Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MIRANDA MUSHROOM FARM, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 78-CE-3-M
MIRANDA MUSHROOM FARM, INC., and ARIEL MUSHROOM FARM, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 78-CE-5-M 78-CE-7-M 78-CE-8-M 78-CE-9-M
MIRANDA MUSHROOM FARM, INC. Respondent and CHARLES HARRINGTON, Charging Party.	Case No. 78-CE-12-M
MIRANDA MUSHROOM FARM INC., and ARIEL MUSHROOM FARM, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner, and CALIFORNIA INDEPENDENTS UNION, Intervenor.	Case No. 78-RC-2-M 6 ALRB No. 22

DECISION AND ORDER AND DECISION ON CHALLENGED BALLOTS

On March 22, 1979, Administrative Law Officer (ALO) Beverly Axelrod's Decision in this matter was transferred to the Board. Thereafter, the General Counsel and the Respondent each filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent that they are consistent herewith and to adopt her recommended Order as modified herein.

Respondent, Miranda Mushroom Farm, Inc., and Ariel Mushroom Farm, herein jointly called Respondent, are joint agricultural employers engaged in the production and marketing of mushrooms. This proceeding involved issues raised by challenged ballots, post-election objections, and a complaint alleging that Respondent committed certain unfair labor practices, in violation of Section 1153 (a), (b) and (c) of the Labor Code.

Following an initial representation election held on January 17, 1978, a runoff election between the United Farm Workers of America, AFL-CIO (UFW) and the California Independents Union (CIU) was conducted on January 25, 1978, among Respondent's agricultural employees. The official tally of ballots showed the following results:

UFW	59
CIU	58
Challenged ballots	11
Total	128

The ALO made no resolution or recommendation with respect to the challenged ballots as she concluded that the CIU was not a labor organization and that the election should be set aside because of Respondent's unfair labor practices. We reject the ALO's recommendation to set aside the election of January 25, 1978, based on the status of the CIU, because of our contrary conclusion that the CIU is a statutory labor organization. As the challenged ballots are sufficient in number to determine the outcome of the election, we have considered and resolved all challenges and shall direct the Regional Director to prepare a revised tally of ballots based upon this Decision.

In the event that the revised tally of ballots indicates an election victory for the UFW, whose conduct was not objected to as grounds for setting aside the election, certification of the UFW shall issue pursuant to 8 Cal. Admin. Code Section 20380. However, in the event the revised tally of ballots shows that the CIU received a majority of the valid votes cast in the election of January 25, 1978, that election shall be set aside because of Respondent's assistance to the CIU in violation of Labor Code Section 1153(b) and (a).

I. DECISION ON CHALLENGED BALLOTS

Eleven employees voted challenged ballots. The Regional Director conducted an investigation and issued his report on

challenged ballots on March 27, 1978.

No Exceptions Filed

With respect to the challenges to the ballots of Manuel Hernandez and Pedro Martinez, we adopt, pro forma, the Regional Director's recommendations, concerning which no exceptions were filed. Roberts Farms, Inc., 5 ALRB No. 22 (1979). Accordingly, we hereby sustain the challenge to the ballot of Manuel Hernandez, who was not employed during the eligibility period, and overrule the challenge to the ballot of Pedro Martinez, who was on an approved leave of absence.

Name Absent From Eligibility List

The Regional Director made no recommendation as to the challenge to the ballot of Enrique Fuentes pending the outcome of one of the alleged unfair labor practices which was at issue in this matter. As we adopt the ALO's conclusion that Respondent discriminatorily denied rehire to Enrique Fuentes in violation of Labor Code Section 1153 (c) and (a), the challenge to his ballot is hereby overruled.

Confidential Employee

The Regional Director recommended that the challenge to the ballot of Barbara Crouch be sustained, based on his conclusion that she was a confidential employee. A confidential employee is excluded from the bargaining unit if the individual assists and acts in a confidential capacity to any person who formulates, determines and effectuates management policies with respect to labor relations. Hemet Wholesale, 2 ALRB No. 24 (1976).

Barbara Crouch was Respondent's sole clerical employee,

and she worked directly for Brian Peyton, who had ultimate control over Respondent's labor relations policy at the Miranda Mushroom facility. Prior to her transfer to the office, Ms. Crouch was supervisor of the packing shed and had responsibility for some of the same clerical functions she performed as secretary to Mr. Peyton. Ms. Crouch's office duties, however, did not directly involve her in Respondent's labor relations or management policies. Both Brian Peyton and Ms. Crouch testified that although she was not consulted or included in conversations relating to labor relations or union matters, Peyton allowed her to remain present in their shared office space during such conversations between Peyton and other individuals.

Her presence in the office at those times indicates that she occupied a position of confidence with Peyton. We find that confidential status, rather than the type of work done, is the determining factor. Our conclusion that she is a confidential employee is amply warranted by the policy underlying the exclusion of confidential employees from bargaining units, i.e., that employees should not be placed in a position involving a potential conflict of interest. Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669 (6th Cir. 1968), 68 LRRM 2849. We, therefore, sustain the challenge to her ballot.

Employees Hired to Vote in the Election

The Regional Director made no recommendation with regard to the challenges to the ballots of Steven Fries and Primitive Nuno, as these employees were the subject of post-election objections and unfair labor practice charges. The ballots of

these two voters were challenged pursuant to 8 Cal. Admin. Code Section 20355(4) on the ground that Respondent employed them in violation of Labor Code Section 1154.6.

Section 1154.6 provides: "It shall be an unfair labor practice for an employer ... willfully to arrange for persons to become employees for the primary purpose of voting in elections." The General Counsel contended that Respondent's asserted justification, that Fries was hired to replace another employee, must be considered pretextual because: (1) Fries was hired a week or more before the departure of the employee he allegedly replaced and the position required only one employee; (2) Fries' term of employment coincided with the elections conducted at Respondent's farms; and (3) Fries had no previous experience working with mushrooms.

Brian Peyton and Steven Fries testified that Fries was hired as the result of a request made by his father at Respondent's Christmas party. There was also testimony that the position often required more than one employee, and that Fries' employment was of short duration because he wanted only interim employment between his layoff and recall by another employer. There was no evidence that Fries required any special training for the work he performed, or that he was idle or given "make-work" assignments, or that it was not Respondent's usual practice to replace employees who were going on a leave of absence. The evidence regarding Steven Fries' employment, including the timing is, without more, consistent with Respondent's statement that it hired him as a favor to his father. As we find that there is insufficient evidence to establish that the Employer hired Fries for the purpose of voting in the election,

the challenge to his ballot is hereby overruled.

The ballot of Primitive Nuno, an assistant mushroom grower, was challenged on the grounds that Respondent had hired him primarily to vote in the election. The General Counsel adduced extensive testimony on Nuno's organizational efforts for the CIU in support of the complaint allegation as to Respondent's unlawful assistance to the CIU, but the Employer presented the only evidence on the issue of the challenge to his ballot. Brian Peyton testified for the Employer that Nuno was hired in November 1977, after he responded to a newspaper advertisement placed by Stoller Research, a joint agricultural employer with Miranda Mushroom, Inc. Peyton further testified that Nuno remained in Respondent's employ until May 1978. As there is insufficient record evidence to establish that Nuno was employed primarily to vote in the election, the challenge to his ballot is hereby overruled.

Supervisors

The ballots of six voters were challenged by the UFW on the grounds that 'they are supervisors. The issue of the supervisory status of Jose Berrea, Jose Mosqueda, Barbara Crouch and Arturo Monjares was set for hearing. Although both the CIU and Respondent filed exceptions to the Regional Director's determination that Santos Orozco and Arturo Miraga were supervisors, their exceptions were not accompanied by declarations and other documentary evidence as required by 8 Cal. Admin. Code Section 20363(b). Broad, conclusory statements of disagreement with the Regional Director's findings are, without more, insufficient. Absent adequate exceptions, we are entitled to rely on the

Regional Director's report, and, therefore, we hereby sustain the challenges to the ballots of Orozco and Miraga.

