Soledad, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

O.P, MURPHY PRODUCE CO., INC., dba O. P. MURPHY & SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 77-CE-34-M 77-CE-36-M 77-CE-37-M 4 ALRB No. 106

DECISION AND ORDER

On April 17, 1978, Administrative Law Officer (ALO) Thomas Patrick Burns issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party and the General Counsel each filed exceptions and supporting briefs, and the General Counsel filed a brief in reply to Respondent's exceptions.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings and conclusions of the ALO, and to adopt his recommended Order to the extent consistent herewith.[1/]

The General Counsel and the Charging Party have filed

[1/]The ALO's proposed remedial Order lists one Martin Hernandez among the discriminatees to be offered reinstatement with back pay. As no evidence was presented at the hearing with regard to this individual, and as the ALO has reported that he was included by mistake, his name has been deleted from the list of discriminatees contained in the Order.

exceptions to the ALO's findings and conclusions concerning events which occurred during UFW organizer Linda Manney's visit to Respondent's property, after the UFW and Respondent had commenced contract negotiations. Ms. Manney had entered Respondent's premises to tell employees about the negotiations and of the need to form a negotiating committee of employee representatives. The ALO found that Ms. Manney had no legal right to be on Respondent's property, that she was a trespasser, and therefore concluded that Respondent did not violate the Act by the conduct of its agents in attempting to place her under arrest and repeatedly photographing her, often as she talked with employees.

We decline to adopt the ALO's finding that a certified collective bargaining representative does not have a legal right to enter an employer's premises during the course of collective bargaining negotiations for purposes related to the union's collective bargaining obligation.

In this decision we address the issue of post-certification access, but only insofar as it relates to a certified labor organization engaged in, or attempting to engage in, collective bargaining negotiations with an employer. We shall not consider herein what, if any, rights of access accrue to the certified representative after the parties enter into a collective bargaining agreement. Access rights of a certified collective bargaining agent during the term of a collective bargaining agreement, for the purpose of implementing or administering the contract, are usually included in the

contract and are best left to the agreement of the parties.

This Board has recognized the right of union representatives to have access to the premises of agricultural employers prior to a representation election. 8 Cal. Admin. Code 20900 and 20901. Limited access is also available for a period of up to 15 days following the counting of ballots. Ibid., 20900 (e) (1) (C). Although our regulations contain no specific provisions for post-certification access by the bargaining representative, they acknowledge that post-certification access rights can come into play. Section 20900(e)(1)(C) provides in part: "Nothing herein shall be interpreted or applied to restrict or diminish whatever rights of access may accrue to a labor organization certified as a bargaining representative."

The need for post-certification access to an employer's premises has a different origin than the need for access prior to an election. Non-employee organizers are permitted access before an election is held, "for the purpose of meeting and talking with employees and soliciting their support." Section 20900(e). After certification, the need for access is based upon the right and duty of the exclusive representative to bargain collectively on behalf of all the employees it represents.

As the certified union is the agent and representative of all the employees in the bargaining unit, it is essential that it have access to, and communications with, the unit employees during the course of contract negotiations, in order to determine their wishes with respect to contract terms and proposals, to obtain current information about their working conditions, to

form and consult with an employee negotiating committee, and to keep them advised of progress and developments in the negotiations. Reasonable access and adequate communications between the employees and their bargaining agent is just as essential to meaningful collective bargaining negotiations as is contact and communications between the employer and its attorney, or other bargaining representative.

In its role as collective bargaining representative, the labor organization owes a duty to all the employees in the bargaining unit to represent them fairly. Wallace Corporation v. NLRB, 323 U.S. 248, 15 LRRM 697 (1944). This duty, which extends to the negotiation of contracts, cannot be discharged unless the union is able to communicate with the employees it represents. Prudential Insurance Company of America v. NLRB, 412 F. 2d 77, 71 LRRM 2254 (2d Cir. 1969), cert, denied, 369 U.S. 928, 72 LRRM 2695 (1969). The ability to communicate during negotiations has been held to be "fundamental to the entire expanse of a union's relationship with the employees." Prudential Insurance Company of America v. NLRB, supra, at p. 84.

Communication between the union and the employees is also essential to the smooth functioning of the bargaining relationship between the union and the employer. If the union cannot easily contact the employees it represents, delays are likely to result, negotiations may flounder, and tentative agreements between the parties may be rejec-ced by the unit employees. Accordingly, all parties benefit from the institution and maintenance of adequate communications between the bargaining

representative and the employees it serves.

Where the union seeks information which is relevant and necessary to enable it to perform its bargaining duties, and which cannot be obtained without access to the employer's premises, the NLRB has held that the employer must allow that access, unless it imposes an unreasonable burden. Wilson Athletic Goods Mfg. Co., 169 NLRB 621, 67 LRRM 1193 (1968). The NLRB has allowed bargaining representatives to enter plants to perform time-and-motion studies, Fafnir Bearing Company v. NLRB, 362 P. 2d 716, 62 LRRM 2415 (2d Cir. 1966); Wilson Athletic Goods Mfg. Co., supra; General Electric Company v. NLRB, 414 F. 2d 918, 71 LRRM 2562 (4th Cir. 1969); Waycross Sportswear, Inc. v. NLRB, 403 P. 2d 832, 69 LRRM 2718 (5th Cir. 1968); Winn-Dixie Stores, Inc., 224 NLRB 1418, 92 LRRM 1625 (1976); to investigate safety conditions, NLRB v. Metlox Manufacturing Company, 83 LRRM 2331 (9th Cir. 1972); Winn-Dixie Stores, Inc., supra, and to evaluate jobs, Triangle Plastics, Inc., 191 NLRB 347, 77 LRRM 1558 (1971); Borg-Warner Controls, 198 NLRB 726, 80 LRRM 1790 (1972); Haskell of Pittsburgh, Inc., 226 NLRB 161 (1976); General Electric Company, 186 NLRB 14, 75 LRRM 1265 (1970); The Kendall Co., 196 NLRB 588, 80 LRRM 1205 (1972); General Electric Company, 180 NLRB 27, 72 LRRM 1616 (1966).

The NLRB has also held that an exclusive bargaining representative is entitled to access to the employer's premises where the employees are otherwise generally inaccessible, and no alternative means of communication exist. NLRB v. Cities Service Oil Co., 122 P. 2d 149, 8 LRRM 540 (2d Cir. 1941);

Richfield Oil Corporation v. NLRB, 143 F. 2d 860, 14 LRRM 834 (9th Cir. 1944); Mid-America Transportation Co. v. NLRB, 325 F. 2d 87, 54 LRRM 2698 (7th Cir. 1963); General Petroleum Corp. of California, 49 NLRB 606, 12 LRRM 180 (1943).

This Board has recognized that unions which seek to organize agricultural employees before an election generally do not have available channels of effective communication except by access to the work-site. 8 Cal. Admin. Code 20900(c). The absence of alternative means of communication was recognized by the California Supreme Court:

> [M]any farmworkers are migrants; they arrive in town in time for the local harvest, live in motels, labor camps, or with friends or relatives, then move on when the crop is in. Obviously home visits, mailings, or telephone calls are impossible in such circumstances. According to the record, even those farmworkers who are relatively sedentary often live in widely spread settlements, thus making personal contact at home impractical because it is both time-consuming and expensive.
>
> Nor is pamphleting or personal contact on public property adjacent to the employer's premises a reasonable alternative in the present context, on several grounds. To begin with, many ranches have no such public areas at all: the witnesses explained that the cultivated fields begin at the property line, and across that line is either an open highway or the fields of another grower. Secondly, the typical industrial scene of a steady stream of workers walking through the factory gates to and from the company parking lot or nearby public transportation rarely if ever occurs in a rural setting. Instead, the evidence showed that labor contractors frequently transport farmworkers by private bus from the camp to field or from ranch to ranch, driving directly onto the premises before unloading; in such circumstances, pamphleting or personal contact is again impossible. Thirdly, the testimony established that a significant number of farmworkers read and understand only Spanish, Filipino, or other languages from India or the

> Middle East. It is evident that efforts to communicate with such persons by advertising or broadcasting in the local media are futile. Finally, it was shown that many farmworkers are illiterate, unable to read even in one of the foregoing languages; in such circumstances, of course, printed messages in handbills, mailings, or local newspapers are equally incomprehensible. Agricultural Labor Relations Board v. Superior Court, 16 Cal. 3d 392, 414-415, 128 Cal. Rptr. 183, 546 P. 2d 687 (1976) [footnotes omitted].

While the need for effective communication in the post-certification context arises from different considerations than those in the pre-election context, the same absence of effective alternative means of communicating with agricultural employees generally exists. The bargaining representative still faces the migratory pattern, the short seasons, and other hindrances to communication which are peculiar to the agricultural setting. Moreover, the communication afforded through pre-election access does not reduce or eliminate the need for post-certification access. Because of the migratory nature of the farm labor force, a bargaining representative may find that it represents different employees when it is negotiating a collective bargaining agreement than it did at the time of the representation election. Even where the composition of the work force does not change, there is often a lengthy period of litigation or other delay between the election and the certification, which makes it necessary that contact between the union and the employees be re-established.

In adopting our pre-election access regulation, 8 Cal. Admin. Code 20900, this Board determined that the alternative channels of communication which the NLRB and federal courts

evaluate in each case are not adequate for pre-election solicitation in the context of agricultural labor. See Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977). Because of the different interests involved after certification, and because of our limited experience with the effect of post-certification access on the negotiating process, we will evaluate the extent of the need for such access on a case-by-case approach.

While we will look at the facts of each case to determine the extent of the need for post-certification access, we start with the presumption that no alternative channels of effective communication exist. We hold that a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit. Where an employer does not allow the certified bargaining representative reasonable post-certification access to the unit employees at the work-site, henceforth such conduct will be considered as evidence of a refusal to bargain in good faith. Where the bargaining representative wishes to observe employees while they are working, in order to obtain information for job evaluations, to conduct safety investigations, or for similar purposes, we shall follow applicable NLRB precedent.

The extent of access during contract negotiations is a threshold matter and is preliminary to those negotiations. Therefore, although we find that the employer may not deny post-certification access at reasonable times and places, we

are not holding that such access constitutes a mandatory subject of bargaining. If it were a mandatory subject of bargaining, negotiations could falter or come to impasse before the substantive contract issues have been addressed. With respect to such matters the NLRB recently noted in Bartlett-Collins Company, 237 NLRB No. 106:

> The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours, and other terms and conditions of employment.' As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue.

Preliminary to bargaining on substantive issues, we shall expect the parties to resolve any problems concerning union access, without delaying the contract negotiations. Where a party's conduct causes delays, as well as where an employer refuses a labor organization reasonable access to the employees it represents, such conduct will be considered as evidence of a refusal to bargain.

We have noted that the right of post-certification access is based upon quite different justifications than preelection access, and that allegations of denials of reasonable access during contract negotiations will be evaluated on a case-by-case approach. We also believe the following guidelines to be appropriate. The purpose for taking access must be related to the collective bargaining process. Absent unusual circumstances, the labor organization must give notice to the

employer and seek his or her agreement before entering the employer's premises. The labor organization must give such information as the number and names of the representatives who wish to take access, and the times and locations of such desired access. The parties must act in good faith to reach agreement about post-certification access.[2/] The right of access does not include conduct disruptive of the employer's property or agricultural operations.

