El Centro, California

STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

ABATTI FARMS, INC., and A3ATTI PRODUCE, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case Nos. 75-CE-60-E(R) 76-CE-45-E(R) 76-CE-48-E(R) 76-CE-51-E(R) 76-CE-60-E(R) 76-CE-63-E(R) 76-CE-72-E(R) 76-CE-73-E(R) 5 ALRB No. 34

DECISION AND ORDER

On November 17, 1977, Administrative Law Officer (ALO) Philip M. Sims issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions, a supporting brief, and a reply brief.[1/]

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

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

[1/] General Counsel filed a motion to strike Respondent's exceptions .as untimely. Although some confusion existed as to the extension of time which was granted, the General Counsel has shown no material prejudice as a result of the alleged late filing. The motion is hereby denied. Genesee Merchants Bank & Trust Co., 206 NLRB 274 (1973), 84 LRRM 1237.

The General Counsel has filed exceptions to the ALO's Decision on the ground that it does not meet the standards set forth in S. Kuramura, Inc., 3 ALRB No. 49 (1977). In that case, we stated the minimum standards for a decision of an Administrative Law Officer under 8 Cal. Admin. Code 20279.

As the ALO's Decision in some areas fails to meet those minimum standards, it will be afforded only the probative value which is warranted as to the areas in which it is deficient. Where testimony was contradicted and the ALO failed to make either explicit or implicit credibility resolutions, we have independently reviewed the record and made factual findings on objective bases, where witness demeanor was not a factor. We have also made factual findings as to certain allegations of the complaint which the ALO recommended dismissing on the ground that no testimony was given as to the material facts, where our analysis of the record shows that adequate testimony was elicited concerning those allegations.[2/]

We turn now to a discussion of the ALO's findings and conclusions to which exceptions were taken, and to the background and evidence of the conduct at issue. Background

Respondent operates under the name of two corporate entities which we have found to constitute a single agricultural employer, as defined in Labor Code Section 1140.4(c). Abatti Farms, Inc., and Abatti Produce, Inc., 3 ALRB No. 83 (1977).

[2/] We affirm pro forma, the ALO's dismissal of allegations in the complaint concerning which no party has filed exceptions but, in so doing, we do not affirm his findings with respect thereto.

Abatti Farms, Inc., employs workers who are employed virtually year-round in the care of crops during the growing stages. Abatti Produce, Inc., primarily employs seasonal workers to harvest the crops grown by Abatti Farms, Inc. The unfair labor practices alleged in the complaint involve employees of both corporations.

In December, 1975, the United Farm Workers of America, AFL-CIO (UFW) began an organizational drive among Respondent's employees, and on January 21, 1976, it filed a representation petition. Following a representation election, which was conducted on January 28, 1976, this Board certified the UFW as collective bargaining representative of Respondent's agricultural employees. Abatti Farms, Inc., and Abatti Produce, Inc., supra.

In the two months preceding the election, Respondent employed more than 200 seasonal workers and between 100 and 130 steady employees. The steady employees were organized in five crews and included tractor drivers, irrigators, shovelers, sprinklers, and weeders and thinners. The complaint alleged that Respondent committed numerous unfair labor practices involving employees in these crews, including denials of union access, interrogation, surveillance, threats of reprisal, discriminatory discharges, and other conduct which interfered with, restrained, or coerced employees in the exercise of rights guaranteed by Labor Code Section 1152, in violation of Labor Code Section 1153(a) and (c). Our review of the record shows that the majority of these charges are supported by a preponderance of the evidence. Denial of Access

Respondent admits that two months prior to the election

it adopted and enforced a policy which denied union organizers access to steady employees who congregated each morning at its shop and that on December 13 and 16, 1975, it caused the arrest and removal by local police of UFW organizers who had taken access to the shop. Nevertheless, Respondent excepts to the ALO's finding that this conduct constituted an unfair labor practice in violation of Labor Code Section 1153(a). Respondent contends that its policy and conduct were justified by the possibility of work disruption and the availability of alternative access sites outside the shop area.

Respondent's shop is located within a fenced enclosure. It houses a field office and a machinery repair and garage area. In the months preceding the election, the only entrance to the shop area was through a gate operated by a security guard, who was under instructions to deny access to union organizers.

With the exception of the weeding and thinning crew, which generally waited outside the gate, employees in the steady crews and their foremen congregated at the shop daily between 5:00 and 6:00 a.m. UFW organizers testified that the one-hour period prior to work was the only time steady employees were assembled in one place during the day because they worked at widely scattered locations and often changed locations.

We agree with the ALO's finding that the period during which employees congregated at the shop was not work time and that union organizers had a right to speak to employees during that hour under the Board's access rule. 8 Cal. Admin. Code 20900, et seq. We conclude that Respondent's denial-of-access policy

and its actual denials of access interfered with employees' organizational rights guaranteed under Labor Code Section 1152 and therefore violated Labor Code Section 1153(a). Whitney Farms, et al, 3 ALRB No. 68 (1977); D'Arrigo Bros., Reedley Dist. #3, ALRB No. 31 (1977). Whether or not other channels existed for communication between organizers and employees, as Respondent contends, is irrelevant. The existence of alternative channels would not legitimate Respondent's efforts to block such communication at the shop, to which access is clearly provided by 8 Cal. Admin. Code 20900(e)(3)(A). We find that Respondent's conduct in causing the arrest and removal of UFW organizers at its shop was an excessive and unreasonable reaction to the organizers' presence and constituted additional violations of Labor Code Section 1153(a). See O. P. Murphy Produce Co., Inc., 4 ALRB No. 106 (1978); Venus Ranches, 3 ALRB No. 55 (1977). Surveillance at the Shop

Johnny Kile was hired as a security guard by Respondent following an act of vandalism in the shop during August, 1975. Although Kile was responsible for opening the gate to the shop each morning, he was not stationed at the gate between 5:00 and 6:00 a.m. until after the first access incident involving a UFW organizer on December 13, 1975. After that incident, Kile was given instructions not to allow organizers inside. This required him to remain at the gate and placed him in a position to observe employees as they spoke to or received leaflets from UFW organizers at the gate. Several witnesses testified that Kile often interrupted conversations between employees and organizers in the

vicinity of the gate, and that by approaching employees and organizers while they were engaged in .conversation he conveyed the impression that he was eavesdropping on their discussions. Kile thereby created the impression of surveillance, for his conduct as an agent of Respondent communicated to employees that Respondent was watching and taking account of pro-union activity. By virtue of Kile's engaging in surveillance of employees or creating the. impression of surveillance the Respondent interfered with the employees' exercise of rights protected by Labor Code Section 1152 and thereby violated Section 1153(a). Tomooka Brothers, 2 ALRB No. 52 (1976); Merzoian Bros., 3 ALRB No. 62 (1977); Better Val-U Stores, 174 NLRB No. 32 (1969), 70 LRRM 1169.

The General Counsel excepted to the ALO's recommended dismissal of the allegation that Tony Abatti's son, Richard, engaged in surveillance of employees as they spoke to UFW organizer Jose Luna at the shop on December 16, 1975. In view of insufficient evidence to establish that Richard Abatti was the person in question, and his testimony that he did not work at the shop at the time of the alleged surveillance and did not recall seeing Luna on the occasions when he was present, we affirm the ALO's dismissal. Interrogation and Threats

1. Weeding and Thinning Crew.

Respondent excepted to the ALO's conclusion that supervisor Jose Rios unlawfully interrogated employee Herlinda Avitua shortly before the election by asking her whether she had signed a UFW authorization card and telling her that she should

not have done so. Respondent contends that the ALO's crediting of Avitua's testimony was in error because Avitua did not testify about the facts found. The record shows that Avitua did testify that Rios questioned her at work shortly after she signed the authorization card and that her testimony was corroborated by Elena Solano. Therefore, we affirm the ALO's conclusion that Rios' conduct constituted unlawful interrogation in violation of Labor Code Section 1153 (a).

Interrogation is not a per se violation of the Act, but it does constitute a violation when it tends to coerce, restrain, or interfere with employees' exercise of rights guaranteed by the Act. Maggio-Tostado, Inc., 3 ALRB No. 33 (1977). The National Labor Relations Board (NLRB) has set forth standards for determining whether interrogation of individual employees under all the facts of a particular case is unlawful. See Blue Flash Express, Inc., 109 NLRB 591, 34 LRRM 1384 (1954) and R. M. E., Inc., 171 NLRB 213, 68 LRRM 1459 (1968). We have applied these standards in previous cases. See Akitomo Nursery, 3 ALRB No. 73 (1977) and Rod McLellan Co., 3 ALRB No. 71 (1977).

According to standards set forth in applicable precedent, Rios' conduct in interrogating Avitua tended to restrain and interfere with the free exercise of employee rights guaranteed by Labor Code Section 1152. Rios was Avitua's supervisor and had exhibited an anti-union animus. He initiated the conversation at work without any legitimate reason or basis for seeking the requested information. Rios gave Avitua no reason for his question, nor did he assure her that no reprisal would be taken based on her

answer. Contrary to the ALO, we hold that Avitua's reaction to the interrogation, i.e., whether she felt intimidated by the questioning, is not relevant to our determination that the interrogation tended to interfere with the free exercise of employees' statutory rights. Anderson Farms Co., 3 ALKB No. 67 (1977). Such questioning, in the circumstances of this case, clearly constitutes a violation of Labor Code Section 1153 (a), even though the conversation between Rios and Avitua was amicable Tom Bengard Ranch, Inc., 4 ALRB No. 33 (1978).

We reject the ALO's recommended dismissal of the allegation that on one occasion Rios asked Avitua how she was going to vote in the coming election and then told her to vote for the "caballitos," referring to the two-horse symbol of the Western Conference of Teamsters. The ALO found that there was no testimony that this had occurred. Our review of the record shows that Avitua testified that Rios made these statements. Although Rios denied asking the question or advising Avitua how to vote, we do not credit his testimony in light of the ALO's explicit crediting of Avitua as a witness and Elena Solano's corroborative testimony that she heard Rios question Avitua about her vote. Questioning an employee about his or her vote immediately prior to a representation election, particularly where an employer's anti-union animus is known, is a violation of Labor Code Section 1153(a) even though the manner in which the question is asked is amicable. Tom Bengard Ranch, Inc. supra.

We also conclude, contrary to the ALO, that Rios

unlawfully interfered with the exercise of protected employee rights in violation of Section 1153(a), by telling Avitua that she should not wear a UFW button. The ALO recommended dismissal of this allegation on the ground that there was no testimony which showed that Avitua ever wore a button. However, Avitua did testify that she wore a UFW button. The fact that Rios denied having seen her wear one does not amount to a contradiction of her testimony, which the ALO found credible in other matters. Rios[1] comment was tantamount to telling Avitua that she should not support the union of her choice and, especially in the context of his other statements and conduct, tended to interfere with Avitua's free exercise of her Section 1152 rights.

2. Shovel Crew.

The General Counsel excepted to the ALO's failure to find that supervisor Ramon Gonzalez threatened and interrogated employees in his crew shortly before the election. We find merit in these exceptions.

There were three incidents involving interrogation of and threats to employees in the shovel crew. Rodriguez testified that prior to the election Gonzalez told him that someone had said Rodriguez had a UFW button. Because he feared losing his job, Rodriguez, who did have a UFW button in his pocket, told Gonzalez that he had found it. The ALO recommended dismissal of this allegation because he found no evidence that Rodriguez was intimidated by the questioning.

The test for whether an employer's questioning constitutes unlawful interference is not whether a particular employee

was actually intimidated, but rather whether the questioning, in the context wherein it occurred, would naturally tend to interfere with the free exercise of employees' Section 1152 rights. See Blue Flash Express, Inc., supra; Akitomo Nursery, supra. In the context of Respondent's other unfair labor practices and open anti-union animus and unfavorable remarks about the UFW by Gonzalez, which were known to Rodriguez, the interrogation of Rodriguez would have tended to have such an effect and, therefore, was a violation of Labor Code Section 1153(a).

In another incident involving employees in this crew, Gonzalez asked employee Bermea which employee in the crew kept the UFW organizing list of crew members. Bermea told Gonzalez that Ramon Berumen had the list. Gonzalez later told employee Francisco Ortiz that Berumen was not authorized to keep such a list and could be sued for doing so. In addition to finding that no witness testified with certainty that Gonzalez had asked Bermea who had the list, the ALO found that Gonzalez' statement to Ortiz was not an unlawful threat because it was not communicated to Berumen and because Gonzalez was not an agent authorized to institute the threatened legal action.

The record, however, shows that Bermea did testify that Gonzalez questioned him about who had the list. Although Gonzalez denied doing so, we do not credit his denial in view of the implicit corroboration of Bermea's testimony by Ortiz. Gonzalez' question was an improper interrogation, in violation of Labor Code Section 1153(a). The absence of evidence that Gonzalez[1] statement to Ortiz was. thereafter communicated to Berumen is not material

to our finding that such a statement tended to interfere with employees' organizational rights and therefore was a violation of Section 1153 (a) of the Labor Code. The statement by supervisor Gonzalez to employee Ortiz that Berumen, the head of the UFW organizing committee in the crew, could be sued for organizational activity would surely tend to have a chilling effect on the future exercise of rights by Ortiz who was also a member of the committee.

As to Respondent's defense of lack of authority on Gonzalez' part to institute the threatened suit, the employee hearing the threat would be likely to be intimidated by the thought of legal action being brought, whether he expected it to be brought by Gonzalez or by Respondent. Furthermore, Gonzalez' lack of authority to take such action would probably not be apparent to the employee. As to Respondent's liability for Gonzalez' remark, it is clear that an employer is liable for an unfair labor practice committed by its supervisor, even though the employer has not specifically authorized it. Labor Code Section 1140.4 (c); Hansen Farms, 3 ALRB No. 43 (1977); Reynolds Corp., 74 NLRB 1622, 16 LRRM 148 (1945). We therefore conclude that Gonzalez' statements constituted violations of Labor Code Section 1153(a).

As to certain remarks allegedly made by Gonzalez to employees regarding the possible sale of certain parts of Respondent's operation, with consequent loss of jobs, in the event of a UFW election victory, we find the record evidence insufficient to support the finding of an unfair labor practice. We therefore uphold the ALO's recommended dismissal of the allegations regarding such remarks.

3. Irrigator Crew.

The General Counsel excepted to the ALO's finding that statements by supervisor Charlie Figueroa to irrigator Abelino Ortega were simply opinions and not threats of reprisal. Ortega testified that Figueroa initiated a conversation during which he asked Ortega his views on the UFW. When Ortega told Figueroa that he supported the UFW, Figueroa replied in effect that if the employees selected the UFW everything would get fouled up, and added, "Right now you are holding one bird in your hand and you see many that are flying. Then you let the one you are holding go to get the ones that are flying, and at the end you end up without nothing."

These statements clearly constitute unlawful interrogation and a threat that supporting the UFW would cause the employee to lose benefits he already had. Figueroa admitted that he spoke to Ortega because he heard Ortega mention the UFW to another employee. He further admitted questioning quite a few irrigators about whether they belonged to the UFW. Under these circumstances, we conclude that by Figueroa's above statements to employee Ortega Respondent violated Labor Code Section 1153(a).

4. Sprinkler Crew.

The General Counsel excepted to the ALO's recommended dismissal of the allegation that Respondent, by its supervisor Eddie Sanchez, made coercive statements to employees in his crew shortly before the election. We find merit in the exception.

Raul Jimenez, an employee in the sprinkler crew and one of the few UFW supporters in the crew, testified that when

Sanchez saw him going to the shop one morning wearing a UFW button he stopped Jimenez and told him that he should take off the .button so that he would not get in trouble with the boss. Jimenez stated that he never wore the button again.

