

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

FILICE ESTATE VINEYARDS,	)	
Respondent,	)	Case No. 76-CE-12-M
	)	
and	)	
	)	4 ALRB NO. 81
UNITED FARM WORKERS	)	
OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
_____	)	

DECISION AND ORDER

On March 9, 1977, Administrative Law Officer (ALO) Barry J. Bennett issued the attached Decision in this proceeding, Thereafter, Respondent, the General Counsel and the Charging Party each filed timely exceptions and a supporting brief, and the General Counsel filed a reply brief to Respondent's exceptions.

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<sup>1/</sup> of the ALO, with the exception noted below, and to adopt his recommended

<sup>1/</sup>The ALO's findings and conclusions are based in substantial degree on his resolutions as to credibility of witnesses. In the absence of clear error, we shall not disturb credibility resolutions based on an ALO's observation of the demeanor of witnesses. El Paso Natural Gas Company, 193 NLRB 333, 78 LRRM 1250 (1971); Standard Dry Wall Products, Inc., 91 NLRB 544, 26 LRRM 1531 (1950); Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977), aff'd 144 Cal. Rptr. 149, 160 (1978). "The ALO's other credibility resolutions, as well as his analysis and evaluation of the evidence, are fully supported by the record as a whole, and we so find.

Order as modified herein.

The ALO concluded that Respondent's eviction of employee Eduviges Hernandez from company housing constituted a violation of Section 1153(a) of the Act, but did not violate Section 1153 (c) because the house did not constitute a term or condition of Hernandez' employment.<sup>2/</sup> Both the General Counsel and the Charging Party have excepted to this finding. We find that their exceptions have merit and agree that the ALO applied an erroneous legal standard in concluding that the house was not "inextricably tied" to Hernandez' employment with Respondent.

The NLRB has traditionally found company housing to be a "term or condition of employment" where rental is provided free, or at a nominal rate, or at less than the usual rate in the area, so that such housing constitutes, in effect, a part of the wages or remuneration for employment services. Sellers Manufacturing Company, 92 NLRB 279, 27 LRRM 1083; Great Western Mushroom, 27 NLRB 352, 7 LRRM 72. When an employee is evicted from company housing following a discriminatory discharge, without any persuasive justification for the eviction, the NLRB will infer that the eviction stemmed from the same discriminatory reasons as the discharge. Abbot Worsted Mills, Inc., 36 NLRB 545, enf'd 127 F. 2d 438; Indianapolis Wire-Bound Box Co., 89 NLRB 617, 27 LRRM 1055; W. T. Carter, 90 NLRB 2020, 26 LRRM 1427. In a more recent case, the NLRB found that a company

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<sup>2/</sup> Section 1153 (c) prohibits "... discrimination in regard to ... any term or condition of employment, to encourage or discourage membership in any labor organization."

house near the work place and provided at a nominal rental was a valuable incident of the employer-employee relationship and a term or condition of employment within the meaning of Section 8(a)(3) of the NLRA.<sup>3/</sup> The Board also noted that the company houses involved were rented only to employees and therefore it was only because of the employment relationship that an individual was eligible to rent a house from the company initially. Florida Citrus Cannery Cooperative, 124 NLRB 1182, 44 LRRM 1613; enforcement denied on other grounds, 288 F. 2d. 630 (5th Cir. 1961); cert, granted 368 U.S. 812, 82 S. Ct. 31, 7 L. Ed. 2d 21, reversed and remanded for reconsideration at 82 S. Ct. 853; enforcement denied on other grounds, 311 F. 2d 541 (5th Cir. 1963).

It is clear from the record herein, and we find, that Hernandez occupied his company house as a valuable incident of his employment relationship with Respondent. The house was located near Hernandez' work place and he occupied the house rent-free for over three years, or during most of the period of his employment with Respondent, except for a 10-month period during which he paid Respondent a \$7.00 weekly fee, which was imposed to encourage conservation of electricity, as utilities were provided without charge by Respondent. Hernandez requested a company house at the time he originally negotiated his job with Respondent and was promised the house would be made

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<sup>3/</sup> Section 8(a)(3) of the National Labor Relations Act is substantially equivalent to Section 1153(c) of the Agricultural Labor Relations Act.

available to him as soon as it became vacant. Therefore, it was because of the employment relationship that Hernandez was given the house initially. We do not consider significant the fact that Hernandez remained in the house for some time after his discharge, in light of the record evidence that he did so upon the advice of a legal assistance attorney who represented him in connection with the eviction.

The record supports the ALO's findings that Hernandez was repeatedly threatened with discharge for his union support by a company supervisor during the 1975 election period at Respondent's ranch and that Respondent ultimately discharged Hernandez because of his union support. Respondent initiated its efforts to evict Hernandez immediately prior to the election, The ALO rejected Respondent's claim that Hernandez was evicted because the house was in disrepair, noting the absence of a showing that the house had significantly deteriorated since Hernandez first occupied the premises in 1972. We concur in the ALO's conclusion that, in light of the timing and other surrounding circumstances, the eviction violated the Act; and we further conclude that, based upon the record as a whole, the eviction, like the discharge, was unlawful discrimination and a violation of Section 1153(c) and (a) of the Act.

Respondent has excepted to the ALO's recommended remedy that Hernandez be offered company housing and maintains that the house formerly occupied by Hernandez is no longer habitable. The ALO specifically found that the house in question had not been condemned by any official act, and that

Respondent's own "condemnation" of the premises represented only its decision that it was time to get Hernandez out of the house. In any event, the record establishes that Respondent is in possession of other houses which it may provide to Hernandez in order to comply with the terms of our remedial Order.

ORDER

Pursuant to the provisions of Labor Code Section 1160.3, IT IS HEREBY ORDERED that Respondent, Filice Estate Vineyards, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any employee in the United Farm Workers of America, AFL-CIO (UFW), or any other labor organization, by evicting any employee from his/her home or by discharging, laying off, or in any other manner discriminating against any employee in regard to hire or tenure of employment, or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(b) Threatening any employee with loss of employment because of his/her union membership or activities, or 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 activity 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 a

collective bargaining agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

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

(a) Offer to Eduviges Hernandez immediate and full reinstatement to his former position without prejudice to his seniority or other rights and privileges to which he may be entitled and make him whole for any losses he may have suffered as a result of his termination from employment, plus interest on such losses computed at seven percent per annum.

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

(c) Offer to Eduviges Hernandez housing on the terms and conditions in effect prior to his eviction by Respondent, and make him whole for any losses including, but not limited to, rental and utilities payments and relocation expenses, which he may have suffered as a result of said eviction, plus interest on such losses computed at seven percent per annum.

(d) Sign and post copies of the attached Notice to Employees at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 12 months following the issuance of this Order. After translation

of the Notice by the Regional Director into appropriate languages, copies of the Notice shall be provided by Respondent in sufficient numbers for the purposes set forth herein. Respondent shall exercise due care, to replace any posted Notice which has been altered, defaced or removed.

(e) Mail copies of the attached Notice to Employees in all appropriate languages, within 20 days from receipt of this Order, to all employees employed at any time during the period from August 28, 1975, to April 22, 1976.

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice to Employees in appropriate languages to the assembled employees of Respondent on company time. The reading (s) shall be at such time(s) and place (s) 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.