Applying the principles set forth herein to the facts of the instant case, we disagree with the ALO's finding that the UFW had available alternative channels of communication with the employees through other employees who were members of the negotiating committee. The UFW, as exclusive bargaining representative for all the agricultural employees in the bargaining unit, had a duty to represent fairly the interests of all those employees. This duty cannot be discharged fully without access to, and the opportunity to communicate directly with, all the employees.

The ALO made no finding as to whether the UFW notified Respondent before Ms. Manney took access to the work-site, and testimony at the hearing left this factual issue in doubt. It appears, however, and we find, that Respondent and its supervisors knew that Ms. Manney was a UFW representative. If

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[2/] It is preferable that in fulfilling their duty to bargain in good faith the parties reach agreement among themselves concerning access. However, in order to negotiate access agreements, the parties may request the aid of the Regional Director and Board Agents.

the UFW gave Respondent prior notice of Ms. Manney's intended visit, it appears that such notice was not effectively relayed to the supervisors, who were apparently confused as to whether Respondent's policy permitted access by UFW agents. In any event, in view of all the circumstances, we find that Respondent's admitted photographic surveillance of Ms. Manney, and its attempts to have her arrested, were excessive and unreasonable reactions to her presence at the work-site and constituted unlawful interference with employees' Section 1152 rights and a violation of Section 1153(a) of the Act.

As the principles concerning post-certification access set forth in this Decision were not known to Respondent or its agents at times material to the incidents herein, we make no finding as to a refusal to bargain and our remedial Order will include no provision with respect thereto.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, O. P. Murphy Produce Co., Inc., dba O. P. Murphy & Sons, its officers, agents, and successors and assigns shall:

1. Cease and desist from:

a. Photographing or attempting to cause the arrest of any UFW representative for peacefully contacting or communicating with employees on its premises.

b. In any other manner interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form, join or assist labor

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

c. Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully refusing to rehire or in any other manner discriminating against individuals in regard to their hire or tenure of employment, in violation of Labor Code Section 1153 (c).

d. Refusing to rehire or otherwise discriminating against its agricultural employees because they have filed charges or given testimony, in violation of Labor Code Section 1153 (d).

2. Take the following affirmative action:

a. Offer to the following employees immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges: Yolanda Guzman, Josefina Lopez Guzman, Socorro Aguilar, Guadalupe Guzman, Rafael Guzman, Josefina Gomez Guzman, Jose Luis Gomez, Concepcion Gomez, Manuel Sanchez, Maria Luz Sanchez, and Pedro Guzman.

b. Make whole each of the employees named above in subparagraph 2a for loss of pay and other economic losses suffered by reason of their termination. The back-pay award shall include any wage increase, increase in work hours *or* bonus given by Respondent during the back-pay period, plus interest thereon, computed at the rate of seven percent (7%) per annum.

c. Preserve and make available to the Board or its

agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records, and reports, and other records necessary to analyze the back pay due to the employees named in subparagraph 2a, above.

d. Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

e. Post copies of the attached Notice on its premises for 90 consecutive days, the times and places of posting to be determined by the Regional Director.

f. Provide a copy of the Notice to each employee hired by Respondent during the six-month period following the issuance of this Decision.

g. Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed at any time between August 4, 1977 and the date of mailing the Notice.

h. Arrange for the attached Notice to be read in all appropriate languages on company time to all employees, by a company representative or by a Board Agent, and thereafter to accord said Board Agent the opportunity, outside the presence of Respondent's officers, agents and supervisors, to answer questions which employees may have regarding the Notice and their rights under the Agricultural Labor Relations Act.

i. Notify the Regional Director of the ALRB

Salinas Regional Office, within thirty (30) days after receipt of a copy of this Decision and Order, what steps the Respondent has taken to comply therewith, and to continue reporting periodically thereafter, on request of the Regional Director, until full compliance is achieved.

Dated: December 27, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. 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; and
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 photograph or attempt to cause the arrest of any UFW organizer for contacting or communicating with employees on our premises at reasonable times.

WE WILL NOT refuse to hire or rehire any employee, or otherwise discriminate against any employee in regard to his or her employment, to discourage union membership, union activity or any other concerted activity by employees for their mutual aid or protection.

WE WILL NOT discharge or otherwise discriminate against any employee because he or she has filed charges or given testimony in matters before the ALRB.

WE WILL offer Yolanda Guzman, Josefina Lopez Guzman, Socorro Aguilar, Guadalupe Guzman, Rafael Guzman, Josefina Gomez Guzman, Jose Luis Gomez, Concepcion Gomez, Manuel Sanchez, Maria Luz Sanchez, and Pedro Guzman their old jobs back, and we will pay each of them any money each may have lost because we did not rehire them, plus interest thereon computed at seven percent per year.

Dated: O. P. MURPHY PRODUCE CO., INC.,
dba O. P. MURPHY & SONS

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.

CASE SUMMARY

O. P. Murphy Produce Co., Inc., dba O. P. Murphy & Sons (UFW)

Case Nos. 77-CE-34-M
77-CE-36-M
77-CE-37-M
4 ALRB No. 106

ALO DECISION

Respondent is engaged in the harvesting and packing of fresh tomatoes. The UFW charged that Respondent:

1. Discriminatorily refused to rehire employees in violation of Section 1153(c) and (a) of the Act.

2. Refused to rehire certain employees because they had testified in the prior unfair labor practice case involving Respondent, in violation of Section 1153 (d) of the Act.

3. Threatened a UFW organizer in the presence of employees and engaged in surveillance by taking photographs.

With regard to the first charge the ALO found that the alleged discriminatees, primarily a family group, were well-known union supporters and seasonal workers who had regularly worked for Respondent through a labor contractor; that they had filed applications in advance of the 1977 harvest; that they were not called by Respondent's supervisor, as promised, before the season began; that their repeated attempts to secure employment after the season began were rebuffed; and that only after charges were filed did Respondent offer employment to the alleged discriminatees. The ALO concluded the General Counsel had established a prima facie case of discriminatory conduct and that Respondent did not overcome the prima facie case because it failed to demonstrate a sound business reason for its actions. Violations of Section 1153 (c) and (a) were thus found.

The ALO found that two persons, a husband and wife, who were not hired in 1977, had been discriminatees who testified against Respondent in a prior unfair labor practice case; that, contrary to Respondent's assertion, one of the individuals did file an application for work in 1977; that Respondent and the hiring supervisor knew of the testimony by the two individuals; that the two individuals requested work from Respondent after the season began and were refused; and that the two were not simply overlooked in the 1977 hiring process. He concluded that failing to rehire the couple was an act of discrimination in violation of Section 1153 (c) and (a) and Section 1153 (d). The ALO recommended that the discriminatees be reinstated to their former jobs with back pay.

The remaining allegations concerned a union organizer who entered upon Respondent's property on several occasions in connection with the union's role as collective bargaining representative for Respondent's employees. The ALO found that the organizer had no legal right to be on Respondent's property, that she was a trespasser, and therefore concluded that Respondent did not violate the Act by the conduct of its agents in attempting to place her under arrest and taking pictures of her. He recommended dismissal of the allegations concerning Respondent's conduct toward the organizer.

BOARD DECISION

With respect to the charges of discriminatory refusal to hire, the Board affirmed the ALO's findings and conclusions and adopted his recommended order.

The Board declined to adopt the ALO's findings that a certified collective bargaining representative does not have a legal right to enter an employer's premises during the course of collective bargaining negotiations for purposes related to the union's collective bargaining obligation. The need for post-certification access was found by the Board to arise from the right and duty of the exclusive representative to bargain collectively on behalf of all the employees it represents. Communication fostered by post-certification access is essential to the discharge of the union's duty to represent employees fairly and to the smooth functioning of the bargaining relationship between the union and the employer.

The Board noted that the NLRB has allowed post-certification access: (1) for the purpose of performing time-motion studies and evaluating specific working conditions; and (2) where employees are otherwise generally inaccessible and no alternative means of communication exists. In the context of pre-election communication with workers, the Board has found that there are generally no effective alternatives to work-site access. Obstacles to communication in the post-certification context are generally the same as in the pre-election context.

The Board will start with the presumption that no alternative channels of effective communication exist in the post-certification setting, but will look at the facts of each case to determine the extent of the need for post-certification access. Generally, a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to collective bargaining. Failure by an employer to permit such access will be considered as evidence of a refusal to bargain in good faith. NLRB precedent will guide the Board in determining whether work-time access is appropriate for time-motion studies, evaluation of working conditions, and the like.

The question of post-certification access is a threshold matter that is to be resolved without delaying contract negotiations. Where either party's conduct in this regard causes delays, that too will be considered evidence of a refusal to bargain.

Post-certification access may be exercised subject to the following guidelines: (1) absent unusual circumstances, prior notice to the employer must be given and his agreement sought; (2) the labor organization must give the employer the number and names of representatives who wish to take access; and (3) disruption of work is not to occur as a result of the access.

The Board disagreed with the ALO's finding that the UFW had available alternative channels of communication. The union organizer here may not have given proper notice before taking access, but, in any event, Respondent's reactions to her presence were excessive and unreasonable and constituted unlawful interference with employees' rights. An order to remedy Respondent's interference was issued.

The Board made no finding as to a refusal to bargain, as the principles concerning post-certification access, as set forth in the decision, were not previously established.

* * *

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: O. P. MURPHY PRODUCE CO., INC., dba O. P. MURPHY & SONS, Respondent, and UNITED FARMWORKERS OF AMERICA AFL-CIO, Charging Party.	CASE NOS. 77-CE-31-M* 77-CE-34-M 77-CE-36-M 77-CE-37-M * Severed during hearing.

SUSAN G. WINANT, for the General Counsel;

ROBERT P. ROY of Dressler, Stolland and Jacobs of Newport Beach, California, for Respondent;

LINTON JOAQUIN, of Salinas, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS PATRICK BURNS, Administrative Law Officer. This case was heard before me on September 26, 27, 28, 29 and 30, 1977, in Salinas, California.

The matter herein is based on unfair labor practice charges filed by the UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereafter UFW) against Respondent, O. P. MURPHY PRODUCE CO., INC., dba O. P. MURPHY & SONS (hereinafter Respondent). Charge No. 77-CE-31-M was filed and served on August 8, 1977 (GCX-5). Charge Mo. 77-CE-34-M was filed and served on August 11, 1977 (GCX-6). Charge No. 77-CE-36-M was filed and served on August 17, 1977 (GCX-7). Charge No. 77-CE-37-M was filed and served on August 22, 1977 (GCX-8). The General Counsel through the Salinas Regional Director issued a Consolidated Complaint based on the above listed charges on September 13, 1977 (GCX-9).

Respondent served its Answer (GCX-10) on September 20, 1977, admitting the allegations in paragraphs 1 through 9 and parts of paragraph 10 of the Consolidated Complaint. The matter proceeded to hearing on September 26-30, 1977, in Salinas, California.

On September 30, 1977, the Executive Secretary granted General Counsel's motion to sever the allegations in paragraphs 11(a), 11(e) and 15 of the Consolidated Complaint. I concurred in the recommendation. A telegram was received from the Executive Secretary granting said motion before the hearing was concluded. As a result, all the allegations based on Charge No. 77-CE-31-M were completely severed and the allegations of Section 1153(e) violations in Charge Nos. 77-CE-34-M, 77-CE-36-M and 77-CE-37-M were also severed. Paragraph 3 of Charge No. 77-CE-37-M which alleges a unilateral change in wages was also severed from this matter. The issues which remain before me concerned Respondent's alleged violations of Sections 1153 (a) and 1153(c) of the Act: i.e., alleged threats and surveillance by Respondent's supervisors and agents and alleged discriminatory refusal to rehire agricultural employees. *I* also considered the Respondent's alleged violation of Section 1153 (d) in refusing to rehire two agricultural employees who had testified at an earlier ALRB hearing: i.e., MANUEL and MARIA LUZ SANCHES.

