Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos.	77-CE-63-D, 77-CE-68-D, 77-CE-92-D, 77-CE-95-D, 77-CE-100-D, 77-CE-130-D, 77-CE-142-D, 77-CE-177-D, 77-CE-183-D, 77-CE-231-D, 78-CE-3-D
	5 ALRB No. 68	

DECISION AND ORDER

On June 1, 1979, Administrative Law Officer (ALO) Gordon Rubin issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party, and the General Counsel each filed exceptions and a supporting brief. Respondent and the General Counsel each filed a reply brief.[1/]

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

[1/]In its brief, Respondent requests that the exceptions of the General Counsel and the Charging Party be disregarded because they were not submitted by registered mail, pursuant to 8 Cal. Admin, Code Section 20480(b). As the exceptions of the General Counsel and the Charging Party were timely submitted and received by the Board, and as Respondent has failed to show that it was prejudiced by the manner of their mailing, we reject Respondent's request. Respondent also requests that the exceptions filed by the Charging Party be disregarded because they contain no citations to the record as required by 8 Cal. Admin. Code Section 20282 (a). Although the Charging Party did not fulfill the requirements of the regulations as to page citations, no prejudice has been shown by Respondent and our conclusions herein would not be affected by the rejection of Charging Party's brief. Accordingly, this request is also rejected.

The Board has considered the record and the attached Decision[2/] in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3/] and conclusions of the ALO as modified herein, and to adopt his recommended order with modifications.

We affirm the ALO's finding that the General Counsel failed to prove by a preponderance of the evidence that the reduction in the working hours of the tractor-driver crew was motivated by anti-union animus. The ALO implicitly credited Respondent's business justification that the reduction in early August resulted from the drought condition and was based on Respondent's decision to avoid lay-offs. In so finding, however, we do not rely on the ALO's broad generalizations regarding the vagaries connected with large farming operations and we reject his assertion that it is "unbelievable" that Respondent would have retailiated against all of the tractor drivers.

[2/]We hereby correct the following inadvertent errors in the ALO decision which in no way affected his decision nor our affirmance thereof: (1) At page 11, line 8 , "General Counsel's Exhibit (GX) 19 "should read" General Counsel's Exhibit (GX) 18"; (2) at page 20, line 24, "Fernando Quintanilla began working for Respondent in March 1970" should read "Fernando Quintanilla began working for Respondent in March 1976."

[3/]The General Counsel has excepted to certain credibility findings made by the ALO. It is the Board's established policy not to overrule an ALO's resolution of credibility based on demeanor unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978). We have carefully examined the record and find no basis for reversing his credibility resolutions.

As to the reduction in hours in July 1977, we find, on the basis of the record, that the General Counsel has not met his burden of showing that the July reduction was discriminatory and in violation of the Act. We note that the record establishes that a similar reduction in the man-hours worked occurred during the same period in 1976.

The ALO concluded that Respondent violated Section 1153(c) and (a) of the Act by its failure to pay employee Francisco Larios his regular wages for time lost from his work during the two-day period he acted as the full-time election observer for the UFW. The record establishes that Respondent paid regular wages to the full-time election observer for the company and to all part-time observers[4/] both for the UFW and for the company. We find merit in Respondent's exceptions to the ALO's conclusion. The Act does not require an employer to compensate an employee for work time spent acting as a union observer during a representation election, even though it compensates its own election observer. Golden Arrow Dairy, 194 NLRB 474, 478, 79 LRRM 1111 (1971).

The ALO concluded that Respondent discriminatorily discharged and refused to rehire Fernando Quintanilla in violation of Section 1153 (c) and (a) of the Act. We do not agree. In our judgment, the General Counsel failed to prove by a preponderance of the evidence that Respondent's discharge of Quintanilla was based on his union membership or activities

---

[4/] The part-time observers were at the election site for brief periods while their respective crews were voting.

rather than his insubordination in refusing to complete an assigned task.

Quintanilla started working for Respondent in March, 1976. At the time of his discharge on September 14, 1977, Quintanilla was working as an irrigator under the supervision of Juan Perez. Quintanilla testified that he openly advocated the UFW at his job site. According to his testimony, Quintanilla wore union buttons almost every day for a period of one month prior to the election. He spoke on a daily basis to fellow workers in support of the UFW, often in the presence of supervisor Perez and assistant foreman Miguel Guerra. Quintanilla also engaged in conversations with Perez and Guerra in which he directly declared his support of the Union. After sustaining a cut in their workday from ten to eight hours in-August 1977, Quintanilla and other irrigators complained several times to Perez and other foremen.

On the day of his discharge, Quintanilla was working in a crew of three. Shortly before the end of the workday, assistant foreman Cornelio Galvan instructed Jose Vasquez, one of the employees in Quintanilla's crew, to move a tractor to another field. Vasquez refused to move the tractor, pointing out that the workday was at an end. Quintanilla voiced his agreement. Galvan drove the three crew-members to where supervisor Perez was working in another part of the field and advised Perez of the problem. Perez directed Quintanilla to move the tractor, and Quintanilla refused. Perez testified that Quintanilla was the crew leader and that it was his

(Perez'} practice to direct orders only to the crew leader in order to avoid confusion. Perez responded that there were still ten minutes left in the work day.[5/] Galvan drove Quintanilla back to the tractor and Quintanilla started driving it in the direction of the second field until he reached the place where Perez was standing. Quintanilla told Perez that he would not take the tractor any further because it was quitting time. Perez ordered Quintanilla to finish his assignment and offered him extra pay for overtime, Quintanilla testified that he again refused and stated that "[Respondent] had already said that eight hours was sufficient." At that point, Perez testified, he decided to discharge Quintanilla for his refusal to obey orders, and shortly thereafter gave him a termination slip which set forth the same reason for the discharge.

We find on the basis of the entire record that Respondent had a legitimate reason for asking Quintanilla to work overtime. Quintanilla's refusal to complete his assignment as requested constituted an attempt to work on terms prescribed solely by .himself. The NLRB and the courts have held that such refusal to work provides an employer with valid grounds for discharge. Successful Creations, Inc., 202 NLRB 242, 82 LRRM 1507 (1973); Emple Knitting Mills, 146 NLRB 106, 55 LRRM 1277 (1964). We find, contrary to the ALO, that Quintanilla was discharged for cause.

[5/]The testimony disclosed that it would take 15 to 30 minutes to drive the tractor to the second field.

The ALO concluded that Respondent did not violate the Act by discharging employee Ramon Lomeli[6/] and supervisor Alfonso Garcia. Although we affirm his conclusion, we reject his finding that the General Counsel established a prima facie case that each of these two discharges was discriminatory. Rather, we find that the General Counsel has failed to establish that Lomeli's discharge was based on his union activity or sympathy, and we find that there is insufficient evidence in the record to show that the discharge of Garcia, a supervisor, would tend to create an impact on employees, the natural consequence of which would be to restrain and coerce them in the exercise of their Section 1152 rights, in violation of Section 1153(a) of the Act. Dave Walsh Company, 4 ALRB No. 84 (1978); Alberici-Fruin-Colnon, 226 NLRB 1315, 94 LRRM 1159 (1976).

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, SAM ANDREWS' SONS, its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

a. Suspending, demoting, refusing to recall, or otherwise discriminating against employees in regard to their hire or tenure of employment, or any other term or condition of employment, because of their union membership,

---

[6/]There is insufficient evidence in the record to establish that Lomeli possessed or exercised any statutory supervisory authority at the time of his discharge.

union activity, or concerted activity for mutual aid or protection.

b. Engaging in surveillance of employees during their contacts with union organizers or other union activities.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to communicate with union representatives and to engage in other union activities or concerted activities for mutual aid or protection.

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

a. Make whole Francisco Larios, Primitive Garcia, Juan Orozco, and Maria Orozco for any loss of pay and other economic losses they have suffered as a result of Respondents' acts of discrimination against them, plus interest thereon at seven per cent per annum.

b. Preserve and upon request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the amount of back pay due 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, produce sufficient copies in each language for the purposes hereinafter set forth.

d. Post copies of the attached Notice in all

appropriate languages for 60 consecutive days in conspicuous places on its property, the period of posting and placement of the Notice 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.

e. Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during July or August of 1977.

f. Arrange for a representative of Respondent, or a Board Agent 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 amount 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.

g. Notify the Regional Director in writing within 30 days after the issuance of this Order of the steps it has taken to comply herewith, and continue to report

//////////////

//////////////

periodically thereafter at the Regional Director's request until full compliance is achieved.

Dated: November 30, 1979

GERALD A. BROWN, Chairman

JOHN P. MCCARTHY, Member

MEMBER RUIZ, Concurring in part:

I concur with the majority's decision to dismiss the allegations in the complaint concerning the discharge of Fernando Quintanilla. However, I am troubled by the possibility that Respondent discharged Quintanilla for engaging in protected activity; such a discharge would be unlawful under Labor Code Section 1153 (a).

In August 1977, Respondent reduced the number of hours in the irrigators' workday. The irrigators, including Quintanilla, repeatedly protested this change in working conditions. On September 14, 1977, Quintanilla refused to work more than eight hours in contravention of instructions from his supervisor; Respondent discharged Quintanilla because of this action.

There is evidence in the record-suggesting that Quintanilla refused to work more than eight hours as part of the general protest over Respondent's decision to reduce the number of hours in the workday. Were we to consider Quintanilla's action to

be such a protest, I would conclude that Respondent discharged him in violation of Section 1153(a).[1/] However, the General Counsel apparently did not litigate the case with that theory in mind and the record does not sufficiently establish that Quintanilla refused to work in protest over the employees' working conditions.

Dated: November 30, 1979

RONALD L. RUIZ, Member

[1/]Such a protest would be both concerted activity (see Self Cycle & Marine Distributor Co., Inc., 237 NLRB No. 9, 98 LRRM 1517 (1978) and Air Surrey Corp., 229 NLRB 1064, 95 LRRM 1212 (1977)) and protected activity(see Gulf-Wandes Corporation, 233 NLRB 772, 97 LRRM 1377 (1977), enf'd in part, 595 F.2d 1074, 101 LRRM 2373 (5th Cir. 1979)).

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have 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 interfere with any union organizers who lawfully visit any of our employees where they live or work.

WE WILL NOT suspend, demote, or refuse to recall any employee because he or she joined or supported the UFW or any other union.

WE WILL pay Francisco Larios, Primitive Garcia, Juan Orozco, and Maria Orozco any wages or other money they lost because of our actions found by the Board to be in violation of the Act, plus interest on such monies at seven per cent per annum.

SAM ANDREWS' SONS

Dated:: _____ 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

Sam Andrews' Sons (UFW)

5 ALRB No. 68
Case Nos. 77-CE-63-D, 77-CE-68-D, 77-CE-95-D, 77-CE-130-D, 77-CE-177-D, 77-CE-231-D, 77-CE-92-D, 77-CE-100-D, 77-CE-142-D, 77-CE-183-D, 78-CE-3-D

ALO DECISION

The ALO concluded that Respondent violated Section 1153(a) through surveillance and interference with UFW organizers as they attempted to meet with Respondent's employees on July 1, 1977 and thereafter.