The ballot of Jose Berrera was challenged by the UFW, which contended that he substituted for supervisor Humberto Godoy when Godoy was absent. Sporadic substitution for a supervisor which involves handling routine matters and/or carrying out instructions does not transform an employee into a supervisor. Frederick Steel Company, 149 NLRB 5, 57 LRRM 1285 (1964). Berrera testified that he so substituted for a period of one week in January 1978, and had substituted on five or six other occasions, unspecified as to date or duration, that his only duty during such substitutions was to count the number of boxes picked by the piece-rate crew members, that he never instructed or directed the employees in the picking operations because they knew what to do, and that decisions as to which mushroom houses were to be picked were made by others. Berrera's testimony was corroborated by both Brian Peyton and Jose Arias, who testified on behalf of the Employer. Although employee Ramon Sicarios testified that supervisor Godoy had told employees that Berrera was to be obeyed in Godoy[1]s absence, Berrera testified that no instructions or orders were ever given by him. Even though Berrera may have had latent supervisory authority while substituting for Godoy, the vast majority of his time was spent in a nonsupervisory capacity. Accordingly, the challenge to Jose Berrera's ballot is hereby overruled.

The UFW challenged the ballot of Jose Mosqueda, contending that he was a supervisor of the Employer's vehicle

maintenance department. Antonio DeAnda, an employee in that department, testified that Mosqueda was his supervisor, that Mosqueda directed and assigned work to him and required him to work on one particular Sunday. There was no evidence that the Employer authorized Mosqueda to exercise any statutory supervisory authority on behalf of the Employer, e.g., to hire, transfer, suspend, or discharge employees, and no evidence that Mosqueda's instructions to DeAnda required the use or exercise of independent judgment. Jose Mosqueda, Brian Peyton and Bob Tate, the supervisor of Employer's general maintenance department, testified consistently in support of the Employer's position to the effect that Mosqueda was merely translating orders from Peyton or Tate and that any directions to DeAnda involved instructing the less-experienced DeAnda in vehicle repair and. maintenance. Additionally, Peyton testified that it was he who had required DeAnda to work on the Sunday in question when he resolved a dispute between DeAnda and Mosqueda and determined that it was DeAnda's turn to work on that Sunday.

In addition there is uncontradicted evidence which aids in our conclusion that Mosqueda was merely a worker who exercised the control of a skilled employee over a less-experienced worker rather than a supervisor who shared the power of management. Northern Virginia Steel Corp. v, NLRB, 300 F.2d 168 (4th Cir. 1962), 49 LRRM 2806. The testimony was in agreement as to the following facts: Mosqueda and DeAnda performed the same duties; they were both paid on an hourly basis; DeAnda had recently been transferred by Peyton from his forklift-operator duties to the

maintenance department; there were 12 persons in the maintenance department under the supervision of Bob Tate; it was necessary for Peyton and Tate to make use of a bilingual employee (such as Mosqueda) in communications with DeAnda, as neither Peyton nor Tate spoke Spanish; and Mosqueda was not included in management meetings. As we find these undisputed facts persuasive, we hereby overrule the challenge to Mosqueda's ballot.

The ballot of Arturo Monjares was challenged by the UFW, which contended that he was a supervisor. Although Monjares was a salaried employee, there was no evidence that he possessed or exercised any authority to affect the employment status of any employees. Only the Employer offered testimony regarding Monjares' duties. Brian Peyton testified that Monjares, as an assistant mushroom, grower, was primarily in a training role under the supervision of the head grower, Bill Pitt. Peyton testified that Monjares' duties consisted of monitoring the growing conditions in all of the mushroom houses, but that he had no authority to direct workers. While there were three or four other employees in this job classification, Monjares was the only one whose ballot was challenged. On the basis of the uncontroverted testimony presented by the Employer, we find that Monjares was not a supervisor and, therefore, the challenge to his ballot is hereby overruled.

Conclusion

We hereby direct the Regional Director to open and count the ballots of Jose Berrera, Steven Fries, Enrique Fuentes, Pedro Martinez, Arturo Monjares, Jose Mosqueda and Primitive Nuno and to

prepare and issue a revised tally of ballots. We direct that the ballots of Manuel Hernandez, Barbara Crouch, Santos Orozco, and Arthur Miraga not be opened as we have found those individuals are excluded from the bargaining unit.

II. OBJECTIONS TO CONDUCT OF THE ELECTION

The CIU objected to the Regional Director's determination that two ballots were to be counted as votes for the UFW. The CIU alleged that the ballots were improperly marked and, therefore, were either void or should be counted as votes for the CIU. This matter was among the issues which were consolidated for purposes of the hearing. However, as the CIU failed to produce any evidence on the issue, we hereby dismiss the objection.

Many of the post-election objections filed by the UFW had reference to the Employer's pre-election assistance to the CIU, which assistance was also the basis for allegations in the complaint that the Employer thereby violated Labor Code Section 1153(b). As we have determined that the election will be set aside if the revised tally of ballots indicates the CIU has received a majority of the ballots cast (Part III below), it is unnecessary to consider the remaining objections to the conduct of the election.

III. UNFAIR LABOR PRACTICES

1. Unlawful Assistance to the CIU

Before we consider the issues of Respondent's alleged domination of or assistance to the CIU, we must first determine whether the CIU constitutes a labor organization under the Act. The ALO found that the CIU was formed to prevent the UFW from

becoming the collective bargaining representative of Respondent's employees, that the CIU's officers functioned in name only, and that the CIU was not an ongoing organization. The ALO concluded that, since the CIU lacked organization and did not exist for the necessary purposes, it was not a labor organization as defined by Labor Code Section 1140.4 (f).

We reverse the ALO's findings and her conclusion. The statute defines a labor organization as:

> ... any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work for-agricultural employees. [Labor Code § 1140.4(f).]

Thus, a group is a labor organization if there is employee participation in an organization which exists, at least in part, to deal with the employer concerning working conditions. NLRB v. Cabot Carbon Co., 360 U.S. 203, 44 LRRM 2204 (1959). The statute does not require that the group have a formal organizational structure nor that the proposed representational activities have come to fruition. Royal Packing Company, 5 ALRB No. 31 (1979).

In the case before us, we find that the CIU was formed and run by employees and that the CIU held meetings, elected officers, established a dues schedule, and maintained a bank account. These facts more than adequately establish employee participation in an organization under our standard in Royal Packing Company, supra. Furthermore, the vice-president of the CIU, Jose Mosqueda, testified that the general purpose of the CIU was to fight for better working conditions and more pay. Noting

that the CIU has not had an opportunity to act upon this stated purpose and since Jose Mosqueda's testimony was not discredited, we find that the CIU existed, at least in part, for the purpose of dealing with Respondent concerning employment conditions. We therefore conclude that the CIU falls within the statutory definition of a labor organization.

We turn now to the question of interference with or unlawful support of the CIU by Respondent. Labor Code Section 1153(b) makes it an unfair labor practice "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." As we have previously stated,

> A violation of this portion of the Act requires a finding that the degree and nature of the employer's involvement with the labor organization has impinged upon the free exercise of the employees' rights under Section 1152 of the Act to organize themselves and deal at arm's length with the employer. [Bonita Packing Company, 3 ALRB No. 27 (1977) , at p. 2 of slip opinion.]

