STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JACK BROTHERS AND McBURNEY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	CASE NOS. 76-CE-100-E 76-CE-106-E 76-CE-128-E 76-CE-138-E 76-CE-63-E 4 ALRB No. 18

DECISION AND ORDER

On April 15, 1977, Administrative Law Officer (ALO) Alan W. Kempler issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party and the General Counsel each filed exceptions and supporting briefs.

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

The Board has considered the record and the attached 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, as modified herein.

1. We do not agree with the ALO's finding that the Employer, Neil Jack, "scuffled" with UFW organizer, Murgia, on December 9, 1976, and thereby violated Section 1153(a) of the Act. Although the record is inconclusive as to whether there was physical contact between the Employer and the organizer on that occasion, it does reveal that the organizer was interfering with

a working crew and that the Employer ordered him to leave the area and he did. There is insufficient evidence to establish that the Employer interfered with Murgia or any other organizer lawfully engaging in organizational activities, as permitted by 8 Cal. Admin. Code Section 20900 (e)(3)(A). Accordingly, we reject the ALO's findings on this issue and dismiss the allegation that the Employer's actions on December 9, 1976, violated Section 1153(a) of the Act.

2. We disagree with the ALO's conclusion that the statements of Respondent's general foreman to an employee on December 18, 1976, did not constitute unlawful interference and restraint.

The evidence presented by the General Counsel concerning the December 18th incident is undisputed. Ines Vargas, an employee of Respondent's for approximately thirty years, testified that Respondent's general foreman questioned him concerning his thoughts about the union and then told Vargas that if the union became the representative of the employees, he would no longer be able to return to work for Respondent after taking his customary two or three month summer leave. We believe that the conversation in its totality, i.e. the questioning of Vargas concerning his feelings about the union, coupled with the statement threatening loss of reemployment rights if the union won, constituted unlawful interference with, and restraint and coercion of employees' Section 1152 rights.

The ALO erroneously based his dismissal of this allegation of the complaint on Vargas[1] subjective reaction to the

foreman's statements. The test, however, for whether an employer's statements constitute an unlawful interference and/or threat is not the employee's reaction but whether the statements would reasonably tend to interfere with or restrain employees in the exercise of their rights guaranteed by the Act. Rod McLellan Co., 3 ALRB No. 71 (1977). We therefore find that Respondent violated Section 1153(a) of the Act by its foreman's interrogation and threat addressed to Vargas on December 18, 1976.

3. The ALO dismissed the allegation that Respondent violated Section 1153(a) of the Act by its labor contractor's statement to employees that Respondent said it did not want the union and would convert to alfalfa if the UPW won. At the hearing, the General Counsel offered to elicit testimony to prove that allegation/ but the ALO refused to take the testimony. In his decision, the ALO dismissed the General Counsel's offer of proof on the basis that the testimony sought to be elicited would be hearsay. We do not agree. Regardless of whether Respondent had made the statement attributed to it by the labor contractor, the testimony was clearly admissable as a threat by the labor contractor to employees to the effect that their support of the union would result in loss of employment. However, as the record does not contain testimony or other evidence on which we can base a finding in this respect, and as our remedial Order will not be materially affected by the ALO's failure to allow testimony on this issue, we hereby dismiss this allegation of the complaint.

We modify the ALO's recommended remedial order to reflect the findings and conclusions herein and to clarify Respondent's obligations with respect to the posting, mailing and reading of the attached Notice to Workers, which we have previously found to be necessary and warranted remedies for violations of the Act. Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the Employer, Jack Brothers and McBurney, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

   a. Interrogating employees concerning their union affiliation or sympathy or their participation in protected activities.

   b. Threatening employees with layoff or other loss of employment, or with an adverse change in working conditions, because of their protected activities or choice of bargaining representative.

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

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

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

   b. Post copies of the attached Notice to Workers at times and places to be determined by the Regional Director. Employer shall exercise due care to replace any notice which has been altered, defaced, or removed.

c. Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this order, to all employees employed during the payroll period encompassing December 18, 1976.

d. Arrange for a representative of the Employer or a Board agent to read the attached notice in appropriate languages to the assembled employees of the Employer on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Employer to all non-hourly wage employees to compensate them for time lost at this reading and question-and-answer period.

e. Notify the Regional Director in writing, within 20 days from the date of receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Employer shall notify him periodically thereafter in writing what further steps have been taken to comply with this Order.

DATED: April 6, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

NOTICE TO WORKERS

After a hearing in which each party had a chance to present its side of the case, the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has told us that union organizers may enter on our property to speak with you when you are eating your lunch and for an hour before and after work. We will not interfere with organizers who come here. You may talk with them freely.

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 to choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help and 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 ask you whether or not you belong to any union or support any union or how you feel about any union.

WE WILL NOT threaten you with loss of work because of your support for, or membership in any union.

DATE: JACK BROTHERS AND McBURNEY, INC.

by_____
(Representative)

4 ALRB No. 18

CASE SUMMARY

Jack Brothers and McBurney, Inc. (UFW)

4 ALRB No. 18
Case No. 76-CE-100/
106/128/138/63-E

ALO DECISION

A hearing was held before an Administrative Law Officer (ALO) on a complaint charging the Employer with violating the Act by interfering with a UFW organizing campaign on the Employer's premises.

1. The ALO found insufficient evidence to support the charge of discriminatory treatment of workers in retaliation for their support of the union, or the charge that the Employer illegally interfered in the organizing efforts of the union by calling workers into his office or by dispersing them while they were listening to union organizers.
2. The ALO concluded that the Employer violated §1153(a) by pushing an organizer and disrupting the organizer's discussion with workers/ but found no violation based on a supervisor's interrogation of an employee about his union beliefs and threatening the employee with loss of employment for supporting the UFW, or the Employer's labor contractor threatening a crew with loss of work if the union became their representative.

