Soledad, California

STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

O. P. MURPHY PRODUCE CO., INC., dba O. P. MURPHY & SONS,[1/]	)	
Respondent,	)	Case No. 76-CE-33-M
and	)	4 ALRB No. 62
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

DECISION AND ORDER

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

On April 15, 1977, Administrative Law Officer (ALO) Thomas Patrick Burns issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed timely exceptions with a supporting brief and a reply brief.

Respondent's exceptions relate in part to the ALO's credibility resolutions based upon demeanor. In the absence of clear error, we will not disturb such resolutions. Standard Dry Wall Products, Inc., 91 NLRB 544; Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977). We have reviewed the record and find the ALO's credibility resolutions are supported by the record as a whole.

[1/] The name of Respondent appears as amended at the hearing by stipulation of the parties.

Two evidentiary rulings of the ALO call for comment. First, we do not adopt the ALO's broad ruling with respect to the general relevancy of questions concerning the legal residency of farm worker witnesses. However, we find that such questioning was properly excluded by the ALO in the present case, for the reasons set forth in his Decision. Secondly, we agree with Respondent that evidence of prior unfair labor practice charges filed by the Union against Respondent and subsequently withdrawn or dismissed by the Regional Director were of no probative value and irrelevant to the present case. Such charges can prove nothing more than the fact that they were filed. We have therefore placed no reliance upon these charges in reaching our Decision in the present case. The cases cited by the ALO for the proposition that such charges may show a "background of conflict" between the parties are inapposite, and hold merely that evidence of specific conduct occurring more than six months prior to the filing of charges upon which a complaint is based may be relevant background evidence. Evidence of one withdrawn charge, signed by an alleged discriminatee, may be considered relevant solely for the limited purpose of establishing Respondent's knowledge that the signator thereby engaged in a protected activity.

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.

ORDER

Accordingly, pursuant to Labor Code Section 1160.3, IT IS

HEREBY ORDERED that the Respondent, O. P. Murphy Produce Co., Inc., dba O. P. Murphy & Sons, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to hire or rehire any employee or otherwise discriminating against any employee in regard to his or her hire or tenure of employment or any term or condition of employment to discourage membership in, or activities on behalf of the United Farm Workers of America, AFL-CIO, or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 1152 of the Agricultural Labor Relations Act.

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

(a) Offer Vicente Martinez, Socorro Martinez, Maria Martinez, Baltazar Martinez, Elena Martinez, Emma Martinez, Idolina Martinez and Roberto (Baltazar) Martinez reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, beginning with the next crop activity for which they qualify, and make them whole for any losses (along with interest thereon at a rate of seven percent per annum) they may have suffered as a result of Respondent's failure to rehire them, from the first day of the 1976 tomato harvest. Such offers of reinstatement shall in any event be made at the beginning of the 1978 tomato harvest season and shall be unconditional as to each of the above-named persons.

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

(c) Sign the attached Notice to Employees and post copies of it at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 60 days. Copies of the Notice, after translation by the Regional Director in appropriate languages, shall be furnished by Respondent in sufficient numbers for the purposes described herein. Respondent shall exercise due care to replace any copy of the Notice which has been altered, defaced, covered or removed.

(d) Hand a copy of the attached Notice to each employee employed during the next hoeing and tomato harvest seasons.

(e) Mail copies of the attached Notice in all appropriate languages, within 31 days after receipt of this Order, to all employees employed during the 1976 hoeing and tomato harvest seasons.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent 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 Respondent to all nonhourly wage employees to compensate them for time lost during this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within 31 days from the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: September 19, 1978

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, 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 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 offer Vicente Martinez, Socorro Martinez, Maria Martinez, Baltazar Martinez, Elena Martinez, Emma Martinez, Idolina Martinez and Roberto (Baltazar) Martinez 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 — 4 ALRB No. 62, 76-CE-33-M

ALO DECISION

On April 15, 1977, Administrative Law Officer (ALO) Thomas Patrick Burns issued his Decision making the following findings:

Discharges:

1. The ALO found that the Vicente Martinez family had been employed at Respondent's place of business through a labor contractor for about ten years up through 1975, at which time Respondent changed its hiring practices. The use of a labor contractor was eliminated and a procedure for receiving and screening applications was established. The practice of hiring families as a unit was still maintained. The record established that one week before the election, Vicente Martinez participated in a work stoppage; that on September 25, 1975, he filed an unfair labor practice charge against Respondent; that he solicited authorization cards, distributed Union literature and gave UFW buttons to two company supervisors. The record also established that on several occasions a co-supervisor called Vicente Martinez a "traitor" and once told Vicente Martinez that he was a troublemaker and that he would not rehire him. Given these circumstances, the ALO concluded that Section 1153 (c) and (a) of the Act had been violated and that in light of Respondent's practice of treating families as a unit/ Section 1153 (c) and (a) had also been violated with respect to Socorro Martinez and Maria Martinez.

2. As to the Baltazar Martinez family, the ALO concluded that the daughter, Emma, was a known Union adherent and had distributed buttons and leaflets during the election period. The ALO also concluded that her activity resulted in the discriminatory refusal to hire her entire family, Baltazar, Elena, Idolina and Roberto, then violating Section 1153(c) and (a) of the Act.

Note also that the ALO found the Vicente Martinez family and the Baltazar family to be so clearly associated that a refusal to hire one was tantamount to a refusal to hire the other.

3. The ALO did not find sufficient evidence on which to sustain a discriminatory refusal to rehire with regard to Raymundo Morales. Although the record indicated that Morales was an active Union supporter, the position for which he applied, dumper, was one of limited employment. Moreover, the ALO found Respondent had made efforts

to reach Morales regarding possible employment and that though the attempt was made late in the season, there was no strong indication of any attempt to place Morales low on the hiring list as a result of his Union activity.

4. The ALO found that there was insufficient evidence from which to conclude that the Sanchez family was not rehired because of their union activity. The Sanchez family did not comply with the application procedure and the requirement of filing an application was not in itself a sufficient change in employment policy to warrant a finding of discrimination.

5. With regard to Eva Serrato, the ALO recommended that the allegation be dismissed. He found that there was no evidence in the record of when Serrato applied for work and that the only fact established was that on some occasions when she went to the field she was granted work. Moreover, Serrato did not testify at the hearing.

Question Regarding Legal Residency of Farm Workers

The ALO found that any questioning by counsel regarding immigration status of farm workers were irrelevant to any issue being litigated and should be prohibited during any ALRB proceeding. Furthermore, the ALO found such questioning tended to interfere with worker rights and was thus violative of the Act.

BOARD DECISION

The Board found that the ALO's credibility resolutions were supported by the record as a whole and affirmed his rulings, findings, and conclusions. However, the Board commented on two of the ALO's evidentiary rulings.

The Board refused to adopt the ALO's ruling with respect to the general relevancy of questions concerning the legal residency of farm worker witnesses, although the Board found the exclusion of such questioning proper in this case.

The Board also stated that it was placing no reliance on evidence of prior unfair labor practice charges. The Board stated that such charges could only prove that the charge had been filed and for the limited purpose of establishing the Employer's knowledge that the alleged discriminatee who filed the charge was engaged in protected activity.