The ALO dismissed the allegation that this statement constituted unlawful coercion in violation of Labor Code Section 1153(a) on the grounds that Sanchez was merely relaying what he felt were Respondent's feelings about employees wearing such buttons and that there was no showing that Jimenez was intimidated or coerced by the statement. While the record indicates that Sanchez was on friendly terms with Jimenez and another employee named Miguel Lopez Chavez and that he may have intended to protect Jimenez from reprisal for wearing the button, his statement is not rendered noncoercive by the amicable manner in which it was communicated or the possible good intentions on the part of Sanchez. The unmistakable message of such a statement is that the Respondent would create trouble for steady employees seen wearing UFW buttons. Such statements tend to restrain, coerce, and interfere with employees' free exercise of guaranteed rights and are violations of Labor Code Section 1153(a). See Jack Brothers and McBurney, Inc., 4 ALRB No. 18 (1978); Arnaudo Bros. Inc., 3 ALRB No. 78 (1977).

Employee Miguel Lopez Chavez testified that on one occasion Sanchez told him that Ben Abatti, knowing who the UFW leaders were in the irrigator crew, had given Figueroa orders not to give them work. The ALO recommended dismissal of that allegation also, on the ground that the record did not show which

employee heard this statement and on the ground that it was multiple hearsay. We find it unnecessary to determine whether Ben Abatti actually made such statements or gave such orders to Figueroa or whether Sanchez or Chavez heard Abatti do so. The record shows that supervisor Sanchez told employee Chavez that Abatti had given such orders. Regardless of whether such orders were actually given, Sanchez' statements would tend to create in Chavez' mind the impression that similar orders would be given to lay off sprinkler employees who were known UFW supporters. Therefore, such statements, indirectly threatening discharge, were violations of Labor Code Section 1153(a). See McAnally Enterprises, Inc., 3 ALRB No. 82 (1977).

5. Lettuce Crew.

The General Counsel excepts to the ALO's finding that supervisor Fidel Quiroz and agent Agnes Poloni did not make threats of reprisal to employee Rafael Ayon prior to the election. Ayon testified that Quiroz told him that if the UFW won the election, the Abattis might go back to Italy. Quiroz admitted telling Ayon that if the Abattis did not want to sign, they would just quit planting. The ALO recommended dismissal of this allegation on the grounds that the testimony did not show who made the remark, and that it was not a threat. The record clearly shows that Quiroz made the statement. Statements linking a possible union victory to loss of jobs are, when made without supporting facts showing economic necessity, threats of reprisal violative of Labor Code Section 1153(a). NLRB v. Gissel Packing Co., 395 U.S. 575, 613-619 (1969).

Ayon also testified that or. one occasion he went to Respondent's office while wearing a UFW button. Poloni worked in the office and had some responsibility for pay checks. She was an admitted agent of Respondent and a sister of one of the Abatti brothers. On this occasion, Poloni saw Ayon's button and told him that if the UFW won, the Abattis would stop planting asparagus, melons, and lettuce and would plant alfalfa instead. The ALO recommended dismissal of this allegation because there was no evidence that Ayon felt threatened or intimidated by the comment. As previously stated, proof of actual intimidation is not necessary to show a violation of Labor Code Section 1153 (a) when comments by employers or their agents to employees have an inherent tendency to interfere with employees' statutory rights. We conclude that Poloni's statement constituted an unlawful threat of reprisal in violation of Labor Code Section 1153 (a). Arnaudo Bros., Inc., supra. Discriminatory Discharges and Refusals to Rehire

The complaint alleged that Respondent discharged and refused to rehire 14 employees because of their UFW activities or sympathies, in violation of Labor Code Section 1153 (c) and (a). The ALO found that the layoffs were due to lack of available work or poor work performance and that the employees were not rehired because they either failed to reapply for work or did so at a time when no work was available. The General Counsel excepted to these findings. After a careful review of the evidence, we find merit in the exceptions and conclude that the employees, other than Rafael Ayon, were discharged and refused rehire in violation

of Labor Code Section 1153 (c) and (a).

1. Shovel Crew.

Ramon Berumen, Reynaldo Bermea, Francisco Ortiz, Lorenzo Chavarria, Andres Montoya, and Augustine Rodriguez were all laid off during the week preceding the election. They constituted one-third of the Respondent's shovel crew, which varied in size from eight to 17 employees depending on the time of year and Respondent's work needs. All were UFW supporters and Berumen, Bermea, Ortiz, and Chavarria were members of the UFW organizing committee in the crew.

Committee members wore UFW buttons to the shop when they reported to crew foreman Gonzalez for instructions. Berumen, Chavarria, and Ortiz passed out union leaflets either at the shop or in the fields. Bermea and Berumen signed UFW authorization cards while Gonzalez watched. Bermea and Ortiz were the subjects of interrogation and coercive statements regarding the organizing list of crew members kept by Berumen. Rodriguez was interrogated about his possession of a UFW button, and he and Bermea heard Gonzalez make threats of reprisal against employees for supporting the UFW. Montoya wore a UFW button to the shop and received a ride each morning from Gonzalez. Under these circumstances, we cannot credit Gonzalez[1] testimony that he had no knowledge of the UFW activities or sympathies of almost one-third of his crew. The aforementioned evidence of Respondent's anti-union animus is substantial and need not be repeated here. The question remains whether Respondent's layoff and failure or refusal to rehire the six employees was due to their support for the union.

Gonzalez testified that the six employees were laid off with others in the crew because of lack of work. The crew's normal work pattern usually resulted in some layoffs in January of each year. Gonzalez testified that he determined which employees would be laid off under an informal seniority system that kept the most senior shovelers employed nine or 10 months a year. Gonzalez testified that he laid off a group of 13 shovelers and then Montoya and Berumen a few days later. Payroll records show the opposite, that the majority of the crew worked two or three days longer in January than the last of the discriminatees who were laid off.

Gonzalez testified that after the January, 1976, layoff he kept on seven shovelers whom he considered permanent, and four other employees. One of these four was a steady tractor driver who had been referred to Gonzalez by Ben Abatti shortly before the election. The remaining three had worked in the shovel crew at other times, but had been working in the sprinkler crews at the time of the layoff. The record does not clearly show whether the six alleged discriminatees had significantly more seniority than any of the employees who worked in the crew after the layoff.

Ben Abatti testified that less senior shovelers were often sent to work in the rapini harvest during slack periods. Such work was apparently available in early 1976, as Respondent contended that its sprinkler foreman had offered rapini harvest work to two employees who were laid off at about the same time as the shovelers. Furthermore, work was also then available in other parts of Respondent's operations. Gonzalez testified that two

laid-off shovelers went to work in the melon crew of foreman Tomas Romero. One of these employees was specifically referred to melon work by Gonzalez because he knew work was available there.

Five of the six discriminatees requested rehire from Gonzalez. None was rehired except Ortiz, who was rehired by Romero and worked for two weeks in May 1976, in Romero's melon crew. He testified that when he asked for work, Romero told him that he hoped his boss would not find out that he had hired Ortiz. Romero denied making this statement.

Gonzalez contended he had laid off Chavarria not only .for lack of work, but also because of frequent absences from work and drinking on the job. The record shows that these reasons were pretextual.[3/] There is conflicting testimony as to whether Chavarria applied for rehire, but it is clear that other discriminatees did seek rehire and were refused employment. Chavarria testified that Gonzalez "said he was going to call me whenever he needed me". Under all of the circumstances of this case it is reasonable to conclude that a request by Chavarria for rehire would have been futile.

In order to establish a discriminatory failure to rehire violative of the Labor Code it must ordinarily be shown that a proper application for rehire was made, but in cases where such an application would clearly be futile, one is not required. The

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[3/] While Chavarria admitted the absences, his work record is similar to that of shoveler Sixto Lopez who was rehired to work in the melon crew after being laid off. Gonzalez regarded Chavarria's drinking as not unusual among employees and testified that Chavarria was not fired, but merely laid off. Chavarria testified that Gonzalez himself bought beer for the crew and drank with crew members.

United States Supreme Court in a case arising under Title VII of the Civil Rights Act of 1964 recently granted relief to discriminatees although they had failed to apply for desired jobs. The Court stated:

> When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.
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> In cases decided under the National Labor Relations Act, the model for Title VII's remedial provisions, Albemarle Paper Co. v. Moody, 422 U.S. 405, at 419, 95 S.Ct. 2362, at 2372 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747, at 769, 96 S.Ct. 1251, at 1266, (1976), the National Labor Relations Board, and the courts in enforcing its orders, have recognized that the failure to submit a futile application does not bar an award of relief to a person claiming that he was denied employment because of union affiliation or activity. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, at 366, 97 S.Ct. 1843 at 1870 (1977).

The Supreme Court's approach to futile requests for work is apposite to the facts here which show that an application by Chavarria for rehire would have been in vain.

Of the approximately 17 shovelers in Gonzalez' crew, virtually every one either continued working in the crew after January 1976, or was transferred to another crew, with the exception of the six discriminatees. We find no reasonable justification for this difference in treatment. We conclude that Respondent's layoff of these employees and its failure to offer them work which was available in other crews, and its subsequent refusal to rehire them, were based on their union activities and/or sympathies, in violation of Labor Code Section 1153(c) and (a).

We affirm the ALO's recommended dismissal of the allegation that Gonzalez illegally discriminated against Ramon Berumen by assigning him to work apart from other crew members. The General Counsel did not produce evidence sufficient to support a finding of anti-union motivation in this work assignment.

2. Sprinkler Crews.

Respondent had three sprinkler crews with approximately four employees in each. Crew foreman Sanchez hired two crews in August/ and a third in September. Ben Abatti testified that the first crew was considered the permanent sprinkler crew and worked year-round. The second crew worked about 11 months a year. The third crew was called the "caminero" or "roadway worker" crew and employees in it worked only from September through January.

Miguel Lopez Chavez, Jr., and Raul Jimenez were hired to work in the caminero crew by Sanchez in September 1975, and were laid off on January 21, 1976, the day the UFW filed its petition for an election. Sanchez testified that he generally had trouble keeping employees in the caminero crew, but that Chavez and Jimenez were excellent employees. In December, 1975, in order to encourage them to return the next season, Sanchez asked for and obtained a bonus for them from Ben Abatti.

There was no organizing committee in the sprinkler crews; Chavez and Jimenez were the only UFW supporters. Sanchez was aware of their UFW sympathies. He testified that he thought most employees in the other two crews did not support the UFW. Both Chavez and Jimenez had signed UFW authorization cards, and Jimenez had told Sanchez that he had done so. Jimenez also

shouted, "Viva Chavez1" in the field one day with Sanchez present.

Sanchez admitted not liking the UFW. He told Jimenez not to wear a UFW button in the shop so that he would not get in trouble with the boss, and made statements to both Chavez and Jimenez which implicitly threatened loss of work opportunities if the UFW won the election.

There is some uncertainty in the record as to whether Chavez and Jimenez were ordered to work a full eight hours on their last day of work or were given the option of quitting when they wanted. There is no doubt that Sanchez told them it would be their last day in the caminero crew.

Sanchez testified that he offered Chavez and Jimenez work in the rapini harvest the day he laid them off, but Chavez and Jimenez denied being offered such employment. They testified that Sanchez had told them earlier in the season that there might be work in the asparagus or onions when shovel work ended, but that on their last day Sanchez told them that there would be no work in those crops. Ben Abatti testified that in slack seasons sprinkler employees were sometimes given work in onion loading, truck driving/ or the cantaloupe or rapini harvests.

Jimenez returned to ask for work in September 1976. He testified that Sanchez told him that he could not hire him because he had filed a charge and that Ben Abatti would not agree if he were hired. Sanchez denied these statements, but admitted questioning Jimenez about his reasons for filing a charge. Chavez did not apply for rehire after Jimenez told him what Sanchez had said. Under the circumstances, it was reasonable for

him to believe that it would be futile to apply. See International Brotherhood of Teamsters v. U.S., supra.

Sanchez testified that he did not rehire Jimenez because he had already hired a third crew for the 1976 season. Payroll records show that Sanchez hired two employees during the last week in September and a third in the first week of October 1976. Since the caminero crew ordinarily had four employees in it, there apparently were at least two open positions at the time Jimenez applied in September. In light of this evidence, we find the reason given by Respondent for refusing to rehire Jimenez and Chavez was pretextual. It is difficult to believe that absent union considerations, Sanchez, having had trouble finding a good caminero crew and having obtained a bonus for Chavez and Jimenez to encourage them to return, would hire a new crew without making some attempt to let them know that work was available. Sanchez had an easy means of making such contact as Chavez' father worked in the second sprinkler crew. Furthermore, Jimenez returned during the same month in which he had been hired the previous season. Sanchez' admitted questioning of Jimenez about his filing of unfair labor practice charges indicates an anti-union motive in his refusing to rehire Jimenez, and is an additional reason why we do not credit Sanchez[1] testimony that he offered Chavez and Jimenez work in the rapini harvest or any other employment opportunities in Respondent's other crops at the end of the sprinkler work. While the evidence that work was available in September 1976 when Jimenez asked to be rehired is not absolutely free from doubt, it is clear that Respondent did not

meet its obligations under the Labor Code with respect to the rehiring of Jimenez and Chavez. That obligation was described by the NLRB in a case involving Section 8(a)(3) of the National Labor Relations Act, the counterpart of Section 1153 (c) of our Labor Code, as follows:

> Under the Act an Employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment is made. Consequently the Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act, and the question of job availability is relevant only with respect to the employer's backpay obligation. Shawnee Industries, Inc., 140 NLRB 1451 (1963), 52 LRRM 1270, enf'd. 333 F.2d 221.

In the light of all of the above, we conclude that Respondent violated Labor Code Section 1153 (c) and (a) in failing to offer Chavez and Jimenez other work opportunities at the time of their layoff and in subsequently refusing to rehire them.

3. Irrigator Crew.

The irrigator crew had approximately 38 employees, 80 percent of whom worked year-round in the crew. During slack seasons, crew foreman Figueroa sent irrigators to work in the shovel crew or assigned fewer hours of work to each employee in order to keep everyone working.

Abelino Ortega worked as an irrigator for Respondent since 1973. During that period he missed only six months of work due to a work-related injury suffered while carrying siphons. Ortega was on the UFW organizing committee for his crew and wore a UFW button to the shop and at work prior to the election.

Ortega also had a. UFW bumper sticker on his car and passed out UFW leaflets at the shop gate after his last day of work on January 26, 1976. Ortega also attended the pre-election conference and served as the UFW observer at the election.

As previously set forth herein, Figueroa interrogated Ortega on one occasion about his UFW sympathies after overhearing Ortega speaking about the union to another employee. Figueroa then made an implicit threat of loss of employment if the UFW won the election. Figueroa also questioned other members of the crew about their union sympathies and made no secret of his dislike for the UFW.

Ortega reported for work the day before the election and was told by Figueroa that Figueroa was going to start laying off some of the newest irrigators. Ortega told Figueroa that he was being run off because of the UFW. Figueroa smiled and said, "Well, those are Ben's orders."

Figueroa testified that Ortega was laid off for lack of work, and contended that Ortega was selected because his work was not as good as that of other irrigators. No other irrigator was laid off with Ortega. Figueroa complained that Ortega spilled too much water and that he was frequently absent from work.

The evidence shows these reasons to be pretextual. Figueroa testified that in spite of Ortega's alleged poor work performance, he would have rehired him had work been available, but then Figueroa reversed himself by saying he would not have done so because Ortega had been fired. Figueroa stated that the normal penalty for spilling water was a layoff or reduced shift

and that he had never fired any other irrigator in 15 years, testimony which he then also contradicted. Payroll records show that Ortega worked full 24-hour shifts in the month before the layoff, shifts which Figueroa himself testified were given to the best irrigators. The same records show, contrary to Figueroa's testimony that Ortega was frequently absent from work, that Ortega had as good a work record as that of another irrigator who was not laid off. Based on this evidence, we find that Respondent discharged Ortega because of his UFW activities and sympathies in violation of Labor Code Section 1153 (c) and (a).

