Delhi, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

FOSTER POULTRY FARMS, Respondent, and ARTHUR HAY, PAMELA HOBBS, VERNON HAMSHER, JOHN BENTLEY, DOMINIC KANE, and OTIS HICKS, Charging Parties.	)	Case Nos. 78-CE-4-F 78-CE-6-F 78-CE-7-F 78-CE-8-F 78-CE-9-F[1/] 78-CE-10-F 6 ALRB No. 15

DECISION AND ORDER

On June 14, 1979, Administrative Law Officer (ALO) Paul D. Cummings issued the attached Decision in this proceeding. Thereafter, Respondent and General Counsel each filed exceptions and a supporting brief, and Respondent filed a reply brief. [2/]

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

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided

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[1/] At the hearing, the ALO granted General Counsel's motion to amend the complaint by deleting the allegations relating to Case No. 78-CE-9-F.

[2/] In its reply brief, Respondent asks that the Board reject certain of the General Counsel's exceptions because of failure to comply with ALRB Regulation 20282 (a), which states that each exception should indicate the specific page(s) in the ALO's Decision to which it relates. As no material prejudice to Respondent has been demonstrated, we hereby deny Respondent's request. George Arakelian Farms, Inc., 5 ALRB No. 10 (1979).

to affirm the rulings,[3/] findings,[4/] and conclusions of the ALO, as modified herein.[5/]

[3/] Respondent excepts to the ALO's reopening of the record to receive additional evidence from General Counsel on the existence and nature of the labor organizations with which Respondent's employees were involved. At the reopened hearing, Respondent also presented additional evidence on other issues. Although the purpose of reopening a record is generally to admit evidence which is newly discovered or was previously unavailable through the exercise of reasonable diligence, Victor Otlans Roofing Co., 182 NLRB 898, 74 LRRM 1447 (1970), enf'd 445 F.2d 299, 77 LRRM 2893 (9th Cir. 1971), we find that the ALO did not abuse his discretion in reopening the record herein. IBEW, Local 648 v. NLRB, 440 F.2d 1184, 76 LRRM 3051 (6th Cir. 1971). Furthermore, Respondent has suffered no prejudice by the ALO's action. In any event, there was sufficient evidence on the record prior to reopening to find that Respondent's employees were engaged in organizational efforts to seek representation by the United Farm Workers of America, AFL-CIO (UFW); the Cannery Workers, Food Processing, Drivers, Helpers Union of Stanislaus and Merced Counties, Local 748, Western Conference of Teamsters (Teamsters)? and the Warehousing, Processing and Allied Workers Union Local 6, I.L.W.U. (ILWU). Moreover, we may take official notice of the status of these well-established labor organizations, who have been involved in proceedings before this Board and/or before the National Labor Relations Board. Cal. Evidence Code § 452(g) and (h).

[4/] The ALO inadvertently found that the complaint alleges violations of Section 1140.4(a) as well as Section 1153(c) and (a) of the Act. Section 1140.4(a) cannot be the basis of a violation as it merely defines agriculture .

[5/] In its exceptions, Respondent claims that it has been denied due process on several grounds. We find these claims to be without merit. First, Respondent asserts that the 28-day period between the issuance of the complaint on October 30, 1978, and the date the hearing opened, November 27, 1978, did not allow Respondent sufficient time to prepare its defense. We find that the allotted period was sufficient to prepare Respondent's case and was well beyond the five-day period between service of complaint and date of hearing required by Section 1160.2 of the Act. Second, Respondent asserts that the complaint was vague and ambiguous. We find that the complaint, and the General Counsel's response to Respondent's motion for a bill of particulars, satisfy the requirements as to specificity set forth in ALRB Regulation 20220 and Giumarra Vineyards Corp., 3 ALRB No. 21 (1977). Third, Respondent asserts that the denial of its request for a five-day extension for filing a post-hearing brief was a denial of due process. There is no

[fn. 5 cont. on p. 3]

General Counsel excepts to the ALO's finding that Respondent's transfer of employee Pamela Hobbs in early November 1977, from the feed-mill office to another building across a parking lot from the mill, was for legitimate business reasons. We find no merit in this exception. The ALO found that Hobbs was transferred not only because the feed-mill office was overcrowded, but because Respondent wished to prevent Hobbs from disclosing confidential information about its operations. However, we find that Respondent did not advance problems of confidentiality as a reason for the transfer. The record shows that Respondent transferred Hobbs, who had been sharing a small office with five working supervisors, because of the lack of space and because Hobbs could perform additional clerical functions in the other office building, which was roomier and more conducive to the type of clerical work which Hobbs performed. [6/]

[fn.5 cont.]

provision in the Act giving parties to an unfair labor practice proceeding the right to file post-hearing briefs. Provision for filing such briefs is set forth in ALRB Regulation 20278. All parties in this case were given 20 days in which to file briefs, pursuant to the regulation. Furthermore, we note that the hearing was conducted during the latter part of November and the first two weeks of December 1978. The record was reopened and the hearing reconvened for one day on February 6, 1979. Briefs were due 20 days after that date. The parties therefore had a considerable amount of time to prepare their briefs. Respondent has demonstrated no extraordinary circumstances warranting an extension of time for filing pursuant to ALRB Regulation 20480(b).

[6/] Although Hobbs testified that her job would be more difficult to perform at the office building, the record shows little evidence of added difficulty. In fact, the transfer eliminated the need for Hobbs' daily trips over to the office building, which had previously been required while she was working in the feed-mill office. The ALO states that Kramer "admitted" that the change in

[fn. 6 cont. on p. 4]

General Counsel excepts to the ALO's conclusion that Respondent did not constructively discharge Hobbs in April 1978. We find no merit in this exception. Hobbs' ingredient scheduling job was eliminated in April due to a decision made by general manager Robert White to combine ingredient scheduling with ingredient purchasing under Respondent's purchasing manager in Livingston, in an effort to maintain adequate minimum inventory levels more efficiently. Respondent offered Hobbs a job at the same rate of pay in breeder scheduling, a position which apparently included opportunities for advancement but which Hobbs declined with virtually no discussion. Furthermore, Hobbs had put her house up for sale in January 1978, in anticipation of moving to Sonora, and actually sold the house a week after she left Respondent's employ. In light of the above circumstances, we affirm the ALO's finding that Hobbs' resignation was voluntary.

General Counsel excepts to the ALO's finding that Respondent did not transfer John Bentley from the feed-mill delivery maintenance department because of his union activity.[7/] We find no merit in this exception. The record shows that Bentley had been transferred to the delivery maintenance department to

[fn. 6 cont.]

location increased the difficulty of Hobbs' job. However, the record shows that Kramer did not so testify, but rather stated at the hearing that the transfer provided Hobbs with improved working conditions.

[7/] General Counsel does not except to the ALO's conclusion that Bentley's subsequent termination from the processing plant was lawful. In the absence of any exception to this conclusion, and because the record shows Bentley's record of excessive absenteeism, we affirm the ALO's conclusion.

help Bob Andrews with the construction of hydraulic stingers, a project which lasted a few months, and with a backlog of repair work. Once the work was completed he, rather than Andrews, a more senior employee and a union supporter, was transferred to a department where work was available.

General Counsel excepts to the ALO's conclusion that Respondent did not discriminatorily lay off Art Hay in violation of Section 1153 (c) and/or (a) of the Act. We affirm the ALO's conclusion and his finding that Hay was laid off due to lack of work. We note that when Respondent reduced its mill maintenance staff, it retained Larry Elam, a more senior electrician and a union supporter, rather than Hay.[8/] However, we reject the ALO's conclusion that Hay's complaints to Respondent and Cal/OSHA about various job safety conditions do not constitute protected concerted activity because Hay made the complaints on his own. An individual's actions are protected, and concerted in nature, if they relate to conditions of employment that are matters of mutual concern to all affected employees. Alleluia Cushion Co., 221 NLRB 999, 91 LRRM 1131 (1975); Air Surrey Corp., 229 NLRB 1064, 95 LRRM 1212 (1977), rev'd on other grounds, 601 F.2d 256, 102 LRRM 2599 (6th Cir. 1979). As Hay's complaints involved safety conditions which were possible violations of the California Occupational Safety and Health Act and about which other employees had expressed

[8/] We reject the ALO's reliance on the fact that other feed-mill employees who were union supporters, such as Al Souza and Ed Lyons, were not laid off, to show that Hay was not discriminated against. It is not necessary to show that other union supporters were discriminated against to establish a case of unlawful discrimination. Desert Automated Farming, 4 ALRB No. 99 (1977) .

concern, he was clearly engaged in protected concerted activity.[9/]

We find no merit in General Counsel's exception to the ALO's finding that Respondent laid off Vernon Hamsher for legitimate business reasons rather than for his union activities. The record shows that Hamsher, an employee in the lowest job classification, was laid off due to a lack of work at the end of February 1978, when Respondent reduced its labor force, and was recalled in April 1978 when another employee left the company.

General Counsel excepts to the ALO's conclusion that Respondent did not discriminatorily discharge Otis Hicks. We find merit in this exception. The record establishes that Respondent knew of Hicks' union activities and discharged Hicks because he supported the union.

In the course of distributing union literature to employees, Hicks had handed out a union authorization card to Michael Armstrong. The ALO concluded that Armstrong was not a supervisor, and therefore found that his knowledge of Hicks' union activities was not attributable to Respondent. We reject the ALO's conclusion that Armstrong did not have supervisorial status. Armstrong was foreman of the plumbing crew in the construction division. Although he was paid hourly and he spent approximately 50 percent of his time performing the same type of work as the

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[9/] Respondent excepts to the ALO's ruling that counsel for the General Counsel was not required to give to Respondent tapes which she had recorded from portions of Art Hay's testimony in a hearing before the Division of Labor Standards Enforcement. We note that the complete and original tapes of that hearing were made available to Respondent by the Division. For that reason, and in light of the fact that the complaint is dismissed as to Hay, we find that Respondent has suffered no material prejudice from the ALO's ruling.

other crew members, Armstrong directed the work of 5 to 15 employees and oversaw the installation of the plumbing systems in the poultry ranches. He assigned the workers to specific tasks, corrected their mistakes, and ordered materials for the systems through another supervisor or a purchasing agent. When he needed employees to work overtime, and the job supervisor was not available, he made the decision to ask the employees. Armstrong filled out time cards and evaluated employees' work performance, effectively recommending wage increases and initiating transfers of employees who were unfit to work on the job. Armstrong was paid $.75 to $1.00 per hour more than the highest paid employee under his direction. On these facts, we conclude that Armstrong is a supervisor within the meaning of Section 1140.4(j) of the Act. Perry Plants, Inc., 5 ALRB No. 17 (1979); Con-Plex Division of U.S. Industries, Inc., 200 NLRB 466, 81 LRRM 1524 (1972).