(g) Hand a copy of the attached Notice to Employees to each of its present employees and to each employee hired during the next six months and to all employees hired during the 1978 peak season.

(h) 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

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Regional Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: October 25, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member



MEMBERS HUTCHINSON AND McCARTHY, Dissenting:

We dissent from the majority's conclusion that Eduviges Hernandez was discriminatorily discharged on April 14, 1976. In our view, neither Respondent's knowledge of Hernandez union activity nor unlawful motivation are inferable from the surrounding circumstances.

Hernandez' union activity was minimal; he signed a UFW authorization card on October 25, 1975 and attended an occasional union meeting at the home of a neighbor but was careful to conceal his union affiliation and refrain from discussing union matters at work.

When asked how Respondent might have learned of such activity under the circumstances, Hernandez surmised, erroneously, that his authorization card would have been made available to Respondent by the Board in the course of a representation

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election on November 3, 1975.<sup>1/</sup> Moreover, the ALO noted the insufficiency of evidence of Employer knowledge, stating, "Given the 'sub rosa' nature of Hernandez union activities, little proof was offered that Respondent knew of such activities."

Another factor which cannot be overlooked is that of timing. The termination in employment occurred five months after the election and the union activity described above. While Hernandez was discharged under circumstances which are not entirely clear, the ALO commented on the lack of evidence to establish that the discharge was union-related. Clearly, therefore, the requisite nexus between the discharge and the employee's union activity has not been established. See Sys-T-Mation, Inc., 198 NLRB 863, 80 LRRM 1799 (1972).<sup>2/</sup>

Notwithstanding the lack of evidence to establish either that Respondent had knowledge of the employee's union activity, or that the subsequent discharge was based, wholly or partially, on such activity, the ALO nevertheless found both knowledge and unlawful motivation, first, by crediting Hernandez' testimony that Louis Filice had warned him before and after the

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<sup>1/</sup> Hernandez could not explain how Respondent might have learned of his union sympathies prior to the election.

<sup>2/</sup> In that case, the NLRB overruled the Trial Examiner's finding that the discharge of a prominent union organizer on seemingly insubstantial grounds was violative of Section 8 (a) where the discharge occurred over six months after the union activity began, and over four months after the election was over. As the Board said, "This is not, then a case in which an unexplained discharge occurs so soon after an employee's embarking on union activity as to clearly give rise to a reasonable inference of causal connection."

election that his union activity could cost him his job and, secondly, by what he characterized as Respondent's "shifting position" in explaining the nature and cause of the discharge.

Louis Filice is Respondent's 70-year-old cousin, employed on a seasonal basis to oversee the work of grape-harvesting crews supplied by labor contractors. Louis denied having made the statements attributed to him by Hernandez and insisted that he first learned of the employee's union affiliation in the course of this proceeding. It should be noted that Louis had left Respondent's employ four months prior to the discharge.

The ALO's finding of both knowledge and animus is premised on a single incident which occurred prior to the election. Hernandez' tractor had been blocked by harvest workers engaged in a work stoppage to protest the prevailing piece-rate pay. The workers had been joined in the field by UFW organizers. Hernandez resisted Louis' demand that he push forward with the tractor, declaring that he was paid to drive a tractor, not kill people. The ALO found, without benefit of transcript, that Louis responded, "You and your union. I'm going to take care of you." He presumably relied on the testimony of another employee who was seated on his own tractor, with the engine running, some 20 to 30 feet away. While this employee was unable to overhear the entire Hernandez-Louis exchange, he actually quoted Louis as having stated "You and this union ... ." [Hernandez made no reference to the described threat even though he had been carefully examined with respect

to all aspects of this incident.] On the basis of his perception of Louis' statement to Hernandez, the ALO then found Hernandez' claim of subsequent threats of job loss to be credible.

Now, with benefit of the full record, it is apparent that Louis' comment was a dual response: first to Hernandez' refusal to obey his command and then as an independent reaction to the protesting workers and organizers who jointly impeded the harvest.

As to the ALO's characterizing Respondent's explanation for the discharge as a "shifting position", we would find only that Respondent has consistently maintained that the precipitating and only cause for the discharge may have been a misunderstanding as the result of language barriers. The probability of just such a misunderstanding becomes apparent upon an examination of the varying accounts of the conversation which immediately preceded the discharge. As Hernandez does not speak English and Michael Filice, a partner in Respondent's company, is not conversant in Spanish, the two men communicated through Fidel Santiago, who is Filipino. [The ALO observed that Santiago's English proved inadequate at the hearing.]

Filice and Fidel Santiago were making the rounds of the fields on the pertinent date when Santiago stopped to give Hernandez work instructions. According to Hernandez' own testimony, Filice asked whether he had located new housing to replace the company-owned house he had been asked to vacate some months earlier. Hernandez indicated that he had been unable to do so because of his work schedule. Filice offered

to lay him off for an indefinite time and to give him a letter attesting to his layoff status. Believing that he had been discharged, Hernandez stopped working immediately after Filice and Santiago departed.

Filice, on the other hand, denied that the subject of housing arose.<sup>3/</sup> He testified that he had asked Hernandez whether he wanted to be laid off as he had heard. When Hernandez answered affirmatively, Filice asked him to work through the following Saturday. Upon reconsideration, however, Filice changed his mind and decided to lay him off immediately. Accordingly, he dispatched Santiago to Hernandez' house that afternoon with a paycheck, a layoff letter and a written eviction notice.

In cases of discriminatory discharges, the employer's motive is controlling. Absent showing of anti-union motivation, an employer may lawfully discharge an employee for good reason, bad reason, or no reason at all. See, e.g., Climax Spinning Co., 101 NLRB 1193, 31 LRRM 1206 (1952); Mueller Brass Co. v. NLRB, 509 F. 2d 704 (C.A. 5, 1975), 88 LRRM 3236. As we would find that Hernandez' discharge, if it were in fact a discharge, was completely unrelated to his union activity or union sympathies, we would dismiss the complaint in its entirety.

Dated: October 25, 1978

ROBERT B. HUTCHINSON, Member

JOHN P. MCCARTHY, Member

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<sup>3/</sup> It was Santiago's testimony that housing had in fact been discussed. When confronted with this apparent discrepancy, Filice speculated that Santiago may have independently pursued the matter with Hernandez particularly since Santiago had discussed housing with him on prior occasions.

NOTICE TO EMPLOYEES

After a trial where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to send out and post this Notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join or help unions;
3. To bargain as a group and choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect one another; and
5. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT say or do anything which interferes with, restrains or coerces any employees in the exercise of the above rights. More particularly:

WE WILL NOT fire, lay off or otherwise discriminate against any employee because such employee exercised any of these rights.

WE WILL NOT threaten to discharge any employee because such employee has exercised any of these rights.

As the Board has found that we discharged Eduviges Hernandez and evicted him from company housing because of his union activity during the 1975 UFW election campaign at our ranch, WE WILL offer him immediate reinstatement to his former job, and offer him housing on the same terms and conditions in effect prior to his eviction, and reimburse him for any loss of pay and rental, utilities, moving costs and any other expenses resulting from his discharge' and eviction, plus interest on such losses and expenses computed at seven percent per annum.