We agree with the ALO's conclusion that Respondent violated Section 1153 (b) by its involvement with the formation of the CIU and its support of the CIU. The record shows that Respondent's general manager, Brian Peyton, suggested to employee Coombs that he form an independent union. Peyton also allowed the CIU to hold two meetings in his office and to use Respondent's business telephone for CIU purposes. This support of the CIU occurred during the UFWs organizing efforts. Where there are two labor organizations in contention for the right to represent the employees, the employer's preferential treatment of one union

clearly tends to inhibit and interfere with the employees' exercise of the rights guaranteed to them by Section 1152 of the Act. Respondent accorded the CIU preferential treatment by allowing the union to use the company premises and telephone for union activities and by permitting the CIU to campaign inside the mushroom growing houses, benefits which were not made available to the UFW. Such disparate treatment of the two unions, as well as the fact that Respondent had promoted the formation of the CIU, clearly upset the equality of organizational opportunities and constituted unlawful assistance to the CIU and interference with employees' statutory rights, in violation of Section 1153 (b) and (a) of the Act. We find that Respondent's unlawful conduct tended to affect the results of the election and constitutes grounds upon which to set aside the election. We therefore order that, should a revised tally show that the CIU received a majority of the valid votes cast, the election be set aside. Agri-Seeds, Inc., 237 NLRB 133, 99 LRRM 1075 (1978).

The ALO also concluded that Respondent dominated the CIU in violation of Section 1153 (b). However, the ALO concluded that the CIU was not a labor organization and did not recommend disestablishment as a remedy. General Counsel excepts to the ALO's failure to recommend disestablishment of the CIU. Disestablishment of a dominated union is the proper remedy to prevent any future interference with the employees' free choice of representative and to remove the consequences of an employer's unfair labor practices. The Carpenter Steel Co., 76 NLRB 670, 21 LRRM 1232 (1948). However, we reject the ALO's conclusion that Respondent

dominated the CIU. To decide whether a labor organization is dominated, we must determine whether the organization represents a choice freely made by the employees, in their own interests and without regard to the desires of their employer, or whether the employees formed and supported the organization because they knew their employer desired it and feared the consequences if they did not. NLRB v. Wemyss, 212 F.2d 465, 34 LRRM 2124 (9th Cir. 1954), To make this determination, we will consider the totality of the circumstances surrounding the employer's conduct which indicate whether the employees created and/or supported the union of their own free choice. Company assistance in the formation of the union, company contribution of time, facilities, or money, employer conduct which threatens employees with undesirable consequences for supporting an "outside" union or which encourages employee participation in the -inside union, participation of managers and supervisors in the union, and a history of employer anti-union animus have all been considered evidence relevant to a determination of domination. Evidence of actual employer control of the union as well as evidence of more subtle employer acts which tend to coerce and influence employees will be considered. Virginia Electric Power Co. v. NLRB, 314 U.S. 469, 9 LRRM 405 (1941); International Association of Machinists v. NLRB, 311 U.S. 72, 7 LRRM 282 (1940); Utrad Corporation v. NLRB, 454 F.2d 520, 79 LRRM 2080 (7th Cir. 1971).

In this case, we find that, although Respondent's involvement with the CIU constitutes unlawful assistance, its conduct does not rise to the level of domination. The CIU was

formed and run by employees. Contrary to the ALO, we find that the CIU's officers and organizers were nonsupervisory employees. Jose Mosqueda, Earl Fries, and Herbert Coombs were not supervisors nor were they in the position of lead men who functioned as a conduit for orders from upper management to the rest of the employees.[1/] Consequently, we find that there was no reasonable cause for the employees to believe that these CIU leaders were acting on Respondent's behalf. See International Association of Machinists v. NLRB, supra, 7 LRRM at 286. Furthermore, Respondent engaged in a "no union" campaign and, other than according to the CIU preferential treatment as discussed above, did not advise or encourage its employees to support or vote for the CIU. Respondent also discharged the president of the CIU, Coombs, for an alleged theft prior to the first election. For the above reasons, we conclude that Respondent did not dominate the CIU, and we therefore shall not order its disestablishment.

2. Refusal to Rehire Ismael Hernandez/Enrique Fuentes

Ismael Hernandez, an undocumented worker, was hired by Respondent's supervisor, Humberto Godoy, under the name of Enrique

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[1/]The ALO inadvertently substituted the name of Jose Mosqueda for Jose Berrera when she stated that Mosqueda often substituted for foreperson Humberto Godoy. Our examination of the record leads us to a contrary determination of supervisory status as to both. See Part I, Decision on Challenged Ballots. There was no record evidence to support the ALO's finding that Earl Fries had authority over other employees. Although Herbert Coombs described himself as a leadman, there is insufficient evidence from which to conclude that he is a supervisor within the meaning of Labor Code Section 1140.4(j).

Fuentes[2/] in December, 1977. This witness originally testified that he was Enrique Fuentes and was not correctly identified as Ismael Hernandez until the latter stage of the hearing. However, the ALO, who was in a position to observe the demeanor of Ismael Hernandez, generally credited his testimony. The ALO also credited the testimony of two other witnesses that Ismael Hernandez was employed by Respondent under the name of Enrique Fuentes.

The ALO found that Respondent violated Labor Code Section 1153 (c) and (a) by its refusal to rehire Ismael Hernandez, aka Enrique Fuentes, immediately after his employment was interrupted by a four-day jail sentence and deportation. Respondent's usual practice was to reinstate workers when they returned after such deportation, if it had received timely notification of the situation and the employee returned within a reasonable time thereafter. Respondent's general manager, Brian Peyton, testified that a "reasonable time" could be for a period for as long as three weeks. Rudolfo Hernandez, Ismael's cousin, testified that he notified supervisor Humberto Godoy the day after Ismael's arrest on December 31, 1977, and Ismael personally applied to Godoy for rehire on January 6, 1978. Respondent concedes that there was work available during the period when Hernandez applied for rehire, as Peyton testified that he personally hired approximately 15 workers during the month of January, 1978.

[2/] Respondent's records indicated that another employee worked for Respondent earlier in 1977 under the name Enrique Fuentes. Rudolfo Hernandez testified that an employee using Enrique Fuentes' social security card was working for Respondent at the time of the hearing.

Noting that Respondent did not come forward with any evidence of a legitimate motive for its supervisor's refusal to rehire Hernandez, the ALO concluded that the refusal to rehire was based on Respondent's knowledge or belief that Hernandez was a UFW sympathizer and, therefore, tended to discourage union activity. The record supports two separate bases from which it may reasonably be inferred that Hernandez was denied reemployment because of his union sympathies or activities.

The record does not establish that Ismael Hernandez ever engaged in any overt union activity during his brief employment, but there is evidence that Respondent knew, or at least believed, he was pro-UFW. During manager Peyton's testimony he referred to a list of employees. Beside each name on the list was a notation, e.g., UFW, CIU, neutral, or ?, which Peyton explained as indicating the probable voting preference of each worker for the representation elections to be conducted among Respondent's agricultural employees. The notations had been made as a part of the services provided, to Respondent by Farm Employers Labor Services (FELS) after it had conducted interviews among Respondent's employees. On the list, beside the name of Enrique Fuentes, was the notation "UFW". It is well established that information or belief concerning an employee's union activities or sympathies need not be accurate if that information or belief provided the motivation for the discriminatory action. Riverfront Restaurant, 235 NLRB No. 41, 97 LRRM 1525 (1978).

Although the record does not establish that Godoy had personal knowledge of the existence of the employee list, or the

notation thereon as to the union sympathies of Fuentes (Hernandez), such knowledge would be consistent with Ismael's uncontradicted testimony that, at the time of the refusal to rehire, Godoy said that if the UFW won, he would not rehire Hernandez.

Respondent contends that Godoy was engaged in unauthorized activities (selling jobs, and hiring male employees under the names of former male employees in order to avoid hiring female workers) and refused to rehire Hernandez for reasons unconnected with Respondent. However, Godoy's reasons were clearly related to the union activity of Hernandez. Rudolfo Hernandez testified to a conversation with Godoy in which Godoy stated that he refused to rehire Ismael because Ismael had reported to the UFW that he (Godoy) was selling jobs to undocumented workers.[3/] Respondent excepted to the ALO's conclusion that Godoy was acting as its agent in that activity, citing Colecraft Mfg. Co. v. NLRB, 385 F.2d 998, 66 LRRM 2677 (1967).