The ALO concluded that Respondent violated Section 1153(c) and (a) by:

(1) Refusing to pay Francisco Larios for the time spent in acting as a union observer at a representation election held on July 12 and 13, 1977;
(2) Assigning Oscar Alvarez to undesirable duties on July 19, 1977 without the assistance normally provided;
(3) Suspending Francisco Larios for two weeks, in August, 1977;
(4) Demoting Primitive Garcia to caterpillar driver in August, 1977;
(5) Discharging and refusing to recall Fernando Quintanilla on September 14, 1977; and
(6) Refusing to recall Juan Orozco and Maria Orozco in August, 1977.

The ALO recommended dismissal of allegations that Respondent violated:

(1) The Act by discharging Ramon Lomeli and supervisor Alfonso Garcia on January 6, 1978; and
(2) Section 1153(c) and (a) by reducing the hours of the tractor-driver crew in July, 1977; and by discharging Ruben Delgadillo on October 8, 1977.

BOARD DECISION

In its Decision, the Board affirmed the rulings, findings and conclusions of the ALO except as follows: The Board concluded that Respondent did not violate the Act by its failure to pay Francisco Larios for the period he acted as the full-time election observer for the UFW, holding that an employer is not required to compensate an employee for work time spent acting as a union observer during a

representation election, even if it compensates company observers for such services, citing Golden Arrow Dairy, 194 NLRB 474, 79 LRRM 1111 (1971).

As to the allegation regarding Fernando Quintanilla, the Board reversed the ALO, finding that the General Counsel failed to prove by a preponderance of the evidence that the Respondent's discharge of Quintanilla was based on his union activities rather than his insubordination in refusing to complete an assigned task.

Although affirming the ALO's conclusion that Respondent did not violate the Act by discharging employee Ramon Lomeli and supervisor Alfonso Garcia, the Board rejected the ALO's finding that the General Counsel established a prima facie case that each of these two discharges was discriminatory. The Board noted that the General Counsel did not establish that the discharge of-supervisor Garcia would tend to restrain or coerce employees in the excercise of their Section 1152 rights, citing Dave Walsh Co., 4 ALRB No. 84 (1978) and Alberici-Fruin-Colnon, 226 NLRB 1315, 94 LRRM 1159 (1976).

REMEDY

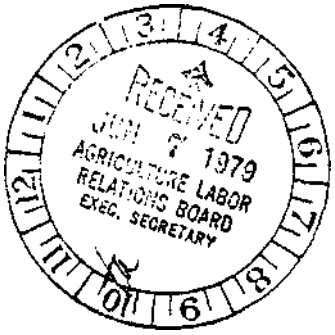
The Board ordered Respondent to cease and desist from its unlawful discrimination, surveillance and interference, to make whole Francisco Larios, Primitive Garcia, Juan Orozco, and Maria Orozco for loss of pay and any other economic losses they suffered, and to post, mail, distribute and read a remedial Notice to Employees.

CONCURRING OPINION

In concurring with the majority's decision to dismiss the allegations in the complaint regarding the discharge of Fernando Quintanilla, Member Ruiz noted that the record evidence suggested that Quintanilla may have refused to work overtime as part of the general protest over Respondent's decision to reduce the number of hours in the workday. With a finding of such a protest, Member Ruiz would conclude that Respondent violated Section 1153(a) by discharging Quintanilla because he engaged in protected concerted activities. In Member Ruiz' view, however, the record does not sufficiently establish that Quintanilla's refusal to finish his assignment was in protest over employees' working conditions.

* * *

* * *



BFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	)	CASE NOS. 77-CE-63-D 77-CE-68-D 77-CE-92-D 77-CE-95-D 77-CE-100-D 77-CE-130-D 77-CE-142-D 77-CE-177-D 77-CE-183-D 77-CE-231-D 78-CE-3-D

DECISION OF THE ADMINISTRATIVE LAW OFFICER

The above-listed charges of unfair labor practices ("ulp's") were consolidated for hearing by Order dated July 31, 1978. A hearing on the charges was held in Bakersfield, California on September 7, 8, 12, 13, 14, 15, 19, 20, 21, 22, 23 and 26, 1978. Pursuant to timely motion by the General Counsel, the original Complaint was amended by a First Amended Complaint and an Answer thereto was duly filed by Respondent.

Upon the entire record, including my observation of the demeanor of the witnesses, review of the transcript consisting of 2025 pages and consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

1. Charges alleging that respondent had committed unfair labor practices were fully filed and served by the United Farm Workers of America, AFL-CIO ("UFW") as set out in this paragraph:

Charge Number	Date Filed	Date Served
77-CE-63-D	July 5, 1977	July 5, 1977
77-CE-68-D	July 11, 1977	July 8, 1977
77-CE-92-D	July 28, 1977	July 27, 1977
77-CE-95-D	July 28, 1977	July 27, 1977
77-CE-100-D	August 2, 1977	August 1, 1977
77-CE-130-D	August 25, 1977	August 24, 1977
77-CE-142-D	September 2, 1977	August 31, 1977
77-CE-177-D	September 13, 1977	September 12, 1977
77-CE-183-D	September 15, 1977	September 15, 1977
77-CE-231-D	October 11, 1977	October 11, 1977
78-CE-3-D	January 11, 1978	January 7, 1978

2. Respondent is a partnership engaged in the growing and harvesting of alfalfa, cotton, melons, cantaloupes, watermelons, and vegetable crops in Kern and Imperial Counties, California. It is now, and has been at all times material herein, an agricultural employer within the meaning of Labor Code Section 1140.4(c).

3. The UFW is now and has been at all times material herein, a labor organization within the meaning of Labor Code Section 1140.4(f).

4. At all times material herein, the following named persons occupied the positions opposite their names and were supervisors within the meaning of Labor Code Section 1140.4{j) and agents of respondent acting on its behalf:

Steven D. Highfill	Personnel Representative
Dolores Alvarez	Farming Operations Superintendent
Albert Poisson	Farming Operations Asst. Superintendent
Jesus Terrazas	Supervisor
Leonel Terrazas	Supervisor
Danny Garcia	Supervisor
Cirilio Alvarado	Supervisor
Frank Castro	Supervisor
John Perez	Supervisor
Raul Mireles	Supervisor
Guadalupe Mireles	Supervisor
Tony Aguilar	Security Guard
Fred Sermino	Security Guard

5. The respondent has a history of anti-union animus directed towards members of the UFW and has been found to have committed numerous ulp's similar to some of those alleged in the First Amended Complaint herein. See, Sam Andrews' Sons, 3 ALRB No. 45 and Sam Andrews' Sons, 75-CE-49-E (R), et al. and Sam Andrews' Sons, 4 ALRB No. 59 (1978). I have taken judicial notice of the Findings in these decisions. Sunnyside Nurseries, Inc., 4 ALRB No. 58 (Footnote 4, page 3).

THE ACCESS VIOLATIONS

(Lakeview Labor Camp)

6. Paragraph 5(a) of the First Amended Complaint alleges :

"On or about July 1, 1977, on respondent's Kern County premises, respondent, through its supervisor Ed Rodriquez, obstructed and otherwise interfered with UFW representatives as they attempted to meet and confer with respondent's employees."

7. On July 1, 1977, UFW organizer David Valles and five other UFW organizers went to the Lakeview Labor Camp, operated and maintained by respondent to talk to workers about the upcoming election. On July 1, they went to the camp around 6:00 or 7:00 in the evening. They were met by armed security guards employed by respondent whose names were Tony Aguilar and Fred (last name not recalled by witness Valles). The organizers identified themselves and were told by the guards to go to the park across the road and not to the barracks. Initially, the organizers went to the park and spoke with the workers who were there. About a half hour later, Valles started to enter the barracks. He was stopped by the security guard named Fred and told he could not enter, that it was prohibited and the company didn't want them there. Valles advised Fred that the law gave the organizers the right to enter the barracks because that was where the workers lived and they had a right to talk to them. Fred said he would check with Tony Aguilar. When Fred left, Valles knocked on the barracks'

door and it was opened by a worker. Valles entered and began speaking to workers who were there. After a short period, Tony Aguilar appeared and told Valles he had to leave, that it was against company rules, Valles asked the workers if they wanted the organizers there and they they did. After 30-45 minutes of discussion with Aguilar, who spoke in a loud and angry voice, in the presence of the workers, a member of the County Sheriff's office arrived. He had been called at the direction of the security guards. He took the names of three of the organizers present there and they went outside. The organizers returned to the Lakeview Labor Camp eight or nine times subsequent to July 1, 1977 and prior to the election in mid-July. On most of these subsequent occasions, security guards would follow the organizers through the barracks while they talked to the workers or the guards would stand nearby while the organizers spoke to the members in the park.

8. The circumstances recounted in paragraph 7 above are essentially similar to the incidents found by the ALO (Findings 44-60 of his Decision) and adopted by the Board in Sam Andrews Sons, 3 ALRB No. 45(1977) at the same Lakeview Labor Camp in 1975. At page 3 of its Decision, the Board stated:

> "The ALO found the respondent effectively denied UFW organizers access to its labor camp. We have already held that Labor Code Section 1152 includes the right of workers to be visited by union organizers at their homes, regardless of where their

homes are located or who their landlords are. Silver Creek Packing Company, 3 ALRB 13 (1977). Accordingly, interference with that right is a violation of Labor Code Section 1153(a)."

9. I find that the conduct of the respondent's security guards, including their interference with the union organizers and their consistent observation of the organizers talking to the workers (constituting prohibited surveillance) to be a violation of the Act.[1/]

[1/] Respondent, in its Brief, page 62, contends that the General Counsel (herein sometimes referred to as "GC") failed to offer proof that Ed Rodriguez engaged in surveillance as alleged in paragraph 5(a) of the First Amended Complaint. In response thereto, I adopt the contention of the GC in footnoot 10, page 24 of its Brief, as follows:

> "The General Counsel's evidence established that unlawful access interference was committed by the respondent through its agents, security guards Tony Aguilar and Fred Sermino, not only on July 1, 1977, but also on subsequent occasions. The NLRB has held that conduct not specifically alleged in a complaint may be found to constitute an unfair labor practice where the violation was fully litigated. Southwestern Bell Telephone Company, 237 NLRB No. 19 (1978). The NLRB found that a violation is fully litigated where the violation relates to the heart of the complaint, the evidence was not objected to by the employer and there was an opportunity to cross-examine the General Counsel's witness. Each of these elements is present in the instant case. See also, Lorenz & Sons, 217 NLRB No. 79 (1975.)."

(Alleged Surveillance By Raul Mireles)

10. Paragraph 5(b) of the First Amended Complaint alleges:

> "On or about July 8, 1977, at respondent's Kern County premises, respondent, through supervisor Raul Mireles, engaged in or created the impression of engaging in the surveillance of employees who were attempting to meet and confer with representatives of the UFW."

11. In July 1977, Raul Mireles, aged 19 or so, worked on one of respondent's cotton thinning crews in which his mother, Guadalupe Mireles, was foreman. In its Brief, pages 54 and 56, respondent, in effect, concedes that Raul was a supervisor by describing him as "an assistant foreman". The evidence presented as to Raul's duties is undisputed and supports the characterization of Raul as a supervisor, and I so find.

