

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN VAN WINGERDEN, )  
KANK VAN WINGERDEN, )  
BILL VAN WINGERDEN, and ) Case Nos . 75-CE-211-M and  
CASE VAN WINGERDEN, dba ) 75-CE-2-V  
DUTCH BROTHERS,. and )  
successor companies, )  
MAX-I-MUM and ) 3 ALRB No. 80  
VALLEY FLOWERS, )  
Respondents , )  
and )  
UNITED FARM WORKERS )  
OF AMERICA, AFL-CIO, )  
Charging Party. )  
\_\_\_\_\_ )

DECISION AND ORDER

On May 9, 1911, Administrative Law Officer Joel Gomberg issued the attached Decision in this case. Thereafter, Respondents and the General Counse<sup>1/</sup> each filed timely exceptions and a supporting brief.

The Board has considered the record and the attached Decision in the light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the Administrative Law Officer and to adopt his recommended Order, as modified herein.

---

<sup>1/</sup>The General Counsel has moved that the Board dismiss certain of Respondents' exceptions for failure to include citations to portions of the record which support its exceptions. Labor Code Section 20282. No transcript had been ordered by either party, In their response to the motion to dismiss, Respondents accept the Administrative Law Officer's findings of fact and direct their exceptions to the logic he employed in arriving at his Decision. In these circumstances, as page citations to the record appear to be unnecessary, the General Counsel's motion to dismiss is hereby denied.

Respondents' principal exception is directed at the finding of the Administrative Law Officer that Luis Campos and Jesus Gutierrez were agricultural workers within the meaning of Section 1140.4(b) of the Act. Given the particular facts of this case, we cannot agree with Respondents' contention that the workers in question were excluded from coverage under the ALRA by virtue of the construction worker exception contained in the second paragraph of Section 1140.4(b). Rather, we concur in the reasoning of the Administrative Law Officer on this issue and in his conclusion that the discharges were in violation of the Act.

In his exceptions, the General Counsel argues that the Administrative Law Officer may have failed to give the dischargees the full benefit of the make-whole supplement which was provided for Respondents' employees in a prior settlement of a refusal to bargain charge. We agree that some ambiguity exists in the Administrative Law Officer's application of the make-whole supplement to the dischargees. It should be made clear that the back pay to be received by the dischargees consists of the wages they would have earned in Respondents' employ, including the make-whole supplement, less any net earnings from other sources during the back pay period. As the effective period (May 1, 1976 to February 28, 1977) of the make-whole supplement remedy of the prior case is entirely within the period of eligibility for back pay herein, the net interim earnings from other sources during the back pay period will constitute the only diminution of the dischargees' back pay award herein.

The General Counsel also excepts to the Administrative Law Officer's notice remedy on the ground that it does not provide for notification by reading and mailing in addition to posting. We agree with the General Counsel that mailing and reading of the notice, in addition to posting, are needed in order to adequately inform the employees and to remain consistent with Board practice. Accordingly, our Order will provide for all three forms of notification.

As requested by the General Counsel, the back pay awards will be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc., 3 ALRB Mo. 42 (1977), and we so order.

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the Respondents, John Van Wingerden, Hank Van Wingerden, Bill Van Wingerden, and Case Van Wingerden, dba Dutch Brothers, and successor companies Max-I-Mum and Valley Flowers, their officers, agents, successors and assigns, shall:

1. Cease and desist from discouraging membership of employees in the UFW, or any other labor organization, by unlawfully discharging, laying off, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any other term or condition of employment, except as authorized by Section 1153 (c) of the Act.

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

- (a) Immediately offer employees Pedro Reyes, Luis Campos and Jesus Gutierrez reinstatement to their former

or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make each of them whole for any losses he may have suffered as a result of his termination.

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

( c ) Post copies of the attached Notice to Workers at times and places to be determined by the Regional Director. The notices shall remain posted for 60 days. Copies of the notice shall be furnished by the Regional Director in appropriate languages. Respondents shall exercise due care to replace any notice which has been altered, defaced, or removed.

( d ) Mail copies of the attached Notice to Workers in all appropriate languages, within 20 days from receipt of this Order, to all present employees, to all employees employed during the payroll periods which include the following dates: October 23, November 14 and November 22, 1975, and to all employees hired by Respondents during the period provided herein for the posting of the notice. The notices are to be mailed to each employee's last known address, or more current address if made known to the Respondents.

( e ) Have the attached Notice to Workers read in all appropriate languages on company time to the assembled employees of Respondents by a company representative or by a

Board agent, at times and places specified by the Regional Director, and accord said Board agent the opportunity, outside the presence of supervisors and management, to answer questions which employees may have regarding the notice and their rights under Section 1152 of the Act.

(f) Notify the officer in charge of the Board's Oxnard subregional office within twenty (20) days from receipt of a copy of this Decision and Order of the steps Respondents have taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

Dated: October 27, 1977

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

DONALD L. RUIZ, Member

HERBERT A. PERRY, Member

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 post 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 NOT 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 fire, lay off or do anything against you because of your feelings about, actions for, or membership in any union.

WE WILL OFFER Pedro Reyes, Luis Campos, and Jesus Gutierrez their old jobs back if they want them, and we will pay each of them any money they lost because we laid them off.

Dated:

DUTCH BROTHERS

MAX-I-MUM

By: \_\_\_\_\_  
CASE VAN WINGERDEN

By: \_\_\_\_\_  
JOHN VAN WINGERDEN

By: \_\_\_\_\_  
HANK VAN WINGERDEN

VALLEY FLOWERS

By: \_\_\_\_\_  
BILL VAN WINGERDEN

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, Dissenting in Part:

I disagree with the majority's opinion to the extent that it finds Jesus Gutierrez to be an agricultural employee. Our Act provides in Labor Code Section 1140.4 (b) an exception to the definition of agricultural employee which reads, Further, nothing in this part shall apply, or be construed to apply, to any employee who performs work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work (as these terms have been construed under Section 8(e) of the Labor Management Relations Petitions Act, 29-USA Section 158(e)) . . . ."

Mr. Gutierrez was hired to work as a carpenter in and construction of a greenhouse on the Dutch Brothers property. After two months of construction work he was discharged because "there was no more work". It is true that agricultural work was available and that other employees were hired in preference.

to rehiring Jesus Gutierrez. It is apparent from the Administrative Law Officer's report that little, if any, general construction work remained to be done after the discharge. What work was carried on was done by the owner and sons.

The Administrative Law Officer would have us consider that Gutierrez was, on other occasions for other employers, an agricultural worker and that he was employed with an expectation of having continuing employment at the nursery after the construction work was completed. Granting that he formerly had been an agricultural employee and that he would have liked to, or even expected to, work in agriculture for this employer, the record shows that he did only construction work except for the possibility of one disputed day during the two months. While employed by Dutch Brothers, Jesus Gutierrez was a construction worker, and I would find him not to be an agricultural worker under Labor Code Section 1140.4( b ) . To hold otherwise would be to ignore the plain and literal meaning of the statute.