Dated: FILICE ESTATE VINEYARDS

By:

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

Filice Estate-Vineyards (UFW)

76-CE-12-M

4 ALRB No. 81

ALO DECISION

The ALO concluded that Respondent's speaking to employee Hernandez about his union activity and warning him of possible job loss constituted a violation of Section 1153 (a) of the Act, and that Hernandez had not quit, as Respondent contended, but was discharged by Respondent, in violation of Section 1153 (c) of the Act.

Although the ALO found that the General Counsel had failed to prove the housing furnished to Hernandez by Respondent was a term or condition of employment, he concluded that Respondent's eviction of Hernandez from the house violated Section 1153 (a) (but not Section 1153(c)) of the Act.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO, with the exception of the ALO's conclusion that the eviction of Hernandez did not constitute a violation of Section 1153 (c), and adopted the ALO's proposed remedial order with modifications.

The Board found that the ALO had applied an erroneous legal standard in concluding that Hernandez' company housing was not a term or condition of his employment. The Board cited a series of NLRB cases in which company housing was found to be a term or condition of employment, where, as in the instant case, the company housing was provided free or at a nominal rate. The Board also cited another series of NLRB cases in which it was held that when an employee is evicted from company housing following a discriminatory discharge, without persuasive justification, it will be inferred from the discharge that the eviction was also discriminatory.

The Board noted that Hernandez' company house was located near his work place, that it was low-rent or rent-free, and that the housing arrangement had been negotiated at the time he was hired. The Board not only affirmed the ALO's finding that the timing of the eviction and other surrounding circumstances warranted the finding of a Section 1153 (a) violation but also concluded that the eviction also violated Section 1153 (c) of the Act.

DISSENTING OPINION

Members Hutchinson and McCarthy would dismiss the complaint in the absence of evidence establishing either Respondent's knowledge of union activity or anti-union animus. They rely in part on Hernandez' admission that he kept his union activity a secret from fellow employees and his testimony that Respondent maintained a position

of neutrality throughout the election campaign. As a further basis for setting aside the ALO's Decision, the dissenting members cite the five-month lapse in time and the lack of a demonstrated causal connection between the union activity and the subject discharge.

REMEDIAL ORDER

The Board ordered Respondent to cease and desist from evicting any employee from company housing, discharging or laying off any employee or otherwise discriminating with regard to terms or conditions of employment, or threatening any employee with loss of employment or in any other manner interfering with, restraining and coercing employees in the exercise of their statutory rights. The Board also ordered that Eduviges Hernandez be offered full and immediate reinstatement, that he be made whole for any losses suffered as a result of his termination and eviction, plus seven percent interest, that he be offered housing on the terms and conditions in effect prior to his eviction, and that Respondent sign, post, distribute and read copies of an appropriate Notice to Employees.

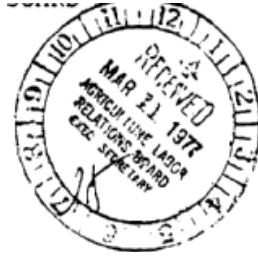
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This case summary is furnished for information only and is not an official statement of the case, or of the ALRB.



STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD



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 In the Matter of: )  
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 FILICE ESTATES VINEYARDS )  
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 Respondent, )  
 )  
 And )  
 )  
 UNITED FARM WORKERS OF AMERICA, )  
 )  
 AFL-CIO )  
 )  
 Charging Party. )  
 \_\_\_\_\_ )

Case No. :76-CE-12-M

Norman Sato, Esq., of Salinas, California  
for the General Counsel

Miller, Perrin, Domino, Giacalone & Ackerman,  
by Ernest L. Miller, Esq. of San Jose, California  
for the Respondent

Christina Bleuler and Ann M. Arbogast,  
of Salinas, California and Watsonville, California  
for the Charging Party

DECISION

Statement Of the Case

BARRY J. BENNETT, Administrative Law Officer: This case was heard before me in Gilroy, California on February 17 and 18, 1977. The complaint in this case was issued by the Acting Regional Director on December 20, 1976, and a notice of hearing issued on that day. The complaint alleged that the Filice Estates Vineyard (hereinafter the "Respondent"), through its agents Louis Filice and Michael Filice, violated Section 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter the "ALRA"). The complaint is based on a charge filed on May 24, 1976 by the United Farm Workers of America, AFL-CIO (hereinafter the "Union").

Said charge was amended, by an undated document, to delete one sentence improperly included in the charge. <sup>1/</sup> Copies of the charge and the amendment were duly served on the Respondent.

All parties were given full opportunity to and did produce, examine and cross-examine witnesses and to produce exhibits relevant to these proceedings, and after the close of hearings the General Counsel and Respondent each filed a brief in support of its respective position. <sup>2/</sup>

Upon the testimony given at hearing, the exhibits presented and upon my observations concerning the demeanor and credibility of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

## Findings of Fact

### I. Jurisdiction

The General Counsel's complaint alleged, and the Respondent did not deny, that the Respondent is a General Partnership engaged in agriculture in Santa Clara County. The testimony further disclosed that the Respondent is engaged principally in the cultivation of grapes, and to some extent in the growing of walnuts, cherries and hay. I therefore find that the Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the ALRA.

I further find that the Union is a labor organization representing agricultural employees within the meaning of Section 1140. 4 (f) of the ALRA.<sup>3/</sup>

The General Counsel alleged, and the Respondent denied on the basis of insufficiency of facts within its knowledge or that of its agents, that Eduvigis Hernandez was an agricultural employee within the meaning of Section 1140.4(b) of the ALRA. Hernandez testified, without contradiction, that he was employed by the Respondent for just over four years, principally as a tractor driver, prunes and irrigator in the Respondent's fields, and I therefore find him to have been an agricultural employee, within the meaning of Section 1440.4(b) of the ALRA, at all times relevant hereto.

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1/ The deleted sentence in the charge referred to a declaration apparently appended to the charge. At hearing, Respondent moved for production of said declaration. Given the amendment of the charge, the resistance of the National Labor Relations Board (herein-

after the "NLRB"), whose precedent we are commanded to follow by §1148 of the ALRA, to pre-trial discovery, and the absence of any showing of prejudice to the Respondent, the motion was denied.

2/ At the opening of hearings, the Union moved, pursuant to Section 20268 of the Regulations of the Agricultural Labor Relations Board (hereinafter the "ALRB") to intervene as a matter of right. Said motion was granted over the objections of Respondent that it had not been given the opportunity to do discovery of the Union.

3/ Respondent denied the allegation to this effect in the General Counsel's complaint, and refused to so stipulate. Nonetheless, in Valley Farms, 2 ALRB No. 41 (1976), and in numerous representation cases, the ALRB has found the Union to be a labor organization, and I am content to be bound by such findings in the instant case.

## II. The Alleged Unfair Labor Practices

The Complaint alleges that the Respondent violated Section 1153(c) of the ALRA by intimidating and threatening Hernandez with the loss of his employment, by evicting Hernandez from company housing and by discharging Hernandez, all allegedly because of his support for the Union. Said actions are further alleged to constitute violations of Section 1153(a) of the ALRA, as constituting interference with rights guaranteed by Section 1152 of the ALRA.