STATE OF CALIFORNIA
BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

FRANCIS P. MURPHY, dba O.P. MURPHY & SONS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	CASE NO. 76-CE-33-M

Susan G. Winant, of Salinas, California,
for the General Counsel

Robert Hinrichs, of Salinas, California,
for Respondents

John Rice-Trujillo, of Salinas, California,
for the Charging Party

DECISION

Statement of the Case

THOMAS PATRICK BURNS, Administrative Law Officer: This case was heard before me in Salinas, California on March 21, 22, 23, 24, 25, and 26, 1977. By stipulation of the parties the name of the employer charged was amended from: Francis P. Murphy dba O.P. Murphy & Sons, to: 0. P. Murphy Produce Co., Inc. dba C. P. Murphy & Sons. The complaint was amended during the hearing as follows: (1) to add the name of Secorro Martinez; (2) to add the name of Idolina Martinez, both in paragraph 5 as complaining agricultural workers; (3) to amend paragraph 4 to name Francis Murphy as Secretary rather than President; (4) to name in paragraph 4 Frances Arroyo and Mike Murphy as agents of Respondent acting on its behalf; and (5) to add the names of Frances Arroyo and Mike Murphy as agents of Respondent.

The complaint alleges violations of Sections 1153(a) and (c) of the Agricultural Labor Relations Act, herein called the Act, by O. P. Murphy Produce Co., Inc. dba O. P. Murphy & Sons, herein called Respondent. The complaint is based on charges and amended charges filed on September 1, 1976, March 22, 1977and March 24, 1977, by United Farm Workers of America, AFL-CIO, herein called the Union. Copies of the charges and amended charges were duly served upon Respondents.

The Union was represented at the hearing by counsel and treated as intervenor.

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

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

FINDINGS OF FACT

I. Jurisdiction

I find that O.P. Murphy Produce Co., Inc. is a Texas corporation doing business in Monterey County, California, as O.P. Murphy and Sons, and is an agricultural employer engaged in agriculture within the meaning of Section 1140(c) of the Act.

I further find the Union to be a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated Sections 1153(a) and 1153(c) of the Act by a discriminatory refusal to reemploy twelve named employees.

Respondents deny a discriminatory refusal to rehire the named employees or that the non-employment of such persons had anything to do with their union activities.

A. Operation of the Farm

O.P. Murphy is the father of Francis Murphy, who is the father of Mike Murphy. The O.P. Murphy Produce Co., Inc. has its main office in Houston, Texas. The Murphy family, with others, own and operate other businesses in addition to the O.P. Murphy Produce Co., Inc.

Francis Murphy is Secretary of the Corporation and is employed by the Corporation part of the time in Texas and part of the time (Summer and Fall) in California. O.P. Murphy remains in Texas. The Company has been doing business in Soledad, California, for approximately 25 years. The Corporation is a buyer, seller and distributor of fresh market tomatoes. Francis Murphy is the Production Manager responsible for the California operation. Among his duties are the direction of quality control. During tomato season he counsels with harvest management, field management and sales management in order to coordinate a pick of tomatoes that will find a destined market.

Those reporting to Francis Murphy include the harvest managers who are responsible for the size, color, quantity and quality of

picked tomatoes. In 1976 the harvest managers were Mike Murphy and Frances Arroyo. In the years from 1967 to 1975 the harvest managers were labor contractors, i.e., Tony Guzman and Secundino Garcia.

Also reporting to Francis Murphy is Pat Bellamy who is in charge of Field Management. Murphy described Bellamy as follows: "Bellamy was my eyes and my feet to see what we had available. ... I listen to Bellamy. He knows more about it than I do." Bellamy would follow a prearranged formula. Fields that were contracted from local owners were worked by the O.P. Murphy & Sons. Bellamy would plan the planting and the harvesting. He spent most of his time in the fields to be sure tomatoes picked were uniform. The Murphy company owned only 17 acres of its own where it maintained sheds including offices. The farms where the tomatoes grew did the irrigation.

The labor contractors, Guzman and Garcia, were paid based upon the amount of tomatoes harvested rather than the number of workers supplied.

Frances Arroyo had formerly worked for one of the labor contractors, i.e., Guzman. She had also been employed by O.P. Murphy as a tomato grader (1967-1969). In 1976 she was employed by Murphy as a Supervisor. She received and checked applications for employment, selected persons for work and notified them. She also worked in the fields to see that the foremen of crews carried out their duties of harvesting tomatoes, i.e., checking size, color, grade, etc. She held title of Harvest Manager or Supervisor.

Bellamy's job was the same in 1976 as it had been in 1975 and before when labor contractors supplied personnel. Mike Murphy took over the duties of the field labor contractors in 1976. He had not previously worked for the Company. He was the immediate supervisor of Frances Arroyo and reported directly to his father, Francis Murphy.

The tomato picking season was generally during the months of August, September, October and the early part of November each year, depending on the weather. There were generally five crews each consisting of 45-50 people during the peak of the harvest in October, but fewer people were needed at the beginning and end of the season.

In 1976, the first crew began working by August 4; the second crew started by August 11; the third crew was working by August 18; the fourth and part of the fifth crews were working by August 25; and the entire fifth crew was working by September 1.

There were approximately 540 people hired by Respondent in 1976 and there were 385 rejected applications.

B. Background of Conflict Between Parties

It was stipulated by the parties that Frances Arroyo knew all of the following named complaining witnesses and they knew her: Vicente Martinez, Maria Martinez, Socorro Martinez, Baltazar Martinez, Elena Martinez, Emma Martinez, Manuel Sanchez (aka Raphael Guzman) Maria Sanchez, Raymundo Morales and Eva Serrato.

Evidence was presented to show there was a representation election held September 30, 1975. One week before the election, about 100 workers walked off the fields in protest over low wages and the firing of a foreman 'named Guadalupe Silvestre. Vicente Martinez, one of the workers participating in the work stoppage, filed an unfair labor practice charge against the Respondent on September 25, 1975, and later withdrew the charge after workers were allowed to return to their jobs. (GCX 2D) Another charge against the Respondent was filed by a UFW organizer on September 26, 1975, alleging that the employer denied access to the UFW during its organizing campaign. {GCX 2C) On October 2, 1975, the UFW filed a charge against the Respondent alleging that on September 26, 1975, the Respondent discriminatorily discharged one Bertina Silvestre for her union activities. (GCX2B) On October 7, 1975, the UFW filed a charge against the Respondent alleging the discriminatory discharge of Maricela Lopez on October 1, 1975, the day after the election. (GCX 2A) The UFW won the election at O.P. Murphy & Sons by a vote of 156 out of 201 ballots cast. (GCX 3C)

During the election campaign, Vicente Martinez, Manuel Sanchez, and Emma Martinez were visibly active in their support of the UFW. Vicente Martinez handed out authorization cards to employees of O.P. Murphy & Sons and he gave out union campaign literature in the mornings to the workers before they went into the fields. Vicente Martinez gave UFW buttons to both Pat Bellamy (a company supervisor) and to Frances Arroyo (a company supervisor) during the week before the election. Vicente was also on the UFW ranch committee at O.P. Murphy & Sons in 1975. Manuel Sanchez and Emma Martinez handed out authorization cards, union campaign literature and UFW buttons during the week before the election. Manuel Sanchez and Emma Martinez wore UFW buttons during working hours at O.P. Murphy & Sons. Raymundo Morales was a UFW observer at the election handing out UFW buttons and leaflets while wearing a UFW eagle patch on his cap and UFW buttons on his clothing during working hours.

