Oceanside, CA

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

EDWIN FRAZEE, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 76-CE-25-R 4 ALRB No. 94

DECISION AND ORDER

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

On May 19, 1977 the Regional Director of the San Diego Region of the Agricultural Labor Relations Board issued a complaint based on unfair labor practice charges filed by the United Farm Workers of America, AFL-CIO (UFW) on January 29, 1976. The complaint alleged that Respondent violated Section 1153 (c) and (a) of the Agricultural Labor Relations Act (Act) by transferring employees Juan Almaraz, Luis Solis Verver, Salome Roman Arrevalos, and ten other employees (Does IV through XIII), to another work location in order to discourage their union activity, and by discharging the said employees, on or about January 9, 1976, for engaging in union activity.

A hearing was held before Administrative Law Officer (ALO) A. E. Nowack on June 13-17, 1977. In his Decision, which issued on June 29, 1977. the ALO concluded that Respondent did not

commit any of the unfair labor practices alleged in the complaint and recommended that the complaint be dismissed in its entirety. The General Counsel filed timely exceptions to the ALO's decision and a supporting brief.

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

In S. Kuramura, Inc., 3 ALRB No. 49 (1977) we stated the minimum standards for a decision of an Administrative Law Officer under 8 Cal. Admin. Code Section 20279.

The ALO's Decision fails to meet these minimum standards. Therefore, we do not feel bound by the implicit credibility resolutions of the ALO, but we do not make contrary credibility resolutions. Rather, we have examined the undisputed facts and the inferences which may reasonably be drawn therefrom and test them against the ALO's ultimate conclusions.[1/]

Unless otherwise indicated, the facts recited herein are entirely or substantially uncontroverted.

Background

Respondent is a corporation engaged in the business of growing gladiolus and gladiolus bulbs in San Diego County. The

[1/]We disavow the ALO's treatment, at pages 15-16 of his Decision, of the threats allegedly made by Gregorio Alcarez. The ALO improperly denied a motion to amend the complaint to include these incidents and incorrectly held that the conversations, as testified to by the workers, did not contain a threat. Since the ALO failed to resolve conflicting testimony as to whether the statements were, in fact, made and since we are unable to resolve the conflict on the basis of this record', we will make no finding concerning them.

officers are John Frazee, President, David Gastelum, Vice-President, and James Frazee, Secretary-Treasurer. In 1975 Respondent grew gladiolus plants and/or bulbs in three leased fields in San Diego County, identified as Valle Verde (or Green Valley), Estude (or Stuart), and San Pasqual. The peak period of employment for the company is May through December, when 225 field workers are employed. The slack period is January through March, when approximately 75 field workers are employed.

In July of 1975, Salome Roman Arrevalos went to the local UFW office to join the union. He filled out some forms and was given a card which indicated that he had signed an authorization for the UFW to represent him. Juan Almarez, Luis Solis Verver, and Robert Ochoa received similar cards in August, October, and on October 20, 1975 respectively. Each of the four distributed leaflets prepared by the UFW and/or wore UFW buttons for a week or two in August and September, 1975.

Some time before August 26, 1975, Respondent increased its employees' wages from $2.35 to $2.75 per hour. On or about August 20, 1975 Respondent caused to be distributed copies of three leaflets (Exhibits 12, 13, and 14). Exhibit 12 makes reference to organizing at the ranch. John Frazee testified that the leaflets were not prepared by Edwin Frazee, Inc., and that Respondent was not aware of any union organizing campaign at its operation. He testified that he was given a stack of each of the leaflets at a social gathering at a fellow grower's home and that the leaflets were available because other growers were aware of organizing among their employees.

Arrevalos, Almarez, Verver, and Ochoa were members of the crew of foreman Gregorio Alcarez in August of 1975. Each of them, except Ochoa, had worked for Respondent in Alcarez[1] crew in previous years cutting gladiolus for market. Prior to 1975, the unofficial practice in the Alcarez crew was that when work in cutting flowers slowed down, the entire crew would temporarily perform other tasks, such as weeding or pulling gladiolus bulbs until there were more flowers ready to be cut. Those who cut flowers had relatively permanent year-round jobs, with vacations and leaves of absence granted freely during Respondent's slack period. Testimony was also adduced that, while Respondent had no formal seniority system, it generally considered an employee's past service with the company in making employment decisions.

In September of 1975, Luis Solis Verver had two conversations with Gregorio Alcarez. The General Counsel presented testimony that in each of the conversations Alcarez threatened Verver with loss of employment by warning him not to get involved with the union because Alcarez had other workers ready to take his place. Alcarez denied threatening any workers, and claimed that Verver had initiated the conversations and that he had only responded that it was not his business. Respondent also presented testimony that all foremen had been instructed not to discuss unions with the workers.

The Transfers and Layoffs

In early November, Arrevalos, Almarez, Verver, and Ochoa were among some 30 employees in Alcarez' crew and rode to work each day, with eight other employees, in a pick-up camper driven

by Margarito Floras. Fourteen of the crew members rode to work in a van driven by Jesus Jimenez, and the others arrived at work independently. The employees determined which vehicle they rode to work. Early in November, the employees who rode in Jimenez' van were transferred to Stuart to pull gladiolus bulbs. Testimony was presented that pulling bulbs was less desirable work than cutting flowers, although each task required manual labor, often in a stooped position. One or two weeks later, the employees who rode in Flores' camper were transferred to Stuart and the Jimenez van riders were transferred back to the Alcarez crew. Shortly thereafter, in late November, the Flores camper riders were transferred to pull bulbs at a third site, in San Pasqual, where they remained until laid off, along with about 80 other workers, on January 9, 1976. Workers pulling bulbs are subject to layoff each year and therefore the matter at issue in this case is the transfer to San Pasqual, since it could have been predicted that the subsequent layoffs would occur.