All parties were represented at the hearing and given a full opportunity to participate in the proceedings. Certain stipulations were entered into by the parties as reflected by parts of Findings of Fact. General Counsel presented twenty-five (25) witnesses at the hearing. Respondent presented five (5) witnesses. Following the taking of testimony the parties waived oral agrument and indicated a desire to submit written briefs.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the written arguments submitted by General Counsel and counsel for Respondent, I make the following findings of fact and conclusions:

FINDINGS OF FACT

I Jurisdiction

The Respondent was alleged and admitted to be an agricultural employer within the meaning of Section 1140.4 (c) of the Agricultural Labor Relations Act (hereafter referred to as the "Act"), and I so find. The UFW was alleged and admitted to be a labor organization within the meaning of the Act, and I so find.

II The Alleged Unfair Labor Practices

The General Counsel's complaint, as amended at the hearing, put into issue the following alleged violations:

1. Respondent discriminatorily refused to rehire employees in violation of Sections 1153(a) and 1153 (c) of the Act

(Denial of employment to GUZMAN-GOMEZ-SANCHEZ family members who had picked O. P. MURPHY tomatoes since 1968, and had filed applications with FRANCES ARROYO for the 1977 season.)

2. Respondent refused to rehire MANUEL and MARIA SANCHEZ, because they had testified in ALRB Case No. 76-CE-33-M.

3. Respondent violated Section 1153 (a) of the Act by threatening UFW organizer in view of employees and engaging in surveillance by taking photographs.

The Respondent denied it violated the Act.

III Facts

O. P. MURPHY PRODUCE CO., INC., is a Texas Corporation doing business in Monterey County, California, as O. P. MURPHY & SONS. It is in the business of harvesting and packing fresh tomatoes at its Soledad location in the above county. O. P. MURPHY & SONS has been doing business in Soledad for approximately twenty-five (25) years. It is and has been an agricultural employer within meaning of Section 1140.4(f) of the Act.

FRANCIS MURPHY is the Secretary of the Corporation and is also the Production Manager responsible for the California corporation. Among his duties are the direction of quality control of the tomato crop. During the tomato harvest season he counsels with harvest management, field management and sales management in order to coordinate the picking of tomatoes for market.

Among those who report to FRANCIS MURPHY are his field supervisors who are not only responsible for the size, color, quantity and quality of the picked tomatoes, but are also responsible for the hiring of employees during the 1977 tomato harvest season. These two individuals were MIKE MURPHY (the son of FRANCIS MURPHY) and FRANCES ARROYO. Prior to the 1976 season, pickers were supplied by two labor contractors, TONY GUZMAN and SECUNDINO GARCIA. Commencing, however, with the 1976 harvest season, the Company discontinued the use of these contractors and chose to hire pickers directly through MIKE MURPHY and FRANCES ARROYO. MRS. ARROYO had previously worked for one of the above contractors, TONY GUZMAN, before starting as a supervisor in 1976, for the Company.

In 1977, notification of available jobs for the tomato harvest season was performed in the identical manner as was utilized by the Company in 1976, i.e., through posters, signs and word of mouth.

Before the start of the August 4, 1977, harvest season, the Company posted a public notice to inform individuals that it would be accepting employment applications on July 21, 22, 1977. This notice was posted for the general public.

A total of 375 applications were received by the Company by July 31, 1977. The bulk of applications were accepted at the Company's office and packing shed in Soledad. Additional applications were sometimes accepted in the fields on days that some crews were short and workers were needed. Generally, FRANCES ARROYO was the supervisor who took applications in the field and would put them in the office. At times, ADELINA SAVALA, a checker in one of the crews, assisted FRANCES ARROYO with the applications at the office and packing shed along with MIKE MURPHY.

It was alleged by Respondent that the policy of the Company regarding employment was that workers who had started work for the Company during the past harvest season and who had completed the season received seniority over all other employees. These employees would be placed in an appropriate crew by date of hiring beginning with Crew # 1 and continuing to Crew # 2 in that order. Workers who had never worked for the Company, but who had applied in 1977 to work the entire season, would have more of a chance of being placed in a crew instead of a worker who had started the 1976 season and did not finish it. The Company's rationale for hiring a new worker instead of one who had worked previously for a short time was one of "dependability". In other words, the Company claimed it was willing to accept a new employee's representation that he would work the entire season and gamble on this, rather than re-hire an individual who had already shown that he was not "dependable" by leaving the previous season early.

Respondent alleged that only the records for the 1976 season were consulted regarding the placement of workers in the respective crews. Respondent claimed that no other records from previous years were utilized, nor were they necessary in view of the Company's hiring policy.

Most of the people who applied for work in 1976 and 1977 were the same employees who had picked Respondent's tomatoes in the labor contractor's crews prior to 1976 including the discriminatees named in paragraph 11 (b) of the instant Consolidated Complaint. It was established at the ALRB hearing on Case No. 76-CE-33-M that MS. ARROYO and MIKE MURPHY used the application procedure to discriminate against the MARTINEZ family in 1976. "(GCX-1) Respondent had claimed that the 1975 labor contractor records were used to determine who worked until the end of the season in order to choose "dependable" employees for the 1976 season. However, the records and testimony in Case No. 76-CE-33-M revealed that Respondent relied primarily on ARROYO'S personal familiarity with the employees from her experience with TONY GUZMAN. FRANCIS MURPHY admitted in the instant case that the 1975 records were not conclusive in determining who finished the season or who was "dependable" (RT V-633). No announcement was made to employees in 1975 regarding Respondent's alleged policy of hiring only people who finished the season (GCX-1 at p. 16). Likewise no announcement regarding this alleged policy was made to employees in the 1976

season. FRANCIS MURPHY admitted that Respondent's alleged hiring policy was devised after the 1976 season was over when MR. MURPHY allegedly met with MIKE MURPHY concerning this issue (RT V-622, 638-9).

In 1977, FRANCES ARROYO accepted applications at Respondent's old packing shed office during the last part of July, but there is a conflict in the testimony of MIKE MURPHY and MS. ARROYO regarding the exact dates that the office was open for applicants to apply (RT IV-550 and RTI-22).

Once all of the applications were received, they were filed in alphabetical order in the Company office. There were two files: active and non-working. The active file included all employees who were presently working and were in numerical order with the employee's number on the application. The non-working file contained the completed applications of those individuals who had not yet been called to work.

Respondent asserts that there existed a filing problem at the Company. MR. WAYNE A. HERSH, one of the Company's attorneys, had spent a day at the Company's office going through the files to get them in order for MARIA LESLIE, an ALRB investigator. MS. LESLIE came to the office pursuant to her investigation of the twelve (12) individuals and requested all twelve (12) applications. MR. HERSH provided her with all twelve (12) applications at that time. He testified that there were four (4) or five (5) of the applications of the alleged discriminatees in the active file who were not presently working. He only remembered the name of MANUEL SANCHEZ. The rest of the applications for the above individuals were in the non-working file. He stated that he removed the four (4) or five (5) applications from the active to the non-working file. The fact that some of these applications were misfiled, Respondent claims, was due in part to the personnel who perform the office filing for the Company. MR. FRANCIS MURPHY testified at length regarding the problems the Company had encountered with respect to misfiled and missing applications caused by part-time girls from an employment agency. Nevertheless, the Company is responsible for acts of its employees.

As the applications were taken, FRANCES ARROYO told the applicants that they would be called and told when and where they should report and to what crew.

MS. ARROYO testified that she telephoned workers for Crew #1 on August 3, 1977, in order to report to work on August 4. She testified that forty (40) people were called. She further testified that she called workers for Crew # 2 on August 3 in addition to all of the necessary foremen, checkers and dumpers. She stated that it took her between five (5) or six (6) hours to make all of the calls. She said that if there was no answer she would call again. Most of the people worked in families and when she notified one family member, the rest would be contacted by that family member. Crews # 1 and # 2 started on August 4, 1977.

MS. ARROYO testified that Crew # 3 started about 2 days later, on August 6, 1977. She said she called up and tried to get forty (40) workers, but not all of them showed up. She testified that some of the crews were short on the initial day of the season, but openings were left for "seniority people" who arrived later that first week. The next day, there were thirty-six (36) to forty (40) workers in Crew # 3. MS. ARROYO said she had called up more people to insure that she had a full crew that day. On August 6, Crew # 3 was again a full crew and MS. ARROYO said she was not hiring additional workers.

On August 8, Crew # 4 started work. On August 9, Crew # 5 started work. MS. ARROYO testified that she called approximately eighty (80) people to fill these crews. On one occasion she says she contacted fifteen (15) people through one phone call. By Tuesday, August 9, the Company had all five (5) crews working. The Company claims it was not hiring more workers at that point in time.

The parties stipulated at the hearing that as a general practice family groups work together in the same crews when picking tomatoes for Respondent. The alleged discriminatees named in paragraph 11b) of the Consolidated Complaint are all members of the GUZMAN-GOMEZ family. General Counsel's Exhibit 19 is a diagram of the family relationship among the discriminatees. YOLANDA GUZMAN, GUADALUPE GUZMAN, JOSEFINA LOPEZ GUZMAN and SOCORRO AGUILAR worked on their parents' employee number from 1968 until 1972 and then each sister worked under her own number. (RT I-66). Respondent stipulated to its practice of allowing several family members to use one number when engaged by the labor contractors to pick tomatoes (see Stipulations in Case No. 76-CE-33-M, GCX-1). Each of the discriminatees with the exception of PEDRO GUZMAN testified that they had picked Respondent's tomatoes every season since 1968 until the institution of the application procedure in 1976.

The GUZMAN family including their cousin PEDRO GUZMAN lived in TONY GUZMAN'S (not related) labor camp from 1970-1976 (RTI-67). During the election period in 1975, the family was very active in supporting the UFW: family members helped to organize employees, wore buttons, passed out buttons and leaflets, MANUEL SANCHEZ, RAFAEL GUZMAN and his wife collected authorization cards, JOSE LUIS GOMEZ (brother-in-law of the Guzmans) served as an election observer for the UFW, and the GUZMAN family sponsored the showing of a UFW film at the back of their trailer in TONY GUZMAN'S labor camp. Additonally, in March, 1977, MANUEL and MARIA LUZ SANCHEZ testified at the ALRB hearing in Case No. 76-CE-33-M.

FRANCES ARROYO was an observer for the Company during the election where she had an opportunity to watch which employess voted in the election. After the election, MS. ARROYO told YOLANDA and GUADALUPE GUZMAN that employees who favored the Chavez union were not welcome to work for Respondent (RTI-70, 111),

In early 1976, TONY GUZMAN evicted the GUZMAN family

from the labor camp on the assertion that he was selling it. The GUZMANS testified that TONY GUZMAN evicted all the active Chavistas from the camp in 1976, though he is still there and Respondent's other employees continue to live there (see testimony of employee ENEDINA CONTRERAS who presently lives in TONY GUZMAN'S camp, RT III-358).