4. Tractor Driver Crew

Isidro Andrade Prieto worked continuously for Respondent as a tractor driver from August 1974 until January 24, 1976, after being recruited from another employer. In this period, his longest layoff was for four days and he was never laid off for disciplinary reasons. During slack seasons some tractor drivers were referred to truck-driving work, and at least one was sent to work in the shovel crew by Ben Abatti in January 1976.

There were about 30 to 40 tractor drivers in Prieto's crew who were supervised by Albert Studer and Tony Abatti. The crew did not have an organizing committee, and UFW organizer Arturo Rodriguez testified that most drivers would do nothing to help the UFW organize. However, Prieto spoke to organizers and took leaflets at the shop gate. He also attended UFW organizational meetings at night and carried UFW authorization cards. He induced one other driver to sign a card.

The extent of Respondent's knowledge of Prieto's

activities or sympathies is in question. Prieto testified that he was careful not to engage in organizational activities when supervisors were present. However, he testified that prior to his layoff, during a conversation with two other drivers, he was told that a driver named Cirilo Robles had told Studer that Prieto was organizing for the UFW. Robles was not called as a witness, and Studer denied any knowledge of Prieto's activities.

Prieto's last day of work was January 24, 1976, when he worked a night shift. When Prieto later reported to work for his next shift, Studer told him that they were giving him his check because there was not going to be any work for two weeks. Prieto testified that Studer also told him that they would let him know when to report for work again. Prieto further testified that he returned two weeks later when he heard nothing from Studer and asked for work. Prieto stated that Studer told him that there was no work available because they had stopped the night shift.

Studer admitted telling Prieto to return to check for work in two weeks, but contended that he had intended to fire Prieto for poor work performance. He testified that Prieto fell asleep while driving a tractor pulling a melon cart, thereby endangering some pickers, and that he slept on the job during the night shifts which resulted in bad plowing and low productivity.

While Prieto's work in some instances may have been unsatisfactory, the timing of his discharge purportedly for bad work, strongly suggests that this was not the motivating factor. On cross-examination, Studer testified that the incident involving the melon crew had occurred in September or October of 1975,

almost three months prior to Prieto's Layoff. There was no evidence that Studer ever warned Prieto about his work on that occasion. Studer further testified on cross-examination that Prieto had never had an accident during his employment. Studer also admitted that even though he felt that Prieto slept on night shift and did less work, he kept Prieto on the night shift in January 1975, while transferring other drivers from that shift to other work. Finally, although Studer testified that Prieto had weaved through the fields because he fell asleep at the wheel of his tractor throughout the entire 17 months he worked for Respondent and that Studer had warned him about this, Studer never imposed any disciplinary sanctions on Prieto for this behavior. Jose Garcia, another driver, testified that he sometimes had to correct crooked rows plowed by Prieto, but on cross-examination admitted that every driver had some tendency to weave because of the nature of the tractor rig. Garcia further testified that in his five years working for Respondent no driver had been discharged or disciplined for poor work. Although there was some testimony by Respondent's witnesses that other drivers may have done more work than Prieto during a shift, we find no evidence that any supervisor ever warned Prieto about this.

Where a discharge is motivated by an employer's anti-union purposes it violates Labor Code Section 1153 (c) and (a) even though additional reasons, of a legitimate nature, may exist for the discharge. Bacchus Farms, 4 ALRB No. 26 (1978); NLRB v. King Louie Bowling Corp., 472 F.2d 1192 (8th Cir. 1973), 83 LHSM 2576. This is true even where, as here, the employer's

knowledge of the dischargee's union activities has not been directly proven but may be inferred from the record as a whole. See AS-H-NE Farms, Inc., 3 ALRB No. 53 (1977). We infer that Respondent knew of Prieto's UFW sympathies from record evidence that Prieto's views were known to other tractor drivers on the relatively small crew, and that Respondent and its supervisory personnel actively sought information about union support among employees, as well as from the timing of Prieto's discharge just before the election after his purportedly poor work performance had been tolerated for many months. All this leads us to conclude that the moving reason for Respondent's discharge of Prieto was his support for and activities on behalf of the UFW and that his discharge was therefore in violation of Labor Code Section 1153 (c) and (a).

5. Weeding and Thinning Crew.

Jesus Solano, Elena Solano, and Herlinda Avitua worked in the weeding and thinning crew of supervisor Jose Rios. Rios first formed this crew in October and November 1975, using primarily employees who had worked previously for Respondent in other crews. For example, Elena Solano had worked for four years in the lettuce-thinning crew of foreman Quesada as had other members of Rios[1] crew. The crew began work with 24 employees and subsequently reached a peak employment of 32.

The Solanos and Avitua were among 10 employees laid off on January 31, 1976, three days after the election. Rios testified that the layoff was necessitated by a general lack of work and that he told those laid off to contact him later about rehire.

The Solanos and Avitua testified that Rios told then he would contact them when work was available.

The Solanos and Avitua constituted the UFW's organizing committee for their crew. Their level of organizing activity varied, with Jesus Solano being the most active. Rios testified that he knew there was an organizing committee in the crew, but contended that he thought only Jesus Solano was on it. The evidence shows that Rios knew that both Elena Solano and Avitua were active UFW supporters and that he interrogated Avitua and made coercive statements to her about her UFW support shortly before the election.

The reasons Rios put forward in his testimony for selecting the Solanos and Avitua to be laid off were inconsistent and unconvincing. He testified that Jesus Solano had slowed down the work of the crew on one occasion by taking some cut grass to his pickup truck for his pigs at home. Later, after admitting that this was not an uncommon thing for members of his crew to do, and that no prohibition was in force against it, Rios changed his reason to Solano's "low seniority" on the crew. Similarly, having given Elena Solano's "frequent absences" as the reason for selecting her to be laid off, he changed to her "low seniority" on the crew after admitting that Ms. Solano had not been absent since November, that he had given permission for that absence, and that he accepted her back to the crew after her absence. With respect to Herlinda Avitua, Rios again changed his testimony in mid-course. At first he attributed her selection for layoff to poor work performance, but he later said that low seniority on

the crew was the reason.

The low-seniority rationale for these layoffs appears pretextual. The crew was first assembled in October and did not reach full strength until December. The Solanos and Avitua joined the crew before the end of October. Elena Solano had worked for Respondent on another crew for four years, and Jesus Solano and Herlinda Avitua also had worked for Respondent for some time prior to joining Rios' crew. Further evidence that the seniority rationale was pretextual is the fact that four crew members, relatives and/or friends of Rios, who had been hired in December and who were laid off with the Solanos and Avitua were rehired two weeks after the layoff. The remaining three workers laid off at the same time and not rehired were all open UFW supporters.

The inconsistencies and inherently dubious elements in Rios[1] testimony as to his reasons for selecting the Solanos and Avitua to be laid off not only deprive that testimony of probative force but, when considered in the light of his coercive statements and interrogation of employees, they strongly suggest that his true motive in selecting them was their support of the UFW. See Garland Knitting Mills, 170 NLRB No. 39 (1968), 67 LRRM 1520. By laying off these employees in January 1976, Rios reneged on a commitment he had given earlier in the season, according to the testimony of Elena Solano and Herlinda Avitua, that they would be employed on his crew until June, going from work on the lettuce to thinning in the melon crop. (This testimony was corroborated in part by Ben Abatti, who testified that the melon harvesting usually took place in June and July and that Rios' crew did not

work as a crew from July 1976 until the beginning of lettuce thinning in October.) In addition, by Rios' own admission, more work became available shortly after the layoffs, yet Rios did nothing to inform the Solanos or Avitua about it or to rehire them, although, according to their testimony, he had told them he would contact them in the event of more work. Rios passed Jesus Solano in the street after the additional work had become available, but said nothing about it, and he regularly picked up and drove to work the four rehired employees at their house, next door to that of the discriminatees, without ever notifying the discriminatees about the available work.

The totality of this evidence leads us to conclude that the Solanos and Avitua were discriminatorily laid off because of their UFW support, in violation of Labor Code Section 1153(c) and (a). See Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977); Machinery Distribution Co., 211 NLRB 756 (1974).

6. Lettuce Crew.

Respondent had four lettuce-harvest crews at times material herein. Each crew had approximately 50 employees. Rafael Ayon worked in the lettuce-harvest crew of supervisor Fidel Quiroz as a cutter and packer.

Ayon testified that he signed a UFW authorization card and wore a UFW button, as did a majority of his crew. Support for the UFW was generally open in all the lettuce-harvest crews. As previously set forth herein, Quiroz and Poloni both made statements to Ayon threatening loss of employment if the UFW won the election.

Ayon was discharged on January 31, 1976, three days after the election. Quiroz testified that Ayon was fired because he continued to pack soft heads of lettuce after Quiroz had warned him a month earlier not to do so. Ayon admitted that Quiroz had criticized his work and that the foreman told him he was being laid off for bad work.

Our review of the record does not show that Ayon's organizational activities or UFW support differed significantly from that of any of the other employees in the Respondent's four lettuce-harvest crews. No other UFW supporters in these crews were alleged to have been laid off for discriminatory motives in this same period. The anti-union remarks of Quiroz and Poloni to Ayon notwithstanding, we find that Ayon's discharge was for poor work and was not motivated by his union activity or support, which was not markedly different from that of other employees who were not laid off.

7. Pattern of Discrimination.

Our conclusions as to the discriminatory nature of the discharges in Respondent's steady crews is confirmed by substantial indications of a pervasive pattern of discrimination. In the week of the representation election, approximately 25 employees were laid off or discharged from the five steady crews. Thirteen of the employees were either members of the UFW organizing committees in their crews or UFW supporters. The pattern strongly supports an inference of discrimination. See Dryden Mfg. Co., 174 NLRB 255 (1969), 70 LRRM 1155; Machinery Distribution Co., 211 NLRB 756 (1974), 87 LRRM 1128. With the

exception of Ortiz, none of these 13 was later reemployed by Respondent in spite of requests for rehire made by most of them. In contrast, virtually every other employee laid off at the same time was either transferred or referred to available work in other crews, or was rehired a short time later. Moreover, the pattern established in the discharges carried over into Respondent's rehiring practices, giving further evidence of Respondent's discriminatory motive in eliminating UFW supporters from its work force, particularly in view of the timing of the discriminatory acts-and Respondent's other unfair labor practices. See Sunnyside Nurseries, 3 ALRB No. 42 (1977); Genuardi Super Markets, Inc., 172 NLRB No. 121 (1968), 68 LRRM 1519; Machinery Distribution Co., supra.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Abatti Farms, Inc. and Abatti Produce, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Laying off, discharging, or refusing to hire or rehire any employee, or otherwise discriminating against any employee in regard to his or her hire or tenure of employment or any term or condition of employment because of such employee's membership in, or activities on behalf of the United Farm Workers of America, AFL-CIO, or any other labor organization.

(b) Discriminating against any employee in regard to his or her hire, tenure, or any other term or condition of

employment because of his or her filing charges with, or giving testimony under the Agricultural Labor Relations Act.

(c) Denying access to its premises to UFW or other union representatives seeking to engage in organizational activity under the access provision of 8 Cal. Admin. Code 20900 and following.

(d) Preventing or interfering with communication between UFW or other union organizers and employees at places where employees congregate before or after work.

(e) Interrogating employees concerning their union affiliation or sympathy or that of any other employee.

(f) Threatening any employee with loss of employment, or reduced work opportunities, or with any other reprisal or adverse change in his or her wages, hours, or working conditions because of the employee's union membership, union activity, or other exercise of rights guaranteed by Labor Code Section 1152.

(g) Engaging in surveillance of employees who are engaged in union activity or otherwise exercising their rights guaranteed by Labor Code Section 1152.

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

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Immediately offer Ramon Berumen, Reynaldo Bermea, Francisco Ortiz, Lorenzo Chavarria, Andres Montoya,

Augustine Rodriguez, Miguel Lopez Chavez, Jr., Raul Jimenez, Abelino Ortega, Isidro Andrade Prieto, Jesus Solano, Elena Solano, and Herlinda Avitua reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make each of them whole for any loss of pay or other economic losses, plus interest thereon at a rate of seven percent per annum, he or she may have suffered as a result of Respondent's layoff, discharge, or failure or refusal to rehire him or her.

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

(c) Sign the Notice to Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies of the Notice in each language for the purposes set forth hereinafter.

(d) Distribute copies of the attached Notice in appropriate languages to all present employees and to all employees hired by Respondent during the 12-month period following issuance of this Decision.

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed by Respondent at any time during the period from December 13, 1975, to September 30, 1976. In the event that addresses of former employees are not maintained by

Respondent, Respondent shall arrange for the Notice to be broadcast in all appropriate languages on a radio station in the southern San Diego County area, once a week for four weeks during Respondent's next peak hiring season. The station or stations and the times of the broadcasts shall be determined by the Regional Director.

(f) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for a 90-day period to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(g) Arrange for a Board agent or a representative of Respondent to distribute and read the attached Notice in all appropriate languages to its employees assembled on company time and property, at times and places to be determined 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 the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the

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

Dated: May 9, 1979

GERALD A. BROWN, Chairman RONALD L.

RUIZ, Member HERBERT A. PERRY,

Member

After a trial at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

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

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

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

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT lay off, discharge, or refuse to hire or rehire, or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL offer Ramon Berumen, Reynaldo Bermea, Francisco Ortiz, Lorenzo Chavarria, Andres Montoya, Augustine Rodriguez, Miguel Lopez Chavez, Jr., Raul Jimenez, Abelino Ortega, Isidro Andrade Prieto, Jesus Solano, Elena Solano, and Herlinda Avitua their old jobs back and will reimburse each of them any pay or other money they lost because we laid off, fired, or failed or refused to rehire them.

WE WILL NOT deny union organizers access to our premises under the Board's access rule, or prevent or interfere with conversations between organizers and employees in places .on our property where employees gather or meet before or after work.

WE WILL NOT question you about whether you belong to or support the UFW or any other union.

WE WILL NOT spy on any employees or watch employees who are engaging in any union activity or exercising other rights set forth in this Notice in order to find out whether employees support or belong to the UFW or any other union or to discourage employees from doing so.

WE WILL NOT threaten employees with loss of employment or threaten to plant crops which require us to hire fewer workers, or make any other threats of adverse changes in your wages, hours, or working conditions because of your joining or supporting the UFW or any other union or exercising any of the rights set forth in this Notice.

Dated: ABATTI FARMS, INC., and
ABATTI PRODUCE, INC.

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

Abatti Farms, Inc., and5 ALRB No. 34
Abatti Produce, Inc. (UFW) Case Nos. 75-CE-60-E(R)
76-CE-45-E(R)
76-CE-49-E(R)
76-CE-51-E(R)
76-CE-60-E(R)
76-CE-63-E(R)
76-CE-72-E(R)
76-CE-73-E(R)

BACKGROUND

Respondent operates under the names of two corporate entities which constitute a single agricultural employer for purposes of this case.

After an organizing drive in December 1975, the UFW filed a representation petition on January 21, 1976. An election was held on January 28, 1976, which the UFW won. The UFW was thereafter certified by the Board.

In the two months preceding the election, Respondent employed some 200 seasonal workers and between 100 and 130 steady employees. The steadies were organized in five crews. Out of some 25 employees who were laid off or discharged from the steady crews between January 21 and January 31, 1976, 13 were prominent UFW supporters and were not later rehired.

