STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JACK STOWELLS, JR. Respondent/Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party /Petitioner.	)	case Nos. 76-CE-98-E 76-CE-l-R 76-RC-2-R 3 ALRB No. 93

DECISION, ORDER AND
CERTIFICATION OF REPRESENTATIVE

Following a petition for certification filed by the UFW, an election by secret ballot was held on January 10, 1976, among the agricultural employees of Jack Stowells, Jr. The tally of ballots furnished to the parties at that time showed that all of the six voters cast their ballots for the UFW. Thereafter, the Employer filed timely objections, and the UFW filed two unfair labor practice charges against the Employer. On February 9, 1977, the Board's Executive Secretary dismissed all of the Employer's objections except those contending that he was not an agricultural employer and had no agricultural employees at the time of the election. The Executive Secretary issued a notice of hearing on those two objections.

A consolidated hearing, on objections and unfair labor practices, was held before Administrative Law Officer (ALO) Robert J. Zweben who, on April 12, 1977, issued a Decision recommending that the objections and all allegations of the unfair labor practice charges be dismissed. The Employer

excepted to the ALO's finding that it is an agricultural employer. As no exceptions were filed with respect to the dismissal of the unfair labor practice charges, the complaint will be dismissed.

The Board has considered the objections, the record and the ALO's Decision in light of the exceptions and briefs of the parties and their oral argument before the Board. We agree with the ALO that Jack Stowells, Jr. is an agricultural employer within the meaning of the Act. However, we arrive at that conclusion through a different analysis.

Petitioner argues that as Respondent provides custom ranch management services, he is an agricultural employer. Respondent maintains that he is a supervisorial employee of several owner/employers and therefore not a statutory employer.

The record indicates that Respondent supplies nine different ranches with labor and some equipment to carry out general labor, irrigation, tractor driving and pruning of citrus. The 10 workers under his control do the same work at each ranch at different times and have identical wages, hours, working conditions and payroll periods. Respondent writes checks to pay the workers' salaries on bank accounts maintained by each landowner. Respondent has complete authority to hire, discharge and transfer agricultural employees and determines their wage rates with the consent of the owners. General decisions are made jointly by Respondent and the owner affected, but Respondent has sole authority in such matters when the particular owner is absent. Respondent consults with some owners every day; others, he may not contact more than once

every two or three months. Respondent is paid on the basis of the number of acres on each ranch and receives an hourly rental fee for his equipment when it is used.

Section 1140.4(c) of the Act provides the definition of agricultural employer:

> The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any persons supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor' contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part. (Emphasis added.)

Unlike the labor contractor in Cardinal Distributing Co., 3 ALRB No. 23 (1977), Respondent does more than simply provide labor for a fee. Here, as in Napa Valley Vineyards, Co., 3 ALRB No. 22 (1977), Respondent functions as more than a labor contractor. He exercises managerial judgment, provides some equipment and receives a per-acre management fee. On the basis of the above and the entire record herein, we find Respondent to be an agricultural employer within the meaning of Section 1140.4(c) of the Act.

In view of the above findings and conclusions, and in accordance with the recommendation of the ALO, the Employer's objections are hereby dismissed, the election is upheld and certification is granted.

ORDER

Pursuant to Section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the consolidated complaint herein be, and it hereby is, dismissed in its entirety.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of Jack Stowells, Jr., for the purposes of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, working hours and other terms and conditions of employment.

Dated: December 19, 1977

GERALD A. BROWN, Chairman

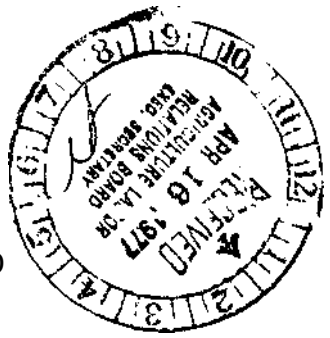
ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of

JACK STOWELL,

Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Case Nos. 76-RC-2-R
76-CE-93-E
76-CE-l-R