Vicente Martinez and his family lived in Tony Guzman's labor camp from 1967 through 1975. Vicente testified that he and Tony Guzman were always friendly during those years until the time of the election. Vicente and his family participated in the 1970 UFW strike against the strawberry and tomato growers in the Salinas Valley. Vicente's family joined the UFW in 1970 as did Manuel and Maria Sanchez. Maria and Roberto Martinez formally joined the UFW in 1974. Raymundo Morales and Eva Serrato were members of the UFW in 1975 before the election was conducted at O.P. Murphy & Sons.

C. The 1976 Change in Employment Practices

Because the ALRA had been signed in June, 1975, Respondent, conscious of the provision in Section 1140.4(c) that "The employer engaging such labor contractor . . . shall be deemed the employer for all purposes under this part," chose to replace the labor contractors in 1976 with Frances Arroyo and Mike Murphy as Harvest Managers.

Francis Murphy designed an application form and notified persons

in the community that Respondent would receive applications for employment on July 26, 27 and 28, 1976, at the office in the packing shed at O.P. Murphy & Sons near Soledad, California. Job seekers were informed of the new procedure through posters, signs and word of mouth.

The application form required: Name, address, phone number, date, social security number, date of birth, citizenship of U.S. (yes or no), immigration card number and signature.

The Respondent claims three reasons for requiring the application forms: "(a) they needed to get the names and phone numbers so that they could select the prospective workers and contact them when they would be needed for work; (b) they needed to have the social security numbers and addresses in order to check the prospective workers' prior employment record and also to set up the payroll records for O.P. Murphy in case the prospective worker was hired; (c) the Company needed to establish whether the prospective worker had a legal right to work in the U.S. at time he was applying for the job."

It was admitted that applications were received from some prospective workers after the three-day period in July. In fact, some persons were hired in the fields if a crew was short. Thirty or forty people came to apply each day at fields.

The applications of family members were attached together and when one was hired the entire family was hired together. If one was rejected for employment the family was not hired.

Frances Arroyo and Mike Murphy selected persons from the applications and notified those selected when to report for work. She testified on direct examination (by General Counsel as an adverse witness) that the 1975 Guzman payroll records were used to determine who had stayed the whole season. On cross-examination, after a one-day hiatus in her testimony, she alleged that it was the number of buckets of tomatoes they were checking for to determine productivity as well as who had stayed to the end of the season.

She also testified that she couldn't remember if the bottom of the form (the immigration number and citizenship) was to be filled out. She would accept forms even if that section was left blank. No one was told they would not get a job. She told all persons that if she needed them she would call them. Some of those hired had worked for Murphy before, some had not. Some were hired who were unknown to Arroyo and Murphy. When a person was hired in the field no background check was made. If applications were not on hand in the field, Arroyo would have them pick it up later, fill it cut and turn it in the next day. Such workers were only asked if they picked tomatoes before. No other questions asked. Even those with no experience were tried cut.

Respondent alleges that the policy of the Company was to hire only "dependable" persons.

Many of the persons hired in 1976 were union members. Some of those hired were active chavistas and were on the Ranch Committee. Frances Arroyo admitted that those known adherents she hired, such as the Chavez family and others, were her personal friends.

Prior to 1976, field personnel were supplied by labor contractors Tony Guzman and Secundino Garcia. The contractors acted as Harvest Supervisors, working in the fields with the pickers. In 1975 the ALRA made, such contractors employees of the primary employer, i.e., O.P. Murphy; hence the pickers were employees of O.P. Murphy & Sons also.

D. Union and Management Encounter on August 19, 1976

On August 19, 1976, Nancy Elliott, Director of Operations in the UFW field office at King City, acting on behalf of a group of workers, went to the O.P. Murphy & Sons office to speak with Mr. Francis Murphy about complaints that persons with up to 10 years prior service had not been hired to work at O. P. Murhpy & Sons for the 1976 tomato season. She explained they were anxious to get the problem resolved, heard they were going to be hiring soon and that the workers were protected by ALRA against discrimination. She testified that Mr. Murphy mentioned a new seniority system. Mr. Murphy denied that he said anything about a new seniority system. In an exchange of letters Ms. Elliott referred to that statement and Mr. Murphy denied it then.

Ms. Elliott informed Mr. Murphy that the UFW would consider his refusal to hire the listed persons an unfair labor practice. Mr. Murphy requested that each of the persons listed be designated by social security number. Respondent's testimony maintains that such numbers were necessary because of duplication of names. The fact is that the records checked, i.e., the contractors 1975 payroll records, had very few social security numbers. General Counsel argues that the request was made as a delaying tactic. Ms. Elliott did send the social security numbers to Respondent.

A few days later, after learning that some of the workers had still not been hired, Ms. Elliott and a group of persons, apparently accompanied by children, returned to the O.P. Murphy office and spoke again with Francis Murphy.

Mr. Murphy was very upset by the number of people present. He asserts that it was because of the danger to little children.

Ms. Elliott specifically mentioned the failure to hire Vicente Martinez and family. No offer of jobs was made and nothing was said by Mr. Murphy to indicate a desire to resolve the problem, other than to get everyone away from the packing shed/office.

As Ms. Elliott and the persons with her were leaving, Pat Bellamy shouted in English to Vicente Martinez, "You cause too many problems with the people. You're a trouble maker." Ms. Elliott translated his words to Vicente Martinez in Spanish.

Vicente Martinez testified that Pat Bellamy had called him "Traitor" every time he met him, i.e., while he was working in 1975.

Pat Bellamy testified he had said to Vicente Martinez on one of the two occasions when Ms. Elliott came to the packing shed, "Martinez, I can't hire you. I wouldn't if I could." He testified that he said that because he thought Vicente was calling him a liar.

E. Resusal to Rehire the Vicente Martinez Family

Vicente Martinez and his wife had been employed through the labor contractor for about 10 years up through 1975 and had annually picked tomatoes for O. P. Murphy & Sons.

A discussion of their union activity appears in the section headed "Background of Conflict Between Parties."

The Vicente Martinez family learned about the new procedure for applying for jobs through the posters in town. On July 27, 1976, Vicente and his wife Socorro, accompanied by their sister-in-law, Elena Martinez, went to the office/packing shed at O.P. Murphy's near Soledad. They were given application forms by Frances Arroyo. They each filled out a form and submitted them to Frances Arroyo.

Socorro filled in her daughter's name and social security number along with other required data. She signed her own name and that of her daughter Maria too. It was unclear from the testimony whether Mrs. Martinez believed that she had made application for herself by filing the form she signed for both. No other form was offered to Socorro and Ms. Arroyo kept the one for Maria until she came in to sign it herself. Ms. Arroyo scratched out the signatures made by Socorro Martinez.

The Vicente Martinez family also appeared at the field though they had not been hired. They appeared repeatedly asking for employment, but were told there was no work available.

While the Martinez family was turned away for lack of work, jobs were given to persons with no prior experience at 0. P. Murphy and, in fact, some who had not even picked tomatoes before. The later produced testimony of Frances Arroyo concerning the productivity of the Martinez family as pickers compared to other families is not borne out by the records. It was clear that one could not tell from the records how many persons were picking under one name or number, and accepted practice. It would be a waste of time to count buckets of tomatoes when there are other variables that make the count irrelevant.