Respondent, in a detailed Answer, denied that it or its agents had intimidated Hernandez or threatened Hernandez with loss of employment because of his support for the Union, denied evicting Hernandez because of his support for the Union, asserting that the house in question was not part of company housing, was in serious disrepair and that Hernandez was permitted to remain in the house, rent free, until he found other housing, and Respondent further denied that it had discriminatorily discharged Hernandez because of his support for the Union, asserting that Hernandez was, in fact, laid off at his own request. Respondent further alleged that the filing of the Union's charge was the first notice it had of Hernandez' opposition to his layoff, and that Respondent took no position with respect to whether or not its employees ought to be represented by the Union for purposes of collective bargaining.4/

### A. The Respondent's Operations

The Respondent is a general partnership owned by Michael, Pete, Frank, and John Filice and the estate of Pasquale Lico. It has been in existence since 1933, and formerly included a winery A.nC..r« as the San Martin Wine Co., which the Respondent operated from the end of Prohibition until the winery was sold. The winery was operated as a "union" enterprise, with no apparent problems.

The current establishment consists of five or six locations, including Pacheco Pass, Loma Glen, and the area of Gilroy, California. The principal office of the Respondent is at the Loma Glen facilities, and it is there that seasonal employees are hired to prune and/or harvest the grapes, cherries, walnuts and hay raised by Respondent. Approximately 50 to 100 seasonal workers may be employed at a given time, depending on the work to be done, and the Respondent also employs approximately 10 year-around employees, who work during pruning and harvest season, but also perform maintenance and

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4/ A representation election was apparently conducted by

the ALRB at Respondent's premises during 1975. No evidence was introduced regarding the results of said election. While the General Counsel asserts, in its brief, that the Union won the election, this does not constitute credible testimony or admissible evidence. Such information might have been helpful. Respondent, in its answer, states that it objected to the election on the basis of peak employment.

irrigating functions, inter alia, during the entire year.

The day-to-day management of the Respondent is in the hands of the four Filice (all brothers) mentioned above, and Michael J. Filice is the principal manager. Orders are transmitted, on virtually a daily basis, to the workers through two "crew bosses," 5/ Louis Filice, who directed seasonal workers during pruning and harvest times and Fidel Santiago, who is in charge of maintenance operations and the permanent employees. Decisions regarding which fields should be picked, pruned or disked were made by the head office in Loma Glen, and all hiring and firing determinations were made by that office.

#### B. Hernandez' Employment

Hernandez, who had lost his left hand in 1954, was employed by the Respondent on July 25, 1972 (Stipulation of the Parties), and was assigned to and did work as a tractor driver, irrigator and pruner. He was able to work well despite his handicap, and performed satisfactorily by all accounts. Shortly after commencing his employment, Hernandez moved, with his wife and three children, into a 4-room house located at 3385 Pacheco Pass Road, on property owned by Respondent and near which stood other houses owned by Respondent. Hernandez paid no rent for this house, except for a period of 8 to 10 months during which, Hernandez testified without contradiction, rent of seven dollars a week was deducted from his paycheck. Hernandez did not pay for utilities. The house had electricity, but had no central heating system, and heat was supplied by an electric heater in one room and the four-burner stove located in the kitchen. Gas was supplied to the house by propane tanks, which were delivered by a local contractor on a regular basis. Hernandez did not pay for the gas.

Sometime around November, 1975, or just prior thereto, Hernandez was given verbal notice by the Respondent that he would have to vacate the house. On February 24, 1976 (General Counsel's Exhibit 3), Hernandez received a written notice to the same effect, and a second written notice was issued on April 14, 1976 (General Counsel's Exhibit 4). At that point, Hernandez sought the assistance of the Union and California Rural Legal Assistance. While no proceedings were ever instituted to evict Hernandez, he did vacate the premises in or about September of 1976.

On or about April 14, 1976, Hernandez had a conversation with Michael J. Filice in which Santiago served as an interpreter

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5/ The issue of the supervisory status of Louis Filice and

Santiago is discussed infra. For purposes of a factual presentation, the non-dispositive title used by the Respondent will be adopted.

for both men.<sup>6/</sup> As a result of this conversation, Hernandez' employment was terminated, and he received a final check, along with the second written notice of eviction (General Counsel's Exhibit 4), from Santiago later that day. Hernandez was unable thereafter to find other employment, and collected unemployment compensation.

### III. Discussions

The above statement of facts is necessarily brief because there were very few facts relating to the unfair labor practice allegations on which there was agreement. So much of the disposition of this case turns on the resolution of disputed factual issues that it seemed wise to state at least those few facts on which there was concurrence. What follows, then, is the position of the parties on the principal disputed factual issues.

#### A. Hernandez' Union Activities

Hernandez stated that he began to support the Union in 1974. He did not sign an authorization card for the Union until October 23, 1975 (General Counsel's Exhibit 2). He attended meetings conducted by Vasquez, a Union organizer, at Vasquez' home opposite the Respondent's ranch on Pacheco Pass Road. Hernandez spoke with seasonal workers, outside of work time, about the Union, although there is no testimony that he ever distributed or solicited signatures on authorization cards for the Union. Vasquez testified that, after the discharge of employee Parra (Vasquez' initial contact on the Respondent's work force), he worked with Hernandez.

Hernandez admitted, however, that he never talked about the Union while Louis Filice or any of the Filice brothers were present, and never engaged in union activities on the ranches or during the work day. He also stated that he only sought help from the Union about the alleged harassment he was suffering after his employment was terminated in April, 1976. Further, employee Michael and crew boss Santiago both testified that they were not aware that Hernandez was involved with the Union until the charges in the instant case were filed.

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<sup>6/</sup> Hernandez speaks very little English. Michael Filice speaks only some Spanish. Santiago frequently translated, as well as conveyed orders from the Filices to the workers.



B. The Respondent's Knowledge of Hernandez' Union Activities

Given the sub rosa nature of Hernandez' Union activities, little proof was offered that the Respondent knew of such activities. Hernandez asserted that Louis Filice "knew" that he had signed an authorization card, but the assertion was based on Hernandez' apparent conception that the Respondent was given the name of all signatories when showing of interest was being determined during the election process. The General Counsel further relies on the fact that Hernandez attended meetings in Vasquez' house, which is located across Pacheco Pass Road from the Respondent's premises and is marked with the Union's familiar black eagle symbol and other marking on a 4' x 8' sign. The location of this conspicuous meeting place is however, of little probative value, especially since the meetings were held, over a period of six months or so, on occasional Sunday afternoons. There was no allegation of surveillance of these meetings, nor any testimony that the Respondent or its agents were even aware of them.

Respondent, for its part, denied knowing that Hernandez was a Union supporter. Michael Filice denied knowing that Hernandez was a member of the Union until the actual hearing in this matter, and crew bosses Louis Filice and Santiago both asserted that they, too, did not know of Filice's membership in the Union. Respondent further alleged, in its Answer, that it took no position on the desires of its employees for Union representation.