Respondent's exception misses the mark. We are not here concerned with whether Godoy was acting as Respondent's agent in the sale of jobs or in discriminatory hiring on the basis of sex. Rather, we are concerned with the basis for Godoy's discriminatory refusal to rehire Hernandez and whether that basis was one which would reasonably tend to discourage or encourage union activity. As a supervisor, Godoy had express authority to hire and discharge

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[3/] There was testimony that Godoy was charging employees for jobs. The ALO misstated the record in attributing that testimony to Brian Peyton. We find the ALO's misstatement not prejudicial, noting that Respondent's brief to the Board in effect conceded that Godoy was selling jobs to applicants and that Godoy was subsequently discharged (in part) for engaging in that practice.

employees in the exercise of independent judgment. Rudolfo Hernandez testified, and the ALO implicitly credited him, that Godoy himself stated that he refused to rehire Ismael because he had reported Godoy's hiring practices to the UFW. The natural tendency of the refusal to rehire was to discourage employees from supporting the UFW or from seeking assistance from the UFW in matters concerning hire and tenure of employment. We, therefore, find that Respondent's exception is without merit.

On the basis of the above, and the record as a whole, we affirm the ALO's conclusion that Ismael Hernandez, aka Enrique Fuentes, was discriminatorily refused rehire by Respondent in violation of Section 1153 (c) and (a) of the Act.

3. Discharge of Charles Harrington

Charles Harrington filed an unfair labor practice charge on February 9, 1978, alleging that he was discharged for engaging in protected concerted activity. The ALO dismissed the charge because it was not connected with union activity, and, therefore, could not be the basis for an unlawful discharge. We disagree. A discharge motivated, wholly or in part by an employer's retaliation for an employee's protected concerted activity is a violation of Section 1153(a) of the Act. Union activity need not be involved. Maggio-Tostado, Inc., 3 ALRB No. 33 (1977).

We concur in the factual findings as to the circumstances surrounding Harrington's discharge. Charles Harrington complained to the Agricultural Commission that he believed that Respondent was using illegal chemicals in its operations. He testified that he made the complaint, after discussion with another worker, for the

benefit of all Respondent's employees. Section 1152 of the Act guarantees employees the right to engage in concerted activities for the purpose of mutual aid or protection. The NLRB has held that "where an employee makes complaints relating to occupational safety designed for the benefit of all employees, he is engaged in protected, concerted activity in accordance with his Section 7 rights". Alleluia Cushion Co., 221 NLRB No. 162, 91 LRRM 1131 (1975).

A finding that Charles Harrington was discharged because of his complaint about safety is supported by substantial circumstantial evidence: (1) Respondent gave inconsistent reasons for the discharge? (2) Respondent's general manager interrogated Harrington regarding the source of the complaint; (3) the decision to discharge Harrington was made by the general manager rather than by Harrington[1]s supervisor, who testified that a suspension would have been his recommended discipline for Harrington's failure to complete his work; (4) Harrington was discharged shortly after an agent from the Agricultural Commission attempted to inspect Respondent's premises; and (5) Respondent's owner was incensed over the complaint and was present at the time of the attempted inspection by the Agricultural Commission. We find that Respondent's manager, Brian Peyton, seized upon Harrington's inadequate job performance on that day as a pretext to punish him for engaging in protected, concerted activity. We shall order reinstatement with back pay because we conclude that Respondent's discharge of Harrington was clearly a violation of Section 1153(a) of the Act.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Miranda Mushroom Farm, Inc., and Ariel Mushroom Farm, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Rendering unlawful aid, assistance, or support to the CIU or any other labor organization, particularly by allowing representatives of one labor organization to engage in organizational activities on company premises while denying any rival labor organization an equal opportunity to engage in such activities.

b. Failing or refusing to hire or rehire, or otherwise discriminating against, any agricultural employee because of his or her known or suspected union sympathies, membership, or activities.

c. Discharging or otherwise discriminating against employees for engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

d. Interrogating employees concerning their union affiliation or sympathy or their participation in protected concerted activities.

e. In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 1152 of the Act.

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

a. Immediately offer Ismael Hernandez (aka Enrique

Fuentes) and Charles Harrington full reinstatement to their former positions or substantially equivalent positions, without prejudice to their seniority or other rights and privileges to which they are entitled and make each of them 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 discharge or refusal to rehire him.

b. Preserve and, upon request, make available to agents of this Board, for examination and copying, all payroll records and reports, and all other records relevant and necessary to a determination of the amount of back pay due under the terms of this Order.

c. 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.

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

e. Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed at any time during January or February, 1978.

f. Arrange for a representative of Respondent or a

Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees assembled on company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable 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.

g. 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: May 1, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCarthy, Member

NOTICE TO EMPLOYEES

After a hearing at which all parties had a chance to present evidence, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

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

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

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

Because this is true, we promise that:

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

Especially:

WE WILL NOT discharge or refuse to rehire any employee because he or she joins, assists or favors the UFW or any other labor union.

WE WILL NOT discharge any employee because he or she has complained to state authorities about safety.

WE WILL NOT interrogate employees concerning their union affiliation or sympathy or their participation in protected activities.

WE WILL NOT give preferential treatment or unfair assistance to the CIU or any other labor union, such as allowing representatives of one labor union to organize employees on our property while denying other labor unions an equal opportunity to do so.

WE WILL NOT in any like manner interfere with, restrain, or coerce any employee in the exercise of the rights described above.

WE WILL immediately offer Ismael Hernandez and Charles Harrington reinstatement to their old jobs and will pay them any money they have lost, plus interest at 7%, because we discriminated against them by refusing to continue their employment with Miranda Mushroom Farm, Inc., and Ariel Mushroom Farm.

Dated: MIRANDA MUSHROOM FARM, INC., and ARIEL MUSHROOM FARM

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

Miranda Mushroom Farm, Inc. and Ariel Mushroom Farm (UFW, Charles Harrington, CIU)	6 ALRB No. 22 Case Nos. 78-CE-3-M 78-CE-5-M 78-CE-7-M 78-CE-8-M 78-CE-9-M 78-CE-12-M 78-RC-2-M

ALO DECISION

This case involved challenged ballots in a runoff election between the UFW and the CIU and related unfair labor practice charges against Respondent. The ALO found that Respondent dominated and assisted the CIU and as a remedy recommended that the election be set aside. Because the ALO found that the CIU was not a statutory labor organization, she did not resolve the challenged ballot issues. The ALO concluded that Respondent discriminatorily refused to rehire Ismael Hernandez, aka Enrique Fuentes, because he reported to the UFW that one of Respondent's supervisors was selling jobs, but recommended dismissal of the allegation as to Charles Harrington, who was discharged after he reported Respondent's pesticide violations to the Agricultural Commission, because she found that his actions did not involve union activity.

BOARD DECISION

The Board reversed the ALO's decision as to the status of the CIU, finding that it met the standards for a labor organization, as discussed in Royal Packing Company, 5 ALRB No. 31 (1979). Inasmuch as the challenged ballots were outcome-determinative, the Board resolved those challenges, finding that seven of the 11 challenged voters were eligible, and directed the Regional Director to prepare and issue a revised tally of ballots.

The Board rejected the ALO's finding of domination because, although Respondent provided unlawful assistance and support to CIU, it did not give employees reasonable cause to believe that the CIU was acting on behalf of management in soliciting employee support. The Board therefore found it was unwarranted to order the disestablishment of the CIU as requested by General Counsel.

The Board affirmed the ALO's findings and conclusions regarding the unlawful refusal to rehire Ismael Hernandez, but reversed the ALO's conclusion regarding Charles Harrington as the evidence established that he was discharged because of his complaint to the Agricultural Commission. Although that conduct did not involve union activity, the Board held that it was protected concerted activity, which made his discharge a violation of Section 1153(a).

