 (1951); Sioux City Brewing Co., 82 NLRB 1061, 23 LRRM 1683 (1949). In these decisions the employer was held liable for the acts of nonsupervisory employees who nonetheless exercised some general authority over other employees, were in a strategic position to translate the policies and desires of management, did so in a manner which constituted restraint, interference or coercion of employees and which was within the knowledge of the company or in conformity with its own course of conduct. As here, these employees were labeled by their employers *as* "lead men,""worker leaders," or "first men."

The International Machinists case contains another principle basic to proper analysis of this issue which was not

reflected in the ALO's decision. It is that the agency concepts pertinent to the doctrine of respondeat superior do not apply here. As the court said:

> We are dealing here not with private rights [citation omitted] nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process of all taint of an employer's compulsion, domination or influence. International Association of Machinists v. NLRB, supra, 311 U. S. at 80, 7 LRRM at 286. See also Labor Code Section 1165.4.

We regard the majority's overturning of the ALO's finding concerning the shift change of employee-organizers Sandoval and Hernandez to be the product of an artificial isolation of this element of the complaint from the case as a whole. The claim made that but for the statements of the employees themselves and the timing of the change the "record in this case is devoid of other evidence which supports the contention that the employer's motive was illicit" overlooks the full catalogue of other violations found, including prior threats directed at these very employees by company officials. We would accept the ALO's treatment and issue a cease and desist order.

Dated: August 30, 1977

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA

THE AGRICULTURAL LABOR RELATIONS BOARD

IN THE MATTER OF ROD Me LELLAN COMPANY, Respondant, and UNITED FARM WORKER OF AMERICA, AFL-CIO, Petitioner.	NO. 75-CE-151-M 75-CE-227-M 75-CE-232-M 75-CE-264-M

Appearances: Norman Sato
Lupe Martinez
21 West Laural Drive
Salinas, California
for General Counsel

Frederick A. Morgan
Robert J. Stumpf
Bronson, Bronson and McKinnon
555 California Street
San Francisco, California
for Respondent Rod Me Lellan Company

Linton Joaquin
Ann M. Arbogast
Salinas, California
for interveners and charging parties
United Farm Workers of America, AFL-CIO

DECISION

I. Statement of the Case

Michael H. Weiss, Administrative Law Officer:

These cases were heard before me in Watsonville, California, during the week of January 17th through 21st, 1977. The hearing

involved twelve separate charges contained in two complaints; the first was filed on December 2, 1975 and contained ten allegations of unfair labor practices pre-dating the representation election held on November 5, 1975; and second complaint that, was filed on the 28th of January, 1976 and contained two post-election unfair labor practice allegations. The complaints allege violations of Section 1140.4(a) and Sections 1153 (a) and (c) of the Agricultural Labor Relations Act, hereinafter called the Act.

All parties were given a full opportunity to, and did, participate in the hearing, and at the close of the hearing, were invited to file post hearing briefs. Both respondant and UFW filed timely post-hearing briefs. Although the General Counsel mailed its post-hearing brief in a timely fashion, it was not received by the hearing examiner until after the decision had been prepared. Nevertheless, I have reviewed the General Counsel's brief and there was nothing in the discussion therein that effected . my decision regarding any of the twelve allegations.

The record of the proceedings consists of the following:

-The testimony of the 13 witnesses called by the General Counsel;

-The testimony of the seven witnesses called by respondant Rod Mc Lellan

-General Counsel's exhibits numbered 1 through 13

-Respondent's exhibits numbered 1 through 16

-Intervener's exhibits 1 and 2

Upon reviewing the entire record, including my observation of the demeanor of the witnesses called by the parties, my visit to and view of respondant's physical layout and operation, and after consideration of the briefs filed by the parties, I make the following determinations.

II. Findings of Fact

A. Jurisdiction

The parties stipulated that Rod Me Lellan Company was an agricultural employer, that the charging parties were at all relevant times agricultural employees and that the UFW has been and is a labor organization. In addition, the parties stipulated that all persons alleged to be supervisors, were, with one notable exception, supervisors. The specific stipulations entered into by the parties and relevant to this decision follow.

Stipulations

1. Consolidated Complaint dated December 2, 1975, General Counsel's Exhibit 4(b) :

   A. The allegations of paragraph one with regard to the serving of a true and correct copy of the original charges in this case are admitted.

   B. The allegations in paragraph two that Rod Me Lellan is a corporation engaged in agriculture is admitted, and that respondant is now and at all times material herein an agricultural employer within the meaning of Section 1140.4 (c) of the Act. It was further stipulated that all references within the complaint to Rod Me Lellan being an agricultural employer in Santa Cruz County would ' be changed on its face to Monterey County.

   C. The allegations of paragraph three that the charging party-employees at all times relevant herein have been agricultural employees within the meaning of Section 1140.4(b) of the Act. The complaint was permitted to be amended

on its face by stipulation to omit the words "and are now" agricultural employees.

D. The allegations of paragraph four are admitted that at all times material herein, the UFW has been and is a labor organization within the meaning of Section 1140.4(f) of the Act.

E. The allegations of paragraph five are admitted as follows: The following named persons occupy the position as set forth opposite their respective names, and, have been and are now, supervisors, within the meaning of Section 1140.4 (j) of the Act and agents of respondents acting on its behalf:

Larry Eddings - General Manager
David Jacobs - Supervisor
Craig Winter - Supervisor
Domingo Sandoval - Supervisor

2. Complaint dated January 28, 1976, General Counsel's Exhibit #5:

F. The allegations of paragraph 1 that a true and correct copy of the original charge was served on the respondent were admitted.

G. The allegations of paragraph 2 that respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act are admitted.

H. The allegations of paragraph 3 that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act are admitted.

I. The allegations of-paragraph 5 of the complaint that at all times material herein, Jose Barretos, has been and was, an agricultural employee within the meaning of

Section 1140.4(b) of the Act, until his employment terminated were admitted.

B. The Unfair Labor Practice Allegations, Generally

The complaints in this consolidated case allege that respondent was responsible for twelve separate violations of Sections 1153(a) and (c) of the Act in the following broad catagories: that the Union was denied access to and was subject to surveillance at the Rod Mc Lellan premises in Watsonville, California; that the employees were subject to intimidation and coercion with regard to the election that occurred on November 5, 1975; that employees sympathetic to or members of the UFW were subject to discriminatory discharge and/or discriminatory terms in the conditions of their employment; and finally that Angie Aguirre was a Supervisor acting as an agent on behalf of respondent with regard to the acts allegedly committed on respondent's premises. The ten allegations of the complaint filed on December 2, 1975 are found in paragraph six and are designated therein as subparagraphs (a) - (j). For simplicity purposes, allegations in the second complaint dated January 23, 1976, which was consolidated at the hearing with the first, shall be referred to as (k) and (1) in order to avoid confusion with any of the allegations of the December 2nd complaint. Each of these allegations of unfair labor practices shall be discussed herein- after seriatim.

Each of the acts, with the exception of unfair labor practice allegation (j), occurred on the premises of respondent's Watsonville operation. The allegation contained in paragraph (j) occurred on the respondent's South San Francisco premises. Respondent denies

each of the allegations contained in the twelve charges with the exception of the allegation contained in paragraph 6(g). Respondent concedes that they did, in fact, commit a "technical" violation and denied access to UFW representatives during noon hours to visit workers eating their lunches within buildings at their Watsonville premises the week immediately prior to the election. The significance of the admission of this violation and its remedy will be more fully discussed later.