C. The Status of Louis Filice and Santiago

Hernandez testified that during pruning and harvesting, Louis Filice was the general foreman for the Respondent, and that Louis Filice came to the various ranches 4 or 5 times daily and gave orders directly to Hernandez and other workers. Hernandez also testified that Fidel Santiago was also a foreman, "right next to Louis," and that, during Louis Filice's off-season, Santiago was in charge of all workers. Hernandez recalled several incidents when Louis Filice reviewed his work, and other times when Louis would order Hernandez from one ranch to another. On cross-examination, Hernandez termed Louis a "first" foreman and Santiago a "second" foreman, at least while Louis worked, and Hernandez testified that the two men told him where and when to report for work and were the persons with whom he would discuss work problems. Santiago translated instructions from the Filice brothers into Spanish and also, at various times, distributed paychecks to the employees. Louis worked mostly with the pruning and picking crews,

and spoke Spanish, Hernandez asserted.

Former employee Michel, a Union member, testified that Louis Filice was the "manager" while Michel was working for the Respondent, and that Santiago was "something like a foreman," who gave work instructions to the employees, corrected their work and who oversaw the work of new employees. The workers, according to Michel, looked on Santiago as a foreman, but Michael Filice told Michel, when Michel attempted to ascertain whom to ask for a day off, that Louis was his (Michel's) only supervisor.

For their part, Santiago and Louis minimized their authority. Santiago testified that he primarily translated and relayed information from the Filice brothers to the workers, and gave daily instructions to the workers based on what the Filices wanted done that day. He stated that he observed new employees, but was never asked to make recommendations on whether or not they should be retained.<sup>7/</sup> Louis Filice testified that he "helped out" with the harvesting operations, and worked with the pruning and harvesting crews. He claimed he worked 3 to 4 months each year, and "saw that the job was done right," ordering the workers to re-do certain work if it was unsatisfactory. Louis stated that he did not give orders to Santiago, and did not have daily contact with him, but that he (Louis) was the only supervisor, travelling among the ranches on a daily basis and overseeing the work.

Michael J. Filice, the chief principal among the Filice brother-owners of Respondent, termed Louis Filice and Santiago "crew bosses." According to Michael's testimony, Louis directed the work of the seasonal pruners and harvesters, and Santiago was in charge of the permanent employees, but both of them were given daily instructions from the main office. Neither crew boss, Michael testified, could hire or fire anyone, nor were the instructions given by them anything more than a ministerial repetition of the daily work orders issued by the head office. Santiago did refer potential employees to the front office for interviews, but did not "effectively recommend" the hiring of such workers and did not have the power to discipline or grant leaves to workers.

D. Alleged Conversations Between  
Louis Filice and Hernandez

Hernandez testified to numerous conversations between himself and Louis Filice relating to Hernandez' employment and his

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<sup>7/</sup> There was no testimony concerning whether or not Santiago did, or was eligible to, vote in the election held at Respondent's premises.

support for the Union. According to Hernandez, on no less than 15 occasions, Louis Filice directed comments to him to the effect that he (Hernandez) would lose his job if he supported the Union. Furthermore, on at least one occasion Louis Filice allegedly moved Hernandez from Pacheco Pass to the Loma Glen ranch to keep Hernandez from communicating with other workers about the Union. Hernandez stated that Louis Filice repeatedly tied Hernandez' future with Respondent to his abandonment of Union support. During a work stoppage by some grape pickers in 1975,8/ Louis Filice allegedly told Hernandez to drive his tractor over the demonstrating workers and, after Hernandez' refusal to do so, employee Michel heard Louis Filice say; "You and this Union. I'm going to take care of you."

Louis Filice denied ever having more than general conversation with Hernandez, denied speaking with Hernandez about Hernandez' union activities and testified that he did not even know that Hernandez was a member of the Union or attended Union meetings. Louis stated that he did not work with or even near Hernandez.

#### E. The April 14, 1976 Conversation

In what, were the matter not so serious, would appear to be a variation on the theme of The Good Soldier, Hernandez, Michael Filice and Santiago were all privy to a brief conversation on April 14 from which each of the participants emerged, judging by their testimony, with a drastically different impression of what had just happened.

Hernandez testified, with a good degree of consistency on cross-examination, that the conversation was as follows, allowing for the fact that I have no verbatim transcript of testimony:

Michael: "Have you found a house so that you can move out of the house on my property, which is condemned?"

Hernandez: how can I find a house when I am working 10 hours a day for you?

Michael: That's not my problem. I want you out of there. You have Sundays off.

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8/ Hernandez tied the stoppage to the presence of Union organizers in the fields that day, which was close in time to the representation election. The presence of Union organizers was not affirmed, denied or even mentioned by any of the other witnesses to the event.

Hernandez: People with homes for rent won't wait for me to come around on a Sunday.

Michael: Well, I won't fire you because I don't want any problems with the state, but I'll lay you off so you can find a place to live. You can apply for welfare.

Hernandez: How long are you laying me off for?

Michael: For an indefinite time. I'll give you a check and a letter of lay off this afternoon."

That afternoon, Hernandez testified that he got a letter (in English, which he could not read) saying that he was fired and that he had 10 days to get out of his house.

Santiago, who all witnesses credit as having been present at the April 14 conversation, testified that the conversation was somewhat different:

Michael: "When are you going to move from the house?"

Hernandez: Lay me off so I can go look for a house.

Michael: I can not lay you off.

Hernandez: In that case, I'm going to quit.

Michael: Ok, you're going to quit. Can you work until Saturday?

Hernandez: Ok, I'll work until Saturday."

Santiago then testified that, when he and Michael got back to the office, Michael told him that if Hernandez was going to quit, that they might as well give him a check that day. Santiago then took a check to Hernandez that day and told him not to work any more.

Michael Fillice remembered another conversational sequence, and testified as follows:

Michael: "I understand you have something to say to me about a layoff. [Michael claimed to have heard, from Frank Fillice some time before, that Hernandez wanted to be laid off].

Hernandez: Yes.

Michael: There'a a lot of work to do. I can't lay you

off. I need you to work.

Hernandez: Then I quit.

Michael: You quit? When?

Hernandez: Now.

Michael (to Santiago): What kind of work is he doing?

Santiago: Driving a tractor.

Michael (to Santiago): How long will it take him to finish?

Santiago: Maybe a couple of days.

Michael (to Santiago): Ask him if he'll quit as of Saturday, so he can finish the job he's working on.

Santiago (after asking): Well, he's agreed to work until Saturday."

Michael denied that any conversation about the house took place, much less any request that Hernandez be laid off so that he could look for a house.

In its Answer, Respondent posited yet another version of the conversation, in which Hernandez asked Michael Filice to lay him off, so that he could terminate his employment with Respondent. Michael allegedly told Hernandez that he would have to waive his seniority, and could then be laid off with some other employees as part of a contemplated layoff. Hernandez was subsequently laid off at his request, according to the pleading. The letter of April 14, 1976 (General Counsel's Exhibit 4), from Michael Filice to Hernandez, recited that Hernandez would be laid off from his job effective April 15, 1976.

For the reasons noted below, I make the following:

#### IV. Conclusions

##### A. Supervisory Status

I find that Louis Filice was a supervisor within the meaning of Section 1140.4(j) of the ALRA, and that Fidel Santiago was not.

Section 1140.4(j) of the ALRA defines supervisor as follows:

- (j) The term "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.