Dated: October 27, 1977

RICHARD JOHNSEN, JR., Member



STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of: )  
)  
JOHN VAN WINGERDEN, HANK VAN ) Case Nos. 75-CE-211-M  
WINGERDEN, BILL VAN WINGERDEN, ) 75-CE-2-V  
)  
and CASE VAN WINGERDEN, )  
)  
dba DUTCH BROTHERS, and )  
)  
successor companies, MAX-I-MUM )  
and VALLEY FLOWERS, )  
)  
Respondents, )  
)  
and )  
)  
UNITED FARMWORKERS OF AMERICA, )  
AFL-CIO, )  
)  
Charging Party. )  
\_\_\_\_\_ )

Ellen Lake of Sacramento, for  
the General Counsel

Donald C. McDaniel of Santa  
Monica, for the Respondents

E. Michael Heumann of Salinas,  
for the Charging Party

STATEMENT OF THE CASE

JOEL GOMBERG, Administrative Law Officer: This matter was heard by me on February 28, March 1, 2, 3, 1, 8, 9, 10, 22, 22, 24, and April 7, 8, and 11, 1977, in Ventura, California.<sup>1</sup> The order consolidating cases and the consolidated complaint issued

1. Case Number 76-CE-14-V, alleging a failure of the Respondents to bargain in good faith with the Charging Party, was consolidated with the instant cases. On the final day of the hearing the parties entered into a settlement agreement (Joint Ex. 1) disposing of all issues in that case.

on January 22, 1976. The Complaint alleges violations of Section 1153(a) and (o)<sup>2</sup> of the Agricultural Labor Relations Act (hereafter the "Act"), by John-Van Wingerden, Hank Van Wingerden, Bill Van Wingerden, and Case Van Wingerden, dba Dutch Brothers (hereafter "Respondents"). The complaint is based on charges and amended charges filed on October 24 and 28, 1975, and on December 1, 1975,<sup>3</sup> by the United Farmworkers of America, AFL-CIO (hereafter "UFW"). Copies of the charges and amended charges were duly served on Respondents.

All parties were given full opportunity to participate in the hearing. The UFW intervened, as a matter of right, pursuant to Section 20266 of the Board's Regulations. The General Counsel and Respondents filed post-hearing briefs pursuant to Section 20278 of the Regulations.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

#### FINDINGS OF FACT

##### I. Jurisdiction.

Respondents have admitted in their answer (GC Ex. I-E) that Respondents are agricultural employers within the meaning of Section 1140.4(c) of the Act and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the

---

2. All statutory citations herein are to the Labor Code unless otherwise specified.

3. All dates herein refer to 1975, unless otherwise specified.

Act, and I so find. The parties have stipulated that Valley Flowers and Max-I-Mum are successors of Dutch Brothers (Joint Ex. 1), and I so find.

## II. The Alleged Unfair Labor Practices.

The complaint alleges that Respondents violated Section 1153(a) and (c) of the Act by discharging and failing to rehire Pedro Reyes, Luis Campos and Jesus Gutierrez because of their membership in, and activities on behalf of, the UFW.

Respondents deny that the discharges were unlawfully motivated and assert that Luis Campos and Jesus Gutierrez were not agricultural employees within the meaning of Section 1140.4 (b) of the Act, and therefore are not entitled to its protections. Respondents further deny that any failure to rehire the three employees related to their union activities.

### A. The Operation of the Nursery.

John, Case, Hank, and Bill Van Wingerden, who are brothers, have operated a chrysanthemum nursery in the same location in Carpinteria since 1966. Anticipating that they might, at some future date, wish to dissolve their general partnership and go into business as individuals, the brothers built four separate greenhouses, one on each quarter portion of their 26-acre property. Each brother and his family built a home adjacent to a greenhouse.

The rhythm of flower growing at Dutch Brothers was governed by a rigid planting regime. Seedlings were ordered months in advance. When they arrived at the nursery, they were kept in

the propagation house for two weeks and then planted in a greenhouse. One greenhouse section was planted each week. Each of the four greenhouses contained four sections. Any given section would be planted every sixteen weeks.

The work force at Dutch Brothers was divided into planting and cutting crews. The crews moved from greenhouse to greenhouse following the planting and cutting cycles. Cutting, the most labor-intensive work, was affected by weather variables such as sunlight and temperature. There were generally smaller yields of chrysanthemums grown during the winter months. While different varieties of chrysanthemums were grown during different seasons in response to market demands, the planting cycle, and the quantity of work for the planting crews, was virtually immune to seasonal fluctuation.

The Dutch Brothers divided administrative and supervisory tasks among themselves. Each had the power to hire and fire and no employees had supervisory authority.<sup>4</sup> The brothers met regularly to discuss the business. Decisions involving layoffs and other discharges were generally made by at least two brothers.

By the summer of 1975, the brothers had decided to divide their business into three different nurseries. Case and Hank were to continue as partners in Dutch Brothers, while Bill and John were to become sole proprietors of their own nurseries.

---

4. Respondents challenged Jefferson Chambers' eligibility to vote in the representation election (R Ex. J) but John Van Wingerden denied at the hearing that Jefferson was a supervisor. Jefferson corroborated this testimony.

Before putting this plan into operation, it was necessary for additions to be constructed to the greenhouses adjoining Bill and John's homes and for packing sheds to be constructed on those plots. The packing sheds were constructed first, largely by independent contractors, but with some labor from Dutch Brothers' agricultural employees. The Dutch Brothers partnership paid for the construction of the packing sheds.

Bill and John hired several workers to construct the additions to the existing greenhouses. These workers were paid on Dutch Brothers checks, were covered by the Dutch Brothers' workers compensation policy, and were listed as Dutch Brothers employees on Dutch Brothers 1975 W-2 forms (GC Ex. 9). However, all of the costs associated with the hiring of these employees were charged to the separate capital account of John or Bill.

B. The UFW Organizational Effort and The Representation Election.

Respondents' employees carried out a quiet and effective union organizational effort. According to Luis Campos, who testified that he brought authorization cards to the nursery in late August, all but two of the employees had signed cards indicating UFW support within a month. Luis Campos, Pedro Reyes and Jefferson Chambers were the leaders of the organizational campaign and the first to sign authorization cards. Jesus Gutierrez was hired after most of the organizational work had been completed, but he soon became an active union member.

The bulk of the organizational effort was carried out at the nursery during lunch and break periods. Jefferson, Luis,

Pedro, and Jesus often ate lunch together. No UFW organizers were involved. The employees deliberately kept a low profile, at least until the petition for certification was filed on October 13. The employees refrained from displaying any kind of UFW insignia, such as bumper stickers and buttons. While Jefferson Chambers testified that the employees had no strategy to hide their efforts, it is clear that they were not flaunting their activity. Luis Campos testified that he feared that he would be fired if Respondents found out about his union organizing.

Sometime in September, approximately two to three weeks prior to the filing of the petition for certification, John and Hank Van Wingerden attended a special meeting of the Santa Barbara Nurserymen's Association to discuss the implications of the Act, which had recently taken effect. The meeting was organized by the Northern California Flower Council and featured Harry Kubo, a grower, and an adviser, probably an attorney. Mr. Kubo informed the nurserymen that the UFW was becoming active and would probably be organizing in the Carpinteria area. He suggested that employers who were paying low wages bring them up to \$2.80 - \$3.00 an hour to avoid the union's "bringing them up for you." The UFW, 'Kubo said, was asking for \$3.10 an hour. The adviser briefed the employers on the provisions of the Act.

Henry Camacho, a grower of ornamental plants, and co-owner of Carpinteria Nursery, testified as to the content of the meeting and the presence of John and Hank. Mr. Camacho had

taken over the presidency of the group from Hank at about the time of the September meeting. John was unable to remember which meetings he attended, but stated that at least one, and usually two, of the brothers went to every meeting.

Between the middle of September and October 3, John had a conversation with Jefferson Chambers regarding unionization and wage rates. Although the versions of the conversation offered by the two men at the hearing differed substantially, the very fact that the conversation occurred demonstrates that John was concerned about possible UFW organizing before the petition was served.