OCTAVIO AGUILAR, of 49 - 849 Harrison Street, Coacheila, California 92236, for the General Counsel

DAVID E. SMITH, of 45-902 Oasis Street, Indio, California 92201, for Respondent

TOM DALZELL and NANCY JARVIS, of 1639 - 6th Street, Coachella, California, for the Charging Party

DECISION

Preliminary Statement

This matter essentially covers two unfair labor practice allegations, which resulted in the filing of a complaint against FORREST JAY STOWELLS, JR. (hereinafter known as Respondent) on January 25, 1977. In addition, a petition to set aside an election was filed by Respondent on January 16, 1977. The unfair labor practices were consolidated by the Agriculture. Labor Relations Board (hereinafter known as the ALRB) and set for hearing *or* January 25, 1977. On February 1, 1977 the ALRB consolidated the unfair labor cases with the petition to set aside the election cease and all matters were scheduled for hearing on February 22, 1977. Cases 76-CE-98-E and 76-CE-l-R allege that Respondent engaged in unfair labor practices within the meaning of Sections 1140.4(a), 1152,. 1153 (s) and 1153(c)

of the Agricultural Labor Relations Act (hereinafter known as the Act) by doing the following:

1. Threatening to abandon the orchard if the United Farm workers of America, AFL-CIO (hereinafter known as the Union) won the election to be held January 10, 1976;

2. Calling Christine Rosado a "traitor" for supporting the Union on January 7, 1976;

3. Reducing the work hours of Enrique Martinez and Ruben Casares in a discriminatory manner; and,

4. Discharging Eustolio Serrato because of his union activities.

The answer to the complaint was filed on February 16, 1977. The allegations of the complaint were generally and specifically denied for the purposes of this hearing. The answer to the complaint was received into evidence as General Counsel's Exhibit IF and may be referred to by reference herein. In addition to the denials contained in the answer to the complaint, the complaint affirmatively sets out the defense that Respondent vas not an employer within the meaning of the Act. The same issue was raised in Respondent's request to set aside the election. The answer to the complaint also raised an issue of service on Respondent, but at the hearing, Respondent, through his attorney, waived any objections that Respondent may have had to the manner of service.

Issues

The issues of this matter are as follows:

1. Whether Respondent is an employer within the meaning of the Act;

2. Whether Respondent threatened to abandon the orchard if the Union won the election;

3. Whether Respondent called an employee a traitor because that employee favored the Union;

4. Whether Respondent reduced the hours of Enrique Martinez and Ruben Casares in violation of the Act; and,

5. Whether Respondent discharged Eustolio Serrato in violation of the Act.

Statement of Facts

Parties, at the outset of the hearing, entered into the following stipulations:

> The parties- agree that the following shall be considered applicable to all time periods covered in the cases consolidated for hearing:

1. The parties agree that Respondent's position is unique in his relationship to the owners of the ranches in question and the agricultural employees in question;

2. Respondent claims he is a supervisorial employee of several owner employers, and not an agricultural employer within the meaning of the Act;

3. The Charging Party claims Respondent is engaged in ranch management services and is an agricultural employer within the meaning of the Act;

4. Neither party claims Respondent is a labor contractor;

5. Respondent's position is that he acts as a supervisor of approximately ten (10) agricultural employees of owners of ranches in the course of his employment by the same owners;

6. The Charging Party's position is that Respondent employs those ten (10) agricultural employees and provides a custom ranch management service for various owners of ranches;

7. Both the Charging Party and Respondent agree that Respondent is the only supervisor of the ten (10) agricultural employee? in question;

8. It is further agreed that Respondent has the authority from the owners of the ranches to hire and fire and transfer agricultural employees performing work on the ranches of said owners and has done so;

9. It is further agreed that the agricultural employees involved perform basically the same work at each of the ranches at different times. The general nature of the work performed is general labor, irrigating, tractor driving, and pruning of citrus;

10. The general decisions relating to wages, cultural practices and work to be performed on the ranches are made jointly by the owners of the ranches and Respondent. The wage rate is determined by Respondent after consulting with all the owners of the ranches and securing their consent thereto. In the absence of an owner of a ranch, Respondent has the authority to make decisions relating to work to be performed and has done so;

