San Luis Rey, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

OCEANVIEW FARMS , INC. , Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 73-CE-39-X	5 ALRB No. 71

DECISION AND ORDER

On March 30, 1979, Administrative Law Officer (ALO) Michael K. Schmier issued the attached Decision in this case. Thereafter, Respondent and General Counsel each timely filed exceptions and a supporting brief.

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.

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

Respondent excepts to the ALO's conclusion that it violated Section 1153(a) of the Act by its supervisor's interrogation of employee Mamerto Cadiz. The ALO's Decision held that the interrogation was unlawful, but the ALO failed to fully articulate the reasons for his conclusion. In light of Respondent's exception, we have examined the record to determine

whether the interrogation under all of the circumstances would tend to coerce or restrain employees in the exercise of their rights guaranteed by Section 1152 of the Act.

The record reveals that the conversation between Cadiz and supervisor Perkins took place at Respondent's premises on July 3, 1978, before work started. Perkins was a relatively new supervisor and a personal friend of Cadiz. Perkins opened the conversation by stating that he had been instructed by Respondent's manager to find out who was trying to organize the shed employees, and asked what Cadiz wanted. Cadiz replied that a raise to 10 cents in the piece rate was wanted. Perkins then told Cadiz to stop organizing the elderly Filipino employees who resided in the camp next to the shed. Notwithstanding 'the fact that Perkins and Cadiz were friends, we find there was no justification for Respondent's manager to attempt to discover the identity of the persons who were trying to organize Respondent's employees, and a reasonable employee could fear that the information given could form the basis for later reprisal against employees. Abatti Farms, Inc., and Abatti Produce, Inc., 5 ALRB Ho. 34 (1979). It is equally clear that Perkins interfered with employees' rights by ordering Cadiz to stop his activities. We, therefore, reject Respondent's characterization of the conversation as isolated, casual and innocuous, and find that Perkins' statements would tend to interfere with, coerce, or restrain employees in the exercise of their Section 1152 rights, thereby violating Section 1153(a) of the Act.

Respondent excepts to the ALO's finding of a violation

of Labor Code Section 1153(a) based upon Parkins' conduct at a beach party on July 7, 1973, which was attended by many of Respondent's employees. On that occasion, Perkins threatened to fire Mamerto Cadiz, Nemesia Cortez, and Jerome Cabanilla, all employees who had been active in soliciting employee support for a representation election. We find that the ALO's findings and conclusions regarding the incident are amply supported by the evidence.

Although Perkins was somewhat intoxicated at the time, it is clear that his threats were based on anti-union animus, as Perkins had just accused the employees of holding a union meeting rather than a beach party, and his threat was to fire them when the union activity was all over. Perkins claimed that 'the threats were the result of hostility which was of a purely personal nature, not related to union activity. The ALO's findings as to this incident were based on his credibility resolutions. We will not reverse such findings unless a clear preponderance of the relevant testimony shows that the credibility resolutions were erroneous. Standard Dry Wall Products, Inc., 91 NLRB 333, 25 LSRM 1531 (1350). The record herein establishes that the ALO was justified in discrediting Perkins' testimony and crediting the consistent testimony of three other witnesses.

The sole exception filed by the General Counsel is to the failure of the ALO to recommend that a remedial Notice to Employees be read to employees during work time followed by a question-and-answer period with a Board agent. We find merit in this exception, and have modified the order to include such a

reading.

ORDER

By authority of Labor Code Section 1150.3, the Agricultural Labor Relations Board hereby orders that the Respondent, Oceanview Farms, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a. Ordering or advising any of its employees to refrain from engaging in organizing activity or any other union activity or other protected, concerted activity, for mutual aid or protection.

b. Threatening to discharge any of its employees because of their union activity or other protected concerted activity for mutual aid or protection.

c. Interrogating any of its employees concerning their union activities or protected concerted activities, or the union activities or protected concerted activities of other employees for mutual aid or protection.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

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

a. Sign the Notice to Employees attached hereto. Upon its translation by a 3oard agent into appropriate languages,

Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter.

b. Within 30 days after the date of issuance of this Order, mail a copy of the attached Notice in appropriate languages to each employee who was on its payroll at any time during the period from July 1, 1978, until September 30, 1978.

c. Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places, on its property, the time(s) and place (s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which nay be altered, defaced, covered, or removed.

d. 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, 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 rats of compensation to be paid by Respondent to all nonhourly employees to compensate them for time lost at this reading and the question-and-answer period.