John testified that he told Jeff that a union was unnecessary "to keep the peace among my people" and that Jefferson agreed. In fact, Jefferson replied that Dutch Brothers' employees were the highest paid nursery workers in the Carpinteria Valley. John was pleased. Jefferson said that some employers paid as little as \$1.50 - \$2.00 per hour, as against the Dutch Brothers wage of \$2.75 an hour, because there was a surplus of farm workers in California. John could not recall whether or not he discussed the possibility of giving the employees a raise.

Jefferson Chambers placed the conversation in the second or third week in September. He testified that John asked if the employees would be satisfied with a raise to \$3.00 an hour for senior workers. Jefferson was noncommittal, replying that he would have to check. According to Jefferson, John warned him not to promise anything to the employees because John had

not yet convinced his brothers to go along. John said that he wanted to raise the salaries to avoid the possibility of a union coming in. John said that he didn't want a union, that he wanted to make his own decisions. Jefferson said that he understood John's point of view, but that the union might be a good thing. Jefferson did not recall saying anything about Dutch Brothers' wages in relation to other nurseries in the area, but, on cross-examination, said that it was possible that he had.

I find Jefferson's testimony to be more credible than John's on this issue. Jefferson's memory was more precise and better fits into the context of events, as will be seen. John testified that he was completely shocked when the petition for certification was filed, and that he had barely heard of the UFW. Yet, although he supposedly believed that Dutch Brothers wages were the highest in the area, John was about to raise them again. Further, John had been briefed on the Act and its implications at least three weeks prior to the service of the petition.

On October 3, a payday, Respondents announced to their employees that their wages would be raised to \$3.00 an hour in five-cent per pay period increments. John testified that he was not present at this gathering and that Hank informed the employees, while Jefferson Chambers stated that John made the announcement in English and had Jefferson translate his remarks into Spanish. Luis Campos also identified John as the speaker. I find the employees' testimony on the identity of the brother



making the announcement to be more credible than John's.

Ten days later the UFW served a petition for certification on Respondents. The petition was handed to John who testified that it came out of the blue and was the first he knew of union activity at the nursery.

The following day, October 14, the UFW held a meeting, open to the public, at the Aliso School in Carpinteria. Mrs. Nina Camacho, Henry Camacho's wife and co-owner of the Carpinteria Nursery, attended the meeting. Her husband had been informed of the meeting by Joe Saragosa, a friend and member of the G.I. Forum, who had reserved the room where the meeting was held. Mrs. Camacho testified that her husband asked her to go to the meeting because "it was going to be informative." Mrs. Camacho took a few notes at the meeting at which the Dutch Brothers' upcoming election, the first to be held under the Act in the area, was discussed. Two people who introduced themselves as Dutch Brothers' employees spoke at the meeting. When derogatory remarks were made about growers, Mrs. Camacho decided to leave. She denied discussing the meeting with any of the Respondents.

The following morning Mr. Camacho addressed all of Respondents' employees on behalf of Respondents. The speech was held outside, close to the packing shed. Mr. Camacho had been asked to point out the possible adverse consequences of a UFW victory and to report back to Respondents on the reaction of the employees. Mr. Camacho said that his speech was based upon an outline of permissible anti-union statements issued by the Associated

Farmers of California, Inc. (R Ex. W). The three employee witnesses maintain that Mr. Camacho distributed a flyer with a cartoon depicting a farm worker in a rowboat being attacked by sharks labelled "forced boycott," etc. Mr. Camacho said that he kept such a flyer posted in his office but didn't believe he distributed copies.

Mr. Camacho said that he had to struggle to get through his speech, because he was almost immediately attacked by Jefferson Chambers and other workers who supported the UFW. According to Mr. Camacho, one employee complained about wages and another complained about a lack of communication with Respondents. Mr. Camacho had little recollection of the details of what was said. He relied heavily on the paper issued by the Associated Farmers.

According to the three employee witnesses, Luis Campos complained that the money being spent on the construction of the new greenhouses should be spent on higher wages. They also testified that Mr. Camacho asked Pedro Reyes if he supported the union. Mr. Reyes said he did because he had worked in a union factory in Los Angeles and that the union helped the workers. Jefferson Chambers said that Mr. Camacho knew him by name. When asked how he knew his name, Mr. Camacho replied that he had his sources.

Mr. Camacho admitted that he had only a vague memory of what was said at the speech and that it was possible that he had said that the company would have the last word in negotiations. On the other hand, the testimony of the employees was

more detailed. I also discredit Mr. Camacho's testimony because of his bias against the UFW. This bias was demonstrated by his relief, that the UFW had not won an election at his nursery and by Mr. Yamato's admission in a settlement agreement in an unfair labor practices case at Carpinteria Nursery that he and his wife had interrogated their employees about their union sympathies and carried out anti-union activities in violation of the Act. (Case Nos. 75-CE-215-H and 75-RC-214-M, GC Ex. 18). These admissions also cast great doubt on Mr. Camacho's testimony that he carefully followed the Associated Farmers outline to avoid violating the Act.

Mr. Camacho testified that John and Hank (the brothers with the best English language skills) and possibly Bill were in the packing shed during the speech. John maintained that he was in one of the greenhouses and not in the packing shed. The employee witnesses stated that two or three of the brothers were in the packing shed, but did not identify them. After the speech, Mr. Camacho spoke with Hank and said that it had not gone well, that Jeff had constantly interrupted and that there had been complaints about wages and communication. While Mr. Camacho indicated that he had only spoken to Hank, John testified that he was present in the packing shed and that Mr. Camacho said that Jeff put up the most resistance but that several other employees, whose names were not mentioned, also were opposed to the company point of view. John thought that Mr. Camacho had handed out leaflets.

Both Jefferson Chambers and Luis Campos testified that

Pedro Reyes exuberantly shouted "Arriba Chavez!" at the top of his lungs shortly after the speech. Jefferson testified that Pedro shouted from inside Greenhouse 1 and that John entered almost immediately. Luis testified that he witnessed the shout and that John turned and stared at Pedro. John denied hearing the shout. There is insufficient evidence to conclude that John heard the shout.

On October 16, Bill and Hank approached Jefferson as he was helping Pedro Reyes to complete a declaration supporting the eligibility of the employees who were constructing the greenhouse additions to vote in the election. Pedro Reyes left as the two brothers approached. Hank inquired about what Jefferson was doing. Jefferson explained that he was gathering declarations to support the construction workers' eligibility to vote. Hank accused Jefferson of destroying the camaraderie between Respondents and their employees. Jefferson said that it was not just him, that there were three or four other workers. (After the election, Jefferson also told Edward Van Wingerden that there were several other employees involved in union organizing.) At this point, John joined the group and Bill said, "John, now they're trying to get your workers."

John testified that he asked Jefferson what he was doing and Jefferson replied that it was none of John's business. John replied that "we must then find out what is our business." When asked by the General Counsel to explain this statement, John said that he meant that he wanted to find out "what we could do if he did something against us."

Jefferson's version of the conversation with John involved a short, but angry dispute about the union and whether the two were still friends. Then John asked if Jefferson thought the union would get \$3.10 an hour. Jefferson said that would depend upon negotiations.

The pre-election conference and the election were held on October 17. At the conference Jefferson handed to Larry Tramutt, the Director of the UFW Oxnard Field Office, the declarations he had worked on the previous day and explained their contents in front of three of the Respondents and their attorney. The UFW won the election 11 to 2, with 4 challenged ballots. Because the challenged ballots were insufficient to affect the outcome of the election, they were not resolved. The UFW was certified as the sole collective bargaining agent for the agricultural employees of Dutch Brothers. John testified that the UFW victory was a vote against the Dutch Brothers personally. It was a betrayal, like being hit in the face.

C. The Work History and Discharge of Pedro Reyes.

Pedro Reyes did not testify at the hearing. All of the testimony concerning his work record was supplied by Jefferson Chambers and John Van Wingerden.