C. The Operation of Rod Me Lellan Company

The Rod Me Lellan Company is a diversified corporation with operations at two locations, in Watsonville and South San Francisco, California. It has been in existence since 1960 and is in the business of producing and selling floral products and plant soil, both wholesale and retail. Its products include fresh eucalpytus plants which are grown outside in fields; roses which are grown in greenhouses and cut daily; orchids which are grown in greenhouses both in the form of plants and/or just for the sale of the flowers; gardenias; and several hundred varieties of house plants also grown in greenhouses in what is designated as the propagation department. In order to cordinate their operation, respondent runs a number of trucks between the Watsonville and South San Francisco premises, as well as to San Francisco, in order to transport the various products from one location to another and also in order to provide their products to their wholesale customers.

The work at Rod Me Lellan Company is seasonal and accordingly, the employment also fluctuates. The fresh flower department, which consists of the roses, orchids and gardenias, and the eucalyptus, is

highly seasonal. The major demand period is between December and May. For instance, in the eucalyptus department, the peak season occurs usually during the months of December and January. There was consistent testimony that the number of employees in the eucalyptus department would generally be around twelve 'to fourteen during the months of September and October, reaching approximately twenty-five in December and usually thirty-five to forty during December and January and then starting to slack in the continuing months.

Respondant's exhibit number 8 which is a chart of the work force at Rod Me Lellan's Watsonville operation broken down by department, reflects the flow of the seasonal employment at that location. During the course of the year, the season's employment would range from a low of 98 to 100 up to a high of as much as 140 to 150 employees. For instance, on November 5, 1975, when the election took place, (which is the subject of a separate challenge presently pending before the Board), there were approximately 110 employees that were eligible to vote in that election. (See Intervener's Exhibit number 2).

D. Physical Lay-Out of The Watsonville Premises

Respondant's Watsonville operation is located approximately twelve miles outside of Watsonville on Highway G-11, approximately three miles west of Highway 101. The property starts from the highway continuing for a distance I would estimate as a quarter of a mile.. Adjacent to the highway, there is a small shoulder where cars can park before you actually are on Rod Me Lellan's premises. Approximately fifty to seventy-five feet off the highway is a gate that is allowed to remain open during business hours,

and otherwise is kept locked. You continue through Rod Me Lellan's property by means of a recently paved road. The paved road continues through a number of fields of eucalyptus trees or bushes containing the crop that is cut and becomes part of the produce of the company. The paved road branches and then leads to two parking lots on either side of what has been designated as the new packing shed. In addition to the new packing shed, which was built in the summer of 1975, there is an additional packing shed which is referred to as the old packing shed, and there is a series of greenhouses which are laid out in what are called ranges, A range through H range. One additional structure, the retail store which was completed in December, 1976, has been built since the election took place in November of 1975. Prior to the completion of the retail store in its present location, the retail store was located in one of the greenhouses "B" range, opposite what is designated as the old packing shed. Two exhibits, respondent's number 9, which is a diagram of the Rod Me Lellan operation in Watsonville, and respondent's number 16, which is an aerial photo of the Watsonville operation taken in October, 1975, have been attached to this decision in order to give a more accurate record of the physical layout of the premises.

E. Organizing Efforts at Respondent's Premises

In June of 1975, the Agricultural Labor Relations Act was passed and took effect on or about August 28, 1975. In early September, 1975, the supervisors and General Manager of Rod Mc Lellan Company held a series of meetings in which they discussed the impact of the Act on the operations at Rod Me Lellan and also the

likelihood that there would be organizing activities on the premises. Mr. Eddings, the General Manager, testified that at that point in time/ Respondent was not aware that any organizing efforts were, in fact, being taken at Rod Me Lellan's by either their employees or by staff organizers for the UFW.

By mid-September, 1975, however, Mr. Eddings became aware through rumors and then from the worker himself, that Angel Sandoval an employee with more than ten years experience with the company, was, in fact, organizing on behalf of the UFW. At this point, Angel Sandoval was the only known worker admittedly and openly organizing on behalf of the UFW. During the next several weeks, however, Joe Hernandez, an experienced worker of respondent's, .who worked closely with Angel Sandoval, also began to openly organize on behalf of the UFW. During this period, more of the workers who sympathized or supported the Union (UFW) wore UFW buttons or other insignia.

The organizing campaign took several forms. Initally, Sandoval and a UFW staff organizer passed out leaflets on the shoulder of the road outside respondent's premises prior to the start of work at 7:30 a.m. Thereafter, Sandoval and Hernandez, sometimes alone, sometimes together, sometimes with a UFW staff organizer would talk to the workers taking their breaks or eating their lunches outside of the buildings or in their cars. During the period from October 30 to November 4, immediately prior to the election, the UFW staff organizers and Sandoval and Hernandez made a concerted effort to gain access unsuccessfully, to those workers who ate their lunches within the buildings. The series of unfair labor practices that have been alleged, occurred chronologically during this period of time and will be discussed seriatim hereinafter.

F. The Unfair Labor Practices Allegations

I. Complaint # 6 (a) - Did David Jacobs intimidate, restrain, and coerce, Joe Hernandez on or about September 14, 1975.

a. Factual Findings

Joe Hernandez, who was a truck driver for several years for Rod Me Lellan, testified credibly that on a date that he was not certain of (it could have been September or October) , possibly a Sunday, in an early morning meeting with his Supervisor, David Jacobs, several inquiries were made with regard to Union organizing at Rod Me Lellan. Jacobs called Hernandez to Jacobs' office in the old packing shed. During that discussion, Jacobs stated to him that he had heard rumors that there were union organizing activities at Me Lellan. He also stated that he and other supervisors had had a discussion with General Manager, Larry Eddings, regarding organizing activities at Me Lellan. "All persons that were involved with organizing at Me Lellan would be without work."

David Jacobs, one of the ten supervisors at Rod Me Lellan's Watsonville operation, also testified that this particular meeting with Hernandez did, in fact, occur. His recollection was that it was sometime in mid-September of 1975, also early in the morning, although his recollection was that it occurred on a Monday or possibly a Tuesday. Jacobs went on to testify that he had stated to Hernandez that he Jacobs, and the other supervisors had been hearing rumors that there was an employee of the company that was organizing and that they heard that it was Angel Sandoval. Jacobs expressed surprise that Angel Sandoval was organizing. Jacobs also stated that there had been a brief meeting of the supervisors with

the General Manager, Larry Eddings, regarding Union organizing. Jacobs went on to say that at the discussion with Hernandez, he stated that anyone who was going to be involved in organizing was going to have to do it during working hours. Jacobs stated that during this 10 minute discussion, Joe Hernandez just listened. However, Jacobs testified that to Jacobs' comment that he certainly did not support any Union at Rod Me Lellan, Joe Hernandez responded, "I don't believe the Company needs a union either." At that time, Jacobs stated he did not know that Joe Hernandez was a supporter of or an organizer for the UFW.

b. Discussion and Conclusions

Contrary to respondent's contention, I find the allegation of unlawful interrogation contained in paragraph 6(a) of the complaint to have merit. The surrounding circumstances regarding the Union activities that were becoming more apparent and prevalent, from mid-September into October would tend to support the charge by Mr. Hernandez. By mid-September it had become apparent and, indeed, admitted by Angel Sandoval that he was organizing as a company employee on behalf of the UFW. Mr. Sandoval and Mr. Hernandez were two truck drivers for Me Lellan and worked together closely at that point on the same shift. It would be reasonable to assume and expect that the relationship between these two men would be an obvious one for the company to observe and to keep a close watch on if it was concerned over the organizing activities of one, as the various supervisors and general manager indicated it was. This would especially be true where both Eddings and Jacobs believed so strongly that the company should not be subjected to a successful

unionization drive. Mr. Hernandez also testified that his activities of organizing in support of the UFW started off on a more quiet/less obvious, basis in early September when his activities as an organizer were not as apparent as, for instance, Mr. Sandoval's. But, by mid-September, it became quite apparent and known that Mr. Hernandez was, in fact, organizing on behalf of the UFW. The inquiries made by Mr. Jacobs were in the context of attempting to ascertain or verify whether or not Mr. Hernandez or others were sympathetic to and/or organizing for the UFW, and if so, to warn him of the consequences to anyone who continued such activity.