All of the alleged discriminatees filed application forms with FRANCES ARROYO in July, 1977. MS. ARROYO admitted to RAFAEL and JOSEPHINA GOMEZ GUZMAN after their questioning of her motives that "this year everything was going to be legal" (RT 11-151, 179). MS. ARROYO did not call the GUZMANS, SANCHEZES or GOMEZES before the season started on August 4, 1977.

MS. ARROYO testified that she called people the day before their crew was to begin working. On or about August 6, the GUZMANS, SANCHEZES and GOMEZES began going to Respondent's fields to ask MS. ARROYO for work. ARROYO refused to hire any member of the families even though they observed her hiring other persons who went to her pickup truck in the field at the same time the alleged discriminatees were there each morning during the first week of the season. The witnesses testified that ARROYO eventually refused to talk to the alleged discriminatees at the field. She rolled up her truck window and drove away from them whenever they attempted to approach her for work.

FRANCES ARROYO admitted that she hired several persons who came to the field on days the crews were short (RT I-44} . For example, on the second day of Crew # 3, August 6, MS. ARROYO hired people who came to the field to ask for work, though she had not called them (RT I-47). The parties stipulated in this matter that:

> "Respondent hired persons to pick tomatoes in both the 1976 and i.977 tomato seasons who initially applied for work by going to the fields and asking Frances Arroyo for work with the tomato crews after the season started." (RT I-19).

The alleged discriminatees contacted the UFW about Respondent's refusal to rehire them and charges of unfair labor practices were filed on August 11, 1977, a week after the season started when all the crews were filled. On or about August 20, 1977, FRANCES ARROYO allegedly called JOSE LUIS GOMEZ to report to work. When he showed up at the field, ARROYO denied having called him. (RT II-205-6) However, ARROYO remembered talking to GOMEZ at the field (RT I-51}.

Respondent's attorney, WAYNE HERSH, advised the Company to offer employment to the alleged discriminatees named in the charge after the matter was brought up in negotiation meetings on August 19, 24 and again on August 25. Respondent sent mailgrams offering employment, August 27, 1977.

During the month of August, 1977, the UFW was engaged

in negotiations with Respondent. The UFW's practice is to set up a negotiating committee consisting of employee representatives. In order to elect the committee, UFW organizer LINDA MANNEY went to Respondent's fields to inform the employees about the negotiations and the need for a committee of representatives. MS. MANNEY testified that at lunch time, on or about August 16, 1977, Respondent's agent CHARLIE DUNCAN allegedly threatened MS. MANNEY with physical injury in the presence of employees. MR. DUNCAN denied such threats. On or about August 19, 1977, Respondent's supervisor, MIKE MURPHY, called the Sheriff's Department to place MS. MANNEY under arrest; she was directed to leave, but not arrested by the Sheriff.

On other occasions in early August, MIKE MURPHY called the Sheriff's Department when LINDA MANNEY came to Respondent's fields to speak with employees. (RT IV-568) Additionally, Respondent's agent, ANDY MURPHY, and supervisors., MIKE MURPHY and FRANCES ARROYO, took photographs of MS. MANNEY.

RELEVANT STATUTORY PROVISIONS

Section 1152 of the Agricultural Labor Relations Act (hereafter the Act) states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The language of Section 1152 of the Act is virtually identical co that of Section 7 of the National Labor Relations Act (hereafter NLRA).

Section 1153 states in pertinent part:

> "It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> (a) To interfere with, restrain, or coerce agricultural employees in the exercise or the rights guaranteed in Section 1152 . . .
>
> * * *

(b) By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

* * *

(d) To discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part.

The language of Sections 1153 (a), 1153 (c) and 1153(d) is essentially the same as Sections 8(a)(1), 8 (a) (3) and 8(a) (4) of the NLRA.

Section 1148 of the Act states that:

> "The Board shall follow applicable precedents of the National Labor Relations Act as amended." (Emphasis added)

It is well established that violations of Section 8 (a) (3) and 8 (a) (4) are per se violations of Section 8 (a) (1) of the NLRA and the Board has followed this rule in finding that violations of Section 1153 (c) and 1153 (d) are per se violations of Section 1153(a) of the Act. See, Morris, The Developing Labor Law, (1971), p. 66, et seq; Tex-Cal Land Management, 3 ALR3 No. 14 (1977), at p. 5.

Section 1160.3 of the Act sets forth the procedures by which unfair labor practice charges and complaints are to be litigated. The standard of proof required to establish the commission of an unfair labor practice is stated in Section 1160.3 of the Act as follows:

> "If, upon the preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement with or without backpay, and making employees whole ..." (Empahsis added)

Section 1140.4(j) of the Act defines the term "Supervisor":

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

Section 1165.4 of the Act sets forth the agency theory to be applied in the administration of the Act.

> "For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

ANALYSIS AND CONCLUSIONS

Respondent Discriminatorily Refused to Rehire Employees in Violation of Sections 1153(a) and 1153(c) of the Act.

Paragraph 11 (b) of the Consolidated Complaint alleges that Respondent discriminatorily refused to rehire the following agricultural employees for the 1977 tomato harvest season: JOSE LUIS GOMEZ, CONCEPCION GOMEZ, RAFAEL GUZMAN, JOSEFINA GOMEZ GUZMAN, SOCORRO AGUILERA (aka SOCORRO LOPEZ GUZMAN), PEDRO GUZMAN, GUADALUPE GUZMAN, MANUEL SANCHEZ, MARIA LUZ SANCHEZ, YOLANDA GUZMAN DE LOPEZ), JOSEFINA (LOPEZ) GUZMAN and MARTIN HERNADEZ. In the instant case, a family of well-known Chavistas who had worked for labor contractor TONY GUZMAN picking Respondent's tomatoes since 1968 were denied employment by Respondent after they had filed applications with supervisor, FRANCES ARROYO.

The application forms of the GUZMANS, GOMEZES and SANCHEZES that were admitted into evidence show the correct address and phone numbers for each applicant. All of the applicants filed their applications in July 1977, before the season began. FRANCES ARROYO put all the applications of the GUZMANS together (RT-74) and upon ascertaining the relationship of the GUZMAN Family to the GOMEZES from JOSEFINA GOMEZ GUZMAN (RTII-177), ARROYO added the applications of the GOMEZES to the same pile. ARROYO told the alleged discriminatees at the time

they filed applications that she would call them. She also told YOLANDA GUZMAN to check back with her (RTI-74). Because ARROYO had not called before the season started, all of the alleged discriminatees went together to the field when they learned that the crews were working. The alleged discriminatees testified that they arrived in the field around 6:00 a.m. each day before people started to work. Respondent contends that the witnesses testified to different hours and dates regarding the week they waited for ARROYO at Respondent's fields.

I agree that there were discrepancies, but I find that they were due to difficulty in recollection by some of the witnesses, and the pressure of testifying. Just as there had been conflict in testimony regarding days of initial acceptance of applications between MIKE MURPHY and FRANCES ARROYO, there was conflict here. In neither instance was it significant nor intentional.

Counsel for Respondent points out that YOLANDA GUZMAN DE LOPEZ also filled out an application on August 29, 1977. When shown the application by her counsel, she thought the signature on it seemed like her signature. Subsequent testimony by her sister GUADALUPE, however, was to the effect that GUADALUPE saw YOLANDA actually sign this application. MS. GUZMAN testified that she went to the fields with all of her brothers, sisters and cousins to ask for work from MS. ARROYO every morning during the first week of August. She said that she asked MS. ARROYO for work, but she kept telling them to check back because she wasn't hiring. MS. GUZMAN testified that she had received a telegram from MS. ARROYO after August 27 informing her of a job opening. MS. ARROYO called, however, before the 27th and said that MS. GUZMAN and all of her brothers and sisters could come back to work since there were available openings.

On cross-examination MS. GUZMAN made certain contradictions in her testimony. She stated that she didn't remember speaking with her attorney, MS. WINANT. It would appear that was incorrect, as counsel indicated otherwise by nodding in an affirmative manner. MS. GUZMAN denied speaking with any ALRB agent, but, her sister GUADALUPE said that MS. GUZMAN had spoken to MARIA LESLIE, an ALRB agent, for at least a half an hour before the hearing. She also testified chat on the fourth day that she went to the field, August 8, all crews were working including Crews # 4 and # 5. Crew # 5, however, did not start work at the Company until August 9. MS. GUZMAN said that she came everyday for a week starting August 4 and saw crews working everyday. Sunday, August 1, however, crews were not working at O. P. MURPHY & SONS. Sunday is a day off for all Company employees.

Additionally, there were contradictions between the testimony of MS. GUZMAN and her sister, GUADALUPE. MS. GUZMAN said that she and her family stayed in the fields each morning until 9:00 a.m., but her sister GUADALUPE said they stayed until 10:00 or 11:00. Furthermore, according to GUADALUPE, only herself, YOLANDA GUZMAN, however, testified that at least seven (7) more

family members had also gone with her to fill out applications that same day.

I believe that though there were contradictions in the testimony they were not so material as to cast doubt on all of the testimony of the witness. Whether she was confused or deliberately mistating facts is not certain, but I am convinced she did apply timely and was refused.

MR. RAFAEL GUZMAN picked tomatoes at the Company for over ten (10) years beginning in 1967. His wife, JOSEFINA, also worked along with him and he helped her carry buckets because they were heavy. MR. GUZMAN worked for TONY"GUZMAN, a labor contractor at the Company, in 1975. He testified that he had filled out an application for employment in 1976 along with his wife. FRANCES ARROYO took these applications in July, 1976, and indicated that she would call the GUZMANS. MS. ARROYO did not call, however, but when MR. GUZMAN went to the fields about a week later, he was hired by MS. ARROYO. MR. GUZMAN continued to work for about a month until he left voluntarily in order to work at another company where his wife and he could work together.

MR. GUZMAN applied for work in July of 1977 at the packing shed at the Company. MS. ARROYO took his application and told him that she would put them all together so that the entire family could be placed in the same crew. When MS. ARROYO did not call, MR. GUZMAN went to the fields and spoke with her. She told him "to wait because we are working up a seniority list". The first day that MR. GUZMAN went to the fields was on the 6th of August and consecutive days thereafter. He stated that he arrived around 6:00, before employees had started, and stayed around two (2) to three (3) hours. On one occasion, MR. GUZMAN testified that MS. ARROYO said that she wasn't going to hire him because he quit during the last season. MS. ARROYO was only hiring new people, because there was a better possibility of their staying the entire season..

MR. GUZMAN testified that he later received a telegram apprising him of a job opening at the Company, but that he did not go to work at the Company this season.

JOSEFINA GUZMAN is the wife of RAFAEL GUZMAN. She had worked for TONY GUZMAN in previous years when TONY GUZMAN supplied workers to O. P. MURPHY AND SONS. MRS. GUZMAN did not pick for the Company in 1976. She stated, however, that she didn't remember when she applied for work in 1976, but that her husband, RAFAEL, had filled out an application for her.

In 1976 she testified that she applied for work with the Company. She didn't, however, remember if FRANCES ARROYO took her application. She testified that after no one called her, both she and her husband went to the fields to seek work. Her husband received work, but she did not.

In 1977 she filled out an application (GCX-21 (A) (B). Both she and her husband's applications were put together. She and her husband then went to the fields and her husband asked FRANCES ARROYO for work. MRS. ARROYO responded that "First I have to hire these people who finished last season, then I'll hire you if there are openings."

