

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

McANALLY ENTERPRISES, INC.,)	
)	
Respondent,)	Case Nos. 75-CE-7-R
)	75-CE-10-R
and)	75-CE-27-A-R
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	3 ALRB No. 82
)	
Charging Party.)	
)	

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On April 4, 1977, Administrative Law Officer Louis M. Zigman, issued his decision in this case. The Respondent, the General Counsel and the Charging Party filed timely exceptions.

Having reviewed the record, we adopt the law officer's findings, conclusions and recommendations to the extent they are consistent with this opinion.

McAnally Enterprises, Inc. is a large egg producer with several operations in California and one in New Mexico. When the UFW began to organize McAnally employees at the Lakeview Ranch in August 1975, the Respondent hired a uniformed guard and constructed a gate across the entrance to the ranch. The employer stipulated that it kept UFW representatives from all of its property beyond the front gate. This included the parking lot, the lunchroom, and employee homes on the property.

The union was restricted to access outside the gate before the employees began work. The gate was not opened until 7:00 a.m. The UFW's only opportunity to contact workers was while they were waiting in their cars for the gate to open. Each morning when organizers were present, two supervisors were at the gate with the uniformed guard. One supervisor made a citizen's arrest of three organizers who were outside the gate leafletting employees waiting in their cars. Another arrest occurred inside the fence as organizers tried to contact employees after work. Communication between organizers and workers was difficult, if not impossible, under these conditions.

Respondent relied on a limiting section of the access regulation to justify its denial of access: 8 Cal. Admin. Code Section 20900(5)(e) (1975); re-enacted as Section 20900(e)(4)(c) (1976).

The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

The employer contends that the presence of organizers on a chicken ranch is "disruptive of the employer's . . . agricultural operations" because of the possibility organizers might spread chicken disease. Two expert witnesses testified to the necessity for stringent disease preventive measures on chicken ranches. Since an epidemic of Newcastle's disease a few years ago, it has been industry-wide practice to refuse to allow nonemployees into chicken houses.

If the Respondent had denied access solely to its chicken houses, its defense might be credible. But the Respondent denied access everywhere on the ranch inside the fence. Organizers could not get inside the gate even to meet with employees in their own houses. The Respondent based its total denial of access beyond its gates upon the UFW's insistence on entering the chicken houses. The union insisted on its right to meet with workers during their lunch hour. The Respondent allowed some workers to eat their lunch in chicken houses. The regulation in effect at this time^{1/} permitted access to the areas where employees congregated before and after work and where they ate their lunch. New regulations reflecting the Board's concern with the transmittal of chicken disease were adopted in 1976.^{2/} This addition prohibits access to chicken houses unless employees are permitted to remain there during the three hours of daily access granted to organizers. It does not prohibit access by union organizers to other parts of a poultry ranch, and in fact would permit access to chicken houses during the lunch hour if workers were allowed to eat their lunches there.

The employer's denial of access went beyond what was necessary for disease prevention purposes. We find the Respondent violated Section 1153 (a) in denying access to its property.

The Respondent excepted to the finding that Manual Vargas was a nonsupervisory employee. It claimed that as a

^{1/}8 Cal. Admin. Code Section 20900 (1975).

^{2/}See 8 Cal. Admin. Code Section 20901 (1976).

supervisor fired for union activity he was not protected by the Act. The Respondent did not establish its awareness of Vargas's efforts on behalf of the union. Moreover, we agree with the hearing officer that Vargas was fired for his wife's union activity, not his own. Even if Vargas was a supervisor, his firing is a violation of Section 1153(a) of the Act. The firing of a supervisor for the union activities of a spouse has an intimidatory effect on other employees. Golub Bros. Concessions, 140 NLRB 120, 51 LRRM 1575 (1962). Therefore, we do not find it necessary to determine whether Manuel Vargas was a supervisor.

Since we uphold the hearing officer's determination that the firing of Vargas violated the Act, we uphold his finding that the eviction of Vargas and of Azucena Hernandez, his wife, is a violation. Kohler Co., 128 NLRB 1062, 46 LRRM 1389 (1960). We agree with the hearing officer that Respondent discharged Vargas so that it could evict him and Azucena Hernandez. Although Hernandez had been fired two weeks previously, she was still engaged in organizing efforts at McAnally.

The hearing officer found the eviction of Azucena Hernandez and Manuel Vargas to be "an independent violation of the Act," and we agree. The General Counsel excepted to the failure of the hearing officer to recommend reinstatement to company housing and reimbursement for expenses incurred in defending against the employer's unlawful detainer action. We find merit in these exceptions and shall grant the requested remedy. We agree with the finding of the hearing officer that the Respondent's motive in firing and evicting Manuel Vargas was to remove Azucena Hernandez from the property. She was

fired for her union activity but continued her organizing efforts while living with her husband in a company house. Immediately after Vargas's firing, the employer filed an unlawful detainer action against them. Vargas and Hernandez defended against this action. We shall order Respondent to pay to them all expenses resulting directly from the defense of the eviction including legal costs and fees plus any appeal costs and all amounts paid as a result of any judgment against them. We order these remedies to undo the effects of the Respondent's unfair labor practices and to restore Vargas and Hernandez as closely as possible to the situation they were in before these actions were directed against them. Cf., Baptist Memorial Hospital, 229 NLRB No. 1, 95 LRRM 1043 (1977).

We concur with the conclusion of the hearing officer that the transfer of Uvaldo Escalera^{3/} was not a violation of Section 1153 (c). Mr. Escalera¹'s former job no longer required a full-time worker. Escalera's supervisor said there were no jobs available other than the one to which he was transferred.

The UFW urges the Board to award damages for emotional distress to Vargas and Hernandez. The Board is divided on this question, and the request is denied for lack of a majority.

Our standard remedy for denial of access is to grant access beyond that required by the regulations.^{4/} We do so here. The Respondent's conduct in preventing employees from contacting

^{3/} Mr. Escalera's full name is Uvaldo Escalera Villa. He is referred to as Mr. Villa in the hearing officer's report.

^{4/} Jack Pandol and Sons, Inc., 3 ALRB No. 29 (1977), Jackson & Perkins Company, 3 ALRB No. 36 (1977), Anderson Farms Company, 3 ALRB No. 67 (1977).

union organizers has denied them the opportunity to select or reject a bargaining representative since the union was unable to garner sufficient showing of interest to trigger an election.

Accordingly, we order the following remedies:

1. There shall be no limit on the number of organizers during regular access hours.
2. The union shall have two hours of company time to conduct organizational activities.
3. The UFW shall be given access without the filing of an intent to take access and without the requirement of a showing of interest. The limitation of four 30-day access periods shall not apply.

These remedies shall be available to the UFW during its next organizational period.

To compensate for the unlawful refusal to allow distribution of union literature on company property during nonworking hours, we shall order the employer to make available to the UFW reasonable space on company bulletin boards.

We adopt the remedies of the hearing officer in regard to all other matters, modifying them to conform to the standard practices of the Board.

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the Respondent, McAnally Enterprises, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:
 - (a) Denying access to its premises to organizers engaging in organizational activity in accordance with the Board's access regulations.

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

(c) Interrogating employees concerning their union affiliation or sympathy or that of any other employee[s].

(d) Surveilling employees when they engage in protected activities.

(e) Promising benefits illegally to discourage unionization.

(f) Preventing employees who live in company houses, their families, and their visitors from freely entering and leaving the property.

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

(h) Threatening employees with layoff or other loss of employment, or with an adverse change in working conditions, because of their protected activities.