Respondent's contend, however, that the circumstances in which Jacobs made his remarks were not "coercive" in any real sense. [Respondent's Post-Hearing Brief, p.9.] First, the office had glass windows on three sides; second, the office was off of a main passageway which was subject to use at any time; third, that Jacobs actually said to Hernandez that "union organizers could" [not would], "be fired if they organized during working hours;" and fourth, that Hernandez was not, in fact, intimidated by Jacob's statements because in response Hernandez is claimed to have said "I know the company cannot under the law do that." [fire for union activity].

The simple answer is that Jacob's actions are not saved by the recognized doctrine that ". . .interrogations of employees about union membership may or may not amount to coercion, depending on how the interrogation was conducted and the surrounding circumstances." N.L.R.B. v. Ritchie Mfg. Co., 354 F.2d 90, 99 (8th Cir. 1975). cf. N.L.R.B. v. Louisiana Mfg. Co., 374 F.2d 696, 700 (8th Cir. 196) [". . .[W]hen a Supervisor with Expressed anti-

union sentiments asks an employee about his union affiliation and the union sympathies of his fellow workers/ there is going to be a most natural coercive effect on the questioned employee."]with Stanislaus Imports, 91 LRRM 1030 (1976).

As part of my fact-finding responsibility in this case I went to and walked through respondent's premises, including Jacob's office. Respondent appears to suggest that Jacob's remarks to Hernandez were made in a fish-bowl-type, non-coercive atmosphere. I do not share their conclusion. Mr. Hernandez was called from his normal place of work activity into a private office, albeit with glass windows that one could look through. He was questioned in a manner that reflected both Mr. Jacob's and respondent's desire to ascertain or confirm who was organizing and to indicate their strong hostility towards union organizing at Rod Me Lellan's. To the extent Jacob's version of what he said varied from Hernandez, I find Jacob's version not credible. Jacobs had recently attended company meetings in which the company's strong anti-union position was expressed. Moreover, he testified to his own very strong hostility towards unions and union organizing. Under these circumstances, *I* view Jacob's statements as a flagrant interference with the statutory rights of Hernandez and constituting conduct violative of Section 1153(a) *o£* the Act and I so find.

II. Whether the General Manager Larry Eddings, intimidated, restrained and coerced Angel Sandoval- (¶6 (b)).

a. Factual Findings

Angel Sandoval was and is an employee of Rod Me Lellan Company for more than ten years, the past approximately six years as

a truck driver. More than any other employee, he was the most active and responsible for the organizing activities at respondent's.

In mid-September, 1975, Larry Eddings, the General Manager the past sixteen months at respondent's, called Mr. Sandoval into his office for a meeting that lasted approximately one hour and a quarter. From all the evidence that I have heard and reviewed in this case, it is my impression that this meeting more likely took place prior to the allegation of the unfair labor practice alleged in paragraph 6(a) which was stated in the complaint to have occurred on or about September 14th. The purpose of the meeting apparently was for Mr. Eddings to ascertain and confirm the rumor that he had become aware of the fact that Angel Sandoval was organizing for the UFW at Rod Me Lellan's. After Mr. Eddings asked and Mr. Sandoval confirmed that Angel was, in. fact, organizing for the UFW, the conversation continued to range over the course of the succeeding hour as to why he was so organizing and whether it was truly in the best interest of the workers and the company for there to be any union including the UFW as the bargaining representative for the workers.

The specific charge made in the complaint testified to by Mr. Sandoval, was that Mr. Eddings stated during the discussion about Mr. Sandoval's reasons for organizing, that should the union be successful in winning the election, that the company would refuse to negotiate and would cease its operations rather than allow the union to come in. Mr. Eddings, on the other hand, testified that while he admitted that he had asked Angel if he was, in fact, organizing for the union, all of the discussions thereafter were with regard to the fact that his previous experience with union organizing was not a positive one, including the one with the UFW, However, he spec-

ifically was not threatening Angel with regard to the activities he was doing. Moreover, Eddings stated he said that he personally would not be the person involved in negotiating a contract should the union win the election.

Both Eddings' and Sandoval's testimony regarding this discussion indicated that it occurred openly, civilly, amicably, almost respectfully in a "man-to-man" manner. However, while the context and tone of the meeting was civil, the subject matter was a deeply earnest one for both participants who represented such opposing views about the UFW.

The cataloguing here of the testimony of this hour and a quarter discussion that was compatible or in conflict would be lengthy and likely of minimal help.

As the trier of fact, I have found this particular charge and the testimony with regard to it to be an extremely close one to make an ultimate finding regarding the question of the coercion and intimidation. Several matters do impress me which ultimately have swayed me to the position that Mr. Eddings did not commit an unfair labor practice during this lengthy and serious conversation with Mr. Sandoval. These factors are, 1) the timing of the meeting with respect to the organizing campaign, 2) the civility in which the discussion occurred and 3) the express statement by Eddings that Sandoval's job was not in jeopardy for his support of or organizing for the UFW. The significance of these factors are: first, the discussion occurred very early in the organizing campaign when the company was seeking to ascertain just exactly who, what, and why there was organizing. In order to ascertain that, Mr. Eddings had,

for want of a better word, a "man-to-man" talk with Mr. Sandoval on whether or not this really was an appropriate action and could it be headed off because everyone at the company felt very strongly against having a union come in at all. Moreover, if the organizing continued, the company would strongly oppose it. I did not get the impression from either Mr. Eddings or from Mr. Sandoval that the purpose, effect, or intention of this meeting and discussion was to bring about a termination to the UFW organizing by intimidating or coercive words or actions. However, each party made it clear to the other that they were each going to pursue their respective positions and the subsequent unfair labor practice charges which will be discussed hereinafter and which I do find, there was, in fact, intimidation, restraint and coercion flow in part from the fact that the respective "dies were cast" at this meeting.

Second, Mr. Sandoval had been a long-term, capable and knowledgable employee of respondent's. Mr. Eddings, on the other hand, was comparatively new to the company and had, up to that point, a good working relationship with Mr. Sandoval. As a result, the meeting was conducted in a civil and open tone. This factor, coupled with the express disclaimer that Sandoval's job was not in jeopardy because of his organizing activities, combined, on balance, to-take Eddings remarks out of the coercive side of the scale. While I shall recommend that the allegations of coercive interrogation contained in paragraph 6(b) be dismissed, I wish to make it clear that if any one or more of the factors discussed above had not been present, I would have found the interrogation a coercive one.