12. The General Counsel's witnesses, Balthazar and Elva Saldana, father and daughter, testified that on occasion when the organizers came and the workers were in the field, Raul would leave the areas in which he was working and move closer to where the organizers were speaking to the workers. He would watch the discussions and occasionally interject comments, usually in the-form of a joke or other inconsequential statement. However, during the lunch break, when the organizers were present talking to the workers, Raul would eat in their camper with his mother,

Guadalupe Mireles, the foreman, which was their normal custom. Significantly, no testimony at all was given that Guadalupe ever concerned herself in any way with the organizers. She was clearly in charge when she was present (which was most of the time) and was respected and treated accordingly by the workers, as indicated by the tenor of the testimony when referring to her. The only testimony suggesting that Haul's conduct was surveillance was given by Elva who said that some workers would not talk to the organizers or take buttons when Raul was present. This testimony is not persuasive, however, in view of other testimony indicating that most of the crew were openly supportive of the union and apparently unafraid of any reprisals. Raul testified that he was frequently spoken to by the organizers about supporting the union and was given union buttons on a few occasions. In addition, the testimony of the General Counsel's witnesses was not specific as to date (the charge alleges July 8) and covers a two week period prior to the election. Under all of the circumstances, therefore, as summarized herein, I find that Raul Mireles did not engage in surveillance as alleged.

THE UNFAIR LABOR PRACTICE VIOLATIONS

(The Failure To Pay Francisco Larios For The Two Days He Acted As Onion Observer)

13. Paragraph 5(c) of the First Amended Complaint alleges:[2/]

[2/] Certain subparagraphs in paragraph 5 in the original complaint were deleted in the First Amended Complaint, thus accounting here and later for the gap in the lettering of the subparagraphs.

"On or about July 12, 1977 and July 13, 1977, a confidential employee, Joan Starkey, as an agent of respondent, changed the terras and conditions of Francisco Larios[1] employment by discriminatorily refusing to pay Francisco Larios because of his support for and activities on behalf of the UFW."

14. Stipulation No. 1, entered into by the parties, provides as follows: "Francisco Larios was not paid at all by the respondent for the hours during which he served as an election observer for the UFW on July 12, 1977 and on July 13, 1977."

15. The testimony is not disputed and the parties have agreed in their Briefs that all other union part-time observers were paid and the respondent's part-time and one full-time observer (performing duties identical to Larios) were all paid.

16. Respondent's position is that it is not obligated to pay Larios because, unlike its own full-time observer, he did not work for the respondent during the election. According to respondent's Brief, page 49, "... all the part-time observers were paid because they lost no more time from work than did other members of their crew who voted." It is clear, therefore, that respondent did not use as its criteria for payment or nonpayment the failure to perform work for the company. Workers who voted in the election (and the part-time observers among them) were not docked for the period of time they were away from their jobs. The operations of respondent were simply adjusted to accommodate the need of holding an election. The situation should not be different in regard to

the full-time union observer. The union was entitled to select its own full-time observer to jointly oversee the election and safeguard the ballot box with the respondent's full-time observer and a representative of the Board. The election was held during the normal work day. The union observer, Larios, was an irrigator who worked during the normal work day. There was no evidence presented that Larios was performing a key function for respondent which required his presence alone. Had respondent objected to Larios being away from his job for the period of the election on the basis that he was a key man whose absence would seriously inconvenience respondent, the issue of payment would be presented in a different context. Here, however, the failure to pay Larios for the time spent as a full-time union observer has the effect of burdening the workers in the selection and "... designation of representatives of their own choosing ..." (Section 1140.2 of the Act) Therefore, I find that respondent violated the Act in failing to pay Francisco Larios for the time spent in acting as a full-time union observer at the election held on July 12 and 13, 1977.[3/]

(Reduction Of Tractor Drivers' Hours Following Election)

16. Paragraph 5(g) of the First Amended Complaint alleges :

[3/] Both parties cite Golden Arrow Dairy, 194 NLRB Mo. 81, 79 LRRM 1111 (1971) as the NLRB decision most in point. For the reasons given above, I believe the facts herein are distinguishable from those presented in Golden Arrow Dairy to the extent that the result herein ..... e.g., payment to the union observer ..... should be different as well.

"Beginning on or about July 19, 1977, respondent through supervisors Dolores Alvarez and Jesus Terrazas, changed the terras and conditions of the tractor driver crew's employment by discriminatorily reducing its hours because of its support for and activities on behalf of the UFW."

17. General Counsel's Exhibit (GX) 19 shows that the hours worked by tractor driver crews beginning mid-July, 1977 through the end of August 1977 was substantially below the comparable period in 1976. Respondent agrees that this is true. (See Letter to ALO dated November 7, 1978, attached to Respondent's Brief in the case file.) Additionally, the parties agree that beginning the end of August 1977, the normal nine-ten hour/two shift operation of the tractor driver crews was reduced to an eight hour/two shift operation and one week later, to an eight hour/three shift operation. A few weeks after that, on September 26, 1977, respondent reverted to its usual nine-ten hour/two shift operation.

18. General Counsel presented evidence showing that most of the tractor drivers supported the union and that .they were harmed by the action of respondent in reducing their hours almost immediately after the election. These facts have been considered together with Finding No. 5 herein of respondent's history of anti-union animus towards the DFW. I find, however, that the GC has failed to prove by a preponderance of the evidence that the reduction of the hours of the tractor driver

crews was motivated by anti-union animus. I make this finding for the following reasons:

19. Fred Andrews, one of respondent's owners, testified as to the tremendous uncertainty and risk connected with large scale farming operations such as respondent's and it takes little reflection to agree with him. The vagararies of weather, availability of personnel and, in August 1977, uncertainty about delivery of water for the coming year all contribute to a situation which is extremely difficult to plan, specifically very far in advance. While respondent has been found previously and herein to have committed serious violations of the Act, these violations were in the nature of attempting to prevent union organizers from contacting workers or in retaliating for union activities against individuals or an isolated crew performing non-mechanical field labor. Conversely, the tractor driver crews were highly skilled workers, most of whom were familiar with respondent's ranch and field layout. It is simply not believable that respondent would attempt to retaliate against all of the tractor drivers at the same time by reducing their hours in the midst of preparing for the next season. Respondent's witnesses testified that the decision to reduce hours was based on a desire to avoid having to lay off experienced drivers because of a contemplated reduction in planting activity. This was done in view of the lack of commitment from the water district for water for 1978 because of the two-year drought affecting the region. Although respondent actually hired additional drivers to complete the three eight-hour

shifts, as soon as other drivers began to quit because of the reduction in hours, the usual two shift/nine-ten hour work pattern was resumed. On the basis of the foregoing, therefore, I find that respondent had a legitimate business purpose in reducing the hours of the tractor driver crews for the period in question.

(Assignment of Oscar Alvarez to Field Numbers 521-524)

20. Paragraph 5(h) of the First Amended Complaint alleges:

> "On or about July 19, 1977, respondent through its supervisors, Juan Perez and Dolores Alvarez, changed the terms and conditions of Oscar Alvarez's employment by discriminatorily assigning him to work in field number 521, because of his support for and activities on behalf of the UFW."

21. Oscar Alvarez had been employed by respondent as an irrigator at its Santiaga Ranch since April 1975. He had actively supported the UFW there since 1976. His support for the union was visibly demonstrated by his pro-union activities including talking to various foremen about the benefits of the union, circulating a petition to the Board in May 1977 on respondent's premises, speaking out for the UFW during the July 1977 election campaign and acting as a-UFW observer during the election. I find that respondent had knowledge of his active union involvement and support.

22. On July 24, 1977, Oscar Alvarez was assigned to work at fields 521-524 at the Lakeview Ranch. He was assigned by Frank Castro, an irrigation foreman who did so at the direction of Dolores Alvarez, a fanning operation's supervisor. Oscar Alvarez had previously been working on fields at the Santiaga Ranch[4/], where he lived and where he normally worked. He was changed from those fields because they were to be sprayed with pesticide on July 24, 1977. Fields 521-524 are called the "desert" by many of respondent's workers. This is because it was recently put into cultivation, has soil which is difficult to work in while wet and is irrigated by recycled or "tail" water which contains more debris and plugs up the sprinklers more frequently than water from other sources. While respondent has other fields that are also difficult to work in, only one other set of fields, 552-555, also appears to have been called the "desert." Oscar Alvarez was assigned there most of the time from July 24, 1977 through August 16, 1977. (See Stipulation No. 3.) Most of that time he was assigned to work alone. On a few occasions, assistant irrigation foreman, Alfonso Garcia, would put a worker there to assist Oscar but the worker would be removed as soon as discovered by Frank Castro or Dolores Alvarez. According to Alfonso Garcia and Ramon Loweli, another assistant irrigration foreman, two or three workers normally would be assigned to check sprinklers in fields 521-524. On the other hand, Dolores Alvarez testified that generally only one irrigator

[4/] The respondent's farming operations are conducted at both Lakeview and Santiago Ranches.

was assigned to those fields. Because of the difficulty in working fields 521-524, it was understood by the workers to be a punishment to be assigned to work there alone for a two to three week stretch of time. Francisco Larios, the most active union member among the workers was assigned to work at the "desert" alone at one point prior to the 1977 election. No evidence was presented by respondent of specific workers being assigned to the "desert" to work alone, although respondent keeps time and payroll records that would show such assignments. Respondent suggests in its Brief, page 61, that Oscar Alvarez had committed two incidents of misconduct that would justify his outright discharge. One occurred in 1976, for which Oscar Alvarez was suspended for two weeks after an arbitration hearing, and the other allegedly on July 25, the day after Oscar was assigned to the "desert." Neither of these incidents can be considered to be a valid business justification for Oscar's assignment. I find, therefore, that the assignment of an active union member to an undesirable assignment without assistance normally provided, and in the absence of valid business justification, to be a violation of the Act.

(Suspension of Francisco Larios)

23. Paragraph 5(i) of the First Amended Complaint alleges:

"On or about August 29, 1977, respondent through its supervisor Frank Castro, changed

the terms and conditions of Francisco Larios' employment by discriminatorily suspending him for two weeks because of his support for and activities on behalf of the UFW."

24. Francisco Larios was probably the most well known union member among respondent's workers. He made a tape urging the selection of the UFW that was played hourly for 24 hours prior to the election and was a full-time observer for the union during the election. His foreman, Frank Castro, .. knew of his union support dating back at least to 1976 just prior to the Proposition 14 statewide election on the farm labor initiative. Prior to the UFW Constitutional Convention in Fresno, beginning August 26, 1977, Larios was elected a delegate by his fellow workers. The union confirmed this by letter dated August 17, 1977 (GCX-7). On August 25, he asked Frank Castro for time off to attend the convention. He gave Castro the letter which Castro read and then refused Larios permission to attend.— Castro testified that Larios did not show him the letter and did not tell him he wanted time off to attend the convention. After the encounter with Larios on the 25th, Castro went to the office, had a call put in to Peter Jacobs, the respondent's local attorney, and then respondent sent Larios a telegram specifically denying him permission to

---

5/ Larios testified that he was selected as a delegate on the 24th or 25th of August. However, I believe he was mistaken about the date and was, in fact, selected prior to August 17, 1977.

take time off. This was the only time the procedure of sending a telegram denying time off after orally denying it was used. Although the testimony about the specific nature of Larios' duties at that time are disputed, I find that his absence did not seriously inconvenience the company. When he returned to work on the 30th, Prank Castro told him to go to the office where they met Dolores Alvarez, the farming supervisor and after a meeting between Castro and Alvarez, Larios was suspended for two weeks. As shown by GCX-19, the two week suspension was" widely disproportionate to the punishment normally given when a worker misses work without permission. The two-week suspension also indicates that Larios[1] duties were not essential to the respondent's operations. On the basis of the foregoing, I find that the two-week suspension of the most active union member following attendance at a union convention, for which permission to attend was requested, to be a violation of the Act.