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

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

(a) Immediately offer Azucena Hernandez, Manuel Vargas and Concepcion Diaz reinstatement to their former or

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

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

(c) Make available to the UFW reasonable space on company bulletin boards during the next 12 months.

(d) During the next period in which the UFW conducts an organizational campaign, the Respondent shall allow UPW organizers to organize among its employees during the hours specified in 8 Cal. Admin. Code Section 20900(e)(3) (1976) without restriction as to the number of organizers.

(e) During the next period in which the UFW conducts an organizational campaign, the Respondent shall allow the UFW to take access without regard to the four 30-day periods and without the necessity for filing an intention to take access or for presenting a showing of interest.

(f) Offer to Azucena Hernandez and Manuel Vargas occupancy of their former, or of a substantially equivalent, home on company property and make them whole for any loss they may have suffered by reason of the eviction, including legal costs and fees.

(g) The Respondent shall provide the UFW with access to its employees during regularly scheduled work hours for

two hours, during which time the UFW may conduct organizational activities among the Respondent's employees. The UFW shall present to the regional director its plans for utilizing the time. After conferring with both the UFW and the Respondent, the regional director shall determine the manner and most suitable times for the special access. During this time, no employees shall be allowed to engage in work-related activities. No employee shall be forced to be involved in the organizational activities. All employees shall receive their regular pay for the time away from work.

(h) Post copies of the attached notice at times and places to be determined by the regional director. The notices shall remain posted until September 1979. Copies of the notice shall be furnished by the regional director in appropriate languages. The Respondent shall exercise due care to replace any notice which has been altered, defaced or removed.

(i) Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this Order, to all employees employed during the payroll periods which include the following dates: September 15, 1975 to October 15, 1975.

(j) 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 time 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.

(k) Hand out the attached notice to all present employees and to all employees hired in the next six months.

(l) During the next UFW organizational period, the Respondent shall provide the UFW with an updated list of its employees and their current street addresses once a month, upon request. No notice of intent to take access or showing of interest shall be necessary to receive this list.

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

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

Dated: November 3, 1977

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, 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 do any of these things:

1. Keep union organizers from talking with workers on the ranch at lunchtime and before and after work.
2. Keep union organizers from visiting workers at their homes on our property.
3. Ask our employees how they feel about the union.
4. Watch workers while they talk with union organizers.
5. Promise benefits to encourage workers to stay out of the union.
6. Keep workers who live on our property, their families and their visitors from coming in and going out of the property as they wish.
7. Discharge or lay off employees in order to discourage membership in the UPW or any other union.
8. Threaten to fire or lay off employees who are engaged in activities protected by the Agricultural Labor Relations Act.

Also, WE WILL offer Manuel Vargas and Azucena. Hernandez their old jobs back if they want them. We will give them back pay for the time they were out of work and offer them company housing. We will pay any expenses they suffered because we wrongfully evicted them.

Dated:

McANALLY ENTERPRISES, INC.

By: _____
Representative Title

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



STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

McANALLY ENTERPRISES, INC.)
Respondent, and)
UNITED FARM WORKERS OF AMERICA,)
AFL-CIO,)
Charging Party,)

Case No. 75-CE-7-R
75-CE-10-R
75-CE-27-A-R

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DECISION

Statement of the Case

Louis M. Zigman, Administrative Law Officer: This case was heard before me in Riverside, California, on November 24, 25, 26; December 3, 4, 5,

22, 23, 29 and 30, 1975. The complaint alleges violations of Section 1153(a) and (c) of the Agricultural Labor Relations Act, herein the Act and Violation of Emergency Regulation Section 20900, by McAnally Enterprises, Inc., herein called Respondent. The complaint is based upon charges and amended charges filed by the United Farm Workers of America, AFL-CIO, herein called the Union, on September 19, 1975, in Case No. 75-CE-7-R; on September 30, 1975, in Case No. 75-CE-10-R; and on October 22, 1975, in Case No. 75-CE-27-R. On October 30, 1975, the Union filed an amended charge to Case No. 75-CE-27-R and was henceforth identified as Case No. 75-CE-27-A-R. Copies of the charges and amended charges were duly served upon Respondent.

All parties were given full opportunity to participate in the hearing, and after close thereof, the General Counsel and Respondent each filed a brief in support of their respective positions.

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

I. Findings of Fact

Respondent, a corporation located in Riverside County, is engaged in the poultry and egg production business. In its Answer Respondent admitted that it is an agricultural employer within the meaning of Section 1140.4 (c) of the Act. Based on the Answer of Respondent and upon the testimony I find that Respondent is an agricultural employer within the meaning of the Act.

II. Labor Organizations Involved

In its Answer Respondent admitted that United Farm Workers of America, AFL-CIO is a labor organization within the meaning of Section 1140.4 (f) of the Act. Based on the Answer of Respondent and upon the testimony, I find that the United Farm Workers of America, AFL-CIO is a labor organization within the meaning of Section 1140.4 (f) of the Act.

III. The Alleged Unfair Labor Practices

The Complaint alleges that Respondent violated Section 1153 (a) by conduct which amounted to threats unlawful interrogation, promises of benefit, unlawful false imprisonment, and unlawful surveillance. In addition, the Complaint alleges that Respondent denied the Union access to its premises as required by Section 20900 of the Agricultural Labor Relation Board's Emergency Rules. Furthermore, the Complaint alleges that Respondent violated Section 1153 (c) of the Act by changing the working conditions of Uvaldo Escalera Villa and Conception Diaz, and by the discriminatory discharge an eviction of Azucena Hernandez and Manuel Vargas.

Respondent denies that it has engaged in any conduct violative of Section 1153 (a), or that it engaged in any conduct violative of Section. 20900 of the Emergency Rules. Respondent further denies that it engaged in any conduct violative of Section 1153 (c).

A. Background and Sequence of Events

Respondent operates several poultry ranches in Riverside County and San Bernardino County, including its main office in Yucaipa, California, and a large production facility in the unincorporated area of Lake View. In addition to these ranches, Respondent also has a facility in New Mexico.

The Union began organizing activities at Respondent's Lake View Ranch in the middle of August, 1975, and substantially all of the operative events took place at that facility. On August 29, 1975, Respondent announced that it was giving an across the board wage increase and additional increases in vacation, holiday and insurance benefits. In September, in order to keep the Union organizers from entering upon their property, Respondent constructed a fence and posted an unarmed guard at the gate. Thereafter, Respondent denied access to all Union Representatives with the exception that Respondent offered to permit access to the Union organizers in an area, owned by Respondent, which was immediately adjacent to the Lake View facility. Respondent also permitted access to the front portion of the parking lot and driveway area which is also outside of the gate and fenced area.

Shortly after the Board's Emergency Regulation concerning access went into effect, the Board was hit with a deluge of lawsuits challenging the rules and validity. Several courts issued orders barring enforcement of the Rules and the question of access was hotly contested. However, on September 18, 1975, the California Supreme Court, in Agricultural Labor Relations Board the Superior Court, (S.F. 23349), issued an order staying several Superior Court injunctions which had prohibited the Board from enforcing the access Rule.

Thereafter however, Respondent sought and was able to procure another injunction from the Superior Court of California, County of Riverside, which denied the Union access. Since that time, Respondent has continued to deny the Union access to its Lake View Ranch, subject to the exceptions noted above.