Pedro Reyes was hired by John as a construction worker on June 23. He worked painting wood until July 5 when he requested a transfer to nursery work because he didn't like painting. The request was granted and Pedro began working inside the greenhouses on July 6. Pedro continued working, primarily in the planting crew, until he was discharged on October 23, 1975.

John testified that Pedro was a regular worker, not the worst, but not always tidy. He also mentioned an incident in which Pedro had been assigned to do painting work and, without permission, switched tasks with another worker inside a greenhouse. John discovered the situation a few hours later and reprimanded Pedro for insubordination. John also testified that Pedro was a slow painter who would have been fired had he not gone to work in the greenhouse.

Aside from the comment on tidiness and the incident involving insubordination, which was referred to vaguely as having occurred in September or October, there were no complaints about Pedro's work. With respect to Pedro's lay-off, John testified that, "We liked the others better than we liked Pedro."

John testified that Pedro was laid off on October 23, a Thursday, because there was a lack of work. Dutch Brothers took seniority into account when making lay-off decisions, but would retain a less senior worker if he were substantially more productive than a more senior employee. Only Hijinio Gomez had less seniority than Pedro Reyes. John's only testimony regarding Gomez' work was a generalized comment that it was better than Pedro's.

Jefferson Chambers, who was discharged on October 20, ostensibly because there was no work, testified that he and Pedro had worked together on the construction of the new packing sheds during July, and had later worked with him planting chrysanthemums. According to Jefferson, Ed Van Wingerden,

John's son, commented during the packing shed work that Pedro was an intelligent worker who understood machinery. Jefferson, who was Respondents' most proficient planter, compared the abilities of Pedro and Hijinio Gomez and said that Pedro was much quicker at planting, and that Jefferson had to do three-fourths of the work when planting on a team with Hijinio. Pedro also could transport plants from the propagation house to the greenhouses, a skill that Hijinio lacked and that relatively few of the other employees had.

Although John testified that Pedro could not use a hammer, Jefferson stated that Case requested Pedro and Jefferson to replace a plastic window in the propagation house on the afternoon of the Henry Camacho speech, a job which required the use of a hammer.

Besides Jefferson and Pedro, another employee, Juan Valdez, was discharged during the same week, on October 17. Valdez was the least senior employee.

Respondents offered substantial testimony concerning the lack of heat in Greenhouse 2 during the fall. According to John, the lack of heat caused the flowers to remain dormant for some time. Reintroduction of heat resulted in three of the four sections coming to maturity virtually at the same time, after which there was little work. When asked by the General Counsel if the lack of heat was one of the causes of the October lay-offs, John said no. Respondents have not urged the heating problem as a cause for the lay-offs in their closing brief and have apparently abandoned this contention.

Monthly invoices of flowers shipped during the last five

months of 1975 show a substantial decrease in the dollar value of flowers shipped between September and October. In September, the invoices amounted to \$57,303.00, while the October total was only \$41,166.00 . (R Ex. CC).

D. The Work History and Discharges of Luis Campos and Jesus Gutierrez.

Luis Campos was hired by Respondents as an agricultural employee in the nursery and began work on August 8. He had quit his job at another Carpinteria flower grower, Endow Nursery, after twelve years, because he wanted to earn more than \$2.25 an hour. It was a common practice at Dutch Brothers for employees to first learn their rate of pay after completing their first two-week pay period. When Luis received his first pay check on Friday, August 22, he was disappointed to discover that he was earning only \$2.20 an hour. He decided not to return to Dutch Brothers.

When Luis failed to come to work on Monday, August 25, John went to his house to find out why. John, who spoke virtually no Spanish, was accompanied by his son, Edward, who acted as an interpreter. Luis explained that he had gone to the Los Angeles office of the Immigration and Naturalization Service in the morning, but had decided not to return to Dutch Brothers because of the low pay. John then offered to pay Luis \$2.50 an hour. Luis accepted the offer. Luis testified that he specifically asked John if the work would be permanent, because he had a family to take care of, and that John said that the work would be for a long time. John and Edward denied making any representations with respect to the duration of the



work, but indicated that, at the time Luis was hired, they expected to keep him on indefinitely to work in the greenhouse once the construction was complete.

Luis began work the following day, August 26. He claims that he spent most of the week cutting flowers in two of the greenhouses, while Edward and John deny that he ever worked inside the nursery. All three were adamant in their testimony on this point. The time and attendance records kept by John (GC Ex. 6) and Dutch Brothers (GC Ex, 8) support Respondents' view. The brothers ordinarily took great care in their records when it came to determining whose account would be charged. Any work done inside the greenhouse in this period would have been shared by the partnership, while construction work was charged to John's capital account. On the other hand, John was equally sure that he had never borrowed any nursery workers to help in the construction. Salvador Carrera testified that he had been transferred from nursery to construction work. Respondents' records confirm his testimony. Several other Dutch Brothers employees performed construction work for John, according to the records. While my inclination is to believe the records, I do not find it necessary to resolve the issue to determine Luis' employment status. See pages 32-35, infra.

In any event, Luis worked almost exclusively on construction of the greenhouse until his discharge on November 14.

Like Luis Campos, and unlike most employees hired by Respondents, Jesus Gutierrez was sought out by John. He had been employed by another local nursery, owned by John's nephews.

Jesus was the brother-in-law of a good friend of Edward's. While Edward was visiting his friend, he asked Jesus if he would be interested in going to work for John. Jesus indicated interest and Ed said he would discuss the matter with his father.

A few weeks later Ed visited Jesus again and final arrangements were made. Ed told Jesus that he would be working as a carpenter. Ed testified that he probably asked if Jesus could use a hammer. Jesus said that Ed assured him that the work would last a long time and that once the construction was complete he would work in the greenhouse. Edward stated that Jesus merely asked if the work would be full-time and that he made no representations about the duration of the employment. But he did indicate that it was his father's intention to keep Jesus on indefinitely. John corroborated Edward on this point. Jesus gave his employer notice. The employer, Jerry Van Winger-den, said that it was all right. He knew where Jesus was going.

Jesus began work on September 22. He and Luis testified that they worked cutting flowers that day. John, Edward, and the business records disagree. In any event, Jesus worked almost exclusively in construction until his discharge on November 22.

Until the end of October, Luis and Jesus sorted and painted wood, constructed A-frames, nailed the A-frames to the posts and nailed 2" x 3" pieces of wood to the 2"x6"x20' roof beams. All this work took place on the ground. Before their arrival, John and his sons, Edward and Winnifred, had placed the posts

for the greenhouse in the ground. This was precision work, John testified, which was beyond the skills of the Mexican agricultural employees. John said that all of the important construction work was done by him and his two sons.

John and Edward testified that the lack of a common language between John and the two construction workers caused some minor problems before November. For example, some wood was sorted rather than painted. These problems were minor, however, and did not substantially interfere with the work. Before Edward left for school in early October, he was able to direct the workers in Spanish. Afterwards, John communicated in gestures and in English. Luis, who understood some English, would translate for Jesus. John had no thought of discharging the workers at this time.

On October 29, John hired a 19-year-old English-speaking worker, Dave Walters, to help in the construction. Pedro Reyes, who, according to Jefferson Chambers, had been considered by John to drive the tractor in this work, had already been discharged.

Dave worked constructing A-frames for several days. On November 3, his task changed. He was to operate a forklift tractor, with a platform attached on the front, to lift John about 16 feet above the ground, for the purpose of installing roof beams to connect the A-frames. Dave had some previous experience driving a forklift.