III. Whether supervisor Jacobs intimidated, restrained, and coerced a group of packing shed workers at a company-called meeting about the UFW (¶6 (c)).

a. Findings *of* Fact

In early September, 1975, respondent's General Manager, Larry Eddings, had meetings with all the supervisors in which he discussed with them the recent enactment of the ALRA and the impact that it had, and the possibility of organizing leaking place on the Rod Me Lellan premises would have. At the time *of* the meeting of the supervisors, Mr. Eddings testified that he was not sure that there was, in fact, organizing going on or who was doing it, but that it was important to establish the company's position that it strongly opposed any union at Rod Me Lellan's.

Subsequent to that early September meeting, Jacobs held a series of meetings with his workers, including one on or about September 18. Four witnesses called by the General Counsel, Joe Hernandez, Verna Miller, Sophia Arroyo, Elizabeth Figerroa, each testified with regard to what Supervisor Jacobs stated at the meeting. Each of these witnesses was subject to very vigorous cross-examination by experienced counsel and their testimony remained consistent and unchanged. Each of the witnesses testified that Jacobs stated that the union would not win the election and if the union should win the election, the company would not negotiate with the union and that if the union were to come in, the company would close down.

Respondent, on the other hand, claims that Jacob's statements to the workers were merely 'intimations or predictions rather than threats of what would occur if an election was held and the union won. ["If there were an election and if a union won, and if the

union made unreasonable demands, then Mr. Eddings could not sign a contract which would break the company."]

b. Discussion and Conclusions

To the extent the testimony of the witnesses regarding this issue is in conflict, I view the testimony of the four witnesses called by the General Counsel as being credible and dispositive of the issue.

However, respondent takes the further position in this as well as other allegations raised in the complaint, that since several of the witnesses testified they did not, in fact, believe the statement the company would close down, that therefore there was not any intimidation (See e.g., Respondent's Brief, p. 13).

First, I find that the allegation of unlawful interrogation has merit and that Jacob's statements were directly aimed at discouraging the workers from supporting the union at the risk of the possible loss of their jobs.

Second, under analagous NLRB precedents, intimidation or the motivation underlying it are not the touchstones for a Section 8(a){l) [of the NLR Act] violation. See e.g., Morris, The Developing Labor Law, 1971 at p. 66:

> [I]nterference, restraint, and coercion under Section 8'(a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.(footnote omitted)

IV. Whether Angie Aguirre is a Supervisor and whether she promised illegal benefits to employees. (¶6 (d) of the complaint)

a. Findings of Fact

Angie Aguirre has worked for Rod Me Lellan Company for approx-

imately ten years. She works in the orchids department and is one of the persons responsible for packing them for shipping. She is what the company calls a lead person, that is, she leads a crew of other workers that would vary between two or three to seven or eight persons in organizing and packing the orders called in. Within its work force of 100 to 140 persons, respondent has approximately twenty lead persons. None of them participate in the supervisory meetings that periodically occur. None of them have the power to hire, fire or discipline, and 95% of the same work that is done by the crew is also done by the lead person. What is apparent from the testimony given by the witnesses at the hearing, was that Angie Aguirre was given the authority to give orders to the various workers as to which orders to fill and occupied a position of some influence with regard to employment decisions. Thus, matters of hiring or firing or discipline could be directed to her for her opinion or for her input with regard to a decision.

b. Discussion and Conclusion

On the basis of the overall employment actions that Angie Aguirre did perform and her activities with regard to what would be considered either typical or usual supervisory functions, I find that Mrs. Aguirre was not a supervisor within the meaning of Section 1140.4(j) of the Act.

Section 1140.4(j) of the Act states:

> "The term 'supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not merely routine or clerical nature, but requires the use of independant judgment."

Even a cursory reading of this provision indicates that the various supervisory functions listed are done so in the disjunctive or alternative. It was undisputed that Mrs. Aguirre did have authority, for instance, to direct employees regarding orders to fill or to recommend an adjustment of employee grievances." Nevertheless, what I find, controlling is the concluding clause of the provision which requires substantially more than routine authority which there was no indication Mrs." Aguirre possessed.

Even if Mrs. Aguirre was not a supervisor within the meaning of the Act, the General Counsel argues that agency principals apply and require imputing the actions of Mrs. Aguirre to respondant.

The General Counsel argues first, that Mrs. Aguirre translated for David Jacobs and conveyed coercive statements of Jacobs to the workers. Second, respondent permitted her to speak at these same meetings to the workers and independently, as well, telling workers they would lose benefits if a union won the election.

While agency principals may be applicable in employer-employee relationships, it's applicability in this setting will have to await a more appropriate case. It appears to me that should I find that the respondent has committed an unfair labor practice on the basis of Angle Aguirre's translation for the same speech that I have already found an unlawful labor practice on the basis of the Supervisor's orginal statement, I would be finding coercive statements and penalizing the employer twice for the same conduct or incident. I decline the invitation to do so.

Moreover, the General Counsel has not established by the preponderance of the evidence that the agency relationship existed at the time Mrs. Aguirre made her statements. While it was estab-

lished that Mr. Eddings testified he knew or was aware that Mrs. Aguirre intended to speak to individual workers, there was no further evidence that respondent authorized or ratified her conduct. I am not prepared to infer it merely on the basis that respondent was pleased that such a vehemently anti-union worker intended to talk to workers individually. Mrs. Aguirre enjoyed her First Amendment rights as did those persons who were pro-union.

While I find that Mrs. Aguirre was not a Supervisor or agent for the Company and therefore, recommend that this charge be dismissed, it is important to note that had I so found, I would have also found the statements she made coercive and an unfair labor practice.

There was credible testimony by Sophia Arroyo and Jaime Rubio that Angie Aguirre made statements at a company-called meeting that if workers did not vote for the union, the company would make jobs available for their relatives. In addition, Marcelino Gutierrez testified that Angie Aguirre had said that the company would withdraw their assistance with immigation papers if the election was won by UFW. Moreover, Mrs. Aguirre did not make a very credible witness in her denials during her testimony. She refused to concede that she had even the most routine authority to direct other workers to fill orders. She denied that she told anyone she was going to talk to workers on her own. Yet Larry Eddings, the General Manager, testified that Mrs. Aguirre had informed him of her intentions to do so. Moreover, Mrs. Aguirre was extremely antagonistic and hostile toweards the UFW and made no secret of it. Finally, she was seriously impeached at least three times on cross-examination from statements she had made to a Board agent when the

charge herein was orginally investigated a year ago.

Thus, I would have found that Mrs. Aguirre's statements were coercive and otherwise have been an unfair labor practice but for my finding that she was not a supervisor within the meaning of Section 1140.4 (j) of the Act.

V. Whether the change in the work schedules of Angel Sandoval and Joe Hernandez was a violation of the Act. (¶6 (e) of the Complaint)

a. Findings of Fact

There is no dispute that on or about October 9, 1975, the Company directed a change in the scheduling of the two truck drivers and the trucks driven daily from Watsonville to respondent's South San Francisco operation. Prior to that date, on the previous schedule, both Mr. Sandoval and Mr. Hernandez came to work at approximately 7:30 a.m. together, one truck being loaded up and leaving later in the morning and the second truck usually leaving sometime after lunch. Under the changed schedule that occurred, the first truck driver would come in at 7:30 a.m. and was required to be on the road no later than 9:00 a.m. while the second truck driver was required to come in at either 11:00 or 12:00 noon, (at first) and (later) at 10:00 a.m. (The drivers changed shifts each week). The company's position with regard to this change in scheduling was that it was for strictly business reasons: First, as Mr. Eddings testified, it was made in response to customer's complaints that deliveries were not being-made on a sufficiently regular schedule; and second, Mr. Jacobs testified that the decision was made in order to eliminate several hours of overlap time in which both trucks were not being utilized in an efficient way.