REMEDY

Reinstate Hernandez and Harrington with back pay, plus interest. Post, mail, distribute, and read remedial Notice to all employees.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
MIRANDA MUSHROOM INC., AND ARIEL FARMS, a division of STOLLER RESEARCH COMPANY, INC.,	)	Case Nos. 78-CE-3-M 78-CE-5-M 78-CE-7-M 78-CE-8-M 78-CE-9-M 78-CE-12-M
Respondent,	)	
and	)	78-RC-2-M
UNITED FARM WORKERS OF AMERICA, AFL-CIO, and CHARLES HARRINGTON,	)	
Charging Parties,	)	
and	)	
CALIFORNIA INDEPENDENTS UNION,	)	
Party in Interest.	)	

Boren Chertkov, Esq., and Maurice Jourdane, Esq., of Sacramento, CA and Fresno, CA, respectively for the General Counsel

Adams. Levin, Cohoe, Bosso and Sachs, by Alan J. Levin, Esq. of Santa Cruz, CA for Respondents

Linton Joaquin, Esq. of Salinas, CA for the Charging Party

Earl Fries, of Salinas, CA, for Party in Interest

DECISION

Statement of the Case

Beverly Axelrod, Administrative Law Officer: these cases were heard before me in Watsonville, California on August 28,

29, 30, 31 and September 1, 5, 6, 11 and 12, 1978.[1/]

On January 16 and 17, pursuant to a petition filed by the United Farm Workers of America, AFL-CIO (hereinafter the UFW), an election was held at Miranda Mushroom Farms, Inc. one of the Respondents herein. The California Independents Union, hereinafter CIU, intervened. Because the results of the first election were not determinative, a run-off election was held on January 25. In January and February, during the election period and following it, election objections and related unfair labor practice charges were filed by the Union, by the CIU, and by an ex-employee of Respondent Miranda Mushroom, Charles Harrington.

Following the run-off election,[2/] the UFW, the CIU, as well as Respondents herein filed Petitions to Set Aside the Election, pursuant to 8 Cal. Admin. Code §20365. On March 27, 1978, the Regional Director of the Agricultural Relations Board, hereinafter the Board, issued its Report on Challenged Ballots. Exceptions to the Report were filed by Respondents, the UFW and the CIU.

On May 17, 1978, the Board issued its Complaint that

1/All dates mentioned herein refer to 1978, unless otherwise specified.

2/The results of the first election were: UFW 54
CIU 39
No union 22
challenges 9

The results of the run-off election were: UFW 59
CIU 58
challenges 11

Respondents had engaged in unfair labor practices affecting agriculture pursuant to Agricultural Labor Relations Act, hereinafter the Act, §1140 et. Seg.[3/] The Complaint was based on charges filed in January and February by the UFW and by Charles Harrington. Copies of the charges were duly served upon Respondents. On June 2, 1978 the Board issued its Order consolidating the challenged ballots for hearing with the related objections and unfair practices charged under the Complaint.

All parties were given full opportunity to participate in the hearing, and after the close thereof all parties, with the exception of the CIU, filed briefs in support of their respective positions.

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

Respondents are engaged in mushroom farming. Respondent Miranda Mushroom Inc., is a corporation, whose major stockholder and president is Benjamin Stoller, Phd. Respondent Ariel Farms is a division of Stoller Research Company, Inc. whose major stockholder and president is Benjamin Stoller.

Both Respondents are engaged in agriculture in Monterey

3/All section references herein are to the Act, unless otherwise noted.

County, California and both are agricultural employers within the meaning of §1140 (c). The record establishes that ultimate responsibility for both farms rests with Dr. Stoller, that they evince a similarity of operation, a common labor relations policy, a common/plan, a similarity of operation, a sharing of management personnel and decision-making, and inter-change of employees working on both farms. Accordingly I find Respondents to be joint agricultural employers engaged in agriculture with the meaning of §1140 (c). Abatti Farms, et. al., 3 ALRB No. 83; Perry Farms, Inc., 4 ALRB No. 25.

I find the UFW to be a labor organization representing the agricultural employees within the meaning of §1140.4 (f). I find that CIU, intervenor and purported labor organization herein, not to be a labor organization representing agricultural employees within the meaning of Section 1140.4(f). As more fully discussed below, the CIU does not demonstrate employee participation in an organization which exists with the purpose of dealing with an employer concerning working conditions. Automatic Instrument Co., 54 NLRB 472, 13 LRRM 197 (1944).

II. The Complaint

The case is a consolidation of unfair labor practice charges filed by the UFW and Charles Harrington, election objections filed by the UFW and the CIU, and challenged ballot proceedings with respect to certain specific challenges. The Complaint alleges that Respondents violated Section 1153(a) and (b) by providing assistance and support to the CIU. The

Complaint further alleges that Respondent refused to. re-hire one Enrique Fuentes because of his UFW affiliation in violation of Section 1153 (a)- and (c) of the Act. The Complaint further alleges that one Charles Harrington was discharged in violation of the above-cited sections because he had engaged in concerted activity.

Certain of the acts alleged as unfair labor practices also form the basis far the election objections filed by the UFW in that Respondents interfered with, restrained and coerced employees in their excercise of rights guaranteed them by Section 1142 of the Act, thereby affecting the election. Further, the Complaint charges that had the CIU not been on the ballot, the UFW would have won the election.

The challenged ballots are determinative of the results of the election because of the run-off election 59 votes were cast for the UFW, and 58 for CIU. Eleven ballots were challenged. Of these eleven, the Board ordered four to be set for hearing on the issue of whether these four were supervisors or not. These individuals were: Jose Berrera, Barbara Crouch, Arturo Monjarez and Jose Mosqueda.[4/]

4/It should be noted that the Order of Ralph Faust, Executive Secretary, ALRB, dated June 5, 1978 consolidating challenged ballots for hearing with related objections and unfair labor practices specified that the hearing should consider the status of four voters who cast ballots, specifically whether they were "supervisors" or not. These four were identified only by reference to paragraph numbers contained in the "Report on Challenged Ballots," dated March 27, 1978, issued and filed by Lupe Martinez, Regional Director. These four voters were the four as above listed. There were two other voters whose ballots were challenged on the ground that they were hired for the purpose of voting in the election. These individuals were Steven Fries (Report on Challenged Ballots, par. 2) and Primitive Nuno (Report, par. 6). The Regional Director's Report states that no recommendation on their elegibility could be made until the

Because I find that the CIU is not a labor union within the definitions of case law and statute, it cannot be certified as an employee bargaining agent, as more fully discussed below. It therefore becomes unnecessary to resolve the challenged ballots, because no matter what the number of votes received by the CIU, it cannot be certified.[5/]

A. The Operation of the Farms

Benjamin Stoller operates Miranda Mushrooms, Inc. and Ariel Farms, as well as Stoller Research Co. It appears from the record that research on mushroom growing methods is done at Stoller Research, carried on at a small scale at Ariel, and if successful there, carried out at a larger scale at Miranda Mushroom, Inc. On both farms owned by Respondents, only mushrooms are grown.

A single broker is employed to sell the mushrooms at both

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determination of pending unfair labor practice charges, referring to the instant Complaint. A problem arises, however, because paragraph 8 (d) , of., the Amended Complaint alleges that Respondent hired Steven Fries for the purpose of voting in the election against the UFW, and there is no similar charging allegation made in the Complaint with respect to Primitive Nuno. In its post-trial brief, Respondent suggested that because of the failure to include Primitive Nuno in the Complaint (either inadvertently or otherwise), Mr. Nuno's right to have his ballot counted has been prejudiced. The Administrative Law Officer can make no ruling with regard to the Nuno issue as there is no charging allegation in the Complaint or a corresponding Order to consider his ballot in the Executive Secretary's Order of June 5, 1978.