Four people were required to attach the roof beams. Dave operated the forklift. John stood on the platform and, once

raised, lifted an 80-100 pound, 2" x 6" x 20' beam over his head, turned it 90 degrees and placed it in a slot on an A-frame. The A-frames were ten feet apart, so the beam connected three A-frames. Meanwhile, Luis and Jesus would stand on ladders by the A-frames on either side of John. Once the beam was resting in the slot of the center A-frame, John would slide the beam toward one of the construction workers. Once the beam was in place, it would be nailed to the A-frames by Luis and Jesus.

Early in the first week of November, on the first or second day of this work, a mishap occurred which was the motivating factor in the discharges of Luis and Jesus, according to John, and the source of great controversy at the hearing. John testified that while he had the beam over his head, either Luis or Jesus or both made a wrong move while holding on to the ends of the beams, which caused John to lose his balance and almost fall to the ground. Greatly shaken, John stopped the work and said, "Guys, I can't work like this. I'm not going to risk my life." John was not sure exactly what went wrong but believed that Luis and Jesus, rather than lifting the beam, pulled it down. John said, "Higher, higher," in English, but the workers pulled down instead. As a result of this incident, John concluded that the language problem was becoming a safety problem.<sup>5</sup>

---

5. General Counsel introduced two exhibits (GC Ex. 11 and 12) as prior inconsistent statements of John concerning the incident. Neither was written by John. Both accounts, one by a Board agent and the other by John's attorney, indicate that only Luis or Jesus was involved. Both accounts were (contd.)

Luis and Jesus gave consistent testimony about this incident which was strikingly different from John's. By their account, Dave Walters caused the forklift to lurch, which made John lose his balance. Neither of them was holding on to the beam at the time. It was the first or second day that Dave had worked on the forklift and he merely raised it too fast. Luis testified in English that John told Dave: "Take it easy. Take your time or there'll be an accident."

Dave Walters also testified about the incident. He said that he had a generally poor memory and that the incident was particularly vague to him. But he remembered part of the incident with much greater clarity than the rest of his testimony, and it tended to corroborate the version of Luis and Jesus. Dave was the participant in the best position to observe what was happening, because he was not occupied with the beam and because he was facing the other three men. While Dave denied that his operation of the forklift caused John to stumble, he did say that it was necessary to move the tractor forward a little while raising the lift. David said that he really didn't know what happened, but "I remember the look on his (John's) face. He was sixteen feet in the air. He looked at me like he was in my hands and for me not to shake it." Dave couldn't remember what anyone said, but thought that John

---

5. contd.

based on the same discussion with John. These statements appear to be the result of a misunderstanding of what John said, rather than an inconsistent statement by John. John's attorney testified that he did not review his statement with John.

might have told him afterward to be careful. John also counseled Dave on other occasions to take his time.

It is unclear whether John stopped lifting the roof beams immediately after the incident or continued for a few days. But on November 10, John hired Mike Havelka, who weighed 200 pounds, to do this work. Dave Walters was amazed that John, in his early fifties, could lift the heavy beams. It was undoubtedly very demanding physical labor.

With Mike in John's place, Luis, Jesus, and Dave continued the work of installing the roof beams. There were no further communication problems mentioned. John said that he warned Mike that there might be language difficulties, but Mike did not report any. Luis was discharged on Friday, November 14. John told him that there was no more work. John's time and attendance records indicate that Dave, Mike, and Jesus were the only construction workers employed during the week of November 17, but Dave and Jesus both testified that they continued installing roof beams that week. None of the witnesses could remember who took Luis' place, although John testified that it was possible that he had done construction work that week. Jesus was discharged by John on Saturday, November 22. By this time all of the roof beams were in place, except for three rows. The posts had not yet been installed in these rows. All that Jesus understood of why he was discharged is that there was no more work.

On November 21, the previous day, Dutch Brothers hired an employee named Angel. On November 24, Jefferson Chambers was reinstated pursuant to a settlement agreement with the UFW.

A worker named Francisco was also hired on November 24. When John was asked why Luis or Jesus were not offered work in the greenhouse, John said that Angel and Francisco had worked for Dutch Brothers before. A careful review of the Dutch Brothers time and attendance records (GC Ex. 3) discloses that no workers named Francisco or Angel had been employed by Dutch Brothers from January 1, 1973, until these two men were hired.

John testified that Luis and Jesus were discharged because of the language problem, of which the falling incident was a symptom, and because the construction was moving into a more difficult phase. There was also some testimony to the effect that Luis and Jesus were afraid of heights, but this is not asserted as a reason for the discharges. John and Dave both testified that Luis and Jesus were good, steady workers.

Luis and Jesus testified that, prior to the election, John had construction materials, such as the A-frames and the roof beams, transported by tractor from the assembly site to the construction site, a distance of several hundred yards. After the election, they were required to carry the heavy loads on their shoulders. The record discloses that the construction workers were carrying wood as early as late September, several weeks before the election, and that John had carrying tools fabricated to aid the workers. These tools did not work out. Additionally, John was anxious to get on with the construction and it does not seem likely that he would have required the wood to be carried out of spite, if that were to mean lost time.

There was little testimony as to the construction work remaining after the discharges. The fiberglass roof had to be put in place, airing windows installed, and the electrical, heating, and plumbing systems put in place. John never asked Luis and Jesus if they could do this work. John did the most complex work with his sons, rather than use any employees. These tasks included, installing the posts, and the heating and plumbing systems. Contractors were hired to do much of the packing shed work and to prepare the land for the building of the greenhouse.

On November 25, Luis and Jesus attended the first UFW-Dutch Brothers contract negotiation session. The UFW representative requested that the two be rehired, but there was no response.

Early in December, Luis, accompanied by Larry Tramutt and another UFW employee, Ann Caponio, went to the nursery to seek employment. Larry had a conversation with John. Again, there is great conflict in the testimony as to the content of the discussion. According to John, Larry demanded that he take the "people" back, and that he would like to negotiate. John said that he refused, but did not give any reasons, although he might have discussed the greenhouse work. John said he was very busy. Larry then allegedly said: "If you don't take him back, we'll return with a thousand people, destroy your nursery, and run you out of business." John said: "You can do this in America with the Bill of Rights?"

Larry Tramutt and Ann Caponio denied that any threats were made. According to them, Larry said he had come to try to get



a job for Luis and to settle the matter reasonably, without filing an unfair labor practice charge. John allegedly said: "We don't want him back." Larry then pointed out the protections afforded to workers under the Act and John replied that nobody was going to take his business away. Larry reminded John that Dutch Brothers had been forced to reinstate Jefferson Chambers. John allegedly replied that the lawyer had paid because it was his mistake.

I find that Larry did make the threats to which John testified. John's testimony was specific, vivid, and more credible on this point. Larry's denial was, as Respondents urge, predictable. I also find that John made the statements attributed to him by Larry. They are consistent with the proud independence displayed by John throughout the hearing. He testified that he had left Holland in 1964 to get away from heavy-handed bureaucratic regulation. He wanted no interference in his business, whether from unions or from government. I therefore credit Larry's testimony that John said, "We don't want him" and "Nobody is going to take our business away."

By putting together these two versions of the conversation a more believable picture appears of a steadily more angry confrontation, culminating in a frustrated threat. While Larry's threat cannot be condoned, it does not appear that it was taken very seriously by John. Only when prodded by his counsel did John say that he attributed the threat to Luis. And when asked if he thought the threat was serious, John replied that he did, especially after reading an article in the Reader's Digest entitled "Arson to Order in the Building Trades.

The article appeared in the March, 1976, issue, three months after the Tramutt threat.

In addition, John, the only brother who heard the threat, did not take out insurance on his greenhouse as a result, although he claimed that Hank and Case did. Hank and Case did secure insurance, but not until March 1, 1976 (R Ex. BB). In any event, the reinstatement request and refusal were made before the threat was uttered, although John said the threat was a major reason he didn't want to rehire Luis.