The complaint alleged that the layoffs or discharges of the UFW supporters were discriminatorily motivated and violated Labor Code Section 1153(c) and (a). Many other unfair labor practices were alleged, including denial of access rights provided by 8 Cal. Admin. Code 20900, surveillance, unlawful interrogation, threats of reprisal and other conduct which interfered with, restrained, or coerced employees in the exercise of rights guaranteed by Labor Code Section 1152.

ALO DECISION

The ALO dismissed all but 5 of the 45 instances of alleged illegal conduct by Respondent. He found that Respondent violated the Labor Code only with respect to (1) denial of access to UFW organizers, (2) causing organizer J. Salazar to be put under citizen's arrest when the latter attempted to take access on December 13, 1975, (3) causing UFW organizers Rodriguez, Garza, Carrillo, Lopez, and Kirkland to be put under citizen's arrest when they attempted to take access on December 16, 1975, (4) interrogation of employee Herlinda Avitua by foreman Jose Rios, and (5) coercive statements to the same employee by the same foreman.

BOARD DECISION

The Board found the ALO's Decision failed in many respects. to meet the minimum standards of acceptability set forth in S. Kuramura, Inc., 3 ALRB No. 49 (1977). It afforded that

Decision only the probative value which was warranted as to the areas in which it was deficient. The Board independently made factual findings on objective bases where witness demeanor was not a factor.

The Board upheld the ALO's findings of access rule violations and independent violations of Labor Code Section 1153(a) in Respondent's causing the arrest of organizers attempting to take access. Contrary to the ALO, the Board found a violation of Section 1153(a) in the surveillance carried out, or impression of surveillance created, by Respondent's security guard in the vicinity of the gate to Respondent's property. The Board further found violations of Section 1153(a) in various incidents of interrogation, threatening and coercive remarks in the weeding and thinning crew, the shovel crew, the irrigator crew, the sprinkler crew, and the lettuce crew.

The Board found that Respondent violated Section 1153(c) and (a) by discriminatory layoffs or discharges and discriminatory refusals to rehire in the shovel crew, where the failure of one discriminatee to apply for rehire was found not to bar a finding of a discriminatory refusal to rehire, as such application would have been futile.

A discriminatory refusal to rehire or to offer laid off employees other available work opportunities at the time of their layoff, in violation of Section 1153(c) and (a), was found in the sprinkler crew. One employee in the irrigator crew and one in the tractor crew were found to have been discriminatorily discharged in violation of Section 1153(c) and (a). Three employees in the weeding and thinning crew were found to have been discriminatorily laid off in violation of Section 1153(c) and (a).

The Board stated that the existence of a pattern in which 13 of the 25 employees laid off or discharged within a week of the representation election were visible UFW supporters in their crews strongly supported an inference of illegal discriminatory motivation on the part of Respondent. Specious and inconsistent reasons put forward by Respondent's witnesses in many instances to account for the choice of these employees for layoff or discharge gave further support to the inference of discrimination.

REMEDIAL ORDER

The Board ordered Respondent to cease and desist from its unlawful discrimination, surveillance, threats, interrogation, coercive statements, denial of access to union representatives, and interference with communication between union organizers and employees. The Board also ordered Respondent to offer to reinstate the illegally discharged, laid off, or not rehired employees and to make them whole for any loss of pay suffered as a result of Respondent's violation(s) of the Act, to take various steps whereby its employees would be notified of the results of this case, and to notify the Regional Director of steps taken to comply with the Board's Order.

This Case Summary is issued for information purposes only. It is not an official statement of the case, or of the Agricultural Labor Relations Board.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:	)	
	)	
ABATTI FARMS, INC.	)	CASE NOS. 75-CE-60-E(R)
	)	76-CE-45-E(R)
Respondent,	)	76-CE-49-E(R)
	)	76-CE-5i-E(R)
and	)	76-CE-60-E(R)
	)	76-CE-63-E(R)
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	76-CE-72-E(R)
	)	76-CE-73-E(R)
Charging Party.	)	DECISION AND ORDER

Statement of Case

PHILLIP M. SIMS, Ad Hoc Administrative Law Officer:

THE UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereinafter called the "Union") having filed charges in this matter with the AGRICULTURAL LABOR RELATIONS BOAPJD against ABATTI FARMS, INC. (hereinafter called the "Employer"). The Board issued complaints which were subsequent ly combined and amended to the Third Amended Complaint and dated, April 21, 1977. A Hearing was held beginning March 16, 1977 and Post Hearing Briefs were filed in June 24, 1977. General Counsel was represented by Nancy Kirk and Respondent was represented by Tom Nassif. The allegations in the Third Amended Complaint state that the Employer engaged in various acts of interference with, and restraint and coercion of its employees in the exercise of their rights guaranteed in Section 1152; 1153(a); 1153(b); 1153(c); and 1140.4(a) of the Agricultural Labor Relations Act.

The Employer filed an Answer to the Complaint, denying the allegations and the commission of unfair labor practices.

Pursuant to the Notice of Hearing this case was tried before me in Imperial County, beginning March 16, 1977. Upon the entire record made in this proceeding and my observation of the demeanor of witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent Employer, I made the following:

Findings of Facts

I. The Union

The Third Amended Complaint alleged and the Respondent Employer admitted at the hearing that the Union has been, at all times material herein, a labor organization within the meaning of Section 1140.4(f) of the Act.

II. Employer Respondent

The Employer Respondent admitted it is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

Background

Brothers Ben and Tony Abatti own and operate three farming entities which, together, create probably the largest growing enterprise in Imperial County. No less than 12 crops are grown on 13,500 acres and harvested by nearly 600 employees during the winter peak season. Abatti Farms, Inc., employs the year-round "steady" workers who maintain the land and crops until they are ready to be harvested. This includes tractor drivers, irrigators, shovelers, sprinklers, and the weeding and thinning crew. Abatti Produce Inc., harvests the crops, that is, it employs primarily seasonal workers who pick the melons, asparagus, lettuce, onions, carrots, rapini, sugar beet." and watermelons. Abatti Produce Inc., does the packing and shipping also, while Abatti Brothers, a partnership, owns and

leases the land. The entire operation is run like a family business with one business office in El Centro, the same bookkeeper and support, staff, a brother-in-law, sister, and many sons and nephews on the payroll.

The Abatti enterprise is no stranger to labor disputes. In 1970, the Union staged a strike during the melon harvest. Since mature melons will rot if left one extra day in the Imperial County's summer, the Abattis lost $400,000 after three days of strike. As a consequence the Abattis executed a written agreement with the Union to bargain in good faith for a contract. There were one or two meetings after the melon season ended, but no contract resulted. During the next year the Union waged two more strikes, one in the melons and one in lettue. A local judge dismissed a Union suit against the Abattis for breach of their 1970 melon agreement (R# 5E).

A Teamster picket line appeared at an Abatti lettuce field in January of 1973 by truckers who take the lettuce cartons from the fields to the cooler. Ben Abatti stated that he was convinced the truckers would not transport the lettuce, so he came to a basic agreement concerning terms for a Teamster contract for all of his harvesting employees by the end of that same day. Ben Abatti testified, he could not remember most of the terms of that contract, including when it expired. He did know, however, that the wage rates for his employees did not change under the Teamster contract.

As a result of the incidents in 1970 and 1973, the Abattis developed a reputation by U.F.W. organizers as being stidently against worker organization and specifically anti-U.F.W. Arturo Rodriguez, co-ordinator for the U.F.W. of the Abatti campaign, testified that the Union developed four special leaflets for the

campaign specifically to the Abattis.

Abattis property is scattered into 100 separate parcels throughout Imperial Valley. The parcels range from 40 to 1,000 acres. On one cluster of parcels near Heber there sits a shop which includes a field office, a garage and repair station for farm machinery, and an area where the steady workers and foremen congregate each morning prior to work in order to receive instructions and assignments. The shop itself sits in the approximate middle of seven acres of fenced in land just off McCabe Road. There is one sliding wire gate which a guard opened to allow entrance to employees. About half of the employees parked along the street and walked through the gate to the shop, while the other half drove through and parked inside. Only one of the five steady crews, weeding and thinning, did not enter the shop each morning. Instead they waited outside in their cars while their foreman, Jose Rios, would go in to find out which field they were to weed or thin that day. The crew would follow him caravan like, from the shop to the location. All of the workers in the other steady crews, as a general rule, went to the shop daily. They would spend from half an hour to one hour and some longer, in the shop. Usually a dice game would progress, usually with irrigators and tractor drivers, workers would get warm by the heater, drink coffee and talk, waiting for the foremen to arrive. The Abattis and the foremen would come at about 5:30, workers would receive their instructions and leave by or around 6:00 a.m.

There were probably 80 to 100 steady workers who regularly came to the shop each morning. There were about thirty workers each in the tractor crew of Albert Studer and the irrigation crew of

Charlie Figueroa. The- shovel crew of Ramon Gonzales varied from 9 to 25. Eddie Sanchez, the foreman of the sprinkler crew, had 12 workers under his supervision during the relevant time.

An election was held on January 28, 1976, at Abatti, and certification of the U.F.W. is pending. Arturo Rodriguez was assigned as coordinator of the election campaign of the U.F.W. in mid-November 1975. For about two weeks Rodriguez did background research :to find out what, if any, special problems might exist, and to develop a campaign plan and strategy. In early December, a very active two-month campaign began. Initially, three organizers, Pablo Carillo, Rosa Lopez, and Jose Luna, were assigned full time to the Abatti campaign. At least one and usually more organizers would be at the shop in the morning on a daily basis. They would have union leaflets to pass out, different ones daily. During the day, the organizers would visit the crews in the fields. After work, there were meetings at the Calexico U.F.W. office for information sharing and ideas and then home visits to workers in the evenings.

On Saturday, December 13, Juan Salazan, a U.F.W. organizer, was assigned to go to the shop to hand out leaflets and talk to Workers about the organizational campaign at Abatti. He stayed in his car for 20 to 25 minutes watching workers arrive and go inside. He then followed by walking inside the shop, there being no guard at the gate to the best of his memory. After only two or three minutes talking to workers, he was approached by Albert Studer, tractor foreman and brother-in-law of the Abattis, who asked him to leave in he presence of workers. When Salazar refused to leave, the sheriff was called who placed him under arrest. On Monday, two days later, two other organizers, Pablo Carrillo and Jose Luna were ordered out

of the shop by Ben Abatti.

The following day, December 16, five U.F.W. organizers, including coordinator Rodriguez, went into the shop to talk with the steady workers before work. Again, they were arrested in the presence of the workers. One of them, Rosa Lopez, was allegedly assaulted by Tony Abatti. After that day, U.F.W. organizers asked the guard at the gate for permission to enter and were refused daily. A policy was then made by the U.F.W. to not force the issue since arrests were imminent and organizers were needed out of jail.

After the steadies received their assignments at the shop, they dispersed to over 20 different locations. Only the shovel crew worked as a group, with the tractors, sprinklers, and irrigators working alone or in small groups of two, three or four. Their locations would change daily or more often and could be in all corners of the Valley, so that it was impossible to know where people would be at their lunch hour. Home visits became a means to talk to the steadies and get authorization cards assigned.

Through the home visits, the organizers initially tried to find key workers from each crew to form an organizing committee. The organizers were instructed to "look for individuals who were looked upon by the workers themselves as leaders within those crews ...for people in the different areas that had leadership quality, that had an interest for not only themselves, but wanted a Union for the ranch and were willing to take it upon their own responsibility to do the organizing." Rodriguez's testimony according to Artie Rodriguez, the first responsibility of committee members was to recognize themselves as the committee, i.e., to accept the responsibility to assist in every possible way even though that

making sacrificies. (Rodriguez, 49, 19.) Specifically, committee members were expected to participate in the committee meetings held at the Union office, wear buttons, and pass out leaflets and buttons (Rodriguez, 50, 4.) Mostcommittee members would stop by the Union office almost every day to report or pick up leaflets, with the all- crew committee meetingsbeing held weekly in January. Approximately thirty to forty workers would attend; ten to fifteen of whom were from the steady crews.(Rodriguez, 52, 13.).

According to Artie Rodriguez, there was a substantial difference between the steady crews and the seasonal workers in terms of the willingness of workers to openly display their support for the Union (Rodriguez, 55, 7.) In the seasonal crews, the workers were more likely to join the Union (Rodriguez, 121., 2.). Among the steady crews, on the other hand, they did not support the Union as enthusiastically. The steadies would not talk to the organizers as readily. Many workers who took leaflets at the shop gate would leave them in their car or fold and put them in their pocket to read at a later time.

During the course of the two month campaign, the Abatti brothers, sister, brother-in-law, and many foremen engaged in conversation with their crews and/or the committee members of the crew relating to the upcoming Union election. Abattis sister, Agnes Poloni, and the foremen of the sprinklers and shovel crews allegedly told workers that the Abattis would sell their asparagus, lettuce, and melon crops and invest in non-labor intensive crops such as alfalfa and wheat if the U.F.W. won the election.

In the weeding and thinning crew, one committee member allegedly discussed with her foreman the authorization cards, her

button, and her vote. She allegedly was told not to sign and to take off her button. She was laid off just after the election, a-long with the two other members in her crew. Among the irrigators, the foreman admitted he discussed with one committee member and other workers in the crew about their membership in the U.F.W. and their vote. The committee member of the crew, one of the employees who passed out leaflets at the gate of the shop with U.F.W. organizers and who had a bumper sticker, was laid off just before the election.

There was no organized committee in the sprinkler crew but the foreman testified that he knew that it was only in Crew No. 3 that there were any Chavistas, that Crew Nos. 1 and 2 were not in favor of the Union. A sprinkler worker and his partner who were Crew No. 3 were laid off before the election.

In the shovel crew, there were some people either formally part of the committee or assisting it in some way. Their foremen allegedly interrogated the workers to find out who wore buttons and who had the list (generally known by the U.F.W. to be given to the committee chairperson).

The tractor foreman laid off one committee member in his crew one week before the election.

Ben Abatti and the foremen generally denied that they knew who the committee members were in the steady crews. Abatti stated some workers were laid off, allegedly, because they had less seniority. The Abattis workers provided different seniority systems or no seniority. Workers were also discharged for allegedly bad work.

. . . .

Marshall Ganz testified that the Abatti campaign was difficult in Imperial County.

THE ALLEGED ACCESS VIOLATIONS

Ever since the enactment of the emergency regulations of the Agricultural Labor Relations Board, Chapter 5 of the regulations and the following modifications or if known as the "access rule" have spurned numerous lawsuits alleging VIOLATIONS of the rule. The California Supreme Court has approached the issue in ALRB v. Superior Court, 46 Cal. 3d 392, 128 Cal. Rptr. 183 (1976) wherein the Court decided in- favor of the constitutionality of the access rule.

The case at hand involves allegations[1/] of several violations of the rule at no basic physical locations under the control of the Respondent (Employer). These are the "shop" and the "fields". The Charging Party in this action alleges that union organizers were denied access to farm workers in several instances which occurred at the shop and in the fields. The issues and law involving the claims are distinct, so as to merit separate discus-ion in this opinion.

ACCESS TO THE SHOP

The specific charges relating to the shop will be discussed as relating to the basic charge alleged as Section 12(a) of the Charging Party's Third Amended Consolidated Complaint.

CHARGE:

§12 (a) On or about December 13, 1975, and on a continual and daily basis, through and including January 28, 1976, Respondent, by and through its agents, at Abatti Farms, Inc.'s Imperial County

1/ §§12(a), 12(b), 12(0), 12(g), 12 (j), 12 (k) , 12(1) of the Third Amended Consolidated Complaint.

premises at its shop on McCabe Road near Heber, California, denied U.F.W. organizers access to the areas of property in which workers congregated during the one hour period before work.