David Gastellum, Respondent's field supervisor, testified that the reason for the transfer at issue was a need for workers to pull bulbs in San Pasqual and a declining need for workers to cut flowers. He testified that, even with the additional workers who rode in the Flores camper, he needed still more workers in San Pasqual. He chose the Flores camper group instead of the Jimenez van riders because the van was larger and had unused seating capacity, which gave him flexibility if he needed to transport more workers to cut flowers. On cross-examination, he admitted that he had never looked inside the vehicles to determine

seating capacity, but rather based his decision on his observation of the exterior of the vehicles and his general knowledge of such vehicles. He denied having any knowledge as to which workers rode in which vehicle or as to any protected activity by any specific employees.

Of the Flores camper riders who were laid off on January 9, 1976, six re-applied for work the following spring and were rehired. The others, including Arrevalos, Almarez, Verver, and Ochoa did not return or apply for work.

Analysis and Conclusion

Section 1152 of the Act guarantees employees "... the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities ...." Section 1153 (a) makes it an unfair labor practice "to interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." Section 1153 (c) makes it an unfair labor practice to discriminate "... 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 General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the discharges. NLRB v. Winter Garden Citrus Products Co-operative, 260 F.2d 193 (CA 5, 1958) 43 LRRM 2112. One of these elements is

anti-union motivation. NLRB v. 0. A. Fuller Supermarket, Inc., 347 F.2d 197 (CA 5, 1967) 64 LRRM 2541; Schwob Manufacturing Co. v. NLRB, 297 F.2d 864 (CA 5, 1962) 49 LRRM 2360; Lu-ette Farms, Inc., 3 ALRB No. 38 (1977).

In the present case, the General Counsel failed to prove unlawful motivation on the part of the Respondent. While conduct which is "inherently destructive" of important rights may give rise to a presumption of anti-union motive, and make independent proof unnecessary, NLRB v. Great Dane Trailers, Inc., 338 U.S. 26, 65 LRRM 2465 (1967), Radio Officers Union v. NLRB, 347 U.S. 17, 33 LRRM 2417 (1954), Respondent's conduct in this case cannot be so characterized. The transfer of 12 workers, only 4 of whom had engaged in protected activity, months after they had engaged in protected activity, is not inherently destructive.

The General Counsel points to a number of occurrences as evidence of anti-union motivation. First, it is argued, the unexplained wage increase and the distribution of leaflets by Respondent in August shows company knowledge of organizing activity and an anti-union animus. But the record shows that only minimal activity had taken place at Respondent's operation at that point in time and there is no evidence that Respondent had actual or constructive knowledge thereof. It is as reasonable to infer that the wage increase was the result of a normal business decision and that the distribution of the leaflets was a reasonable communication to employees occasioned by the enactment of the ALRA, which became effective on August 28, 1975.

General Counsel also argues that the transfer at issue

was a departure from the usual practice of Respondent in that the Flores camper riders had more seniority or service and Alcarez' crew had not been split up before. Although the transfer may have represented a change in an unofficial work pattern, the business justification advanced by Respondent satisfactorily explains the change and the claimed need for workers to pull bulbs in San Pasqual was unrefuted. Moreover, the claimed declining need for flower cutters is supported by the fact that the number of workers left in Alcarez' crew remained relatively constant after the transfer. If the need had been pretextual, it is likely that the employees transferred would have been replaced. Further, the claim that Alcarez' crew was not split up in prior years loses its effect in light of the fact that prior to the transfer to San Pasqual, the group in each vehicle had been transferred to the Stuart field to pull bulbs for one or two weeks. There is no claim nor proof that the Stuart transfer was a violation of the Act, though it was similarly a departure from Respondent's previous practice.

Finally, the timing and sequence of events negates the likelihood that the transfer was motivated by ant•i-union animus. We cannot find on this record that, in response to relatively minimal union activity by four workers in August, the company initiated a plan in which they transferred workers three months later to a dead-end job which resulted in their termination six months later. If the Employer actually had an anti-union motive with regard to these workers, it would have more likely exhibited itself .

Thus, we find that the General Counsel has failed to e

by a preponderance of the evidence that Respondent's conduct in relation to these workers was the result of an anti-union motivation. As stated in NLRB v. Winn-Dixie Stores, 71 LRRM 2054 (CA 5, 1969) in language equally applicable to the transfer and layoffs in this case:

> The Act does not insulate an employee from discharge. It is only when anti-unionism is the motive for the discharge that the Act is violated. The burden of proof is carried only when substantial evidence pointing toward the unlawful motive appears from the record taken as a whole. See also Lu-ette Farms, Inc., 3 ALRB No. 38.

In determining whether the Employer's conduct here independently violated Section 1153 (a), the same conclusion must be reached. These employees were not treated in such a manner that it would be reasonable to conclude that either they or other workers' rights to protected activity were interfered with or that the transfers and subsequent layoffs were anything but ordinary employment assignments. NLRB v. Vacuum Plating Corporation, 155 NLRB 820 (1965).