The General Counsel on the other hand, claims, and both Mr. Hernandez and Sandoval, so testified credibly, that the reason for the change in the schedule was in order to separate the two prime, employee organizers for the union in order to interfere with and discourage and restrain any coordinated union organizing activities. A number of factors have led me to the conclusion that a purpose, if not the purpose, at the time of the change, was, in fact, to interfer with and discourage and restrain the union organizing activities of Mr. Sandoval and Mr. Hernandez and I so find that the change constituted an unlawful interference with protected activity and was an unfair labor practice.

b. Discussion and Conclusion

The factors that I found persuasive in finding an unfair labor practice are as follows: 1) The timing of the charge. By mid-September, the company supervisors were aware that Angel Sandoval was actively organizing on behalf of the UFW. Moreover, shortly thereafter, they became aware of the fact that Joe Hernandez, the other truck driver was also one of the key organizers campaigning on behalf of the UFW at the Watsonville premises. During this period, the two workers were participating in an organizing campaign with respondent's workers before and after work and during breaks. The change in their work schedule came right in the midst of this organizing campaign. Notwithstanding the company's preferred reasons, I find this no mere coincidence.

I find it noteworthy that the previous schedule had been in effect for years although there were periodic complaints of occasional late deliveries (testimony of Angel Sandoval) and management considered this schedule change for months before putting it into

effect during a union organizing campaign.

2) The strong hostility expressed against the UFW by the company. Subsequent to the mid-September meeting between Eddings and Sandoval, in which each side discussed their respective positions, Mr. Sandoval made it clear he was going to continue organizing, and Mr. Eddings made it equally clear that he and the company were very strongly opposed to the union, and though Sandoval was told he should not fear loosing his job, nevertheless the company would actively oppose the union and its organizing efforts.

3) The impact of the charge. Sandoval's and Hernandez' organizing activities specifically revolved around their ability to arrive at work prior to 7:30 p.m. when the vast majority of workers arrived and also to be able to coordinate between themselves the actions to be taken on that specific day as to who was going to talk to which group of workers, where they were going to focus their energy, both prior to the work and also during the breaks (at 10:00 in the morning and 2:00 in the afternoon) and during lunch time.

The natural or intended effect of the scheduling change was to prevent at least one key organizer from arriving at work the same time all the rest of the workers came and also being present during break and lunch time as the other workers. As a result, Sandoval and Hernandez credibly testified, their ability to plan and coordinate and share in the organizing efforts was disrupted effectively. The fact that Mr. Hernandez or Mr. Sandoval would come in an hour or two earlier when they were on the 12:00 or the 11:00 portion of the shift and do their organizing during the break period at 10:00 was obviously .an adjustment that Mr. Sandoval and Mr. Hernandez made to the change of schedules by the company. Nevertheless, the impact of the schedule

change on organizing was effective.

4) Applicable NLRB Precendent. Respondent suggests that the change was the result of business reasons and the result of business reasons only aid that there is no direct evidence that the reasons were pretextual for anti-union motivation to interfere with the union drive (Respondent's Brief, p. 20). However, respondent has failed to meet i burden of rebutting the anti-union motive of the timing and impact of the scheduling change under the rationale of both the majority and dissenting opinions in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, at 34 and 40, 87 S.Ct. 1792 at 1798, and 1801 (1967).

VI. Whether supervisor Craig Winter improperly interrogated Verna Miller. (Paragraph 6(f) of the Complaint)

a. Findings of Fact

Verna Miller had worked at Rod McLellan Company for approximately a year and a half. She had been married to Joe Hernandez since approximately 1970. Apparently at some point during the time of the organizing at Rod Me Lellan in September, October and early November of 1975 she was separated from Hernandez. In late September or early October, possibly the first week of October, Ms. Miller credibly testified that her supervisor, Craig Winter, called her into his office where he asked her a series of questions regarding Joe Hernandez and union activities. Specifically Mr. Winter asked her did she know why Joe Hernandez was organizing. In addition, he asked why was Hernandez jeopardizing his job, asked if she had signed an authorization card and finally if she knew the number of workers who had. Her response was that she did not discuss those matters with

Mr Hernandez and did not know the number of persons who had signed cards.

Respondent on the other hand contends that Winter's inquiry was an isolated, off hand remark that occurred during a more lengthy discussion involving other unrelated matters. Mr. Winter testified that he was merely curious about Hernandez's motivation, already knew that Hernandez was, in fact, organizing at that time and from previous conversations with Ms. Miller believed she was not a supporter of the union.

b. Discussion and Conclusion

Contrary to the contribution of respondent, I find the allegation of unlawful interrogation found in paragraph 6(f) to have merit. While it is true that the questioning was relatively brief, the timing of it could have had but one primary effect: To request a worker to express the nature of the union sympathies and activities of her husband and other workers. The fact that Verna Miller brought the discussion to an abrupt ending by her responses does not minimize the coercive effect of the questions.

As indicated earlier in this decision, "when a Supervisor with expressed anti-union sentiments asks an employee about his union affiliation and the union sympathies of his fellow workers, there is going to be a most natural coercive effect on the questioned employee." N.L.R.B. v. Louisiana Mfg. Company, supra, 374 F.2d at 700.

VII. Whether, on or about November 1st, through November 4th, 1975, Rod Me Lei 1 an Company denied access to UFW representatives in violation of Section 20900 of the Board's Emergency Regulation. (¶6(g)of the Complaint.

During the week immediately prior to the election, that was

on November 5, 1975, staff organizers for the UFW came to Rod Mc-Lellan's premises and parked in the parking lot during the lunch hours. They would engage in conversations and talk with those employees who were eating their lunches outside of the various greenhouses and packing sheds near or about the parking lots.

After having discussions with the workers that were on the outside, the staff organizers along with either Joe Hernandez and/or Angel Sandoval would approach and attempt to enter each of the packing sheds or the greenhouses in order to talk to the employees that were eating lunch in the inside of these buildings.

It was conceded by all parties that Rod Me Lellan's supervisors, Larry Eddings, David Jacobs, Craig Winter and Tom Rose blocked the entrances to those buildings and prevented the organizers from going inside where workers were eating their lunches. The company has conceded that the actions by the supervisors were in its words, a "technical" violation of the access regulation as it then existed.

The company while admitting the "technical" violation, points out the following factors should mitigate against an imposition of any remedy, let alone an extraordinary remedy as a result of its violation: One, while organizers were denied access to the enclosed areas, specifically the packing sheds and several of the greenhouses, the organizers were permitted access to the non-enclosed areas, specifically the parking areas and areas in between the greenhouses where the worker's cars were parked. Two, when the organizers approached the various buildings, one of the supervisors went inside the buildings and announce to the workers within that there were organizers for the UFW outside who wished to discuss matters with them on the outside.

Three, the organizers did in fact speak to a great number of the workers, Four, that at all times the "confrontation" between the company supervisors and the UFW organizers was "amicable" in the words of Mr. Eddings and that no physical or verbal confrontations or arguments occurred.