It is well settled, under NLRB authority, that said definition should be read in the disjunctive, so that one need not possess all of the above powers in order to be considered a supervisor. *Servette, Inc.*, 376 U.S. 46 (1964); *N.L.R.B. v. Gray Line Tours*, 461 F.2d 763 (9th Cir. 1972). It is in this light that the duties and powers of Louis Filice ought to be considered.

Louis, a self-described "third or fourth cousin" to Michael Filice, worked only during the pruning and harvesting seasons. He worked with crews brought in by labor contractors and, in Michael's words, developed his (Louis') own crew from among the workers whom the labor contractors produced. While Michael denied that Louis was more than a crew boss, this ability to "develop" a crew carries with it a strong inference of independence in selecting a work force. Michael likewise did not refute the testimony of employee Michel that, when Michel asked to whom he should go to request a day off, Michael told him that Louis was his only supervisor. While the legal conclusion in the response does not necessarily bind the Respondent, the implication of authority surely does.<sup>9/</sup>

Louis, according to unrefuted testimony, visited the fields four or five times daily, inspecting the pruning and harvesting work. Where Louis did not like the way the work was done, he would have it re-done by the labor contractor's crew. Such decisions and directions were made by Louis without, apparently, any consultation with the Lora Glen head office.

So, during the Respondent's busiest, in terms of employment, period of the year, Louis Filice was the principal voice of authority among the 100 or so seasonal workers who performed the pruning and harvesting work. Louis travelled among the Respondent's various work sites, and had the authority to and did order work performed and re-done until it met his satisfaction. Louis also,

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<sup>9/</sup> It should not pass without comment that, in its Answer, Respondent admits that Louis Filice was its agent. A decision regarding supervisorial status is still pertinent, however, lest questions of ratification or scope of agency later arise.

to some extent, had the authority to grant employees time off, although he does not appear to have had a general power to hire and fire employees beyond his "development" of the seasonal crew. Based on the above, I am satisfied that Louis met the criteria for supervisory status under 1140.4(j) of the ALRA.

With respect to Fidel Santiago, the record is clear that his authority is inferior to that of Louis Filice. Workers, including Hernandez, considered Santiago a "second" foreman, and Hernandez listed Santiago among the permanent employees on the ranch. When employee Michel tried to get Santiago to authorize a day for him, Santiago professed to have no authority to do so. Confused, Michel asked Michael Filice who his supervisor was, and was told that Louis Filice was his only supervisor. While Santiago oversaw the performance of work, instructed workers on how to properly carry out their duties and told workers where and when to report, all of these directions were a result of daily communications from the head office, implying that Santiago's discretion was extraordinarily limited. Even though there was no level of authority between Santiago and the head office 10/, the scope of Santiago's authority was confined to the routine judgment of work performance, coupled with no power to hire, fire, discipline or reward. Under these circumstances, I do not find Santiago to be a supervisor under the ALRA.

#### B. Discussions of Hernandez' Union Activities

Hernandez testified that Louis Filice spoke to him many times about his union activities, warning him that he might lose his job. Louis denied having anything besides general conversations with Hernandez, and denied knowledge of Hernandez Union sympathies, membership and activity. While Hernandez recollection was specific, and Louis' denial was general, such a juxtaposition would not necessarily resolve an apparent credibility conflict.

The fly in the Respondent's ointment, in this instance, is the unrefuted testimony of Michel that Louis Filice threatened to "take care of Hernandez and [his] union" on the day the grape pickers struck. I credit Michel's testimony, which was uncontradicted at any rate, as showing both Louis' knowledge (and, hence, the Respondent's) of Hernandez' union activity and Louis' opposition to that activity. In view of that conclusion, I credit Hernandez' testimony with respect to his conversations with Louis Filice about the Union, and find Louis' discussions of the possibilities that Hernandez might lose his job over the Union to constitute interference, restraint and coercion within the meaning of Section

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10/ Louis Filice testified that 'he did not give orders to Santiago, and did not have daily contact with him.

1153(a) of the ALRA, and an unfair labor practice.

C. The Termination of Hernandez

Untying the Gordian snarl of the various accounts of the conversation leading to Hernandez termination proved to be the most perplexing problem associated with this case. The versions proffered by the parties differed widely not only as to subject matter(s) and resolution, but also as to length and tone. For the reasons stated below, I credit Hernandez' version of the April 14 conversation.

In its letter to Hernandez dated April 14, 1976 (General Counsel's Exhibit 4), the Respondent informed the employee that he "will be laid off" from his job. I do not find it likely that an employer whose workers are covered by unemployment insurance compensation, to whom an employee expresses an angry determination to quit, would issue a letter to the employee laying him off. Additionally, the Respondent's Answer, as mentioned, recites at some length a discussion concerning Hernandez waiver of seniority. When Michael Filice was asked, at hearing, about this discussion of laying off other workers, and Hernandez waiver of seniority rights in that regard, he denied the occurrence of such a dialogue. This second internal conflict in the Respondent's position raises a serious credibility question. When coupled with the distinctions between Santiago's and Michael Filice's recollection of whether or not Hernandez housing situation was discussed, and considering the implausibility of Hernandez being eager to leave an employer who had been content to overlook his handicap, I must rule that, despite its denial, the Respondent terminated Hernandez employment on April 14, and that Hernandez did not quit.

The only question then remaining with respect to Hernandez' termination is whether it constituted a discriminatory discharge violative of Section 1153(c) of the ALRA. The Respondent would have us discard that possibility, on the alternative theories that (1) the Respondent did not know of Hernandez union activities; (2) the Respondent, even if it did know of such activities, had no anti-union animus; (3) the April 14 discussion contained no hint of relation to Hernandez' union activities, and (4) the fault, if anywhere, may have resulted from a misunderstanding between Hernandez and Michael Filice, removing any intentional element from the Respondent's conduct. For reasons noted below, I find that Respondent did, in fact, violate Section 1153(c) in terminating Hernandez' employment.

With regard to the Respondent's knowledge of Hernandez' union activities, our findings regarding Louis Filice's discussions



with Hernandez are dispositive. While the Respondent contended that Louis' actions, if any, were outside the scope of his agency and were not imputable to the Respondent, citing *Herzog v. Capital Company*, 27 C.2d 349, the NLRB has consistently held employers responsible for supervisorial conduct even where such conduct specifically violates the employer's instructions. *Local 636, Plumbers v. NLRB*, 287 F.2d 354 (D.C. Cir. 1961), 47 LRRM 2457, 2460-61, citing *I.A.M. v. Labor Board*, 311 U.S. 72, 80 (1940); *Suburban Transit Corp.*, 203 N.L.R.B. 465, 83 LRRM 1588 (1973).

With respect to the Respondent's anti-union animus, or lack of it, and specifically concerning the absence of union connection in the April 14 conversation, the NLRB, and we, continue to rely on shifts in employer positions regarding the basis for an adverse action as a basis from which to infer unlawful motivation to the extent such motivation may be required. *J. R. Townsend Lincoln Mercury*, 202 NLRB 71, 82 LRRM 1793 (1973); *Holiday Inn of Hemyetta*, 198 NLRB 410, 80 LRRM 1697 (1972); enforced, 488 F.2d 498, 84 LRRM 2585 (CA 10, 1973); *Goodyear Tire and Rubber Co.*, 197 NLRB 666, 80 LRRM 1701 (1972). See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Also see *Christens en and Swanoe*, "Motive and Interest in the Commission of Unfair Labor Practices, The Supreme Court and the Fictive Formality," 77 *Yale L.J.* 1269 (1968).