11. The working conditions on all ranches are basically the same, in that the wages paid agricultural employees are all the same and the hours worked are the same;

12. Respondent owns certain items of mechanical equipment consisting of one D'8 tractor, one HD7 tractor, one 200 tractor, two 5000 tractors, three scrapers, one disc, one border and two brush shredders. The total estimated value is $8,000.00;

13. Above equipment and certain small tools such as shovels and pruning shears owned by Respondent are used by the agricultural employees in question when the owner of the ranch on which work is being performed does not have such equipment. When Respondent's equipment is used on the ranches in question, an hourly rental charge for the use of that equipment of Respondent is made to the owner of the ranch;

14. Respondent receives a monthly salary from each owner of a ranch who employs him and regular payroll deductions in the nature of FICA and SDI deductions. Contributions are made therefrom by each owner who annually sends Respondent a wage and tax statement form U-2 of the Internal Revenue Service. Respondent's salary is based upon the number of acres of each ranch;

15. It is agreed that each ranch owner maintains a separate payroll bank account into which he -deposits funds with which the agricultural employees in question are paid. Respondent draws checks on said accounts in favor of all agricultural employees but does not pay his own salary from these accounts An agricultural employee is raid from the account of the ranch upon which he performs work and may receive more than one payroll check during a weekly payroll period if he performs work on more than one ranch. The payroll periods for all ranches involved are the same for the agricultural employees in question;

16. Respondent maintains a labor loan account from which he makes payments to agricultural employees in the event an owner of a ranch does not have a payroll account on which Respondent may draw a check. There are some cases where an owner of a ranch maintains a payroll account upon which Respondent cannot write a check. When payroll checks due to agricultural employees from such an employer account are late, Respondent may advance pay to the agricultural employees from the labor loan account. This loan to the agricultural employees is repaid by the agricultural employee endorsing his payroll check when received from the owner of the ranch to Respondent who then deposits the check into Respondent's labor loan account. All FICA and SDI deductions and contributions of all agricultural employees in question are made by the owners of the ranches;

17. Respondent was served with a petition for certification on January 5, 1976;

18. Prior to January 8, 1976, Enrique Martinez and Ruben Casares were informed by and through Respondent that they would be working only four hours per day;

19. On January 7, 1976, Respondent called Christine Rosado a traitor; and,

20. It was understood by the parties at the outset of the hearing that any references made to the role of Respondent as a supervisor, employer, or any other characterizations, were not to be construed as any admissions or denials of what was his legal status under the Act.

The facts presented at the hearing through witnesses are as follows. Respondent was called as a witness by the attorney for the regional office of the ALRB, Mr. Octavio Aguilar. Respondent's testimony essentially covered the following points. He indicated that both by word of mouth and other means, he had made contact with various owners of farmland property in the Choachclla area. His testimony indicates that he did not have specific recall of the exact way in which he procured his employment with the owners of various ranches. In the year 1976 and at the time relevant to this hearing, Respondent testified that he worked at nine (9) different properties. Their names and their approximate acreage are as follows: Mecca Mesa, 40 acres; Mecca Slope, 40 acres; Desert Gulch, 110 acres; Mecca Mesa West, 40 acres; Rucker, 120 acres; Reeder, 80 acres; Alberts Ranch, 20 acres; W. W. Hendricks, 40-45 acres; end, Heggblade, Marguleas, and Tenneco, 60 acres.

Respondent testified that he had no regular schedule for being at any of the ranches in which he himself was employed. His pay is established on a per acre basis. He further indicated that there was no specific schedule for contact with the owners of any of these ranches. The degree of communication that Respondent had with the different ranch owners ranged any where from every day to once every few months.

Respondent said that probably over fifty percent (50%) of his work did not include the use of his own machinery, although without being able to give a precise figure, he testified that he does use a substantial amount of his own machinery on these ranches.