5/The record indicates that both the UFW and the CIU filed petitions for certification on January 11. The CIU was deemed intervenor by the Board. While the CIU apparently presented the qualifying number of authorization cards to appear on the ballot, §1156 requires that the bargaining agent for employees as it appears on the ballot be a "labor organization." Early in the election proceedings the UFW objected that the CIU was not a "labor organization" within the meaning of the statute, and that the CIU's allegation that it was a labor union was incorrect. (See UFW Petition to Set Aside the Election, Jan. 23, 1978

farms and is paid by Miranda Mushroom, Inc. while there is a separate management structure at each farm, Dr. Stoller, takes ultimate management responsibility at both farms. Joint management meetings take place between Dr. Stoller and managers of Ariel and Miranda Mushroom. The Ariel manager, Jim Kranton, often gives advice at Miranda. A single health insurance plan covers employees of both companies. Dr. Stoller testified that he spent 60% of his time involved with Miranda Mushroom and 40% involved with Stoller Research and Ariel Farms. The contested election and the unfair labor practices charged all took place at Miranda Mushroom, Inc.

Miranda Mushroom and Ariel Farms have similar management structures. Dr. Stoller heads both operations. Below him is a farm manager who supervises a chain of command which includes a head grower, a maintenance supervisor, and supervisors of two picking crews. In addition to a maintenance crew and assistance to various growers and supervisors, there are generally some 30 to 33 pickers always present at Miranda Mushroom. However, January, 1978 when the elections were held was a peak month for Miranda and there were more pickers than usual. At the time of the 1978 election, pickers were earning 25 cents per basket of mushrooms picked and those on salary, such as growers' assistants, were being paid $4.25 per hour.

Mushrooms are grown at Miranda Mushroom in a cycle. At Miranda, a new cycle is started every eight days. The entire mushroom growing cycle takes approximately four to six weeks to complete. There are two picking crews at Miranda. One is loosely termed the outside crew and the other the inside picking crew. The outside crew commences the mushroom growing cycle

by making compost outside of the growing houses, filling growing trays with the newly made compost and then moving the trays into two pasturizing houses. Next, the mushroom spore is introduced into the compost and begins to grow. This process is known 'as spawning. After spawning, the trays are moved into a growing room where they stay from five to fifteen days. Upon completion of the spawning period, a casing material is placed over the spawn and the trays are moved into a growing house where they remain roughly three weeks. Mycelium forms into what are called mushroom pins. These are knocked down, mushrooms form, and then are picked. After picking, the trays are emptied and the cycle recommences. The outside picking crew takes responsibility for the first part of the cycle, and the inside crew does the remainder.

There are 34 mushroom houses at Miranda on approximately 55 acres, ten of which are in use. The mushroom houses are controlled for temperature and humidity and are kept dark inside. There is one packing shed where the mushrooms are packed for shipment. The packing shed has its own foreperson, as does each picking crew.

The office for Miranda Mushroom is near the entry to the farm. It is one large room, twenty-five percent of which is divided down the middle by a divider. In January, there were five desks and five telephones in this room. The manager worked out of this office, as did the various supervisors when they had phone calls to make or paperwork to do. In addition, the mushroom broker worked out of this office, as did a secretary to the manager.

B. The CIU

Union organizing began at Miranda Mushroom in July, 1977, when the UFW went to Miranda and Ariel to establish the union. Apparently the UFW met with employer resistance at that time concerning UFW access to the mushroom houses. An unfair labor practice charge was filed. This charge was apparently resolved by agreement with the Board and the company.[6/]

Herbert Coombs,, a mechanic and leadman in his crew, was the first president of the CIU. He came to work at Miranda in August. Prior to coming to work at Miranda, he was a businessman. He testified that early in September he had a conversation with Brian Peyton, manager of Miranda Mushroom in which Peyton said that the UFW was trying to establish a foothold at Miranda, and that it would be advantageous to the employees to have their own union. Coombs further testified that subsequent to that conversation, he held conversations with other people and later in September a meeting of employees was held. This meeting was held in Peyton's office during the lunch hour. Peyton was not present.

Brian Peyton denied discussing the formation of the CIU with Coombs. He admitted that he gave permission to Coombs for an employee meeting in his office, but testified that Coombs stated no purpose for the meeting. He testified that he heard in October that the employees were starting to organize their own union.

Coombs testified that during the course of the following

6/This charge was not included in the instant Complaint.

months he and Peyton had several conversations in which Coombs learned of continued employer hostility toward the UFW. Coombs testified that during one of these conversations, Peyton stated that if the UFW came into Miranda, "Mr. Stoller would turn it into a cold storage and shut the place down and everybody would be out of a job." Peyton denied this conversation.

At the formation of the CIU, initiation fees of $25.00 per person were set. Coombs testified that fees were collected from sixteen people. He also testified that he received an "anonymous" donation from one of the supervisors, Bob Tate. Tate testified that the check was written by his wife, a Miranda Mushroom employee and a CIU member, on their joint checking account. Jose Mosqueda, the first Vice-President of the CIU testified that there were only two meetings of the CIU, and that the final one was prior to the elections. He testified that the CIU had no office, no standing membership, no up-to-date dues, no collective bargaining agreements with any employers, no medical plan, and no provisions for salaries or reimbursement of expenses of its officers. Finally, he testified that while the CIU's general purposes were to better working conditions, one of its purposes was to avoid the UFW coming to Miranda.

Both Mosqueda and Coombs testified that Peyton permitted use of the office and the phones to the CIU. Respondents' position regarding the use of the facilities was that they were not aware of their use by the CIU for its own purposes. Earl Fries, a Miranda employee was President of the CIU at the time of the hearing in this matter. The CIU, as Intervenor in this action, was represented at the hearing by Mr. Fries. Mr. Fries

did not choose to testify, nor did he call any witnesses on behalf of the CIU.

Respondent has attacked the credibility of Coombs' testimony by pointing to his discharge from Miranda Mushroom in the belief that the company thought he had stolen its property. There was no prosecution of Coombs for theft or for receipt of stolen property. And the police officer who made the search of the premises shared by Coombs and a co-worker at Miranda testified that some of the property was there with Brian Peyton's permission. No evidence was introduced at this hearing to show that Coombs stole or received stolen property and the failure to prosecute convinces me that no prosecution could have been made. Respondent also alleged that Coombs was biased because of the discharge. On cross-examination, it appeared that Coombs made the statement which purports to show bias in the course of attempting to obtain his pay check, which the company refused to give him. It was made in the context of suing for the wages owed to him. I find that Coombs has not been impeached by the allegation of theft nor by the described statement.

The CIU was replete with employees with supervisorial status. It's first president Herbert Coombs was a leadman, with supervisorial power over two other mechanics. The second president of the CIU, Earl Fries, while himself not a supervisor, had authority over other employees. And Jose Mosqueda, the first Vice-President of the CIU, often substituted for his foreperson, Humberto Godoy, when Godoy was absent, and exercised the independent judgement of a foreperson. Anton Caratan and Sons,

4 ALRB No. 103, citing Montgomery Ward & Co., Inc. 228 NLRB 750, 96 LRRM 1383 (1977).[7/]

Based upon all of the foregoing, including the credibility and demeanor of the witnesses, I find that the CIU is not a labor organization within the meaning of §1140.4(f).[8/] I also find that Respondents dominated the CIU as well as provided it with substantial support in violation of §1153 (b). Superior Farming Company, Inc., 5 ALRB No. 5; Harden Farms, 2 ALRB No. 30; Veg. Pak, Inc., 2 ALRB No. 50.

C. Findings

Only labor, organizations certified pursuant to the statutory scheme can be parties to a legally valid collective-bargaining agreement: §1159 states that "in order to assure the full freedom of association, self-organization, and designation of representatives of the employees own choosing, only labor organizations certified pursuant to this part shall be parties to a legally valid collective-bargaining agreement." (emphasis added) While Section 1140.4 (e) defines "representatives" for

7/The employee status of Mr. Mosqueda was one of the issues at the hearing. Mr. Mosqueda's ballot was challenged, it having been alleged by the UFW that he was a supervisor. While I find substantial evidence of his supervisorial role, my finding with regard to the CIU itself obviates any necessity to make an ultimate determination of whether or not Mr. Masqueda was a supervisor. For purposes of the totality of evidence regarding the CIU, I find that Mosqueda often functioned in a supervisorial capacity with regard to other employees.