BOARD DECISION

The Board affirmed the ALO's findings in paragraph 1, above. As to paragraph 2, above, the Board found: (a) that the evidence was inconclusive as to whether the Employer actually pushed the organizer, but that the organizer was in violation of the Board's access regulation at the time of the incident and that there was no proof the Employer interfered with any organizer lawfully engaged in organizing activities under the access regulation and consequently it reversed the ALO's finding of violation of §1153Ca); Cb) that the ALO had improperly relied on the subjective lack of fear of the employee who was threatened and, citing Rod McClellan Co., 3 ALRB No. 71 (1977), reversed the ALO and found a violation of §1153(a); and (c) that the ALO had improperly excluded as hearsay preferred testimony as to the labor contractor's threats of diminished employment, but as a finding on this alleged threat would not affect the remedy, the Board affirmed the ALO's dismissal of that allegation.

REMEDIAL ORDER

As a remedy for the Employer's interrogation and threat, the Board ordered the Employer to cease and desist from engaging in such conduct, to sign, post and mail to its employees a copy of a Notice to Workers explaining its actions, and to arrange for a reading of the Notice to its assembled employees on company time.

This case summary is for information only and is not an official statement of the Board.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JACK BROTHERS AND McBURNEY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA AFL-CIO, Charging Party.	CASES NOS.	76-CE-100-E 76-CE-106-E 76-CE-128-E 76-CE-138-E 77-CE- 63-E

DECISION

Statement of the Case

ALAN W. KEMPLER, Administrative Law Officer: These cases were heard before me in Calexico, California, on March 17 and 18, 1977. The order of consolidation and the complaint issued on February 1, 1977. Subsequently an amended complaint issued. A summary of the charges and my recommendations, as well as the parties' stipulations, as to disposition, follows:

The Complaint should be dismissed as to the matters set forth in Paragraph 9 (a), (Case 106-E), namely interference with organizing rights by calling the workers to the office on December 3, 1976, alleged in Paragraph 10 to violate Section 1153 (a) of the Agricultural Labor Relations Act ("The Act").

The Complaint should be dismissed as to the matters set forth in Paragraph 9 (b) (Case 100-E), namely interference with organizing efforts by virtue of a purported threat, attributed to Respondent's officers by a labor contractor, to the effect that Respondent did not want the union and its adherents should leave, including a further threat proffered in evidence that Respondent would plant its fields to alfalfa, thereby diminishing the need for workers. The alleged conduct was said in Paragraph 10 to violate Section 1153 (a).

Counsel for the Board withdrew the charge based on the facts set forth in Paragraph 9 (c) namely violation of Section 1153 (a), originally alleged, consisting of scattering the workers while they were listening to UFW organizers.

The Board alleged in Paragraph 9 (d) (Case 106-E) and proved *a* violation of Section 1153 (a) in that, on December 9, 1976, before working hours, Neil Jack, Respondent's president, pushed a UFW organizer, one Murgia, and disrupted Murgia's discussion with workers. Remedies, as hereinafter set forth, should be ordered to prevent a recurrence of any such practice.

The Complaint should be dismissed as to Paragraph 9 (e) (Case 128-E), which alleged interference with organizing rights in violation of Section 1153 (a) in that Respondent's supervisor, Owens, interrogated a worker, Vargas, about the union support among the other workers, and expressed various opinions about the union and organizing rights.

Respondent, without admitting the allegations of Paragraph 9 (f) (Case 138-E) namely that Section 1153 (a) and (c) were violated in that the working conditions of employees, Vargas and Espinosa, were changed in retaliation for their union activities and the filing of an unfair labor practice charge, consented to an order, set forth with greater specificity below, to refrain from any form of discrimination in allocating work assignments, based upon employees organizing activities or support thereof.

The remedy recommended in connection with the activity alleged in Paragraph 9 (f), namely the consent order, is sufficient to prevent the occurence of such matters as are alleged in Paragraph 9 (g) (Case 77-63-E), namely, a violation of Section 1153 (c) based on a discriminatory layoff. Although the charges were not proven, dismissal of the Complaint as to matters alleged in Paragraph 9 (f) and (g) should await evidence of compliance with the proposed Consent Order.

During two days of hearings, witnesses testified for the charging party and Respondent. By stipulation, English-Spanish translation was provided by a Board employee. Stipulations as to cumulativeness of testimony and other procedural flexibility and cooperativeness of all concerned permitted the hearing, originally scheduled for five days, to be completed much earlier. Numerous exhibits were voluntarily produced by Respondent at my request. Briefs were filed by Counsel for the Board and Respondent.

The demeanor and credibility of the various witnesses is discussed below in connection with those issues involving a conflict in pertinent evidence, of which there was surprisingly little. Interpretations and opinions varied widely but there was no substantial dispute about the day-to-day practices and patterns of operation which formed the background for the key issues. To the extent there was conflict about such matters, the evidence offered by respondent, based on the exceptionally detailed and precisely recalled facts embodied in the testimony of respondent’s president, and corroborated by written records, produced in response to my requests, tended to be more reliable.

Stipulations as to jurisdictional facts

All pertinent jurisdictional facts were undisputed, and I find that Respondent is an "agricultural employer", within the meaning of Section 1140.4 (c) of the Act and the charging party is a "labor organization entitled to represent "agricultural employees" within the meaning of Section 1140.4 (b) and (d).