By reference to the stipulation as well as testimony by Respondent, it would appear that he had large, if not total, authority to hire or fire, employees and to determine the allocation of their time on the job. He kept time cards and time tickets on each of the employees, listing the hours and on which ranch they worked. At the end of a pay period, which was usually done on a weekly basis, a worker would receive a check from the account of the ranch at which he worked. Testimony indicated these checks might be signed by the ranch owner, by Respondent, or by Respondent's wife. There was no set pattern for the signature of the checks. Respondent indicated in his testimony that he generally kept bank balance books for the accounts. Specifically, the Rucker Ranch account balance was entered into evidence and Respondent testified that he kept the balances on that account. He would figure out the payroll deductions on the checks issued to the ranch employees, and would send a statement of the deductions to the employers on a monthly basis. The deductions for any State and Federal Taxes or unemployment insurance would be paid by the ranch owner. Each ranch had its own worker's compensation policy and each ranch owner took responsibility for making the appropriate deductions.

Respondent denied stating that he would abandon the orchard. He then went on to say that it would be impossible to abandon the orchard because he did not own it. He denied having any conversations with Bernardo Aguiar regarding abandoning any ranch properties.

In his testimony regarding his conversations with Eustolio Serrato prior to the alleged discharge of Mr. Serrato, Respondent recalled having several conversations on or around the last day of Mr. Serrato's employment. Prior to the day when Mr. Serrato's employment was terminated, Respondent indicated that Mr. Serrato had several back pay checks coming to him from the Rucker Ranch. Respondent testified "that he had told Mr. Serrato that Mr. Rucker had not made any deposits into any account prior to that time, and that Respondent decided to write the checks and give them to Mr. Serrato without having any knowledge as to whether Mr. Rucker had made a deposit into the bank account.

Testimony indicated that Mr. Serrato was employed for four (4) years as a worker on the ranches with which Respondent had been affiliated. Mr. Serrato worked on the Rucker Ranch on an average of nine (9) or ten (10) hours per day. The only other person that would normally be working on the ranch for pay was Mr. Rucker's son. There was no testimony as to whether anyone else was hired to take Mr. Serrato's place after his alleged discriminatory discharge.

In his testimony, Mr. Serrato indicated that he had had conversations with Respondent concerning the back checks. He also discussed the necessity of asking the Union for assistance. It was the uncon-troverted testimony at the hearing that Mrs. Nieto had been contacted by Mr. Serrato. Mrs. Nieto called Respondent. The conversations with him were quite brief. The major point made by Mrs. Nieto was that if Mr. Serrato was not paid the Labor Commission would be contacted.

Mrs. Nieto testified that in .conversations with Respondent, he indicated that Mr. Rucker was having problems with procurring a loan and with selling the fruit. Respondent indicated that he would give Mr. Serrato the check as soon as possible, but tried to explain it was really up to Mr. Rucker to obtain a bank loan or be able to procure enough return on the sold fruit, or to arrange for some other source by which to put monies into the bank account. Respondent had indicated in his testimony that Mr. Rucker had been remiss in putting monies into the account at other times in the past and Respondent did not want to advance money because of possible problems between Mr. Rucker and himself. Nevertheless, the day after the phone call from Mrs. Nieto, Respondent paid the overdue wages to Mr. Serrato and brought his pay up to date.

Mr. Serrato said that when he received his check from Respondent, he was told that when he returned from his bi-weekly trip to Mexico, he should talk to Mr. Rucker about any future work. Mr. Serrato testified it was clear to him that he could no longer assume he had a job. He further testified that at no time did Respondent tell him that he was fired, but left him with the impression that he would have to make arrangements with Mr. Rucker before he was to work again. Mr.

Serrato further testified that in the four (4) years he had been working there, he had never been told to talk to Mr. Rucker about such matters. He also said there was no discussion concerning the Union during these conversations. Mr. Serrato testified that Respondent said he was giving money to Mr. Serrato to avoid any problem with the Labor Commission. He went on to testify that Respondent had told him that Mr. Rucker was in Arizona and there were problems getting the money from Mr. Rucker into the Rucker bank account. Upon his return from Mexico the following Monday, Mr. Serrato inquired about work in other places as he assumed he had been terminated from his position at the Rucker Ranch. He testified that he made several unsuccessful attempts to get in touch with Mr. Rucker. He said the last time he tried to contact Mr. Rucker was at the end of October or the beginning of November.