On the other hand, the union points out, that its organizers calculated that by the denial of the access the company prevented the union organizers from having access to at least one half of the employees at the Me Lellan premises during lunch hour. Two, that company supervisors were in very close proximity to the organizers during this period of time, and that their presence in such close proximity, whether or not they could overhear the conversations of the organizers and the workers, resulted in a chilling effect on the true effectiveness of the limited access that there was granted. Three, throughout the organizing campaign, the UFW organizers were subject to constant or frequent surveillance by company supervisors which again effected the ability to have an open discussion and conversation with the workers.

The company's position is that no additional access opportunities are necessary, that they are prepared and willing and have so indicated all along, to abide by ALRB's revised Emergency Regulations in access found in section 20900.

The union on the other hand, suggests that because of the effect the denial of the access had and because of the ongoing surveillance during the limited access granted that expanded access is absolutely essential in order to offset the effect and impact that the company denial of access had prior to the election. Upon reflection of the surrounding circumstances and impact of the denial of access, it is my opinion that an appropriate remedy in this case

would lie somewhere between positions taken by the parties in this matter.

Specifically, it would appear appropriate that the union should be allowed to have a somewhat more expanded access to the workers for a very limited period of time of three days, enabling them to have access not only an hour before and an hour after work, and also during lunch time, but during extended breaks that is, at least a one-quarter hour period in the morning and a one-quarter hour period in the afternoon when the normal break period is taken at Rod Mc Lellan Company.

It is noteworthy in this context that respondent utilized its unlimited access to the workers by holding periodic and frequent meetings on company time in order to provide information and influence the worker's decision regarding signing authorization cards and voting for the union.

In addition, Rod Me Lellan Company has a retail store that is open to the public. The concerns that Rod Me Lellan Company and other nursaries expressed which were, in part, the reason for the change in the access regulation as applied to nursaries does not apply to that specific building. Accordingly, the union organizers should have access to the retail store on an unlimited basis, during its normal hours for two days. (It is noteworthy that the number of employees working there can vary between two and ten depending on the season. Moreover, they are permitted to eat their lunch inside as well).

Finally after viewing respondent's physical operation, the concerns that Rod Me Lellan Company and other nurseries expressed regarding the presence of outside persons within the interior por-

tions of the greenhouses do not seem to apply to the work performed within the packing sheds. Accordingly, as part of the remedy in this case I would recommend that the organizers have expanded access to workers within the old and the new packing shed during break, lunch and before and after work time for a period of three days in order to give them an equal opportunity to campaign and present their point of view to the workers at those locations.

VIII. Whether respondent engaged in improper surveillance of UFW representatives and organizers. (¶6(h) of the Complaint.

a. Findings of Fact

During the organizing campaign this occurred during the months of September and October and into the week prior to the election held on November 5, respondent's supervisors were present both outside the gate, prior to 7:30 a.m sitting in their vehicles observing the passing out of literature, and at the parking lot and between the greenhouses when the UFW staff and employee-organizers were seeking to talk to workers. The company surveillance expanded during the week prior to the election when company supervisors would follow each of the organizers as they sought to talk to workers eating their lunches outside the greenhouses and packing sheds. Respondent defends the need to maintain the close observation of the UFW organizers in order to deny them access to their buildings where other workers remained inside and ate their lunch. Finally, the surveillance culminated during the final week when Craig Winter, one of the supervisors., brought and at times used his movie camera while organizers attempted to talk to workers eating their lunch. Each of these allegations of sur-

veillance are discussed separately.

1) Surveillance at the gate allegation.

Angel Sandoval and Verna Miller both testified that on individual occasions, they observed organizers passing out literature to workers that were parked in their cars outside of the gate along the road prior to the time workers had to report for work. Angel Sandoval testified that both Mr. Eddings, the General Manager and Mr. Jacobs were both present at the gate when he passed out pamphlets and observed who he passed the literature to. Verna Miller testified that she observed Tom Tose sitting in a pick up truck on one occasion when she was sitting in a car and organizers were passing out pamphlets.

With regard to the one incident involving the presence of Mr. Eddings, Mr. Eddings testified that there was one occasion where he received a phone call from Mr. Ron Frazer, the Assistant General Manager, telling him that a group of persons were at the main gate congregating there and that he didn't know what was going on, but that he did notice that his, Mr. Eddings' children, were on the road near the gate waiting for the school bus. Mr. Eddings further testified that he jumped in his truck and drove down there to make sure that everything was alright and waited there until he noticed that the school bus picked up his children, then returned back to his office in the packing shed.

On this particular point, I simply do not find Mr. Eddings testimony very credible. In the first place, in his rush to get down to the gate in order to observe whether or not his children's safety was being jeopardized, Mr. Eddings still managed to spend enough time to find and pick up Mr. Jacobs and take him down with

him. Second, upon arriving at the gate, Mr. Eddings testified that he observed that the group of people that were down there were just the workers from the various crews receiving literature from union organizers just immediately prior to coming to work. Both he and Mr. Jacobs waited around-and observed this activity during the time that it was apparent that he was well acquainted with persons there and could see what the activity was. There clearly was no purpose in remaining there other than to observe and note who was actually doing the organizing and who was receiving the literature from the organizers.

2) Surveillance-in-the-parking-lot allegation.

The UFW staff organizer, Jose Reneteria and Angel Sandoval and Joe Hernandez testified regarding the surveillance that occurred while they were attempting to talk to and organize in the parking lot and in the area between the greenhouses where employees also parked their cars. Each testified credibily that company supervisors would stand either immediately next to, behind or a very short distance from them as they approached the various workers that they wished to talk to. The supervisor would then stand back a few paces and observe or listen to the conversations that would take place. It was their testimony that the company supervisors could and did overhear the conversations. The company supervisors, on the other hand, each testified that they remained in the area but a considerable distance away in order to protect the company greenhouses from access by the union organizers: they further testified they neither made lists of nor overheard any conversations between organizers and workers.

3) The presence and use of the movie camera.

On at least two or three days immediately prior to the election, Craig Winter, one of the supervisors at Me Lellan, carried with him his own personal movie camera during the time that staff UFW organizers were in the Rod Mc Lelland Company parking lot. Mr. Eddings, the General Manager, testified that he had asked Mr. Winter to do so, since Mr. Eddings' previous experience in the May, 1970 lettuce strike in which the UFW and Teamsters were involved (See e.g., Englund v. Chavez; 8 Cal. 3d 572, 105 Cal. Rptr. 521 (1973), taught him that the camera could be an effective deterrent to or observation of any violence that may take place.

Mr. Winter testified that he, in fact, used the camera only once, and that was because he felt that there may have been organizers violating "a regulation permitting organizers talk with only one worker at a time within 24 hours of an election." Jaime Arreloa Rubio, a worker at respondent's who was present when UFW organizers came to talk to workers the week before the election testified credibly that on at least two or three occasions, Mr. Winter had his camera and carried it around with him and actually pointed it towards him and the organizers and gave the impression of shooting the activities of the organizers as they were talking to workers outside in the parking lot arid between the buildings of the company.

b. Discussion and Conclusion

Contrary to the contentions of the respondent's, I find that the presence of supervisors at the gate and in the parking lot and the use of the camera while organizers sought to talk to or hand out literature to workers were unlawful surveillance for the following reasons:

1. Mr. Eddings testified that throughout the time that the union organizers were present their conduct was peaceful both physically and verbally and that he in fact had an amicable and amiable relationship with Mr. Reneteria, and Mr. Perez during the time that he escorted them to make sure that they did not have access to the greenhouses and packing sheds. There was no intimation or evidence of any of the violence Eddings experienced during the Teamster and UFW strike in 1970. I therefore look with great suspicion on the "justification" of the company that the purpose of the camera was to prevent or deter physical violence or to photograph it if it did occur. Moreover, the use of the camera did not occur until the second day after union organizers were in fact on the premises and had given no indication from their conduct or their manner after being denied access by the company supervisors that there was going to be any confrontation over the access denial.