Respondent's operation

Respondent corporation, whose president, Neil Jack, exercises active, day-to-day supervision, and demonstrated deep personal familiarity with the employees and with all details of the Respondent's activities, operates 10 beet ranches, together with other ranches on which cotton, tomatoes, lettuce, wheat and alfalfa are grown, and employs about 40 persons on a permanent basis. Labor contractors provide additional personnel as required. Respondent's owned and leased properties aggregate about 4,800 acres, but it was undisputed that at all times pertinent to this case, only the 10 beet ranches required work by the general laborers, to whose problems this case was largely confined. In addition to some 10 general laborers, in a crew under the supervision of foreman Emilio Regalado (referred to as the "Regalado crew"), there was a maintenance crew of workers more skilled than, the Regalado crew, under the supervision of foreman Erasmo Gonzales preferred to as the "Erasmo crew"), consisting of two to five workers, depending upon requirements, an irrigation crew and tractor drivers. There is some interchange between the crews, particularly the Erasmo and Regalado crews, with two to three of the general laborers occasionally having the opportunity to work with Erasmo.

The beet crops are grown pursuant to contracts with sugar refiners. The various beet fields are planted progressively beginning in late summer and throughout early autumn. A few weeks after planting the young plants are thinned. Depending upon soil conditions on the ranches, which vary, the fields are irrigated every 30-45 days, and require one to two weeks to dry before any cultivation work can be done. The parties' estimates of required drying time conflicted.

Each beet field (two of the ten beet ranches contain more than one field) is weeded manually once during the fall-winter season. During the winter, grass (as distinguished from ordinary weeds), is removed with a chemical herbicide.

Insecticide application on the beet fields is done once in each season, when the plants are partly grown. The chemical employed, Thimet, is highly dangerous and application requires *a* State Department of Agriculture permit, valid for thirty days

after issuance, and which must thereafter be renewed. For at least one week after Thimet application, it is unsafe for employees to enter a field.

In the 1976-77 season, Respondent planted 963 acres to beets, as compared to 1076 acres in 1975-76 and 1110 acres in 1974-75. During the first eight weeks of 1977, when the Regalado crew is almost exclusively involved to beet cultivation, (tomato cultivation occurs at the end of February, a time not pertinent to this case), the Regalado crew and its members were assigned 40 days of work on this diminished beet crop. (See Note).

Respondent's president testified that one of the objectives of scheduling the various tasks was stability of employment for the year-round personnel. One of the critical issues in this case turns on whether that policy was upheld following the arrival of the union on the scene.

Organizing activity

During December 1976, the United Farm Workers of America ("UFW") sent organizers on a daily basis to Respondent's property in order to bring about certification of the UFW as the bargaining agent of Respondent's employees, and the election was held December 21, 1976. During the campaign, episodes occured on December 3, 4, 8, 9 and 18, each of which became the basis for an unfair labor practice charge. My special legal and factual conclusions as to each episode, together with a more extended discussion of a layoff subsequent to the election, are detailed below, but some overall perspective is useful.

In the main, the episodes were trivial. While it could not be said that a welcome was accorded by Respondent to the UFW, Respondent's various supervisory personnel having expressed in writing and in conversations with the employees their negative views about the union, the organizing period was not characterized by the bitterness and even violence which have unfortunately prevailed in other settings of this kind. Slogan shouting and button wearing were the object of no particular attention by

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Note: The Erasmo maintenance crew had 47 days of work in the period. In the first eight weeks of the three prior years, the Erasmo and Regalado crews had the following total days of employment :

Year:	1974	1975	1976
Erasmo	45.5	48	43
Regalado	41	44	38

Respondent's supervisory personnel. In only one instance, was a UFW organizer molested. No law enforcement personnel were called to the property and no employee was dismissed. The general work routine of the ranches proceeded as usual.

December 3, 1976

Prior to work, while they were listening to organizers, employees were called into the office to sign insurance cards. Clearly, this matter benefitted both the employer and employee. The question of whether the employees' interest in listening to the organizer was outweighed by the practical necessity of obtaining their signatures, so that the latter could be established as interference with their organizing rights in violation of Section 1153 (a) of the Act, turns on whether other reasonable alternatives were available for obtaining the signatures.

Respondent's property is extensive and groups of employees could be working in widely separated areas on a given day. Their departure times varied, Respondent having only sporadically enforced a policy of requiring the employees to remain until a fixed hour. At least some employees had a practice of leaving when they felt the day's assigned task was finished. One employee, Vargas, who testified on another issue, felt that such early departures were his right. Neil Jack admitted that during periods between sporadic enforcement efforts, Respondent was permissive in this regard. Clearly the brief period before the day's work began offered the most convenient opportunity for all concerned for signing of insurance cards.

On the one day in question, I conclude that the interest of the employees in having their insurance benefits protected, took precedence over the opportunity to hear the UFW organizers, who, with only one other exception, were not interfered with in their daily visits in December. Furthermore, from the isolated nature of these two incidents of alleged interference with the organizers, I conclude that the signing arrangements were not motivated by any desire of Respondent to interfere with the organizers. In the absence of such motive, a slight and trivial interference with employee interests does not rise to a violation of Section 1153 (a) of NLRB v. Brown, 380 U.S. 278, 289; 13 L. ed. 2d 839, 848 (1965).

December 4, 1976

The Board offered to prove that Lucio Gonzales, a labor contractor (not to be confused with Erasmo Gonzales, one of Respondent's foremen), said that Respondent's personnel said that they didn't want the UFW and that they would convert to an alfalfa operation requiring less personnel. If true, this occurence, in the context of an organizing campaign, could constitute a violation of Section 1153 (a) , for a labor contractor is impliedly

established as an agent of the employer who engages him under Section 1140.4 (c) and employers are responsible, respondent superior for threatening and other declarations of their agents and supervisory personnel in violation of Section 1153 (a), cf. NLRB v. Kaiser Agricultural Chemical Division, 473 F2d 374 (5th Cir. 1973;; NLRB v. Varo, Inc. 425 F2d 293 (5th Cir. 1970). An isolated incident of this kind, however, not shown to reflect employer policy, would not establish a violation. NLRB v. Garland Corp., 396 F2d 707 (1st Cir. 1968); NLRB v. Superior Co., 199 F2d 39 (6th Cir. 1952).