(Demotion of Primativo Garcia)

25. Paragraph 5(j) of the First Amended Complaint alleges:

> "On or about August 29, 1977, respondent through its supervisors, Jesus Terrazas and Leonel Terrazas, changed the terms and conditions of Primativo Garcia's employment by demoting him to caterpillar driver, because of his support for and activities on behalf of the UFW."

26. Primitive Garcia was an experienced tractor driver who began working for respondent in March 1976. Shortly thereafter, he was promoted from Tractor Driver II to the higher paying Tractor Driver I, at the direction of Dolores Alvarez, faming supervisor. Thereafter, Garcia worked almost exclusively performing the functions of planting and cultivating vegetables which paid a premium vegetable rate of twenty-two cents per hour more than other tractor work. Just prior to the union convention beginning August 26, 1977, Garcia asked his foreman, Jesus (Jessie) Terrazas for three days off beginning on the 26th. Terrazas agreed. Garcia did not tell Terrazas why he wanted the time off." On August 30, when he returned to work, Garcia testified that he was assigned to caterpillar work instead of his usual assignment. When he asked why Terrazas was changing his work, the foreman replied that Dolores Alvarez, the farming supervisor, was angry that Garcia had attended the union convention. Terrazas, in his extensive testimony, did not deny this statement attributed to him. Thereafter, until February or March 1978, Garcia worked a substantial amount of time performing work on the caterpillar and tractor other than that which paid the premium vegetable rate, although premium work was usually being done by others. Garcia also missed work completely "for a number of days because of a back injury suffered at work in early October. After being released to return to work after his injury, Garcia was assigned for a time to work on a tractor cutting cotton

stalks, which did not pay the premium. Respondent advances several justifications to explain the deviation in work assignments given to Garcia after the convention as compared to prior to it. These include: 1) the need to train other tractor drivers to do planting and cultivating; 2) Garcia's inability to perform certain tractor functions paying the premium vegetable rate; 3) his absences from work due to his accident and otherwise; 4) his need for light duty after returning after his accident; 5) less planting being done because of the drought and less equipment on hand; and 6) reduced cost by having less expensive Class II tractor drivers perform functions at the' premium vegetable rate. Respondent further notes that after the convention, much of the available cultivating work was done by Francisco Morales, who also was designated as a delegate to the union convention (GCX-20), thereby negating the inference of anti-union animus arising from the change in Garcia's assignments on his return from the convention. However, RX-21, the tractor driver chart, shows that Morales worked on August 26-29 and did not attend the convention. Garcia confirmed this in his testimony indicating that only he and Francisco Larios, among respondent's workers, attended the convention. In addition, Garcia also testified that after returning to work following his accident, it would have been easier for him to plant than to operate the cotton stalk cutter. It also would have been cheaper for respondent because, unlike some of those doing the planting after the convention, he did not need

another man to ride the tractor as a guide because he was skilled enough to plant by himself.

27. The foregoing summary, as well as the evidence presented at the hearing, gives rise to a variety of inferences to explain the changes in Primativo Garcia's assignments (and reduction in wages) following his return from the union convention. The record herein and previous proceedings before the Board involving this respondent, establishes that it has retaliated against its employees who show active support for the UFW-It did so against Francisco Larios, the other delegate attending the UFW Convention with Garcia, and I find, therefore, by a preponderance of the evidence that respondent violated the Act by changing Primativo Garcia's assignments as set forth herein.

(Discharge of Fernando Quintanilla)

28. Paragraph 5(k) of the First Amended Complaint alleges :

> "On or about September 14, 1977, respondent through its supervisor, John Perez, discharged and at all times pertinent hereto, continues to refuse to rehire Fernando Quintanilla because of his support for and activities on behalf of the UFW."

30. Fernando Quintanilla began working for respondent in March 1970. About four months thereafter he was assigned as an irrigator. He often worked in a three-man crew and was generally designated by the foremen to be the lead man for the crew. This indicates that his work was generally held in high

regard by the foremen and that he could competently direct the three-man crew. About four or five months before the July 1977 election, Quintanilla began expressing his support for the UFW by talking about the benefits with other workers and with his irrigation foreman John Perez and assistant irrigation foreman Miguel Guerra. He also wore a UFW button to work. Prior to September 14, 1977, Quintanilla had only been given one written warning about his work. This was on August 29 and involved failure to completely move sprinkler pipes within a field. Respondent offered testimony concerning other incidents prior to August 29, but these were not documented by warning slips and appear rather minor. Following the July election, in August 1977, the hours of the irrigators were cut from 10 to 8. When Quintanilla, along with other workers complained of the reduction in hours, John Perez told them there was a decrease in work and they were just going to get eight hours, that eight hours was sufficient. Quintanilla and the other workers complained almost daily about the reduction in hours. (This reduction in hours is in accord with respondent's testimony about the reduction in planting activity because of the drought presented in connection with the reduction in tractor driver crews' hours above.) On September 14, 1977, Quintanilla was fired by John Perez, after he consulted with Dolores Alvarez, farming supervisor, because Quintanilla refused to move a tractor from one field to another after 4:00 p.m., the end of the (shortened) working day. Quintanilla was one of a crew of three workers. He drove the tractor from the field in which

it was located to where Perez was but refused to take it further because the work day had ended. Perez said he would pay Quintanilla for the extra time, but Quintanilla testified he told Perez that they (respondent) had said eight hours was sufficient, so he would not work beyond that period. The initial order to move the tractor was communicated by another worker to the three-man crew and they all refused to move the tractor. However, Perez did not ask either of the other workers to move the tractor and he only discharged Quintanilla. Since-each of the three workers had refused to move the tractor initially, the discharge of Quintanilla alone was clearly discriminatory, especially so since neither of the other two was reprimanded at all. Quintanilla was singled out by Perez because he was outspoken about respondent's reduction in hours, a form of protected activity, and was seen as a spokesman among his fellow irrigators. If Perez did not make an example of him, it would be more difficult to control the others. He was known to Perez to be a strong union supporter as well. For these reasons, I find that the discharge and refusal to rehire Fernando Quintanilla was a violation of the Act.

(Discharge of Ruben Delgadillo)

30. Paragraph 5(1) of the First Amended Complaint alleges:

> "On or about October 8, 1977, respondent through its supervisor, Alfredo Ganderilla, discharged and at all times pertinent hereto,

continues to refuse to rehire Ruben Delgadillo because of his support for and activities on behalf of the UFW."

31. Ruben Delgadillo was hired by respondent in December 1976 to work in garage washing and greasing company vehicles, as directed by his foreman, Alfredo Ganderilla. Since Delgadillo's duties were performed exclusively in connection with and in support of respondent's farming operations, I find that he is an agricultural worker entitled -to the protection of the Act.

32. Prior to the July 1977 election, Delgadillo[1]s UFW support was apparently limited to wearing a union button to work. On the day the ballots were counted at Lakeview Ranch, Delgadillo was part of a group of workers cheering every time a UFW ballot was counted. He was standing across from a group of foremen, including farming supervisor Dolores Alvarez. Dolores also was consulted by foreman Ganderilla concerning the incident leading to Delgadillo's discharge on October 8, 1977. Only because of the history of anti-union animus by respondent, and the involvement of Dolores Alvarez in this incident do I find that General Counsel has made a prima facie case of discriminatory discharge of Delgadillo herein. Against this, the respondent has offered testimony that indicates that the reason for the discharge was Delgadillo's refusal to wash the car of a foreman, Frank Castro, after being ordered to do so by his foreman Ganderilla. Delgadillo testified that he had been

previously directed by Ganderilla not to wash any cars for other foremen. In this instance, Ganderilla directed that Delgadillo wash Frank Castro's car because Dolores Alvarez had said to do it. Delgadillo flatly refused. After discussing the refusal by radio with Alvarez, Gandarilla again asked Delgadillo to wash Castro's car. Delgadillo again refused. Gandarilla tried to convince him to do so but when it appeared he wouldn't change his mind, Gandarilla initiated Delgadillo's discharge. It is clear that Delgadillo would not have been discharged if he had agreed to wash Castro's car. It was during the normal work day • and the request, while changing a prior rule, was not unreasonable. Delgadillo's refusal had nothing to do with a protest involving wages, hours or working conditions, or other protected activities. His reason for not washing the car was not even because it was a foreman's car. It was because it was Frank Castro's car and he and others had gotten into a fight with Castro the night before at the Blue Note Bar in Lament. General Counsel argues that it is the severity of the action taken ..... discharge ..... that is the issue, not Delgadillo's reason for his actions. However, the discharge was not summary. An effort was made to convince Delgadillo to overcome his personal animosity to Castro and perform a task which he was employed to do. No evidence was presented that Delgadillo was involved in union activities in the three months since the ballots were counted. Under these circumstances, therefore, I find that the discharge of Ruben Delgadillo did not violate the Act.

(Terminations of Alfonso Garcia and Ramon Lomeli)

33. Paragraph 5(m) of the First Amended Complaint alleges:

> "On or about January 6, 1978, respondent through its supervisor, Steven D. Highfill, interfered with, restrained and coerced its employees by discriminatorily terminating supervisors Alfonso Garcia and Ramon Lomeli."

34. Alfonso Garcia was employed by respondent as an irrigation foreman for nearly four years prior to his discharge. For most of that period he performed his duties without criticism from his superiors. About mid-1977, he received some complaints from his immediate supervisor, Frank Castro, apparently based on problems observed by Fred Andrews, one of respondent's owners and overall head of the farming operations. However, none of this criticism was sufficient to cause Garcia to be discharged at that time or even to be given written warnings. In late August 1977, Garcia was designated as a union delegate to the convention in Fresno and the respondent received written notice of this (GCX-20). Garcia also frequently assisted active union members who were having difficulty with respondent by assigning workers to help them (Larios and Oscar Alvarez) when they were assigned to work the "desert" alone. When this was discovered, the extra workers were removed by Garcia's supervisors. Garcia also assisted Larios in trying to obtain payment for the two days he spent as a union observer by going with him to the office to inquire. Also,

Garcia was the son-in-law of Primativo Garcia, one of the workers who actually attended the convention. On the basis of the foregoing, I find that the General Counsel has made a prima facie case that Garcia's discharge in January 1978 was in violation of the Act.