ORDER

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

Dated: November 22, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Edwin Frazee, Inc. (UFW) 4 ALRB No. 94

Case No. 76-CE-25-R

ALO DECISION

On June 29, 1977, Administrative Law Officer (ALO) A. E. Nowack issued his Decision, in which he recommended that the complaint be dismissed in its entirety, based on his findings: (1) that there was no evidence Respondent interfered with, restrained, or coerced its employees in the exercise of rights guaranteed in Section 1152 of the Act; (2) that there was no evidence Respondent discriminatorily transferred any of its employees to work at another location in order to discourage their union activities, sympathy, or support and no evidence that any of Respondent's employees were discouraged from their union activities, sympathies, or union support, and (3) that there was no evidence that any of Respondent's employees were discharged, laid off, or transferred to other work sites, because of their union activity, sympathy, or support.

BOARD DECISION

The Board found that the ALO's decision failed to meet the standards set forth in S. Kuramura, Inc., 3 ALRB No. 49. The Board therefore reviewed, considered, and discussed the undisputed record evidence and the inferences which could reasonably be drawn therefrom as a basis for its findings of fact and conclusions of law.

The Board found that the General Counsel had failed to prove by a preponderance of the evidence that the transfer and subsequent layoff of the alleged discriminatees were based on anti-union motivation, or were otherwise in violation of Section 1153 (c) and (a) of the Act. The Board also found that the record as a whole failed to establish that the Employer's acts and conduct constituted independent violations of Section 1153 (a) of the Act.

ORDER

The Board ordered the complaint dismissed in its entirety.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of Edwin Frazee, Inc. Employer And UNITED FARM WORKERS OF AMERICA, AFL-CIO Petitioner	Case No. 76-CE-25-R DECISION and Recommended Order

The above entitled matter was heard before the undersigned AD-HOC Administrative Hearing Officer in San Diego, California, on July 13, 14, 15, 16 and 17, 1977.

The employer, Edwin Frazee, Inc., appeared by its attorney, Richard A. Paul, .of Gray, Gary, Ames and Frye.

The Petitioner, United Farm Workers of America, AFL-CIO, appeared by Michael Egan, for part of the first day of this hearing, to wit, June 13, 1977, and not thereafter.

The Agricultural Labor Relations Board, appeared by JORGE CARRILLO, from its General Counsel. Eduardo E. Garcia, acted as Spanish-English interpreter.

Pleadings

The complaint alleges;

1, That on January 29, 1976, the Petitioner, herein identified as "U.F.W." filed a charge against the Employer, herein after identified as "Respondent"

2. On January 28, 1976, a copy of the charge was served upon Respondent.

3. That Respondent is an agricultural employer.

4. That "U.F.W." is a labor organization.

5. That: - David Gastellum, Gregorio Alcaraz, John Frazee, and "Does" 1 through V are supervisors of Respondent.

6. That: - Juan Almaraz, Luis Solis Verver, Salome Roman Arrevalos and "Does" VI through XIII" are agricultural employees.

7. That Respondent has committed unfair labor acts in that:-

(A) In November 1975 discriminatorily transferred employees to another location to work in order to discourage their union activities, sympathy and support.

(B) On January 9, 1976, Respondent discharged employees for engaging in union activity.

(C) That as a consequence or result of these alleged acts Respondent interfered with, restrained, coerced, its employees in the exercise of rights guaranteed to them in Section 1152, and did discriminate in regard to the hiring or tenure of employment and thus discouraged membership in a labor organization in violation of Sections 1153(c) and 1140.4 (a) of the Alatorre-ZENOVICH-Dunlap-Berman Agricultural Labor Relations Act of 1975, hereinafter identified as the "Act."

Respondent in its answer denied the allegations alleging commission of the unfair labor acts, and affirmatively alleged "that the complaint fails to state a claim against Respondent upon which relief can be granted." and "that the claim is barred by the doctrine of laches".

Statutory Provisions

Sections 1140.4 and 1153 of the Act deal with activities and conduct of an Agricultural employer.

Section 1152 of the Act sets out the rights of an agricultural employee.

Section 1153 (a) of the Act makes it an unfair labor practice for an agricultural employer to interfere with, restrain or coerce agricultural employees in the exercise of their guaranteed rights under Section 1152, in their right to self organization, to form, join or assist labor organizations.

Section 1153 (c) adds "By discrimination in -regard to the hiring or tenure of employment, ..."

Section 1155 of the Act, provides "The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit."

Section 1160.2 of the Act provides that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board...."

Section 1148 of the Act, provides, "The board shall follow applicable precedents of the National Labor Relations Act, as amended"

Section 1160.5 of the Act, provides that "Whenever it is charged that any person has engaged in an unfair labor practice within the cleaning....of 1155, the preliminary investigation of such charge shall be made forthwith and given priority..."

Section 1160.2 of the Act, provides, "....The person so complained against shall have the right to file, an answer to the original or amended complaint.. ." and further "All such proceedings shall, so far as practicable be conducted in accordance with the Evidence Code."

I

Demurrer

The attack upon the complaint, prior to adducing evidence, and at the close of the entire case, is overruled. The pleading, and as amplified, alleges a charge upon which statutory relief could be grounded, as a matter of pleading. Evidence of record failed to sustain the broad statutory allegations.

II

Laches

The employer urges that petitioner (U.F.W.) has been guilty of laches in prosecuting the alleged charges to its detriment, in that it "has (thereby been) severely prejudiced (in its) Respondent's ability to prepare and present its case,..."