The opportunity did not arise to evaluate, in the light of the foregoing principles, the proffered declarations of Lucio Gonzales, because Gonzales did not appear and an examination of the *offer of proof,* reiterated in the brief of counsel for the Board, together with some new material (see Note), reveals again that his declaration was offered, not only for the fact of what he had said, but for the truth of another occurence, namely that Respondent had said the things that the hearsay declarant was assertedly repeating. It is, of course, immaterial whether Respondent actually intended to convert to an alfalfa operation, but whether personnel of Respondent said they would do so is a material fact (a verbal act) required to be supported by competent evidence. The California Evidence Code being applicable to ALRB hearings (Act Sec. 1160.3), such a statement could not be received into evidence Evidence Code, Section 1200.

In any event, even if Lucio Gonzales had been present to render his version of the alleged event, careful scrutiny of the declaration attributed to his principal, the Respondent, would have been appropriate. People v. Ramirez, 114 Cal. Rptr. 916, 40 C.A. 3rd 347, cert, den., 419 U.S. 1116, 42 L. ed. 2nd 815 (1974). Absent the opportunity to hear Lucio Gonzales[1] version and cross-examine, minimal weight would have been accorded to the hearsay declaration, even if it had been received into evidence.

The amended Complaint should be dismissed as to the matter alleged in Paragraph 9 (b).

December 8, 1976

For reasons never revealed, the charge based on Paragraph 9 (c) of the Amended Complaint was withdrawn, although it was one of only four instances of alleged direct interference with the month-long organization campaign.

Note: At the hearing, no offer was made to prove that Gonzales left the employees waiting for the bus while ostensibly determinir if there was work for them. Even such petty harassment would have called for a remedy, if proven. I have taken labor contractors into account in recommending a remedy in connection with the violation found based on the matter set forth in Paragraph 9 (d), and in the Consent Order.

December 9, 1976

It was alleged by Arturo Ledesma, principal witness for the charging party, and freely admitted by Neil Jack, Respondent's president, that Jack scuffled briefly with Murgia, a UFW organizer in the early morning period when the Regalado crew had not yet started to work and was listening to Murgia, and when other crews were due to begin work. Jack's explanation was that some of the employees were scheduled to start the day's work at the time Murgia was addressing them and "I lost my cool". He offered no resistance to my admonition, indeed he nodded assent, that the law required an effort to accomodate the organizing rights of those employees who had not begun to work and to whom Murgia clearly had the right of access, whereby some reasonable means could be found to make an opportunity available for Murgia to discuss with them without interfering . with the employees whose work day had begun. In the "(loss) of (his) cool", Jack overlooked the responsibility to direct such an effort and Respondent thereby violated Section 1153 (a). A remedy, discussed below, is recommended. The legally sanctioned right of employees to learn of their rights to organize and select a collective bargaining agent cannot be disregarded because of some momentary inconvenience to the employer, and a responsibility falls upon the employer, who controls the work environment, to find reasonable means to accommodate this right. This is the indeniable intent and thrust of the Act and the regulations dealing with access. Act, Section 1153; Administrative Code, Title 8, Part II, Chapter 9.

The charge embodied in Paragraph 9 (d) of the Amended Complaint should be upheld.

December 18, 1976

Employee Ines Vargas testified and the Respondent did not deny that "Bill" Owens, a superior whose authority among Respondent's personnel is surpassed only by that of Neil Jack, spoke to Vargas and inquired as to how many workers supported the UFW. After receiving a non-committal reply, he launched into an uninformed discourse about the UFW's contracting practices, suggesting that Vargas would suffer his work routine to be decided by the UFW, not Respondent if the union prevailed in any forthcoming election; that the union would require him, as an older worker, to perform picket line duty and that. Respondent would be deprived of the opportunity to hire him back after his customary leaves of absence, Respondent being assertedly required to hire on a first-come first-served basis from a hiring hall. Vargas, aging, seasoned and ruggedly defiant of any attempt to manipulate his mind or his physical person (He has simply walked off the property rather than accept a work assignment which he finds distasteful or too difficult and is permitted to work when he returns.),was unmoved by this parade of horrors. He apparently reported the conversation to UFW organizers and continued to support the union.

Section 1155 of the Act, a provision with an identical counterpart in the National Labor Relations Act, protects the employer's expressions of views, when unaccompanied by threats or promises of benefit, from the inference of unfair labor practice, particularly, interference with the right to organize. Both our Legislature and Congress had clearly bowed in the direction of the First Amendment in protecting such expressions from being the subject of prosecution. Nevertheless, circumstances such as those revealed by Vargas's testimony must be carefully scrutinized for elements of threat, for a sham exercise of First Amendment rights to disguise activity in violation of laws regulating business conduct is not tolerated. Trucking Unlimited v. California Motor Transport Co., 433 F2d 755 (9th Cir. 1971), aff'd in part, remanded 404 U.S. 508, 30 L. ed 2d 642 (1972).

Inquiries by supervisors about workers[1] support for a union or lack thereof would seem to have an inherent tendency to threaten and to be subversive of the right to a secret ballot in union elections prescribed by Section 1156-7 (c) of the Act; but such inquiries have not been held to constitute, ipso facto, an unfair labor practice unless some specific threatening element accompanies the inquiry. NLRB v. Grand Foundries, 362 F2d 702 (C.A. Mo. 1966).