DISCUSSION:

The regulations of the ALRB are clear on the point that:

> "Organizers may enter the property of an employer for a total period of one hour before the start of work and one hour after the completion of work to meet and talk with employees in an area in which employees, congregate before and after working." Chapter IX, para. 3, ALRB regulations, (1976).

Respondent claims that allowing the union organizers to enter the shop would be disruptive of business.[2/] However, this position is not necessarily in total opposition to allowing union organizers the access to workers before work has begun. Respondent claims that instructions are given to work crew at the shop at some time during the period of 5:30-6:30 each morning, this being as the time respondent claims that the union organizers were disrupting work. However, respondent advises that workers are paid for their work beginning at 6:00. It seems then, in the opinion of this officer, that the union organizers would be within the confines of the Act if they approached workers for one hour before 6:00 in the morning. Respondent can not at will vary the hours of work without varying the corresponding pay period, simply to intentionally I frustrate the union organizers. This is not to be construed to mean that the respondent is not free to vary his work hours, but that respondent simply inform his workers what time their work, -and .hence their pay, begins, and then it is up to the Union to find this out so they can enable themselves of the advantage of access to the

2/ Chapter 5, para, e, ALRB regulations.

workers at the allowable one hour prior to work period. This is in accord with, the hearing officer's decision in a recent case, Jack Pandol, and Sons, Inc., 3 ALRB No. 29 (1977) , where the hearing officer wrote,

> "It is the time which controls, not the place." Pandol, supra., hearing officer's decision, P. 7.

Several other recent decisions of the ALRB support allowing access to company controlled areas, Silver Creek Packing Co., 3 ALRB No. 13 (1977); Mitch Knego, 3 ALRB No. 32 (1977); Merzoian Bros. Farm Management Co., Inc., et al, 3 ALRB No. 62 (1977); Anderson Farms Co., 3 ALRB No. 67 (1977); Whitney Farms, et al, 3 ALRB No. 68 (1977) . The weight of the decisions, although on the facts most admittedly deal with access to company controlled labor camps, preponderate in favor of allowing union organizers access at reasonable times. As the Board wrote in TEX-CAL Land Management, Inc., 3 ALRB No. 14 (1977) at page 16,

> "...our rule expressly rejects as inappropriate a case-by-case approach to this problem of Union contact with employees on the employer's property. The regulation expresses and reflects our finding that as a general principle the alternative channels of effective communication which the NLRB and the Federal courts evaulate in each case are not adequate in the context of agricultural labor; therefore, on-site organizing is necessary to further the fundamental policy of the set that agricultural employees determine, free of coercion, whether they wish or do not wish to be represented by a union."

The union organizers must not construe this as a mandate for total access at any hour, or allowing the disruption of business, but simply that they are allowed access within the limits of the set. The employer is estopped from claiming a disruption of business at any time a union organizer arrives on the scene, but once work has

begun, as defined by the employer's general policy and pay period, union organizers are estopped from disrupting work.

In this case, it is clear from the facts that the workers congregated around the shop before work began, so it follows that the union organizers be allowed access to those employees not engaged in work, and that no work be disrupted, i.e. after 6:00, or whatever time the employer has established work, and pay for that work, has begun.

Respondent avers that union organizers should not be permitted access to the shop during the hours of instruction and meetings. I would agree with this, so long as the respondent has recognized this as work by compensating the employees for their time spent at such meetings and instruction. The respondent can not claim that this is pre-work on one hand and that business is disrupted on the other.

Respondent may not prohibit access, and the union organizers nust not disrupt business, in accordance with this opinion and the ALRB regulations. As the two are not mutually exclusive, and are compatible.

CONCLUSION:

Therefore, the charges alleged in Section 12(a) of the Third Amended Consolidated Complaint which are in violation of Section 1153 (a) of the Act are hereby upheld in so far as consistent with the above opinion.

CHARGE:

§12(b) On or about December 13, 1975, and on a continual basis, Respondent by and through its agent, Albert Studer, at Abatti farms, Inc.'s Imperial County premises, verbally harassed U.F.W.

organizer Juan Salazar, and used profane language regarding the ALR3 so as to. interfere with concerted union activities and intimidate employees.

DISCUSSION:

In so far as this charge relates to the denial of access to union organizers, the issue is joined in the determination of the charge in §12 (a) supra. This means that union organizer Juan Salazar was legally engaged in organizational activities protected under the Act, as they are discussed in reference to allegation §12 (a) supra.

To quote from Respondent's Post Hearing Brief, p. 15, "The question here does not revolve around the right to access as much as it revolves around the alleged statements made by Mr. Studer."

The testimony does not prove that the profane language used on the occasion did indeed interfere with union activities and/or intimidate employees. The only evidence presented on the issue was the testimony of Juan Salazar, (RT Salazar, 4/18/77 pp. 11-13) which consists of hearsay as to whether other employees of Respondent were in fact intimidated.

It is equally unproven that any so-called verbal harassment of Mr. Salazar in fact interfered with union activities to such an extent as to violate §1153(a) of the Act, as charged.

CONCLUSION:

The charge of §12(b) is dismissed in accordance with the opinion above.

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. . . .

CHARGE:

§12(c) On or about December 13, 1975, Respondent by and through its agents, Ben Abatti and Albert Studer, caused a U.F.W. organizer, Juan Salazar, to be put under citizen's arrest which was denial of access and further interference with organizational rights.

DISCUSSION:

This charge is interconnected with §12(b) supra., but its determination must be made separately.

The testimony, indicates that Mr. Salazar was arrested by Mr. Studer for organizational activities in behalf of the U.F.W., which at the time were lawful. Mr. Salazar was attempting to talk to Respondent's workers at the shop on December 15, 1975 at approximately 5:00 that morning. The decision in §12(a) supra., finds that organizational activities occurring at such times prior to work are lawful. Therefore, consistent with the opinion in §12(a), Mr. Salazar was lawfully engaged in union organizing at the time of his arrest.

CONCLUSION:

The charge in §12 (c) which is in violation of §1153 (a) of the Act is hereby upheld for the reasons stated in the opinion above.

FURTHER CHARGES:

Certain conclusions of law will be found following the (discussion and disposition of these charges. The law relates to many of the charges, so the cases are cited with general reference to the charges by subject matter.

. . . .

. . . .

CHARGE:

§12(d) On or about December 15, 1975, and on a continual basis, Respondent through its agent, Richard Abatti, conducted surveillance of U.F.W. organizer, Jose Luna and employees during a discussion about organizational activities.

This allegation initially stated a son of one of the Abattis conducted surveillance of Jose Luna. Later admendments to these allegations stating it was Richard Abatti, son of Tony jAbatti who at the time of alleged incident was some 14 years old. Jose Luna first described the boy as being blonde.

There was some other general descriptions with regard to the appearance of the person. There was testimony that the workers knew all the family members of the Abattis who worked there, but no one testified exactly who the person was other than they believed him to be a son of the Abattis. There is testimony that maybe this could be the person. However, there was other testimony that other people had been there and they weren't sure exactly who it was.

Later on Richard Abatti testified he was decidely dark in complexion and having dark hair. He denied being the person being as alleged in §12(d). There was some confusion as to correct identification and on that basis the §12(d) allegation is denied.

CHARGE:

§12 (e) On or about December 15, 1975, and on a continual basis, Respondent by and through its agent, Richard Abatti, used profane and hostile language in reference to and while communicating with a U.F.W. organizer, Jose Luna, so as to interfere with concerted union activities and intimidate employees.

. . . .

CONCLUSION:

For the reasons provided in §12(d) the allegations are denied in Charge 12(e).

CHARGE:

§12 (f) On or about December 16, 1975, Respondent by and through its agent, Tony Abatti, at Abatti's shop on McCabe Road did assault U.F.W. organizer, Rosa Lopez, by roughly grabbing her arm so as to interfere with organizational activities and intimidate employees. DISCUSSION:

The union organizers were lawfully in the shop area, see §12 (a) supra. My factual determination of this charge is that the charge is not fully substantiated by the testimony, and therefore the General Council has not met its burden of proof on it. Testimony from Mr. House, Mr. Studer, and Mr. Abatti contradicted Ms. Lopez allegations, sufficiently to raise a presumption that was not overcome by the Charging Party.

CONCLUSION:

The charge in §12(f) is hereby dismissed in accordance with the above opinion.

CHARGE:

§12(g) On or about December 16, 1976, Respondent by and through its agents, Ben Abatti, Tony Abatti, Jim House, and others, caused five (5) U.F.W. organizers, Arturo Rodriguez, Ricardo Garza, Pablo Carrillo, Rosa Lopez, and William Kirkland, to be placed under citizen's arrest which was a denial of access and interference with organizational rights.

. . . .

DISCUSSION:

The charge is substantially supported by the findings in $$12 (c), $12 (a) supra. The union organizers were engaging in lawful practices. Their organizational activities were unduly denied and interfered with.

CONCLUSION:

The charge of §12(g) in violation of §1153 (a) of the Act is therefore upheld in accordance with the opinion above.

CHARGE:

§12(h) On or about December 20, 1975, and on a continual basis, Respondent by and through its agent, Johnny Kile, armed guard, conducted surveillance of U.F.W. organizers and employees (during discussions about organizational activities involving the U.F.W.

DISCUSSION:

There was insufficient testimony presented by the Charging Paty indicating that any witness, save one, felt at all intimidated by Mr. Kile's presence. The actions of the guard moving through the gate is a neutral act.

CONCLUSION:

The charge of §12 (1) is dismissed in accordance with the dismissal at the hearing, KT, 4/26/77.

CHARGE:

§12(i) On or about January 15, 1976, Respondent by and through its agent Ben Abatti, used profane and hostile language regarding the access rule and the ALRB to U.F.W. organizer Pablo Carrillo so as to deny access, interfere with organizational activities, and intimidate employees.

DISCUSSION:

The use of profane language is not at all uncommon among workers, and there is no testimony that any workers actually said or understood what was allegedly said. Most of the workers peak Spanish and only partial, if any, English. Therefore, because of the language barrier, and lack of testimony, it would be speculation to find that employees were intimidated, access was denied and organizational activities were interfered with. See the opinion under charge §12(b) supra.

CONCLUSION:

In accordance with the opinion above, charge 12 (i) is hereby dismissed.

CHARGE:

§12 (j) On or about January 24, 1976, Respondent by and through its agents, Albert Studer, Ben Abatti and Agnes Poloni, at Abatti Farms, Inc.'s Imperial County premises, denied U.F.W. organizers access to the property during a one hour period during the working day.

DISCUSSION:

The Charging Party has alleged that Respondent "exposed its virulent attitude against the U.F.W. and ALRB" by the manner in which it denied access to the organizers in the field. General Counsel's Post-Hearing Brief, p. 33. I find that there is insubstantial evidence to support these allegations. It appears from the testimony that Respondent asked organizers to leave a field only when it was apparent that work was being disrupted and property (crops) were being damaged through the neglect of the organizers.

The record indicates that access to the workers in line with Chapter 5, paragraph (b) of the ALRB regulations, allowing "lunch time" access or its counter part if no established lunch time exisits, was not violated. Access to a field was only denied when work was disrupted or crops were carelessly damaged. No general policy of denying access until such disruption or damage occurred was proven by the Charging Party.

CONCLUSION:

The charge of §12(j) is therefore dismissed in accordance with the opinion above.

CHARGE:

§12 (k) On or about January 24, 1976, Respondent, by and through its agent, Ben Abatti, at Abatti Farms, Inc. premises in Imperial County, used profane language, directed towards U.F.W. organizer Arturo Rodriguez so as to interfere with concerted union activities and intimidate employees. It is doubtful that such strong sentiments as union affiliation could be more than insubstantially intimidated only by the Respondent asking the organizers to leave in admittedly foul but not uncommon language among workers. There is no direct evidence that a substantial number of workers indeed witnessed such incidents, and retained more than passing notice at what happened, much less than being intimidated by what allegedly occurred.

CONCLUSION:

The charge in §12 (k) is hereby dismissed as substantially unproven, in accordance with the opinion above.

. . . .

. . . .

CHARGE:

§12(1) On or about January 24, 1976,Respondent by and through its agents, Ben Abatti and Albert Studer, caused a U.F.W. organizer Arturo Rodriguez, to be put under citizen's arrest which was a denial of access to U.F.W. organizers and further interference with organizational rights.

DISCUSSION:

This charge is substantially similar to that of $12 (j), and the opinion thereunder is reiterated for this charge. The testimony of James House, RT House, 4/28/77, at pages 31-34 is uncontradicted by the testimony of Mr. Rodriguez, RT Rodriguez, 3/28/77. Mr. House testified that Mr. Rodriguez and his co-organizers disturbed and destroyed heads of lettuce, RT, House, P. 32, 33 which would constitute conduct by the organizers which would violate Respondent's denial of access to the fields. The question of the propriety of an arrest is not properly before this hearing, so the part of the charge referring to the arrest should be stricken.

CONCLUSION:

As the testimony concerning the denial of access to the fields as a result of the destruction of property is justified in accordance with Chapter 5, para. e of the ALRB regulations (regarding destruction of property), and is uncontroverted by the Charging Party's testimony, the charge is hereby dismissed.

CHARGE:

§12(m) On or about January 14, 1976 Respondent by and through its agent, Jose Rios, interrogated an employee, Herlinda Avitua, concerning whether or not she signed a U.F.W. authorization

card, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

The testimony indicates that Ms. Avitua was interrogated by Mr. Rios and was intimidated by his questioning. This is based on direct testimony, demeanor of witnesses and the ability of Ms. Avitua to testify. The interrogation of employees regarding their union sympathies and activities constitutes unlawful interference with protected activities, NLRB v. Berggren & Sons, Inc., 406 F.2d 239, 70 LRRM 2338 (8th Cir. 1969), approving rules set out in Struksress Construction Co., 165 NLRB No. 102, 65 LRRM 1385 (1969). Under the National Labor Relations Act, where no union has formally requested recognition, interrogation can serve no legitimate purpose. Union News Co., 112 NLRB NO. 57, 36 LRRM 1045 (1955). If a union has formally requested recognition, interrogations are unlawful unless taken by secret ballot with stated assurance against reprisals for express purpose of determing the validity of a union's claim to majority status. Under the ALRA, requests of. recognition on the basis of alleged majority status are not permitted, since exclusive collective bargaining rights are only available to unions certified by the ARLA as the representative of a majority of the employees after a fair, secret ballot election. Hence, under no circumstances is interrogation permissible under the ALRA. General Counsel's Post-Hearing Brief, pp. 41-42.

CONCLUSION:

The charge, §12(m) is hereby upheld in accordance with the provisions of §1153(a) of the Act and the above opinion.

. . . .

CHARGE:

§12(n) On or about January 14, 1976, Respondent by and through its agent, Jose Rios, after an employee signed a U.F.W. authorization card, told said employee that she should not have signed an authorization card so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

This charge is directly related to the above charge, §12 (m). Ms. Avitua is the employee referred to in this charge and the interference with concerted union activities and intimidation is inseparable from the incident upon which charge §12(m) is based.

CONCLUSION:

For the reasons stated in the opinion above, and consistent with the opinion in §12(n) supra., charge §12(m) is hereby granted and Respondent is found in violation of §1153(a) of the Act.

CHARGE:

§12 (o) On or about January 14, 1976, Respondent by and through its agent, Jose Rios, told an employee, Herlinda Avitua, to take off and stop displaying a U.F.W. button, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

It was not cearly substanitated that the U.F.W. button referred to in the charge was actually worn by Ms. Avitua. This charge is related to charges §12(m) and §12(n) supra., and the findings thereunder are relevant. However, as it is essential that the fact that the button was worn be established, the lack of such proof is determinative of this particular charge.

. . . .

CONCLUSION:

Consistent with the above opinion, charge 12(o) is hereby dismissed.