This State's (California) policy with respect to lapse of time is embodied in statutes applicable to actions and quasi-Judicial proceedings, and the mere lapse of time, other than that proscribed by

such statute's does not bar relief (Wolpert v Gripton, 213 Cal. 474 -2P(2) 767).

Section 1160.2 of the Act, provides that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board..."

On January 28, 1976 the original charge was served upon Respondent. On the next day, January 29, 1976, it was filed with the Board.

On May 19, 1977, a notice of Hearing and Complaint was served on Respondent, alleging unfair labor practices in November 1975 and January 9, 1976.

The complaint was served (issued) on Hay 19, 1977, alleging (based upon) unfair labor practice alleged (occurring) in November 1975, it follows that "less" than six (6) months prior to the filing of the charge with the board on January 28, 1976, no violation of the provisions of Section 1160.2 of the Act, is indicated, and I so hold and find.

A fuller appraisal of the defense of "laches" is needed. It is in the nature of a claim of stale claims or charge, which is itself nothing more than a particular application of the doctrine of estoppel. Hence, the time (November 1975) at which employees statutory rights (Chapter 3, Section 1152 of the Act) are claimed to have been invaded, the operative point starts counting the flow of time as to whether or not a controversy is stale and therefore barred by a defense of "laches". (Maguire v Eibernia Savings & Loan Soc. - 23 CA (2) 719, 146 P(2) 673).

The defense of laches may also be viewed as seeking dismissal of the complaint for failure to diligently and timely prosecute these charges.

Section 583(a) C.C.P. allows the Hearing Officer in his discretion, to dismiss for want of prosecution, if it is not brought to trial within two (2) years after this proceeding <u>was filed</u> (May 18, 1977).

The reason for this stringent rule is to corapel timely prosecution. (Chapin vs Superior Court, (1965) - 234 CA(2) 571; 44 Cal. Rptr. 496), and time starts to run from the filing of the complaint, to wit, May 18, 1977 (Jackson vs. DeBenedetti, (1940) - 39 CA(2) 574; 103 (P(2) 990)

The exercise of discretion relates to whether reasonable diligence in prosecuting these charges were utilized and thereby affording Respondent an opportunity to defend. (Steinbauer vs. Bondesen (1932) 125 CA 419; 14 P(2) 106) Was it impossible to proceed to trial within the two (2) year period, evaluated in the light of circumstances in this particular situation (Rouse vs Palmer (1961) 197 CA(2) 666; 17 Cal Rptr, 509) is the issue.

I am bound to consider not only whether petitioner (U.F.W.) had reasonable opportunity to proceed to trial, but also whether petitioner

discharged its duty to prosecute with reasonable promptness and diligence. (Bonelli vs Chandler (1958) 165 CA(2) 267; 331 P(2) 705.) Each case must be viewed in light of its own particular facts. (Jensen vs Western Pacific R. Co. -(1961) 189 CA(2) 593; 11 Cal. Rptr. 444.)

The Act was approved by the Governor on June 5, 1975 and filed with the Secretary of State June 5, 1975, no budget was enacted for months thereafter. I conclude and find these charges are not stale; did not violate the provisions of Section 1160.2 of the Act., and did not contravene the provisions of Section 583(a) C.C.P., and hence the defense of laches is unfounded and not well taken.

III

Respondent-Employer's demand for Production of documents and statements from General Counsel and the Petitioner-Union (U.F.W.) pursuant Section 20274(a) of the Regulations.

At the conclusion of the first day's testimony and at intervals thereafter, Counsel for the employer made oral demands upon the Petitioner-Union and General Counsel for the immediate production and turn over of all records and statements, written and oral.

Before the noon day lunch recess, the Petitioner-Union left the hearing room, and did not return. No one was in the hearing room from the Union for the entire balance of the hearing, 5 days.

Section 20274(a) provides that "At anytime a witness is called in a hearing (Thus fixing the time for the demand for production).... shall order the .production of any statements of the witness (Thus restricting production to statements of that witness) in the possession of any other party that relate to the subject matter of the testimony (and not necessarily the subject matters at issue)"

Hence the demand to produce and turn over was too broad, untimely, not restricted to that witness'es testimony, and attempted to supercede all other Civil Procedure remedies: would have on turning over, afforded blanket, unrestricted access to adversary records.

It was denied and correctly so.

IV

Evidence

Testimony was adduced from Juan C. Almaraz; Luis Solis BARBER;

Salome Roman Arebalos; Roberto Ochoa Garcia; Gregorio Alcaraz Garcia; James Frazee; David Gastellum and John Frazee, in San Diego, California, on June 13, 14, 15, 16 and 17, 1977.

The employer, Edwin Frazee, Inc., is a California corporation. It has been raising flowers, on three (3), 100 acre plots, since 1945. In peak seasons it employs about 225 farm Xvorkers. In slack seasons it employs about 75 persons. Peak season is from May through July. Business slackens and tapers off, resumes busy activity in the fall and tapers off again in January. In January, the slowest part of the season, employees are laid off, paid, given vacation periods geared to years worked and computed at a percentage of earnings. The lay offs in January provide vacation funds for employees return to Mexico, and are treated as leaves of absence, until they return and resume work. Eisployer does not seek out farm workers. Farm workers seek and secure the work.

The farming operation consists of three (3) basic functions, namely, (1) preparing the ground, turning the ground over, plowing, seeding, watering; (2) cutting the flowers, weeding, lawn mowing (cutting growth around the flowers) removing flowers to ware house, pulling up bulbs, and (3) ware housing operations of the cut flowers.