MRS. GUZMAN stated that she saw FRANCES ARROYO hire people in the fields, but that she didn't know if they ever worked there before.

JOSE LUIS GOMEZ had worked in 1975 for the labor contractors, GUZMAN and GARCIA. He was an observer for the Union at the 1975 election. He applied for work in 1976 for the Company and worked in Crew # 2. He worked for approximately one and one-half to two months at the Company and then voluntarily left before the end of the season to work in the grape harvest for PAUL MASSON. Respondent's Stipulation # 1 shows that MR. GOMEZ only worked at MURPHY'S from August 18, until September 15, 1976. He stated that he saw ROBERTO LEMUS PEREZ and ANN SANCHEZ DE LEMUS PEREZ who worked with him at MURPHY'S in 1976 working at PAUL MASSON about the same time as he did. Respondent's Stipulation # 2 shows, however, that both of the PEREZ' worked until November 4, 1976, which was the end of the harvest season.

MR. GOMEZ made out an application in 1977 to work at MURPHY'S (GCX-22). FRANCES ARROYO said she would call him. He testified that he went to the field, because MRS. ARROYO had called him. When he arrived, however, MRS. ARROYO stated to him that she didn't remember calling him.

CONCEPCION GOMEZ applied for work at the Company in 1977, but did not receive work. MS. GOMEZ had not finished the entire season in 1976.

After ARROYO refused to rehire the alleged discriminatees, they went to the UFW office in King City to file charges. LINDA MANNEY, a UFW organizer attempted to assist them in obtaining jobs from Respondent. MANNEY had first met members of the family group at organizing meetings in July before the season began to elect delegates to attend the UFW political convention (RTIV-459-460). JOSE LUIS GOMEZ, RAFAEL GUZMAN and MANUEL SANCHEZ were chosen as delegates to attend the convention (RTIII-286-287). After the charges were filed and the matter of Respondent's refusal to rehire the GUZMAN Family group was brought up at negotiations, MANNEY informed the alleged discriminatees that Respondent's attorney at negotiations said they should report to work. When they reported to the field, ARROYO refused to hire them. MANNEY testified the date of this particular request for work was more or less around August 25 just before the UFW convention (RTIV-461-A) and also before attorney WAYNE HERSH advised Respondent to send mailgrams on August 27, 1977, offering employment.

Respondent's Belated Offer of Employment After Charges Were Filed Does not Relieve Liability.

Counsel for Respondent argues that Respondent did offer employment on August 27, 1977. Respondent's failure to rehire seasonal workers who have been employed regularly is as serious as a discharge or unwarranted lay-off under NLRA precedent; refusal to rehire is a change of term or condition of employment. In Tri-City Paving, Inc., 84 LRRM 1086 (1973), the NLRB held that the employer violated the NLRA when it refused to rehire two (2) employees for work during construction season, because of their union activity. The employer in that case was a highway construction company. Of the two employees discriminated against by the company, one was denied employment in preference to an employee with less seniority and was not offered reemployment when other jobs opened up. The second discriminatee was denied reemployment despite his long service with the company based on his "drinking" problem which had long been condoned by the company and which had since been cured. The NLRB found that the employer's reason to be mere pretext to cover up its discriminatory motivation.

The above cited case is instructive in analyzing the liability of Respondent in the instant case. In agricultural labor relations, we are dealing with a specialized industry where the livelihood of agricultural employees depends on regular seasonal work and the industry as a practical matter provides this work on a regular basis. The facts of our case describe a very typical situation in which the same employees work for the same company at the same time each year. Respondent's refusal to rehire the GUZMAN family group was not a mere oversight nor was it motivated by a legitimate hiring policy. In fact, it was hard for ARROYO to ignore the GUZMANS: she often rolled up her truck window, refused to talk to them and took off rather than face their requests for work. Her conduct alone suggests the insincerity of Respondent's purported policy.

The first element necessary to prove a violation of Section 1153 (c) is discrimination in regard to condition of employment, hiring or tenure.

The second element necessary to prove a violation of Section 1153 (c) is that the change in company policy was accomplished for the purpose of discouraging membership in a labor organization. To discourage "means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an anti-union purpose." NLRB v. Great Dane Trailers, 388 U.S. 26, 33, 65 LRRM 2465, 2468 (1967).

A prima facie case of unlawful motivation in a discharge case (analogy to refusal to rehire) consists of evidence that 1) the employer knew of union activity of a discharged employee, NLRB v. Whitin Machine Works, 204 F2d 883, 32 LRRM 2201 (1st. Cir. 1953), NLRB v. Ampex Corp., 442 F3d 83, 77 LRRM 2072 (7th Cir. 1971); 2) that the employer had an animus against the union, Maphis Chapman Corp. v. NLRB, discharged had the effect of discouraging union activity, though subjective evidence that employees actually were discouraged is not required.

Once the General Counsel has put forth a prima facie case that the employer has engaged in discriminatory conduct, the burden shifts to the employer to establish that it was motivated by legitimate objectives. NLRB v. Great Dane Trailers, supra, NLRB v. Okla-Inn, 84 LRRM 1697 (1972) . When an employer shifts from one reason to another as the basis for discharges, the NLRB finds unlawful motivation even if the individual reasons might have provided a legitimate reason for discharge. NLRB v. Okla-Inn, supra, J.R. Townsend Lincoln Mercury, 202 NLRB No. 12 (1973).

The contradictions discussed supra, negate Respondent's claim that its policy was to rehire only those employees who finished the 1976 season. Another hole in the story is the fact that Respondent eventually offered employment to the discriminatees after charges were filed.

Likewise with respect to the August 27, 1977 offers of reemployment, it is well-established that reinstatement of aggrieved employees after charges are filed does not rebut the presumption that the discharges (or refusal to rehire) were discriminatorily motivated in the first place. NLRB v Ertel Mfg. Co., CA 7, 1965, 60 LRRM 2280; Sehon Stevenson & Co., 1964, 58 LRRM 1156. Subsequent reinstatement does not obviate the need for a remedial order. Stork Restaurant, 47 LRRM 1327.

Respondent refused to rehire MANUEL and MARIA SANCHEZ because they testified in ALRB Case No. 76-CE-33-M.

It is a violation of Section 1153(d) of the Act to discriminate against any employee who testified an a Board proceeding. The SANCHEZ couple were discriminatees who testified against Respondent in Case No. 76-CE-33-M. Respondent failed to rehire them in 1976 claiming they did not file applications. Both MANUEL and MARIA SANCHEZ filed applications in 1977, and went with the rest of the GUZMAN family to the field to request work after the season began. ARROYO testified that she spoke to MANUEL in the field and she told him she would call him. ARROYO claimed that MANUEL never filed an application this year (RTI-54-55). General Counsel's Exhibit 24 which is MANUEL'*S* 1977 application controverts ARROYO'S testimony. WAYNE HERSH in his investigation on August 27, 1977, particularly remembers MANUEL'S application was misfiled (RTV-588). The alleged misfiling of his application does not relieve Respondent of liability.

I find that it was not a mistake that MANUEL and MARIA SANCHEZ were overlooked in the 1977 hiring process. ARROYO testified that MANUEL came in to apply in 1977 and told her that he knew she was not going to call him. (RTI-55).

Respondent and its supervisor, ARROYO, knew that the SANCHEZ couple testified at the hearing. They also knew that the ALO dismissed the allegations as to their case in light

of the fact that the TRO enjoining Respondent from denying reemployment to the MARTINEZ family did not include reinstatement of the SANCHEZES.

The elements of proof in an 1153 (d) violation are the same as those required in an 1153(c) violation. It is well-established that when an employee is denied employment shortly after testifying against the employer in an unfair labor practice proceeding it is a circumstance in support of finding that the employer violated Section 8(a) (4) of the NLRA (analogy to Section 1153 (d) of the Act). See, e.g., NLRB v. Oklahoma Transportation, CA 5, 1962, 51 LRRM 2702; Haynie Electric Co., Inc., 1976, 93 LRRM 1267.

I find, therefore, that such conduct by FRANCES ARROYO, an agent of Respondent, in refusing to hire MANUEL and MARIA SANCHEZ constitutes violation of Section 1153 (c) of the Act. Accordingly, I find also violations of Section 1153 (a) of the Act.

FRANCES ARROYO'S knowledge of Union Activity attributed to Respondent.

Counsel for Respondent states that for employer discriminatory activity to be proscribed, it must be shown that the Employer had some knowledge that the employee was engaged in protected, concerted activity. (See NLRB v. Whitin Machine Works, 204 F.2d 883, 32 LRRM 2201 (CA 1st 1953). It is impossible for a discharge to be discriminatory without proof that the employer had knowledge of the employee's union activities, (See NLRB v. Garner Tool & Die, Inc., 493 F.2d 263, 268, 85 LRRM 2652 (CA 8th 1974). The Board always has the burden of proving such knowledge with substantial evidence. (See Garner Tool & Die, supra.)

I find that the employer through its agents and employees, as discussed herein, did in fact have knowledge that the alleged discriminatees had been engaged in protected, concerted activity.

A supervisor's knowledge of employee union activities or other concerted activity will be imputed to the employer. (See, e.g. Mac Donald Engineering Co., 1973, 82 LRRM 1646). Moreover, the Board has disavowed "any implication that a discriminatee must be 'very active' in union affairs before the employer's knowledge may be inferred. Such knowledge may be inferred as to any union adherent from the record as a whole."
(AS-H-NE Farms, 3 ALRB No. 53 (1977) at p.2).

ARROYO testified that she knew the GUZMAN Family when they lived in VIC ASCONA'S Labor Camp and later in TONY GUZMAN'S Labor Camp. ARROYO particularly remembers that YOLANDA GUZMAN picked Respondent's tomatoes when labor contractor, TONY GUZMAN, supplied workers to Respondent. (RTI-56-53). ARROYO remembered

that YOLANDA GUZMAN worked in tomatoes since 1967 and that she and her family worked for several years picking tomatoes.

ARROYO worked for TONY GUZMAN as an assistant and checker during the years the GUZMAN family lived in TONY'S labor camp. She was familiar with the activities of the workers during those years which included their participation in an industry wide strike in 1970 and a work stoppage in 1975 (GCX-1). MANUEL SANCHEZ put a union flag on his house at TONY GUZMAN's labor camp in 1970. When members of the GUZMAN family group distributed flyers and handed out authorization cards, TONY GUZMAN, FRANCES ARROYO and other Company personnel observed their conduct. ARROYO was also an observer for the Company during the election when JOSE LUIS GOMEZ served as an observer for the UFW. The representatives of O. P. MURPHY employees who were elected as delegates to the 1977 UFW political convention were MANUEL SANCHEZ, JOSE LUIS GOMEZ and RAFAEL GUZMAN. I have drawn an inference that where the employees of Respondent considered these persons UFW supporters, then FRANCES ARROYO must have also come to the same conclusion since she worked with them before and during the relevant election period. Finally, the fact that RAFAEL GUZMAN attended the first negotiations meeting in June, 1977, as a member of the provisional negotiations committee clearly designated him as an active UFW supporter. In the related proceeding of 77-CE-31-M, et al. which was heard October 17, 1977-December 16, 1977, this fact was established by uncontroverted testimony. I have taken judicial notice of related proceedings which are before the Board. See, citations, supra.