In light of testimony by Respondent's agents, it is concluded that entire families were treated together as one for the purpose of employment. It was testified to by Frances Arroyo that, if a family had people who were not dependable, the family would not be hired.

There is extensive testimony in the record concerning whether

or not various members of the Martinez family were "dependable", i.e., stayed to the end of the season and picked a reasonable quantity of tomatoes. I deem that material irrelevant to the issue of discriminatory refusal to rehire in light of testimony by Frances Arroyo when asked whether she was willing to hire Vicente Martinez: "According to me he would have been hired. If we had needed him we would have hired him. Vicente quit early every year, but if we had needed him, we would have hired him." She also stated she would have hired Socorro Martinez and the whole family.

F. Refusual to Rehire the Baltazar Martinez Family

Baltazar Martinez is the brother of Vicente Martinez. His wife is Elena. Their children in this matter include Idolina, Emma and Roberto. (Roberto is also known as Baltazar and his social security number is in the name of Baltazar. Herein I will refer to him as Roberto.) The family had worked for Tony Guzman, the labor contractor, from 1968 to 1975, much of that time in the tomatoes at O.P. Murphy & Sons.

All of the family had been union members since 1970. The family often worked together with the family of Vicente Martinez and always worked as a unit.

On July 28, 1976, Baltazar Martinez attempted to file an application in conformance with the new practice at O.P. Murphy & Sons. He asked Frances Arroyo for an application, but was told that he could not have one until he had finished working in the lettuce. This was the only person, of the some 800 applicants, that we are aware of having been refused an application. He never returned again, because he knew that his brother was not hired and believed he would not be either.

At the same time as his father attempted to make application, Roberto filed an application under his name of Baltazar.

Elena and the girls Idolina and Emma filed applications during the three-day authorized period. Elena was present with Vicente and Socorro when they filed applications.

None of the Baltazar Martinez family was ever hired or called to work at O.P. Kurphy & Sons in 1976, though other persons with no prior experience at O. P. Murphy were employed

G. Refusal to Rehire Raymundo Morales

Raymundo Morales had worked for O.P. Murphy & Sons in 1975, through the labor contractor, Secundino Garcia. He had been a dumper, i.e., dumped buckets of tomatoes into a truck.

He had been an observer for the UFW in the 1975 election. He sometimes distributed flyers for the union and wore a union button and an eagle patch on his cap.

On July 26, 1976, Raymundo Morales filed an application at the O.P. Murphy's Sons office. He was told he would be called when

needed. It was understood he was to be hired as a dumper.

Frances Arroyo testified she had tried to call Mr. Morales on repeated occasions, but never got him. She eventually talked to his mother, but by then it was October and he was already working at another job. Apparently two other dumpers had been hired previously, but had left before the end of the season. The application form of Mr. Morales contained a designation of Dumper 3A, showing an intended assignment.

H. Refusual to "Rehire Manuel Sanchez and Maria Sanchez

Manuel Sanchez and wife Maria had worked for O. P. Murhpy & Sons through labor contractor, Tony Guzman, from 1968 to 1975. (Sanchez is also known as Raphael Guzman.)

Neither he nor his wife filed applications for employment at O. P. Murphy & Sons in 1976. They knew of the application requirement on July 28, 1976, but failed to submit them.

It was not until the second week of the season that they actually went to Respondent's fields. Mr. Sanchez was given two applications, but neither one was filled out or filed at any time. Mrs. Sanchez did not personally request employment until the fifth time she and her husband went to the field. The first four times she stayed in the car.

Both Mr. and Mrs. Sanchez testified that the reason they did not fill out the form was that they saw that others who had filled out the form were not being hired. The fact is that about 800 forms were filled out and over 500 persons were hired by use of the forms.

Manuel Sanchez had been a visible and active supporter of the UFW during the 1975 election campaign.

I. Late Hiring of Eva Serrato

Eva Serrato did not testify. There was no evidence offered to show when she applied for work at O. P. Murphy & Sons. Apparently she was hired later in the season by appearing at the field.

III Discussion of the Issues and Conclusions

Testimony of Frances Arroyo

The primary and star witness of the case was Respondent's Harvest Supervisor, Frances Arroyo. I found her testimony frought with contradiction and must characterize it as highly doubtful. Not only her demeanor and the manner in which she testified, but also the character of her testimony was such as to cast doubt on much of the relevant evidence offered in support of Respondent. (Evid. Code Sec. 780) The most clear inconsistency was her deliberate assertions under examination by General Counsel and the Union that the only things she and Mike Murphy tallied from the 1975 Guzman payroll records was the payroll periods worked by each of the workers.

Upon examination by counsel for Respondent after *a* one-day hiatus in her testimony she alleged that the analysis of records included a computation of the number of buckets of tomatoes picked by each worker

On the one hand she attempted to justify her failure to employ certain persons on the basis of their productivity, their staying to the end of the season or not, and on the other hand she admitted she hired many persons without knowing anything about them and even though they had no experience. She alleged that she was able to tell who were good workers and who were poor ones from her own knowledge of the people, but when confronted with a list of numerous people she was often unable to say anything about them because she couldn't remember them. If she could not recall at the time of the hearing one must wonder how she was able to do so at the time of employment.

Accordingly, I mistrust a large part of the witness' testimony as I believe she was wilfully false as to a material point. Certain aspects I accept, in that the probability of truth favors her testimony in those other particulars, as hereinafter noted. (Witkin Calif. Evid. (2d ed) Section 1125)

Knowledge of Union Activity

I infer to the knowledge of the employer a consciousness of the Union activity on the part of all of the complaining witnesses or their families. Families were treated together, as Respondent's witnesses indicate, because they worked together, often under one name or one number. In fact, applications were stacked together, or clipped together, as families, even if filed at different times. Respondent's witness, Arroyo, admitted she hired a family on the basis of her assessment of its individual members. Hence, if she felt one was not suitable for employment she did not hire the remaining members of a family. Accordingly, when I look at the union activity of any one member of a family, I attribute its net effect to the remaining members of the family insofar as the employer here responded.

Testimony of witnesses indicates union membership of all complainants and specific union activity of a protected nature by Vicente Martinez, Emma Martinez, Manuel Sanchez, and Raymundo Morales. Such activity included participation in a work stoppage one week before the 1975 election by Vicente Martinez and the visible active support by Vicente Martinez, Manuel Sanchez and Emma Martinez during the election campaign by distribution of literature, buttons and authorization cards. Raymundo Morales and Vicente Martinez were UFW election observers. Morales wore an eagle on his cap while working in the fields.

Respondent was aware of the activity of the union adherents, not only because of their visible participation in the election campaign and wearing of union insignia, but also because the agents of the employer were offered buttons by Vicente Martinez, i.e., to Pat Bellamy and Frances Arroyo. Such agents admitted their awareness of the activity of the union adherents, but denied prejudice.

Employer cites NLRB v Shen Valley Meat Packers 33 LRRM 2769: "While it is not necessary that knowledge of employee's union activities or intent to discriminate on account of union activities be established by direct evidence and circumstantial evidence is sufficient, the evidence before Board must be of circumstances which do more than give rise to a mere suspicion. They must be of such a character that they can reasonably be accepted as establishing as a fact the matter which is in issue."