Mr. Serrato also testified that prior to the time that he went to the Union regarding his late paychecks, he had never sought the assistance of any outside party or parties in regards to his late paychecks.

Mr. Arnulfo Reyes testified that he had been employed at the Reeder Ranch. He voted in the election held on January 10, 1976. He talked to Respondent during the week of the election. They had a conversation in which Respondent indicated that the strikers had been giving him problems.

Mr. Bernardo Aguiar also testified at the hearing. He was employed at the ranches and talked to Respondent on January 7, 1976. He testified that Respondent told him that if the Union won the election, he would leave the ranch so that he would not have any more trouble with the Union. In his testimony, Respondent denied having this conversation with Mr. Aguiar. Mr. Aguiar recalled that he voted in the election, and that he had also had other conversations with Respondent about Ruben Casares. Respondent told Mr. Aguiar that Mr. Casares had given two of his paychecks to the Union so that the Union could make copies of them to determine what Respondent's status was in relation to the various ranches. Mr. Aguiar testified that he worked for Respondent for about eight years. He indicated that he understood the Union was trying to show that Respondent was an employer and for this reason Ruben Casares had given his paychecks to the Union.

Under cross examination by Respondent's attorney, Mr. Aguiar indicated that Respondent gave him orders regarding his place of employment. He worked in as. many as four ranches in any one week. He received individual checks from each ranch. Mr. Aguiar further testified under cross examination that he considered Respondent to be his employer. He also testified that he remembered the checks had been signed. At least one check was signed by Mr. Rucker and at least one check was signed by Mrs. Stowells. He could not recall specific-ill., whether checks were signed by Respondent.

Resolution of Disputed Allegations

I. Designation of Respondent as an employer

The first question to be answered is whether Respondent is an employer within the meaning of the Act. Section 1140.4(c) specifically states that the definition of employer is to be liberally construed. Even without relying on a liberal construction, the evidence presented at the hearing supports the conclusion that Respondent is an employer within the meaning of the Act.

This question has been litigated on numerous occasions in decisions reported under the National Labor Relations Act. Deaton Truck Lines, Inc., 143 NLRB 1372 (1963) review dismissed, 337 F. 2d 697 {CA 5, 1964) Monican Trucking Co.. 131 NLRB 1174 (1961). Section 2(2) of the National Labor Relations Act does not call for liberal construction nor does it provide the numerous examples that are set out in Section 1140.4(c) of the Act.

The determination of the employer status is essentially a factual question. Boire v. Greyhound Corp., 376 U.S. 473, 481 (1967), 153 ALRB (1965) enforced,: 368 F 2d 778 (CA 5, 1966). The Deaton case suggests that a convenient starting point of any analysis should concentrate on the old common law principle, the "right of control test." In Deaton, the decision relied on facts which illustrated that the alleged employer controls the ends as well as the means by which the services are performed.

In this case, the major factors which might suggest that Respondent is not an employer are the following:

1. The landowner pays all State and Federal Tax Deductions for the employees.

2. Respondent receives his pay from individual ranch owners for his services.

3. Separate bank accounts are maintained for each ranch.

4. Bach ranch owner maintains Workman's Compensation insurance.

5. The ranch owners own some equipment or pay a fee for Respondent 's equipment.

The above factors, however, are more than counter-balanced by the following:

1. Respondent can hire, fire, direct, and essentially control all work performed by the workers.

2. Respondent or his wife have the authority to write paychecks and balance the various ranch account bank bocks. The owner can also do this function, but the flavor of testimony and the stipulation suggest that Respondent or his wife do this task the majority of the time.

3. The ranch owners have no set schedule for overseeing Respondent or the workers. In fact, some are essentially absentee owners.