I found no such threatening elements or promises embodied in Owen's encounter with Vargas, for several reasons:

No such elements appear on the face of the remarks;

Owens and Vargas had known each other for a long time and Vargas, as a long time employee of advanced age, was indulged and permissively treated in various respects, both before and after the organizing campaign. Vargas knew and Owens must have known that the former had little to fear from such an encounter;

Respondent's overall policy in dealing with the employees' organizing efforts seems to have been expressed in remarks at a conference prior to the January election, attributed to Neil Jack by the charging party's principal witness, Ledesma. When asked by a group of workers about the possibilities for additional benefits if they did not join the union, Jack is said by Ledesma to have replied: "No promises. Joining the union is your own decision"; any intimidation intended by Owens would not have been reflective of the apparent "hands-off" policy wisely directed by Jack;

Respondent's conduct toward Vargas after the election, while made the subject of a charge, was not consistent with any attempt to intimidate him or retaliate against him (see discussion below)

An isolated encounter of the kind testified to by Vargas, not shown to be reflective of an employer policy to harass or

intimidate employees in their organizing efforts, does not constitute an unfair labor practice. NLRB v. Garland Corp., supra; NRLB v. Superior Co., supra. The charge embodied in Paragraph 9 *(e)* of the Amended Complaint should be dismissed.

December 22, 1976 and subsequent related episodes (Complaint Paragraph 9 (f)

It is alleged in Paragraph 9 (f) of the Amended Complaint that, on the abovementioned date, "the working conditions of Ines Vargas and Ambrosio Espinoza" were changed. Witness Vargas, an irrigator, testified in support of the charge, the gravamen of which was an alleged "demotion", whereby for one day, the morrow of the election, having refused an assigned irrigation task, he was asked to weed beets, a task he denied having been assigned for many years. Subjectively, Vargas felt offended by the weeding assignment. Respondent's president felt that Vargas was being indulged by the offer of an alternative assignment. Certainly, there could be firmer indications of an intention to harass Vargas and discourage his union support than the one day alternative assignment and accepting him back at his regular work after he refused it. After refusing the work, he went home. There was no counteraction by Respondent. Vargas was unable to point to any other specific change in his routine, although he made a vague assertion that he was working harder than before. He admitted that, without counter-action by Respondent, other than a partial docking of pay on one day in January 1977, he simply left Respondent's property on other occasions when he felt an assigned task was too onerous, his main objection being to simultaneously irrigating two or three fields. He felt that more help was needed with the equipment and cited other problems that arose when more than one field had to be irrigated. No evidence was presented that other irrigators were given less difficult tasks.

Vargas also complained that Respondent paid him for only 8 hours of an unspecified day following the election. He had admittedly left the property in the early afternoon of another day in that time frame. Respondent contended he left before one o'clock, Vargas admitted to having left at 2:30 P.M. The normal workday for irrigators lasts until 4 to 5 P.M. According to Vargas, Respondent's supervisors were liberal in their departure time policy prior to the election, paying for a full 8 hour day even when employees left early. Respondent, as previously stated, admitted to intermittent permissiveness, between sporadic efforts to enforce a regular departure time. Apparently, the permissiveness has set in again: Vargas admitted that he has since been paid for some full days despite early departures, and there has been no recurrence of weeding or other menial assignments. Vargas' "demotion" was indeed transitory and fleeting. His working conditions do not appear to have changed at all.

In sum, the Vargas episodes appear to have been grossly

overstated *as* to the underlying motives and effects. Dismissal of this charge was Rooming as the appropriate result, except for the fact that employee Espinoza did not have a chance to testify and the hearing would have had to be prolonged into the following week for him to have his day. Because of a cooperative gesture by Respondent, this necessity was avoided:

Respondent, without admitting the allegations constituting the charge, consented to an order enjoining against any discrimination in allocation of work assignments based on employees union activities. The remedy is detailed further below.

The layoff,, Monday January 31, to and including Friday, February 4.

The charging party's principal witness, Arturo Ledesma, held, with passionate conviction, to the view that a five day layoff experienced by the Regalado crew on the above-mentioned dates was punishment for their union support. Admitting that irrigation (but more typically, inclement weather) had previously resulted in layoffs of two to three days during winter months, while fields otherwise available for cultivation were drying, he forcefully and persuasively insisted that no five day layoff had ever occurred. He was suspicious and resentful enough, in the actual event, to go to the property during the layoff on Wednesday, February 2, to examine the condition of one of the beet ranches, Ranch 9, which had three fields referred to as "north", "middle" and "south", a ranch which his crew had been weeding several days before the layoff, but had not completed. Ledesma contended that, at very least, work was available on Ranch 9 for his crew.

His stated observations were that the north field had no plants. The south field was dry and full of weeds and there was no characteristic odor of Thimet. He denied Respondent's contention that the Thimet odor dissipates quickly. No tractor tracks were noticed by Ledesma, such tracks being a sign of irrigator's recent presence. His observation of the middle field was that the "weeds were big". Respondent, having made an exceptionally detailed and persuasive showing of recent weedings, irrigations and other factors dictating unavailability of work at the other beet ranches, the controversy as to whether work was available focussed on Ranch 9 and Ranch 15. One field on Ranch 9 had not received its seasonal manual cultivation, and Ranch 15 had been incompletely weeded. On Ranch 9, Respondent contended, and its record showed (see Note), that irrigation was done on the middle field of Ranch 9, by witness Vargas, on January 30 and 31, after the application of Thimet on January 28. The records further showed that the south field had received its sea-

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Note: Foreman Regalado's note book shows that Ranch 9 was irrigat by Vargas on January 30 and 31. A summary worksheet prepared by Respondent shows that Ranch 9 middle field was irrigated January 30.

sonal weeding in November 1976, and an herbicide, IPC, was applied on January 31. This chemical, rather than the manual labor, is used to kill grass.

Vargas indeed testified that he went to Ranch 9 during the layoff to irrigate; however, he denied the presence of Thimet's characteristic odor and said there were high weeds (which he referred to as "grass"). He set gopher traps, thus coming close to the ground where he could have observed Thimet pellets and any lingering odor, if any there were. He denied any awareness of Thimet's presence.