All employees, including the two individuals who provided the transportation for the workers from home to work and return, were performing the second (2) operation types of work, such as the cutting of the flowers and pulling up bulbs. Workers were furnished a 3% inch blade-knife. They performed the work of cutting flowers and pulling bulbs in a stooped position. All workers provided their own transportation. Work assignment was not by individuals. Each of the two motor vehicles that arrived at the work scene, carried a crew. Any other method created transportation problems for the individual worker. Work performance assignments were rotated as field conditions required from cutting flowers to pulling bulbs. No one was assigned any exclusive all time work function, or all time specific field to work in.

Four employees, Juan Casillas Alvarez, (Exhibit 10); Luis Solis Barber, (Exhibit 11); Salome Roman (Exhibit 16) and Roberto Ochoa, (Exhibit 19) signed identification cards with the United Farm Workers of America AFL-CIO. These identification cards were signed on July-29. 1975, August 19, 1975, October 20, 1975, respectively, at Union headquarters. Mrs. Ibarra was the union individual to whom these workers applied for "membership" and received these identification-cards. She did not appear at the hearing; nor did anyone else appear other than Michael Egan, (Exhibit 2).

These four workers were given handbills which they distributed. The record is barren as to what it actually was they distributed other than the label they placed on the materials.

One worker, Luis Solis, Barber, (Exhibit 11) testified that sometime after he received his union identification card, (1) he was told,

in words or phrases not to get involved in the union because there was a wagon full of men ready to replace him on the job, and (2) Exhibit 14, the Union constitution, he felt was a threat to him.

On August 19, 1975, (Exhibit 10) Juan Casillas Alvarez, went to union headquarters to join. He went in a motor vehicle with 10 others. Only he and another entered union offices. He received his identification card. Eight of the ten workers did not leave the motor vehicle and did not go into union offices.

In August 1975, at a growers (friends) social gathering, the President of the Employer picked up packs of Exhibits 12, 13, and 14, brought them to his offices, handed them to his field supervisor and directed distribution to field workers with instructions not to get involved. Employer knew of no union organizing activities, or card solicitations. No union representative ever appeared. No workers called on employer for recognition.

On January 9, 1976, at conclusion of the day's work, the entire crew of one motor vehicle were handed their individual pay checks, vacation money and W-2 forms. The workers who testified never returned to work for this employer. The record is unclear whether any others did do so.

It thus appears that the unfair labor practices charged herein arise cur of (1) The four identification cards;

(2) Distribution of items called but not otherwise identified, as pamphlets,
(3) Change of work location,
(4) Assignment from flower cutting to bulb pulling, etc.,
(5) Increase in per hour pay from $2.35 per hour to $2.75 per hour.
(6) Luis Solis Barber testimony not to get involved in union because a wagon -full. of. men were waiting to replace him,
(7) Luis Solis Barber reaction to Exhibit 14, as a threat to him,
(8) Employer distribution in August 20, 1975 of Exhibits 12, 13 and 14,
(9) Opening sentence of Exhibit 12,
(10) January 9, 1976 lay offs.

V

Rationale

The complaint, alleges Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed to them in Section 1152 of the Act, in that it discriminatorily transferred employees to another location to work in order to discourage their

union activities, sympathy and support, and that they discharged employees for engaging in union activity. (underscoring added)

Chapter 3, Section 1152 of the Act, spells out the rights of agricultural employees to include:

1 - right to self organization

2 - to form, join, or assist labor organizations

Chapter 4, Section 1153 of the Act, defines unfair labor practices, as
(a) To interfere with,
(b) restrain,
(c) coerce,
agricultural employees in the exercise of the rights guaranteed to them in Section 1152, and
(d) By discrimination in regard to

(1) hiring, or
(2) tenure, of employment, or
(3) any term, or
(4) condition of employment, or
(5) to discourage membership in any labor organization
(6) To discharge an agricultural employee because he has filed charges, or
(7) given testimony under this part.

The record clearly discloses that of the 225 field workers only four received "Identification" cards, authorizing the Petitioner-Union to use then as "authorization-cards". These four may have applied for "membership", These identification cards spell out the limits of their relationship to the Petitioning-Union, nor did it (U.F.W.) offer any evidence to sustain the employees assertions. Neither did the Petitioning-Union (U.F.W.) produce, the individual to whom these four workers claim to have applied for union membership.

Furthermore these four workers freely and without any interference or hinderance, did distribute handouts. It is left to conjecture as to what these handouts were concerned with. Not even the language used thereon is in this record. Nor did the Petitioner-Union, (U.F.W.) produce any such items.

No one testified about the reaction to receiving one of these handouts.

No outside union representatives appeared at any time. No

picketing took place.

No union representative ever contacted Respondent for any purpose to date hereof.

No one solicited signatures.

No petition for an election was circulated, presented or filed.

No election was held.

No union was certified.

No organizational campaign activities took place in addition to circulation of these unidentified handbills for about a week.

In this setting General Counsel urges Respondent committed unfair labor activities based on findings of fact from the record.

Findings of fact themselves must be supported by substantial evidence on the record considered as a whole.

Direct evidence is that which tends to show a fact in issue without the intervention of proof of any other fact.

Evidence is direct and positive when the facts in dispute are sworn to by those who have actual knowledge of them by means of their senses.

Under certain conditions, from the proof of one fact we may reasonably infer certain other facts.

Proof is the effect or result of evidence.