CHARGE:

§12(p) On or about January 14, 1976, and on a continual basis, Respondent by and through its agent, Jose Rios, spoke of Jesus Solano by name and said he was crazy and brainwashed, referring to his organizational activities on behalf of the U.F.W., so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

There was insufficient showing by the Charging Party that the reference to Mr. Solano as crazy and brainwashed was any more than a mere opinion on the part of Mr. Rios. Again, there is only an allegation that employees were intimidated by this, and a substantial lack of testimony and evidence to sustain the Charging Party's burden of proof on this charge.

CONCLUSION:

The charge, §12(p) is hereby dismissed in accordance with the above opinion.

CHARGE:

§12(q) On or about January 14, 1976, and on a continual basis, Respondent by and through its agent, Jose Rios, referred to Jesus Solano by name as the Chavista leader, thereby threatening employees with retaliation since the company was aware of who. the U.F.W. supporters were so as to interfere with concerted union activities and intimidate employees.

. . . .

DISCUSSION:

The complainant, Mr. Solano, did not testify as to the alleged comments of Mr. Rios, because he did not hear them. Other employees, such as Adelina Morena testified that she never heard Jose Rios state that Jesus Solano was crazy or brainwashed (R.T. 5/10/77, pp. 6-7). There were no other witnesses presented who testified that they actually heard Mr. Rios make the alleged comments. There was also a paucity of evidence which would prove that it was interfering with concerted union activities and intimidation of employees to refer to Mr. Solano as "the Chavista leader." This conclusion is particularly supported by the fact that many employees had pro U.F.W. sentiments, so there is no reason why a Chavista would be necessarily intimidating. Charge §12 (q) is dismissed.

CHARGE:

§12 (r) On or about January 24, 1976, and on a continual basis, Respondent fay and through its agent, Jose Rios, interrogated employees concerning their vote in the upcoming representation election. Jose Rios told at least one employee, Herlinda Avitua, to vote for the Teamsters. He added that a vote for the Teamsters was a vote for the company, so as to lend assistance and support to the Teamsters union.

DISCUSSION:

While it may be unlawful to interrogate employees as to union affiliation, (see discussion §12(m) supra.), there is insufficient showing to support the allegation that the alleged comment was actually made to Ms. Avitua. There were no witnesses presented testifying to the incident, and Mr. Rios denied giving such support to the Teamsters. The testimony also showed that there was no

favoritism toward any union by the company at any of the pertinent times. This charge is then unsupported and insufficiently proven or damaging.

CONCLUSION:

The charge §12(r) is hereby dismissed in accordance with the above opinion.

CHARGE:

§12 (s) On or about January 28, 1976, the day of the representational election, Respondent by and through its agent, Jose Rios, told an employee, Herlinda Avitua, to vote for the Teamsters, so as to lend assistance and support to the Teamster union.

DISCUSSION:

This charge is interconnected with charge §12(r), The reasons for disposition of this charge is a reiteration of the discussion under charge §12(r).

CONCLUSION:

The charge §12 (s) is hereby dismissed for the reasons stated in the discussion of charge §12(r) and above.

CHARGE:

§12(t) On or about January 28, 1976, the day of the representation election, Respondent by and through its agent Jose Rios, accepted buttons from a Teamster organizer and put the buttons on his person, in the presence of Abatti employees, so as to lend assistance and support to the Teamsters union.

DISCUSSION:

There was no testimony preferred in support of this allegation which would be sufficient to prove that Mr. Rios in fact

wore such buttons and thereby gave assistance to the Teamsters union, lore importantly, it was never proven by the Charging Party that, even if true, that Mr. Rios showing support for the Teamsters would give assistance to the Teamsters. Given the circumstances at which the Charging Party's witnesses allege as to the Respondent's anti-union bias support for a particular union could easily have the opposite effect of solidifying employee sentiment against the Respondent and any party that Respondent supported. However, this is all speculation as Charging Party did not prove this theory one way or another.

CONCLUSION:

For the above stated reasons, charge §12 (t) is hereby dismissed.

CHARGE:

§12(u) On or about January 30, 1976, Respondent by and through its agent, Jose Rios, stated the U.F.W. won because the election was crooked, so as to interfer with concerted union activities and intimidate employees.

DISCUSSION:

The charge was dismissed at the hearing, (R.T., 4/26/77, p. 11), and I include my comments from the transcript.

The statement did arise after the elction when Ms. Avitua vas riding with Mr. Rios. The question was: What did she say? She said the election was crooked. General Counsel's office asked her to be more specific, and she said, "Well, not truthful," and the question was then asked by General Counsel: What does that mean to you? In my notes there was substantial period of questioning and disorganization that she could not really understand what it meant.

The basis that she did not have a clear understanding of what it meant, she may not have been able to, but she wasn't able to testify to it. Secondly, since it took place after the election I am going to dismiss §12(u). (R.T., 4/26/77, p. 11, lines 8-19.)

CONCLUSION:

The charge §12(u) is dismissed in accordance with the decision at the hearing.

CHARGE:

§12(v) On or about January 30, 1976, Jose Rios refused to provide transportation to work for Elena Solano because she and her husband Jesus Solano, had participated in U.F.W. activities, and remarked that Chavez should buy them a car, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

Ms. Avitua testified that on two occasions Mr. Rios provided a ride for Ms. Avitua and Ms. Solano in the morning. On the occasion complained of, Ms. Solano was not in front of Ms. Avitua's house, or outside, where she was normally picked up, so Mr. Rios did not refuse a ride to Ms. Solano, but that Ms. Solano simply was not available for the ride.

CONCLUSION:

For the above stated reasons, charge §12(v) is hereby dismissed.

CHARGE:

§12(w) On or about January 31, 1976, and on a continual basis, Respondent by and through its agent, Jose Rios, discharged and refused to rehire Herlinda Avitua, Ascencion Gutierrez, Alejandra Gutierrez, Joe Gutierrez, Elena Solano and Jesus Solano,

and has failed and refused to reinstate then to their former or substantially equivalent conditions of employment, so to interfere with concerted union activities and intimidate employees.

DISCUSSION:

The charge as it relates to the Gutierrez was dismissed at the hearing, (R.T. 4/26/77, p. 9), and I include my comments on the same issue, but regarding a different individual; "I feel very strongly about this, that if any individual uses the resources of the State to bring charges against another individual, by bringing that he makes the decision that, first of all, he is going to appear and testify, and, secondly, that he is going to hold himself out to be cross-examined in the manner which is appropriate to get the truth. Since we use an adversary system, we can't prescribe or limit the type of cross-examiantion unless it becomes harassment or interference." (R.T. 4/26/77, p. 8, lines 3-11.)

As to the Solano's, there is testimony from Elena and Jesus Solano in which they state that they were seasonal employees, and that they were laid-off, not discharged. Others were laid-off at the same time, many of whom had not engaged in union activity. Neither of the Solano's asked for re-employment, which would be a pre-requisite to a valid finding that the Respondent intentionally refused to re-hire them.

CONCLUSION:

In accordance with the above opinion, charge §12(w) is hereby dismissed.

CHARGE:

§12(x) On or about January 17, 1976, and on a repeated and continual basis, Respondent by and through its agent, Charlie Figueroa.

Figueroa, told employees that if the U.F.W. won the election employment conditions would deteriorate.

DISCUSSION:

The testimony indicates that the phrase Mr. Figueroa used,[3/] although crude, is susceptible to myriad interpretations. The expression is analogous to a personal opinion as to the state of the union, not that conditions would necessarily deteriorate. It is not an unfair labor practice to voice an opinion regarding the speakers observation on the workings of the union. This charge is very weak and nearly spurious.

CONCLUSION;

In accordance with the above opinion, charge §12(x) is hereby dismissed.

CHARGE:

§12(y) On or about January 17, 1976, Respondent by and through its agent Charlie Figueroa said to U.F.W. committee member, Abelino Ortega, that organizing for the U.F.W. was analogous to letting a bird in the hand go in order to catch more in the air which was intended to be and received as a threat of retaliation if said employee continued to engage in organizational activities on behalf of the U.F.W.

DISCUSSION:

This charge is very similar to charge §12 (x) in that here an allegorical saying is alleged to be a threat. Such an allegation can not be fully substantiated as an unfair labor practice, and to do so would place allegory and the interpretation of it by the hearer on the same plane as actions such as denial of

3/ "if Chavez's union gets in, everything is going to get fucked up" (R.T. Ortega, P. 8)

access, etc. This does not constitute a threat, which vitiates the charge.

CONCLUSION:

In accordance with the above opinion, charge §12 (x) is hereby dismissed.

CHARGE:

§12(z) On or about January 24, 1976, Respondent by and through its agent, Charlie Figueroa, discharged and refused co re-hire Abelino Ortega, and has failed and refused to reinstate him to his former or substantially equivalent conditions of employment, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

Mr. Figueroa's testimony in R.T. 5/12/77, is that Mr. Ortega was hired as a temporary irrigator. There was indicated sufficient reasons to believe that Mr. Ortega was laid-off because work was slack, and that Mr. Ortega's work had been less than satisfactory, (R.T. Figueroa , 5/12/77, p. 16). It is reasonably clear from the testimony of witnesses, that Mr. Ortega was not laid-off for union activity, but merely because of his unsatisfactory performance on the job.

CONCLUSION:

The charge §12 (z) is hereby dismissed in accordance with the above opinion.

CHARGE:

§12(aa) On or about January 21, 1976, Respondent by and through its agent, Fidel Quiroz, at Abatti Farms, Inc.'s Imperial Zounty premises threatened an employee, Rafael Ayon, by stating that

if the U.F.W. won the representation election, the Abattis would return to Italy, implying that there would be no work, so as to interfere with concerted union activities and intimidate employees.

There is a complete paucity of testimony which could substantiate this charge. It is unclear from the testimony who in fact said the alleged remark, much less than proving it to be a threat. This charge therefore, has no basis as an unfair labor practice.

CONCLUSION:

Change §12(aa) is hereby dismissed for the above stated reasons.

CHARGE:

§12(bb) On or about January 21, 1976, and on a continual basis, Respondent by and through its agent, Agnes Poloni, in its business office stated to and threatened an employee, Rafael Ayon, that if Chavez won the election, the Abattis would plant alfalfa, rather than labor intensive crops, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

This charge is not supported by Mr. Ayon's testimony that he felt threatened/ but only that he heard the comment. This comment amounts to no more than a prediction, at best, rather than a threat. Such predictions are permissible and are not unfair labor practices. There was no proof preferred by the Charging Party which would substantiate this comment as a threat, or any more than a speculative prediction on behalf of Ms. Poloni.

. . . .

. . . .

CONCLUSION:

Charge §12(bb) is hereby dismissed accordance with the above decision.

CHARGE:

§12 (cc) On or about January 31, 1976, and on a continual basis, Respondent by and through its agent, Fidel Quiroz, discharged and refused to re-hire Rafael Avon, and has failed and refused to reinstate him to his former or substantially equivalent conditions of employment, so to interfere with concerted union activities and intimidate employees.

DISCUSSION:

Mr. Ayon testified that he had refused to be a member of U.F.W. organizing committee and had never acted in behalf of the union, so far as organizing. He did testify that Mr. Quiroz had complained to him about the quality of his (Ayon's) work and that Mr. Quiroz had discharged Mr. Ayon because of his poor work. Mr. Ayon was the only one that was laid-off by Mr. Quiroz, and there was no substantial proof that the layoff was for any other reason than unsatisfactory work.

CONCLUSION:

For the reasons stated above, charge §12 (cc) is hereby dismissed.

CHARGE:

§12(dd) On or about January 15, 1976, Respondent by and through its agent, Eddie. Sanchez, while at the Abatti Farms, Inc.'s premises of the shop near Heber, told employee Raul Jimenez to take off the U.F.W. button he was wearing so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

This charge was dismissed at the hearing. (R.T. 4/26/77, pp. 11-12). The following is an excerpt from the transcript of the hearing officer's comments:

Specifically, the statement itself, Mr. Sanchez did not interfere as such with his earing the button. He was relaying general information about the attitude that he felt the Abattis shared with regard to them wearing a U.F.W. button, but there was no evidence in reading Mr. Jiminez testimony and that intimidated or coerced Jiminez from either discussing the matter with Sanchez, wearing his button, or in any way interfering with hi" activities except in the shop where the bosses, as he called them, were present. (R.T. 4/26/77, p. 12, lines 5-13).

CONCLUSION:

Charge §12(dd) is hereby dismissed for the above reasons.

CHARGE:

§12 (ee) On or about January 20, 1976, and on a continual basis, Respondent by and through its agent, Eddie Sanchez, told employees that the company did not want a union because it would cause problems and would plant alfalfa instead of asparagus if the U.F.W. won the representation election which would result in fewer jobs, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

This is another charge which proffered statements of Respondent are asserted to be a promise, rather than a prediction. The testimony is such that Mr. Sanchez was working statements which were predictions, which is not unlawful. Buddies Supermarkets,

Inc., 192 NLRB 1004 (1971), 78 LRRM 1236; Jefferson Stores, Inc., 201 ALRB 672 (1973), 82 LRRM 1316; D. H. Baldwin Co., 207 NLRB 25 (1973), 84 LRRM 1602; L. Tweel Importing Co., 219 NLRB No. 130 (1975 90 LRRM 10'16 See discussion under charge §12 (aa).

CONCLUSION:

For the above reasons, the charge §12 (ee) is hereby dismissed.

CHARGE:

§12(ff) On or about January 20, 1976, Respondent by and through its agent, Eddie Sanchez, told an employee that Ben Abatti already knew who the U.F.W. supporters were among the irrigators and that Ben had told Charlie Figueroa, the irrigation foreman, to fire the Chavistas so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

The testimony at the hearing which attempted to substantiate this charge was based on hearsay or multiple hearsay and thus can not be given weight as to proof. There was no proof as to the identity of the employee, so this employee would testify as to what he heard.

CONCLUSION:

As the burden of proof was not surmounted by the Charging Party, this charge §12(ff), is hereby dismissed.

CHARGE:

§12(gg) On or about January 21, 1976, and on a continual basis, Respondent by and through its agent, Eddie Sanchez, discharged and refused to re-hire Miguel Lopez Chavez, Hector Faust, and Raul Jiminez, and has failed and refused to reinstate them to their

former or substantially equivalent conditions of employment, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

The charge against Mr. Faust was dismissed at the hearing, because of his failure to appear. (R.T. 4/26/77, p. 8). From the testimony, as to Mr. Jiminez and Mr. Chavez, it appears that Eddie Sanchez had a healthy respect for both Raul Jiminez and Miguel Lopez Chavez. He liked Haul's humor and felt free to discuss things with him. He thought very highly of their work and told them so. He got them a bonus which had never been given to their remporary crew before because of their good work. The charge was not substantiated, as there are indications that they were laid-off as a result of a slack in the work, rather than for their union activity, which was very limited.

CHARGE:

§12(hh) On or about January 14, 1976, Respondent through its agent, Palacio, told lettuce employee Rodolfo Lopez that Ben Abatti had given orders to lay off Chavistas, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

This charge was dismissed at the hearing, (R.T. 4/26/77, ?. 13). The following is an excerpt from the hearing officer's comments.

"In regards to §12(hh), this was Mr. Rodolfo Lopez, as I recall, and in the deposition - and I have to re-read the deposition to refresh my memory - but in that one General Counsel said that this particular individual was put on to testify to the general attitude

of the Abattis, and I don't recall the exact language that's in the deposition, but to show two things: One is how the employees felt and the general attitude of the workers at Abatti. There was quite an extensive discussion with regard to the hearsay, chat the General Counsel repeated the purpose of this person's testimony was not for any specific charge but to go to the overall charge. I asked directly that question, and it was re-affirmed.