2. Throughout the time the UFW organizers were compaigning at respondent's their conduct was lawful and within the guidelines established by the Act and the Access Regulation. Moreover, there is no reference in the Act or Regulations that I'm aware of that limits on organizer to speak to but one worker at a time within 24 hours of an election, as Mr. Winter testified to as the reason for his using the movie camera. (Mr. Winter had testified that he had been advised of this rule by Mr. Eddings.) Thus, *I* find support for my finding here from the precedents cited in Morris, The Developing Labor Law, Supp. (1971-1975) p. 42.

3. Finally, the impact of the presence of the Supervisors and the movie camera while staff UFW organizers sought to talk with

workers would have the obvious chilling effect on the workers ability to speak freely to the organizers. The ultimate effect was to limit and curtail the organizing campaign by intimidating workers while lawfully pursuing legitimate concerted unionizing activity. Accordingly, I find the surveillance conducted by the company to be a most flagrant interference with the statutory rights of these employers, constituting conduct violative of Section 1153(a) of the Act.

IX. Whether David Jacobs unlawfully required Joe Hernandez to load his truck contrary to the normal procedures, in part, because of his union activities. (¶(6 (i)of the Complaint.)

a. Findings of Fact

Mr. Hernandez testified that prior to the schedule change which occurred on or about October 9, he was always able to have an assistant available, if necessary, to help him in loading the truck. Subsequent to the change, however, he testified that a helper was no longer available.

The specific allegation of paragraph 6(i) states that on October 8, 1975, Hernandez was required to load his truck without the usual assistance of a helper. Jaime Arreola also testified that prior to the schedule change he would be available to assist Hernandez or Sandoval, but after the change he was told to perform other tasks. Respondent, on the other hand, points out that there is no "truck driver helper" for the drivers. Rather, assistance was available from the individual departments before and after the schedule change.

b. Discussion and Conclusions

After carefully reviewing the tesitmony regarding this al-

legation, I have concluded that the General Counsel has not sustained his burden of showing by preponderance of the evidence that the conduct of the company was that different subsequent to the October 9, date than before regarding the availability of a helper. Moreover, there has been no independent showing that this denial was also related, in part, to Mr. Hernandez' organizing activities.

I view the evidence regarding this and paragraph 6(j) equivocal at best, and accordingly, I shall recommend that both allegations be dismissed.

X. Whether David Jacobs unlawfully required Angel Sandoval to unload his truck. (¶6 (j) of the Complaint)

a. Findings of Fact

Mr. Sandoval testified that on or about October 29, 1975, he was ordered by Supervisor David Jacobs to unload a truck that he had driven to their South San Francisco premises in contrast to the normal procedure of permitting a helper to assist Mr. Sandoval in unloading the truck. As a result of having to unload a truck late in the afternoon by himself on a damp day, Mr. Sandoval's bursitis condition acted up requiring him to see a doctor on the following day in order to receive medical attention for the bursitis.

The company on the other hand, responds that Mr. Sandoval left later than usual and arrived at the South San Francisco premises later than usual and there was not any one available to assist him and that the load itself was not unusually heavy. Furthermore, requiring the unloading was a usual part of his job and the fact there was no one to assist had nothing to do with Mr.

Sandoval's union activity.

b. Discussion and Conclusion

After reviewing all the evidence and testimony regarding this particular incident I have concluded that the General Counsel has not sustained its burden of presenting by preponderance of the evidence, sufficient evidence that this activity or this conduct was the result of Mr. Sandoval's union organizing.

There was neither clear nor a preponderance of the evidence to indicate that the duties Mr. Sandoval was required to perform on this day was the result, even in part, of his union activities. Simply stated, while the allegations of paragraph 6{i) & (j) may in fact have been a serious change in the working conditions and were instituted because of the union activities of the two drivers, the General Counsel has failed to prove the allegations, even by a preponderance of the evidence. Accordingly, I shall recommend that the allegation be dismissed.

XI & XII Whether a violation occurred when Jose Barretos was denied a leave of absence and thereafter denied rehiring. (Paragraphs 6(k) & (1) of the Complaint.)

a. Findings of Fact

Jose Barretos was an employee of Rod Me Lellan's for approximately two and a half years working as a cutter and driver in the eucalyptus department. In October of 1975, Mr. Barretos asked permission from his Supervisor, Domingo Sandoval, to obtain a leave of absence in December for a thirty day period to go to Mexico to visit his mother. On at least two occasions, Mr. Domingo Sandoval told Mr. Barretos that "there would be no problem" in obtaining his leave of absence. All he had to do was indicate

when he wanted to go and it could be arranged. At least two other employees of the eucalyptus department, Ramon Villapando, and Jose Ramirez, credibly testified that they heard Domingo promising Barretos his leave of absence. In December, Mr. Barretos asked to take the leave of absence. He was advised at that time by Mr. Domingo Sandoval that the leave of absence would not be available since December was the start of the eucalyptus department's busy season and that they would need him there for the very busy part of the season. Mr. Sandoval indicated that Mr. Barretos could inquire from Mr. Eddings whether or not he could obtain special permission to leave, but that was his decision. Mr. Barretos did go to visit Mr. Eddings at his office, and took with him an interpreter and requested permission to leave, indicating that he wanted to go visit his elderly mother in Mexico. He was advised by Mr. Eddings that it was not the company policy to permit employees to leave during their busy cutting season of December to May and therefore he would deny the permission. However, he would call up the company president in South San Francisco to confirm whether or not he could give permission and suggested for Mr. Barretos to contact him, Mr. Eddings the next day.

On the next day when Mr. Barretos did contact Mr. Eddings, Mr. Eddings confirmed that he could not be permitted to leave. Mr. Barretos indicated that he was going to leave anyway, and Mr. Eddings indicated that if he did, he was going to hire replacements and that when Mr. Barretos returned he was not going to fire the replacements.

There was credible testimony that Mr. Barretos while not

an active organizer to the same degree as Angel Sandoval or Joe Hernandez, was a strong sympathizer who periodically wore the union buttons and assisted or helped in organizing for the farm workers at Rod Me Lellan. The supervisor, Mr. Domingo Sandoval, testified that he was totally unaware of Mr. Barretos' union activities and while he was aware of union activities and organizing going on he was totally unaware of who was actually doing the organizing. Moreover, he denied ever saying there would be "no problem" for Barretos' leave of absence. Finally, he testified that his denial of permission to leave was totally unrelated to Mr. Barretos' union activity.

When Mr. Barretos returned 45 days later,(he left work on or about December 6th or 7th and returned on or about January 26th or 27th from his leave of absence) he went to Mr. Domingo Sandoval and asked if he could have his job back. Mr. Sandoval told him that he did not have any work but he would ask Mr. Eddings. Mr. Sandoval went to Mr. Eddings and advised him that Mr. Barretos had returned and was seeking work and they decided that there was no additional work for him and they were not going to fire the replacements they had for Mr. Barretos and therefore declined to rehire him.

b. Discussion and Conclusion

At the outset I wish to make it clear, I do not find Mr. Domingo Sandoval's testimony credible on two points: one, that he did not in fact, promise to Mr. Barretos that "there would be no problem" in his taking a leave of absense in December, and two, that he was unaware of Barretos support of and organizing for the UFW.