From the testimony of the Company supervisors, FRANCIS MURPHY, MIKE MURPHY and FRANCES ARROYO, it appears that ARROYO was actually the only person who implemented Respondent's hiring procedure. MIKE testified that ARROYO did most of the hiring "since she knows the names better than I do." (RTIV-554). FRANCIS MURPHY indicated that ARROYO was instructed to hire employees from a particular list (which was never introduced into evidence by Respondent); however, FRANCIS MURPHY was not sure that ARROYO actually used such a list (RTV-641).

I infer that ARROYO used the application procedure to weed out the GUZMAN family group in 1977 in the same way that she treated the MARTINEZ family group in 1976, because of their union activities.

Respondents Anti-Union Animus is Established.

Respondent argues that in proving anti-union motivation, the General Counsel is not required to produce direct proof of the Employer's state of mind, but may rely upon circumstantial evidence. (Lapeer Metal Products Company, 134 NLRB 1518, 49 LRRM 1380 (1961) ; Standard Dry Wall Products, Inc., 188 F.2d 362 enforcing 91 NLRB 544(1961). However, such indirect circumstantial evidence must be substantial and sufficient to support an inference of discriminatory motivation of the employer charged

with having violated the Act. (NLRB v. Ford Radio & Mica Corp., 285 F.2d 457, 42 LRRM 2620, denying enforcement to 115 NLRB 1046 (CA 2.d 1958); NLRB v. European Cars Ypsilanti, Inc., 136 NLRB 1595, 50 LRRM 1058 (1962). Phillips & Buttorff Mfg. Co., 96 NLRB 1091 (1951); NLRB v. Murray Ohio Mfg. Co., 326 F.2d 509, 513, 55 LRRM 2181, (6th Cir. 1964); Acme Products, Inc. v. NLRB, 389 F.2d 104, 106, 67 LRRM 2536 (8th Cir. 1968).

I do find anti-union animus and accept the circumstantial evidence noted hereafter as substantial and sufficient to support my inference of discriminatory motivation of Respondent in refusing work to the alleged discriminatees.

I have also taken Into account the testimony and evasive, if not false, assertions by MR. FRANCIS MURPHY at the hearing. He presented an air of one who already represents an anti-union attitude.

The election objections filed by Respondent after the election in September, 1975, were rejected by the Board which upheld the election and certified the UFW. (O. P. Murphy & Sons, 3 ALRB No. 26 (1977). The testimony of Respondent's witnesses at the election objections hearing in December, 1975, referred to MANUEL SANCHEZ and JOSE LUIS GOMEZ as well as to VICENTE MARTINEZ and RAYMUNDO MORALES, two of the discriminatees named in Case No. 76-CE-33-M. Despite the UFW's overwhelming victory in the election, Respondent incurred the expense of an objections hearing on apparently meritless grounds presumably to delay the Board's certification of the Union. Respondent's anti-union animus was clear at the time of the election objections hearing when its objections were based on conduct of the more outspoken union supporters during the 1975 campaign. The Board dismissed all the objections of Respondent.

In the 1976 season following the election, Respondent refused to rehire union activists VICENTE MARTINEZ and his family and MANUEL and MARIA LUZ SANCHEZ. On September 1, 1976, charges in Case No. 76-CE-33-M were filed in the matter which proceeded to hearing in March, 1977. The ALO's decision (GCX-1) found Respondent violated Sections 1153 (a) and 1153(c) of the Act for discriminatorily refusing to rehire the MARTINEZ Family. When Respondent refused again to rehire the MARTINEZ Family at the beginning of the 1977 season, the Board authorized the General Counsel to seek injunctive relief from the Monterey County Superior Court pursuant to Section 1160.4 of the Act. In Monterey County Case No, 73511, the Superior Court issued a Temporary Restraining Order on August 4, 1977, enjoining Respondent from denying reemployment to the MARTINEZ Family (GCX-2). Notwithstanding the Court's Order, Respondent continued to express its anti-union animus by refusing to rehire family member BALTAZAR MARTINEZ. A petition for contempt proceedings was filed by the General Counsel on September 16, 1977. The Court ordered Respondent to appear and show cause why contempt should not be found on September 23, 1977 (GCX-4). On September 23, 1977, after a trial on the matter at which all parties appeared, the Superior Court held Respondent in contempt of Court and fined the Company accordingly.

I have taken judicial notice of "all relevant documents and facts" from prior cases involving the same parties. (See, e.g., NLRB v. Harrah's Club, CA 9 , 1968, 69 LRRM 2775; Longshoremen (ILWU), Local 13, 1974, 88 LRRM 1117). I conclude that anti-union animus is established.

Discriminatory Motive Inferred.

Counsel for Respondent argues that assuming, solely arguendo, the Respondent discriminated against the alleged discriminatees, the General Counsel has the affirmative burden to show that the discrimination was based solely upon the criterion of union membership. (Pittsburg-DesMoines Steel Co. v NLRB, supra).

He noted that there exists a legitimate business justification for the conduct of the Respondent which provides a sufficient inference to determine that any discrimination was not based solely upon union activity of the alleged discriminatees .

Assuming the Respondent had knowledge of union activities of the alleged discriminatee, he argues, this occurred almost two years previous to the date of this hearing. "Certainly with the passage of time, the attitudes of individuals change with respect to specific ideologies. Just because a certain employee had participated in electioneering almost two years ago on behalf of the Union, does not mean that he still adheres to his same ideology." I must note on the contrary that even MR. FRANCIS MURPHY demonstrated his holding on to an anti-union ideology as evidenced by his demeanor and misleading testimony. How can one assume that employees have abandoned their beliefs in the union merely by the passage of time? In any case, there had been no let up in the discriminatory acts over the prior two (2) years. Matters were kept fresh by the employer.

Section 1153 (c) fo the Act prohibits employers from altering their hiring practices for the purpose of discouraging the union activities of its employees. This statuory prohibition applies to employees whose employment is terminable at will at any time by either party. See, e.g., NLRB v. Waterman Steamship Corp., 309 U.S. 206, 5 LRRM 682 (1940).

An employer's true motive in a refusal to rehire case is generally controlling in determining whether the Act has been violated. However, it is well-established that direct evidence of intent to discourage union membership is not an indispensable element of proof where the employer's conduct inherently discourages union membership. Radio Officers Union v. NLRB, U.S. Sup. Ct. 1954, 33 LRRM 2417. There need be no showing of an immediate change in employees' attitudes as a result of the employer's actions if the foreseeable consequences are inherently destructive of protected employee rights. NLRB v. Erie Resistor Corp., U.S. Sup. Ct. 1963, 53 LRRM 2121. An employer's "pick and choose" process of refusing to rehire a

few union adherents while reemploying many other known union supporters may constitute discriminatory conduct because of its discouraging effect upon union activity among the workers "chosen" to be reemployed. Harold W. Baker Co., 18 LRRM 1464 (1946).

In NLRB v. Putnam Tool Co., 290 F2d. 663, 48 LRRM 2263 (6th Cir., 1961), the Court held that because direct evidence of a person's state of mind is generally not available, circumstantial evidence is sufficient to support a finding of an employer's motivation for discharge. NLRB tests for finding the true motivation of an employer in discharge cases are instructive to the instant case of a refusal to rehire. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 LRRM 620 (1945). In NLRB v. Bird Machinery Co., 161 F2d 589 (1st Cir. 1947), the Court stated:

> "... (D)irect evidence is seldom attainable when seeking to probe an employer's mind to determine the motivating cause of his actions. (Citations). Moreover, the weight to be accorded the inferences by the Board (that the discharges were discriminatory) is augmented by the fact that the explanation of the discharges offered by Respondent did not stand up under scrutiny."

The NLRB precedents support General Counsel's contention that the very fact that Respondent has offered a less-than-credible explanation of its conduct is itself evidence of an intent to commit an unfair labor practice. In NLRB v. Eclipse Moulded Pod. Co., 126 F2d 576 (7th Cir., 1942), the Court held that in light of the confused and inconsistent testimony of the employer's officials as to reasons for discharge, and in light of the hostility of the employer to the union, the circumstances reasonably supported the Board's inference that an employee was discharged for union membership.

The instant case is not as clear-cut as the facts were in Case No. 76-CE-33-M. In that case, the MARTINEZ family were victims of Respondent's new application procedure. The 1976 implementation of the application procedure following the election was an unannounced change in conditions of employment. The changed employment conditions affected workers who had picked Respondent's tomatoes for the previous 7-8 consecutive years. The application procedure has now been in effect for two seasons. As background to the instant matter, however, it is noteworthy that Respondent failed to rehire several of the instant discriminatees in 1976 as a result of its discriminatory policy: i.e., YOLANDA GUZMAN, MANUEL and MARIA SANCHEZ, and JOSEFINA GOMEZ GUZMAN.

In the cases of the SANCHEZES and YOLANDA GUZMAN, Respondent's defense is their failure to file applications. However, as Respondent stipulated herein, ARROYO hired people

in 1976 and 1977 who initially applied for work in the field after the season started. It is now Respondent's position that because they didn't work in 1976 they had no priority in 1977. I agree with General Counsel's contention that this is a convenient way for Respondent to cover up its initial discriminatory conduct in 1976 in order to avoid liability in 1977. With respect to JOSEFINA GOMEZ GUZMAN who filed an" application in 1976 at the same time her hsuband RAFAEL did, there is no defense on record as to why ARROYO refused her employment. Both RAFAEL and JOSEFINA testified that they went to the fields and persisted in talking to ARROYO after the 1976 season started because she had not called them to work. On the day ARROYO hired RAFAEL, she refused to hire JOSEFINA although other persons were hired that same day. ARROYO admitted she knew RAFAEL'S wife. JOSEFINA continued to request employment when she came to the field herself after RAFAEL was hired, but ARROYO continued to deny her employment. It is symptomatic of Respondent's discriminatory motive that ARROYO refused employment to JOSEFINA in light of the stipulation that family groups generally work together. ARROYO'S failure to rehire JOSEFINA in 1976, was in fact a plan to force RAFAEL to quit the season early since ARROYO knew the couple always worked together. In 1977, Respondent used the excuse that RAFAEL left before the end of the season as a defense to discriminatory motivation.

JOSE LUIS GOMEZ, the UFW election observer, was hired in 1976. GOMEZ testified that it was his common practice to leave the tomato harvest each year before it was finished in order to work at Paul Masson, the wine company that has a contract with the. UFW (GCX-1). GOMEZ testified that many people leave the harvest early in order to pick grapes. Even MIKE MURPHY testified that many people leave early to work in the grapes (RTIV-565). CONCEPCION GOMEZ, SOCORRO, GUADALUPE and JOSEFINA GUZMAN also worked in 1976, out did not finish the season. There was no evidence presented by Respondent to indicate that employees in 1976 were advised they would not be rehired if they left the harvest early. I infer from this evidence that Respondent fabricated a policy of preferential hiring to cover up its motive for refusing to rehire the alleged discriminatees.

Respondent relies on the defense that new employees were preferred over those who didn't finish the 1976 season. FRANCES MURPHY admitted that Respondent had no way to guarantee the new employees would stay through the end of the season. MURPHY also admitted that there was no way to guarantee that the old employees who completed the 1976 season would finish the 1977 season. (RTV-642-643). ARROYO testified that she preferred to hire old workers over new workers and that only when she couldn't get the old workers would she hire new people. (RTI-49). She admitted that MANUEL SANCHEZ, RAFAEL GUZMAN and JOSE LUIS GOMEZ are old workers. (RTI-52-54).