8/Section 1140.4 (f) of the Act States:
The term "labor organization" means any organization of any kind, of any agency or employee representation committee or plan, in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work for agricultural employees.

purposes of collective bargaining to include "any individual or labor organization," there is no provision allowing employee groups which do not qualify as labor organizations to be certified by the Board. At issue in the instant hearing is the certification of either the UFW or the CIU as the representative for collective bargaining. §1156.3, Gonzales Packing Co., 2 ALRB No. 48. If the CIU is not a labor organization, it cannot be certified pursuant to the Agricultural Labor Relations Act, Labor Code, §1140, et. seq. It further appears that §1156.3 (b), which allows intervention by a second union in the request for an election, permits only labor organizations to be intervenors, provided they meet other requirements of the statute.[9/]

Section 1156 provides, in pertinent part:

> Representatives designated or selected by a secret ballot for the purpose of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit . . .

Because §1140.4 (e) defines "representatives" to include "any individual or labor organization", it might appear that in conjunction with §1156 above-cited, an individual as well as 'a labor organization could become the employees' representative. While this might be the case, there is no indication that an organization which purports to be a labor organization, but which in fact was not a bona fide labor organization, could become the employees' representative.[10/]

9/In this regard, see fn. 5, supra., setting forth the UFWs position that the CIU incorrectly described itself as a labor organization.

10/A substantial number of other provisions of the Act imply that it contemplates only bona fide labor organizations as employee representatives. See, e.g., §1156.3 (e), de-certification because of racial discrimination; §1156.6, certification bar; §1156.7(b), contact bar; and §1156.7(c), de-certification.

The Act's definition of labor organization Section 1140.4(f), defines labor organization in terms nearly identical to the definition under Section 2(5) of the National Labor Relations Act which provides as follows:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work for agricultural employees.

The NLRB in considering whether a group is a labor organization within the meaning of the National Act considers three basic factors: (1) is there employee participation in (2) an organization which (3) exists for the purpose of dealing with " an employer concerning working conditions. See, E.G. Tabardrey Manufacturing Co., 51 NLRB 246, 12 LRRM 284 (1943), dismissing a representation petition filed by a self-appointed employee's committee which existed with the basic object of testing the asserted claim of a CIO affliate to be the exclusive representative of the employees and where the committee did not constitute a formal organization; Automatic Instrument Co., 54 NLRB 472, 13 LRRM 197 (1944), wherein an individual employee sought to represent an independent union; McDonalds of Canoga Park, California, Inc., 162 NLRB No. 29, 64 LRRM 1030 (1966) where the Board dismissed a petition for an election filed by an alleged union because it was unable to determine whether petitioner was competent to act as employee bargaining representative despite the fact that the organization had dues-paying members, monthly membership meetings, and had previously been certified in two consent election cases.

The CIU' does not meet standards for a labor organization.

It was formed in order to be an "inside" union to prevent the UFW from organizing the farm. To the extent it elected officers, those officers functioned in name only. The organization existed as an organization only for a small time, immediately prior to the elections held at Miranda Mushroom, and as such cannot be honestly deemed an ongoing organization. It appears to have been a device by which a petition could be filed and an election held as a means of barring UFW organizing and certification as the bargaining agent. Because the CIU lacks organization and because it does not exist for the necessary purposes, it cannot be certified as the bargaining agent at Miranda Mushroom Inc. §§1156.3(b), 1159; Superior Farming Co., supra.

II. The Firing of Enrique Fuentes

Enrique Fuentes testified that he worked for Miranda Mushroom for approximately three weeks in December, 1977 before he was arrested and deported for being an illegal alien. During the course of the hearing, it developed that the individual who originally testified under the name Enrique Fuentes was also known as Ismael Hernandez. He was arrested on Friday, December 21, 1977. The following Friday, January 7, 1978, he returned and went to Miranda Mushroom to ask to be rehired. He testified that he asked "Humberto", the foreperson of one of the picking crews, for his job back. He said that "Humberto" told him that there was no work and that if the UFW won, he couldn't give him the job back, but if the CIU won, he could give him the job back.

Testifying in support of his belief that the individual who testified under the name Enrique Fuentes was not the individual he claimed to be, Brian Peyton testified that Umberto Godoy, one of the picking crew supervisors had been suspected of hiring pickers on his own, without telling Peyton, who normally did the hiring, and having them assume the identity and social security number of registered employees. Godoy would in essence "sell" the job to the new employees. Godoy had been fired for this practice when it was discovered. Peyton further testified that it was his practice to give a former employee his job back if he was taken from the farm by immigration officials, and returned, if a family member made a request that the job be held.

The General Counsel produced two witnesses with regard to Enrique Fuentes. The first, a cousin of Ismael Hernandez, testified that he had worked for two years at Miranda in Godoy's crew. He testified that his cousin had been picked up by the police and turned over to Immigration. He testified that he had told Godoy that his-cousin had been arrested, and asked him at Miranda whether Ismael could have his job back if he returned, and Godoy at that point said no. Rudolfo Hernandez then testified he had a later conversation in a bar with Godoy during which Godoy told him that he could not give Ismael his job back because he had "put the finger" on Godoy with the union and that Ismael had reported to the UFW that Godoy was charging people to give them jobs.

Luis Hernandez, an uncle of Ismael Hernandez, was a picker at Miranda. He testified that his nephew was the individual who was given the name Enrique Fuentes by his supervisor and had

testified at the hearing under that name. He also testified that it was the general practice at Miranda to give pickers their jobs back after being picked up by Immigration, but that Godoy refused to give Enrique his job back.

Respondent takes the position that "the real Enrique Fuentes" left Miranda Mushroom in December, 1977 and never returned, and that Ismael Hernandez was "able to obtain payroll checks and negotiated them using the assumed identity." (Respondents' Post-Hearing Brief, P. 34.) Respondent then asserts that Godoy was selling jobs to pickers, and that the real reason for the refusal to rehire is that Fuentes had threatened Godoy's illegal ' business activities. Respondent apparently concedes both the identity of Fuentes/Hernandez, as well as the refusal to rehire. Respondent contests that Fuentes/Hernandez was refused re-employment because of his UFW sympathies, and contests that Godoy's actions are attributable to it under a respondent superior theory.

An employer will be charged with the responsibility for the acts or remarks of a supervisorial employee when the company's employee's would have cause for believing that the supervising employee's conduct or remarks were made on behalf of the company. Furr's, Inc. v. N.L.R.B. (1967) 381 F.2d 562, cert. den., 389 U.S. 840; Colecraft Mfg. Co. v. N.L.R.B. (1967) 385 F.2d 998; Paul W. Bertuccio and Bertuccio Farms, 5 ALRB No. 5. I reject the Respondents' suggestion that any employee or potential employee of Miranda could have or should have known that Godoy's actions were not sanctioned by the employer. To the extent that Godoy's practices affected hiring of pickers at Miranda over what appears

to have been a substantial period of time, I find that Respondent Miranda Mushroom is responsible for these actions. Paul W. Bertuccio and Bertuccio Farms, supra.

Respondent also takes the position that Fuentes did not request re-employment and could not have spoken to Godoy because Godoy was away on the day that Fuentes said he requested re-employment. Respondent did not call Godoy to testify, and apparently relied instead on a calendar kept by Brian Peyton indicating that Godoy was sick on the date that the conversation between he and Fuentes would have taken place. The testimony regarding the purpose of the notation on the calendar, when the -notation was made, and the use of the calendar itself was less than conclusive. Peyton first testified that the notations were made prior to Godoy going on vacation, and then testified that, they were made when he returned. In view of Respondent's failure to present Godoy as a witness, it is impossible to regard the calendar notation as conclusive evidence that Godoy could not have had the conversation with Fuentes.