4. Respondent made the initial hiring arrangements with most, if not all, of the employees. See Mohican Trucking Co. , 131 NLRB 1174, 48 LRRM 1213 (1961).

Respondent has close to unlimited, if not unlimited, authority over the workers. This type of control is the underlying tenet in the Deaton decision. See also Albert Lee. Cooperative Creamery Association. 119 NLRB 817, 821-822, 41 LRRM 1192 (1957).Under the National Act, it is relevant who withholds tax deductions and social security deductions, but not determinative. Frederick 0. Glass, et al. dba Miller Road Dairy, 135 NLRB 217, 49 LRRM 1477 (1962), enforced in part, 317 F. 2d 726, 53 LRRM 2336 (CA 6, 1963).

Evidence presented at the hearing also suggests that Respondent considered himself an employer firm whenever conveniency dictated. General Counsel's exhibit #2 is a letter written by Respondent in 1973. This letter illustrates the flexibility of definition utilized by Respondent.

The arrangement Respondent has with the ranch owners has all the earmarks of accounting convenience. While case law precedents of the National Labor Relations Act indicate the mode of payroll disbursements is relevant, it is by no means a controlling factor. One reason may be that the payroll accounting procedure is set up more for the Internal Revenue Service and the Franchise Tax Board than for the employer-employee relationship.

Designating Respondent as an employer does not appear to be inconsistent with the case, Kotchevar Brothers v. United Farm Workers, AFL-CIO, 2 ALRB 45 (1976). In Kotchevar the Board found Mr. Walker to be a custom harvester. Respondent appears to be a custom harvester in many respects. While there are differences in the financial arrangement between the cases, the general, flavor is the same. In this case, it was agreed that Respondent was not claiming to be a labor contractor within the meaning of the Act. Respondent, like Mr. Walker, is something more than a labor contractor.

Moreover, the designation of Respondent as an employer appears consistent with the Board's holding in Napa Valley Vineyards, Co., and United Farm Workers of America, AFL-CIO. 3 ALRB 22 (1977).The Board considered the "whole activity" of the alleged employer. This approach is another expression of the National Labor Relations Board standard of control of the employment process. Respondent receives his own per-acre fee. The factors mentioned above illustrate an almost all pervasive degree of control over the activity on each ranch.

For the reasons stated above, it is the opinion of this Hearing Officer that Respondent is an employer within the meaning of the Act.

II. Reduction of hours of Enrique Martinez and Ruben Casares

Neither Mr. Martinez nor Mr. Casares testified at the hearing. No testimony was received indicating any reasons regarding the reduction of work hours of the two named employees. No time sheets of the employees were received into evidence. Time sheets of the employees after the reduction of hours were not submitted to illustrate lack of economic need for the reduction of hours. The evidence presented was not sufficient to allow this Hearing Officer to conclude that an unfair labor practice was committed.

It should be noted that one witness, Mr. Bemardo Aguir, did testify that Respondent was aware that Mr. Casares turned over checks to the Union. This testimony is the only" evidence through which one could infer anti-union animus on the part of Respondent. Neither the General Counsel nor the Union representative pursued a line of questions which would have produced more evidence on this allegation.

Therefore, the General Counsel and the Union did not present a prima facie case of discrimination. See also HLRB v. Winn Dixie Stores, 71 LRRM 2055 (1969).

III. The Discharge of Eustolio Serrato

The evidence presented at the hearing clearly shows that a money flow problem existed from Mr. Rucker to Mr. Serrato. Mr. Serrato had not been paid for several weeks of work. Normally, he was paid by the week. No one denied that the checks were late.

Respondent's testimony suggests that although he could have paid Mr. Serrato with his own money, he preferred to avoid having to collect from Mr. Rucker for monies advanced.

Respondent became motivated to pay Mr. Serrato when Mrs. Nieto, a Union volunteer, called. He knew that he did not need any problems with the Labor Commissioner.