Sectioa 140 of the California Evidence Code, defines, "'Evidence' to mean testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or non-existence o£ a fact."

The totality of activities of these employees and the employer in this record before me fail to sustain the charge that this employer interfered with restrained or coerced any of 225 employees at the times involved in this proceeding, in their free choice, or for that matter, any choice, in the exercise of their rights guaranteed to them by Section 1152 of the Act.

The record before me is barren of any facts from which I can infer that this employer at the relevant times in this proceeding interfered with, restrained or coerced any, each, or all of its 225 employees from exercising their right to freely organize, to form, join, or assist labor organizations, or to engage in any concerted activities for the purpose of collective bargaining, or other mutual aid or protection and I so find.

General Counsel urges the employer discriminatorily transferred employees to another location to work in order to discourage their union activities, sympathy and support.

Section 1153 (c) of the Act, makes it an unfair labor practice to discriminate in regard to any term or condition of employment.

An unfair labor practice arises when an employer in order to encourage or discourage its employees union activities, sympathy or support by discriminatorily assigning employees to other locations to perform their farm work activities. This section of the Act, and the allegations of the complaint recognize, that only such discouraged union activities, sympathies and support as actually result from or flow out of changed work situs are prohibited, or proscribed. (Radio Officers Union of Commercial Telegraphers, A.F.L. vs N.L.R.B. et.al. 347 US 17, 42 (1954) Mere change of work situs alone is not enough.

Proof of "discrimination" within the meaning of Section 1153 (c) of the Act, we need (1) a classification, and (2) a distinction within that classification, (3) a different treatment between constituents of the classification, and (4) a discrimination which effects and affects union membership.

A single, sole employee of a business venture fails to qualify for such a classification.

Where all employees in one plant are union members and all perform one function, in one shift, there is one classification, until unequal treatment arises within that one classification, at which time classification is according to treatment.

Here, one field crew was working in one field. Work in this field declined. Another field required field workers. An entire crew (per transportation vehicle) was assigned to the field needing workers. This was customary work assignment practice.

A "discriminatory" motive may be inferred from all the circumstances of a work situs change only where a disproportionate number are moved about without any economic reason therefor. (NLRB vs American Car & Foundry 161 F(2) 501; NLRB vs Star Publishing Co, 97 F(2) 465).

An employer may not move his employees around, where his decision to do so is based on union considerations or where its action has the practical effect of discouraging the worker's union activities, sympathies or support.

It was the Petitioner-Union's burden to produce evidential facts and evidence as to these necesssry results flowing from such work situs facts. (Market St. R. Co. vs 25 Railroad Commission of California, et. al. 324 US 548)

The record before me lacks any evidential facts indicating any of its 225 employees, including members of the crews assigned to different work areas, that such assignment or assignments was to, or did, discourage their union activities, union sympathies or their support of any labor union or unions. And, I so find.

I also find that these work situs changes of members of these field crews was not discriminatory, within the meaning and intent of the Act.

During the hearing General Counsel propounded that a change of work functions from cutting of flowers to work around the site of flower growth, such as pulling bulbs, cutting the grass, weeds, etc. was an arbitrary punitive assignment.

All work operations were unskilled, manual, performed in a stooped and bent positions, and were always performed by these farm workers. The record is clear that these functions around the flower beds did not require any additional expenditure of energy and consisted of regular functions. I therefore conclude and find the assertion is without substantive foundation.

We now come to the January 9, 1976, entire work crew lay off.

Lay offs may violate Section 1153 (c), and/or 1153 (d) of this Act.

Section 1153 (d) of the Act, makes it an unfair labor practice "To discharge or otherwise discriminate against an agricultural employee becauseTa has filed charges or given testimony under this part."

Whereas, Section 1153 (c) makes it an unfair labor practice,"By [To] discriminate in regard to ... tenure of employment or any term or condition of employment, to . . . discourage membership in any labor organization."

Thus we need to have spelled out

1 - illegal conduct <u>following</u> the

(a) filing of charges,

(b) testimony

2 - Discrimination in the utilization of lay off from work aimed at or that results in discouraging membership in a labor organization.

Lay offs for legitimate economic reasons are not discriminatory and do not violate the Act. (155 N.L.R.B. 820)

A discriminatory motive may be inferred where a disproportionate number of employees are laid off for ostensibly economic reasons. (N.L.R.B. vs American Car & Foundry 161 F(2) 501; N.L.R.B. vs Star Publishing Co., 97 F(2) 465)

An employer may discharge, lay off, or change area work assignments, for a good reason, a poor reason, or no reason at all, so long as the provisions of the Act are not violated. (N.L.R.B. vs. Condenser Corp., 128 F(2) at p 75 (3rd C.)

Page 22 of General Counsel's brief recognizes the significance of the resulting effects that color employer exercise of lay off power to make such conduct violative of the Act.

The complaint itself recognizes that the charged employer - acts alone are not violative of the Act, without proof that such alleged acts were "for engaging in union activity" and "...did _[actually] interfere with, restrain and coerce ... its [respondent' s] employees in the exercise of rights guaranteed in Section 1152 of the Act, ..."

General Counsel's brief is replete with colorful statements and factual assumptions, wholly unsupported by the record before me, unless one accepts the definitions of the Act as being synonomous with the proscribed effect of such conduct. A lay off, or a discharge, or a work site assignment change, in and of itself are not violative of the Act, without evidence of the resultant prohibited effects.