Because of the shifting Respondent position on the nature and cause of Hernandez' discharge, we tend to disbelieve the Respondent's professions of neutrality towards, if not union activities in general, at least Hernandez' activity in that regard. We therefore find that Hernandez' discharge was to some extent related to his union activities, and was therefore violative of Section 1153(c) of the ALRA.<sup>11/</sup>

#### D. The Eviction of Hernandez

In addition to allegations concerning Hernandez' termination and Respondent's threats of loss employment, the General Counsel also alleged that the Respondent evicted Hernandez from company housing because of his support for the Union.

In support of the General Counsel's contentions, Hernandez

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<sup>11/</sup> In support of the Respondent's theory that a misunderstanding occurred, it should be noted that employee Michel testified that Santiago's Spanish was not very good. At hearing, Santiago's English also proved to not be very good. In view of our other findings, we do not deem this fact worthy of further explication, but the ALRB might want to note this for purposes of review.

testified that he lived on Pacheco Pass Road, while working for the Respondent, from 1972 to 1976. Hernandez stated that he left because he was served with a series of written and oral notices of eviction. Hernandez testified further that there were no inspections of the house, by the Respondent or any government agency, that another nearby house in similar condition was still occupied and that he paid no rent or utilities on the house except for a few months when rent was deducted from his paycheck.

Both Hernandez and his wife concurred in the facts that the house had no heat, had a broken window in the front (which Hernandez taped), that the septic tank had had to be pumped out at least once and that, despite getting eviction notices as early as in or about October, 1975, they did not move out until in or about September, 1976. The house did have electricity, and both Mr. and Mrs. Hernandez denied, without contradiction, that certain photographs marked by the Respondent for identification, which showed broken sockets, open wall fixtures and bare wires, accurately portrayed the condition of the house at the time they lived there or moved. Mrs. Hernandez also stated that, after Hernandez' layoff, the gas for cooking which she had been receiving (free of charge) ran out, and the "gas man" told her he had no permission to sell her more, though she offered to pay directly for the gas. She thereafter cooked outside, and what heat the house had derived from the four-burner stove in the kitchen was no longer available.

Santiago, testifying for the Respondent, recalled the plugged-up septic tank connected to the Hernandez dwelling, and some holes Hernandez had dug to open up the plugging. On cross-examination he recalled being in Hernandez' house once, to drink coffee. Michael Filice, for the Respondent, recalled Hernandez seeking a house in 1972, and recalled telling the employee that the house needed rewiring and plumbing work and might not be able to pass inspection. Michael recalled having the house inspected by the county and having to pump out a septic tank connected to the house after the beds stopped operating and sewage began seeping onto the open ground. (The time of this occurrence was identified as 1975). Shortly thereafter, Michael began pressuring Hernandez to leave the house, and testified that he offered Hernandez more money if he would leave.

When cross-examined, Michael stated that he had been in the Hernandez home about 6 times prior to this moving in, though not afterwards, and that the house had not been condemned by the county but that the term "condemned" referred to the Respondent's decision to have the house vacated based on its impression of the house's conformity to code. Michael testified that the Respondent had paid, 15 years earlier, to renovate the house next to the Hernandez family's home, and that homes similar to Hernandez' were

not being rented out because of their dilapidated condition. No improvements were made in the Hernandez home during the period Hernandez and his family lived there.

In its Answer, the Respondent denies that the Hernandez home was part of company housing, asserts that the house was in serious disrepair and states that, despite the presentation of eviction notices to Hernandez, the Respondent did not press Hernandez to move until he found other housing.

This proceeding is, of course, an unfair labor practice hearing. The undersigned is not qualified to evaluate whether Hernandez weather-worn (see Respondent's Exhibit 2) home would have or did pass an inspection with regard to habitability. The initial questions to be resolved here, it appears, are whether the house was part of the terms and conditions of Hernandez' employment, and, if so, whether his eviction constituted discriminatory treatment of him in that regard, and, if not, whether the eviction violated Section 1153(a) as alleged.

The dispositive answer to the first question is negative, Hernandez testified that he paid rent on the house for about 3 to 10 months, which rent was deducted from his paycheck until Hernandez arranged, through his foreman, to discontinue paying rent. Although the house was identified as being at 3385 Pacheco Pass Road, there was no testimony that it was on the Respondent's ranch.<sup>12/</sup> Michael testified that he got the house for Hernandez, after warning the employee of its run-down condition. There is then no question that Hernandez secured the house and paid rent for it through his employer, and that such a process began within the first two months of Hernandez employment with the Respondent.

However, there is virtually nothing in the record (or the briefs of the parties, save the unrefuted denial by the Respondent, in its Answer, that company housing was not involved) which tends to prove that Hernandez' possession of the house was inextricably tied to his employment with the Respondent. Hernandez worked for the Respondent for two months while living elsewhere, waiting for the then-current tenants (whose employer we do not know) to leave. He was first notified of the necessity to vacate the house in or around October, 1975, but the oral notice to vacate, no more so than the written one in February, 1976, was not tied to any change in his employment status. While Hernandez paid rent, for 8 to 10 months, through payroll deductions, I regard this as simply a convenient method of collection for the Respondent, rather than

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<sup>12/</sup> Vasquez testified that his house, which was 1/8 of a mile from Hernandez' home, was directly across Pacheco Pass Road from the Respondent's ranch, so I conclude that Hernandez' home, on the same road but 1/8 of a mile away, was not right on the ranch.

evidence that the residency was a benefit accruing to Hernandez due to his employment. Finally, while Hernandez' second written notice to vacate was coincidental with his termination (the April 14 letter), he was permitted to stay in the house, rent free, until many months later.

Section 1153(c) makes it an unfair labor practice for an employer... "to encourage or discourage membership in any labor organization..." "by discrimination in regard to...any term or condition of employment."<sup>13/</sup> Even if discriminatory treatment were to be proven, the subject of such treatment must be a "term or condition of employment." Because, I find, the General Counsel has not met its burden of showing that Hernandez' housing was such a term or condition of employment, I shall recommend that the aspect of the complaint alleging that the eviction violated Section 1153(c) be dismissed. *Kohler Co.*, 128 N.L.R.B. 1062, 1092 (1960); *N.L.R.B. v. Semis Bro. Bag Co.*, 206 F.2d 33 (1953).

The complaint alleges that the eviction violated Section 1153 (a) as well. In this regard, no finding of discriminatory motive need be made. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). The only issue for decision is whether the eviction of Hernandez constituted "interference, restraint and coercion" of Hernandez in connection with his efforts to exercise his rights under Section 1152 of the ALRA. I find that it did.

I have already found that the Respondent, through its admitted agent, and supervisor, Louis Filice, repeatedly threatened Hernandez with loss of his job during 1975, and discharged Hernandez in April, 1976, all in connection with Hernandez activities on behalf of the Union. While such findings do not of necessity compel a finding that the eviction violated Section 1153(a), and while I do not accept the General Counsel's post hoc, Procter hoc theory of unfair labor practice analysis, i.e. Hernandez got evicted after he started organizing, therefore it was because he started organizing, I do find that the record supports a finding that the Respondent attempted to evict Hernandez in violation of Section 1153(a) of the ALRA. *Kohler Co.*, *supra* at 1092-3.