No testimony was presented which would relate Mr. Serrato's discharge to his union activity or to the assistance of Mrs. Nieto. To be sure, Mrs. Nieto stimulated some action on Respondent's part, but there was a continuing payment problem which began several weeks before Mrs. Nieto became involved. The existence of this problem was uncontradicted.

An intriguing line of questions which was not pursued would have inquired whether Respondent hired anyone to replace Mr. Serrato. Obviously, if another person was hired, then Respondent's motivation sight be unlawful. Direct evidence of this is not necessary to support a finding of discrimination. Intent may be inferred from the record as a whole. See Time - D.C., Inc. v. NLRB, 87 LRRM 2853, 504 F. 2d 294 (CA 5 1974) . "The record in this matter shows that paycheck's were *a* problem. It does not show that Respondent's explanation fails to withstand scrutiny.. In the absence of more testimony or physical evidence, the discharge cannot be said to be unlawfully motivated. Again, the General Counsel and the Union failed to present a prima facie case.

IV. Paragraph 5(a) of Complaint - Threat to abandon the orchard

Mr. Bernardo Aguiar testified that Respondent threatened to abandon the orchard if the Union won the election. The election was held on January 10, 1976. Mr. Aguiar said Respondent and he talked on January 7, 1976.

Respondent denied saying he would abandon the orchard. He also stated that it would be impossible because he did not own the orchard.

If this is a violation, it would be so because the nature of the comment is a threat. There is no distinction to be made between a threat or a prophecy in this instance. See Chicppee Mfg. Co., 107 NLRB 106, 33 LRRM 1064 (1953). Section 1152 of the Act proscribes a threat of such a nature. Aside from the words themselves, the surrounding conduct provides a context in which a conversation, if any, existed.

In the course of the hearing, several witnesses testified about observations of and conversations with Respondent. Arnulfo Reyes, who still works for Respondent, testified that the strikers had been giving Respondent problems. No testimony directly established the existence of a strike, but the testimony imparted the sense that some type of strike-related action occurred in early January, 1976.

Eustolio Serrato testified that during the election, Respondent was in the general election area. While there, Mr. Serrato said he observed Respondent with binoculars. When Respondent testified, he gave unspecific accounts of his whereabouts on election day. He said he was probably in the area; He also indicated he might have turned off some irrigation water outlets.

The impact of the testimony at the hearing suggests that Respondent was unhappy over the prospect of the Union representing the employees. During the week prior to the election, Teamster organizers came to talk to various employees. Mr. Serrato testified that Respondent and he talked about the Teamsters. Mr. Serrato remembered that Respondent initiated the conversation. When Mr. Serrato asked Respondent which union would be better for him, Respondent replied that the Teamsters were good. Very little other testimony was heard regarding the unionizing efforts and Respondent's reactions to them.

The threshhold question is whether the General Counsel sustained his burden of proof. At the outset of the hearing, Respondent was called as an adverse witness by the General Counsel. The examination of Respondent could have been much more comprehensive. Respondent's attorney chose not to call Respondent nor any other witnesses for Respondent's case. Thus, the only examination of Respondent was a relatively brief and incomplete attempt at the outset of the Charging Party's case. The state of the record does not contain sufficient evidence to conclude that an unfair labor practice was committed by Respondent. To conclude otherwise would require that this Hearing Officer assume that Respondent fabricated his testimony. The state

of the record, especially the examination of Respondent by the General Counsel and the Union does not permit such a conclusion to be drawn.

V. Paragraph 5(b) of Complaint - Accusation of employee as being a "traitor" for supporting the Union.

The parties stipulated that Respondent called Christino Rosado a "traitor" on January 7, 1976. Apart from this stipulation, no testimony regarding this statement was presented at the hearing. Therefore, it cannot be concluded that this constituted an unfair labor practice because a prima facie case was not presented.

Conclusion

1. The petition to set aside the election on the basis that Respondent is not an employer within the meaning of the Act is denied.

2. No other unfair labor practice allegations were proven by the General Counsel and the Charging Party.

DATED: April 12, 1977

Robert J. Zweben

ROBERT J. ZWEBEN, Hearing Officer