Respondent contends however, that the crux of this issue is the company's written policy, which limited leaves of absence between the months of December through May for only emergency reasons. In addition, there was no work for Mr. Barretos when he returned and Mr. Eddings had warned him, prior to his leaving that he would not fire the replacement.

The problem with respondent's contentions are that their own documents undercut their position.

Mr. Eddings testified that while there was a written policy, it was in a manual only he and the Supervisor had access to. Moreover, the leave of absence policy was ambiguous and misunderstood enough by both the workers and supervisors that a written policy statement (Respondent's Exhibit #4) was posted on January 20, 1976 after the denial occurred herein.

Respondent's Exhibit $6 is a Summary of the Company's leaves of absences granted in the years 1974-1976. A cursory review indicates that during the same period at issue here (December 1975 to May 1976), five employees were granted leaves of absences. For the comparable period in 1974-75, seven employees were granted leaves of absences.

Plainly the leave of absence policy is administered in an inconsistent and arbitrary way.

Moreover, one employee Enrique Ibarra had been granted a six week leave of absence from approximately December 1, 1975 to January 15, 1976. Mr. Ibarra testified that he requested the leave to get married and was told he couldn't go. When he insisted he was going to go anyway, he was granted permission for thirty days and requested and obtained permission for an additional

two weeks. While Mr. Ibarra was not in the same department as Mr. Barretos, his department (propagation) was in the height of its peak season when he departed.

Finally, and most significantly, Respondent's Exhibit #8 its summary of work force by department and weekly pay period starkly belies its position regarding the denial of rehire. Referring to Exhibit 8, page 4 and comparing the eucalyptus department's size during the precise period that Barretos requested to be reinstated, and was told there's no work, I find it significant that respondent hired four additional workers during that week. This tends to buttress my conclusions that the true motivation for the refusal to rehire was Mr. Barretos' support of and organizing for the union.

For the foregoing reasons, *I* find that Barretos was denied a leave of absence initially and then denied rehiring for his organizational activities on behalf of the Union, and that by such conduct Respondent has discriminated against Barretos thereby violating Section 1153(c) of the Act.

III. REMEDIES

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 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 policies of the Act.

Having found that Respondent unlawfully refused to reinstate Jose Barretos, I will recommend that Respondent be ordered to offer him immediate and full reinstatement to his former or substantially equivalent job. I shall further recommend that Respondent make whole Mr. Barretos for any losses he may have incurred as a result of the wages he would have earned from the date of the refusal to reinstate to the date he is reinstated or offered reinstatement, less his net earnings, together with interest thereon 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 National Labor Relations Board in F. W. Woolworth Company, 90 NLRB 289, and Isis Plumbing and Heating Co. 138 NLRB 716.

Having found that Respondent has unlawfully denied access to and engaged in surveillance on union representatives, *I* will recommend that the union be entitled to a limited expanded access.

The unfair labor practices committed by Respondent strike at the heart of the rights guaranteed to employees by Section 1152 of the Act. The inference is warranted that Respondent maintains an attitude of opposition to the purposes of the Act with respect to protection of employees in general. It will accordingly be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

The General Counsel urges that the employees be given other remedial notices in addition to posting at Respondent's. I agree that the unique nature of the agriculture industry renders the typical posting required by the National Labor Relations Board inadequate. If the objective of notifying the employees" that the employer has been found to have engaged in unfair labor practices, has remedied such violations, and will not engage in future violations with respect to them, is to be achieved, some additional approaches should be sought. The Board has as yet established no guidelines for the agricultural industry in this regard. The General Counsel urges a combination of mailings, posting, and speeches to accomodate the purpose. I view this as being overly complicated, and I am of the opinion that the object can be achieved by making sure that each employee who comes to work for Respondent from now to the end of the next harvest season is personally given an appropriate notice by Respondents. Accordingly I shall recommend that Respondent hand each present and new employee a copy of the notice attached. Such notice shall be given both in English and Spanish. Simultaneously with handing out such notices, Respondents 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 him in either English or Spanish.

The General Counsel urges that Respondents be ordered to award costs to the General Counsel and the Charging Party. This is a policy matter which the Board has yet to consider. It was not the general practice of the National Labor Relations Board. I would deem it inappropriate to make a recommendation at this time and will not do so.

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.

O R D E R

Respondent, their officers, their agents, and representatives, shall:

1) Cease and desist from:

(a) Discouraging membership of any of its employees in the Union, or any otherlabor organization, by unlawful interrogations or by telling them not to vote in an employee election, or by discharging, laying off, or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any term or condition of employment. except as authorized in Section 1153(c) of the Act.

(b) In any other manner interfering with, restraining and coercing employees in the exercise of their 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, or to refrain from any and 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 of continued employment as authorized in Section 1153 (c) of the Act.

(c) Denying access to or surveillance of any Union representative who is lawfully present and engaging in protected and concerted activities, except to the extent such denial is ex-

pressly authorized by Section 20900, as amended, of the Emergency Regulations of the Board.

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

(a) Offer to Jose Barretos immediate and full reinstatement to his former or substantially equivalent 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 the refusal of reinstatement 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 other records necessary to analyze the back pay due.

(c) Give to each present employee and new hirees up to and including the harvest season in 1977 copies of the notice attached hereto and marked "Appendix." Copies of this notice including an appropriate Spanish translation, shall be furnished Respondent for distribution by the Regional Director for the Salinas Regional Office. Respondent is required to explain to each employee at the time the notice is given to him that it is important that he understand its contents, and Respondent is further required to offer to read the notice to each employee if the employee so desires.

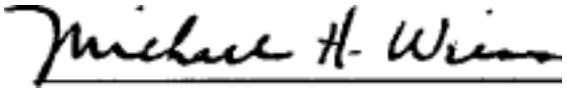
(d) Notify the Regional Director in the Salinas Regional Office within twenty (20) days from receipt of a copy of this Decision of steps Respondent has taken to comply therewith,

and continue to report periodically thereafter until full compliance is achieved.

(e) Provide additional limited access to representatives of the union as described above in Section VII entitled Denial of Access, Etc., specifically pp. 29-30.

It is further recommended that the allegations found in paragraph 6 (b), (d), (i) and (j) of the complaint alleging violations by Respondents of Section 1153 (a) & (c) be dismissed.

DATED: February 11, 1977



Michael H. Weiss
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 planting, cutting, and harvesting seasons, that we will remedy those violations, and that we will respect the rights of all our employees in the future. Therefore we are now telling each of you:

(1) We will reinstate Jose Barretos to his former job and give him back pay for any losses he had while he was off work.

(2) We will not question any of our employees about their support of the United Farm Workers of America, or any other labor organization, and we will not tell them not to vote or how they should vote in any election which may be ordered among our employees.

(3) We will not observe or watch any of our employees while they are- in the presence of or talking to representatives of the United Farm Workers.

(4) All our employees are free to support, become or remain members of the United Farm Workers of America, or of any other union. 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 choice provided this is not done at times or in a manner that it interferes with their doing the job for which they were hired. We will not discharge, lay off, or in any other 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.

Signed:

Dated: Rod Mc Lellan Company

By: _____
(title)