Despite these problems the Union organizing continued at the Lake View facility and on September 18, 1975, two Union organizers were able to get inside the fenced area. Before they were located and taken out, they had given employee Ulvado Escalera Villa, some Union literature to distribute. Villa placed the literature near the time clock and then went back to work. Shortly thereafter, Respondent took the literature and informed Villa that he could not distribute any literature during company hours.

On September 22, 1975, Villab job was changed and his new duties were admittedly less desirable than his previous duties.

On September 23, 1975, employee Conception Diaz, at whose house a Union meeting was scheduled that evening, was also told that his job was being changed. His transfer resulted in a loss of some overtime hours and thus he suffered a loss in pay.

On or about September 23, 1975, several employees attended a Union

organizational meeting at Conception Diaz's home. During the next few days there were several conversations between supervisors Ellias Parraz and Andres' Vargas and employees Azucena Hernandez, Manuel Vargas and Ascencion Diaz, a substance of which are in dispute.

Thereafter, on September 28, 1975, Azucena Hernandez ceased work. The General Counsel asserts that she was unlawfully terminated and Respondent asserts that she voluntarily quit.

On October 1, 1975, Azucena Hernandez, who was at that time still living in a house on Respondent's ranch, went to the gate to talk with Union organizers. The General Counsel asserts that she was refused permission to exit from the ranch and thereby she was falsely imprisoned within the ranch. Respondent denied this allegation and stated that she was never refused permission to exit through the gate.

On October 14, 1975, when Azucena Hernandez was turning into the Union office San Jacinto, California, she noticed Dr. Lofgren, Respondent's vice president, in a car behind her. The General Counsel asserts that Respondent unlawfully engaged in surveillance by such action and Respondent denied it.

On October 14, 1975, Respondent discharged Manuel Vargas for allegedly engaging in union activities. Respondent asserts that Manuel Vargas was a supervisor, at all times material, and therefore his discharge was not in violation of the Act. The General Counsel contends that Manuel Vargas was an employee, not a supervisor, and that his discharge was violative of the Act. In the alternative, the General Counsel asserts assuming arguendo that Manuel Vargas was a supervisor, he was terminated in order to stifle other employees union activities and such termination was a violation of the Act.

After the discharge of Manuel Vargas, Azucena Hernandez's husband, both of them were evicted from the house that they occupied on the Lake View Ranch.

B. The Access Issue

The facts on this issue are not in dispute. Respondent admitted that it erected a fence in September and stationed an unarmed security guard at the gate in order to keep out unauthorized intruders, i.e. Union Organizers. Respondent also admitted that each time the union organizers sought to enter its ranch it refused to permit access.

Respondent asserted that it had the right to deny the organizers' access because of the disease threat organizers posed to the chickens housed at the Lake View Ranch. Respondent further asserted that its position is consistent with the Board's own limitation of the right to access as set forth in Chapter 9, Section 5 (e) wherein the Board has provided that the right of access shall not include conduct disruptive of the employer's property or agricultural operations including injuries to crops or machinery. Thus, Respondent submitted that denial of access was consistent with the purposes behind the institution of the access rule.

Respondent further asserted that at the time access was denied, an injunction denying the Union access was in effect and therefore because of said injunction, it could not be guilty of any unfair labor practices.

Respondent also stated that its denial of access was also partially in response to illegal intrusions by union organizers and that such illegal intrusion consisted of union organizers coming on to, or trespassing, on its property.

More particularly with respect to the threat of disease caused by union organizers, Dr. Joseph Dunsing, Doctor of Veterinary Medicine, and an avian pathologist, testified that disease prevention in the poultry industry is very important and that some poultry diseases can have catastrophic effects. He cited the Newcastle epidemic which caused mortality rates as high as eighty percent in many poultry farms in Southern California during the 1960's.

He further testified that poultry diseases are commonly transmitted by man to organisms either carried on their clothing, on their bodies, in their hair or on their boots. For this reason, he stated that one of the cardinal rules in disease prevention is one which precludes members of the general public from entering upon poultry facilities. He also explained that other disease prevention practices included vaccination of birds, use of disinfectants, use of properly clean clothing and boots, isolation of buildings, poultry and personnel on the farms. He also stressed the need to make sure that people do not visit different poultry farms within a short time span, since diseased organisms could easily be transmitted from one farm to another and that some organisms can remain alive as long as thirty days or more.

Dr. Dunsing stated that as a general rule individuals who are given access to a poultry farm are almost always escorted with supervision by the employer. In his opinion, the threat of disease would be significantly reduced if individuals followed the procedures as described above with respect to wearing the proper clothing and by stepping into disinfectant pans while walking in the area. He further testified and explained, however, that it would be contrary to disease prevention to permit people to go into the chicken houses for the purpose of talking to others, since this would bring the person into direct contact with the birds.

He also pointed out that although disease prevention is important on the entire poultry farm, it is particularly important in the "brood" and "grow" areas where the chickens are very young and are susceptible to disease.

Carl Nall, Executive Director of the Pacific Egg and Poultry Association,^{1/} testified as to industry wide standards as applied generally in the poultry industry.

1/ Mr. Nall has served as Executive Director for twenty-one years. His background includes a minor in Poultry Husbandry with a BA in Dairy Manufacturing. He is one of twelve people of the United States who sits on an Advisory Committee to the United States Secretary of Agriculture on Poultry Health. As part of his duties, he has visited hundreds of poultry ranches and he also testified before the Board

He further explained that a very common practice among poultry ranchers is simply not to permit access unless the specific terms and conditions of the access are spelled out. Generally, this requires that the person entering the property put on protective clothing; he would be restricted as to certain areas within the facility and he would be accompanied by someone from the facility wherever he went.

Nall further testified that although he has been on hundreds of poultry facilities he has never been permitted in a "brooder" chicken house and very rarely has he been allowed into the "grow areas" inasmuch as both of those areas are areas where birds are more susceptible to highly contagious diseases.

Nall also explained that he is often contacted by groups requesting visits to poultry production facilities and that the answer is uniformly no because of reasons of poultry health.

Nall further explained that disease prevention is of particularly great concern to poultry men in Southern California because of the large concentration of production in Riverside and San Bernardino Counties. Since these counties are the number one and number two poultry counties nationwide and because of the proximity of production, the threat posed by unrestricted access, in Nall's opinion, is even more dangerous and of more concern to poultry men since a disease can be transmitted from one ranch to another more readily.

With respect to the disease prevention practices at Respondent's facility, the evidence disclosed that although Respondent did not adhere to all of Dunsing's recommendations, it appears that over the course of years for the most part Respondent did restrict access of outside visitors.

The General Counsel asserts that the real reason and the only reason for Respondent's denial of access was because of Respondent's desire to curtail Union activities and that the prevention of health hazards was just a convenient device to screen its true motive. In arguing this position the General Counsel pointed to the fact that the fence, gate and guard were only used after the establishment of an access rule and that they were therefore motivated solely to keep out Union organizers. Furthermore, the General Counsel asserts that Respondent exhibited animus towards the Union and its organizers as demonstrated by its unfair labor practices and by production manager Frank Campbell's remarks when he cursed several of the organizers and had them placed under citizens' arrest. Furthermore, the General Counsel was able to demonstrate several instances wherein Respondent admittedly did not follow proper disease prevention practices. As for example, its acquiescence in permitting workers from different ranches to play softball in an outer pasture of the Lake View premises; permitting two employees, Manuel Vargas and Azucena Hernandez, who live together, to work in two different facilities; its rather limited use of

1/(cont.)

on the issue of access vis-a-vis poultry disease programs when the Board was conducting hearings to establish permanent regulations.

disinfectant pans; the fact that officers of the company on occasion brought their wives and children to the ranch and the fact that there are no hygiene rules in general circulation around the ranch. Therefore, the General Counsel asserts that the "practicality" of taking any number of disease preventitive precautions was mainly a management prerogative and that the haphazard manner in which this prerogative was exercised gave Respondent a convenient excuse for denying access.