Respondent showed a California Department of Food and Agriculture permit, with information apparently supplied by Respondent, prior to the controversy, in the regular manner, indicating that on January 28, 1977, 70 acres of growing sugar beets were treated with "Thimet 15 G" in a volume of 10 pounds per acre. The location designated was "Trif7, 126", which is the canal serving Ranch 9, middle field. An invoice dated January 24, 1977, from Rockwood Chemical Company shows that 300 gallons of a chemical manufactured by "PPG" bearing Environmental Protection Agency registration number 00748-00161-AA was sold to Respondent for application on a total of about 300 acres. The "PPG"—produced chemical is IPC. By a preponderance of the evidence, it appears that Respondent treated one of the planted fields in Ranch 9 with Thimet on January 28, 1977, thereby rendering it unsafe for workers for at least one week and then irrigated the field, rendering it too muddy for cultivation during any of the layoff days; that the other planted field was treated with IPC and that it had already been manually cultivated earlier in the season; that Ranch 15 was irrigated on January 28, rendering it unavailable for cultivation during the layoff. That ranch had not been irrigated for 50 days, far more than the normal interval.

The observations of witnesses Ledesma and Vargas, neither of whom materially disputed estimates by Respondent's president as to required drying time after irrigation and delays in cultivation after Thimet application to a field, were not offered with an intent to mislead; but evaluations such as "dryness" or "wetness" and presence or absence of a given odor, particularly when offered in a vigorously contested proceeding, cannot outweigh items of evidence recorded dispassionately prior to a controversy.

Other evidence in support of the charge that the layoff was motivated by a desire to discourage union activity by Regalado's crew, most of whom were fairly active in the UFW campaign at Respondent's ranches and all of whom were UFW supporters, included:

(1) A statement attributed by witness Vargas to foreman Erasmo Gonzales, after the December 21 election, that "All my workers come with me. I don't want any Chavistas"; if true, the

episode would be some indication of an intention to discriminate in a critical particular, namely the occasional opportunity for some general laborer's to join the Erasmo maintenance crew when, as occurred in the layoff period, cultivating work was not available. As previously shown, the Erasmo crew has more steady work. Gonzales hotly denied making any such statement and pointed to the fact that at least one member of his crew, one Reyes was a UFW supporter. Respondent also contended that one Hernandez, another member of Erasmo's crew, was a UFW supporter, but the degree *of* Hernandez support, if any, was effectively challenged by the charging party's Ledesma. Gonzales also denied any opportunity or authority to decide whom, among the workers, would join his crew, a statement which I found evasive and incredible.

I believe that Gonzales indeed said something uncomplimentary about the UFW within earshot of Vargas and that he does have pivotal authority in the matter of effectuating Respondent's declared policy to make reasonably steady work available to general laborers in the "off-season"; however, Erasmo's "bark" was not followed by any specific "bite". It was not shown that he actually excluded any UFW supporter from his crew, there being no indication that any of the complaining witnesses asked to work with him.

(2) One Cigalo, not a UFW supporter, was hired back, after an absence, during the layoff, to work on the Erasmo crew, on which he had previously worked; whether his union status or his previous experience on the relatively skilled work of the Erasmo crew was decisive in his rehiring could only be a matter of surmise;

(3) A rancorous atmosphere prevailed on the farm for a while after the December 21 election. Supervisor Owens threw a mild tantrum at Vargas after the latter filed his charge (discussed above). Other supervisory personnel appeared disgruntled, unfriendly.

(4) Prior to the election, Regalado told witness Valencia, a member of his crew and a UFW supporter, that Respondent's president had said that Respondent would plant more lettuce and less work would, therefore, be available. (See Note). Regalado also inquired about persons involved in UFW leaflet distribution. Respondent's Jack effectively countered that lettuce is more labor-intensive than any of the crops and denied receiving any reports from Regalado or any particular interest in leaflet distributors. Valencia's testimony had some significance. Regalado has a role in shifting workers from his crew to other available work, particularly on the Erasmo crew, when general field labor requirements are slack and the Erasmo crew needs extra hands.

Note: The double hearsay problem also was involved in this proffer but since both Regalado and Jack were available to testify, it was received.

(5) Ledesma insisted that in prior years, even if no weeding work was available, some jobs, cleanup and other functions, would be found to keep the general laborers busy; however, his testimony lacked certainty in this regard. He admitted that his crew was less busy than in previous winters in view of the diminished beet crop, a fact of which he was aware.

The ultimate question which must be resolved by a preponderance of evidence fact, Section 1160.3), if the charge of violating Section 1153 (c) (See Note) is to be sustained, are:

(1) Was there "discrimination" against the. Regalado crew 'in hiring or tenure... or any term or condition of employment", by virtue of any failure on the part of Respondent to adhere to and even-handedly apply its policy of providing reasonably steady work in the off-season? The layoff clearly involved a matter of 'hiring or tenure of employment" and "term(s) or condition(s) of employment", within the meaning of Section 1153 (c).

(2) Was any such discrimination motivated by a desire to "discourage membership in any labor organization", such motive being a necessary element of an alleged violation of this kind? NLRB v. Great Dane Trailers, 338 U.S. 26, 18 L. ea. 2a 1027 (1967), (construing the corresponding language in the federal Act.)

Undisputedly, the Regalado crew was treated differently than the Erasmo crew and, in that sense, there was "discrimination". The latter performed more skilled work and typically had more regular employment in the "off-season", as previously shown. In the first eight weeks of 1977, the pertinent period, the Erasmo crew had a full seven days more work than the Regalado crew, a difference not significantly greater than prior years, 6% days more work having been assigned to the Erasmo crew in 1974, four days more in 1975 and five days more in 1976.

Although the total days of work assigned to the Regalado crew was not significantly different from prior years (they received a little less in 1976 and a little more an 1974 and 1975), they never had experienced a full five day layoff. Total layoffs in prior years had, however, aggregated at least as much and the 1977 layoff was the only one.