We find that Armstrong's knowledge of Hicks' union activities, based on receiving a union authorization card from Hicks, is attributable to Respondent. Moreover, the circumstances surrounding Hicks' discharge reveal that he was terminated because of his union activities. At the end of January 1978, after Hicks requested a re-evaluation of his assignment to a low job classification, Respondent put Hicks on 30-days' probation and, on February 2, issued a written warning which stated that Hicks' attitude had changed and that Hicks had "a chip on his shoulder." The 30-day probationary period ran without incident. On March 8, supervisor Larry Clemence told Hicks that he had noticed a slight improvement in Hicks' work, although it was not enough to take

him off warning status, and that Hicks could continue to work for Respondent if he kept showing improvement. In mid-March, approximately a week before his termination, Hicks handed out a union authorization card to Armstrong.[10/] On March 22, 1978, Clemence terminated Hicks, stating that he had not shown enough improvement. This method of discharge was inconsistent with Respondent's discharge policy which, according to general manager Robert White, consisted of a four-step procedure: an oral warning, followed by a written warning, and then suspension of the employee before termination. Hicks was discharged without first being put on suspension.

We conclude that the timing of Hicks' discharge, which occurred shortly after Respondent became aware of Hicks' union activities, and the procedure used in discharging him, in light of Respondent's anti-union animus as evidenced by its unlawful interrogation and threats, as described infra, reveal that Respondent discharged him because of his union activities. Respondent's asserted reasons for discharging Hicks are unconvincing. At the hearing, Respondent's witness stated that Hicks was terminated because he had a bad attitude and the quantity and quality of his work were low. Respondent did not come forward with any more specific reasons for Hicks' discharge or evidence of his poor job performance or attitude. In fact, although Hicks testified that he had complained about overwork, supervisor Clemence testified

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[10/] Hicks began to distribute union cards and pamphlets to fellow employees in the new construction division on March 1, 1978, and continued to do so until the date of his discharge. Hicks was the only employee in his department who engaged in such union activity.

that Hicks did not complain more than other employees. Respondent's nonspecific reasons for poor attitude and work performance on the part of Hicks, an employee for more than two years, are insufficient to overcome the General Counsel's prima facie case of discrimination. As the General Counsel has established a prima facie case by a preponderance of the evidence, and as Respondent presented no persuasive evidence of improper behavior or unsatisfactory job performance, we conclude that Respondent violated Section 1153(c) and (a) of the Act by discharging Hicks. Auto-Truck Federal Credit Union, 232 NLRB 1024, 97 LRRM 1088 (1977); Red Line Transfer & Storage Co., Inc., 204 NLRB 116, 83 LRRM 1273 (1973).

The complaint alleged several instances of unlawful interrogation by Respondent.[11/] Respondent excepts to the ALO's conclusions that supervisor Jim Osmer unlawfully interrogated employees Vernon Hamsher and Al Souza on one occasion and Ken Burdno on another, by asking them what they thought about the union. Respondent also excepts to the ALO's conclusion that supervisor Chester Jantz unlawfully interrogated Vernon Hamsher by asking him what he thought about the union. We find no merit in these exceptions. The ALO credited the testimony of the employee witnesses as to these incidents, wherein Osmer and Jantz asked the employees to reveal their union sentiments, thereby violating

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[11/] The ALO concluded that feed-mill manager Jake Kramer did not unlawfully interrogate Art Hay in September 1977, finding that Kramer essentially told Hay not to conduct union business on company time. As no exceptions were filed to that conclusion, it is hereby affirmed.

Section 1153 (a).[12/] Prohoroff Poultry Farms, 3 ALRB No. 87 (1977). Respondent excepts to the ALO's conclusion that Osmer's interrogation of Burdno was illegal, on the grounds that there was no evidence that Burdno felt intimidated by the questioning. It is a well-established principle that the actual effect on the employee is not relevant in determining whether an act of interrogation violates the Act; rather, the criterion is whether the interrogation would reasonably tend to interfere with employees in the exercise of their Section 1152 rights. Abatti Farms, Inc., et al., 5 ALRB No. 34 (1979); Dave Walsh Co., 4 ALRB No. 84 (1978).

Respondent excepts to the ALO's conclusion that supervisor Jim Osmer unlawfully interrogated employees when, in the presence of about 13 employees in the feed mill break room, Osmer said, "I wish somebody would make a phone call to find out if the union was coming in or not so that the boys can settle down and go to work and be not confused." We find merit in this exception. The statement appeared to be an innocuous comment not aimed at discovering the employees' union sympathies and thus did not tend to interfere with or restrain the employees in the exercise of their organizational rights.

We find no merit in Respondent's exception to the ALO's conclusion that supervisor Osmer threatened Vernon Hamsher with a

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[12/] To the extent that credibility resolutions are based upon demeanor we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978); El Paso Natural Gas Co., 193 NLRB 333, 78 LRRM 1250 (1971); Standard Dry Wall Products, Inc., 91 NLRB 544, 26 LRRM 1531 (1950).We find that the ALO's credibility resolutions herein are supported by the record as a whole.

loss of benefits. When Hamsher asked Osmer whether he could arrange his work schedule in order to take time off later to celebrate his anniversary, Osmer stated that, if the union came in, there would be no way he would be able to change the work schedule; and that, if the union came in, they would go strictly by the book. We agree with the ALO that this statement goes beyond the expression of a personal opinion and constitutes a threat of reprisal which tends to interfere with, coerce, and restrain employees in the exercise of their Section 1152 rights. Buddies Supermarkets, Inc., 192 NLRB 1004, 78 LRRM 1236 (1971), enf'd 461 F.2d 847, 80 LRRM 2940 (5th Cir. 1972), cert. den. 410 U.S. 910, 82 LRRM 2245 (1973).

We find no merit in Respondent's exception to the ALO's conclusion that supervisor Leroy Hooker created an impression of surveillance by telling employees that he knew who attended a union meeting. Respondent asserts that the ALO erred in his credibility findings as to Hooker and employee Paul Jaegel and in his conclusion that a violation occurred based on a conversation in January 1978, although the complaint alleged that the violation took place in April 1978. We find that the ALO's credibility resolutions are supported by the record as a whole and that the discrepancy in dates does not prevent a finding of a violation. Although Jaegel at one point testified that the conversation was in April, both Jaegel and Hooker testified, and the ALO found, that the conversation occurred shortly after a union meeting in a Turlock restaurant, which was held in January 1978. We find therefore that the record supports the ALO's conclusion that Hooker

created an impression of surveillance. McAnally Enterprises, Inc., 3 ALRB No. 82 (1977).

ORDER

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

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee in regard to his or her hire or tenure of employment or any term or condition of employment because of such employee's union membership, activities, or support.

(b) Interrogating employees concerning their union affiliation or sympathy.

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

(d) Creating an impression of surveillance of employees engaging in union activities or otherwise exercising their rights guaranteed by Labor Code Section 1152.

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

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

(a) Immediately offer Otis Hicks reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and privileges.

(b) Make Otis Hicks whole for any loss of pay and other economic losses, plus interest thereon at a rate of seven percent per annum, he has suffered as a result of Respondent's discrimination against him.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records and reports, and all other records relevant and necessary to a determination by the Regional Director, of the back pay period and the amount of back pay due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places at its Collier Road complex, the times and places of posting 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.

(f) Mail copies of the attached Notice, in all appropriate languages, to all employees employed at the Collier Road complex at any time during the payroll periods from September 1977 to April 1, 1978.

(g) Arrange for a Board agent or a representative of

Respondent to distribute and read the attached Notice in all appropriate languages to its employees, employed at the Collier Road complex, assembled on company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, 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: March 19, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

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

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

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

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

Because this is true we promise that:

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

Especially:

WE WILL NOT discharge or otherwise discriminate against any worker because of his or her union activity or union sympathy.

WE WILL offer Otis Hicks his old job back and will reimburse any pay or other money he lost because we discharged him.

WE WILL NOT question you about whether you belong to or support a union.

WE WILL NOT threaten employees with loss of employment benefits or with other changes in wages, hours, or working conditions because of their joining or supporting a union or exercising any of the rights set forth in this Notice.

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

Dated: FOSTER POULTRY FARMS

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

Foster Poultry Farms

6 ALRB No. 15
Case Nos. 78-CE-4-F
78-CE-6-F
78-CE-7-F
78-CE-8-F
78-CE-9-F
78-CE-10-F

ALO DECISION

1. The ALO found that Respondent transferred employee Hobbs for legitimate business reasons rather than because of her union activities and that her employment was later terminated by voluntary resignation rather than by constructive discharge.

2. The ALO found that Respondent transferred employee Bentley for legitimate business reasons and subsequently discharged him for excessive absenteeism rather than his union activities.

3. The ALO concluded that Respondent discharged employee Hay for legitimate business reasons rather than because of his union activities, holding that Hay's complaints about safety conditions to the company and to Cal/OSHA did not constitute protected concerted activity.

4. The ALO found that Respondent did not lay off employee Hamsher because of his union activity but rather for a legitimate business reason, an overall reduction in the labor force, and rehired him shortly thereafter when another employee left.

5. The ALO concluded that Respondent did not discharge employee Hicks because of his union activity, but for unsatisfactory job performance, finding that the termination was not handled differently from other terminations and that Respondent had no knowledge of Hicks' union activities. (The ALO had concluded that assistant foreman Armstrong, to whom the alleged discriminatee had handed a union authorization card, was not a supervisor and therefore that his knowledge of Hicks' union activity was not attributable to Respondent.)

6. The ALO also concluded that Respondent violated Section 1153(a) of the Act by illegal interrogations, a threat to change employees' working conditions, and by giving employees the impression of surveillance of their union activities.

BOARD DECISION

The Board generally affirmed the ALO's findings and conclusions as to employees Hobbs, Bentley, Hay, and Hamsher, but rejected the ALO's conclusion that Hay's complaints to Respondent and to Cal/OSHA about job safety were not protected concerted activity. The Board held that such individual complaints relate to conditions of employment that are matters of mutual concern to all affected employees and therefore constitute protected concerted activity.

The Board rejected the ALO's conclusion that Respondent discharged employee Hicks for cause rather than for union activities, concluding that assistant foreman Armstrong, to whom Hicks had attempted to give a union card was a supervisor and therefore that his knowledge of Hicks' union activity is attributed to Respondent. The Board concluded that the timing of the discharge, shortly after Respondent became aware of Hicks' union activities, the unusual manner of the discharge which was inconsistent with company policy, in light of Respondent's anti-union animus, established a prima facie case of discrimination which Respondent's nonspecific defenses of poor attitude and poor work performance were insufficient to overcome.

The Board affirmed the ALO's conclusions as to the Section 1153(a) violations except for his finding unlawful a supervisor's statement that he wished someone would call to find out whether the union was coming so that the employees could settle down. The Board concluded that it was a personal comment not aimed at discovering, discouraging, or interfering with the employees' union activities and therefore did not constitute unlawful interrogation.