The General Counsel further asserts that Respondent's motive was demonstrated by its actions in refusing to come to any real compromise during the meetings arranged to seek an accomodation on the access issue. In this respect, the General Counsel concedes that there is some risk of disease being transmitted by individuals coming on to a poultry facility but asserts that the risk can be reduced appreciably by the use of proper clothing, boots, disinfectants and by organizers avoiding visits to different poultry facilities. These promises were made by the union organizers at one of the meetings but was not acted upon by management.

And finally, the General Counsel points to the fact that when members of the clergy asked Respondent if it would permit them to enter its facility to perform spiritual duties, the reply was in the affirmative, but in the negative when the clergy asked if they could enter to speak to employees about their rights as employees.

In its defense which was raised prior to the decision in Agricultural Labor Relations Board, et al., v. The Superior Court of Tulare County, et al., supra., Respondent specifically did not attack the constitutionality of the Emergency Regulation. Rather the basis of its defense, was that it was attempting to comply with said Regulation, and that unrestricted and uncontrolled access in this particular situation could cause injury to crops, i. e. , chickens in this case, and thus the denial was consistent with Section 5 (e) of said Regulation.

It appears from the evidence noted above and from the record as a whole that the permitting of individuals to wander freely about Respondent's premises, including inside the chicken houses, as demanded by the union organizers would create very harmful, potential health hazards to Respondent's poultry. Dr. Dunsing and Carl Nall's testimony clearly indicated that.

The testimony also indicated that when Respondent met with the union organizers to try and work out a compromise, Respondent did offer certain areas near the fence and near the lunch area to be used for union organizing, and it offered to insure that supervisors and foremen stayed out of the area during the time that the organizers would be on the property. This was not acceptable to the Union as they wanted unfettered access to all areas where employees worked. The Union offered to wear protective clothing and to follow legitimate safety precautions when entering Respondent's premises but the Union continued to insist that the organizers be given access to every part of the ranch including the chicken houses. Respondent would not compromise on the access to the chicken houses and the attempts to reach a compromise then broke down.

Respondent points to the fact that what is involved here is a balancing of interests. On the one hand, there is the interest of Respondent to prevent a disease outbreak amongst its flocks and on the other hand is the interest of the Union to organize the workers. General Counsel occasionally has characterized this balancing process as the "calculus of risk". This "calculus of risk" involves the balancing of potential harm suffered by one party. Respondent, against the potential harm suffered by the other party, the Union and employees. This "calculus of risk" also appears to have been recognized by the Board of Section 5 (e) of the Emergency Regulation which recognizes a restriction or limitation of the right of access. This limitation was also recognized by the California Supreme Court Agricultural Labor Relations Board, et al. v. The Superior Court of Tullary County, et al., supra, wherein the Court rejected the argument that the regulation was overly broad and in conflict with the National Labor Relations Board v. Babcock and Wilcox Co. (1956) 351 U.S. 105. The California Supreme Court specifically rejected the contention that the General Counsel must show that employees and the Union have no alternative means of communication, however, in upholding the broad and general emergency regulation, the court indicated that the Rule did in fact have a restriction or limitation. That limitation is Section 5 (e) and is the basis of Respondent's position.

Therefore, I conclude that Respondent was not precluded from rating this issue at the hearing inasmuch as it was not attacking the constitutionality of the Regulation nor was it attempting to demonstrate that the Rule is inapplicable to Respondent under the theory of Babcock and Wilcox, supra.

It appears in the instant case that Respondent sought to reach an accommodation with the Union to permit some type of access while at the same time protecting its poultry against potentially catastrophic losses, the type of which it had suffered several years ago. I do not find persuasive the argument that because Respondent was not heretofore rigidly enforcing all disease preventative practices, it was now foreclosed from instituting some more stringent procedures when faced with a potentially hazardous situation, (i.e. unfettered access by strangers). It also appears from the testimony that this "potential", hazard is a real hazard rather than some mere abstract possibility for if the potential harm was very small or dubious then the balance would weigh more heavily in favor of the Union.

As noted above, it appears that Respondent did endeavor to reach a reasonable accommodation on the access issue and that the impasse' partially the result of the union's insistence on going into the chicken houses. Although the Union did offer to wear proper protective clothing and to observe other safety precautions it appears from the evidence that the risk inherent in entering the chicken houses far exceeded the need for the union organizers to enter that area for there is no showing that any workers, other than a couple, ever ate in that area. Certainly Respondent would not have been correct in denying union organizers' access to most of the portions of the ranch, but it appears as a result of the negotiations, that access continued to be denied because the organizers continued to represent that they would go into the chicken houses.

Despite of the fact that there was some animus directed against the union, I cannot find that the General Counsel has sustained its burden in demonstrating that Respondent denied access and violation of the Emergency Regulation. Rather it appears that Respondent denied access in order to protect itself against the possible spread of disease through contamination in the chicken houses. Therefore, despite the fact that Respondent employed private security officers to keep the union organizers from entering its property, I cannot conclude that constitutes a separate and independent violation because of the reasons noted above.

C. The No-Solicitation-Rule

The evidence on this issue is also not in dispute. As indicated above, on September 18, 1975, two union organizers were able to get past the guard and once inside the premises they gave employee Villa a stack of union literature to hand out. Villa placed the literature near the time clock where other employees kept their lunch pails and other personal items. Sometime later that morning Dr. Lofgren became aware that the union organizers had left the literature with Villa. Lofgren told the office manager Jackie Wheeler that if the employees were engaging in Union activity and passing out literature at times other than lunch breaks she should stop it and she should pick up the papers. Lofgren also told her to tell the people that they could pick up the literature in the office at break time or after 5:00 P.M.

After talking with Lofgren, Wheeler sent Marmolejo over to carry out those instructions. Marmolejo took the literature from the time clock and told Villa that the papers were not to be passed out during company time. She also told him that he could pick them up from the office later in the day.

The Supreme Court in 1945 laid down the basic rules for employee solicitation and distribution. The enforcement of no solicitation, no distribution rules against employees during non-working time generally is unlawful the court held. An employer may forbid such activity by employees during non-working periods only where there are unusual circumstances. Republic Aviation Corp. v. NLRB; LeTourneau Co. v. NLRB, US Sup. Ct., 1954 16 LRRM 620. These actions are not improper because the Union literature may have been at other poultry ranches and therefore might pose a health hazard. The employer also asserts that after October, 1975, its actions with respect to distribution of materials was pursuant to the injunction issued by the Superior Court of the County of Riverside. The General Counsel asserts that the employees were denied the right to distribute literature during their non-working time and that the literature was confiscated while in a non-working area. This prohibition, the General Counsel asserts, is contrary to the aforementioned decision and contrary to the National Labor Relations Board's policy as stated in Stoddard-Quirk Mfg. Co. 51 LRRM 1110, wherein the Board held that a rule forbidding distribution in non-working areas during non-working time is presumptively invalid.