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

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

Dated: December 11, 1979

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present it its evidence, the Agricultural Labor Relations Board, has found that we have interfered with the rights of our employees. The Board has ordered us to post this Notice and 'to take 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 unions;
3. To bargain as a group and to choose whom they want to speak for them;
4. To act together with other workers to try to get a. contract or to help and 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 question employees about their organizing activity or other union activities.

WE WILL NOT tell employees to stop engaging in organizing activity or other union activities or that we do not-want them to organize or join unions.

WE WILL NOT threaten to fire, lay off, or replace any employee because of his or her union activities or other activities to help or protect each other.

Dated:

OCEANVIEW FARMS, INC.

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Oceanview Farms, Inc. (UFW) 5 ALRB No. 71
Case No. 78-CE-39-X

ALO DECISION

The ALO dismissed the allegation of a Section 1153(a) violation based upon surveillance or the impression of surveillance of union activities because the evidence of one occurrence when 'management personnel spoke with an employee shortly after the union organizer had spoken with him was inconclusive, and therefore not supported by a preponderance of the testimony. The ALO recommended dismissal of the allegation that Respondent violated Section 1133 (a) by increasing employees-' wage rates-shortly before an election petition was filed. Although he found the timing suspicious, the ALO concluded that Respondent's actions were not proven to be based on union considerations. Respondent was acceding to an employee demand to increase wages, and the increase was made only after competitors had initiated a similar increase. The ALO also recommended dismissal of the allegation of discriminatory transfers in violation of Section 1153 (c) and (a). The ALO found that General Counsel had not sustained his burden of proof in light of Respondent's evidence that the transfers "were motivated by legitimate business considerations and that the transferred employees suffered no monetary loss due to the transfers.

The ALO found two violations of Section 1153(a) based upon the conduct of Respondent's supervisor in interrogating an employee about his organizing efforts and in threatening three employees with discharge because of their support of the union.

BOARD DECISION

In light of Respondent's exception that the ALO treated the interrogation as a per se violation, the Board considered the circumstances under which the interrogation took place to determine whether the conversation between the supervisor and an employee would tend to coerce, restrain, or interfere with employee rights. The supervisor initiated the conversation on company property and told the employee that he had been instructed by Respondent's manager to find out the identity of the union organizers and asked the employee what he wanted. Such a conversation would tend to restrain or coerce employees because there was no justification for seeking the information and the information could form the basis for later reprisals against employees. In the same conversation, the supervisor ordered the employee to stop organizing some elderly workers. This order clearly interfered with the employees' right to solicit support for a representation election. Notwithstanding the fact that the supervisor and the employee were friends, the conversation would tend to coerce, restrain or interfere with employees' Section 1152 rights.

The Board affirmed the ALO's finding that the threats of discharge violated Section 1153(a) of the Act as they were based on union activity. The Board modified, the ALO's proposed remedial order in light of General Counsel's exception to the ALO's failure to include a reading of the Notice to Employees on company time followed by a question-and-answer period with a Board agent.

REMEDY

The Board Ordered Respondent to cease and desist form interrogating, threatening, or otherwise interfering with, restraining, or coercing employees in the exercise of their Section 1152 rights, and to read, post and distribute an appropriate remedial Notice to Employees.

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

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STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD[1/]

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

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

Gray, Cary, 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, 23, 29, December 7 and 8, 1978[2/] and on January 29 and 30, 1979 in San Diego, California; ail parties were represented by counsel. The charge was filed by the United Farm Workers of America, AFL-CIO herein called "UFW"[3/] on July 18, 1978. The complaint issued on November 3, 1973, and alleges violations by 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 ware duly served on 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 organization was involved in the instant matter, to with Fresh Fruit and Vegetable Workers Union, Local 78-B AFL-CIO (herein called "Local 73-3"), which labor organization filed a

Upon the entire record, including ray 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 (3 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 Sec-ion 1153 (a) and (c) of the Act.