35. Ramon Lomeli had worked for respondent for many years, off and on, in various capacities. He was recruited to work a few times by Dolores Alvarez, who he was personally friendly with. At the beginning of 1977, while working as an " irrigation foreman under John Perez, he was selected to read water meters so the respondent could have an accurate record of its water use. He continued to do this until late 1977 when this duty was concluded. Lomeli had spoken in favor of the union to Dolores Alvarez on occasion and other foremen also and respondent knew he was in support of the UFW. He was criticized on occasion for failure to push his workers as hard as some of the other foremen. On this basis, his discharge in January 1978 raises a prima facie inference that it was in violation of the Act.

36. In response to the General Counsel's contentions, the respondent offered evidence to show that because of the uncertainty concerning water deliveries for 1978, irrigation and planting activity beginning August 1977 began to decrease, resulting in a shortening of hours for irrigators and tractor driver crews. Early in 1978, Fred Andrews decided to reduce the work force and asked his main irrigation foremen, Frank

Castro and John Perez for their input as to who should be discharged. After two long meetings, Castro and Perez could make no recommendations, although Castro indicated that Garcia was weaker than the other assistant foremen. Andrews then decided to discharge Garcia, because he was the weakest, and Lomeli because his function of reading the water meters had been concluded. Steven D. Highfill, personnel representative, so advised them on January 6, 1978, giving as the reason the reduction in force because of the uncertainty about water. At this time, the total number of irrigators was also reduced substantially by 19 layoffs for lack of work (RX-17). In addition, the dis-. charges of Garcia and Lomeli were not in conjunction with any union activity in which they were then involved or supporting and more than six months had - passed since the election and more than four months had passed since Garcia was designated to attend the union convention. For these reasons, therefore, I find that respondent has presented a valid business purpose justification for the discharges of Alfonso Garcia and Ramon Lomeli and did not thereby violate the Act.[6/]

(Failure.to Call Juan and Maria Orozco)

37. Paragraph 5{n) of the First Amended Complaint alleges:

[6/] General Counsel argues that Lomeli at the time of the discharge was not a supervisor under the Act. If this was true, respondent was obligated to comply with the terms of the collective bargaining agreement which allowed layoffs only in order of inverse seniority (GCX-8, page 7) However, no evidence was presented by General counsel to show how this would have affected Lomeli and, accordingly, no decision can be made.

"During the period from August 15, 1977 through and until August 30, 1977, the respondent through Dolores Alvarez and other agents, discriminated against employees Juan Orozco and Maria Orozco by refusing to recall them to work available during the period because of their union support for and activities on behalf of the UFW."

38. Maria and Juan Orozco were members of the labor crew of Cirilo Alvarado with seniority dating from early 1976. The crew finished working at the end of July 1977. About the middle of August 1977, Dolores Alvarez, the farming superintendent, called Margarita Ibarra, one of the crew members and indicated that she should get about five workers from the crew to come back to work to do some cotton weeding. He called Ibarra because the crew leader, Alvarado, was on vacation and she had called people to come back to work in the past. The testimony is in conflict as to whether Ibarra called Maria Orozco to ask if she and Juan would return to work. Ibarra said she did, although the Orozcos were not among the names she was given by Dolores Alvarez to call. Maria denies being called by Ibarra and having declined to return to work. Maria testified that she called Ibarra to find out about work and was told only a few were recalled. Ibarra"s testimony is highly suspect because she failed to tell a Board investigator, Janis Johns, on October 11, 1977 that she had initiated the call to Maria although she did say that Maria had called her. Even more strangely, Ibarra did not recall even talking to Johns

about the incident. Therefore, I credit Maria Orozco's testimony over Ibarra's and find that the Orozcos did not refuse to return to work because they were not asked to do so during the period here in question. When Dolores first spoke to Ibarra, he gave her five names to call. They did not include the Orozcos even though their seniority was sufficient to make them among the first to be recalled. Respondent candidly admits in its Brief, page 32, that the Orozcos should have been recalled based on seniority, but claims it was merely an error" and not because of anti-union animus. The Orozcos were DFW supporters and openly wore union buttons and participated in the election campaign. Juan was an election observer even though his name was not on the list of official union observers (RX-3). Most other members of the crew were not identified as union supporters. I find that respondent had knowledge of the Orozcos' union activity. General Counsel contends that once discrimination between union and nonunion workers is shown, and absent an adequate business purpose to justify the discrimination, anti-union animus need not be shown. I agree. Here/ the initial act of Dolores Alvarez in specifying the recall of certain workers without regard to seniority was a violation of the collective bargaining agreement then in force. Failure to include active union members with seniority in the recall was clearly discriminatory. Accordingly, I find that respondent's actions as described herein to be a violation of the Act.

FINDINGS RE DEFENSES ASSERTED

(The Deferral Doctrine)

39. Respondent contends that pursuant to Collyer Insulated Wire, 77 LRRM 1931, these proceedings should be deferred pending action under the grievance-arbitration procedure of the collective bargaining agreement between respondent and the Teamsters, which was effective until July 15, 1978 (GCX-8). I disagree. As pointed out by the General Counsel's Brief, pages 43-44, the NLRB has rejected deferral in General American Transportation Corp., 228 NLRB 102, 94 LRRM 1483 (1977) and reaffirmed that rejection in several 1978 cases.

(Admissibility of GCX-26, Water District Report)

40. General Counsel offered the Biannual Report, 1976-1977 of the Wheeler Ridge-Maricopa Water Storage District as rebuttal evidence. Respondent objected to its admission as a business record under Evidence Code 452(c) and (d). Decision on admissibility was postponed until the parties filed their Briefs. Only respondent addressed the issue. I have determined not to receive GCX-26 because I am unclear as to the purpose for which it is offered and the General Counsel has not addressed this issue in its Brief. Therefore, I have not read GCX-26 and it remains sealed as when delivered.

CONCLUSIONS OF LAW

1. By the acts described in paragraphs 5(a), 5(e), 5(h), 5(i), 5(j), 5(k) and 5(n) of the First Amended Complaint, respondent interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Labor Code

Section 1152, and thereby engaged in unfair labor practices within the meaning of Labor Code Section 1153(a).

2. By the acts described in paragraphs 5(e), 5(h), 5(i), 5{j), 5(k) and 5(n) of the First Amended Complaint, the respondent has discriminated against employees in regard to tenure or conditions of employment, to discourage membership in a labor organization, the UFW, and has thereby engaged in unfair labor practices within the meaning of Labor Code Section 1153(c).

3. The acts described in paragraphs 5(b), 5{g), 5(1) and 5(m) having not been proved by a preponderance of the evidence, are hereby dismissed.

REMEDY

Having found that respondent engaged in certain unfair labor practices in violation of Sections 1153(a) and (c) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative steps to effectuate the policies of the Act.

I shall also recommend that a notice, in the form attached hereto, be posted and read to employees in the presence of a Board agent with said Board agent afforded the opportunity" to answer questions the employees may have and that a copy of the notice be mailed to those employees employed by the Company at any time between March 1, 1979 and the date of posting of said notice who are not employed during the time the notice is required to be posted.

Accordingly, upon the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160,3 of the Act I hereby issue the following recommended:

ORDER

Respondent, SAM ANDREWS' SONS, its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

a. Discriminating in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization; and

b. Interfering with, restraining and coercing employees in the exercise of their right to engage in concerted activities for the purpose of mutual aid or protection; and

c. In any other manner interfering with, restraining or coerving employees in the exercise of their right to self organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153 of the Act.

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

a. Offer to Fernando Quintanilla full reinstatement to his former or substantially equivalent position without prejudice to his seniority and/or to any other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of respondent's illegal termination of him, in accordance with the Board's formula.

b. Pay to Francisco Larios, Primativo Garcia, and Juan and Maria Orozco an amount sufficient to make them whole for any loss of pay they may have suffered by reason of respondent's illegal failure to pay, suspension, demotion or failure to recall them, as applicable, in accordance with the Board's formula.

c. Preserve and make available to the Board or to its agents, upon request, for examination and copying,

all payroll records, time cards, social security payment records, personnel records and reports, and other records necessary to determine the amounts required to make the above-mentioned employees whole for the loss of pay they may have suffered as a result of respondent's illegal actions in regard to said employees;

d. Respondent shall post the attached notice in English and Spanish in conspicuous places, including all places where notices to employees are customarily posted, for a period of ninety consecutive days in 1979, which period shall include the Company's peak employment period. Respondent shall promptly replace any notices which are altered, defaced or removed and shall take whatever steps are necessary to insure that said notices are not altered, defaced or removed.

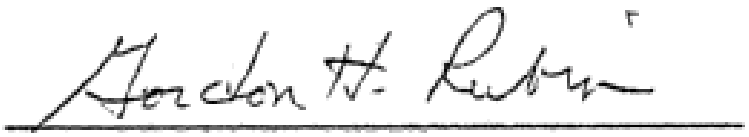
e. Have the attached notice read in English and Spanish to all employees by a Company representative or by a Board agent and give the Board agent an opportunity to answer questions which employees may have regarding the notice and their rights under Section 1152 of the Act. The notice shall be read on Company time to each crew of respondent's employees employed during the 1979-1980 peak period of employment. Mail a copy of the attached notice to all workers employed by the respondent during the period from March 1, 1979 to date who are not employed by the Company during the ninety days during which the attached notice is posted at the Company.

f. Notify the Regional Director of the Board, in writing, within thirty days of the receipt of this Order and

inform him of the steps respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

IT IS FURTHER ORDERED that allegations contained in the Complaint not specifically found to be violations of the Act be, and hereby are, dismissed.

DATED: June 1, 1979.



GORDON H. RUBIN
Administrative Law Officer

APPENDIX

This is an official notice of the Agriculture Labor Relations Board, an agency of the State of California. Do not remove or mutilate.

NOTICE TO WORKERS

After a trial in which each side had a chance to present evidence, the Agriculture Labor Relations Board found that we discriminated against a worker by discharging him, by failing to pay a union observer at the 1977 election, and by suspending him, and by demoting and failing to recall by seniority other workers who engaged in protected concerted activities, The Board has told us to post this notice and to mail it to those workers who have worked with the Company since March 1, 1979, but who will not be employed during the three months that we have to post this notice.

We will do what the Board has ordered, and also tell you that the Agriculture Labor Relations Act is a law which gives all farm workers these rights:

1. To form, join or help unions;

2. To bargain as a group and to choose whom they want to speak for them;

3. To act together with other workers to try to get a contract or to help or to protect one another; and

4. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

1. We will not do anything in the future that forces you to do, or stops you from doing any of the things listed above.

2. We will not fire you or lay you off because you exercise any of your rights.

3. We will offer Fernando Quintanilla his old job back if he wants it and we will pay him any money he lost because we discharged and refused to rehire him. We also will pay to Francisco Larios, Primativo Garcia and Juan and Maria Orozco any wages they lost because of our actions found by the Board to be in violation of the Act.