* * *

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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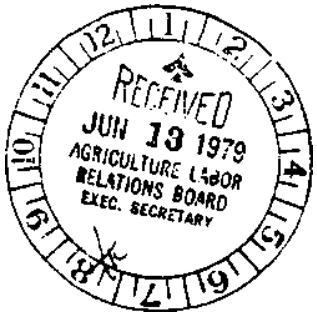

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
FOSTER POULTRY FARMS,	)	Case Nos. 78-CE-4-F
	)	78-CE-6-F
Respondent,	)	78-CE-7-F
	)	78-CE-8-F
and	)	78-CE-9-F
	)	78-CE-10-F
	)	
ARTHUR HAY, PAMELA HOBBS, VERNON HAMSHER, JOHN BENTLEY, DOMINIC KANE, and OTIS HICKS,	)	
	)	
Charging Parties.	)	
	)	

BETTY O. BUCCAT, Esq. for the General Counsel.

THOMAS, SNELL, JAMISON, RUSSELL, WILLIAMSON and ASPERGER, Esq. by JAY V. JORY, Esq. of Fresno, California, for Respondent.

DECISION

STATEMENT OF THE CASE

PAUL D. CUMMINGS, Administrative Law Officer: This case was heard before me in Merced, California on November 27, 28,29,30, and December 1,2,3,4,5,6,12, and 13, 1978 and February 6, 1979. The consolidated complaint alleges violations of Sections 1140.4 (a) and 1153 (a) and (c) of the Agricultural Labor Relations Act, herein called the Act, by Foster Poultry Farms, herein called Respondent. The complaint is based on charges filed by Arthur Hay, Pamela Hobbs, Vernon Hamsher, John Bentley, Dominic Kane, and Otis Hicks, all employees of

of Respondent on March 9, April 6, April 7, April 10, and April 14, 1978 respectively. The charges and the consolidated complaint were duly served upon Respondent.

All parties were given full opportunity to participate in the hearing and after the close thereof the General Counsel and Respondent each filed a brief in support of its respective positions.

At the initial stage of the hearing, the General Counsel moved to dismiss without prejudice Charge 78-CE-9-F, stating that Dominic Kane, the Charging Party, who was in Maryland and from all indications was not coming back, had requested that he would like his charge to be withdrawn or dismissed. The Administrative Law Officer dismissed the charge, but with prejudice, and all allegations in the Consolidated Complaint pertaining thereto.

The Consolidated Complaint alleges that Respondent violated Sections 1153 (a) and (c) and 1140.4 (a) of the Act by reason of the following discriminatory acts:

1. The interrogations of employees about their protected union activity by supervisors Jake Kramer, Jim Osmer, Chester Jantz, and Ken Stinson.

2. Discriminatorily transfering, demoting, and constructively discharging Pamela Hobbs because of her protected union activities and/or concerted activities.

3. Creating the impression through supervisor Leroy Hooker of engaging in surveillance of employees engaged in protected union activity.

4. Discriminatorily transfering, demoting, and

discharging John Bentley for engaging in protected union activity through its supervisors Nick Perino, Ralph Meraz, and Leroy Ross.

5. Threatening employees with a change in working conditions if the union came in through supervisor Jim Osmer on or about February 1, 1978.

6. Threatening employees with loss of employment if they continued their union activity through supervisor John Doidge on or about February 22, 1978.

7. Discriminatorily discharging Arthur Hay for engaging in protected union activities and concerted activities and Vernon Hamsher for engaging in protected union activities by supervisor Jim Osmer on or about February 25, 1978.

8. Discriminatorily discharging Otis Hicks for engaging in protected union activities by supervisor Larry Clemense on or about March 22, 1978.

Respondent denied that it had committed any of the unfair labor practices as alleged.

As affirmative defenses Respondent has alleged that:

1. The General Counsel has denied Respondent its constitutional rights through the failure of the General Counsel to completely investigate the consolidated complaint, to give Respondent adequate time to prepare its defense, and to make relevant exculpatory evidence available to Respondent.

2. The consolidated complaint is vague and ambiguous and violates the constitutional rights of Respondent.

3. The General Counsel is pre-empted from issuing a complaint based on the allegations contained in paragraph 10

(j) of the consolidated compalaint as a prior proceeding in Division of Labor Standards, Enforcement Case No. 04-2412 had previously been initiated on said matter.

4. The consolidated complaint does not comply with Section 20220 of the Rules and Regulations of the Agricultural Labor Relations Baord, herein the Board, in that it fails to allege specific facts and specific violations.

Respondent, in its allegations of unconstitutionality, did not direct the attention of the Administrative Law Officer to any particular provision of either the state or federal constitution in support of its allegations.

The General Counsel did not address himself to any of Respondent's affirmative defenses.

I find no merit in any of Respondent's affirmative defenses.

As to the first, the General Counsel is empowered to determine the extent of any matter within the purview of his authority. When charges are filed against a party, the party is put on notice that it may become a Respondent in an unfair labor practice complaint and a prudent party would prepare his defenses from such time. Respondent had such notice and time to prepare its defense. As to exculpatory evidence, the General Counsel had none to provide.

As to the second, the consolidated complaint is set forth with sufficient specificity to put Respondent to its defenses. This is particularly true when such consolidated complaint is supported by the General Counsel's Response to Respondent's Demand For Bill of Particulars.

As to the third, the state legislature, in its statutory scheme of things, has created the Board and granted it the sole power to determine initially who has or has not committed an unfair labor practice. This power was not given to the Division of Labor Standards Enforcement or any other state agency. While it may be that a particular act may come under the purview of more than one law administered by seperate agencies, the determination of one agency within its jurisdiction does not prevent another agency from acting within its legislative power and authority. This is true particularly when, as in the case of Arthur Hay, the surrounding circumstances were more extensive than the filing of a complaint relating to safety matters. The same principle applies to the defense of Respondent relating to Pamela Hobbs to the effect that her union activity status was determined by the Unemployment Insurance Appeals Board in its denial of unemployment benefits to Mrs. Hobbs. The Appeals Board does not have the authority to investigate unfair labor practice cases, nor does it have the remedy of ordering reinstatement. Those powers lie with the General Counsel and the Board. The Appeals Board only determines when one is entitled to unemployment compensation. It cannot order an employer to put anyone back to work. Had the Appeals Board ruled in Mrs. Hobbs' favor that would not have been determinative of the issues before the Board either.

As to the fourth, the consolidated complaint complies with Section 20220 of the Rules and Regulations of the Board, particularly when supported by the General Counsel's Response to Respondent's Demand for Bill of Particulars.

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

FINDINGS OF FACT

I. Jurisdiction

I find that Respondent is an employer engaged in agriculture in California and is an agricultural employer within the meaning of Section 1140.4 (c) of the Act. Respondent is an integrated poultry operation, with over 65 chicken ranches, a processing plant, and a feed mill in the Stanislaus and Merced County areas. The processing plant is located in Livingston, California and has approximately 2,200 employees who are under a collective bargaining agreement with the Butcher's Union. In the agricultural operations of Respondent, which includes the breeder ranches, the construction and live haul divisions, and the feed mill, there are over 1,000 employees. About 400 employees work at Respondent's Collier Road complex where the feed mill is located. There are approximately 45 employees working at the feed mill. It was stipulated between the parties that Respondent is an agricultural employer with respect to its agricultural operation and I so find.

I further find that the Cannery Workers, Food Processing, Drivers, Helpers Union of Stanislaus and Merced Counties, Local 748, Western Conference of Teamsters, herein called the Teamsters, is a labor organization within the meaning of Section 1140.4 of the Act.

I further find that the Warehousing, Processing

and Allied Workers Union Local 6, I.L.W.U., herein called the Longshoremen, is a labor organization within the meaning of Section 1140.4 of the Act.

I further find that the United Farm Workers of America, AFL-CIO, herein called the UFW, is a labor organization within the meaning of Section 1140.4 of the Act.

I further find that Arthur Hay, Pamela Hobbs, Vernon Hamsher, John Bentley, and Otis Hicks are agricultural employees of Respondent within the meaning of Section 1140.4 (b) of the Act.

I find no merit to the position of Respondent that neither the Teamsters nor the Longshoremen are labor organizations under the Act. Both are in the business of representing employees with their employers in the matter of wages, hours, and working conditions, and when agricultural employees seek their assistance for such purposes, it is sophistry to contend that, because neither organization presently represents agricultural employees, neither is a labor organization under the Act. Both have the right to represent such employees and when such employees undertake to enlist their support that makes them labor organizations under the Act.

II. Organizational Efforts of Employees

Several employees from Respondent's feedmill solicited Teamster Local 748 to organize Respondent's feedmill employees in September, 1977. They were given authorization cards and told to try to get 51 percent of the employees to sign up. These employees took the cards and returned cards signed to the Teamsters. At a subsequent meeting, those employees were told that because of a jurisdictional agreement with the UFW,

the Teamsters could not represent them. The Teamsters instead referred the employees to the Longshoremen Local 6 in Stockton and set up a meeting between the Longshoremen and Respondent employees at the Teamsters' Local 748 office in Modesto on October 7, 1977. At this meeting the employees were told that the Longshoremen would like to meet with them at a later date to discuss whether or not the Longshoremen would try to organize them. This later meeting took place at Divine Gardens in Turlock, California on-November 13, 1977 at which time authorization cards and pamphlets were given to Ed Lyons, an employee, to pass out to the employees. Signed authorization cards were returned and a petition for an election of a production and maintenance unit of Respondent's Feed Mill employees was subsequently filed with the National Labor Relations Board by the Longshoremen. The Regional Director of the National Labor Relations Board declined to process the petition on the grounds that such employees were agricultural employees and as such were not covered by the National Labor Relations Act. Another meeting was held by the Longshoremen with Respondent's employees again at Divine Gardens early in January, 1978 at which time the employees were told that there was *a* question as to whether the Board or the NLRB had jurisdiction and until the matter was clarified, the Longshoremen would not be meeting with them again. Against this organizational effort by Respondent's employees the unfair labor practices are alleged to have taken place.

III. The Alleged Unfair Labor Practices

A. The Transfer and Discharge of Pamela Hobbs

Pamela Hobbs was first employed by Respondent in

March of 1970 as a clerk in the finance department located in Waterford, California. Two years later she was transfered to the administration office in Livingston, California as a cost accountant aide. In 1974 she was transfered to the feed mill as a mill controller. As such her duties were to record the warehouse receipts, to process accounts payable, and to maintain the feed ingredient contracts. She also assisted the mill manager with the ingredient scheduling. In the summer of 1975 a new mill manager came in, Jake Kramer, and the accounting and ingredient scheduling functions were separated. A month later Mrs. Hobbs was transfered out of the finance department into the operations end at the feed mill and given a new job with the title record keeper and a higher rate of pay. As record keeper Ms. Hobbs' main function was ingredient scheduling. She scheduled ingredients in such a manner as to control traffic and to keep a proper level of inventory. There were 56 or so different ingredients, 13 or 14 of them major. Other employees provided Ms. Hobbs with the figures setting forth inventory levels. If there was a problem with the figures she received, she would check the containers to see that a safe level was on hand. Ingredients were brought in by truck and by railroad car. She would have to make arrangements for the ingredients to be brought in by truck and to make sure that railroad cars were being shipped and arriving in a timely manner so that the ingredients would arrive when needed and when they could be unloaded with a minimum of wasted time.