It is clear that nothing occurred in 1977 which was so inherently destructive of employees' interests and rights as to carry with it a presumption that anti-union bias rather than legitimate business purpose was involved. NLRB v. Great Dane

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Note: Although the layoff is also said in Paragraph 10 of the Amended Complaint to violate Section 1153 (a), I find that there was no pertinent organizing activity to which the charge could relate, at the time of the layoff, and the real gravamen of the charge is covered by Section 1153 (c).

Trailers, supra. NLRB v. Brown, 380 U.S. 278, 289, 13 L. ed 2d 839, 848 (1965); American Shipbuilding Co. v. Labor Board, 380 U.S. 300, 13 L. ed. 2d 855 (1965). NLRB v. Erie Resistor Corp. 373 U.S. 221, 227; 10 L. ed 2d 308, 313 (1963). In Brown, the Supreme Court said that, in striking the balance between asserted business justifications and employee's rights, in the light of the labor laws, when "the resulting harm to employee's rights is slight and a substantial business end is served, the employer's conduct is prima facie lawful and an affirmative showing of improper motivation must be made". Conversely, when some substantial possibility of improper motive is made to appear, the employer must come forward and the asserted business justification for the discriminatory treatment, however slight the effect, should be carefully scrutinized if the policy of the Act is to be upheld.

Although a showing of possible improper motive for the layoff was made, sufficient to require the Respondent-employer to come forward with evidence to support the asserted business justification, the showing was weak. In cases of this kind, the inference of improper motive, drawn from animus, typically consists of acts constituting interference with organizing activity and consistent harassment and oppression of union members. Findings of unfair labor practices would be endless and universal if, in a case of this kind, resort to largely inconsequential instances of inhospitality to a union were required to sustain the burden of proof. The charging party's evidence left the need for inappropriate conjectures in order to conclude that the complicated scheduling of manual cultivation, chemical applications and irrigation, was done in order to create a punitive layoff not, in the overall, longer than other layoffs resulting from similar circumstances in prior years. Nor is this conjecture made any more compelling by the fact that all of the employees were accepted back to work and were assigned substantially as many days of work in the 1977 off-season as in prior years, despite the reduced off-season crop. Clearly, then, there was no substantial departure, if any, from the policy of prior years to maintain reasonably steady work for the permanent employees, and the proofs adduced on behalf of the charging party fell far short of the preponderance of evidence required to sustain the charge set forth in Paragraph 9 (g) of the Amended Complaint, and that charge should be dismissed after evidence of the voluntary undertaking of compliance referred to below is received.

The order consented to by Respondent's president, at the hearing, in connection with the charge embodied in Paragraph 9 (f), involving alleged changed working conditions for two irrigators, carries over to any such future discrimination as is alleged in Paragraph 9 (g). The proposed consent order has been drafted in such a form as to expressly recognize that it covers such matters, as are alleged in Paragraph 9 (g). The employer has thus affirmed in a substantial manner, a policy of refraining from unlawful dis-

crimination under the Act; however, my findings would have been the same regardless of this voluntary undertaking by Respondent.

REMEDIES

Having found Respondent guilty of an unfair labor practice in accordance with the charge set forth in Paragraph 9 (d) of the Complaint, namely interference with employees' rights to enjoy the access of union organizers to their work place in violation of Section 1153 (a) of the Act and Administrative Code, Title 8, Chapter II, Section 9, I recommend an order that Respondent cease and desist from such actions and that certain affirmative actions be taken to assure future compliance and effectuation of the purposes of the Act and of regulations adopted by the Board.

Since the violation arose out of a failure by Respondent's supervisory personnel to reasonably accomodate the rights of those workers present at Respondent's property, but not yet on the job, to hear and discuss with union organizers, an appropriate communication, in English and Spanish, discussing the access rule and indicating some practical application to the circumstances of Respondent's operation, should be communicated promptly by Respondent to it's supervisors and to labor contractors. A form of communication is included in the recommended form of order. Written acknowledgements of receipt and understanding of the recommended form should be signed by each such person.

A notice, in English and Spanish, should be conspicuously posted at the place where workers assemble on Respondent's property prior to the day's work, advising that the communication referred to above has been forwarded to all supervisory personnel and the text of the communication should appear on the notice.

Since regret for the episode involving Murgia was sincerely expressed by Neil Jack at the hearing in the presence of UFW personnel and a number of Respondent's employees, who heard his remarks translated and who had the opportunity to observe his demeanor, no further action in this regard should be required.

Within 30 days from the effective date of any order issued pursuant to this recommendation, Respondent should be required to certify, in writing, compliance with the above items and to include, in the report of compliance, statements as to the manner of compliance with each item, and a statement that written acknowledgements in the prescribed form were received from each recipient of the required communication.

Respondent, having consented to an order to refrain from practices violative of Section 1153 (c) of the Act, without having been found guilty, however, of any unfair labor practice, it is

recommended that the Board retain jurisdiction of so much of the consolidated cases as relate to alleged violations of Section 1153 (c), in order to facilitate administration of Respondent's voluntary undertaking of compliance, for a period of one year. Upon receipt by the Board of a satisfactory report of compliance as recommended, those charges should be dismissed after the Board's counsel and the charging party have an opportunity to review the report. A hearing should be ordered with respect to compliance only if the charging party shows substantial cause. The order should take the form of the stipulation signed by Respondent's president and its legal representative which is filed herewith.

Notwithstanding any retention of jurisdiction by the Board, pursuant to this recommendation, no remedy is recommended for the prior occurences involving employee Vargas and the layoff of egalado's crew, because there was insufficient proof to sustain these charges. Only new matters arising during the period of retained jurisdiction should be the possible subject of remedies in addition to any penalties for any violation of the voluntary undertaking of compliance.

These dispositions should result in greater care and surveillance by Respondent to uphold the policies of the Act. Even those occurrences having a slight effect on protected employee interests could be magnified in importance in view of Respondent's undertaking. On the other hand, the undertaking should not be permitted to result in harassment of Respondent and the contrivance and exaggeration of grievances.