The contradictory testimony of Respondent's supervisors raises the inference of a discriminatory hiring policy. Respondent's failure to produce the alleged list of people who

finished the 1976 season discredits its own defense on that score. MIKE MURPHY who allegedly made up the list, according to FRANCIS MURPHY, did not mention the existence of such a list in his testimony regarding the 1977 hiring policy. (RTIV-545-546). FRANCES ARROYO did not mention a list in her testimony either. To the contrary, she testified that she took the names and phone numbers of people who applied in the field since she hired people to fill up crews as she needed them, i.e., friends and relatives of people who were already working. (RTI-43-44).

MIKE and FRANCIS MURPHY testified that Respondent cut off accepting applications after July 22, 1977, except for those who had finished the 1976 season. However, FRANCES ARROYO accepted applications from the GUZMAN sisters on July 27 and from ANTONIO MARGARITO a new worker on the first day of August. In contradiction to Respondent's purported policy of hiring only employees who finished the 1976 season ARROYO hired MR. MAGARITO as a member of Crew # 2. MR. MARGARITO testified that he had never before worked for O. P. MURPHY & SONS or picked tomatoes. Nevertheless, ARROYO hired him at the field on the first day of the season. She also hired MARGARITO'S son RODOLFO on that day even though he had not filed an application. Acorrding to ARROYO, she only hired people for Crews # 1 and # 2 from the 1976 season. She testified that if someone didn't show up then she would wait and call again that evening. ARROYO obviously did not follow her own policy when she hired ANTONIO and RODOLFO MARGARITO. These inconsistencies suggest a less than candid explanation of the hiring policy by Respondent's supervisors and agents.

Finally, ARROYO testified that Crew # 3 was short on the first two (2) days. She had called them to work, i.e., August 6 and 8. Only about fifteen (15)-twenty (20) people out of forty (40) showed up. ARROYO admitted that only the second day, (August 8) she hired people who were looking for work in the field to fill up the Crew. According to ARROYO, the people she hired that day had filed applications and she knew them from past work with Respondent. (RTI-38-39). The GUZMAN family group was at the field on that day to ask for work. They had applications on file and they had previously worked for Respondent. They arrived at the field before the crews began working. However, ARROYO maintained throughout her testimony that she never needed any member of the GUZMAN family on the days they asked for work.

In accord with the foregoing discussion, I conclude that circumstantial evidence preponderates in favor of a finding that Respondent's motive was discriminatory.

Sound Business Reasons not Demonstrated.

Counsel for the employer states that an employer has a right to hire and fire at will so long as such action is not based on opposition to legitimate union activity. (See NLRB v. Century Broadcasting Corp., 419 F.2d 771, 778, 72 LRRM 2905, 2910(8th Cir.1969). Where management can point to sound business

reasons for its failure to hire an individual, the Board must prove that these reasons were not the motivating basis for rejection of an application for employment or they were, even if sufficient, pretextual. (See Reliance Ins. Companies v. NLRB, 415 F.2d 1, 7. 72 LRRM 2148 (8th Cir. 1969). In my opinion, Respondent failed to show a sound business reason for its failure to hire the alleged discriminatees. In fact, Respondent did offer the jobs later in the season, after the matter came up at the negotiation table. If it had a sound reason to not hire it would surely have remained with that position.

Further, I conclude that Respondent's conduct was inherently destructive of employee rights. NLRB v Great Dane Trailers, Inc., 65 LRRM 2465 (1967). "If it can be concluded that employer's discriminatory conduct was inherently destructive of important employee rights, no proof of anti-union motivation is needed and NLRB can find a violation of LMRA even if employer introduces evidence that the conduct was motivated by business considerations ..."

Counsel for Respondent cites Federal Paper Board Company, Inc., 206 NLRB No. 100, 84 LRRM 1479, 1380 (1973) and Swift Textiles, Inc., 88 LRRM 1371, 1372, to show that an employer did not violate 8(a) (b) of the NLRA when it failed to hire a family member of a known union adherent. I find those cases inapplicable here because in the agricultural business, or at least as a practice in the instant case, it is common for all members of a family to be hired together and treated as a single unit.

Counsel for Respondent notes that reliance upon prior unfair labor practice charges by the Hearing Officer for findings and conclusions based upon that evidence alone is not sufficient: for a valid order. (Singer v. NLRB, 64 LRRM 2313, at 2314 (CA 8th 1967). I have not relied exclusively upon prior unfair labor practice charges in determining this case. To the extent that reference was made to such prior charges it is noted and explained.

In light of all the circumstances discussed in the foregoing analysis, I find that Respondent did in fact discriminatorily refuse to hire the alleged discriminatees as set forth in the complaint herein and did violate Section 1153 (c) of the Act. Accordingly, I find also violations of Section 1153 (a) of the Act. Such discriminatees are: YOLANDA GUZMAN, JOSEPHINA LOPEZ GUZMAN, SOCORRO AGUILAR, GUADALUPE GUZMAN, RAFAEL GUZMAN, JOSEPHINA GOMEZ GUZMAN, JOSE LUIS GOMEZ, CONCEPCION GOMEZ, MANUEL SANCHEZ, MARIA LUZ SANCHEZ, MARTIN HERNANDEZ and PEDRO GUZMAN.

Union Representative Manney was Trespassing.

General Counsel asks that I make a finding that the UFW had a right to post certification access. I do not so find. Instead I find that LINDA MANNEY was trespassing.

In promulgating Section 20900 of its Regulations (the Access Rule), the Board declared its policy as follows:

Section 20900-Solicitation by Non-Employee Organizers --

Labor Code Section 1140.4 declares it to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing.

(a) Agricultural employees have the right under Labor Code Section 1152 to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as well as the right to refrain from any or all of such activities except to the extent that such right may be affected by a lawful agreement requiring membership in a labor organization as a condition of continued employment. Labor Code Section 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of these rights.

(b) As the United States Supreme Court has stated: Organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages of organization from others. When alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require that a reasonable and just accomodation be made between the right of unions to access and the legitimate property and business interests of the employer.

(c) Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor.

> (d) The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issues to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections..
>
> (e) Accordingly, the Board will consider the rights of employees under Labor Code Section 1152 to include the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support . . .

The Access Rule as promulgated by the Board refers to pre-election access by union organizers. Access under Section 20900 is available to any labor organization for four (4) thirty (30)-day periods in any calendar year. Access commences when the labor organization files its notice of intent to take access in the appropriate regional office. The right of access continues after an election petition is filed until five (5) days following the completion of the final ballot count.

The Access Rule also provides for voluntary agreements on access between unions and employers in order to facilitate resolution of problems that may arise. The voluntary agreements may expand the access granted to the union but may not limit the right.

Organizers may enter the employer's property one (1) hour before and after work and during the lunch break. Organizers are required to identify themselves by name and labor organization upon the request of the employer's agents.

The NLRB's leading case on access by non-employee union organizers, NLRB v. Babcock and Wilcox Co., 351 U.S. 105, 1956, held that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the Union through other available channels of communication still enable it to reach the employees with its message . . . (38 LRRM at 2004}.

Thus, under NLRB authority, the Union has the affirmative burden of showing that it has no other reasonable channels of communication with the employees before an employer has to yield its property rights to the union organizers, and then only to the extent necessary to communicate the Union's message to the employees.

Under the facts of the instant case, the Union has not met this burden. The UFW organizer, LINDA MANNEY, testified that she had not requested permission of any Company official prior to entering the Company's property to speak to employees. To the contrary, she stated to one supervisor, that she had a legal right to be there. It is apparent that MS. MANNEY had been taking access at the commencement of the season. The UFW, however, had not received any official directive with respect to post-certification access until August 15, 1977. (See Respondent Exhibit letter to Melvern Mayo from Allyce Kimerling dated August 15, 1977).

According to the Respondent's attorney, WAYNE A. HERSH, the letter granting such extraordinary access was ex parte, in that it was granted on the same day it was received by the ALRB, Salinas office, and the Respondent was not contacted regarding its position. Furthermore, on August 19, 1977, MR. MAYO contacted MR. HERSH and indicated that the access granted to the UFW had been revoked.

The Board has not yet considered the rights of union organizers to speak to employees on the property of employers after a union has been certified.

I defer to the Board for consideration of a change to its rule, but in my own opinion it is unnecessary to grant such rights where unions have other means of communicating with employees. I conclude in the meantime that LINDA MANNEY was trespassing.

Respondent Did Not Violate 1153 (a) by Taking Photographs of UFW Organizer.

The evidence is undisputed that FRANCIS MURPHY authorized MIKE and ANDY MURPHY and FRANCES ARROYO to take photos of LINDA MANNEY whenever she came to Respondent's property to talk to employees. Some of the photos are in evidence (GCX-29-A-D) and contain vague pictures of employees as well. It is well-established that surveillance of employee activities which has a reasonable tendency to affect employee exercise of statutory rights violates Section 1153(a); proof that the surveillance actually interfered with employees' union activity is not necessary. Merzoian Bros, et al., 3 ALRB No. 62 (1977) .

In Summit Nursing And Convalescent Home, 204 NLRB No. 19, 83 LRRM 1323 (1973)it was held that an employer did not violate the LMRA by virtue of its apparent photographing of non-employee union organizers while they were soliciting an employee to join the Union since this incident was isolated.

The Board held that at the time of the incident, the organizers were "trespassing" on the employer's property. Also, before the pictures were attempted, officials of Company had been advised by the Company's attorney to take such a photograph for the purpose of using it as evidence in future injunctive proceeding against the Union (83 LRRM at 1324).

Franklin Stores Corp., 199 NLRB No. 10, 81 LRRM 1650 (1972) held no violation of Section 8(a)(1) of the LMRA when an employer photographed a union organizer who was speaking to employees on the floor of its store, since the employer had a right to prohibit such activity altogether. (There existed a valid No-Solicitation rule for work time).

In Berton Kirshner, Inc., 209 NLRB No. 170, 85 LRRM 1543 (1974) an employer did not violate the LMRA when it took pictures of union representatives while they were handbilling employees who were leaving the employer's premises, since this conduct does not constitute either surveillance of union activity or creation of impression of such surveillance. The Board found that 1) the photograph handbilling occurrred on the employer's property and the employer promptly called the police and 2) the Union's subsequent handbillings occurred without incident.

Lastly, in M. P. Building Corp., 165 NLRB 829, 65 LRRM 1581 (1967) the Board held that an employer did not violate the LMRA by taking pictures of employees at work, even though this conduct at times constituted harassment, since it was not connected to union activity.

The instant complaint alleges that the Respondent has engaged in surveillance by taking photographs of employees who were, engaged in concerted activities with UFW organizers for the purpose of collective bargaining.

Prior to the time of the access letter, the Respondent's position was that non-employee union organizers had no access rights. Furthermore, it was a proper subject for collective bargaining between the Respondent and the Union. In order to document any possible violations of trespass laws, the Respondent: through FRANCIS MURPHY, directed that ANDY MURPHY take photographs of the UFW organizers when they came to the fields.