Mrs. Hobbs' duties, other than ingredient scheduling, involved working on personnel matters and as a receptionist.

In November of 1976, Mrs. Hobbs received a new job title, that of traffic coordinator and record keeper, with a raise in wages, but her duties remained the same. She remained in the feed mill until November 1, 1977, at which time she was transferred under protest across the parking lot to building A. At the time of her transfer she was told by Mr. Kramer that the reason she was being transferred was because of pressure from the divisional manager Phil Croft with regard to lack of space in the feed mill. Mr. Kramer admitted that it would be more difficult to do the job from across the parking lot but Mr. Croft felt that she could continue scheduling the ingredients from building A. Mrs. Hobbs pointed out that she was up for review and promotion at that time and that it was not exactly a promotion going to a lower-pay area. She was also, with the move, transferred out of operations back into the finance department. Mr. Kramer told her that she should look on the move as a promotion, that she did not have a management point of view, that there was not any place she could go at the feed mill, and that she should accept the job and make the best of it.

Mrs. Hobbs had a lunch meeting with Theodore Clement , the supervisor under whom she would be working in building A. They talked about the opportunity for an increase in wages. Mr. Clement reminded her that she was in a lower-pay area and told her that there would be no raise.

She was given the job classification of traffic coordinator. The main function was ingredient scheduling and the rest of the time was filled with accounting matters, assisting Loretta Zanos the accounts payable clerk, a person whom she had trained two years before. After her transfer Mrs. Hobbs spent approximately half her time scheduling ingredients and the other half doing other accounting functions.

Mr. Clement, Mrs. Hobbs' new supervisor, had previously been in the feed mill location before being transferred to building A, as had Loretta Zanos, a woman with whom Mrs. Hobbs had worked in the feed mill and with whom she was again working in building A. They were transferred to building A at the time Mrs. Hobbs went from finance into operations. Mr. Jack Harrison, who had charge of the purchasing of ingredients had at one time also been located at the feed mill before being transferred to Livingston.

Scheduling ingredients from building A Mrs. Hobbs found more difficult to accomplish because, whereas she had previously relied on her own information to make her decisions, she now had to rely on other personnel and to do much of her work on the telephone calling people who were not always available when she wanted or needed them. According to Mrs. Hobbs, there were slow downs under the new method of scheduling ingredients but no specific occasions were cited. She also testified on cross-examination that the mill had run out of ingredients from time to time for various reasons while she was scheduling ingredients at the feed mill before her transfer to building A.

After her transfer to building A, other than the ingredient scheduling work she did there, Mrs. Hobbs testified that the personnel work she had been doing was transferred to the division personnel office and the remainder was divided up among the supervisors, with Mr. Kramer, Jim Osmer, and John Willis each doing a part. There was no clear definition as to just what this remaining work was, other than physically inventoring the ingredients from time to time at Mrs. Hobbs' request.

In mid-March Mr. Clement told her that her job was being dissolved and the ingredient scheduling function was to be combined with the purchasing department in Livingston, California, under Mr. Harrison. Mrs. Hobbs testified that she was told at this time that the purchasing department was fully staffed and that, since there was no other work for her, she was out of a job. Mr. Clement told her that he had heard a rumor that there possibly might be an opening in fryer accounting under Phil Crocker but he was not sure what the job was or whether it really was for sure. He said he would check into it if she would like. Mrs. Hobbs stated that Mr. Clement checked into the job and later told her in effect that it would be a clerk's job under a lead person under Mr. Crocker, that it was basically doing clerk's work reviewing computer data, with no decision making and no contact with outside people at all. The lead person, a Jeri Silva, made $3.50 an hour and Mrs. Hobbs would make what she had been making, $5.25 an hour, but she would lose an $18.00 a week mileage expense account that she had had as traffic controller.

This mileage expense account was reimbursement at 14 cents per mile for picking billings of laden up at the Southern Pacific office in Modesto and bringing them to the mill. Respondent had elected to have these documents delivered by other means.

Mrs. Hobbs testified that she felt that the conditions relating to the new position were intolerable and expressed her feelings about the job to Mr. Clement. Mr. Clement told her that since she would not accept that position, that was all he had to offer. Mrs. Hobbs then asked for a letter of recommendation, which was gladly given. She agreed to stay two weeks to transfer the ingredient scheduling over to Jean Hayes in the purchasing department and terminated her employment with Respondent on April 5, 1978.

On cross-examination Mrs. Hobbs stated that a new job in breeder scheduling under Phil Crocker was offered to her but that she turned it down without asking Mr. Crocker about it because it was under Miss Silva whom she knew and who, she thought, would speak poorly about her because she was making more money than Miss Silva. Later on re-direct she testified that she did not talk to Mr. Crocker about the new job as breeder scheduler because she felt that Mr. Clement had told her enough about the job, that the job did not have any security nor did it have any future as far as pay advances were concerned. It was on these facts that she based her decision, that and because it was a clerk's job.

Mrs. Hobbs and her husband put their house up for

sale in January of 1978 and it was sold April 13, 1978, a week after she left Respondent. They had put a deposit on property in Sonora, California, Mrs. Hobbs stated that they were not sure whether they were going to live on the property at that time or not, but when her job dissolved they decided they would. Prior to that she had asked Mr. Kramer if possibly there might be a position with the Foster Farms Chicken-To-Go Restaurant in Sonora. At the time Mrs. Hobbs put her house up for sale she had lost hope of getting her job back at the mill.

Mrs. Hobbs was an active union supporter. She signed and distributed authorization cards for both the Teamsters and the Longshoremen.

Mrs. Hobbs testified:

> "I had a discussion with John Willis, who was the production and receiving supervisor. I had a number of discussions with him, but one in particular. This would have been after September. We discussed -- I personally discussed with him how I felt about the union and that I had signed a card...I offered this information to him. We discussed it openly...I had also had a conversation with Chester Jantz, where we had discussed what the employee's were doing as far as organizing... it was during August and November. I don't remember if it was before I had this conversation with John Willis."

The General Counsel contends in his brief at footnote 11 on page 50 that Mr. Kramer testified that Mr. Willis was the supervisor for production and receiving as early as June, 1977 but does not refer the Administrative Law Officer to any testimony other than Respondent's Exhibit 39. Respondent Exhibit 39 is a three page exhibit, each page being an organization chart of the Feed Production Department. The earliest

effective date of any such chart is October 26, 1977. This is the period of time when Jim Osmer took over the maintenance department after having been supervisor over production and receiving. On this chart Mr. Willis is a write-in as production and receiving supervisor.

While the record does not show when Mr. Willis became a supervisor, he was a supervisor in the feed mill on October 26, 1977 and Mrs. Hobbs had told him she had signed a union authorization card prior to that time.

The Complaint alleges and Respondent admits that Chester Jantz is a supervisor and I so find. While Mrs. Hobbs and Mr. Jantz may have discussed the union activity going on at the feed mill, nowhere in the record does it disclose that Mrs. Hobbs told Mr. Jantz of her own union activity.

There was extensive testimony about Mrs. Hobbs changing her pattern of taking breaks from taking them at her desk to taking them in the break room, talking union with other employees, and about Mr. Kramer coming in and bothering her about trucks having arrived. It is the position of the General Counsel that it should be decided from this that Respondent had knowledge of Mrs. Hobbs' union activity. I do not find so.

The General Counsel in his brief makes a point that Mrs. Hobbs was also sympathetic to employee problems and directed the attention of the Administrative Law Officer to a particular section of Mrs. Hobbs’ testimony.

In answer to the question: "Did you ever express to supervisors your concern for employees?", Mrs. Hobbs answered:

> "Yes. In fact, even Mr. Kramer had asked me to speak for employees on a number of occasions. One was a short time after he became the mill manager, and he was receiving a cold treatment, and he asked me to talk with employees and see what the problem was and to speak for the employees to him and tell him what it was. It would have been in 1975.
>
> Also, one time he asked me-- he had planned a Christmas breakfast, and he asked me what the employees thought of that, if I knew what the employees thought, if they liked the idea. That would have been Christmas of 1976....
>
> I had complained to Mr. Kramer a number of times on conditions for the employees, and many times did Mr. Kramer discuss problems that the employees had, personal problems or job-related problems, because I had worked in the feed mill since 1974 and knew prior, certain accepted procedures....
>
> There was a meeting held in the break room...the last of October.....management called together five or six employees to discuss the problems. It was Bob White, Cliff Oiler, and Phil Croft.... They expressed concern for these problems and what was causing the upset with the workers, and they wanted to discuss these with us.
>
> I believe Jerry Howard was the first one to speak and he mentioned on the point where they had done some extensive testing, but management never reported back to them as to results.
>
> I felt at the time that he was just trying to break the ice, but nobody was willing to come out and say what some of the issues were. And I spoke up as far as the conditions in the restroom and the breakroom.
>
> Before I did this, I did present my position that I was in a position to know feed mill management first hand, working in the office and working side by side with them, yet that I was still a worker and had the feelings and know the issues the workers had been discussing....I did express that the bathroom was deplorable ....it stunk and it was filthy, and also that the break room conditions were terrible and that it was dirty, and they expected the employees to clean it up instead of

seeing to it that it was provided to us clean.

> Also, I expressed about a state compensation problem, that I felt, and a number of the other employees felt that they were being blackmailed. Everytime there was a job-related accident it was presented to them that it was their fault and they were disciplined verbally and written disaplinary action against them."

Mrs. Hobbs then testified that she knew about workingmen's compensation cases because she had access to the personnel files, and that anytime there was a new item put in the personnel file, it was usually given to her to file.

From the above it is clear that for a long period of time management had heard from Mrs. Hobbs with respect to employee problems and even consulted with her concerning them. But being sympathetic to employee problems cannot be equated with union activity. And for employees simply to speak out at a meeting called by management soliciting their complaints cannot be equated with concerted activity. If Mrs. Hobbs accomplished anything at that meeting it was to point out to top-level management that here was an employee sitting in a room full of supervisors with access to confidential files, who was not adverse to disseminating the information contained therein. As the Genreal Counsel pointed out in his brief, Mrs. Hobbs was especially helpful in organizing employees. Because of her work and location at the mill, working with personnel files and office files, and sharing the same offices with the mill supervisors, she was able to acquire and provide helpful information to Ed Lyons for the furtherance of unionization.