Luis and Jesus testified that they met a solid wall of rejection in attempting to find work at local nurseries after their discharges. Jesus was told by the foreman at the Tanaka Nursery to forget about getting work because he was known as a union member. The foreman told Jesus to go to the union office if he wanted a job. Luis testified that he was finally re-employed at the Endow Nursery in May, 1976, after he assured Mrs. Endow, as a condition of employment, that he was no longer with the union. Henry Camacho testified that nursery owners in the area would generally be reluctant to hire union members, although some would hire people regardless of their beliefs. Camacho also said that word got around fast in the Carpinteria Valley.

## DISCUSSION, ANALYSIS, AND CONCLUSIONS

### I. The Discharge of Pedro Reyes.

#### A. The General Counsel's Prima Facie Case.

To establish that a discharge violates §1153 (a) and (c) of the Act, the General Counsel must establish that: (1) Respondents possessed an anti-union animus, (2) Respondents knew that Pedro was a union supporter, and (3) the discharge was motivated by Pedro's union sympathies and activities.

The evidence clearly establishes Respondents' anti-union animus. First, Respondents announced a wage increase to all workers on October 3, ten days before the petition was served, although John testified that he believed Dutch Brothers' wages to be the highest in the area and that no employees had requested the raise. The announcement occurred after Hank and John had attended the meeting at which Harry Kubo alerted them to the likelihood of UFW activity and the need to bring wages up to scale to counter the organizational effort. The announcement also followed John's conversation with Jefferson Chambers in which John expressed concern about a union coming in and elicited Jefferson's views on a potential wage increase. Despite this evidence, John maintained that he had barely heard of the UFW before the petition was served and that the petition came as a total shock. John's naivete was clearly feigned. Second, John admitted that the service of the petition made him angry and that the UFW election victory was like a hit in the face and a betrayal, because the workers would not have chosen a union if they were happy. Third, John testified that

he and his brothers were philosophically opposed to a union shop, hiring hall, and seniority principles. Fourth, Respondents had Henry Camacho make an anti-union campaign speech to the workers. Respondents cite case authority to establish that the speech and its contents were lawful. The lawfulness of the activity is not an issue in this case; the anti-union animus it demonstrates is.

Respondents' knowledge of Pedro's union activity is largely circumstantial, but convincing. Until the service of the petition, the organizing activity at the nursery was very quiet, apparently by design. But, as the election approached, and emotions grew more heated, the union supporters became less cautious. The credible testimony of Luis and Jefferson establishes that Henry Camacho questioned Pedro about his union support and that Pedro replied that he strongly supported the union. Mr. Camacho had been charged by Respondents with getting feedback on the employees' reaction to his speech. He discussed the reaction with several of the brothers for twenty minutes immediately afterward. It seems highly doubtful that he would not have reported Reyes' remarks and described Pedro, especially in light of Camacho's admission that he made an anti-union speech and unlawfully interrogated his own employees (GC Ex. 18). The timing of the discharge also supports a finding of knowledge of Pedro's union activities. The NLRB's so-called "small-plant rule" is applicable on the facts in this case. NLRB v. Joseph Antell, Inc., 353 F.2d 880 (1 Cir. 1966); NLRB v. Abbott Worsted Mills, 127 F.2d 438 (1 Cir. 1942).

There were four supervisors at the nursery and fewer than 20 employees, including the construction workers. Once their attention was alerted to union activity, it would not be difficult for Respondents to discover who the leaders were.

The feature most suggestive of Respondents' discriminatory motive in the Reyes discharge is its timing, especially in the context of the discharge of Jefferson Chambers. Jefferson was discharged on Monday, October 20. The usual day for a discharge at Dutch Brothers was Friday. Jefferson was told that he was discharged because there was not enough work and John tenaciously clung to this justification at the hearing. Jefferson was Respondents' highest paid worker. He was the only employee who drove the rototiller and, as the only bilingual employee, often acted as an interpreter. Although he had once quit work, John missed him and convinced him to return. Jefferson was known to Respondents as a leader, indeed, from their point of view, the prime mover, in the union campaign. Less than five days before his discharge, Jefferson's eligibility to vote was challenged on the ground that he was a supervisor. At the hearing, John denied that Jefferson had such a status.

Jefferson and Pedro had worked closely on construction projects and in the planting crew for several months before the election. Despite John's denials it is clear that John knew that Jefferson and Pedro were friends. Two of Respondents saw Pedro with Jefferson working on declarations before the election.

Pedro was discharged on Thursday, October 23, six days

after the election. A Thursday discharge at Dutch Brothers was extremely unusual. These facts are more than sufficient to establish the General Counsel's prima facie case.

B. Respondents' Explanation for the Discharge.

Respondents assert that the discharge of Pedro Reyes was a lay-off for lack of work, evidenced by a decline in flower production which occurred every fall. Respondents introduced records which indicate a substantial decline in the dollar amount of flowers shipped between September and October. While no comparative figures from previous years were introduced, the decline is substantial enough to conclude that Respondents had a business justification for reducing their work force. General Counsel's argument that the dollar decline may have resulted from chrysanthemum varieties which produced a lower yield than those grown at other times during the year supports Respondents' contention, because less time would be needed for cutting those varieties.

A business justification for the discharge does not necessarily mean that it was not carried out with a discriminatory motive. Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977). John testified that it was clear in early October that lay-offs would be necessary, but none took place until after the election. And no reason has been advanced for the unusual timing of the discharge.

John testified that in selecting which employee would be laid off both seniority and productivity were considered. It is not clear how much weight was given to the two factors. The

only employee with less seniority than Pedro was Hijinio Gomez. As against John's generalized assertion that Hijinio was the better worker, Jefferson gave a detailed opinion of their relative abilities, concluding that Pedro was the superior nursery worker. John's complaint about Pedro was limited to one occasion when Pedro, assigned to a painting job, switched tasks with a worker from the nursery. Aside from the inconsistency of having Pedro, assertedly a poor painter, do painting work, John was vague as to the date of the occurrence and testified that it did not happen again. And John testified that Pedro was a regular worker, but that Respondents liked the others better than Pedro. According to Jefferson's credible testimony, not contradicted by Edward, Edward said that Pedro was an intelligent worker. Even taking into account Jefferson's friendship with Pedro, I cannot find that, using Respondents' own standards, Pedro would have been selected for discharge in preference to Hijinio, absent a discriminatory motive.

This conclusion is buttressed by the fact that Pedro was working in the planting crew, which experienced no seasonal fluctuation in the amount of work to be done. Planting went on at a steady pace all year, without regard to weather or any other factor. Pedro's discharge appears even more suspect because another planter, Jefferson Chambers, had been discharged just three days earlier.

I conclude that Respondents' asserted business justifications do not overcome the General Counsel's prima facie case

and that Pedro Reyes was discriminatorily discharged because of his union activities in violation of §1153 ( a ) and ( c ) of the Act.

II. The Discharges of Luis Campos and Jesus Gutierrez.

A. Luis Campos and Jesus Gutierrez Were Agricultural Employees Within the Meaning of the Act.

A threshold question is whether Luis and Jesus were agricultural employees within the meaning of §1140.4 ( b ) , during the course of their employment.

The parties are in agreement that both employees fall within the agricultural employee exception of the NLRA, in accordance with the reasoning of the Ninth Circuit in NLRB v. Monterey County Building and Construction Trades Council, 335 F.2d 927 ( 1964 ) . That would ordinarily end the discussion. But the Legislature, in enacting §1140.4 ( b ) , inserted an additional exclusion from the definition of agricultural employee for "any employee who performs work to be done at the site of the construction, alteration, painting, or repair of a building, structure . . . "

Again, the parties agree that both Luis and Jesus did perform construction work on a building, but the General Counsel urges that the exclusion be narrowly construed to avoid placing some employees in a "no man's land" between the coverage of the NLRA and the Act, while Respondents urge that the Legislature intended to create just such a situation.