3/(con't)petition for certification of a unit consisting of Respondent's packing shad employees on July 7, 1973. On July 12, 1573, the Board's Regional Office -dismissed the petition as it deemed Respondent's packing shad employees did not constitute an. appropriate bargaining unit within the meaning of Section 1135.2 of the Act. There was no subsequent official involvement by Local 73-3 en 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, 1973 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. Parkins 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 tarn 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 Parkins 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 ALR2 No. 58 (1977}; the Garin Co., 5 ALRB No. 4 (1979TI7"

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 ocher grower regarding any other pay increase. Yasukochi was informed about the pay increase offered by the other growers

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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 chat he was not with any non employee although a non-employee was hearby. 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 net 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 then, at least by June 27. Yasukochi testified that the July increases were intended to keen 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 ha decided to raise Respondent's piece rate at the end of that weekly pay period. The North County growers commonly communicate about pay raises put 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, vas 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 Parkins telephoned him at home on July 3 and told Cabanilla Manilla 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, Parkins announced the one penny increase in the packers pices rates to effective the day before, July 5. Perkins testified that the day he announced the piece rata increase he told Cudiz 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 likehood of an incrases, Respondent's increase was not instituted and announced until July 6, after the other growers had announce, their incrases.

The General Counsel contends that this increase had the affect of interfering with the organizational rights of employees and cites International Shoe Co. 43 LRRK 1120 (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 incrases in wages or benefits made during an organizational campaign Is presumed to have been done with the intent of interfarce 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 -he "economic realities" analysis found in NLR3 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 -he 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, 1973.

At about 5:30 p.m. on July 7, Cadiz served an election petition by Local 73-3 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 barbecue 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[1] 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, Parkins' 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' 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[1] 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, Cadiz 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 ALSB 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. 39 (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 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 ascartaining 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

surveillance is alone sufficient to violate Section 1133(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. Parkins 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 creative the impression thereof, was true or whether on the other hand, those engaged in union activity, as they are commonly went 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 testimony taken" Whitney Farms, 3 ALRB Mo. 63 at 11 (1977) Joe Maggio, Inc. 4 ALRB Mo. 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 S Nemesia Cortez

General Counsel alleged and proffered testimony that on July 11 Jerome Cabanilla was moved to a different place en the packing line to work between two people different from these 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 Co arise-alleges that these actions were motivated by anti-union animus. General Counsel alleges that a packers ability to pack, and therefore the amount of tomatoes which that packer will pack, is largely dependant upon speed and attitude of packers or each side of him. The number of tomatoes which can be packed also depends or 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 chance 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 chanced 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. 5 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 rather 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 Cortez 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 1757, 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 giver, 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 discriminates's ability to pack as many tomatoes as before the chance. Wolfe testified that the results were

that Cortez, 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. Percentile 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 2.336% of the total output. For the period July 21 through July 31, Cortez' percentile increased to 2.937%. 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 AIRS No. 94, Lu-Ette Farms, Inc. 3 ALR3 Mo. 33. Given Perkins former contact with these employees his action in making the transfer is suspicious. 3ut, the transfer of Cabanilla and Cortez on the packing line was not proven to be "inherently destructive" of important protected rights. Jerkins' 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 1973 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 Jerkins' 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 wa-3 able to better his or her position monetarily in the subsequent period is important. I find that the preponderance of evidance 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 1 threats to terminate Jerome Cabanilla, Memerto Cadiz and Nemesia Cortaz in front of several employees of Respondent and his interrogations of said employees for the surpass of discouraging employees from jcinig, 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 degist from infringing in, any manner upon the rights guaranteed in Section 1153 of the Act and take certain affirmative action designed to effectuata the policies of the Act.

In addition to the standard renadies, 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 Directory

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 12 days;

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

Hold an employees meeting in the presence of Board agents leaving tine 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 11S0.3 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 chair 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 concerzed 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 period. 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 or 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 the positions and placement on the packing line of Jerome Cabanills 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.

Dated: March 30, 1979

Michael K. Schmier
Administrative 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

3) 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 ca 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