It was pointed out that almost any entry of persons or property on Respondent's premises to some degree increases the risk of potential disease. However, because of the practical impossibility of operating its business in total and absolute isolation, the evidence demonstrated numerous situations where persons or property, i. e. , trucks, equipment, etc. , come on to Respondent's premises and that the risk in those situations is very small and insignificant. The risk of literature or other paper products carrying disease is almost non-existent unless the papers had been on another poultry facility. Inasmuch as there was no evidence of such a situation, other than a mere assertion that organizing was going on at another poultry ranch, I do not find Respondent's argument persuasive that the literature posed an appreciable risk to the facility. Indeed I find significant Lofgren's actions in September, when learning of the material, he informed Wheeler to confiscate the literature if it was being distributed "at times other than lunch or break time".

I therefore find that Respondent violated Section 1153 (a) of the Act, on September 18, 1975, by refusing to permit employees to distribute literature during their non-working hours and in the non-working areas of Respondent's facility. Inasmuch as in October, 1975, the Superior Court of the County of Riverside issued an injunction, in effect, denying the Union and Respondent's employees the right to distribute literature, I recommend that the Board issue a Cease and Desist Order as to future violations.

D. The Increase in Benefits

On August 29, 1975, one day after the Act went into effect, Respondent announced to the employees that it was giving an across the board wage increase and that the employees would also be receiving increased insurance benefits, an additional holiday and increased vacation time. This announcement was contained in a written notice that was attached to the employees' paychecks that day.

It was undisputed that Respondent's prior policy on wage increases was that raises were given based solely upon merit and that they were given without any uniform pattern. It was also undisputed that the wage increase was only given to employees at Respondent's California location whereas the other benefits were also given to Respondent's employees at its New Mexico facility.

The General Counsel asserts that the increase in benefits was effectuated for the purpose of interfering with the employees' choice to unionize and with the specific purpose of defusing union activity. Although there was some dispute as to Respondent's knowledge of union activity as late as August 29, 1975, the evidence did demonstrate that Respondent was aware of the Union's organizing activities at that time.

Respondent asserted that the increases were the result of promises made long before the Union was ever present on its facility and that the benefits were the result of a plan developed prior to Union activity.

Testimony preferred by Respondent indicated that Respondent had been denying requests for individual raises for several months prior to August 1975 and that the employees were told that increases would be granted as soon as egg prices began to climb. Several of Respondent's officers further testified that in June 1975 the Board of Directors decided on a wage increase and directed the Executive Committee to draw up a plan. After several Executive Committee meetings the plan submitted was adopted.

Larry McAnally testified that the wage increase was tied to an increase in the price of eggs and pursuant to his formula, cost of feed plus 12 cents, the price of eggs met the figure of cost of feed plus 12 cents at the end of August 1975 and therefore the wage increases promised were given at that time.

Robert Petersen, personnel manager, also testified that Respondent's previous system for setting wages had presented problems for the Company and that it was agreed that a uniform plan would be better in that there would be less confusion rather than continually reviewing increases on an individual basis.

With respect to the insurance increases, Petersen testified that he reviewed the policies yearly and in June, 1975 the Board of Directors notified him that they were going to increase benefits and that he suggested adding a boost in the insurance coverage.

Petersen also testified that when he began checking on current wages in the poultry industry he also recommended increases in holidays and vacations and that his suggestions with modifications were adopted.

The total cost package for the approximately sixty employees came to approximately \$6,000 per week or \$312,000 per year and was conceded by Respondent's witnesses to have been rather substantial.

From my observation of the witnesses and from my evaluation of the evidence as a whole, I find that the increase in benefits was in fact influenced by the organizing activities of the Union and was implemented with the hope of thwarting the union's organizing activities. More specifically, I note that although there was some alleged concern as to uniformity in wages in the past, nothing was done until the advent of unionization. In addition to the suspicious nature of the timing of the increases I note that the manner of notifying the employees was different than in previous years and even more questionable was the fact that Respondent concededly gave substantial increases just months after it had gone through a severe economic "depression" with substantial losses. Respondent's witnesses also conceded that at the time the increases were granted it was still in a loss situation as to profitability. The increases were not limited to wages alone but also covered other benefits traditionally included in collective bargaining agreements. Moreover, the testimony of McAnally with respect to the computation of his formula and the resulting benefit increases was self-serving, inconsistent and quite ambiguous.

Almost as suspicious as the convenient timing of the increases was Respondent's documentation. Respondent submitted minutes of Executive Board meetings for August 1975, which dealt exclusively with this subject, however, Respondent asserts that no Executive Committee minutes had ever been formally kept before and the minutes only concerned labor matters.

Any final doubt as to the purpose and motive for the increases was laid to rest by the credited testimony of Azucena Hernandez, wherein her supervisor, Andres Vargas,, told her that they (Respondent) were going to raise the wages because nobody in McAnally wanted the Union..

I therefore find and conclude that Respondent violated Section 1153 (a) of the Act by granting and instituting wage, insurance, holiday and vacation benefits on August 29, 1975.

E. The Changed Work Duties of Uvaldo Excalela Villa

Mr. Villa has been employed by Respondent for approximately five years and during that time he was primarily assigned to work at the fertilizer pad where he drove a tractor, spreading and turning chicken fertilizer. On September 22, 1975, he was notified that he was being assigned to work with his two sons on a new crew.

The General Counsel asserts that Respondent changed Villa's duties in retaliation for Villa's Union activities. In particular, the General Counsel points to the fact that Villa joined the Union on August 13, 1975; that he had a Union meeting in his house in September, and that he had been "caught" with Union literature while at work on September 18. In addition to this, the General Counsel pointed to the testimony of Manuel Vargas where he stated that his supervisor Parraz told him that the Escaleras would be fired after the problem with the Union was over. This conversation, although denied by Parraz, took place on or about September 25, 1975. Azucena Hernandez also testified that her supervisor, Andres Vargas, told her, in September 1975, that all of the Escaleras were on a short leash because they were supporting the Union. That statement was denied by Andres Vargas.

Respondent concedes that Villas's new job was less desirable than his previous one but contends that Villa's transfer was caused because his old job had been eliminated by technology.

The evidence demonstrated that in the past, fertilizer had been spread on farm land and that it had been turned and dried out until it was ready for use. However, about two years ago Respondent became involved in the research and development of a dryer which would render obsolete the necessity for spreading out the fertilizer. By September 1975, Respondent had two dryers in operation and virtually all of the fertilizer began to be processed through the dryers. Prior to the use of the dryer, all of the fertilizer had been taken to the fertilizer pad where Villa spread and turned it. Villa himself readily conceded that the dryers were doing virtually all of his work.

Although I credit the testimony of Azucena Hernandez and Manuel Vargas, I cannot find that the General Counsel has met its burden of demonstrating that Villa's duties were changed for discriminatory reasons. As noted above, all of the evidence, including Villa's own testimony, demonstrated that Respondent's action was predicated on the use of the newly constructed dryers and that Villa's former duties simply did not exist any longer. Therefore, Respondent had to move Villa to another crew and the evidence also indicated that he was given duties similar to ones he had performed at some time in the past.