As the General Counsel argues, a slavishly literal construction of the exclusion would permit an employer to free



himself from the requirements of the Act by asking an employee to hammer a few nails. Pedro Reyes, for example, worked in construction during three separate periods in 1975, the last being only two days before the election, when he and Jefferson Chambers repaired a window. To avoid such an absurd conclusion, it is necessary to determine the legislative intent behind the exclusion. California has little formal legislative history, so the courts have looked at the historical background of enactments to determine their intent. Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 333 (1940).

Once more, the parties are in agreement as to the background of the construction worker exclusion. Late in the Act's passage through the Legislature, the building trades unions expressed concern that the definition of agricultural employee might cover their members working on farm land. The exclusion was inserted to meet this concern. See Levy, The Agricultural Labor Relations Act of 1975 - La Esperanza De California Para El Futuro, 15 Santa Clara Lawyer 783, 736; and Comment, California's Attempt to End Farmworker Voicelessness: A Survey of the Agricultural Labor Relations Act of 1975, 7 Pacific L.J. 197, 212 (1976).

Clearly, the Legislature intended to exclude from the Act's protections employees who were trained as construction workers and whose primary function was to work in tasks utilizing those specialized skills. Employees whose only construction tasks involved rudimentary structures, and who were not trained as construction workers, could not have been intended

to be excluded, because such workers would not have been eligible for membership in construction unions. In making this distinction, the NLRB definition of a "craft unit," enunciated in American Potash and Chemical Corp., 107 NLRB 1418 (1954), is helpful:

[A] true craft unit consists of a distinct and homogeneous group of skilled journeymen craftsmen, working as such, together with their apprentices and/or helpers. To be a "journeyman craftsman" an individual must have a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training. 107 NLRB at 1423.

Turning to the facts of this case, it is undisputed that Luis and Jesus had no particular construction skills and that John did not require any such skills for the work he had. When such skills were required, as in the construction of the packing sheds, a contractor was employed. It is also agreed that John intended, at the time they were hired, to keep Luis and Jesus on as nursery employees once the construction was completed. A number of other employees were called upon to perform construction work, including painting and repair. Such work is part and parcel of the operation of a nursery. Luis and Jesus were integrated into the Dutch Brothers operation, receiving the same wages, benefits, and protections as other employees. Indeed, it was only after consulting with his attorney that John had any idea that his workers were not agricultural employees.

Because it is clear that the Legislature intended to exclude only trained, professional construction workers from

the protections of the Act, and because it is clear that Luis Campos and Jesus Gutierrez were not such workers, I conclude that they were agricultural employees within the meaning of §1140.4 (b) of the Act.

B. The General Counsel's Prima Facie Case.

I have discussed the elements of a prima facie case in connection with the discharge of Pedro Reyes. The analysis of Respondents' anti-union animus applies equally to Luis Campos and Jesus Gutierrez. With respect to these employees, however, Respondents urge that their animus was directed personally against Jefferson Chambers, and not the "UFW. While it is true that Respondents, and particularly John, were especially angry at Jefferson, and considered him to be the union ringleader, it is obvious that their animus against the philosophy of unionism ran very deep.

As far as Respondents' knowledge of Luis' union activities is concerned, the evidence establishes that he was one of the employees who sharply challenged Henry Camacho's defense of Dutch Brothers' policies. The day before the election Jefferson was drafting declarations in support of the eligibility of Luis and Jesus to vote and Bill said to John: "Now, they're trying to get your workers," Both Luis and Jesus identified themselves in Mrs. Camacho's presence at the Aliso School meeting. After the election, the local nurserymen discussed the election at Dutch Brothers during social occasions. It was the first election in the area and, as such, held great interest. Events too trivial to report before the election may have loomed much larger later on. According to Luis and

Jesus, at least two nursery owners knew of their union membership. If other farmers were aware of this fact, then Respondents surely must have been. Again, in retrospect, the fact that Chambers, Reyes, Campos, and Gutierrez often ate lunch together would also have been significant. And, of course, the "small-plant rule" is applicable here. While employer knowledge of an employee's union activity is essential to a finding of violation of §1153(c), such knowledge may be inferred from circumstantial evidence, Texas Aluminum Co. v. MLRB, 435 F.2d 917 (5 Cir. 1970); and especially in a small plant, A.J. Krajewski Manufacturing Co. v. NLRB, 413 F.2d 673 (1 Cir. 1969). I find that Respondents had knowledge of the union activities of Campos and Gutierrez.

The motivation for the discharges will be discussed more fully in conjunction with the analysis of Respondents' business justifications. However, the timing of the discharges is significant. As has been noted, all of Respondents' justifications relate to language problems, yet Luis Campos, who understood and spoke some English and who had more experience than Jesus, was discharged first. Luis, of course, had been an early, active union organizer. In addition, by the time of Luis' discharge, unfair labor practice charges had been filed as a result of the Chambers and Reyes discharges, and Respondents were aware of the Board's authority in the area. By the time of Jesus' discharge, Respondents had decided, after an ALRB investigation, to reinstate Chambers with back pay. Since the time of the election, Respondents had been operating under the

assumption that Luis and Jesus were construction workers, outside the protections of the Act. Such employees could be discriminatorily discharged without legal liability.

B. Respondents' Business Justifications for the Discharges.

Respondents advance three reasons for the discharge: (1) The falling incident, which was "merely symptomatic" of the language barrier; (2) the language barrier itself; and (3) John needed to spend more time in the greenhouse and needed to be able to give instructions to American workers once a day, rather than continually supervising Mexican workers. (Respondents' Brief, p. 13.)

The falling incident took place on November 3 or 4. While the testimony of four people present indicates that the likeliest explanation is that Dave V7alters operated the forklift in a jerky manner, John may have unreasonably blamed Luis and Jesus for the near accident. It seems less likely that John would attribute the problem to a lack of communication. John testified that the work was repetitive and that by the time of the incident each worker understood his responsibility. Words did not play a big part in the operation. While Dave remembered the look on John's face, he could not remember anything being said. At the hearing, John at first placed very great emphasis on the falling incident. The brief finds it "merely symptomatic."

Had John been convinced that Luis and Jesus were endangering his life, it is incomprehensible that he would have continued them in the same task with Mike Havelka, a newly

hired worker. Yet Mike worked for a week with both Luis and Jesus and for a second week with Jesus, apparently without any problems.

Furthermore, if John had decided on November 3 or 4 that he would have to discharge Luis and Jesus, it is strange that he did not give them notice, because John testified that it was his policy to give employees two weeks notice. Moreover, if language was the only problem, it seems reasonable that John would have transferred Luis and Jesus to nursery work when hiring began on November 21, especially since John had sought out both men to work for him, and has testified that he liked them and knew they were experienced nursery workers. He had done exactly that when Pedro Reyes had not worked out as a construction worker. John's failure to transfer the workers appears even more suspect because Respondents' records contradict his testimony that the two workers who were hired had previously worked for Dutch Brothers. All of the workers in the greenhouse were Spanish-speaking. John had had ten years experience in supervising-Spanish-speaking employees.

Other than the falling incident, there had apparently, according to Edward and John, been a few problems caused by the language barrier. All had been minor, occurred before the incident, and had numbered no more than four or five. When asked if he allowed that many mistakes before discharging a worker, John replied that he allowed many more because he was soft-hearted. And John testified that he had had no thought of discharging Luis and Jesus before the falling incident.