Counsel for the employer cites the case by reference only to the words underlined above. The cited case differs from the O. P. Murphy case in several ways, but specifically in that the Shen Valley employer was not shown to have had any knowledge of the union activity of the discharged employees. In the case at hand, there is evidence of the employer's knowledge of union membership and specific activity of certain of the complaining employees.

Specifically reference is made to the employer's knowledge of union activity as shown in the material identified as General Counsel Exhibits 2d and 10 with reference to Vicente Martinez and Raymundo Morales, in addition to other references above. It was clear from the testimony that agents of employer were cognizant of the activities of the other complainants as well.

The employer cites NLRB v Citizens News Co., 12 LRRM 643, a 1943 case, to say that the fact that an employee was engaged in union activities, taken alone, is not substantial evidence of discharge for engaging in union activates. In the cited case the Board found that the activity had ceased and therefore did not move to order cessation of possible discriminatory actions by the employer.

In Shattuck Denin Mining Corp. v NLRB, 62 LRRM 2401, the Ninth Circut Court was faced with the citation of the above cited Citizens News Co. case, among others, and said: "The Board in support of the findings, cites cases indicating that it is for the trial examiner and the Board to resolve conflicts in the evidence and pass upon the credibility of witnesses (citations), that inferences drawn by the Board are strengthened by the fact that the explanation of the discharge offered by the employer fails to stand scrutiny (citations), that the Board may consider facts and incidents compositely and draw inferences reasonably justified by their cumulative effects (citations).

"Many more cases could be cited in which the courts have used various expressions and stated various reasons in upholding or refusing to uphold the findings of the Board. There is more than enough scripture upon the subject to enable any devil to cite some of it for his purpose. (The devil can cite scripture for his purpose. Merchant of Venice, Act 1 Scene III, 1.99, William Shakespear.) We think it quite unnecessary to discuss, much less to reconcile, all of the statements made by various judges on the subject, or even all of the statements appearing in the opinions in the cited cases. The statute commands that we examine the record of each case to ascertain whether the findings of the Board are supported by substantial evidence on the record considered as a whole. This is not always easy, and judges may, and sometimes do, disagree about the

result. On its face, each case is unique."

Also considered in the case before us is the background of conflict between the Union and Respondent. There were several unfair labor practice complaints filed and later withdrawn or dismissed.

Objection to Prior Complaints

The Respondent objected to the admission of General Counsel's Exhibits 2A, 2B, 2C, and 2D on the ground that those four charges filed by the UFW against the Respondent in 1975 and subsequently dismissed or withdrawn may be highly prejudicial to Respondent's case. They were admitted for their relevance to show a background of conflict between the parties. The facts being litigated in the instant case are not dependent upon the allegations in those earlier charges. However, the election period in 1975 is relevant to the instant case and those earlier charges were filed during the election period. Local Lodge 1424 v NLRB, 45 LRRM 3213: ". . . However, where occurences within the limitations period in and of themselves constitute unfair labor practices, the earlier events may be utilized to shed light on true character of matters occuring within such period. NLRB v Carpenters District Council, 66 LRRM 2177 (1967): "The Trial Examiner properly considered four charges which had been dismissed or withdrawn and even though the activities had occurred beyond the six-month statute of limitations because it could support an inference as to the Union's motive. Those activities possessed background relevancy with respect to activity within the six-month period, and in any event were only part of all the materials which the Board utilized." Longshoreman (ILWU) Local 13, 88 LRRM 1117: "NLRB may take judicial notice in unfair labor practice proceeding of all relevant documents and facts from prior cases involving same parties."

Showing of Business Justification for Conduct

Respondent attempted to show evidence of a substantial business justification for its conduct. Mr. Francis Murphy stated the reason for use of application forms was partly because the law holds employers responsible for employment of illegal aliens. The fact is, however, that Frances Arroyo trestified she did not require completion of the alien section of the form, and people were hired notwithstanding its incompleteness.

Respondent argued that business requires that they only hire persons whose records indicate "dependability." In fact, however, no information was sought, either on the application form or personally, that would provide data concerning prior employment. Persons with no previous record of employment, either at O. P. Murphy & Sons, or even in picking tomatoes, were, hired in preference to 'certain union adherents.

Testimony concerning the checking of 1975 payroll records for dependability was in conflict and found questionable. Even if such a check had been made, the records are inadequate to determine such dependability because various family members work together

under one or two names and thus distort the count as to how many buckets of tomatoes are picked by any one person. Further, no record was kept of whether crews were laid off at the end of the 1975 season resulting in a notation of early leaving by some. Even if, such evidence were available or reliable, it is clear that many other persons were hired though they left the fields early in the 1975 season.

I do not find that the Respondent has come forward with evidence to sustain its contention that it was motivated by legitimate business objectives. Further, I conclude that the employer's conduct was inherently destructive of the employees rights. NLRB v Great Dane Trailers, Inc., 65 LRPM 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; if, however, the adverse effect of the discriminatory conduct on employee rights is comparatively slight, an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct; in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him."

Both parties cite Radio Officers Union v NLRB, 33 LRPM 2419: "Section 8(a)(3) of the Act does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrmination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

"Act does not require that employees discriminated against be the ones encouraged for purposes of violations of Section 8(a)(3); nor does Act require that change in employees' 'quantum of desire' to join, a union have immediate manifestations . . ."

"Congress, in enacting Section 8(a)(3) of Act, intended the employer's purpose in discriminating to be controlling."

"Specific evidence of intent to encourage or discourage membership in a labor organization is not an indispensable element of proof of violation of Section 8(a)(3) of Act.

"Employer's protestation that he did not intend to encourage or discourage membership in a labor organization must be unavailing in proceeding under 8(a)(3) of Act where a natural consequence of his action was such encouragement or discouragement."

Ever since the first case to reach the court under NLPA, Labor Board v Jones Laughlin Sted Corp., 301 US 1 [1 LRPM 703],

it has been held that the employer's true purpose, his real motive, is the question to be decided.

The Employer cites Pittsburg - Des Moines Steel Co. v NLPB, 47 LRRM 2135 "(9th Cir., 1960) , and contends that it holds that an employer's discriminatory intent may be conclusively presumed only if the encouragement or discouragement of union membership must be a natural and foreseeable consequence of the discrimination and the discrimination itself must be based solely upon the criterion of union membership or protected activity.

The Pittsburg - Des Moines Steel Co. case provides an estensive discussion of the cases of Radio Officers Union v NLRB, 347 U.S. 17, 33 LRRM 2417 (1954) (which itself contained a consolidation of cases including NLRB v Gaynor News Co., 197 F2d 719, 30 LRRM 2340 (2nd Cir 1952) cited in Employer's brief in the O. P. Murphy case.). That discussion states in part that "When criteria other than union membership or activity are used as the basis for an employer's discrimination, the exceptional rule of Radio Officers' does not apply since the kind of discrimination which impelled the rule is absent. It is then up to the Board to predicate a conclusion of unlawful intent upon more specific evidence; a showing of the discriminatory treatment plus its natural and foreseeable consequences will not suffice."