F. The Alleged Unlawful Threats, Interrogation and Surveillance

The facts with respect to these allegations are disputed by the parties. The substance of the allegations are contained in several conversations between supervisors, Parraz, Campbell, Andres Vargas and Manuel Vargas, Azucena Hernandez and Ascension Dias.

i. Conversations Between Parraz and Manuel Vargas

Manuel Vargas testified that on September 25 or 27, 1975, while he was having lunch with two other employees, Aguilar and Santiago, Parraz came over and asked the men what they thought of the Union. Aguilar and Santiago stated that they didn't know anything and Manuel Vargas told Parraz that he thought the Union was good because it protected the farm worker. Parraz replied that the Union would be expensive both for the workers and for the boss. He told the men that the organizers were pretty dirty. Again, according to Manuel Vargaz, Parraz told him that he knew that his wife, Azucena Hernandez, had attended the Union meeting and that the company knew all those who signed cards and that they had a list. Parraz continued by telling the men that the Escaleras would be fired as well as all those who had signed cards.^{2/}

Manuel Vargas also testified that during the first week of October 1975, several days after Azucena Hernandez had been terminated, Parraz approached and asked him that if he could stop his wife from talking with the organizers because she was hurting his job. Parraz continued by telling Vargas that what his wife was doing was not going to hurt the company but that it would hurt him.^{3/}

ii. Conversation Between Andres Vargas and His Brother Manuel Vargas

Manuel Vargas further testified that his brother spoke to him one day in late September, 1975, and he told Manuel that his wife, Azucena Hernandez, should desist in her Union activities. When Manuel replied that she was only fighting for her rights, Andres replied that she was hurting him.^{4/}

2/ Parraz testified that he may have had a conversation at that time with the three men but he could not recall anything more specific. Parraz denied ever telling Manuel Vargas that the company had a list of employees who had signed Union cards and that they would be terminated.

3/ Parraz denied making any such statements.

iii. Conversation between Campbell and Manuel Vargas

Manuel Vargas testified that on October 13, 1975, the day before he was terminated, Campbell approached and asked him what he thought of the Union. Vargas answered that he didn't know and Campbell asked him what he thought of the Union. Vargas answered that he didn't know and Campbell asked him what his wife thought about the Union. Vargas answered that she thought the Union was pretty good and that was why she was fighting for the cause. Again, according to Vargas, Campbell told him that they had never had any trouble with him but that he'd better now look for another job, Campbell told him that he wasn't firing him then but that he was giving him a warning.^{5/}

iv. Conversation between Parraz and Ascension Diaz

Ascension Diaz testified that on September 24, 1974, in the afternoon after the Union meeting at Conception Diaz's house, Parraz approached and asked him if he had any questions he wanted to ask about the company. Ascension replied that he had none, that he was happy with his job. At that point, according to Ascension, Parraz asked him what he thought about the Union. Ascension replied that from what he heard he thought it was good. Parraz replied that was O.K. and that anyone could think the way they felt. Parraz then left and returned about ten minutes later and asked Ascension if there were a lot of people at Conception's house. Ascension replied that there were very few and Parraz asked if the people wanted a Union. Ascension did not recall his reply but stated that Parraz then asked if Conception was working for the Union and he replied no. Parraz then stated that Conception was working for the Union and that's why he changed him to the mill. Parraz told Ascension that if he had returned from vacation earlier he would have changed Conception earlier. Ascension then replied that there was a chance that the Union would come in this year or next year to which Parraz replied that they would not come in next year because the company would be more ready. During the conversation Parraz also mentioned that there were only three cars at Conception's house the night before and Ascension replied yes and asked how Parraz knew but he could not recall Parraz's answer. Parraz testified that before he spoke to Ascension he had a conversation with one of the truckdrivers and the truckdriver, knowing that Parraz had just returned from vacation, told Parraz of the Union activity and further told him that he had attended a Union meeting at Conception's house the night before. A few minutes later when Parraz saw Ascension he said hello and when he noticed that Ascension was wearing UFW buttons he asked him how the meeting went at his uncle Conception's house. Ascension responded all right and according to Parraz that was the extent of the discussion.

4/ Andres admitted this conversation but characterized it as a conversation between two brothers, rather than one of supervisor to employee.

5/ Respondent asserted that Manuel Vargas was interrogated about his Union activities because Respondent contends that Manuel Vargas is a supervisor. Respondent denied that Vargas was ever interrogated about his wife's Union activities however.

V. Conversation between Andres Vargas and Conception Diaz

Conception Diaz testified that he had many conversations with Andres Vargas during August and September and that reference to the Union would come up on occasion. Although Conception could not recall the substance of the conversations he stated that Andres Vargas said both good and bad things about the Union and when Conception told him that he should be on one side or the other, Andres Vargas laughed and said that he couldn't do anything because he was a foreman.⁶

Conception stated that during his conversations he told Andres Vargas that he had attended Union meetings and at one point he stated that Andres Vargas did ask him what they had been talking about at those meetings, but at another point in his testimony Conception reversed himself and stated that Andres Vargas did not ask him what had occurred at Union meetings.

vi. Conversation between Campbell and Azucena Hernandez

Azucena Hernandez testified that on October 1, 1975, while she was at the gate trying to get out to speak to some of the Union organizers, Campbell would not let her out and that he told her that she was making it necessary that they fire her husband, Manuel Vargas.⁷

vii. Conversation between Andres Vargas and Azucena Hernandez

Azucena Hernandez testified that at some day in September, 1975, prior to her termination, Andres Vargas came by and began speaking to her about the Union. Her only recall of the conversation was that he told her that all the Escaleras and the other persons who were in cahoots with the Union were going to be on a short leash, i. e. a close rein.⁸

viii. Surveillance

The General Counsel asserts that there were numerous instances during September, 1975, wherein Respondent conveyed to employees that it had accurate knowledge of their Union activities thereby creating the impression of surveillance. As indicated supra the General Counsel points to Azucena Hernandez's testimony wherein Andres Vargas told her that the Escaleras were on a "short leash"; the conversation wherein Parraz told Manuel Vargas that Respondent had a list of the Union supporters; the conversation wherein Parraz told Ascension Diaz that he knew there were only three cars at Conception Diaz's house the night of the Union meeting; the fact that Respondent's agent, Marmolejo, confiscated the Union literature shortly after he received it; and to the fact that Campbell would appear almost daily at the gate where the Union organizers congregated.

6/ Andres Vargas denied making such statements.

7/ Azucena Hernandez had been terminated several days before October 1, 1975, but she was still living on the property with her husband at the time.

8/ Andres Vargas denied making the statement or in fact ever speaking with Azucena Hernandez about the Union prior to her discharge.

In addition to the above acts, Azucena Hernandez testified that on October 14, 1975, Lofgren followed her from Respondent's facility to the UFW Office in San Jancinto. Another such incident occurred on the same day late in the afternoon, as Azucena Hernandez was standing beside the road talking to a Union organizer, Campbell and Parraz drove by and made a u-turn near her.

Respondent admitted to both such incidents and Lofgren testified that on the day in question he drove from the ranch into San Jancinto to speak to the Sheriff and that the UFW office was nearby. He denied following Azucena Hernandez that day. With respect to the u-turn incident Parraz stated that he and Campbell drove by looking for a UFW organizer because they had a restraining order that they wanted to serve. Parraz stated that he saw several people congregated on the road where Azucena Hernandez was apparently standing, and they drove by but turned around when they didn't recognize any UFW organizers.