DATED:

SAM ANDREWS' SONS

By:_____
(Title)

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
OCEANVIEW FARMS, INC.,	
Respondent,	Case No. 78-CE-39-X
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party	

Warren L. Bachtel, Esq.
of San Diego, California for the
General Counsel

Gray, Gary, Ames & Frye, by
James K. Smith, Esq. of
San Diego, California for the
Respondent

DECISION

STATEMENT OF THE CASE

MICHAEL K. SCHMIER, Administrative Law Officer: This case was heard before me on November 27, 28, 29, December 7 and 8, 1978[2/] and on January 29 and 30, 1979 in San Diego, California; all parties were represented by counsel. The charge was filed by the United Farm Workers of America, AFL-CIO herein called "UFW"!/, on July 13, 1978. The complaint issued on November 3, 1978, and alleges violations fay Oceanview Farms, Inc., (herein called "Respondent") of Section 1153 (a) and (c) of the Agricultural Labor Relations Act (herein called the "Act"), Copies of the charges and complaint were duly served oh Respondent. The parties were given the opportunity at the trial to introduce relevant witnesses and argue orally, briefs in support of their respective positions were filed after the hearing by all parties.

1/ Herein called the Board

2/ Unless otherwise indicated, all dates herein refer to calendar year 1978.

3/ As a matter of clarification, although the unfair labor practice charges giving rise to the complaint herein were filed by the UFW, another labor organisation was involved in the instant matter, to wit: Fresh Fruit and Vegetable Workers Union, Local 78-B AFL-CIO (herein called "Local 78-B"), which labor organization filed a

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent is engaged in agriculture in San Luis Rey, San Diego County, California, as so admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

Further, it was stipulated by the parties that the UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices

The complaint alleges, inter-alia, that Respondent, through its agents, interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 1152 of the Act by:

1. On or about July 3, interrogating an employee concerning his union activities [4/];

2. On or about July 5, increasing the piece rate for packing tomatoes from seven -and one half (7 1/2) cents per layer to eight and one half (8 1/2) per layer for the purpose of discouraging union support among employees;

3. On or about July 7, threatening to fire employees Jerome Cabanilla, Nemesia Cortez and Mamerto Cadiz, threatening Jerome Cabanilla by brandishing a knife sheaf and by physically assaulting and battering Nemesia Cortez;

4. On or about July 9, surveilling employee Mamerto Cadiz and others engaged in union organizing activities;

5. On or about July 21, discriminatorily changing the conditions of employment of employees who engaged in organizing activities, to-wit: a) by moving Jerome Cabanilla to another section of the tomato belt, b) by transferring a faster picker next to Nemisia Cortez, both acts done for the purpose of retaliating against the employees by attempting to reduce and by reducing their compensation. Additionally, the alleged acts referred to in parenthesis five (5) supra, are alleged as violations of Section Il53 (a) and (c) of the Act.

[3/](con't)petition for certification of a unit consisting of Respondent's packing shed employees on July 7, 1978. On July 12, 1978, the Board's Regional Office dismissed the petition as it deemed Respondent's packing shed employees did not constitute an appropriate bargaining unit within the meaning of Section 1156.2 of the Act. There was no. subsequent official involvement by Local 78-B on this record.

[4/] The term "union" in lower case is not intended herein to refer

Respondent denies that it engaged in any unlawful activities.

III. The Facts: Summary, Analysis and Conclusions

Respondent is engaged on a full-year basis in the agricultural business of cultivating, packing and marketing tomatoes, strawberries and califlower in San Luis Rey located in the Northern part of San Diego County. From early June through late December Respondent's major crop is tomatoes. After harvesting, these tomatoes are packed into crates in Respondent's packing shed for shipment to market. In late June and early July, union organizational activity among Respondent's packing shed employees began.

All of the employees specifically mentioned in the complaint were packing shed employees at the time of the alleged unfair labor practices. The employer has other employees that work the fields and other places who are not involved in the instant matter. Ray Perkins is a supervisor for Respondent within the meaning of the Act.

As each charge in the complaint, when taken alone, arises out of a separate and distinct factual circumstance, each will be summarized, discussed and resolved separately in chronological, order.

During the last weeks of June and July, there were rumors circulating among employees of several growers in this farming community about an impending increase in the piece rate for packing tomatoes. Indeed, the growers were discussing this and, in fact, implemented it. Respondent's employees wanted .to secure an. increase in their piece-work rates. To this end, Respondent's employee, Mamerto Cadiz, acted as spokesman for Respondent's employees.

1. The July 3 Interrogation of Cadiz by Perkins

On July 3, 1978 at the Oceanview Packing shed Memerto Cadiz talked with Ray Perkins, a supervisor of Respondent. The General Counsel contends that during this conversation Perkins unlawfully interrogated Cadiz about his organizing activities and ordered him to stop such activities.

Cadiz testified that during the last week of June and the first week of July, he helped to organize Respondent's packing shed employees. At about 9:00 o'clock a.m. on July 3, Perkins spoke with Cadiz in front of the packing shed. Perkins asked Cadiz who was. organizing and what the employees wanted. Perkins told Cadiz to stop organizaing the old men because they were getting aroused and that there was a labor contractor coming from Mexico who could supply packers in the case of a strike.

4/ (con't) to any specific labor organization and the term "union activities" in lower case is herein intended as a term of art synonomous with "protected, concerted activities," whether or not involving a labor organization.

Near the end of this conversation, Cadiz became nervous when he saw a friend ("Louie" or Louis Rimos, not an employee of Respondent) who had been helping to organize the workers at a neighboring farm. Cadiz did not want Perkins to see Louie for fear of having the scope of the organizational attempt discovered.

Perkins recalled that at this time, Louie was with Cadiz on the premises. Perkins testified that one of the packers had told him that Cadiz was going to have Louie talk to the employees about union activities. Perkins admitted that he told Cadiz that Perkins wished Cadiz "would stop whatever he [Cadiz] was up to." Perkins recalled that afterwards Cadiz called out to "Louie" and told Louie to "Knock it off. They already know what's going on." Louie said alright and left. Perkins denied talking to Cadiz about the organizing efforts of the packers and the labor contractor from Mexico.

Based upon the other corroborating circumstances of the testimony of both men, as well as my general impression of the credibility of the witnesses, Perkins'denial is not credited. Cadiz' version of the incident is credited and the disposition of the matter, as a matter of law, flows from this. Whether done with or without knowledge of the illegality of interrogation of employees, Respondent is liable for its supervisor's unlawful interrogation of the employee as well as for the supervisor's improper direction to the employee" to stop his organizing activity. Such amounts to clear interference with rights guaranteed by Section 1152 of the Act and is, therefore, a violation of Section 1153(a) of the Act, cf. Whitney Farms, 3 ALRB No. 68 (1977); the Garin Co., 5 ALRB No. 4 (1979)[5/]

2. The Increase In Piece Rates

On July 6, Perkins announced to Cadiz that a one cent per layer increase in pay effective July 5, the day before, was in effect, that other growers in this area were also giving this raise, and that two days before, on July 4, Perkins had talked to owner Allan Yasukochi about working conditions and a pay raise.

Yasukochi testified that there was a piece rate pay increase from seven and a half (7 1/2) cents to eight and a half (8 1/2) cents in July. The background and history of the pay raise is important. During the third or fourth week in June Yasukochi testified that he spoke with two other neighboring growers, Harry Nagata and Hiroshi Ukegawa. Sometime between the latter part of June and July 4 Yasukochi testified that he spoke with two other neighboring growers, Harry Nagata and Hiroshi Ukegawa. Sometime between the latter part of June and July 4, Yasukochi discussed better working conditions and a pay raise with employee Cadiz. This conversation occurred a day or so before Yasukochi's first telephone conversation with any other grower regarding any other pay increase. Yasukochi was informed about the pay increase offered by the other growers

---

5/ Respondent's "contention that Perkins was merely expressing a legitamate concern that Cadiz and an outsider were going to engage in organizational activities during working hours is a red herring. Cadiz' credited testimony was that he was not with any non emplcvee although a non-employee was nearby. Moreover, Perkins did not refer to the non-employee, but specifically to Cadiz. Were Perkins to be truly concerned with the presence of the outsider, his comments would have been directed to that outsider not to Cadiz. Seen in this posture, the interrogation of Cadiz is

between June 25 and June 27. When Yasukochi first talked with. Cadiz about this matter, he was unaware of the pay increase granted by the other growers but soon learned of them, at least by June 27. Yasukochi testified that the July increases were intended to keep Respondent at the same piece rate level as the other North County growers, as had been his practice. If the other North County growers were to raise their piece rates for the packers, he would do likewise. After further discussion in early July with Harry Nagata, a neighboring grower, Yasukochi testified that he decided to raise Respondent's piece rate at the end of that weekly pay period. The North County growers commonly communicate about pay raises but often learn of competitor's impending raises from their employees, as the employees of all of the area growers communicate freely.

Cadiz testified that he spoke with Yasukochi on July 4, 1978 concerning the employees' demands for bottled water, cleaner rest-rooms, and higher wages. Yasukochi's reply, and here there is substantial agreement among the two witnesses, was that Yasukochi would not be the first to raise his rates but that Respondent would not pay less than any of the other growers. Jerome Cabanilla testified that Perkins ' telephoned him at home on July 3 and told Cabanilla that Yasukochi would not' in increase the paid piece rate until the other growers increased their piece rates. Yasukochi testified that within a day or two after the conversation with Cadiz, he talked to neighboring grower Ukegawa and was informed that Ukegawa would be raising his piece rate as of the next payroll period. At that point, Yasukochi testified that he determined to raise Respondent's piece rate. Accordingly, on July 6, Perkins announced the one penny increase in the packers' piece rate to be effective the day before, July 5. Perkins testified that on the day he announced the piece rate increase he told Cadiz that the reason was because the other local packing sheds had gone up similarly.

Although Yasukochi discussed an increase with other growers in late June and was informed of the likelihood of an increase, Respondent's increase was not instituted and announced until July 6, after the other growers had announced their increases.

The General Counsel contends that this increase had the effect of interfering with the organizational rights of employees and cites International Shoe Co. 43 LRRM 1520 (1959). The General Counsel cites the classic "fist inside the velvet glove" words of the U.S. Supreme Court found in NLRB v. Exchange Parts Co. 375 U.S. 405, 55 LLRM 2098 (1964). General Counsel argues that an increase in wages or benefits made during an organizational campaign is presumed to have been done with the intent of interference with the employees right of free choice.

However, increases may be explained by employers. In

5/ clearly in violation of Section 1153 (a) of the Act. Likewise, Respondent's contention that this conversation may be immunized as an isolated conversation must be rejected as it is at odds with the totality of the occurences regarding the supervisor, Perkins.

Hansen Farms , 2 ALRB No. 61 (1976) the Board adopted the "economic realities analysis found in NLRB precedent in establishing two issues:

1. Was the increase an unfair use of the employer's economic position?;

2. If so, did it interfere with protected employee rights?

General Counsel contends that the timing and other circumstantial evidence can be used to prove that Respondent had the intent of frustrating the union organizational effort. General Counsel further contends that the raises were given with the intent to frustrate the union effort: if it was decided in June to give an increase at the next pay period, (a)why would Yasukochi have waited until July 6 instead of instituting the increase with the pay period beginning July 4 or earlier?; (b) why would Yasukochi have told Cadiz on July 4 that he did not know what the other growers would do about the pay and that he would not be the first to give an increase?