Respondent knew of Mrs. Hobbs union activity

through its supervisor John Willis. Nevertheless, I find that Mrs. Hobbs' transfer from the feed mill to building A was not brought about by her union or protected concerted activities. Conditions in the office used by Mrs. Hobbs and five or six other people had been crowded for some time and the problem was alleviated a short time later. It was only when Mrs. Hobbs spoke up at the meeting of top management that her transfer was brought about. Nevertheless I do not find that the transfer was because of her union activity. The National Labor Relations Board has always excluded confidential secretaries from bargaining units, and for a good reason. Management has the right to maintain the confidentiality of its operations. I find that Mrs. Hobbs was transfered out of the feedmill for legitimate business reasons. The small office in which she worked was overcrowded, being occupied by not only herself but by as many as five other individuals, all in supervisory positions. At a time of union activity among its employees, Respondent had the right to remove from its inner sanctum, an employee who demonstrably was willing to share employer confidences with her fellow employees. It was more practical to remove one employee to the building nextdoor than to remove all the supervisors and their records. She retained the same wages and the same duties, albeit the method of accomplishing them changed and not to her liking. That too was a management decision. The fact is the job could be done to Respondent's satisfaction and in apparently half the time. I find that the combining of ingredient scheduling with the purchasing operation in Livingston, with

which it was closely allied, was also a legitimate business decision, in no manner prompted by Mrs. Hobbs' union activity. Mrs. Hobbs was offered a new job at the same wages, which was at least comparable to the work she had been doing, but she chose instead to terminate her employment because it was not to her liking. Jobs cannot always be tailor made to suit the wishes of employees neither can varying pay scales in different departments of an employer's establishment. I find no constructive discharge but rather a voluntary resignation for personal reasons. Mrs. Hobbs found the new job to be intollerable but this was a subjective state of mind in no way brought on by any discrimination on the part of Respondent.

B. The Transfer and Discharge of John Bentley

John Bentley began working for Respondent on September 25, 1975 as a maintenance man in fryer production. After 11 months, he was transfered into fryer production trucking as a truck driver, doing some maintenance work on the trucks. After eight months he was transfered into the feed mill delivery department as a maintenance man under the supervision of John Doidge. This was in mid-April, 1977. There was one other maintenance man in this department, Bob Andrews. At the time of his employment in this department, Mr. Doidge told Mr. Bentley that he had some work to be done on the trailers, the fabricating of new type stingers, and that the work would last approximately three months, but that it could possibly work into something permanent. He also told him that at the

end of 90 days he would be a permanent employee of that department. And that at 90 days he would be evaluated and receive a raise or be terminated.

On August 8, 1977, Mr. Bentley was evaluated and on September 23, 1977 he was recommended for a wage increase from $4.45 to $4.75. When Mr. Bentley told Mr. Doidge he did not think it was right, both went in to discuss the matter with Mr. Kramer, who then raised it to $4.90. Mr. Bentley was rated low on the scale of good on his employee performance appraisal. At the time of his appraisal Mr. Bentley was told by Mr. Doidge that because he was a permanent employee of the department he could have uniforms. These consisted of five or six sets of khaki work clothes with his name on them.

On Thursday, November 3, 1977, Mr. Kramer and Mr. Doidge told Mr. Bentley they had eliminated his job because the work had run out and that he would have to take a position elsewhere or they would lay him off. They gave him a list of four people he should talk to about getting a job with them. One was Nick Perino, in personnel, one was Lew Cardey, head of fryer production, one was Dean somebody from live haul, and the other was Bob Smith, head of maintenance in the processing plant. The next day he went to see Mr. Perino and they went to see Mr. Cardey but he had no opening. Mr. Bentley never went to see about an opening in live haul because he went to the maintenance department at the processing plant and they gave him a job. Mr. Bentley had gone to the processing plant and talked to two people about a job in maintenance. They knew he was coming. After interviewing him they told him

that they would let him know in an hour. He returned to the feed mill and subsequently was informed he was hired. He started the following Monday.

At the time he was told his job was eliminated, Mr. Bentley asked Mr. Kramer why he did not lay off one of the other maintenance people who had been there only two or three months. Mr. Kramer told him he did not think he was qualified to do their job. These other employees were in feed mill maintenance, doing maintenance on the feed mill itself. They all used the same shop and tools but had different supervisors. There were no bumping rights in effect.

Mr. Bentley maintained that the work had not run out. He stated that Mr. Andrews had drawn up a list of work remaining to be done and that all of that work had not yet been completed.

Bob Andrews testified that the maintenance work on the trailers was a "pretty heavy" backlog. He requested help of Mr. Doidge which he would need if he were going to manage to keep the routine and emergency maintenance done on the trailers and at the same time fabricate new stingers for the new trailers Respondent had purchased. He requested an assistant. In answer to his request Mr. Bentley was brought in, at which time Mr. Doidge said that he would start Mr. Bentley part time to see how he worked out and that if there was enough work to warrant it, they would probably keep him on, that it depended on how the situation worked out. When Mr. Bentley first started there, he would go back and forth from fryer production until June when he stayed on full time

until the special projects job on the trailer stingers was completed and perhaps a month and a half or two after that. While working on the stingers, a backlog of maintenance repairs that should be done had stacked up. Mr. Andrews asked Mr. Doidge if they could possibly keep Mr. Bentley on full time for the time being until he could catch up on this backlog. Mr. Andrews testified "And we had got a little bit behind on that because the new special projects took most of our time. And we did work quite a bit of overtime on that until we finished the trailers." Mr. Doidge asked Mr. Andrews to submit a list of maintenance repairs that needed to be done. This list was submitted about September 15, 1977. Mr. Doidge looked the list over and said he would try to justify to Mr. Kramer keeping Mr. Bentley around until they caught up. Mr. Andrews testified that there was consideration that Mr. Bentley would be terminated prior to September, 1977. Mr. Doidge asked him from time to time how the work schedule was coming along and did he really need Mr. Bentley any further after they had completed the stingers. With respect to the list of maintenance work Mr. Andrews testified that some of the work listed had been completed and some had not yet been completed. He also testified that he was now working alone, as he had been before the advent of Mr. Bentley, and that he has only worked about 10 hours of overtime between November of 1977 and May of 1978. There is *a* contention that the work that might have been done by Mr. Bentley was now being done by the truck shop but the credible evidence is that the truck shop is only doing the type of work that it would have been doing.

Mr. Bentley began working in the processing plant

on Monday, November 7, 1977. He was terminated on November 30, 1977 by Leroy Ross for excessive absenteeism. In the time he was at the processing plant Mr. Bentley was absent four and a half days. On the first day he was on the job he got doused with water and the next day he was sick. He reported to work but was too sick to work more than a couple of hours. He received permission from Mr. Ross to go to the nurse's office. She sent him to see a doctor at the Livingston clinic. The doctor wrote him a prescription and an excuse telling him not to return to work until Friday, at which time Mr. Bentley gave the excuse to Mr. Ross. Mr. Bentley missed work on November 28 and 29. His car had been wrecked and he had no way to get to work. On this occasion Mr. Bentley called in as he was supposed to. He reported for work the following day and was told by Mr. Ross that he had not received Mr. Bentley's message, that he did not know he was going to be absent or why and that he needed somebody that was there all the time and that he was going to have to let him go.

Mr. Bentley reported a complaint on his termination to the union steward of the butcher's union representing the processing plant employees but heard nothing further on it nor did he follow up on it.

Respondent had a strict attendance program at the processing plant, particularly during the first 30 days of probationary employment, which was a period during which Respondent had the opportunity to evaluate an employee's performance and attitude. That attendance was considered critical was reviewed with Mr. Bentley before he commenced

employment. He was also given warning that if he did not straighten up, he would have to be terminated. Mr. Bentley just did not comply with Respondent's requirements at its processing plant with respect to attendance. During 16 possible working days, Mr. Bentley left early on two occasions, was tardy on one occasion and was absent on four occasions. The evidence is that Mr. Bentley's termination was effected in accordance with company policy and there is no evidence that he received disparate treatment as compared to other employees similarly situated. There is also no evidence that he was terminated for his union activity.

Mr. Bentley was an active participant in the union activity of the employees. He attended union meetings and signed authorization cards for the Teamsters and the Longshoremen. He also drew up a petition authorizing Cesar Chavez to negotiate for Respondent's feed mill employees. Approximately a week before he was transfered to the processing plant. Mr. Bentley was in the break room with Mr. Lyons. They both worked swing shift but had come in the morning to catch the truck drivers to get them to sign the petition, when Mr. Doidge came in. Mr. Bentley testified:

> "He walked into the break room while me and Ed were there with the petition. He said, What are you guys doing here so early? We worked swing shift. I told him, 'We're passing out a petition. Do you want to sign it? and held it up. He said, What's that? What's that?' Then he said 'No. I don't even want to see it. He kept looking at it. He said, "[wlhat is it?' I said, 'It's a petition to get Chavez up here,' and he walked out the break room and on his way out he said 'I wish I'd known that, Bentley' and walked out".

Mr. Lyons' version is essentially the same as that of Mr. Bentley. Mr. Doidge denied having been shown a union petition in the break room. He did recall a time when Mr. Bentley pushed a paper under his face and asked him to sign. He did not know what, if anything was on the paper. This was after Mr. Bentley had been told his transfer had gone through and it occurred in Mr. Kramer's office. Mr. Bentley was highly upset and Mr. Doidge got Mr. Perino and together they tried to calm him down. I credit Mr. Bentley and Mr. Lyons on this point.

Mr. Bentley testified concerning a meeting of maintenance employees held in the break room by Mr. Kramer and Mr. Osmer two or three days before he circulated his Cesar Chavez petition. He stated in answer to the question "Was the union discussed at all at this meeting?" that he didn't know, that he believed he said something about it, that he did not know. In answer to the further question "What did you say about the union at this meeting? he responded:

> "Well, we'd get more money if we had a union in there. They were trying to tell us, you know, that they couldn't afford to pay us very much more. I also said the thing about Tommy Foster's $750,000 home, and that's when I, you know started getting in trouble.... Now someone in the room -- there were about a dozen of us -- had mentioned at the meeting wages. I don't know who it was, and I don't know exactly what was said."
>
> "Then Jake went into his little speech about how they couldn't afford to pay us as much as we wanted. Then I popped off at the mouth and said something about Tommy Foster's $750,000 home, and I said, 'Maybe if the union was in, we'd make more money, make enough to live on', something to that effect."

"And he turned to me and he said, ‘Do you have any objection to Tommy Foster's house?’ And I said 'No.’ And he said, "Do you have any objections to my house?" And I said 'I haven't seen your house.’

"And he said, 'You know your job could be eliminated.’ That's the first mention of my job being eliminated, right there. I pretty much shut up through the rest of the meeting....Now I can't remember exactly like I said, like I told you."