I find here that it was indeed union activity that was used as a basis of discrimination by O. P. Murphy & Sons in refusing to rehire certain union adherents.

From my observation of all of the witnesses, their demeanor and the character of their testimony, I conclude that the refusal to rehire certain persons, as hereinafter designated, was indeed discriminatory and sufficient inference was available for me to determine that the activity of union adherents was the true, underlying reason for such action by the employer. Shattuck Denin Mining Corp. v NLRB, 62 LRRM 2403: "Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self serving. In such cases, the self serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact--here the trial examiner--required to be any more naif than is *a* judge. ('Judges are apt to be naif, simple minded men, and they need something of Mephistopheles.' Holmes, Law and Court, in Speeches 102, 1913.) If he finds that the stated motive for a discharge is false he certainly can infer that there is another motive. More than that he can infer that the motive is one that the employer desires to conceal--an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference. . . ."

"We are to respect the duties of the trier of fact to decide whom to believe, to reconcile conflicting evidence and to draw such inferences as the evidence reasonably supports. And we are told by the Supreme Court, in no uncertain terms, that 'there is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases, (NLRB v

Walton Mfg. Co., 52 LRRM 2272). The statute also commands that the Board consider whether the employee was discharged for cause (citations)."

As stated in NLRB v Ace Comb Co., 58 LRRM 2732, it has long been established that for the purpose of determining whether or not a discharge is discriminatory in an action such as this, it is necessary that the true, underlying reason for the discharge be established That is, the fact that a lawful cause for discharge is available is no defense where the employee is actually discharged because of his union activities. A fortiori, if the discharge is actually motivated by a lawful reason, the fact that the employee is engaged in union activities at the time will not tie the employer's hands and prevent him from exercise of his business judgment to discharge an employee for cause.

Conduct of Pat Bellamy

The statements of Pat Bellamy to Vicente Martinez are found to be the statements of the employer. Martinez could reasonably believe that Bellamy's calling him a "traitor" and a "trouble maker", and saying that even if he could hire him he wouldn't do so, were the statements of Respondent.

It has been held that even if a foreman is not a supervisor, the employer placed him in a position where employees reasonably could believe that he spoke on behalf of management, and therefore his acts are imputable to employer whether or not these acts were actually authorized or subsequently notified.

"Under circumstances such as here present, an employer is chargeable with knowledge of union activities acquired by a supervisor, and the supervisor's statements are probative evidence of the motivation for the discharge of employees." Montgomery Ward and Co., 115 NLRB 645.

Section 1140.4(j) of the Act defines the term supervisor: "The 'supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, 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."

Additionally, pursuant to Section 1165.4 of the Act, the conduct of Respondent's agents, Francis Murphy, secretary and production manager, Frances Arroyo, supervisor, Mike Murphy, supervisor, and

Pat Bellamy, supervisor, are attributed to respondent whose liability is founded upon the conduct of its agents.

Change of Hiring Policy

The employer here contends that he did not change any rules. He asserts that the policy of not rehiring "undependable" workers was longstanding with the O. P. Murphy companies and was specifically applied to all other personnel except field persons. Respondent maintains that the same policy would have applied to field personnel if the company had control, but that in prior years such persons were under control of labor contractors.

I find that the labor contractors were in fact employees of Respondent and, as such, were its agent for all purposes. (Section 1140.4(c) of the Act provides in pertinent part that "The employer engaging such labor contract . . . shall be deemed the employer for all purposes under this part.") In 1975 the affected employees worked for O. P. Murphy & Sons, notwithstanding its contention that they worked only for contractors.

Thus, a change was made in the policy affecting field personnel when in 1976, only "dependable" persons were to be reemployed. Further, no announcement of such a policy had been made to the employees either in 1975 or 1976. None of the employees was warned that leaving the fields before the end of tomato season, or failure to pick a certain number of buckets of tomatoes, would be grounds for not rehiring.

Pertinent to the instant case is the case of Spotlight Co., 76 LRRM 1441: "Employer violated LMRA when it failed to reinstate employee following her leave of absence, allegedly for overstaying her leave and for poor production, since real reason was her union activities prior to her leave. (1) employer knew of employee's union activities; (2) employer made statement indicating that its failure to reinstate employee was discriminatorily motivated; (3) employee never had been reprimanded for her alleged poor production, and, even assuming her production was low, this would not justify employer's subsequent hiring of many inexperienced workers; (4) two other employees who also had overstayed their leaves of absence were neither discharged nor reprimanded."

"Employer had imposed a new condition of employment upon employee seeking to return to work. He thus violated the act in that such condition was actually imposed due to her prior union activities." (Spotlight Co., supra)

Employer cites Indiana Metal Products Corp. v NLRB, 31 LPRM 2490, accurately stating the holding in that case that the General Counsel had the burden of proving- affirmatively, by substantial evidence, that an employee's discharge was due to union activities. However, the cited case indicates that it was clear from the record that nothing had happened prior to the discharge of the employee (Meyer) which would sustain the Board's finding that it was his activity upon behalf of the Union which was the cause of his discharge.

Such is not the case in the O. P. Murphy matter.

Also, in the Indiana Metal Products case the court pointed out the numerous inferences that were made by the Board in order to find that Meyer was fired for union activity. The court noted that "it is well established that inference piled on inference is not a substitute for evidence."

In the O. P. Murphy case it was not necessary to put one inference upon the other to find discrimination in light of testimony by Respondent's agent Frances Arroyo which, through repeated contradictions and doubtful statements, leads one to conclude that union activity was, indeed, a basis for refusing to hire employees. Hence, the contention of Respondent that it had substantial business justification for its conduct is rejected.

Some Union Members Were Hired/Some Non-activist Persons Were Not Hired

Employer cites Quality Casting Co. v NLRB, 54 LRRM 2674 (6th Cir 1963), and alleges it holds that if the group affected clearly includes employees who did not engage in the protected activites, both discrimination and motivation must be proved.

We distinguish the Quality Casting Co. case from the O. P. Murphy matter in part by noting that in Quality the court found: "An important consideration in determining whether petitioner was motivated by anti-union bias is whether such bias had manifested itself in other situations. Although this petitioner had experienced more than one year's labor unrest, starting with certification of the Union, proceeding through the strike and the strike's failure, and concluding with the Union decertification, the only complaint of an unfair labor practice which was made was the one that is before us now."; while in the O. P. Murphy case we note that several unfair labor practice charges were made by the Union against the employer during the year prior to the charges at hand.

Further, the courtheld in the Quality case that where the employer's action is directed at a group that clearly includes others who did not engage in such activities, NLRB must not only prove discrimination but also the employers motivation. The facts of that case make it plain that the employer's intent was not clearly to discriminate against Union members by changing a profit-sharing plan to exclude employees with 50 percent absenteeism. Evidence supported the employer's claim that the plan was changed to permit more strikers to receive benefits than would have been permitted under stricter adherence requirements of the former plan and that the employer's plan was only to require a minimum amount of work and consequent profit creation for profit-sharing eligibility.

In the O. P. Murphy case, however, Respondent maintains it hired many Union members and even some who had served on the Ranch Committee. First, it is clear from the overwhelming vote for the Union that Respondent had no choice but to hire Union members if it wanted to have its tomatoes picked. Second, the activist

members listed by the employer, i.e., known Chavistas, were declared by Frances Arroyo to be her personal friends.