Anita Diaz, Conception's wife, stated that on the evening of the Union meeting at her house, she received a telephone inquiry about the meeting and that she recognized the voice as Parraz¹'s wife. She further testified that several minutes later an unidentified car drove past her house. The General Counsel, relying on Ascension Diaz's testimony, alleges that Mr. Parraz engaged in surveillance the evening of the Union meeting.

ix. Analysis of Statements

Both parties contend that witnesses for the other party were either lying or did not recall the events as they occurred and therefore should not be credited. In viewing the witnesses' testimony in light of the overall case, it appears that some of their testimony was either self-serving, vague or at times inconsistent and that one could easily point to parts of each witnesses testimony and find some discrepancies or inaccuracies. However, in viewing the testimony in context of the entire case and upon my observation of the demeanor of the witnesses I have credited the testimony of Azucena Hernandez. Manuel Vargas and Ascension Diaz with regard to the statements attributed to Andres Vargas Ellias Parraz and Frank' Campbell. In crediting the testimony of Manuel Vargas I have noted Respondent's assertion that in earlier testimony Vargas referred to himself as a supervisor while in the instant case he declared that he was not a supervisor. Contrary to Respondent, I do not consider that testimony in the nature of perjury inasmuch as the question of supervisory status can be a very difficult and complex issue.

In view of my findings I conclude that Respondent violated Section 1153 (a) of the Act by unlawful interrogation, threats of discharge and by creating the impression of surveillance.

With respect to the independent allegation of surveillance by Lofgren, I credit his testimony with regard to the incident at San Jancinto and find no violation by his conduct. Similarly, I cannot find that the General Counsel has sustained his burden with respect to "the u-turn incident.

G. Discharge of Azucena Hernandez

Azucena Hernandez first became involved in Union activities after attending a Union meeting on September 24, 1975. Thereafter, she spoke to her fellow employees urging them to join the Union. Several days after she attended the meeting, Parraz spoke to her husband, Manuel Vargas, and as related above, told him that they knew everyone who had attended the Union meeting; everyone who had signed cards and that all those people would be fired. Parraz also told him that he knew that his wife had also attended the meeting.

On September 28, 1975, Vargas told her that he had no more work for her for a month and when she offered to work part time or to transfer to another crew Vargas refused saying that he and she just couldn't work together.

Azucena Hernandez returned thirty days later on October 28, 1975, but was told that there was no job for her because she had voluntarily quit on September 28, 1975.^{9/}

From the evidence adduced at the hearing, it appears that Azucena Hernandez was indeed terminated or constructively terminated because of her Union activities. In this regard I note the statements by Parraz that Respondent knew everyone who had attended the Union meeting, everyone who had signed cards and that they would all be fired. In a subsequent conversation Parraz warned Manuel Vargas that his wife's activities were hurting him. In addition to these statements, I noted the further animus as expressed by Andres Vargas wherein Andres told his brother to have Azucena desist from her Union activities. Moreover, there was un rebutted testimony by Manuel Vargas that Campbell also indicated his "displeasure" at Azucena's Union activities and in fact Campbell told Manuel Vargas that her activities were going to cause his discharge. And finally the testimony of Ascension Diaz in which Parraz told him that Parraz had changed Conception's duties because of the Union is further evidence of Respondent's motive.

In my analysis I have carefully weighed the witnesses produced by Respondent and in light of their testimony as well as the witnesses produced by the General Counsel I conclude that Respondent violated Section 1153 (c) of the Act by terminating Azucena Hernandez.

9/ Respondent asserted that Azucena Hernandez was not discharged from her employment and that he voluntarily quit her job. Vargas testified that her ranch was going into molt and therefore he offered her a chance to transfer to a job with her husband or to take a 30 day leave. According to Vargas, she reacted very emotionally to this offer and he couldn't speak to her anymore that day. The next day Vargas stated that he spoke to his brother Manuel Vargas and told him the same thing he had told Azucena. Vargas also testified that he had no knowledge of Azucena's Union activities.

H. Discharge of Manuel Vargas

Respondent asserted that it discharged Manuel Vargas for his Union activities and that it did so because Manuel Vargas was a supervisor and therefore should not have been involved with Union activities. The General Counsel asserted that Manuel Vargas was discharged because of his wife's Union activities and that he was not a supervisor as defined in the Act.

Putting aside the employment status of Manuel Vargas, the evidence demonstrated that Manuel Vargas was terminated because of his wife, Azucena Hernandez's union activity. Based upon the credited testimony of Manuel Vargas, it appeared that his brother, Andreas Vargas, tried to warn him to keep his wife from being involved with the Union. In addition, on separate occasions, both Parraz and Campbell warned Manuel Vargas that his wife's activities were going to cause his discharge. Despite the fact that Azucena Hernandez had already been terminated, she still lived on the ranch and because of that she was still able to talk to employees in order to help the Union in its organizational attempt. Indeed this was brought home by Campbell's comments on the day before Manuel Vargas was fired when Campbell in effect told Vargas that his wife's activities were causing his discharge.^{10/} Therefore, in order to rid itself of Azucena Hernandez's influence, Respondent had no other choice but to discharge her husband and thereby have them leave the property and their house.

The discharge of a supervisor because of the Union activities of his or her spouse has been held to be a violation of the National Labor Relations Act.

Consolidated Foods Corporation, 165 NLRB 953; Golub Bros. Concessions, 140 NLRB 120. On the basis of the foregoing, assuming arguendo that Vargas was a supervisor, I would thus find that the Respondent violated Section 1153 ("a) and (c) of the Act when it discharged Manuel Vargas.

With respect to the supervisory issue, I cannot conclude that the evidence demonstrated that Manuel Vargas was a supervisor for the the evidence did not demonstrate that Manuel Vargas was ever given any one of the powers as enunciated under Section 1140.4(j). The record demonstrates that Manuel Vargas was hired as a foreman and that Respondent, as well as Manuel Vargas himself, thought of him as a supervisor, but in terms of actual duties, powers and responsibilities other than a few self-serving statements from Respondent's witnesses the evidence failed to establish that Manuel Vargas had or exercised any of the duties under Section 1140.4(j). Although Manuel Vargas was ostensibly "in charge" of his crew, the evidence disclosed that he would always check with Parraz and secure his O.K. before doing anything having to do with other employees. The fact that Manuel Vargas met many of the "secondary" tests in weighing supervisory status is of no consequence since he did not possess any of the powers or duties under the primary test as deliniated in Section 1140.4(j).

10/ Campbell did not testify to refute those statements.

Therefore, inasmuch as Manuel Vargas was a non-supervisory employee and inasmuch as Respondent asserted that it terminated him for his Union activity, this would be an additional violation of Section 1153 (c) of the Act.

I. Eviction of Azucena Hernandez and Manuel Vargas

After Hernandez and Vargas were discharged. Respondent served an eviction notice on them to vacate their company-owned home pursuant to a written housing policy conditioning tenancy on full employment. Inasmuch as I have found that the discharge of Azucena Hernandez was in violation of the Act and inasmuch as I have found that Manuel was discharged primarily because of his wife's activities, it is apparent that Respondent's true motive was to get them off its property and had to carry this out not only through discharge but also in conjunction with eviction.

I therefore find the eviction to have been predicated on unlawful activity and an independent violation of the Act. See Kohler Co., 128 NLRB 1062, 1092-1093.

j. The Changed Work of Conception Diaz

The facts in regard to this issue are not in dispute. On September 23, 1975, Parraz informed Diaz that he was being sent to the mill in Perris the next day. Diaz was subsequently transferred to another job on Ranch 5C where he was driving an electric cart.

The General Counsel asserts that Respondent discriminated against Diaz by transferring him to other locations and by giving him more onerous work activities.

Respondent denied that the duties were in fact more onerous and that the change was due to Diaz's Union activities.

From the record it is difficult to determine whether Diaz's new duties were more onerous or more physically distasteful but it was undisputed that the change in duties meant that Diaz worked fewer days, fewer hours, with resulting less pay. In addition, Diaz was removed from his normal work contact with his fellow employees.