That individual's testimony, as I recall, was not all that strong. I don't think it is adverse to the case and, therefore, I will dismiss §12(hh)." R.T. 4/26/77, p. 13, lines 8-23.

CONCLUSION:

For the reasons stated above, charge §12(hh) was dismissed at the hearing.

CHARGE:

§12(ii) On or about January 24, 1976, and on a continual basis, Respondent by and through its agent, Albert Studer, discharged and refused to re-hire Isidora Andrade Prieto, and has failed and refused to reinstate him to his former or substantially equivalent conditions of employment, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

Mr. Prieto, according to the testimony of Mr. Studer, (R.T. Studer 5/19/77), was hired to drive a tractor and do general discing or subsoiling. Mr. Prieto did about one-half of his work at light, which consisted of discing, and other jobs with the tractor. Mr. Prieto, is also partially deaf, and the known by the nickname, "Sordo".[4] Mr. Studer testified on p. 35, that Mr. Prieto had a tendency of falling asleep on the tractor, and that on occasion,

/4 "Sordo" means deaf.

Mr. Studer had actually perceived Mr. Prieto dozing off and asleep. He had also seen Mr. Prieto weaving his tractor through the fields, (p. 35) Mr. Studer had spoken to Mr. Prieto about this on several occasions, and Mr. Prieto said he was sorry but he just dozed off. (p.36). Mr. Studer testified also that falling asleep was dangerous to other workers who might be in the field, (p. 34), and that Mr. Prieto didn't do enough work, (p. 36). Mr. Studer stated - hat while Mr. Prieto would work maybe 7 or 3 hours, he would out down 10 or 11 hours on his time card. Mr. Studer could tell how much work Mr. Prieto had done by asking the daytime drivers, who would know how much was left after Mr. Prieto's night shift, and by the measuring device on a tractor, which would show how much fuel was consumed. All of this was pointed out to Mr. Prieto by Mr. Studer. This testimony was verified by comparison with the testimony of Mr. Jose Garcia, (R.T. Garcia, 5/9/77), a co-employee of Mr. Prieto.

There were valid business reasons for laying off Mr. Prieto as indicated by the testimony, especially, that of Mr. Garcia, the co-worker.

CONCLUSION:

For the reasons stated above, charge §12 (ii) is hereby dismissed.

CHARGE:

§12(jj) On or about January 20, 1976, Respondent by and through its agent, Ramon Gonzalez, threatened employees at various times by saying that if the U.F.W. won the election the company would sell its asparagus and packing shed and plant alfalfa, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

This is another charge involving a threat v. a prediction. The disposition of this charge is directly related to the discussion under charges, §12 (aa), §12 (bb) and §12 (ee), supra.

CONCLUSION:

For the reasons stated above and in the discussion to charges, §12(aa), §12(bb), §12(ee), supra., charge §12(jj) is hereby dismissed.

CHARGE:

§12(kk) On or about January 20, 1976, Respondent by and through its agent Ramond Gonzales, interrogated Reynaldo Berumen and other workers concerning which shoveler maintained the organizing list used by U.F.W. committee members, so as to interfere with concerted union activities and intimidated employees.

DISCUSSION:

There is no such individual as Reynaldo Berumen in this action, so the inference is that it is either Reynaldo Bermea or Ramon Berumen. Regardless of which individual the charge refers to, neither person testified about any interrogatories. One testified that he had the list; the other one testified that he was the one who told Mr. Gonzalez that he had the list. The General Counsel did not clear up this charge in the post-hearing brief, and the charge remains confused. As there was no direct testimony or evidence which would surmount the burden of proof on this charge, it seems that only a list was made known to Mr. Gonzalez, and that at most, Mr. Gonzalez replied, who has the list?, but this is speculation.

. . . .

CONCLUSION:

As a result of the confusion and unsubstantiation of this charge, charge §12(kk) is hereby dismissed.

CHARGE:

§12(11) On or about January 20, 1976, and on a continual basis, Respondent by and through its agent Ramon Gonzalez interrogated Agustine Rodriguez concerning whether he had, in his possession, a U.F.W. buttons, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

The testimony of Mr. Rodriguez, (R.T. Rodriguez, 4/14/77), indicated that Mr. Gonzalez asked him if he had a button. Mr. Rodriguez replied that he said, "yes, I have a button," but also testified that he never wore a U.P.W.. button, but kept it in his pocket, because he had a fear that he would be fired if he wore it. The testimony was never clear as to whether Mr. Rodriguez was afraid to wear his button because of anything Mr. Gonzalez had done or said, or for some other reason. Similarly to other charges of intimidation, the Charging Party never surmounted its burden of proof to show to a reasonable certainty that it was Respondent's actions as alleged in the charge which intimidated Mr. Rodriguez. Even taking the testimony of Mr. Rodriguez as to his state of mind in the position most favorable to the Charging Party, is not enough to surmount the burden of proof.

CONCLUSION:

For the reasons in the above opinion, charge §12(11) is hereby dismissed.

. . . .

CHARGE:

§12(mm) On or about January 20, 1976, and on a continual basis, Respondent by and through its agent, Ramon Gonzalez, told Francisco Ortiz that Ramon Berumen was not authorized to make a list of the employees, and that he could be sued for so doing, so as to interfere with concerted union activities and intimidate employees discussion. The testimony on this charge is confused, but it seems that based upon the testimony and on the charge that Mr. Gonzalez made a statement to Mr. Ortiz that a third party, Mr. Berumen could be sued if he made a list. This is obviously not a direct threat to Mr. Berumen, and there was no testimony that this statement was communicated to Mr. Berumen. Secondarily, even though Mr. Gonzalez is an agent of Respondent, he would have no authority to institute legal action in behalf of Respondent. This statement then is analogous to those charged in §12(aa, §12(bb) and §12 (ee) in that it is more of a prediction than a threat.

CONCLUSION

For the reasons stated above, and in charges §12(aa), §12 (bb), §12 (ee) supra, re: prediction v. threat, charge §12(mm) is hereby dismissed.

CHARGE:

§12(nn) On or about January 20, 1976, Respondent by and through its agent Ramon Gonzalez, threateneed Reynaldo Berumen speaking disparagingly about Cesar Chavez and the U.F.W. and the "benefits" that would be lost if the U.F.W. won the election, so as to interfere with concerted union activities and intimidate employees.

. . . .

DISCUSSION:

It is unclear to whom this charge relates, (see discussion, charge §12(kk) supra.), but there was no testimony regarding any overt threat to either Mr. Berumen or Mr. Bermea. Likewise there was no proof as to the state of mind of Mr. Berumen or Mr. Bermea which could substantiate their perception of a threat. Mr. Berumen testified, (R.T. 4/18/77), that Mr. Gonzalez old him that the U.F.W. wasn't very good and they were better off independent. Also, that Mr. Chavez wasn't very competent, and that the lost benefits would be that the union didn't allow any drinking. Even granting that this might not be the loss of benefit referred to in the charge, there weren't any other benefits from the employer at that time, which could have been lost.

CONCLUSION:

For the reasons stated above, charge §12(nn) is hereby dismissed.

CHARGE:

§12(oo) On or about January 20, 1976, and on a continual basis, Respondent by and through its agent, Ramon Gonzalez, separated Ramon Berumen from the crew to discourage or prevent further concerted activities by said employee, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

It is apparent from the testimony of Mr. Berumen on cross-examination, that Mr. Berumen had worked around Mr. Ben Abatti's house with a fellow employee. Mr. Enrique Hernandez, on four or five occasions in January of 1976. This was no different from the times when Mr. Berumen had gone to Mr. Abatti's house to do work in the

past. There was no proof to indicate that Mr. Berumen was sent over to Mr. Abatti's house unusually. It was past practice to send him to do such work, prior to U.F.W. activities at the Abatti's.

There was also no testimony presented to verify that any employee, including Mr. Berumen was intimidated by his transfer to Mr. Abatti's house for the short period.

CONCLUSION:

For the above reasons, charge §12(oo) is hereby dismissed.

CHARGE:

§12(pp) On or about January 20, 1976, and on a continual basis, Respondent by and through its agent, Manuel Lopez, "El Bobo", told Francisco Ortiz that if the U.F.W. won the election, workers, such as he, who supported Chavez would be laid-off, and that he, Francisco Ortiz, will have a need to kill the pig he was raising at home, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

Mr. Lopez, "El Bobo" is the son-in-law of Mr. Gonzalez, and as such was often seen with Mr. Gonzalez riding in his pick-up. About one year before the incidents alleged as charges, El Bobo, visited Mr. Gonzalez at the hospital on various occasions when Mr. Gonzalez was ill, and El Bobo would carry Mr. Gonzalez instructions out to the fields. Apparently, it seemed that because of this, El Bobo was a sub-foreman for Respondent, when in fact he was not. According to Mr. Berumen in his testimony, (R.T. 4/19/77) in response to direct examination from General Counsel, that El Bobo never complained to him about the quality of his work because he had no right to complain since he was just another worker.

El Bobo's alleged statement would then not be attributable to Respondent, as El Bob held no official capacity with Respondent. This is dispositive of the charge.

CONCLUSION:

For the above reason, charge §12 (pp) is hereby dismissed.

CHARGE:

§12(qq) On or about January 26, 1976, and on a continual basis, Respondent by and through its agent, Manuel Lopez, told Andres Montoya that he would be laid-off if he wore a U.F.W. button, so as to interfere with concerted union activities and intimidate employees.

DISCUSSION:

As Manuel Lopez, "El Bobo", was not acting in an official capacity for Respondent, (see discussion charge §12 (pp) supra.) any remark made by him is not attributable to the Respondent.

CONCLUSION:

For the reasons stated above, and in the discussion to charge §12(pp), charge §12(qq) is hereby dismissed.

CHARGE:

§§12(rr) On or about January 23, 1976, and on a continual basis, Respondent by and through its agent, Ranon Gonzales, discharged and refused to re-hire Ramon Berumen and Lorenzo Martinez Chavarria, and has failed and refused to reinstate them to their former or substantially equivalent conditions or employment, so to interfere with concerted union activities and intimidate employees.

DISCUSSION:

The testimony of both Mr. Berumen (R.T. 4/19/77) and Mr. Chavarria (R.T. 4/13/77) indicated that neither man had been involved in much union activity.

Mr. Berumen testified that Mr. Gonzalez laid him off because there wasn't any more work. When Mr. Berumen asked Mr. Gonzalez about returning the tools in his car after the lay off, Mr. Gonzalez told him not to return the tools because when he came back to work, he could bring them with him. Mr. Beruemn worked one full day, four days after the layoff, but later when he came back for work, there was no work, because of the seasonal nature of the work.

As to Mr. Chavarria, he testified (R.T. 4/13/77), that he had worked very little as a shoveler. He had little connection with the U.F.W., but he never helped to organize workers. Additionally, beside lack of work, Mr. Chavarria testified on cross-examination that he was laid off because he was frequently absent, and got drunk on the job. Also, Mr. Chavarria never asked Respondent's for work after the layoff.

These two individuals were laid-off because of the seasonal nature of the work, because of poor performance in the case of Mr. Chavarria and for lack of proof as to the connection between union activity and job lay off.

CONCLUSION:

For the above reason, charge §12(rr) is hereby dismissed.

CHARGE:

§12 (ss) On or about January 29, 1976, and on a continual basis, Respondent by and through its agent, Ramon Gonzalez, discharged and refused to rehire Reynaldo Berumen, Agustine Rodriguez, Andres Montoya and Francisco Ortiz and has failed and refused to reinstate them to their former or substantially equivalent conditions of employment, so to interfere with concerted union

union activities and intimidate employees.

DISCUSSION:

It appears from the testimony that all of the parties in the charge were discharged or laid-off at the same time as other workers because of the seasonal nature of the work.

Mr. Bermea (si.c. Berumen in the charge), testified (R.T. 4/13/77) that he was laid-off for lack of work. He testified he was out of the area to look for work, and was employed in Coachella in April, May, June and early July of 1976.

Mr. Rodriguez testified, (R.T. 4/14/77), that he was employed by Respondent for only two weeks before he was laid-off, and his only union activity was to sign an authorization card.

Mr. Montoya testified, (R.T. 4/12/77), that he had worked for Respondent, quit work, and then was re-employed. He apparently never had any particular union activity, and was laid-off seasonally on more than this occasion.

Mr. Ortiz testified, (R.T. 4/12/77) that he was laid-off in January, 1976, but was later re-employed by Respondent in May, 1976.

As a result of reviewing the testimony, the defense that the employees were laid-off for seasonal reasons, and not for union activities stands, and the allegations of the charges are not substantiated, and the burden of proof on the General Counsel is not surmounted.

CONCLUSION:

For the reasons above, charge §12(ss) is hereby dismissed.

CONCLUSIONS OF LAW

STATEMENTS IN GENERAL

Serv-U-Stores, Inc., 225 NLRB No. 7 (1976) 93 LRRM 1033.

Speaking in allegory such as the alleged bird in the hand statement from foreman Charlie Figueroa to Abelino Ortega, has been held not to be violative of the Act.

Consolidated Supply Company, 192 NLRB 982 (1971) 78 LRRM 1155. During a sale of stock from a predecessor to a successor corporation a union organizing campaign was being conducted. The predecessor employer, after an employee admitted signing a union authorization card, asked the employee why he "had done this to them." This questioning was not held to be violative of the Act.

J. C. Penney Company, Inc., 204 NLRB No. 20 (1973) 83 LRRM 1635. The employer did not violate the Act when the acting assistant manager said that the employer ought to discharge striking employees since the assistance manager was not a supervisor within the meaning of the Act, it appearing that he was not authorized to make decisions and had not been held out as having authority of any type.

Boston Cab Company, Inc., 212 NLRB No. 92 (1974) 86 LRRM 1644. The employer did not violate the Act when a supervisor told a known union leader that he was the "biggest trouble-maker" among its employees, even though the remark had reference to union activities. The employer also did not violate the Act when one of its officials saw the union leader distributing union leaflets on its premises, and waived a finger at him and said, "You bastards are never going to win."

Montgomery Ward S Company, Inc., 217 NLRB No. 35 (1975) 89 LRRM 1127. The employer did not violate the Act despite an allegation that, after the employee volunteered information that he was campaigning for the union in the forthcoming representation

election, a supervisor replied that the union was not "a thing" for employees "to get involved" and that "there would be hell to pay"; even assuming that the supervisor made the statement, it does not constitute an unlawful threat of reprisal, it appearing that the ' employee must have known and expected that the supervisor, who openly was opposed to the union, would react emotionally.

FREEDOM OF SPEECH

Buddies Dupermarkets, Inc., 192 NLRB 1004 (1971) 78 LRRM 1236. The employer may relate the truthful possible consequences of certain concerted activity without constituting an unfair labor practice. For example, in this case the court held that an employer's pre-election speech stating inter alia, that employees who struck could be "in danger of losing (their) job," did not violate the Act or interfere with the election. See also, D. H. Baldwin Company, 207 NLRB 25 (1973) 84 LRRM 1602.

Mission Tire and Rubber Company, 208 NLRB 84 (1974) 85 LRRM 1550. It was held that the employer did not violate the Act or interfere with the representation election when its plant manager told employees that the employer would neither be competitive nor able to remain in business if a rival to the union, favored by the employer, was successful in organizing the employer's plant and made the same demands on the employer as are contained in its existing collective bargaining contracts with other area employers; the manager's statement is merely an expression of opinion that is reasonably based upon known economic facts, and therefore it is protected under the Act.

L. Tweel Importing Company, 219 NLRB No. 130 (1975) 90 LRRM 1046. An employer's statement is not an unlawful threat of

reprisal, but is a mere opinion, based upon demonstrable facts, as to economic consequences that reasonably might be expected from full implementation of the union's excessive demands.