Peyton's own records indicate his awareness of Fuentes[1] UFW sympathies. In testimony, Peyton identified a list of Miranda employees during December, 1977 and January, 1978, which he testified he had used to refresh his recollection for testimony, The list contained the names of all Miranda Mushroom employees and most significantly, next to their names were notations regarding their union sympathies or lack thereof. By way of explanation, Peyton testified that George Daniels, an employee of FELS (Farm Employers Labor Service), as a part of his services to Miranda Mushroom, had conducted employee interviews and their

union sympathies were determined. PELS was retained by Respondents for advice regarding management's relations to union organizing at Miranda and Ariel.

Prior to the first election, Peyton went over the list with Daniels, and the notations were made by the two of them. Standing alone, this conduct, evidenced by the document, consituttes unlawful interrogation on the part of the company. Akimoto Nursery, 3 ALRB No. 73; Tom Bengard Ranch, Inc., 4 ALRB No. 33. Further, it establishes that the employer was well aware of Fuentes' UFW sympathies. Upon his return from being deported, the employer took advantage of the opportunity presented and refused to rehire him.

Brian Peyton testified that January, 1978 was the biggest month Miranda Mushroom had ever had. While the normal number of pickers employed during any given period at Miranda is 30 to 35, in the month of January, 1978, 100 pickers were required. Peyton personally hired 15 pickers that month. No explanation was given why Fuentes who sought employment was not rehired. Given the Miranda policy to rehire pickers who had been deported, that January was a peak month and substantial numbers of workers were needed, management's awareness of Fuentes/Hernandez' UFW sympathies, and the testimony regarding Godoy's refusal to rehire because of the employee's UFW sympathies, I find that Respondent Miranda Mushroom violated §1153 (c) and (a). Anton Caratan and Sons, supra,; Sahara Packing Co. (UFW), 4 ALRB No. 40.

III. The Firing of Charles Harrington

Charles Harrington began employment at Miranda Mushroom September, 1977. His primary duty was to carry mushrooms from the houses to the packing shed. He had a bachelor of science degree and was to a certain extent, knowledgable in the area of pesticides. In February, 1978, he noticed what he believed were a number of violations of law regarding Miranda's use of pesticides and protection of Miranda employees from the pesticides Early in February, 1978, Harrington filed a Complaint with the Agricultural Commission in Salinas. On February 8, 1978, an inspector from the Commissioner's office came to Miranda at approximately noon to conduct an inspection of the premises. Dr. Stoller refused this individual access to the premises. Harrington testified that shortly 'thereafter Brian Peyton told him that he thought that Harrington was the one who had filed the Complaint and brought the Agricultural Commission to Miranda Mushroom. Harrington testified that he made no admission to the accusation.

Harrington further., testified that at approximately the same time as his conversation with Peyton, his supervisor told him to finish bringing in the mushrooms and clean up the cooler, which he did. He testified that he finished his work and at two o'clock he informed the administration that he was leaving and he left. Harrington testified that his normal work day depended upon the amount of mushrooms he had to transport. When production was high, he would work longer hours, and when production was low, there were shorter hours.

Respondent offered conflicting testimony regarding the termination of Harrington. Brian Peyton testified that

Harrington was fired for failure to obey orders of his supervisor. Dr. Stoller says that he quit after throwing a "temper tantrum." Harrington's foreman, Greg Schwenne, who was still employed at Miranda at the time of the hearing, testified that on the day in question he saw no tantrum. He said that Harrington's job was to pick up the mushrooms in the mushroom houses and transport them to the packing shed and that when he was done with that he was to help in the packing shed. He testified that he gave Harrington orders to clear the packing shed floor of water that had gathered there, and that upon his return to the shed, he found that the job had not been completed and that Harrington had punched out for the day. Schweene, who had been packing shed supervisor only for a short time before the Harrington incident, stated that had it been up to him, he would have issued a reprimand of three days off to Harrington, but not fired him. Harrington was fired by Peyton upon his return to work the next day.

General Counsel takes the position that Harrington did not perform his duties cleaning up the floor perfectly, but that his job was that of mushroom carrier, not floor cleaner. General Counsel asserts that Harrington was fired for having filed the pesticide complaint, and that Respondents had no other reason to fire him.

While assertion of inconsistent reasons for discharge may create an inference of discriminatory conduct (see, e.g., Sunnyside Nurseries, 3 ALRB No. 42), I find that Respondent fired Harrington primarily for failure to perform his duties. Jack. T. Baillie Co., Inc. 3 ALRB No. 35. I further find that

the discharge, whatever reasons motivated it, was not based on factors connected with union activity and therefore cannot be in violation of Sections 1153 (c) and (a) of the Act. Hansen Farms, 3 ALRB No. 43. This charge is dismissed.

IV. Conclusion and Remedy

A. Recommendation re Objections to the Election

Having found that Respondent Miranda Mushroom engaged in certain unfair labor practices with regard to assistance to and domination of the CIU, in violation of Sections 1153(a) and (c) of the Act, and further that the CIU is not a labor organization as hereinbefore set forth, it is the recommendation of the ALO that the conduct of the Respondent Miranda Mushroom, Inc. found herein warrants the setting aside of this Election.

B. Conclusion and Remedy

Having found that Respondents refused to rehire Enrique Fuentes, I recommend that Respondents be ordered to offer him immediate and full reinstatement to his former or substantially equivalent job. I shall further recommend that Respondents make whole Enrique Fuentes for any losses he may have incurred as a result of their unlawful discriminatory action towards him, together with net interest thereon at the rate of 7% per annum.

In order to remedy the effects of Respondent's unfair labor practices, the Board should require the Respondent Miranda Mushroom to cease and desist from continuing to violate the Act and give notice of the following order by mailing, posting and reading the attached notice to its said employees.

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

ORDER

1. That the election be set aside.

2. That Respondent Miranda Mushroom, Inc., its officers, agents, successors and assigns shall:

(a) Cease and desist from rendering unlawful aid, assistance and support to the CIU or any other labor organization by allowing its representatives to engage in organization activities on company premises while denying equal assistance to a rival labor organization;

(b) Cease and desist from interrogation of employees regarding their union affiliation or lack thereof;

(c) Cease and desist from interfering in another manner from interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by Section 1152.

3. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) To make Ismael Hernandez, aka Enrique Fuentes, whole for any losses he may have incurred as a result of their unlawful discriminatory action towards him, together with net interest thereon at the rate of 7% per annum.

(b) Preserve, and upon request make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(c) Post copies of the attached notice at times and places to be determined by the regional director. The notices

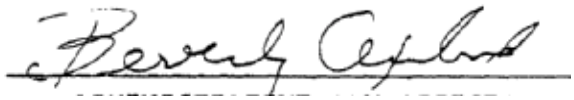
shall remain posted for a period of 60 consecutive days following the issuance of this order. Copies of the notice shall be furnished by the regional director in appropriate languages. The respondent shall exercise due care to replace any notice which has been altered, defaced or removed.

(d) Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this order, to all employees employed during the payroll periods occuring during the time period of January, 1978.

(e) A representative of the respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of the respondent on company time. The reading or readings shall be at such times and places as are specified 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 employees may have concerning the notice or their rights under the Act.

(f) Notify the regional director in writing, within 20 days from the date of the receipt of this order, what steps have been taken to comply with it.

It is further ORDERED that all allegations contained in the Complaint and related actions and not found herein are dismissed.



ADMINISTRATIVE LAW OFFICER
BEVERLY AXELROD

NOTICE TO WORKERS

After a trial where each side had a chance to present their 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;

(5) to decide not to do any of these things.

Because this is true we promise that:

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

Especially:

WE WILL NOT give assistance or aid to the CIU.

WE WILL NOT unlawfully favor one union over another.

WE WILL NOT refuse to hire or rehire anyone because of union affiliation.

WE WILL pay Ismael Hernandez any money he lost because we refused to rehire him.

Dated: MIRANDA MUSHROOM, INC.

By:_____
(Representative) (Title)

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