ANDY MURPHY was told to document everything when someone was trespassing. According to MR. HERSH, unfair labor practice charges were filed alleging violations of 1154 (a) (1) and (c) in early August. Furthermore, the Company also filed a Motion to Deny Access in conjunction with the above unfair labor practice charges. MR. HERSH went to Monterey Superior Court on August 15, 1977, in order to seek an injunction against the access of UFW organizers. The purpose of these photographs was to document the trespass of organizers for evidence at both the injunctive hearing and for the ULP charges. In this respect, the instant case, is very similar to the facts of Summit Nursing and Convalescent Home, supra. Furthermore, the Respondent had a legal right to exclude the organizers before it had received the letter from MR. MAYO since there was not law in existence under the ALRB which governed the situation. (See Franklin Stores Corp., supra.)

Access to the employees was available, but the Union did not avail itself of any alternative means of communication other than to come onto the business premises. There was some

testimony that some employees were members of the Negotiating Committee, which has one or two representatives from each crew which attend negotiation sessions. Messages to the employees could also have been sent through these individuals when they returned to work. I find that the Union has not met its burden.

The General Counsel argues that the photographing of employees while they were engaged in speaking to UFW organizers violated Section 1153(a) because this was protected activity. I do not find it to be protected activity in this instance where the Union agent was trespassing and employees were eating.

Accordingly, I recommend that the charge of violation of Sections 1153(c) and (a) as they relate to surveillance and photographing of UFW organizer and employees be dismissed.

The Alleged Attempted Arrest of a Non-Employee Union Organizer is not Violative of Section 1153 (a) of the Agricultural Labor Relations Act Where an Organizer is Trespassing on the Company's Premises.

The complaint alleges that the Respondent harassed and interfered with a UFW organizer by calling the Sheriff to the Respondent's business premises to arrest said organizer in front of employees in order to discourage support for the UFW.

The Respondent contends that it was justified in calling the Sheriff to arrest LINDA MANNEY because she was trespassing on the Company's premises at a time when employees were working. The facts show that MS. MANNEY was not arrested in the presence of employees.

ANDY MURPHY testified that MS. MANNEY came to the fields and would not identify herself when requested to do so. She would come at different times, sometimes at 11:00 a.m., other times at 2:00 p.m. in the afternoon. She would also come at lunch time and also in the mornings.

MIKE MURPHY testified that he was directed by FRANCIS MURPHY to ask for an organizer's identification and then to tell that person to leave. He remembers that LINDA MANNEY came on August 4, 1977, to see employees while they were working. She had no identification button on her outer clothing. MIKE MURPHY asked her for an identification three (3) times and she finally went to her car to get one. She responded that she had a right to be there MR. MURPHY testified that no one from the Company had instructed him that LINDA MANNEY was coming to the fields.

MS. MANNEY, on cross-examination, conceded that she had never asked any Company official for permission to come onto the premises.

On the day of MS. MANNEY'S "arrest", MIKE MURPHY stated that he put her under "citizen's arrest" because she did not leave

the fields. She was going through the fields in order to get to the employees who were working. MIKE testified that he then called the Sheriff. MS. MANNEY was not, however, placed into custody by the Sheriff's Department.

In Miller's Discount Department Stores, 198 NLRB No. 40, 81 LRRM 1145 (1972) an employer did not violate the LMRA when it caused the arrest of two union organizers who were in its department store. The employer had invited the union organizers to the store in order to discuss disharge of employees, but the employer caused the organizers to be arrested only after they refused to acede to the employer's wish that they leave.

Miller's Discount Department Stores, supra, is analagous to the instant case. MS. MANNEY's status on the business premises of the Respondent was that of a trespasser. Legally she had no right to be there, nor had she sought any permission from the Respondent. Furthermore, she was requested to leave by a Company supervisor, and when she refused she was placed under citizen's arrest. The incident transpired without employees' knowledge of what was said, and furthermore, the Sheriffs did not arrest MS. MANNEY, but merely escorted her from the field.

Thus, the conduct of the Company was the product of its legal right to evict a trespasser on its premises and was not directed nor motivated towards discouraging support for the UFW.

The evidence does not preponderate in favor of the conclusion that the Respondent's conduct was directed at discouraging support for the UFW, but was based upon a valid legal justification I recommend that charge should be dismissed.

The Respondent, Through Its Agent, CHARLIE DUNCAM, Did Not Threaten To Do Physical Injury to a UFW Organizer in the Presence of Employees.

The General Counsel has alleged that the Respondent, through its agent, CHARLIE DUNCAN, threatened physical injury to a UFW organizer, LINDA MANNEY, in view of employees in order to discourage support for the UFW.

MS. MANNEY testified that she was at CHARLIE DUNCAN FARMS in order to speak to employees who were on lunch. As she was crossing a field, she observed a man running after her and shouting at her. When he approached her, he stood approximately two (2) feet from her and threatened her with physical harm. She stated that there were employees in the immediate area who saw this.

ROBERTO BALTHAZAR MARTINEZ, a young picker in one of the crews who worked that day, testified that he saw the incident while he was on lunch. He did not understand what MR. DUNCAN was saying.

MR. DUNCAN testified that he owns the premises and corps where MS. MANNEY was on the day in issue. He stated that she was walking through the field and stepping on tomato plants. When he observed her he waived his arms to get her attention and then approached her and requested that she leave the field. He at no time threatened MS. MANNEY with physical injury.

CARLOS ESCARSEGA, a foreman of the crew in which ROBERTO BALTHAZAR MARTINEZ worked, testified that he observed MS. MANNEY and MR. DUNCAN in the field that day. He stated that employees were working at the time he saw MS. MANNEY and MR. DUNCAN and that he was approximately eighty (80) meters away. He was sure that no one in his crew was closer to MANNEY and DUNCAN than he was. He also observed MS. MANNEY walking through the field.

I do not find that a preponderance of evidence is available to support the charge of a physical threat and I do not find that the action was intended to have a chilling effect on organizing. I am convinced that MR. DUNCAN just wanted her to stop stepping on the tomato plants.

I recommend that the charge in this instance be dismissed.

REMEDY

Having found that Respondent has engaged in certain unfair practices within the meaning of Section 1153 (a) and (c) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the entire record, the findings of fact and conclusion of law, and pursuant to Section 1160.3 of the Act, I hereby issue this Order:

ORDER

Respondent O.P. MURPHY & SONS, its officers, agents, successors and assigns shall:

1. Cease and desist from:

   (a) In any manner interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent

that such right may be affected by an agreement the type of which is authorized by Section 1153(c) of the Act.

(b) Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully refusing to rehire or in any other manner discriminating against individuals in regard to their hire or tenure of employment, or any term or condition of employment, except as authorized by Section 1153 (c) of the Act.

(c) Refusing to rehire or otherwise discriminating against its agricultural employees because they have filed charges or given testimony.

2. Take the following affirmative action:

(a) Offer to the following employees immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges: YOLANDA GUZMAN, JOSEFINA LOPEZ GUZMAN, SOCORRO AGUILAR, GUADALUPE GUZMAN, RAFAEL GUZMAN, JOSEFINA GOMEZ GUZMAN, JOSE LUIS GOMEZ, CONCEPCION GOMEZ, MANUEL SANCHEZ, MARIA LUZ SANCHEZ, MARTIN HERNADEZ and PEDRO GUZMAN.

(b) Make each of the employees named above in subparagraph 2(a) whole for all losses suffered by reason of their termination. Loss of pay is to be determined by multiplying the number of days the employee was out of work by the amount the employee would have earned per day. If on any day the employee was employed elsewhere, the net earnings of that day shall be subtracted from the amount the employee would have earned at O. P. MURPHY for that day only. The award shall reflect any wage increase, increase in work hours or bonus given by Respondent since the discharge. Interest shall be computed at the rate of seven (7%) percent per annum.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records, and reports, and other records necessary to analyze the back pay due to the foregoing named employees.

(d) Distribute a NOTICE TO WORKERS (to be printed in English and Spanish) to all present employees and to all employees hired by Respondent within

six (6) months following initial compliance with this Decision and Order and mail a copy of said NOTICE to all employees employed by Respondent between August 4, 1977, and the time such NOTICE is mailed if they are not then employed by Respondent The NOTICES are to be mailed to the employees' last known address, or more current addresses if made known to Respondent.

(e) Post the NOTICE in prominent places at Respondent's Soledad vicinity properties in an area frequented by employees and where other NOTICES are posted by Respondent for not less than a six (6)-month period.

(f) Have the NOTICE read in English and Spanish on Company time to all employees by a Company representative or by a Board Agent and to accord said Board Agent the opportunity to answer questions which employees may have regarding the NOTICE and their rights under Section 1152 of the Act.

(g) Make available to the UFW sufficient space on a convenient bulletin board for its posting of notices and the like for a period of six (6) months from Respondent's beginning compliance with the mandates of this Decision and Order, and to provide the UFW the names and addresses of all employees who will receive the NOTICE TO WORKERS.

(h) Notify the regional director of the Salinas Regional Office within twenty (20) days from receipt of a copy of this Decision and Order of steps the Respondent has taken to comply therewith, and to continue reporting periodically thereafter until full compliance is achieved.

It is further recommended that the allegations of the complaint alleging violations by Respondent of Sections 1153 (a) and 1153 (c) by photographing employees and UFW agent, and by calling the Sheriff to arrest the UFW organizer be dismissed.

DATED: April 17, 1978

Thomas Patrick Burns
Administrative Law Officer

EXHIBITS

ALRB GENERAL COUNSEL:

1. Decision of Hearing Officer in ALRB Case No. 76-CE-33-M
2. Temporary Restraining Order Issued by Superior Court
3. Preliminary Innunction and Final Order, issued 9/16/77
4. Order to Show Cause Re Contempt Issued by Superior Court
5. Charge. Against Respondents, 77-CE-31-M
6. Charge Against Respondents, 77-CE-34-M
7. Charge Against Respondents, 77-CE-36-M
8. Charge Against Respondents, 77-CE-37-M
9. Consolidated Complaint
10. Respondent's Answer to Complaint
11. ~~Charge against Respondent, 77-CE-41-M~~
12. ~~Charge against Respondent, 77-CE-42-M~~
13. ~~Charge against Respondent, 77-CE-43-M~~
14. ~~Charge against Respondent, 77-CE-53-M~~
15. Respondent's Motion for Continuance and General Counsel's Opposition to Motion
16. Respondent's Motion for Discovery
17. Employment Application of Yolanda Guzman (A and B)
18. A and B Employment Application of Guadalupe Guzman
19. Guzman Family Tree
20. Employment Application for Rafael Guzman Lopez
21. A and B Employment Application for Josefina Guzman
22. Employment Application for Jose L. Gomez Cabrera
23. Employment Application for Concepcion Gomez Cabrera
24. Employment Application, Manuel Sanchez

25. A and B Employment Application, Maria Sanchez
26. A and B Employment Application, Pedro Guzman
27. A and B Employment Application, Josefina Guzman
28. Employment Application, Socorro Aguilera
29. A, B, C, D Photos

RESPONDENT:

1. ~~Declaration of Yolanda Guzman~~
2. ~~Declaration of Rafael Guzman~~
3. ~~Declaration – Jose Luiz Gomez~~
4. ~~Declaration – Manuel Sanchez~~
5. ~~Declaration Pedro Guzman – –~~
6. ~~Employment Application, Socorro~~ Guzman
7. ~~Declaration, Enedina Contreras~~
8. Declaration by Linda Manney
9. ~~Declaration by Roberto Martinez~~
10. Motion to Deny Access
11. Order Denying Motion to Deny Access
12. UFW Letter to Melvern May
13. Payroll Record for Jose Luis Gomez
14. ~~Diagram of tomato field~~