The necessity for the production in this record before me of evidential facts in the record, as distinguished from gratuitous assertions in, a brief, plus evidence as to the results which flow from such record facts, are a basic requirement, lacking in this record, and I so find. (Market St. R. Co. vs Railroad Commission of California, et. al. 324 US 548)

The evidence of record and the pleadings herein fail to disclose that any field worker was discharged, laid off or had the situs where he performed work changed by reason of, or because of, or as a result of, any filed charges, or testimony adduced from such individual worker, and I so find.

There is no evidence in this record before me that the January 9, 1975, lay off, or discharge of one crew, was by reason of any interference with their protected employee rights or did in fact discourage, or was aimed at discouraging union membership, and I so find.

Respondent's slow season is usually in the period January through March. This proceeding related to a portion of its operations, namely the unskilled, non English speaking, field laborers. In January 1976 the work in- the field was substantially finished. What remained was cleaning up boxes, work for 3 men. No other work was available in Respondent's fields. The lay off resulted from this lack of work, and I so find.

When slow season ended after January 1976, six out of eleven of the field workers (Margarito Flores riders) returned in the spring and resumed field work. (Exhibits 29m, o, q, s, u, and v.)

The record before me is devoid of any evidence of the required statutory results or effects or affects of this alleged employer misconduct, and *I* so find.

Other than procuring four identification cards from the union, and unhindered distribution of papers called "union literature", for about *a* week, there is no evidence before me of (1) any union activity; (2) any interference, (3) any restraints, or (4) any coercion, or any of Respondent's employees in the exercise by them of their rights

guaranteed to them in Section 1152 of the Act, and I so find.

Much is made of the variations in length of service of the field workers, and it is suggested that the employer (Respondent) should have recognized the rights of "seniority" and explained his actions to his illiterate field workers.

It is a deceptive concept. To the lay man it may appear that way. However, it is anything but simple. In the negotiation and administration of the labor agreement there have been few issues as troublesome. There has been a growing belief among both employer and employees that for many purposes, e.i., promotions, transfers, lay off and recall, job or work assignments, vacation privileges, parking privileges, pensions, length of service wage adjustments, bonuses, long service rewards, and the like, the longer service workers are entitled to greater security and superior benefits as a matter of equity. Inequitable treatment arising out of failure to recognize length of service is not a statutory unfair labor practice. It may, where a labor contract, exists, be a breach of the negotiated labor contract.

Even if discrimination or selection of individuals with lesser work histories over longer work history workers, for lay off, work site transfers, be conceded for the moment, it still would not be an unfair labor act. The Act deals only with such types of discrimination as accomplish the prohibited results. The Act does not outlaw discrimination in employment as such. Only such acts of discrimination as encourage or discourage membership in a labor organization is proscribed. (Radio Officers Union of Commercial Telegraphers Union, A.F.L. vs. N.L.R.B. et. al. - 347 US 17, 42 (1954) No such discrimination and no such results ensuing therefrom, are in this record before me, and I so find.

We now reach the Respondent-employers voluntary hourly wage increase to its field workers.

In and about August 1975, the hourly wages of the field workers was increased from $2.35 an hour to $2.75 an hour.

Preceding that, and on July 29, 1975, Salome Roman, received an "identification" card from the union. (Exhibit 16)

On August. 19, 1975, Juan Casillas Alvarez, also received a union. identification card. (Exhibit 10)

Juan Casillas Alvarez travelled to the union offices with 12 other field workers. Ten out of this dozen field workers did not get out of the vehicle and did not apply for or receive any union document.

Several months after the August 1975 hourly wage increase, and on October 20, 1975, Luis Solis Barber, received a union-identification card. (Exhibit 11) On the same day, namely October 20, 1975, Roberto Ochoa Garcia, received a union-identification card. (Exhibit 19)

General Counsel urges on Page 7 of his brief that "... the wage increase of 40 cents an hour, without explanation, at a time when workers, eg. Almaraz and Roman Arrebalos, were filling out authorization cards and joining the union is evidence that the increase was consciously given at a time to ward off union organizing at Respondents premises" (underscoring added)

Setting aside "without explanation", and taking full cognizance of lack of any evidence from these field workers, or the petitioning union, that any worker joined the union, and any evidence in the record that any union organizing took place or was warded off, the bare problem posed is the voluntary hourly rate increase.

Conferral of employee benefits while a representation campaign and election is pending, is such prohibited conduct which is deemed Immediately favorable to employees so as to lend itself to the purpose of such beneficence as reasonably calculated to infringe on the employees freedom of choice for or against unionization. (Medo Photo Supply Corp., vs N.L.R.B., 321 US 678, 686) However, where no campaign or election is pending, where the beneficence is not ephemeral, and the hourly rate increase is not removed (no such evidence in this record), to label such a voluntary hourly rate increase in the circumstances appearing in this record before me, illegal, would itself discourage benefits to labor, and violate the purposes of the Act. (N.L.R.B. vs Exchange parts Co., 375 US 405.)

I find that the award of the hourly pay increase of 40 cents, was not discriminatory, and was made and paid when no union organization activity or pending an election, without threats or intimidation, and hence not violative of the Act.

As to Exhibits 12, 13, and 14. General Counsel on Page 7, of his brief argues: -
"... David Gastellum testified that he heard about the 'problems' that other ranchers were having with union organizing. He wanted to let the workers know his views on unions. This indicated an awareness on the part of management that unions were organizing at other agricultural ranches and that organizing was imminent at Frazee. There is no other logical explanation for Respondent's action in distributing the copies of Exhibits 12, 13, and 14." (underscoring added)

Exhibit 12 is in English and sets out that "Under the new California farm labor law, unions cannot become your official representative unless you vote for them in a secret ballot election, and ..."