ORDERS

I recommend Orders in the following form, one of which will dispose of the one charge involving Section 1153 (a) as to which a violation was found, and the other, the Consent Order, will dispose of the charges involving Section 1153 (c).

ORDER (1)

Respondent, Jack Brothers & McBurney, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

a) Denying access by union organizers to its premises for the purpose of organizing pursuant to the duly published Regulations or Orders of the Board.

b) Interfering with meetings and discussions between employees and union organizers duly exercising access rights to Respondent's premises.

2. Take the following affirmative actions to effectuate the policies of the Act:

a) Direct a communication in the form annexed hereto to all of Respondent's supervisors, foremen and labor contractors dealing with Respondent, and obtain their signed acknowledgement of receipt and understanding.

b) Prominently post the text of the communication at the place where permanent employees assemble at the beginning of the work day, namely the area near Respondent's office and shop, with an appropriate legend indicating that the notice has been directed as aforesaid.

3. Within 30 days, from the date hereof, certify to the Executive Secretary of the Board, in a written declaration under penalty of perjury, that the above steps have been taken, including a statement that the signed acknowledgements of receipts and understanding have been received from all of Respondent's supervisors and foremen and all labor contractors dealing with Respondent.

EXHIBIT to ORDER (1)

NOTICE

Access to Company Property by Union Organizers

Jack Brothers & McBurney, Inc., ("The Company") has been

found guilty of an unfair labor practice in that, on December 9, 1976, there was unlawful interference by supervisory personnel of the Company with the right of a union organizer to meet with employees who had not yet begun to work. That incident was regrettable and no recurrence will be permitted.

Under circumstances prescribed by law, union organizers have the right to meet with employees of the Company, before employees[1] regular working hours, for one hour during their lunch break and for one hour after work. Such meetings may take place in the assembly area near the Ranch office and shop, and at the various field locations where buses arrive and depart. Because of varying work schedules, those employees not at work will be furnished an opportunity to meet with organizers in such a way as to interfere neither with employees whose scheduled work has begun, nor with such organizing meetings.

Such visits by union organizers may be authorized by the Agricultural Labor Relations Board in the future. Interference with access of union organizers to the Company property is prohibited. All supervisors and foremen are hereby instructed to check with the Company office if they believe that any organizing activity is being conducted inappropriately and no action may be taken with respect to such activity without specific instructions from the Company office.

In addition to refraining from interference with any future authorized access to the Company- property by union organizers, effective immediately, all supervisors, foremen, labor contractors and their supervisory personnel are directed to refrain from all types of interference with employees' rights in the matter of support for or adherence to any labor organization.

Jack Brothers & Mc Burney

By _____
President

(The following legend should appear on the above text when posted at a prominent place on Respondent's premises for the benefit of employees:

THE ABOVE NOTICE HAS BEEN SENT TO ALL OF THE COMPANY'S SUPERVISORS AND FOREMEN AND TO ALL LABOR CONTRACTORS DEALING WITH THE COMPANY.)

FORM OF ACKNOWLEDGEMENT

The undersigned acknowledges receipt and understanding of the attached notice.

ORDER (2)

With the consent of Respondent, Jack Brothers and McBurney, Inc., it is hereby

ORDERED THAT

1. Said Respondent shall not violate Section 1153 of the Labor Code by discriminating as between its various employees in matters of work assignments, crew membership and making provisions for steady work assignments in such a manner to encourage or discourage membership in any labor organization;

2. No later than June 11, 1977, Respondent shall report to the ALRB on such directives as it shall have issued to its supervisors, including crew foremen, so as to assure compliance with this order as well as with its own stated policy of not engaging in such discrimination (attaching copies of such directives).

3. No later than April 12, 1978, Respondent shall furnish to the ALRB a declaration under penalty of perjury, certifying that no such discrimination as -is referred to in paragraph one hereof has occurred and reporting in detail the various steps that have been taken by Respondent to assure compliance with the aforesaid statutes and aforesaid policy.

EXHIBIT to ORDER (2)

NOTICE

DISCRIMINATION AGAINST COMPANY EMPLOYEES

TO ENCOURAGE OR DISCOURAGE SUPPORT

OF ANY LABOR ORGANIZATION

PROHIBITED !

It is the policy of Jack Brothers & McBurney (the Company) to refrain from any form of discrimination against any employee on the basis of his support for or refusal to support any labor organization. The Company has made a voluntary undertaking of compliance with the law in this respect, and has consented to an order of the Agricultural Labor Relations Board whereby special notice and instructions regarding this policy must be directed to all supervisors, foremen, and labor contractors dealing with Jack Brothers & McBurney.

Any discrimination in work assignments based on an employee's union affiliation or lack thereof is prohibited, subject to the provisions of any future collective bargaining agreement to which the Company might become a party.

No employee or group of employees may be laid off because of union status or support.

No labor contractor or foreman may exclude an employee from a crew because of union status or support.

No supervisor, foreman or labor contractor may suggest to any employee the possibility that he will receive less work, less desirable work or any other change of working conditions because of union status or support.

Jack Brothers & McBurney

By _____

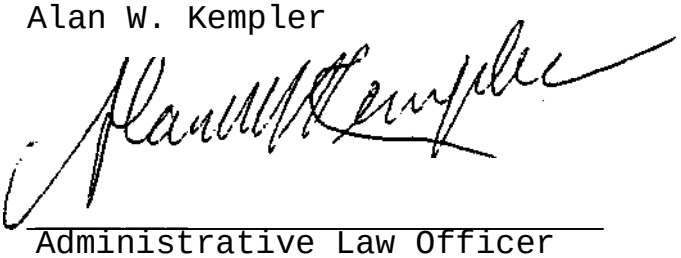
_____President

The undersigned acknowledge receipt and understanding of the attached notice.

_____

April 15, 1977

Alan W. Kempler



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Administrative Law Officer