The Martinez Families

Though there is clear evidence that Vicente Martinez had been an observer at the 1975 election, he denied it in his testimony. The question is whether his false statement taints the remainder of his testimony and whether the false statement is relevant. Actually, to tell the truth would have been more in his interest, as it was his intent to show that Respondent discriminated against him on account of his union activities. The false statement does not have sufficient significance to warrant rejection of his total testimony in light of the corroboration of other evidence in support of his remaining statements (Witkin, Calif. Evid. (2d ed) Section 1125)

There is sufficient indication from all testimony taken together, in addition to the showing of conflict between the parties due to union activity, that Vicente Martinez was discriminatorily refused reemployment because of his union activity. He had never been informed that his work was unsatisfactory, never disciplined, never told that there would be a change in policy for the coming year, not warned to stay for an entire season. He was told by an important agent of the employer, Pat Bellamy, on several occasions that he was a "traitor". He was also told in an angry shout by that agent that he was a "trouble maker" and that even if he (Bellamy) did have authority to rehire he wouldn't do it.

At the hearing, Respondent offered conflicting testimony as to the reasons for not rehiring Vicente Martinez. It was admitted, however, that had a job been available he and his entire family would have been hired. This statement negates all of the other testimony alleging inadequacies of the family as tomato pickers.

Section 1152 of 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."

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 of the rights guaranteed in Section 1152. . . . (c) 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."

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

Section 1148 of the Act states that: "The Board shall follow applicable precedents of the National Labor Pelations Act as amended."

It is well established that a violation of Section 8(a)(3) is

a per se violation of Section 8(a)(1) of the NLRA, and the Board has followed this rule in finding that a violation of Section 1153(c) is a per se violation of Section 1153(a) of the Act. See Morris, The Developing Labor Law (1971), p.66.

Under the circumstances I view Pat Bellamy's statements as a flagrant interference with the statutory rights of Vicente Martinez, and as constituting conduct violative of Section 1153(c) of the Act, and I so find. Accordingly, I find such conduct also a violation of Section 1153(a) of the Act.

Furthermore, I find that in light of the employer's espoused practice of treating whole families together, Socorro Martinez and Maria Martinez suffered the same discrimination as that of Vicente Martinez. Hence I find the same violations of 1153(c) and 1153(a) for each of them.

As to the Baltazar Martinez family, I find that it was the daughter Emma who was the activist union adherent. She, too, was known by management as one of the distributors of buttons, leaflets, etc. during the 1975 election period. It is concluded that her activity resulted in discriminatory refusal to rehire her and consequently her entire family including Baltazar, Elena, Idolino and Roberto (aka Baltazar).

It is sufficient to conclude that the refusal to rehire one of the two Martinez families was tantamount to a refusal to hire the other because it appears from the testimony that both families worked together, had previously lived together, were related, applied together (in part at least) and were thought of as a unit. That would be enough. In addition, however, I find that Frances Arroyo's refusal to give an application form to Baltazar was an outright act of discrimination. No one else was refused an application form on any grounds. The fact that he was working in the lettuce on July 18, did not mean he would be doing so on August 5 or later. If Ms. Arroyo had wanted to consider him she could have called and checked to see if he was available. A refusal to accept his application assured she would not do even that.

I find, therefore, that such conduct by Frances Arroyo, an agent of Respondent, in refusing to hire such member of the family, constitutes violations of Section 1153(c) of the Act. Accordingly, I find also violations of Section 1153(a) of the Act.

Hence I find such violations in the cases of: Baltazar Martinez, Elena Martinez, Emma Martinez, Idolina Martinez, and Roberto (Baltazar) Martinez.

Raymundo Morales

In the matter of Raymundo Morales I do not find sufficient evidence to sustain the allegations of the Union and General Counsel that he was refused employment because of his union activities.

Mr. Morales was an active supporter of the Union and known as

such by management, but there is no evidence in his case such as there was in the Martinez matter that management acted against him.

Mr. Morales requested that he be hired as a dumper. This is a limited position. Not many were employed. There is nothing to indicate that he deserved any preference over the few others chosen. He had worked for Murphy as a dumper only one other time.

In fact, I believe that the employer did try to contact Mr. Morales. Even he admitted that his mother received a call for him in late September or early October when he was about to start at another job. The fact that it was late in the season may imply a desire to put this UFW advocate at the bottom of the list, but there is no strong indication of such a motive. The fact that the employer already designated the truck and the side of the truck (3A) that he would work on implies its good faith effort to try to hire him. Accordingly, I recommend that the allegations of discriminatory refusal to rehire Raymundo Morales be dismissed.

The Sanchez Family

I also find in the matter of Manuel Sanchez and Maria Sanchez insufficient evidence to sustain allegations that they were refused employment because of union activities.

There was nothing done by the employer to indicate a specific feeling about the Sanchez family, though Mr. Sanchez had been a visible and active supporter of the Union.

I believe it would be unfair in this instance to expect the employer to give jobs to Mr. and Mrs. Sanchez though they did not even comply with the application procedure.

Requiring the application was not in itself a sufficient change in policy to warrant a finding of discrimination here. The employer certainly needs some means of knowing who is interested and where to contact applicants.

The Sanchez family knew of the requirement and of the three-day acceptance period. They ignored both. It was not until the second week of picking that they went to the field and asked for work. By then, they had to take a chance with others. Still they refused to fill out applications. I do not find their explanation for refusal convincing in this instance, i.e., they claim they were afraid to fill out applications because others had done so and didn't get jobs. There were others who did get jobs. Besides they could not have formed that opinion until after picking began. By then they had already ignored the procedure. I do not find a preponderance of evidence to support the allegations of discriminatory refusal to rehire in this instance. Accordingly, I recommend that the allegations of discriminatory refusal to rehire Manuel Sanchez and Maria Sanchez be dismissed.

Eva Serrato

In addition, there was insufficient evidence offered to sustain

an allegation that Eva Serrato was refused reemployment due to discriminatory conduct by the employer. In fact, there is no indication in the record of when Eva Serrato applied for work. We only know that when she applied for work in the field on some occasion it was granted. Her application form was not offered and she did not testify. In addition, there was insufficient information to conclude that she had a basis for alleging discrimination.

Accordingly, I recommend that the allegation of discriminatory refusal to rehire Eva Serrato be dismissed.

IV. Questions Regarding Legal Residency of Farmworkers

Both parties have asked for a determination of the matter as to whether or not witnesses in an unfair labor practice hearing may be asked questions regarding their legal residency. I found the questions irrelevant at the hearing, but repetition of the question may have had a chilling effect on testimony. It was alleged, at least in arguments, that one witness did not testify on that account.

There was sufficient basis for a ruling of irrelevancy in the instant case, because Frances Arroyo had testified as an agent of the employer that she did not require the completion of that section of the application form which called for alien status. She stated that some filled it out and some did not. It did not preclude their employment. Further, when I asked counsel for the employer if he was alleging that legal residency was one of the reasons people were not hired, he answered in the negative. In such an instance I needed to look no further. Nevertheless, I make the following contentions and recommend that no questions concerning legal residency be admitted in an unfair labor practice case:

No State or Federal law requiring employers to check the immigration status of its employees is currently in effect or was in effect at the time the complaining witnesses were denied reemployment. It is not illegal to hire non-U.S. citizens who have no immigration documents, nor is it illegal for such undocumented persons to work. In fact, the Federal Statute which prohibits the harboring of aliens not lawfully entitled to enter or reside in the U.S. provides specifically that employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring. Title 8 U.S. Code Section 1324(b).