Exhibit 13, is in both English and Spanish, and lists portions of the Constitution of the United Farm Workers of America ..."

Exhibit 14, is also in English and Spanish and details other provisions of the Constitution of the United Farm Workers of America, ..."

Reliance on the first sentence of Exhibit 12, "... union organizers have been asking you to sign union cards or petitions, "as evidence of such fact is not well placed in the light of the absence of such testimony and the failure of the petitioner-union to come forward on that issue.

Absolute precision of statement and complete honesty are not always attainable at any level of a campaign, nor are they expected by employees. (Celenase Corp. of America, 121 N.L.R.B. 303, 306)

Even an employer's expression of his legal position is not violative of the Act. (Esquire Inc., 107 N.L.R.B. 1238 (1954)

What the Act aims at is to maintain 'laboratory conditions' for the exercise of freedom of choice in selecting a bargaining representative. (Peerless Plywood Co. - 107 N.L.R.B. 427); General Shoe Corp. -77 N.L.R.B. 124.) Hence only evidence of (1) gross misrepresentation, about (2) some material issue, (3) with significant impact disturbing the laboratory conditions vitiating free choice, that is proscribed. (Dal-Tex Optical Co. Inc., 137 N.L.R.B. U82)

I conclude and find that distribution of Exhibits 12, 13 and 14, containing no gross misrepresentation of and about any material issue and did not thereby result in interference in anyway with the free choice of any of the employer's farm workers, and hence did not violate any provision of the Act.

Threats

Conversations are relied on to spell out "threats". One by "Verver" with "Alcaraz" wherein "Alcaraz "warned "Verver" not to get involved in the union because "Alcaraz" had a man from Corona who would furnish other workers instead of "Verver".

Two days later "Verver" and "Alcaraz" talked again, and this time "Alcaraz" said he had a station wagon full of workers in Oceanside available to replace "Verver".

It is conceded by General Counsel on P22 of his brief, that (1) Employer speech to its employees is protected. (2) Only if these conversations contain (a) a threat of force, or (b) reprisal, or (c) promise of benefit, will they be violative of the employee's protected rights and thereby violate Section 1153 (a), in that they interfere with, restrain, or coerce employees in the exercise of the rights guananteed by Section 1152 of the Act, and thereby these conversations will not be protected.

I hold, conclude and find that these two conversations (A) contain no threat of force or reprisal or promise of benefit, and (B) did not violate the employees protected rights, and (C) did not interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by Section 1152 of the Act. The record before me is barren of such evidence and proof.

VI

Post-hearing motions

General Counsel moved to substitute specific names in place and instead of "Doe". This is granted.

General Counsel moved to conform the pleadings to the proof. This also is granted.

General Counsel moved to add a new and additional paragraph, "6c", namely that on or about September 1975, Respondent at its San Diego Company premises by and through its agent, Gregorio Alcaraz, threatened employee Luis Solis Verver in order to discourage his union activity, sympathy and support.

This is new matter which has not been administratively investigated and evaluated as a prerequisite requirement to issuance of a complaint. There is nothing in this record before me to indicate these new matters were presented in any charge. The motion is denied without prejudice.

VII

Based upon the pleadings, memorandums submitted, and all evidence of record, I find and conclude as follows:

1 - No Respondent's farm worker is a member of a labor organization

2, - Four field workers received identification cards from petitioning union (U.F.W.)

3 - No one, other than these four employees, ever solicited Respondent's field workers to sign union authorization cards

4 - Respondent never was contacted by any union organizer, officer or agent for purposes of union recognition

5 - Four field employees freely and unhamperedly distributed union leaflets

6 - No union ever filed a petition for an election

7 - No union ever asked to be recognized as the collective bargaining agent for Respondent's employees

8 - No union petitioned for an election to be held to be certified

9 - No union has ever been certified as the collective bargaining representative of Respondent's employees

10 - No labor agreement has been entered into.

11 - Petitioner-union has failed to adduce evidence that Respondent has interfered with, restrained, and coerced and is interfering with, restraining and coercing Respondent's employees in the exercise of the rights guaranteed to them in Section 1152 of the Act.

12 - Petitioner-union has failed to adduce evidence that Respondent discriminatorily transferred any of its employees to another location to work in order to discourage their employees union activities, sympathy and support, and also failed to adduce evidence showing that any of Respondent's employees were discouraged from their union activities, sympathies and union support

13 - Petitioner-union failed to adduce evidence tending to show that any of Respondent's employees were discharged, laid off from work or transferred to other work sites, for engaging in union activity, sympathy and support

14 - The evidence shows changes of work performance and work situs, were routinely adhered to

15 - The evidence shows January 9, 1976 lay off was by reason of lack of work.

CONCLUSION

It follows, and I so conclude, that Petitioner-Union has failed to adduce evidence to sustain the allegations of the Complaint, as amended.

Hence, the motion to dismiss the complaint, as amended, be and it is hereby, in all respects granted, and the complaint as amended, is dismissed for failure of proof. Proposed findings of fact are inadequate and hence not been adopted.

On the basis of this record, Respondent-Employer, has not been shown to have committed any unfair labor Acts, in violation of the Acts.

Dated: June 29, 1977

Agricultural Labor Relations Board

by

A. E. Nowack
Administrative Hearing Officer