The answers are not as obvious as the General Counsel would find. Although it is true that in the instant matter there was an annoucement of a wage increase made and implemented shortly after the Respondent became aware of an organizing campaign, it is critical to note that the wage increase was made,in part, in response to a specific express demand for that very wage increase made by Memerto Cadiz, two days earlier, on behalf of Respondent's employees. Cadiz wanted Respondent to grant a wage increase immediately. To argue that acceding to. employee-demand for a wage increase violates the Act by interfering with their union activity by allowing Respondent to demonstrate the lack of need for a union, is to put the Respondent in an impossible position. Respondent contends that its intent was to match the piece rates paid by it's competitors as was demanded. The record is devoid of any evidence that Respondent's intent was to chill the union effort by raising the piece rates. Moreover, the record did not demonstrate, let alone prove, that the piece rate increase had an effect, or a likely effect, on employee organizational activity, which ceased for other reasons. A petition for certification signed by Local 78-B was not filed with the Board's Regional Office until the day after the increase and there is little support for charging Respondent with knowledge that the petition was in the offing. Whether or not the employer suspected a petition, this is basically a matter of an employee spokesman, Cadiz, demanding a .pay increase for the employees and the employer, within two days, responding to the demand by granting it. The likely explanation for this occurrance is that there was talk in this agricultural community among the workers of several different growers that a piece rate increase was in the works. Cadiz, as representative of Respondent's employees, contacted Respondent to push this demand for Respondent's employees. The talk in the community was correct— the other growers were moving in this direction. After confirming this, Respondent made the decision decision to follow the lead of the other growers and to grant the requested increase. I am unable to impute to Respondent on the record hers, an intent of frustrating protected rights under the Act. Accordingly, this allegation is properly dismissed.

3. Threats made by Ray Perkins at the beach party on July 7, 1978.

At about 6:30 p.m. on July 7, Cadiz served an election petition by Local 73-B filed with the Regional Office of the Board on the Respondent by delivering a copy to Perkins. Later that evening, Respondent's packing shed employees held a "grunion party" at Carlsbad beach in North County San Diego. A. sign noticing the party had been posted in Respondent's packing shed for three or four days. The beach party was attended,inter-alia, by employees from Respondent's shed as well as employees from the Ukegawa and Kawano packing sheds. The party was a barbeque at which many persons were drinking some alcoholic beverages.

Perkins showed up at the beach party at approximately 10:00 o'clock. He had been drinking some beer and was showing the effects. He told the assembled employees that the "grunion hunt" was actually a union meeting and that Jerome Cabanilla, Nemesia Cortez and Memerto Cadiz would be fired for these activities. Perkins grabbed Nemesia Cortez' hand and pulled her down to the sand and pinched her leg. Perkins told all present that he knew who was trying to organize Respondent's employees and that those persons would regret it. He told Nemesia Cortez and Jerome Cabanilla again that they and Memerto Cadiz would be the first to go.

Perkins denied that he pulled Nemesia Cortez down on the sand and testified that he did not recall touching her at all. Perkins' explanation was that he told Jerome Cabanilla and -Nemesia Cortez that he would fire them because he was angry because they upset his girlfriend, Charmaine, concerning a personal feud about Perkins' divorced former wife. Perkins attempted to justify his admitted statements that he would fire the three of them "when this is all over." Perkins testified that "when this is all over" meant the union organizing.

Perkins testified that he had been very close with Jerome Cabanilla and in fact had lived with Cabanilla for about two weeks in the home of Nemesia Cortez. He testified that Cabanilla and Cortez were aware of his marital problems. Perkins explained that during the day of the beach party, Cabanilla had made certain comments to Charmaine, Perkins[1] girlfriend, that upset her. Perkins testified that he telephoned Cabanilla to determine what was bothering his girlfriend. Perkins further testified that he was "kind of drunk—feeling good" at the party.

Cadiz testified as to two conversations at the beach party. First, in response to Perkins[1] inquiry about the union, Cadiz testified that he replied the union matter was now with the ALRB, (the Board). An hour later the two again talked. Perkins asked Cadiz why he was trying to bring a union in to the packing shed during Perkins' first year as a supervisor. Perkins asked

Cadiz if he wanted to make a bet: if the union got in Parkins would quit; if not, Cadis would quit.

Perkins approached Jerome Cabanilla at the party stating "I know why you guys are here. This is a union meeting, and I know you are a leader." During the course of this conversation, Perkins unsnapped and snapped his buck knife holder. Perkins again asked why everyone was organizing during his first year as a supervisor and stated "before this thing is over, I promise you guys [Cortez, Cadiz and Cabanilla] are going to get fired."

Perkins' explanation of his activities at the beach party "is unsatisfactory. Whether or not Perkins was aware of the requirements of the Act, his denial of having told Cabanilla that he knew the packers were at the beach for a union meeting is at odds with the testimony of several witnesses and is rejected. The story Perkins advanced about being upset over his girlfriend smacks of a concoction likely fabricated long after the occurrence at the time Perkins first learned that his actions were to be the subject of Board scrutiny. The explanation is implausible.

The testimony regarding the occurrence at the beach party profferred by the General Counsel is overwhelming and is credited. The threat of discharge, especially when made in the presence of other employees, whether or not implemented, tends to restrain and interfere with employees in the exercise of the rights guaranteed under section 1152 of the Act and is, therefore, a violation of 1153(a) of the Act.,c.f. Anderson Farms Co. 3 ALRB No. 67 (1977). This is a classic violative threat. The act of a supervisor may be imputed to an employer even if this act was not authorized or ratified. Frank Lucich Co., Inc.., 4 ALRB No. 89 (1978). The employer may be liable for violations even if they occur outside the work place, Frank Lucich Co., Inc., supra, Butte View Farms, 3 ALRB No. 50 (1977).

In conclusion, I find that during the beach party on July 7, Perkins, as Respondent's agent, threatened the employees in violation of Section 1153 (a) of the Act.

4. Alleged Surveillance on or about July 9

Jerome Cabanilla testified that he saw Memerto Cadiz talking to a packing box nailer, named Pedro, in the packing shed on July 9. Shortly thereafter he saw Allan Yasukochi and Ray Perkins talk to Pedro. This was confirmed by Nemesia Cortez although there was some problem in ascertaining the precise date. General Counsel argues that although he was unable to produce evidence concerning the gist of the conversation between Yasukochi and Perkins with the box nailer named Pedro, that it is not necessary for the General Counsel to prove actual surveillance because merely creating the impression of surveillance is violative of Section 1153 (a) of the Act. General Counsel cites McAnally Enterprises, Inc. 3 ALRB No. 82 (1977).

Although it is true that creating the impression of

surveillar.ee is alone sufficient to violate Section 1153 (a) of the Act, the allegation must be proven. The burden of proof is on the General Counsel. Tomooka Brothers, 2 ALRB No. 52; Kanda Brothers 2 ALRB No. 34 (1976).

Respondent asserts that its supervisors presence in the vicinity of the packing shed was ordinary, predictable and expected by the employees. Perkins was normally present to supervise the work in the packing shed. Yasukochi was present every day in the course of ordinary business operations. Furthermore, this is an isolated coincidental instance. Cadiz admitted that he never saw any supervisor talking to an employee with whom he had just discussed the union. Moreover, there was no other evidence that any other supervisor engaged in any other activity along this line or that anyone of these supervisors did it at any other time.

Clearly, it is permissable for an employer to engage in conversations with its employees. The Board has made clear that it will not assume that the employer was present for the prohibited purpose of surveillance. Tomooka Brothers, supra. Although the incident with the box nailer, Pedro, is suspicious, and although the employees that testified may think that they "know" what was going on, the evidence presented on the record, at best, appears inconclusive. In this posture, General Counsel has failed to meet his burden of proving surveillance.

Although creating the impression of surveillance poses a tougher question because two witnesses testified that this incident caused them to form the personal impression that Respondent was surveilling their union activity, the scant evidence still does not;support a finding of creating an impression of surveillance. I do not determine whether the suspicion of surveillance or creating the impression thereof, was true or whether on the other hand, those engaged in union activity, as they are commonly wont to be, were overly sensitive conducing to the creation of this impression in their own minds unfairly. As the General Counsel has the burden of establishing that the employer engaged in unfair labor practices as alleged by a "preponderance of the testimonv taken" Whitney Farms, 3 ALRB No. 68 at 11 (1977) Joe Maggio, Inc. 4 ALRB No. 37 at 2 (1978), I find that he has not met this burden and therefore this allegation is properly dismissed.

5. Change in working conditions of Jerome Cabanilla & Namesia Cortez

General Counsel alleged and proffered testimony that on July 21, Jerome Cabanilla was moved to a different place on the packing line to work between two people different from those between whom he worked before and a different packer was put in the line immediately behind Nemesia Cortez. At the end of August, a different packer was put in the line immediately ahead of Nemesia Cortez. General Counsel alleges that these actions were motivated by anti-union animus. General Counsel argues that a packer's ability to pack, and therefore the amount of tomatoes which that packer will pack, is largely dependent upon speed and attitude of packers on each side of him. The number of tomatoes which can be packed also depends on the time of the season and the size and quality of the tomatoes being packed at that particular period. General Counsel asserts that

Jerome Cabanilla was not able to pack as many tomatoes after July 21 as before that date because of Respondent's change of Cabanilla's position on the line. Likewise, General Counsel asserts that Nemesia Cortez was not able to pack as many tomatoes after the packers next to her were changed as she had been able to pack before this change. General Counsel asserts that Cabanilla and Cortez each lost money because of said changes and that each had complained to their supervisors about these changes but obtained no relief. General Counsel asserts in his brief that although an employer has the right to assign duties in accordance with its best judgment and that such decisions will not be disturbed by the Board without proof that the employer intended to inhibit the exercise of Section 1152 rights or that the adverse effect of the change on employee rights outweighed the employer's business justification,, the Board has also held that where the employer presents no substantial business justification for the changes, knows of the employees pro-union feelings and where threats of reprisal therefore have been made, violation of Sections 1153(a) and (c) can be found citing Arnaudo Bros., Inc. 3 ALRB No. 78 (1977).

General Counsel asserts that the pro-union sympathies of Cabanilla and Cortez were well known and refers to the threats Perkins made against each of them at the Carlsbad Beach on July 7.

In summary, the essence of this allegation is that by moving Cabanilla and Cortez, those two persons were able to pack fewer tomatoes and suffered monetary loss. The loss, General Counsel contends, was intended by Perkins to punish these two persons for their protected activities.

Respondent's defense is essentially twofold. First, Respondent contends that there were business justifications for Perkins making this move, viz: to promote the efficiency and harmony on the packing line. Second, Respondent contends that, in fact, Cortez and Cabanilla each earned more money than they would have earned had they remained in their old positions ratlaer than less.