California Labor Code Section 2805(a) makes it a misdemeanor for an employer to "knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers". This statute was enjoined as an unconstitutional preemption of Federal authority before any enforcement took place. Dolores Canning Co., Inc. v Howard, 40 CA 3d 673 (1974); De Canas v Bica 40 CA 3d 976 (1974). The U.S. Supreme Court reversed the California Court of Appeal in De Canas v. Bica, U.S. , 96 Ct. 933 (1976) but the case was remanded to the California Court of Appeal to determine if the statute is unconstitutional as applied, a question not reached by the California courts. The Court of Appeals has made no ruling to

date and the injunction against enforcement is still in effect.

Undocumented aliens are included in the definition of employee under the NLRA and the ALRA. Handling and Equipment Corp., 85 LRRM 1603 (1974), Lawrence Rigging, Inc., 82 LRRM 1784 (1973). Alienage is irrelevant to a determination of legal rights under the ALRA.

The case on point is Amay's Bakery & Noodle Co., 94 LRRM 1165 (1976), in which the NLRB held that employees in California who are illegal aliens and who have been discharged in violation of the NLRA are entitled to reinstatement and back pay since illegal aliens are "employees" within the meaning of the NLRA and entitled to its full protection. The NLRB in the Amay's, supra, case discussed the current status of Labor Code Section 2805 and found that the statute is permanently enjoined from enforcement until a final determination is made by the California Supreme Court pursuant to DeCanas v. Bica, supra. Thus the Respondent incurs no liability under Labor Code Section 2805.

I assert further that it is an unfair labor practice to interfere with, restrain or coerce farmworkers in the exercise of their rights under the Act. The right to testify at a hearing is a protected right under Section 1153(d). Systematic intimidation of farmworkers by counsel for any party cannot be condoned in practice before the ALRB. The questioning about immigration status tends to frighten witnesses who fear deportation by the Immigration and Naturalization Service. Exercising the privilege against self-incrimination is not sufficient to calm the fears of farmworkers who may not trust the mysterious ways of the law to protect them against deportation when it is the same legal system which subjects them to deportation in other contexts.

Accordingly, I find that any questioning by counsel regarding emigration status of farmworkers during any proceedings before the ALRB should be prohibited. Such questions are categorically irrelevant to any issues being litigated and, furthermore, constitute an unfair labor practice which tends to interfere with, restrain and coerce farmworkers in the exercise of their rights under the Act.

V. Remedy

Having found that Respondents have engaged in certain unfair labor practices within the meaning of Section 1153(a) and (c) of the Act I shall recommend that they 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 conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommenced order:

ORDER

Respondents, their officers, their agents and representatives, shall:

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

(a) offer to the below listed persons employment and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their not being employed from the first to the last day of the 1976 tomato picking season. This shall apply to Vicente Martinez, Socorro Martinez, Maria Martinez, Baltazar Martinez, Elena Martinez, Emma Martinez, Idolina Martinez and Roberto (aka Baltazar) Martinez. Additionally, the employer shall pay to those persons named an interest rate of 7% on any sum of such back pay due (Valley Farms and Rose J. Farms, 2 ALRB No. 41). Such offer of reinstatement shall be made at the beginning of the 1977 tomato harvest season and shall be unconditional as to each of the above-named persons.

(b) preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of unconditional reinstatement under the terms of the Board's Order.

(c) mail a Notice to all employees of O. P. Murphy & Sons, to be printed in English and Spanish, along with a copy of the Board's Order to all of its employees listed on its master payroll for the payroll period ending September 15, 1976. The necessity of mailing the Notice and Order to employees from the 1976 season is due to the seasonal nature of the tomato harvest and the fact that on September 15, 1976, Respondent employed five full crews of workers indicating its last peak employment period prior to these proceedings Southland Mfg. Corp., 157 NLRB 1356, 61 LRRM 1552 (1966).

(d) the same Notice to all employees in English and Spanish shall be posted at the beginning of the 1977 tomato harvest season for a period of 60 days in prominent locations next to employer work areas, such as on the dumping bins, pick-up trucks, portable toilets and other movable items present in the tomato fields as well as in the packing sheds and other fixed locations to be designated by the Board (NLRB v Express Publishing Co., 312 U.S. 426, 8 LRRM 415 (1941) and Valley Farms and Rose J. Farms, 2 ALPB No. 41 (1976).

(e) the same Notice in Spanish and English shall be read in both languages at the commencement of the 1977 harvest season on company time to all those then employed, by a company representative. A Board agent shall be present at the reading of the speech and shall be given the opportunity at that time to meet with the employees for a time certain in the absence of the company's representatives to answer questions regarding the contents of the Notice and to explain employee rights under Section 1152 of the Act. The Board has recognized there is significant illiteracy among agricultural employees (Samuel S. Vener Co., 1 ALPB No. 10 (1975)). The fact of illiteracy is a basis for ordering the reading of notices. See, e.g. , NLRB v Bush Hog, Inc., 405 F.2d 755, 70 LRRM 2070, 2072 (5th Cir. 1968);

Marine Welding and Repair Works v NLRB, 439 F.2d 395, 76 LRRM 2660, 2663 (8th Cir. 1971) and cases there cited.

The Notice to employees shall begin with the following paragraph:

"After a trial in which all parties had the opportunity to present their evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that O. P. Murphy & Sons violated the Agricultural Labor Relations Act, and has ordered the company to (make this speech, write this letter, post these notices) and keep the promise that it makes in this (speech, letter, notice)".

The company shall promise in its Notice that it will do what the Board has ordered; that it will not commit any of the unfair labor practices so enumerated by the Board and that the rights of agricultural employees under the ALRA shall not be violated by the company. The Board's Notice to workers in Tex-Cal, supra, 3 ALRB No. 14 at P. 21, shall be the guideline for drafting an appropriate Notice in this case.

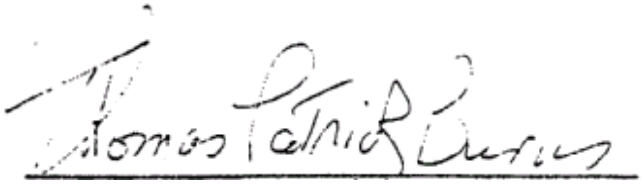
2. Cease and desist from:

(a) discouraging membership of any of its employees in the Union, or any other labor organization, by cajoling them, commenting upon their allegiance, refusing to employ, employing later in the season, giving preference to friends of the employer's agents, changing work rules and policies in such a manner as to have the effect of discriminating because of union membership, 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 in Section 1153(c) of the Act.

(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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

It is further recommended that the allegations of the complaint alleging violations by Respondents of Sections 1153(a) and 1153(c) by their refusal to rehire Manuel Sanchez, Maria Sanchez, Eva Sarrato, and Raymundo Morales be dismissed.

DATED: April 15, 1977



Thomas Patrick Burns
Administrative Law Officer