Mr. Kramer testified that at this meeting Mr. Bentley indicated that he felt terrible that Tom Foster was spending $400,000 on a house and he wished that he would spend more money on giving the employees more wages. Mr. Kramer answered that it was Mr. Foster's right to live in the kind of house he wanted to, the same as it was for Mr. Bentley or himself, that he was also fulfilling obligations to the community by providing jobs for people, that he could just sell everything and stop everything and he would be as well taken care of. Mr. Kramer concluded by saying, "We wouldn't have a job with the company and we would be looking someplace else."

In view of the expressed uncertainty of Mr. Bentley about what was said at this meeting, I credit the version of Mr. Kramer. I do not find Mr. Kramer's words to be a threat or coercion with respect to the union activity of Mr. Bentley or any other employee. I do find that through the episode of the Cesar Chavez petition, Respondent by its supervisor Mr. Doidge had knowledge of Mr. Bentley's union activity. However, I do not find this to be a motivating factor in the transfer of Mr. Bentley to the processing plant. The compelling evidence is that the job in the feed mill delivery department was temporary. Mr. Bentley was informed of this when he was

first employed there. Mr. Andrews also knew the job was temporary and tried to prolong Mr. Bentley's stay. The work that Mr. Bentley would have done was not done by someone else. Maintenance in this department had been done by one person before the special project of building the stingers called for someone to assist Mr. Andrews. When the special project was completed and the backlog stabilized so that one man could do the job, it was a proper management decision to let Mr. Bentley go. He was not terminated. He was transfered. Although the place he went was already organized, he was also referred to an unorganized entity for employment, but chose instead to take a job in the processing plant. I find that his union activity played no part in either his transfer or his ultimate termination.

C. The Layoff of Arthur Hay

Arthur Hay was employed by Respondent as an electrician in the maintenance department of the feed mill February 15, 1977. At the time of his employment Larry Elam and Ken Stinson were working as electricians. Ivan Nix was hired as an electrician after him.

In June, 1977 Mr. Kramer first talked to Mr. Jantz about dividing the maintenance department into two departments, one to continue doing maintenance work and the other to do mostly new construction work, matters that were handled differently in accounting than regular maintenance work, the second department to be known as special projects. Prior to this, special projects work had been done by the maintenance department under Mr. Jantz. Mr. Jantz went on vacation and when he returned he headed the special projects department and Ken

Stinson headed the maintenance department. The employees Mr. Jantz supervised were already working on special projects work. The only one he asked to work for him was Larry Elam. With respect to Mr. Hay, Mr. Jantz said that he worked in special projects most of the time except when possibly he was on night shift. From Mr. Hay's testimony it is difficult to conclude when he was in and when he was out of special projects. However, it appears from the entire record that he was working principally on special project work.

Mr. Kramer testified that the number of employees was increased in the maintenance department because there were construction projects that could not be completed with the normal staff and that this increase was begun before the special projects department was formed. He testified that Mr. Hay was doing special project work.

In late October, 1977, special projects and maintenance were again reunited into one maintenance department under Jim Osmer. Mr. Jantz's employment with Respondent was terminated at this time. Mr. Hay worked in this department until his lay off on February 25, 1978. At the time of his lay off, Mr. Hay was informed by Mr. Osmer that Respondent was cutting down on the work force and they were going to have to lay some people off. He told Mr. Hay that he had been hired for special projects and, due to that being shut down they were having a reduction, and he was being laid off. He was offered a job in the processing plant at $4.50 an hour, whereas he had been making $6.85 an hour. He did not accept the job.

Mr. Hay was an active union supporter and a member of the organizing committee at the feed mill. He had passed out

authorization cards in September, 1977. Mr. Hay testified with respect to certain supervisors who may have overheard him and other employees discussing union activity matters. Since these supervisors may just as well not have overheard, I cannot and do not find that they did. Mr. Hay and Mr. Jantz both testified that they discussed union matters, including whether supervisors would be represented if the union came in. During this conversation Mr. Hay offered to show Mr. Jantz his withdrawal card from the Teamsters. A conversation between an employee and a supervisor about union activity does not of itself impart company knowledge of a particular employee's union activity, in this case Mr. Hay. Nor does showing a union withdrawal card. A withdrawal card in no way indicates active union participation in current union activity.

Mr. Hay testified that on the last of September or first of October Mr. Osmer came into the break room with 13 or so employees present and said, "I wish somebody would make a phone call to find out if the union was coming in or not so that the boys can settle down and go to work and not be confused." Mr. Hay responded "Well, I can call for a vote, and I can probably have you an answer within five minutes when the date is." Mr. Osmer answered "Do it." Mr. Hay made a phone call to the Teamsters and directly informed Mr. Osmer that he had done so. In answer to the question as to what Mr. Osmer said, Mr. Hay testified:

> "He said, 'Well, I'll have to talk to Jake.' Immediately after -- probably about ten minutes after he went to talk to Jake Kramer, there was a phone call over the PA system. It say, 'Art, come to the office.' And I went to the office, and Jake informed me that I was not to

> talk union on the job, preferably not even off the job. And so I told him that I felt like that during the break and lunch hours that I was considered off the job. And he said, 'Well, just don't talk about it.' And he did bring in the conversation of Pam Hobbs and...' Mr. Hay then related that Mr. Kramer discussed the transfer of Ms. Hobbs and the termination of Mr. Jantz."

Al Souza, a maintenance man at the feed mill, testified that he was present when Mr. Osmer came in the break room. He also overheard Mr. Hay telling Mr. Osmer that he had made his phone, which Mr. Souza had seen Mr. Hay do. With respect to this conversation Mr. Souza testified:

> ".... And he told him he says, 'I got a hold of them. I got hold of the union and they're going to try to make it down, today or tomorrow.' And Jim says, 'Well, it would have been a lot better if you wouldn't have used the company phone.' He said, "You should have done it when you got home or after work or something."

Vern Hamsher, a maintenance employee testified similarly to Mr. Hay and Mr. Souza.

With respect to this conversation, Mr. Osmer testified that on one occasion he met up with Mr. Hay in the corn pile area and asked him "How things going?" and in that conversation Mr. Hay volunteered that he was getting tired of the situation and that he could put a stop to it by making a phone call. When Mr. Osmer asked "A phone call to where?", Mr. Hay responded "Well, to the union hall." Mr. Osmer said "You must know someone there." Mr. Hay showed him a card and said he could call a number and he would have someone out that afternoon to talk to Mr. Kramer. Mr. Osmer said, "I can't tell you to go ahead and make that call. I mean, that's something you do on your own, because that's not up to me." Mr. Osmer then went in and told Mr. Kramer that some-

body would be coining to visit him. Mr. Hay then came in the office. Mr. Kramer asked Mr. Hay if he had made the phone call on his own time and Mr. Hay answered that he had. Mr. Osmer then left.

Mr. Kramer's version is that between 7:30 and 8:00 o'clock in the morning Mr. Hay came to his office voluntarily saying that he was unhappy with the feelings the people were getting about the union and that he wanted to contact someone in the union to get them out there to talk to the people. Mr. Kramer stated that he suggested that Mr. Hay use the public phone for that purpose. He denied ever telling him not to talk about the union on company time.

I credit the version of Mr. Hay, Mr. Hamsher, and Mr. Souza. In any event all versions support the conclusion which I make that Respondent had knowledge of Mr. Hay's union activity.

There was extensive testimony about Mr. Hay having made reports and complaints about safety matters at the feed mill to supervisors and had filed complaints with Cal/OSHA about these safety matters. However, the record is clear that he made these complaints on his own. On no occasion did he participate in concerted activity with his fellow employees in connection with these matters. In fact his Cal/OSHA complaint was precipitated to settle an argument between him and another employee as to who was right with respect to safety conditions. Such does not constitute concerted activity. Neither does volunterring his observations about safety matters when such are solicited by his supervisors during a safety meeting

called for such purposes by these supervisors.

Even though Respondent had knowledge of Mr. Hay's union activity, that union activity I find was no factor in his lay off in February of 1978. That lay off occured as a result of a management determination based on a cost study made of feed mill operations initiated before the advent of union activity among Respondent's employees in September, 1977. Because of that study and a curtailment of special projects, Mr. Osmer was ordered to cut back his maintenance work force to a complement of ten employees, which allowed for one electrician, that being Mr. Elam, the senior and in Respondent's opinion the most qualified. Mr. Hay, being an electrician, was laid off. Mr. Jantz testified that in his experience there were always two electricians, but on cross-examination he stated that at times there was only one electrician in maintenance. Mr. Kramer testified credibly in effect that from time to time there might be more than one but that was because of special work that had to be done. This was not refuted. The cutback was to be effected March of 1978 and the ten employees allowed were two more than pre-special projects. At the time of the lay off of Mr. Hay the remaining special projects on a projection of such had been completed or canceled. Mr. Osmer testified credibly that what remained was "piecemeal-type stuff" that the reduced maintenance force could accomplish as they went along. There was extensive testimony with respect to the use of subcontractors by Respondent. Although some of these contractors did electrical work, there was no demonstration that these subcontractors did work that Mr. Hay would have done had he still been employed or that they indeed were doing his work. To the contrary, I find that there was no change in Respondent's use

of subcontractors and that these subcontractors would have been doing the work they were doing whether Mr. Hay were employed or not.

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D. The Lay-off of Vernon Hamsher

Vernon Hamsher was first employed by Respondent in fryer production. In July of 1977 he transfered to the special projects unit and was hired by Mr. Jantz as a mechanic. When the special projects unit was done away with he became a mechanic under Mr. Osmer and was evaluated by Mr. Osmer as such in December, 1977. Subsequent to that time a classification system was put into effect by Mr. Osmer in which mechanics were classified A mechanic, B mechanic, C mechanic and mechanic's helper. Mr. Hamsher was slotted as a mechanic's helper. When the cutback described above went into effect, Mr. Hamsher and a Mr. Dominic Kane, as the lowest men by classification and seniority, were effected.

Mr. Hamsher's union activity consisted of signing a union authorization card. In November, 1977, Mr. Hamsher and Mr. Souza were by the corn pile when Mr. Osmer came up and asked them what they thought about the union. Mr. Hamsher responded to the effect that it would not hurt to listen to what the union had to say. In this conversation Mr. Souza said that he had signed a union authorization card. Mr. Souza testified that at this meeting he said nothing about signing a card but that at another meeting about this time he did tell Mr. Osmer he had signed a card. Mr. Osmer denies this, but did say that in response to employees asking him what to do with the card, he told them that it was their right to sign them or not. I credit Mr. Hamsher and Mr. Souza but in no way did Mr. Hamsher's statement impart company knowledge of his union activity, whereas Mr. Souza's statement did. Mr. Souza has continued his employment since that time.

I find that Mr. Hamsher was not terminated because of his union activity but for legitimate business reasons, a downstaffing to meet the goals of the department of 10 maintenance employees. On his lay-off Mr. Hamsher was offered comparable employment with Respondent but chose for reasons of his own not to take it, and, when in April C mechanic Ivan Nix left the company in April 1978, Mr. Hamsher was recalled to take his place. This act is an unlikely indication that this employee had just designated its ranks of this particular employee because of union activity as alleged.