In light of the fact that the Union meeting was held at Conception Diaz's house at the time of the transfer and Parraz's direct admission to Ascension Diaz that he transferred Conception Diaz because of his Union activities demonstrates that Diaz's work transfer was in violation of Section 1153 (c) of the Act.

K. The False Imprisonment of Azucena Hernandez

The facts with respect to this allegation are in dispute. Azucena Hernandez testified that she left her house at about 6:30 A.M. on October 1, 1975, and when she got to the front gate she asked to have it opened so she could leave. According to Hernandez, Campbell walked in front of the gate and physically blocked her exit.^{11/} Hernandez wanted to go outside in order to speak with the

11/ Security Officer Randolph Brooks testified that he was on duty at the gate on October 1, 1975, and that he closed the gate around
(see next page)

organizers and other employees who were congregating in the area. She and Campbell began arguing and Campbell told her that she was making it necessary that he fire her husband, Manuel Vargas. When she was denied permission to leave she went back to her house and telephoned the Sheriff. When she returned it was about 7:00 A.M. and the gates were opened to let the employees in and Hernandez was able to leave.

Deputy Sheriff Bruckner testified that he arrived at about 7:15 A.M. after being advised that a person had called and stated that she was being forcibly held at that location. Bruckner stated that when he asked Brooks whether Hernandez had been physically restrained he said no but he did state that Campbell wanted her to remain until 7:00 A.M.

From the foregoing and from the entire record, the evidence demonstrated that Respondent uniformly kept its gate closed in the mornings until 7:00 A.M. and therefore on October 1, 1975, Azucena was apparently refused permission to leave for approximately one-half hour. Such conduct interfered with her Union activity and constitutes a violation of Section 1153 (a) of the Act notwithstanding the fact that she was no longer employed inasmuch as her employment ceased as a consequence, of Respondent's unlawful actions.

The Remedy

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 Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

11/ 6:30 A.M. because Union organizers were starting to appear. He stated that when Hernandez arrived she got into an argument with Campbell because she felt she had been fired and he insisted that she had quit. Brooks stated that Hernandez asked to leave; Campbell hesitated and then he opened the door but Hernandez did not leave. Instead she went to the fence, spoke to a few organizers, and then went back to her house and returned with her car. She jumped out and demanded to leave the ranch and Campbell told her to do so. According to Brooks she refused again and began arguing with Campbell. A few minutes later the Sheriff arrived and Hernandez told him that she had been held prisoner inside.

Having found that Respondent unlawfully discharged Azucena Hernandez and Manuel Vargas, and unlawfully changed Conception Diaz's duties, I will recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent jobs. I shall further recommend that Respondent make whole Azucena Hernandez, Manuel Vargas and Conception Diaz for any losses that they may have incurred as a result of its unlawful discriminatory action by payment of a sum equal to the wages they would have earned from the date of their discharge to the date they are reinstated or offered reinstatement, less their 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. Woodworth Company, 90 NLRB 289, and Isis Plumbing and Heating Co., 138 NLRB 716.

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 also urges that the employees be given remedial notices by means other than posting at Respondent's premises. I believe that a notice should be posted by Respondent at its facility both in English and Spanish and because of the lapse in time, caused in part by the lack of funding of the Board, I believe that the employees should be informed of the outcome of the charges by having the Respondent mail copies of said notices to the employees on Respondent's current payroll.

The General Counsel also requests that because of the denial of access the Union should have expanded rights of access. Inasmuch as I have not found that Respondent violated the regulation with respect to access, I cannot follow the General Counsel's recommendation. However, I would recommend that, if assurance by the Union is given that they will not enter the chickenhouses and the impasse on that issue is broken, then Respondent would be required to permit access on to its property provided further that the Union complies with the safety procedures it had previously willingly accepted.

The General Counsel also urges that Respondent be ordered to award costs to the General Counsel and to the Charging Party. It is not the general practice of the National Labor Relations Board to make such awards and I do not agree that Respondent's actions in defense of this suit were "patently frivolous" to warrant such a finding. In this regard, I also note that the General Counsel issued complaint in this matter before it had given Respondent an adequate opportunity to cooperate and to give statements to the various Board agents who were initially investigating the case. Therefore, I cannot recommend that costs be awarded.

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

Respondents, their officers, their agents, and representatives, shall cease and desist from:

(a) Discouraging membership of any of its employees in the Union or any other labor organization, by interrogating employees about their Union activities and sympathies or the Union activities and sympathies of their fellow employees; by creating the impression of surveillance of Union activities, by illegal promise of benefits; by threatening employees with discharge or other changes in working conditions; or by enforcing an invalid no-solicitation rule;

(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, 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.

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

(a) Offer to Azucena Hernandez, Manuel Vargas and Conception Diaz immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their 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 reports, and other records necessary to analyze the back pay due.

(c) Post in conspicuous places, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix". Copies of said notice shall be posted by Respondent; immediately upon receipt thereto and shall be signed by Respondent's representative. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material. Said notice shall be posted for a period of 60 consecutive days. Said notice shall be in English and Spanish.

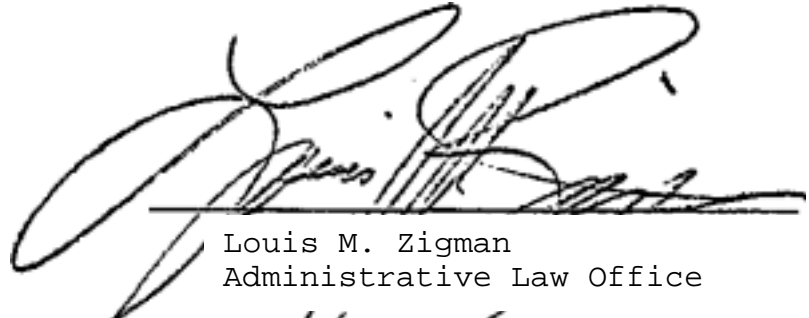
(d) Mail to each employee, a copy of said notice to the employee last known address. Said notice shall be in English and Spanish.

(e) Notify the Regional Director in the San Diego Regional Office, or the Executive Secretary at the Board's Main office in


Sacramento, within twenty 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.

It is further recommended that the allegations of the complaint alleging violations of the access rule be dismissed. It is also recommended that the allegations of violation of Section 1153 (c) with respect to the change of duties of employee Uvaldo Escalera Villa also be dismissed.

Dated:



Louis M. Zigman
Administrative Law Office



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

(1) We will reinstate Azucena Hernandez to her former job and give her back pay for any losses that she had while she was off work.

(2) We will reinstate Manuel Vargas to his former job and give him back pay for any losses that he had while he was off work.

(3) We will offer Conception Diaz his former job or a substantially equivalent job and give him back pay for any losses that he had while he was engaged in other duties.

(4) We will not discharge employees for engaging in union activity.

(5) We will not threaten employees with discharge in order to discourage union activity.

(6) We will not change employees duties for engaging in Union activities.

(7) We will not interrogate employees about their Union activities or sympathies or about their fellow employees Union activities or sympathies.

(8) We will not promise or give benefits in order to discourage union activity.

(9) We will not enforce invalid no solicitation rules.

(10) We will not evict employees from our premises for engaging in union activities.

All our employees are free to support, become or remain members of the United Farm Workers of America, or any other union. We will not in any other manner interfere with the rights of our employees to engage in these and other activities, or to refrain from engaging in such activities, which are guaranteed them by the Agricultural Labor Relations Act.