Problems in communication were not mentioned by John as the reason for the discharges or his failure to reinstate the workers when the initial reinstatement requests were made. The falling incident was first mentioned after the unfair labor practice charges were filed.

It is not clear that John had less time to spend supervising the construction as time went on. He testified that Case had taken on extra supervisory work inside the greenhouse to free him for construction work. Besides, once Dave was hired on October 29, concededly before any thought had been given to discharging Luis and Jesus, there was an English-speaking worker to instruct. If anything, the communication problem had eased.

Fear of heights and Jesus' need to have his work permit renewed periodically were also raised as justifications at the hearing, but are not asserted in Respondents' brief as major factors in the discharges. Neither appears to be persuasive.

Respondents cite a number of cases which stand for the proposition that an employer need not ordinarily have any cause, let alone good cause, to discharge an employee, even if the employer is anti-union and the employee is pro-union. But once the General Counsel has carried its burden of establishing a prima facie case of a violation of §1153 (c), the burden shifts to the employer to demonstrate that the discharge was not discriminatorily motivated. Maggio-Tostado, Inc., 3 ALR3 No. 33 (1977), citing NLRB v. Great Dane Trailers, Inc.,

388 U.S. 26 (1967),

As the court noted in NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9 Cir. 1970) :

Certainly in the absence of other circumstances the employer has the right to discharge its employees, (citations omitted) and the mere fact that an employee is or was participating in union activities does not insulate him from discharge. (Citations omitted.)

On the other hand, the cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity; a business reason cannot be used as a pretext for a discriminatory firing. (Citations omitted.) The test is whether the business reason or the protected union activity is the moving cause behind the discharge. (Citations omitted.) In other words, would this employee have been discharged but for his union activity? (Citation omitted.) 436 F.2d at 49-50 (emphasis in original).

John's hostility toward Larry Tramutt's request for Luis' reinstatement, which was manifested before Tramutt's threat, reinforces the evidence of the discriminatory nature of the discharge. NLRB v. Lizdale Knitting Mills, 528 F.2d 978 (2 Cir. 1975).

While John may have had some difficulty in communicating with Luis and Jesus, Respondents have-not demonstrated that it was a motivating factor in their discharges. Nor have they shown that the work was reaching a more complex stage, beyond the skills of the two workers.

I conclude that the discharges of Jesus Gutierrez and LJLS Campos were ordered primarily because of their union activities, and would not have occurred but for those activi-



ties, in violation of §1153(a) and (c) of the Act.

#### THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices within the meaning of §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 Respondents unlawfully discharged Pedro Reyes, Jesus Gutierrez, and Luis Campos, I will recommend that Respondents be ordered to offer each of them immediate and full reinstatement to their former or substantially equivalent jobs. I shall further recommend that Respondents make whole each of the three employees for any losses they may have incurred as a result of their unlawful discriminatory action by

---

6. Although Luis Campos and Jesus Gutierrez were hired and employed by John Van Wingerden rather than Dutch Brothers, John's business was in an embryonic stage of development in 1975. The two employers had a common labor relations policy, employed the same attorney and bookkeeper, and had common management and ownership, to the extent that John had the power to hire and fire in both operations. In addition, there was a substantial interchange of employees, the businesses were located in the same place, John's employees were identified as working for Dutch Brothers on their 1975 W-2 forms, and were paid on Dutch Brothers checks. Clearly, Dutch Brothers and John Van Wingerden constituted a single employer, "regardless of any nominal separation." Louis Delfino Co., 3 ALRB No. 2, page 3 (1977). The discharges of Campos and Gutierrez resulted from their union activities among Dutch Brothers employees and were intended to discourage those employees in the exercise of their rights under the Act. As beneficiaries of the unfair labor practices, Dutch Brothers should share the liability. See Majestic Molded Products v. NLRB, 330 F.2d 603 (2 Cir. 1964).

payment to them of a sum of money equal to the wages they would have earned from the date of their discharges to the date they are reinstated or offered reinstatement, less their net earnings, together with interest thereon at the rate of seven per cent per annum, and that the loss of pay and interest be computed in accordance with the formula used by the NLRB in F.W. Woolworth Co. , 90 NLRB 239 , and Isis Plumbing and Heating Co. , 138 NLRB 716 .

In Case No. 76 CE-14-V Respondents stipulated that they refused to bargain in good faith with the UFW from May 1, 1976 , to February 28 , 1977 , in violation of Section 1153 ( a ) and ( e ) of the Act. Respondents further agreed to make their employees whole for the loss of pay resulting from their refusal to bargain. ( Joint Ex. I ) . Had Reyes, Gutierrez, and Campos not been unlawfully discharged, they would have been covered by the settlement agreement. In order to make the back pay order in this case complete, the three discharged employees must also be made whole for Respondents' refusal to bargain. Otherwise, Respondents would benefit from their violation of the Act.

The parties stipulated that if I should conclude that a make-whole order were appropriate as to the three discharged employees, the formula outlined in the settlement agreement for the computation of the make-whole remedy should apply. I approve this stipulation. The dischargees will be entitled to a make-whole award only for those periods during which they were entitled to back pay.

Although the Board has generally required a notice explain-

ing its orders to be read to employees, I do not believe that a remedy beyond posting is required in this case. The settlement agreement in the failure to bargain case provides for reading of a notice and for a meeting/ out of the presence of Respondents, at which the Act and order will be explained to Respondents' employees by Board agents and UFW representatives.

ORDER

Respondents, their officers, agents, successors, and assigns shall:

1. Cease and desist from discouraging membership of any of their employees in the UFW, or any other labor organization, by discharging, laying off, or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any other condition of employment, except as authorized by §1153 (c) of the Act.

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

(a) Offer to Pedro Reyes, Luis Campos and Jesus Gutierrez immediate reinstatement to their former or substantially equivalent jobs and make each and every one of them whole for any losses each and every one of them may have suffered as a result of his termination, in the manner described above in the section entitled "The Remedy."

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll

records, Social Security payment records, time cards, personnel records and reports, and any other records necessary to analyze the back pay due.

(c) Post a copy of the notice attached hereto, including an appropriate Spanish translation, within two weeks of the effective date of this Order, on a wall in each packing shed, in the vicinity of the employee lunch area, where notices are customarily posted. These notices shall remain posted for a period of sixty (60) days.

(d) Notify the Officer in Charge of the Board's Oxnard Subregional Office within twenty (20) days from receipt of a copy of this decision of the steps Respondents have taken to comply therewith, and to continue to report periodically thereafter until full compliance is achieved.

DATED: May 9, 1977.

AGRICULTURAL LABOR RELATIONS BOARD

By

  
\_\_\_\_\_  
JOEL GOMEERG  
Administrative Law Officer

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 our employees that we will remedy those violations and we will respect the rights of all our employees in the future. Therefore, we are now telling each of you that:

(a) We will offer to reinstate Pedro Reyes, Luis Campos, and Jesus Gutierrez to their former jobs and give each and every one of them back pay for any losses each and every one of them had while each was off work.

(b) We will not discharge, lay off, or in any manner interfere with the rights of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

This notice is in addition to the notice we have already read to you explaining that we failed to bargain in good faith with your union.

DATED: \_\_\_\_\_

DUTCH BROTHERS

MAX-I-MUM

By: \_\_\_\_\_  
CASE VAN WINGERDEN

By: \_\_\_\_\_  
JOHN VAN WINGERDEN

By: \_\_\_\_\_  
HANK VAN WINGERDEN

VALLEY FLOWERS

By: \_\_\_\_\_  
BILL VAN WINGERDLM