E. The Discharge of Otis Hicks

Mr. Otis Hicks was first employed by Respondent in April, 1974 as a general laborer and progressed to a welder's helper. He testified that Respondent had a big lay-off in March, 1975 and he was laid off at that time. He testified that John Osteen was his supervisor when he was reemployed as a welder in November, 1975, in the new construction division. He was discharged on March 22, 1978 by Larry Clemence.

He testified that he first participated in union activities by handing out authorization cards and booklets for the Longshoremen to his fellow employees behind the new construction welding shop and elsewhere starting the first of March, 1978. He testified that he continued passing out cards until he was terminated. On the occasion he passed out cards in back of the welding shop Mr. Osteen was 20 to 30 feet away. I find Mr. Osteen to possess the indicia of supervisory status. However, in back of the welding shop was a common place for employees to gather, and without more than being 20 to 30 feet away, knowledge of Mr. Hicks' union activity cannot be attributed to Mr. Osteen.

Mr. Hicks also attempted to pass out an authorization card to Michael Armstrong, assistant foreman over the plumbing division in construction. It is the contention of the General Counsel that Mr. Armstrong is a supervisor. As assistant foreman he ran the plumbing crew. He designated jobs for the men of his crew and saw that they were carried out. The work they did was the construction of chicken houses on ranches. At all times he has a foreman over him and a supervisor over all of them. He is an hourly paid employee and the work they do is of a routine nature. Essentially the same chicken houses are built over and over again. His duties I find to be those of a lead man in a construction crew. I find no supervisory powers in Mr. Armstrong.

Mr. Clemence testified that after January 30, 1978, he became Mr. Hicks' supervisor but that he had occasion to observe his work habits on a daily basis prior to that time when Mr. Hicks was under the supervision of Ed TenNaple, because he would be on the same job site. Mr. Clemence stated that beginning about December, 1977 or January, 1978 the quality of Mr. Hicks' work performance slipped. Before that he described that quality of Mr. Hicks' work as being "pretty good". At the end of January, Mr. Hicks was slotted into the classification grade of Grade 4 Entry Level Welder. As a result of this Mr. Hicks requested a meeting of Mr. TenNaple, Joe Parravano, and Mr. Clemence. A formal evaluation was filled out to aid in the interview and the quality and quantity of Mr. Hicks' work was discussed and Mr. Hicks was put on a 30 day formal probation. This meeting took place about the end of January 1978. Sometime between the middle and the end of February, 1978 Mr. Clemence became Mr. Hicks' supervisor as well as the supervisor of a

number of other people. In reviewing Mr. Hicks' file the probationary warning came to his attention. On March 8, 1978, he talked to Mr. Hicks and explained to him about being the new supervisor and told him that he had been paying particular attention to him in the shop area and that he had noticed that Mr. Hicks had made a slight improvement, but certainly not enough to take the employee warning out and to take him off probation. He told him that as long as he was making some improvement, he would continue to work with him and that he had to keep making improvement to keep working for them. Mr. Clemence testified that, after the first time he looked Mr. Hicks up, he seemed to have reached some kind of a peak and his improvement had leveled off, came to a plain, and then it was no better afterward.

On March 22, 1978, Mr. Clemence made an entry in Mr. Hicks' file:

> "Not enough change worth writing about, looking at Otis 6 months or 1 year from now I can't see him improving beyond where he is now. In my dealings with Otis up to this time I believe he has not lived up to his employee warning conditions, and at this time, I believe that in order to be fair to Otis and Foster Farms he should be terminated as of 3-23-78. 3-22-78 Larry E. Clemence" (See Respondent Exhibit 23)

This appears to the hearing officer to be a most unusual way to exercise fairness, particularly in view of the 30 day probationary period having long since run on a warning that was precipitated by a request of the employee for discussion of his grade slotting solicited by Respondent. (See Respondent Exhibit 15) Mr. Clemence may have acquired new employees to supervise but Mr. Hicks' probationary status was no surprise

to him. He was privy to the action and was well aware when the 30 day had run. Nevertheless, his actions in and of themselves are not proscribed under the Act. There is no evidence that Mr. Hicks' termination was handled any differently than other terminations in that division nor is there any evidence that would lead to the conclusion that Respondent had knowledge of Mr. Hicks' activity on behalf of the union.

F. Interrogation of Employees

It is alleged that on or about September, 1977, Respondent, by and through its agent and supervisor Jake Kramer, interrogated its employees about their protected union activities.

The General Counsel in his brief directs the attention of the administrative law officer to the events as found above with respect to Mr. Hay having made a telephone call to the union at the request of Mr. Osmer. While I fully credit Mr. Hay's version, I do not find Mr. Kramer's actions to constitute illegal interrogation or a violation of any other rights of employees granted under the Act. I find that he essentially told Mr. Hay not to conduct union business on company time.

It is also alleged that on or about September, 1977 and continuing thereafter, that Respondent, by and through its supervisor Jim Osmer interrogated its employees about their protected union activities.

When Mr. Osmer entered the breakroom with 13 or so employees present and made the statements he did with respect to somebody phoning the union, as found above, his actions in that sequence of events constituted improper interrogation

of employees.

I further find that Mr. Osmer improperly interrogated employees when he asked Mr. Hamsher and Mr. Souza what they thought about the union in the event described above in connection with the lay-off of Vern Hamsher.

Kenneth Burdno, an employee who operates the feed batching panel in the feed mill, stated that on one occasion late in September, 1977 Mr. Osmer came into the room and asked him what he thought about the union. Mr. Osmer denies having said this. I credit Mr. Burdno and that Mr. Osmers' act constituted unlawful interrogation of an employee.

It is further alleged that on or about September 14, 1977, and continuing thereafter, Respondent, by and through its agent and supervisor Chester Jantz, interrogated its employees about their protected union activities.

I find that in September, 1977 Mr. Jantz approached Vern Hamsher behind the shop and asked him what he thought about the union. This constituted improper interrogation of an employee.

Pamela Hobbs had conversations with Mr. Jantz about union activities among the employees but under all the circumstances, I do not find that Mr. Jantz's actions were other than general conversation on such occasions. The record does not say what was said or by whom.

It is further alleged that Respondent, by and through its agent and supervisor Ken Stinson, interrogated employees about their protected union activities. I could find no evidence of such interrogation by Mr. Stinson and *I* make no finding of fact other than that this allegation has not been proved,

I find that the interrogation of Respondent's employees was the result of a concerted plan on the part of Respondent to lead employees into conversations whereby Respondent would learn as much as it could about the extent of their union activity among its employees for its own purposes. *I* further find that Respondent took action to discourage the organization of its employees so that it could keep the union out. Such activity in and of itself in no way constitutes an unfair labor practice under the Act. An employer does not have to like the organization of its employees and can undertake to inform them of its ideas with respect to a union or the employees need for such. What it cannot do is interfere with the rights of employees granted under Section 1152 of the Act and in illegally interrogating its employees about their union activity as described above it has so done.

G. Threatened Change in Working Conditions

It is alleged that on or about February 1, 1978 Respondent, by and through its agent and supervisor Jim Osmer, threatened employees with a change of working conditions if the union came in.

Mr. Hamsher testified that in January he asked Mr. Osmer for time off in February for his anniversary and was told that something might be worked out, but that if the union came in there would be no way he would be able to work a day or two ahead and take time off like that, that if the union came in, they'd go strictly by the book.

Mr. Osmer's remembrance of this conversation was the same in effect, only the flexibility would be lost because of a stringent law that they would have to follow because of a union contract. He took the opportunity to tell this to

Mr. Hamsher because it was an opportunity to sell the company to an employee. I credit Mr. Hamsher 's testimony. H. Threats of Loss of Employment It is alleged that on or about February 22, 1978, Respondent, by and through its agent and supervisor John Doidge, threatened employees with loss of employment if they continued their union activities.

John DeVasure a dispatcher of feed to the ranches testified:

> " John Doidge told me... for what reason: I guess for my own personal benefit. I was already aware of the fact. What I mean is he told me I could be fired for talking union on the job ... John Doidge said that it was noticed that Ed Lyons had been coming up after he completed his shift and talking to me and to be aware not to talk about the union on the job. I told him I was "fully aware of what could happen about talking union business on the job."

As a dispatcher Mr. DeVasure's job was for a straight eight hours with no lunch break and his duties were to see that the trucks are kept moving, not to be talking union on the job or anything else. There is no evidence that would lead one to the conclusion that an improper no-solicitation rule was being imposed. Mr. Doidge denied telling Mr. DeVasure he was not to talk union matters on the job. I credit Mr. Doidge. But even if he said what they said he said, I would find no violation.

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I. Impression of Surveillance

It is alleged that on or about April 7, 1978, through its agent and supervisor Leroy Hooker, Respondent created the impression of surveillance of its employees engaged in union activity. Mr. Hooker testified that on a Monday morning, the end of December, first of the year, maybe even February of 1978, Nick Perino and Lew Cardey told him that one of his employees, a Bob Rogers, had attended a longshoremen meeting of employees at Divine Gardens in Turlock. He further testified that the subject came up one time when he was transporting two of his employees, Paul Jaegel and Ken Cooper, back to the feed mill from Stockton in his pickup. As to who initiated the conversation and what was said, and by whom, he could not remember other than that he told them he knew that one of his employees, Bob Rogers was at the meeting. Mr. Jaegel/ who was under a severe personal strain at the time, testified as to the event in the pickup:

> "The extent of the conversation had to do with the meeting at the Divine Gardens in Turlock .... "Well, I believe it was a Monday and the meeting was on a Sunday, and I was supposed to have gone, and didn't go, and I said this to Leroy, and he said, "Well, I know you didn't go, because I know who was there". And that was about it.

I credit Mr. Jaegel's version of the event and find that it took place early in January, 1978, The complaint alleges that the event took place on or about April 7, 1978. This is apparently long after meetings were taking place at Divine Gardens. The record is clear that the last such meeting took

place in January. I find that the events related by Mr. Jaegel took place on the day after such meeting. I further find that the alleged date of "on or about April 7, 1978" put Respondent on notice as to his defense in this matter. Respondent was aware of the Divine Garden meeting and the period of union activity among its employees.

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Conclusions of Law

The numbered paragraphs referred to in these conclusions of law are those set forth in the allegations in the complaint.

1. The allegations set forth in Paragraph 10a are not supported by the facts. Mr. Kramer as manager of the feed mill had the right to tell Mr. Hay not to conduct union activity on company time. There is no evidence of any improperly imposed no-solicitation rule. American Shipbuilding Company, 100 LRRM 1269.