Perkins, as management's representative, is responsible for making assignments on the tomato packing line. His job performance depends upon keeping production high. His decision, whether correct or incorrect, would appear to fall within traditional management prerogative, absent provable discriminatory intent. Perkins testified that he made the changes in the line, as he did from time to time, in order to try to get people to better get along together and to keep emotions and tempers cool. Perkins testified that where he could, he would try to get the line straightened out so everybody could get along. For example, with respect to Nemesia Cortez, Perkins testified that Benny Bucnap asked to be moved away from her because she was packing his tomatoes. Therefore, in August, Perkins removed Benny Bucnap replacing him with his son Michael Bucnap. Perkins testified that problems remained because Cortsz found that she could not come into Michael Bucnap's packing table because he did not want her to help him. General

Counsel contends that the actions of Ray Perkins, which Perkins claims were to alleviate problems, did not make sense because they are illogical and erratic. Therefore, General Counsel asserts that it is more likely that Perkins took actions for reasons other than those claimed. General Counsel further asserts that even if Nemesia Cortez and Jerome Cabanilla earned more money in the new line positions, that does not negate the violation if discriminatory intent motivated the change. The test, General Counsel asserts, is whether the conduct may reasonably tend to interfere with the free exercise of employee rights, citing Cooper Thermometer Company, 154 NLRB No. 37, 59 LRRM 1767, among other cases. General Counsel concedes that anti-union animus is a key element in establishing this violation.

Respondent, in addition to presenting Perkins' testimony as to the business justifications for the move, i.e., the attempt by Perkins to make the line run more smoothly and efficiently, called its office manager, Gerald Wolfe, who is in charge of the preparation of financial statements and records. Wolfe offered substantial testimony as to Respondent's payroll system for its., packing shed employees and presented detailed exhibits comparing the amounts of money that Cabanilla and Cortez earned before and subsequent to the move.

Wolfe explained that each employee was paid at one piece rate for each lug and another piece rate for each flat box packed. The employee placed a card with that employee's number into the box to enable the accounting. Respondent introduced a copy of the weekly packers recap or reconciliation for the period beginning -on June 19 through the week ending November 19. The exhibit represents the number of boxes packed by each packer on a given day and/or week. The charts reflect the number of two layer flats and three layer lugs that the individual packers packed during the week that the recap represents. By multiplying the piece rate of 8 1/2 cents per layer times the gross number of layers packed, the total gross compensation of a particular person for a particular week is determined. By dividing the average number of packers during this week period by the total number of layers packed for a given period, Wolfe determined what percent of the total the average packer would have packed during a given time period. Wolfe went into a lengthy dissertation of the mathematical computations involved. Another exhibit Wolfe submitted was to compare the actual production of Cortez, Cabanilla and Cadiz during the time period of July 1 through July 20, with the period from July 21 to the hearing date. Wolfe acknowledged that the charts were calculated strictly on a weekly payroll basis and did not account for any differences in tomato crops available for packing in a given period. Respondent's other exhibits contained figures comparing the percentage amount packed by Cortez and Cabanella after their alleged discriminatory changes in packing line positions with their percentages of the total amounts packed prior to the changes. In this manner, Respondent contends that one can determine whether the changes adversely affect the alleged discriminatee's ability to pack as many tomatoes as before the change. Wolfe testified that the results were

that Cortaz, Cabanilla and Cadiz's percentile shares of the total production for the period July 21 through July 31 were higher than the earlier period, July 1 through July 20. Percantila shares is a figure which neutralizes the impact of the differences in the' size of the tomato crop, which, in fact, increased at that time period.

Nemesia Cortez for the period July 1 through July 20 packed 2.886% of the total output. For the period July 21 through July 31, Cortez[1] percentile increased to 2.987%. The same categories for Jerome Cabanilla indicate that his production increased from 2.422% to 2.640%. Likewise, Cadiz' percentage increased. Each of their actual earnings increased. A "projected earnings" figure was used to attempt to include the amount the alleged discriminatees would have earned if packing at their pre-July 21 pace, plus their pro-rata percentage of the additional tomatoes available for production in the latter period. Both Cadiz and Cabanilla show bottom line gains.

General Counsel was not able to dispute these figures with any effectiveness. General Counsel's only attack on the figures was that the total number of days that the packers worked during each period was the determining factor. General Counsel disputes use of this criterion arguing that none of the exhibits contain any adjustment for any differences in the length of time worked by any of the packers on any particular day. In other words, a packer who worked four hours a day is weighted the same in the average as one who worked ten hours a day. General Counsel, however, failed to present any evidence that the workday differed for any of the persons involved. General Counsel, nevertheless, argues that because of the lack of calculations concerning the hours per day, the figures and calculations at best are inconclusive.

General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the changes. Edwin Frazey, Inc. 3 ALRB No. 94, Lu-Ette Farms, Inc. 3 ALRB No. 38. Given Perkins ' former contact with these employees his action in making the transfer is suspicious. But, the transfer of Cabanilla and Cortez on the packing line was not proven to be "inherently destructive" of important protected rights. Perkins' business justifications are also suspicious. However, Perkins had responsibility to adjust the placement of workers on the line to promote efficiency which, from time to time, he did. The changes did not alter the employees responsibility or duties. Both Cortez and Cabanilla continued to work for Respondent as packing shed-employees through the 1978 season. Respondent's exhibits reveal that the changes in packing line position of alleged discriminatees resulted in an increase in earnings, rather than a loss. Clearly, no monetary detriment was suffered by either Cortez or Cabanilla, a factor weakening General Counsel's ability to carry his burden of proof. The suspicious.circumstances of Perkins[1] actions and the failure of Perkins to later remedy complaints by the affected two employees frame a close decision. The suspicion is high, but the closeness of the decision persuades me that the General Counsel has not sustained his burden of proving by a preponderance of 'the evidence that the transfers on the packing line were done in

retaliation for union activities. Without further evidence of this motivation, the inferential gap is too great. Moreover, although I am mindful of,and suspicious of, the potential for psychological tyranny which some supervisors are capable of inflicting on employees by dint of their position of power over employees, this is not adequately established on this record. The fact that no economic harm was done, indeed, each of these employees was able to better his or her position monetarily in the subsequent period is important. I find that the preponderance of evidence test has not been met and that General Counsel has not sustained his burden of proof. Accordingly, this allegation is properly dismissed.

CONCLUSIONS OF LAW

1. Respondent, Oceanview Farms Inc. is an agricultural employer within the meaning of Section 1104.4 of the Act.

2. United Farm Workers of America, AFL-CIO ("UFW") is a labor organization within the meaning of Section 1140.4(b) of the Act.

3. By Perkins' July 3 interrogation of Memerto Cadiz and his July 7 threats to terminate Jerome Cabanilla, Memerto Cadiz and Nemesia Cortez in front of several employees of Respondent and his interrogations of said employees for the purpose of discouraging employees from joining, assisting, supporting, and voting for a labor organization, Respondent engaged in unfair labor practices within the meaning of Section 1153 (a) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153(a) of the Act, I shall recommend that it cease and desist from infringing in any manner upon the rights guaranteed in Section 1153 of the Act and take certain affirmative action designed to effectuate the policies of the Act.

In addition to the standard remedies, the General Counsel, in his complaint and in his brief urges much more extensive relief. The General Counsel urges that Respondent be ordered to:

Make a public statement to its employees that it will not engage in the unlawful conduct in which it is found to have engaged to be made verbally or in writing at a time and place to be determined by the Regional Director;

Post the terms of the Board's order written in English and in Spanish, in such places and at such time or times as the Regional Director shall determine for a period of at least 120 days;

Arrange a public apology, by Ray Perkins, if he is employed by Respondent during the next packing season, to Jerome Cabanilla, Nemesia Cortez and Memerto Cadiz for his treatment of them and threats made to them as found;

Hold an employees meeting in the presence of Board agents leaving time for questions and answers for the employees with Board agents out of the presence of Respondent and others not pertinent.

At the outset, it is noted that fashioning these remedies involves a delicate balance. The desired end is to eradicate the effects of the unfair labor practices while respecting Respondent's rights. This entails assessing the magnitude and pervasiveness of the unfair labor practices as well as the individual character of Respondent's operation and its employee work force. Although agricultural employment is generally seasonal and employees do not always return from year to year, Respondent's tomato production operation appears to afford more regular and steady employment than many operations. It is also noted that although the testimony in this matter was taken in English, some employees may have little or no facility with this language and others may be illiterate in both English and Spanish. Thus, posting typical notices in the English language could well be meaningless. Therefore, it is my view that special steps have to be taken to ensure that employees are apprised of their rights. Accordingly, I recommend that the attached notice be translated into both English and Spanish, with the approval of an authorized representative of the Board, and, as printed in both English and Spanish, that copies be handed by Respondent, to each employee during the period beginning with the height of the next tomato season. This is in addition to the usual posting of this notice. I shall recommend that Respondent mail said notice to all former employees who worked during the aforementioned period, to their last known mailing addresses.

The standard NLRB type remedies are herein recommended. The question then becomes" whether the violations found herein are so extraordinary as to require extraordinary relief. As stated above, this involves delicately assessing the degree of the seriousness, intensity and effect of the violations.

Upon the basis of the entire record, the findings of fact and conclusions of law and pursuant to Section 1160.3 of the Act, I hereby -issue the following recommended;

ORDER

Respondent, its partners, its officers, its agents and representatives shall:

1. Cease and desist from discouraging membership of any of its employees in any labor organization, by unlawful interrogations, concerning their collective or union activities and by any threats of termination in retaliation for said activities.

(a) In any other manner interfering with, restraining and coercing employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their

own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153 (c) of the Act.

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

a) Hand to each employee employed anytime during the period beginning July 1, 1978 and ending on the date of the implementation of this ordered distribution and mail to each former employee employed who worked during this period at the last known mailing address copies of the notice attached hereto and marked "Appendix". Copies of this notice, including an appropriate Spanish translation, shall be furnished to Respondent for distribution by the Regional Director for the San Diego Regional office. The copies are to be signed by an authorized representative of Respondent.

b) Post in its place of business in San Luis Rey, California, copies of the attached notice marked "Appendix" including the appropriate Spanish translation as referred to in paragraph (a) above, the copies to be signed by an authorized representative of Respondent. Said notices shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 120 consecutive days thereafter, in conspicuous places including all the places where notices to employees customarily are posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

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

It is further recommended that the allegations of the complaint alleging violations of Section 1153 (a) and Sections 1153 (c) and (a) of the Act: by engaging in surveillance of Memerto Cadiz and/or acts creating the impression of surveillance; by increasing the piece rate of packing employees on July 6 with the intention of interfering with the rights protected by Section 1152 of the Act; and by changing the conditions of employment, to-wit; the positions and placement on the packing line of Jerome Cabanilla and Nemesia Cortez, be dismssed.

IT IS FURTHER ORDERED, that the complaint be dismissed in so far as it alleges unfair labor practices other than those found herein.

Michael K. Schmier
Admistrative Law Officer

APPENDIX

NOTICE TO WORKERS

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by interfering with the right of our workers to decide freely if they want a union or if they want to join together to bargain with us about wages and working conditions. The Board has ordered us to hand out or send out and post this Notice and to take certain other actions.

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 any union;

3) To bargain as a group and to choose anyone they want to speak for them;

4) To act together with other workers to try to get a contract or to help or protect each other; 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 to interfere with protected rights ESPECIALLY

WE WILL NOT interrogate employees concerning their union activities or joining-together to bargain with us;

WE WILL NOT ask you whether or not you belong to any union or do anything for any union or how you feel about any union

WE WILL NOT threaten employees with termination or discharge because of their union activities or joining together to bargain with us

Oceanview Farms, Inc.
by:

_____
Authorized Representative (title)