INTERROGATION REGARDING

UNION ACTIVITIES

Mueller Brass Company, 204 NLRB No. 105 (1973) 83 LRRM 1637. An employer did not violate the Act when the manager questioned an employee concerning his union activity, since the interrogation was provoked by a union button which the employee was wearing and the questioning was not coercive.

Boaz Spinning Company and United Steel Workers of America, 84 LRRM 1339 (1973). It was held that an interrogation of a strong known union sympathizer in the course of interviewing him was not unlawful since the evidence failed to establish that it was coercive.

J. C. Penney Company, Inc., 209 NLRB 313 (1974). The employer acted lawfully when, in the course of the union adherence discussion of the union with two other employees during break time, the employer interrogated employees, where the inquiry was not coercive.

G. R. I. Corporation, 216 NLRB No. 14 (1975) 88 LRRM 1129. The employer's group leader telling employees that she wanted workers to vote against the union in the forthcoming election because she did not feel they needed a union was not considered a violation, despite the claim of interrogation.

General Stencils, Inc., 76 LRRM 2288 (1971. General rule appears to be that mere questioning about union and activities is d. right so long as it is not coercive.

L. B. Hartz Wholesale, Inc., 139 NLRB 564 (1971) 76 LRRM 1337. A supervisor's questioning of employees as to wearing union buttons did not violate the Act in view of the close, casual relationship of the supervisor with the employees.

Statler Hilton Hotel, 193 NLRB 197 (1971) 78 LRRM 1491. The questioning of an employee about his union membership did not violate the LMRA, where he had previously disclosed his membership.

National South Wire Aluminum Company, 197 NLRB 1008 (1972) 80 LRRM 1589. Where the question is innocent, a supervisor may lawfully ask an employee if he had signed a union authorization card.

Unarco Industries, Inc., 197 NLRB 489 (1972) 80 LRRM 1621. The employer lawfully asked for employee's opinion as to how the election would turn out; lawfully requested the employees to vote against the union in a. representation election; and lawfully asked the employee if she had voted in the election.

Sys-Tems Motions, Inc., 198 NLRB No. 119 (1972) 80 LRRM 1799. Conversations with employees in which the union was discussed and wherein officials indicated a knowledge of the identity of union adherence, did not vioalte the LMRA.

Independent Rapid Trucking, 200 NLRB No. 58 (1972) 82 LRRM 1169. The employer acted lawfully when, following the union's recognition demand, the employer asked one employee if it signed a union card.

Farah Manufacturing Company, Inc., 202 NLRB 666 (1973) 32 LRRM 1623. The employer acted lawfully when a supervisor asked an employee wearing a button why the employees were trying to get the union in.

. . . .

Walgreen Company, 225 NLRB No. 132 (1976), 93 LRRM 1279. The employer did not violate the Act when it discharged a pharmacist,) even though another pharmacist with less seniority was not discharged, since the employer had other reasons for discharging this particular pharmacist; the employee's union activity was limited to signing a union authorization card and other employees who signed cards were retained; the employer did not have a policy giving seniority controlling weight.

COMPARATIVE TREATMENT

Kal-Die Casting Corporation, 221 NLRB 172 (1975), 91 LRRM 1059. The employer did not violate the Act when it discharged three union adherents and withheld job training and overtime work from three others. The employer's knowledge of the employees union activities and the timing of certain of these activities create a suspicion of unlawful motivation, but the evidence fails to demonstrate an abiding or "action-producing" hostility toward these employees because of their protected concerted activities.

Trailmobile, Division of Pullman, Inc., 221 NLRB No. 178, 1975), 91 LRRM 1155. Although an employee was an active union adherent and was the only employee within his job classification ever advanced as to why the employer would single him out from the other employees, it was held that the discharge did not violate the Act.

Timing of Dismissal - Extent of Union Activity

Sharky's Tire and Rubber Company, 222 NLRB No. 40 (1976), 91 LRRM 1183. The employer selected six employees for inclusion in a ten employee layoff. The layoffs were prompted by a need to reduce the work force; all but one of the persons laid-off were supporters

of the union; 75% of the 16 employees in the unit attended at least one union meeting and signed an authorization card. There is no direct evidence that the employer knew which of the employees favored the union, and with one possible exception, the employer followed the basic seniority pattern in the layoffs. The layoff occurred approximately one week before the representation election.

International Harvester Company, 222 NLRB No. 61 (1976), 91 1RRM 1231. Here, even though the employer told the discharged clerk before the discharge that an official knew she "probably had signed" a union card, and even though the employee's union activities consisted of signing a union card, attending a union meeting, and asking of the other employees if they planned to sign union cards, the discharge was lawful since the employer had another valid reason for the discharge.

Reinstatement Offered or Refused

United Engines, Inc., 222 NLRB No. 9 (1976), 91 LRRM 1208. The employer did not violate the Act when, after the Union was certified, it laid off six mechanics who were union supporters, since the evidence fails to establish that the layoffs were not Economically motivated. Although the mechanics had not been laid off in prior years during such decline in work, there was a different economic climate now and the employer offered to recall he laid off employees as its business picked up.

Central Engineering and Construction Company, 200 NLRB No. 1 (1972), 82 LRRM 1413. The layoff was lawful, even though workers with less seniority were retained, since the employer did not consider seniority as a controlling factor in the layoff resulting from a lack of work.

Filmmakers Labs, Inc., 211 NLRB No. 93 (1974), 87 LRRM 1091. Inclusion of union adherents in economic layoffs was lawful, although the employer retained workers with less seniority. The snip lover considered ability and readiness to work in making the selection for layoffs.

Discrimination - Failure to Recall

Site-Con Industries, Inc., 200 NLRB No. 9 (1972), 82 LRRM L230. The employer did not violate the Act when it failed to recall two employees from layoff; the fact that the two employees were union members, plus the fact that they were not recalled, does not establish that their union membership was the reason that they were not recalled.

F. W. Woolworth, 204 NLRB No. 55 (1973), 83 LRRM 1621. The employer did not violate the act when it failed to recall a laid off employee, since the evidence does not establish that the reason was for union activity. The union activities of the employee were not exceptional and there was no direct evidence that the employer knew of them. There was no showing that the employer had an opening and hired an employee other than the laid off worker to fill it within a reasonable time following the laid off worker's application.

The evidence does not establish that the employer had a. policy or practice of seeking to re-employ laid off personnel before hiring other employees to fill a position.

Assuming that the employee had been a good worker and that bhe employer knew of his union activity this is insufficient to support a finding of discrimination.

In this case one female employee was laid-off on January 26, 1961. She returned to the store several times during March and April and talked to the Personnel Director about re-employment. However, the employer had no opening at the time. About June 15, the employer advertised in the local newspaper for an opening in the laid off employee's former job. The former employee went to the store on June 16, and couldn't locate the Personnel Director. That day the employer hired another woman to fill that job.

Another employee was laid-off from her job on January 6, 1971. She returned to the store on several occasions thereafter and talked with the Personnel Director about employment. Her last visit to the store occurred shortly before the election.

Both had previously been involved in the union campaign that was going on when they were laid-off. The employer knew of the second employee's union activities and filled her job with another.

Heckerthorn Manufacturing Company, 208 MLRB No. 46 (1974), 85 LRRM 1469. The employer did not violate the Act when it refused to recall known union adherents who had been laid-off for economic reasons, since the employer was not motivated by discriminatory considerations, it appearing that refusal to recall was due to the employee's misconduct against his supervisor on his last working day before his layoff.

Cochemco Co., Inc., 214 NLRB No. 73 (1974), 88 LRRM 1047. The employer did not violate the Act when it failed to rehire a former employee who had been very active as a union member. She was a trustee and a principal one of four union stewards. She processed grievance and served on a union negotiating committee. She worked

openly to defeat a decertification election and she was on the committe that negotiated a new contract with the employer. She was a completent and satisfactory employee.

At the time of her termination due to her union activities, notation was made that she was not to be re-employed and subsequent to her reapplication a management official suggested that due to her union activities, she would not be re-employed. Since there was no showing that the employer knew of her reapplication at the line when a job opening occurred in her classification, there is no violation.

Employer's Responsibility for the Conduct of Others

Abe Munn Picture Frame Manufacturing, Inc., 212 NLRB No.68 (1974), 87 LRRM 1057. The employer did not violate the Act through actions of the son-in-law of its president, to decertify a union, even though he may have made coercive statements, since he was not an agent of the employer. The son-in-law acted on his own initiative and for his own reasons in conducting a decertification campaign. Although other employees may reasonably have felt that he was speaking for the employer, this is not enough to establish the fact of agency and to hold the employer liable for the son-in-law's activities or statements, where the evidence fails to establish that the agency relationship in fact existed.

EMPLOYER DISCRIMINATION-

DISCHARGE AND LAYOFF

Southwest Chevrolet Corporation, 194 NLRB No. 975 (1972) 79 LRRM 1156. The general rule is that the discharge or layoff of an employee absent evidence that it was based on his union activities is lawful.

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Consolidated Services, 223 NLRB No. 126 (1976) 91 LRRM 1559. The employer did not violate the Act when it laid-off seven employees two days after the union filed its representation petition, or when on the day of the representation election that the union won, the employer laid-off several employees. The reason for the layoff was a slackening of work and the employer began recalling workers when work picked up.

G. A. Dress Company, 225 NLRB No. 8 (1976) 93 LRRM 1176. The employer did not violate the Act when it failed to hire two individuals, where evidence failed to establish that the employer acted on the basis of their adherence to the union. Testimony that the employer told individuals that their adherence to the union was the reason for the failure to hire them is not credited.

EMPLOYER DISCRIMINATION

Lawrence Rigging, Inc., 202 NLRB 159 (1973) 82 LRRM 1734. The employer did not violate the Act when it re-assigned an employee to a job involving more menial tasks and thereafter laid him off, where the evidence fails to establish that the employer took its action because of the employees support for a particular union. Although the employee joined the union, he was not particularly active on its behalf and in view of the employer's slack business conditions, which resulted in the layoff of eight employees, it is not unreasonable to infer that the employer attempted to keep the employee gainfully employed by assigning him, on a limited basis, to other tasks involving less arduous duties, at the same rate of pay; and where other workers whose union sentiments were known by the employer to be identical to those of the employee, and they were not subjected to altered working conditions.

SURVEILLANCE

Tarrant Manufacturing Company, 196 NLRB 794 (1972) 80 LRRM 1123. The employer acted lawfully when its vice president seated himself in a company car at the plant parking lot and observe employees distributing handbills to fellow employees leaving the plant.

Peerless of America, Inc., 198 NLRB No. 138 (1972) 31 LRRM 1472. A supervisors conduct in remaining in a shipping area during the employees meetings does not constitute illegal surveillance, the motive being the past problems with pilferage, fire, and employee horseplay in the plant; a meeting was held in the work area that was open and in which shipping supervisors and employees had a right to be.

G. C. Murphy Company, 216 NLRB NO. 113 (1975) 88 LRRM 1619. The assistant store manager stationed himself at the rear exit of the store after closing the store and observed distribution of union handbills. It was held to be no violation since it was not proved that he was there for the purpose of surveilling the activities.

DOMINATION OR ASSISTANCE OF THE UNION

Builders Supply Company of Houston, 168 NLRB No. 29 (1967) 66 LRRM 1319. An Employer may favor one union over another. Here the employer did not violate the Act when he solicited employees to vote and support the encumbent union over the rival union, since conduct by the employer's president lay within the permissible bounds and he did not threaten the employees with discharge if they joined the rival union.

GENERAL CONSIDERATIONS

The findings and conclusions in this case were quite difficult to determine. The hearing was exceedingly lengthy, the witnesses numerous and the testimony complicated. Additionally, when working with new law such as the California Agricultural Labor Relations Act the importance of even the Administrative Law Judge's are important in giving guidelines and interpretation to the Act for future determinations.

If the Act is to be honor 3d and followed by the parties to whom it is applicable the parties have the right to expect the law be fairly impartially followed. Not to do so would clearly be a signal to all that this particular law is to be used not as an aid in resolving labor conflict in the agricultural community of California but as a weapon by one side or other in agricultural labor relations.

The testimony has been reviewed carefully. The demeanor and personal presentations of witnesses were also weighed. Great consideration was given to the fact that the majority of the witnesses neither spoke English nor were familiar with the administrative law procedure. Every witness was given broad latitude in testifying and presenting the facts as they understood them to be. Counsel for Respondent was admonished by this Administrative Law Officer both on and off the record to exercise restraint in cross-examination of particular witnesses. Also extreme liberality was given to the rules of evidence so that all testimony could be included and used to weigh the charges as alleged. A fair hearing was intended and given to both sides.

. . . .

The particular charges in this case presented a unique problem. With the issue of the access violations the factual setting and activities of the people at the shop gave no room for any other determination as has been previously stated. The incidents of access violations charges that occurred in the field, again, are clear and the determination was not exceedingly difficult. The facts and not the proof presented decided those issues.

The questions of interference, intimidation and coercion of employees presented a completely different set of problems.

The making of allegations is not the same as sustaining the] burden of proof. That one statement contains the conclusion as to what caused most of the charges alleged of interference, intimidation and coercion to be dismissed. General Counsel's presentation was effective. The case was very well well prepared and exceedingly well organized by General Counsel. However, the facts presented could not prove the allegations. General Counsel would have presented the facts necessary if such facts had existed.

If the individuals charges contained in the complaint were part of one allegation alleging an unlawful concerted activity engaged in by the employer against the employees then there may have been a possibility of concluding the employer had violated the Act. General Counsel's summary in the Conclusion portion of the Post-Hearing Brief implies that a "pattern" could be viewed even if there was doubt as to the specific charges. Such a charge would have been more successful with the facts given than the specific charges alleged.

The testimony of those who were full time organizers for the United Farm Workers showed a desire to make the Respondent

Employer an example to other growers rather than meet the legal requirements necessary to prove the allegations of the complaint. It may very well be the Respondent Employer did not enjoy a good labor relationship in the past with the United Farm Workers organization but that is not the same as proving the allegations of intimidation, interference or coercion with employers employees.

WHEREFORE, relief is granted as follows:

1. A public apology to the employer's employees during peak season, the manner, method, and substance is attached, and;

2. A public statement to the employer's employees during peak season that employer will not engage in the conduct herein complained of, and;

3. Posting of the terms of the Board's Order in writing or in a conspicuous place on the employer's property, and;

4. The mailing of notice to the last known home address of all peak season employees of the terms of the Board's Order, and;

5. All notices to be in English and Spanish;

6. Periodic reports to the designated agent of the Board, under penalty of perjury, illustrating compliance with the Board's Order.

DATED March 9, 1977

Administrative Law Officer

POSTED BY ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD
An Agency of the State of California

After a trial which all sides had the opportunity to present their evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act, and has ordered us to post this notice and we intend to carry out the order of the Board.

The Act gives all employees these rights:

To engage in self-organization;
To form, join or help unions;
To bargain collectively through a representative of their own choosing;
To act together for collective bargaining or other mutual aid or protection; and
To refrain from any and all these things.

WE WILL NOT "do anything that interferes with these rights. More specifically,

WE WILL NOT prevent Union representatives from coming on our premises, in accordance with the Board's "access rule," for the purpose of organizing the employees.

WE WILL respect your rights to self-organization, to form, join or assist any labor organization, or to bargain collectively in respect to any term or condition of employment through any representative of your choice, or to refrain from such activity, and WE WILL MOT ' interfere with, restrain or coerce our employees in the exercise of these rights.

You, and all our employees are free to become members of any labor organization, or to refrain from doing so.

_____
(Employer)

Dated _____ BY _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 90 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance-with its provisions may be directed to the Board's Office.