2. The allegations set forth in Paragraph 10b are supported by the evidence. No matter what the motive of the employer, it is an incursion into the rights of employees for Respondent to question them about their union activity and this includes asking what they think about the union. It also includes asking a group of employees if one would call the union even if he wanted things to come to a rest. This constitutes interfering, restraining, and coercing employees in their Section 1152 and Section 1153 (a) rights. Union activity is for the employees alone. Urging them to act is unlawful interference. Guaranteed Power Vacuum Suc. Co., NLRB, 1978, 100 LRRM 1184, Amoco Oil Co., NLRB, 1976, 223 NLRB No. 134, 92 LRRM 1027.

In accordance with the above, I find that Respondent through its supervisor Mr. Osmer unlawfully interrogated Art Hay, Vernon Hamsher, Al Souza, and Kenneth Burdno, thereby interfering with, restraining, and coercing employees in the exercise of their Section 1152 rights, in violation of Section 1153(a) of

the Act.

3. The allegations in Paragraph 10c are supported by the evidence. I find for the reasons set forth in Paragraph 2 above that through the interrogation of its employee by its supervisor Chester Jantz, Respondent violated the Section 1152 and Section 1153(a) rights of its employees.

4. I find that the allegations set forth in Paragraph 10d with respect to the interrogation of employees by Ken Stinson have not been proved.

5. I find the allegations in Paragraph 10e have not been proved. Pamela Hobbs was an active union supporter and Respondent was aware of this. But even with Respondent knowledge of her activity through John Willis or otherwise, I still find that Ms. Hobbs was transfered to building A not because of union or protected concerted activity, but because Respondent wanted her out of the office, not because it was crowded, but because it wanted to maintain the confidentiality of employer business affairs. It had the right to do this, and took the only reasonable means available to accomplish it. It kept Ms. Hobbs in her job and transfered her to building A from which location the work could be accomplished, with slight adjustment, just as effectively.

In NLRB v. Allied Products Corp., CA 6, 1977, 548 Fed. 2d 644, 94 LRRM 2433, the Court said:

> " ... We have in the past recognized the need to balance the right of employees to be represented ... with the right of the employer to formulate, determine, and effectuate its labor policy with the assistance of employees not represented by the union with which it deals".

Westinghouse Elec. Corp. v. NLRB, CA6, 1968, 398 Fed. 2d 669, 68 LRRM 2849; Illinois State Journal Register, Inc. v. NLRB, 412 Fed. 2d 37, 71 LRRM 2668.

It follows from this that an employer does not have to make its confidences known to an employee who has openly declared that her interests lie with the organizational activity of her fellow employees.

6. I find that the allegations in Paragraph 10f have not been proved. Mr. Bentley was an active union supporter and Respondent through its supervisor John Doidge had knowledge of this activity. Nevertheless, an employee's union activity is no bar to discharge or transfer so long as the discharge or transfer is not motivated by the desire either to discourage or encourage union membership. NLRB v. Condenser Corp., CA 3, 1942, 128 F 2d 67, 10 LRRM 483. Timing is important. Discharge or layoff of an employee immediately after the employer has learned of his union activity is always a suspicious circumstance. But such timing is not proof of discrimination. It is evidence which can be overcome by positive proof that the cause was proper. Boston and Lockport Block Co., NLRB, 1952, 29 LRRM 1388. I find that Respondent has established by substantial positive proof that Mr. Bentley's transfer was for proper business reasons, and not because of his union activity.

7. I find that the allegations in Paragraph 10g have not been proven by the evidence. Leroy Ross instituted the discharge for cause. Mr. Bentley, during a probationary period, did not measure up to Respondent's attendance requirements. Ralph Meraz, as personnel director of the division, verified the

cause and determined that the discharge was in keeping with processing plant policy. There was no discrimination against Mr. Bentley for union activity or otherwise.

8. I find that the allegations in Paragraph 10h have been proved by the evidence. When Mr. Osmer told Mr. Hamsher that Respondent would lose flexibility in granting time off if the union came in, he interfered, restrained, and coerced employees in the exercise of their Section 1152 rights under the Act. Flexibility in time off is an economic benefit which, in the event a union came in, could easily be bargained for between an employer and a labor organization. To tell an employee that if a union came in they would lose such a benefit is a threat of loss of that benefit, interfering with, restraining, and coercing the employees in their right to organize or not organize as they saw fit. Such action does not constitute a mere description of one of the rights the employees now enjoy. It is the threat of loss of that benefit through union activity. I find that by these acts Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 1152 rights, in violation of Section 1153 (a) of the Act.

9. I find that the allegations in Paragraph 10i have not been proved by the evidence. It is not a violation of the Act for a supervisor to tell an employee not to talk union on the job absent evidence that employees can talk about everything else on the job but the union. Mr. DeVasure described his job as one that in affect called for constant attention to what he was doing. It did not leave time to chat with other employees about the union or anything else. In

any event, I credit Mr. Doidge that such a conversation did not take place.

10. I find the allegations in Paragraph 10j have not been proved by the evidence. I find that Respondent through its supervisor Jim Osmer had knowledge of Mr. Hay's union activity. Mr. Hay's layoff took place in late February, 1978 at a time when union activity at the feed mill if not over, was well on the wane. I am not convinced that he was laid off for his union activity. Other employees in the feed mill about whose union activity Respondent had knowledge were not discriminated against. These include Al Souza and Ed Lyons. There is no reason why suddenly Respondent would pick out Mr. Hay and decide to lay him off because of union activity that others were similarly taking part in. With respect to Mr. Hay's complaints about safety matters, as discussed above, I have found that under the circumstances Mr. Hay's complaints were done as part of his duties or in a unilateral manner that I do not find to be concerted activity. I find that Mr. Hay was laid off by Respondent because of a lack of work which brought about a cut back in the work force, a legitimate management prerogative.

11. For the reasons set forth in 10 above with respect to union activities, I find that the allegations set forth in Paragraph 10k are not supported by the evidence. Vernon Hamsher was laid off for legitimate management reasons and not for his union activity.

12. Paragraph 101 of the complaint has been dismissed with prejudice. Once a matter has been scheduled for hearing and that hearing has commenced, a complaint should not be

permitted to be withdrawn simply because the charging party is not available. Dominic Kane, the charging party was out of the state and it was not known when he would return if ever.

13. The allegations set forth in Paragraph 10m are not proven. Because Respondent knowledge of Otis Hicks' union activity was not established, this allegation must fail.

14. The allegations set forth in Paragraph 10n are not proven. Pamela Hobbs' employment was voluntarily terminated under circumstances that do not lead me to conclude that she was constructively discharged. Respondent had a legitimate basis for combining the ingredient scheduling function with that of ingredient purchasing. Ms. Hobbs' refusal to accept the new job offerred her can fairly be regarded as a defiance of her employer's managerial authority and an attempt to dictate her own terms of employment. She did what she felt she had to do; she resigned. But Respondent is not accountable for that. St. Joseph's College, 228 NLRB No. 87 (1977), 94 LRRM 1726.

15. The allegations set forth in Paragraph 10o are supported by the evidence. I find that Respondent through its supervisor Leroy Hooker created the impression of engaging in the surveillance of employees engaged in protected union activity. For a supervisor to tell employees that management knew who was attending union meetings interferes with, restrains, and coerces those employees in the exercise of their Section 1152 rights. NLRB v. Swan Fastener Corp., CA 1, 1952, 199 Fed- 2d.935, 31 LRRM 2082. This constitutes a violation of Section 1153 (a) of the Act.

The Remedy

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

Having found that Respondent has violated Section 1153 (a) of the Act by interrogating employees, threatening employees with changes in working conditions, and giving employees the impression that they were under surveillance, I shall recommend that Respondent make known to its employees that it has been found in violation of the Act and that it has been ordered to cease violating the Act and not to engage in future 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 recommendations:

ORDER

Respondent, its officers, agents, and supervisors shall:

(1) Cease and desist from interrogating its employees, threatening them with loss of economic benefit if they should chose to be represented by a labor organization, giving the impression of surveillance over their union activities, or in any other manner interfering with, restraining, or 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 col-

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

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

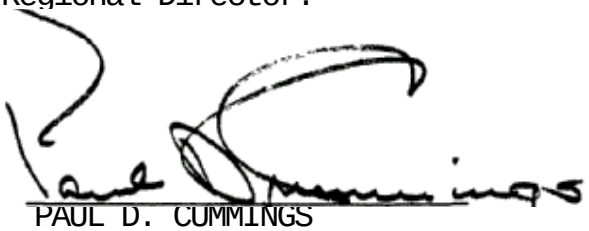
(a) Post copies of the attached notice at times and places to be determined by the regional director. Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

(b) A representative of Respondent or a Board agent shall read the attached notice to the assembled agricultural employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the regional director to assure reasonably that such employees will be informed of the notice. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the notice and their rights under the Act.

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

(d) Copies of the Notice attached hereto shall be furnished to Respondent for posting by the Regional Director.

DATED: June 14, 1979



PAUL D. CUMMINGS
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing during which all parties presented evidence, an administrative law officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act and has ordered us to notify all persons employed by us that we will remedy these violations, and that we will respect the rights of all our employees in the future. Therefore, we are now telling each of you:

1. We will not interrogate any of our employees about their activities on behalf of the Cannery Workers, Food Processing, Drivers, Helpers, Union of Stanislaus and Merced Counties, Local 748, Western Conference of Teamsters, the Warehousing, Processing and Allied Workers Union Local *6,* ILWU, the United Farm Workers of America, AFL-CIO, or any other union.

2. We will not threaten to take away any benefits from our employees because of their activities on behalf of the Cannery Workers, Food Processing, Drivers, Helpers, Union of Stanislaus and Merced Counties, Local 748, Western Conference of Teamsters, the Warehousing, Processing and Allied Workers Union Local 6, ILWU, the United Farm Workers of America, AFL-CIO, or any other union.

3. We will not give the impression in any manner of surveillance over our employees in their activities on behalf of the Cannery Workers, Food Processing, Drivers, Helpers, Union of Stanislaus and Merced Counties, Local 748, Western Conference of Teamsters, the Warehousing, Processing and Allied Workers Union Local 6, ILWU, the United Farm Workers of America, AFL-CIO, or any other union.

4. Each of our employees is free to support, become or remain a member of the Cannery Workers, Food Processing, Drivers, Helpers, Union of Stanislaus and Merced Counties, Local 748, Western Conference of Teamsters, the Warehousing, Processing and Allied Workers Union Local 6, ILWU, the United Farm Workers of America, AFL-CIO, or any other union. Our employees may wear union buttons, pass out and sign union authorization cards or engage in other organizational efforts including passing out literature or talking to their fellow employees about any union of their choice provided this is not done at times or in a manner which interferes with the employee doing the job for which that employee has been hired. We will not discharge, lay off, change the working conditions of or in any manner interfere with the right of our employees to engage in these and any other activities which are guaranteed them by the Agricultural Labor Relations Act.

Dated: FOSTER POULTRY FARMS

By: _____
TITLE

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California. DO NOT REMOVE OR MUTILATE.