Hernandez lived in the house from 1972 to 1976, and there was no showing that the condition of the house had materially altered during that time except possibly for a septic tank repair required in 1975. There was no county inspection of the premises, nor was there any inspection of the premises by Respondent after Hernandez moved in. The "condemnation" discussed by Respondent was not an official act, but represented a determination by Michael Filice that it was time to get Hernandez out of the house. No imminent

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<sup>13/</sup> The words of the section have been rearranged for emphasis. See Ward, "'Discrimination' Under the National Labor Relations Act," 43 *Yale.D.J.* 1152, 1156 (1939).

danger to the interests of the Respondent or Hernandez was cited as part of that determination, and the timing of that determination, arising during the period immediately prior to the election and at a time when, we have found, the Respondent through Louis Filice was unlawfully threatening Hernandez with the loss of his job, weighs against the Respondent. Valley Farms, 2 ALRB No. 41 (1976).

Based on the questionable timing of the decision to evict and on the absence of reasons justifying that decision at the time that it was made, I conclude that the decision to force Hernandez to vacate constituted interference, restraint and coercion in violation of Section 1153(a) of the ALRA, an unfair labor practice.

#### IV. The Remedy

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

Having found that Respondent unlawfully discharged Eduvigis Hernandez, I will recommend that Respondent be ordered to offer him immediate and full reinstatement to his former or substantially equivalent job. I shall further recommend that Respondent make whole Eduvigis Hernandez for any losses he may have incurred as a result of their unlawful discriminatory actions, by payment to him or a sum of money equal to the wages he would have earned from the date of his discharge to the date he is reinstated or offered reinstatement, less his net earnings, together with interest thereon at the rate of seven percent per annum, and that loss of pay and interest be computed in accordance with the formula used by the National Labor Relations Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing and Heating Co.*, 138 NLRB 716.

The unfair labor practices committed by Respondent strike at the heart of the rights guaranteed to employees by Section 1152 of the Act. The inference is warranted that Respondent maintains an attitude of opposition to the purposes of the Act with respect to protection of employees in general. It will accordingly be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

With respect to the eviction of Hernandez, I shall recommend that *the* Respondent make him whole for the Less he has suffered 14/, including the payment of all expenses of looking for housing, moving, increased rent and travel, according to proof, and that ^he Respondent be directed to offer to Hernandez housing on the

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14/ Although no violation of Section 1153(c) was found in

regard to the eviction, the NLRB has not distinguished between its sections 8(a)(1) and 8(a)(3) for remedial purposes. See, e.g. Duquesne Electric and Mfg. Co., 87 LRRM 1457 (1974).

terms and conditions in effect prior to the eviction of Hernandez.

With respect to the recommended Order which follows herein, General Counsel requested that it be posted in a conspicuous place on the Respondent's property. I agree, and recommend that the Respondent be directed to post the Order in a conspicuous place on each of its ranch properties for a period of sixty (60) days from the date of said order, as well as for a period of sixty (60) days from the beginning of the next peak employment period, whether that be the pruning or harvest period. I further recommend that a copy of said Order be handed to each employee employed by the Respondent currently and during said peak employment period. Valley Farms, 2 ALRB No. 41 (1976). Said Order will, of course, be written in both Spanish and English.

The General Counsel further requests that the Respondent be directed to issue an apology to his employees for the commission of unfair labor practices. I deplore the use of the term "apology," in all its perjorative sense, in a proceeding such as this. Given the significant degree of illiteracy among farmworkers which the ALRB has previously found to exist, e.g. in its determination that symbols would be necessary on representation election ballots, I hereby recommend that, on one occasion within seven (7) days after the below Order, or such other Order as the ALRB directs, is commanded to be posted, and again within seven (7) days after the commencement of the next peak employment season (should those two events not coincide), that Louis Filice, with Michael Filice and Eduviges Hernandez in attendance, read the contents of said Order to the assembled employees of the Respondent, including the permanent and seasonal employees of the Respondent. Bush Hoa, Inc., 161 NLRB No. 136, enf'd. 405 F.2d 755 (5th Cir. 1968); Texas Electric Cooperatives, Inc., 160 NLRB 440, enf'd. 398 F.2d 772 (5th Cir. 1963); Marine Welding & Repair Works, 174 NLRB No. 102, enf'd. 439 F.2d 395 (3rd Cir. 1971); J. P. Stevens and Co., 163 NLRB No. 24, enf'd. 380 F.2d 292 (2nd Cir. 1967).

Upon the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160.3 of the ALRA, I issue the following recommended:

#### ORDER

Respondent, its officers, agents, and representatives, will:

1. Cease and desist from:

(a) Discouraging membership of any of its employees

in the Union, or any other labor organization, by threatening said employees with the loss of their jobs due to their union activities, by evicting them from their homes, or by discharging, laying off, 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.

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

(a) Offer to Eduviges Hernandez immediate and full reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and privileges, and make him whole for any losses he may have suffered as a result of his termination in the manner described above in the section entitled "The Remedy."

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

(c) Offer to Eduviges Hernandez housing on the terms and conditions in effect prior to the eviction of Eduviges Hernandez by the Respondent, and make him whole for any losses he may have suffered as a result of his eviction.

(d) Give to each permanent employee and each employee hired up to and including the harvest season in 1977, copies of the notice attached hereto and marked "Appendix." Copies of this notice, including an appropriate Spanish translation, shall be furnished Respondent for distribution by the Regional Director for the Salinas Regional Office. Respondent is required to explain to each employee at the time the notice is given to him that it is important that he understand its contents, and Respondent is further



required to offer to read the notice to each employee if the employee so desires.

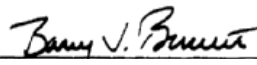
(e) Have its agent Louis Filice, in the presence of Michael Filice and Eduviges Hernandez, read this Order to the permanent employees, and again to those employees hired during the 1977 peak employment period, in Spanish and English.

(f) Post, in a conspicuous place on each of the Respondent's properties where agricultural labor is performed, copies of this Order for a period of sixty (60) days following the issuance of this Order, and also for a period of sixty (60) days following the beginning of the 1977 peak employment period.

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

It is further recommended that the allegations of the Complaint alleging violation by Respondent of Section 1153(c) in the eviction of Eduviges Hernandez from his home be dismissed.

DATED: March 9, 1977.

  
\_\_\_\_\_  
BARRY.J.BENNETT  
Administrative law officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act, and has ordered us to notify all permanent employees and all persons coming to work for us in the next peak employment season, that we will remedy those violations, and that we will respect the rights of all our employees in the future. Therefore we are now telling each of you:

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

(2) We will restore Eduviges Hernandez to housing under conditions similar to those in which he lived prior to the time we evicted him.

(3) We will not threaten any employees with loss of employment because of their support for the United Farm Workers of America, or any other labor organization.

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

Signed:

DATED:

FILICE ESTATES VINEYARDS

By: \_\_\_\_\_  
(Title)