Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GIANNINI & DEL CHIARO CO., Employer-Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner-Charging Party.	Case Nos. 79-RC-5-SAL 79-CE-123-SAL 6 ALRB No. 38

DECISION, ORDER

AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed on May 24, 1979, by the United Farm Workers of America, AFL-CIO (UFW), a representation election was conducted on May 26, 1979, among the agricultural employees of Giannini & Del Chiaro Co., the Employer-Respondent herein. The official Tally of Ballots showed these results: 19 votes for the UFW and 1 vote for No Union.

The Employer timely filed objections to the election. The Executive Secretary dismissed some of the Employer's objections and set the remaining objections for hearing. On June 26, 1979, the Executive Secretary consolidated for hearing the objections and an unfair labor practice complaint against the Employer.

On October 10, 1979, Administrative Law Officer (ALO) Richard Doctoroff issued the attached Decision in this case. Thereafter, Respondent timely filed exceptions and a supporting brief, and General Counsel and Charging Party timely filed reply briefs.

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

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/] and conclusions of the ALO as modified herein, and to adopt his recommendations to dismiss the Employer's objections and to certify the UFW as the exclusive collective bargaining representative of the Employer's agricultural employees.

UNFAIR LABOR PRACTICE ISSUES

The Discharge of Jose Luis Hernandez

Respondent excepts to the ALO's conclusion that employee Jose Luis Hernandez was discharged in violation of Section 1153(a) of the Act. We find no merit in this exception. Respondent discharged Hernandez after he protested a foreman's abusive treatment of a co-worker. Respondent contends that Hernandez' actions do not constitute protected concerted activity and that Hernandez was lawfully discharged for insubordination. We disagree.

On the morning of May 23, 1979, foreman John Kloncz came to check the work of a crew picking artichokes. After he and employee Santiago Torro Mendez exchanged greetings, Mendez jokingly

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[1/] Respondent excepts to several of the ALO's credibility resolutions. We will not reverse an ALO's credibility resolutions based on demeanor unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry'Wall'Products, Inc. (1950). 91 NLRB 544 [26 LRRM 1531]; Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978). 4 ALRB No. 24, review den. by Ct. App., 2nd Dist., Div. 3, Mar. 17, 1980. We find that the ALO's credibility resolutions herein are supported by the record as a whole.

suggested that Kloncz pick up a basket and start picking artichokes. Kloncz became incensed, asserted his authority as supervisor over the workers and said, "I don't have to take that shit from you." Hernandez, who was working nearby, stepped in and protested Kloncz' actions, saying that Kloncz could direct the work, but it was not right for him to speak in such a manner. Kloncz swore at Hernandez and told him he was fired. The argument became more heated and insults and obscenities were exchanged. At that point, Kloncz walked over to his pickup truck parked nearby, assertedly to get a warning slip to give Hernandez. Hernandez waved the other workers over to witness the dispute. Some of the workers walked over to where the men were standing. Because Kloncz spoke little Spanish and Hernandez spoke little English, Hernandez asked employee Jose Flores to translate for them. The two men calmed down, the dispute appeared to be settled, and Hernandez assumed the discharge had been retracted. Kloncz did not give him a warning slip. The crew members who had left the field went back to work. Hernandez also returned to work. The interruption of work had lasted about five to ten minutes.

Kloncz attempted unsuccessfully to contact manager Jon Giannini, Jr. on the pickup radio. After working for a short period of time, he succeeded in contacting Giannini. The two men met around 2:30 that afternoon. Kloncz told Giannini about the incident and also about Hernandez[1] refusal to move an artichoke truck earlier in the morning. (See discussion, p. 5.) Kloncz recommended discharging Hernandez. Giannini made the decision to discharge Hernandez on the spot and went immediately to the office

to write up Hernandez' check. In the evening, Kloncz and Giannini, accompanied by employee Miguel Mora, went to Hernandez[1] house to inform him that he was discharged.

This sequence of events reveals that Hernandez was discharged for protesting Kloncz[1] treatment of Mendez. When an employee comes to the aid of another worker involved in a dispute with a supervisor which arises out of the employment relationship, this act constitutes protected concerted activity. S & F Growers (Aug. 21, 1978) 4 ALRB No. 58; National Tank Co., Div. of Combustion Engineering, Inc. (1969) 176 NLRB 332 [71 LRRM 1349]. Protesting a supervisor's abusive treatment of employees is activity which is protected under the Act. Hitchiner Mfg. Co., Inc. (1978) 238 NLRB No. 176 [99 LRRM 1645]; Wood Parts, Inc. (1952) 101 NLRB 445 [31 LRRM 1090].

We reject Respondent's contention that Hernandez' conduct was such as to deprive him of the protection of Section 1152. The law allows employees leeway in presenting grievances over matters relating to their working conditions. Such activity loses its mantle of protection only in flagrant cases in which the misconduct is so violent or of such a serious nature<as to render the employee unfit for further service. Firch Baking Co. (1977) 232 NLRB 772 [97 LRRM 1192]; American Telephone & Telegraph Co. v. N.L.R.B. (2d Cir. 1975) 521 F.2d 1159 [89 LRRM 3140]. As long as the character of the conduct is not indefensible in the context of the grievance involved, the activity remains protected. Hugh H. Wilson Corporation v. N.L.R.B. (3d Cir. 1969) 414 F.2d 1345 [71 LRRM 2827], cert. den. (1970) 397 U.S. 935 [73 LRRM 2600].

In this case, although Hernandez became embroiled in a heated argument with Kloncz, his initial protest of Kloncz' treatment of Mendez was not couched in strong or provocative language. The argument escalated only after Kloncz became angry at Hernandez. During the course of the argument, after Kloncz told Hernandez that he was fired, Hernandez waved the other workers over to witness the dispute. Although Respondent asserts that the situation could have become violent, it is apparent that no intimidation or threat of violence occurred. The dispute lasted only a few minutes and all the employees, including Hernandez, then returned to work. We note also that Hernandez was a long-term employee with no history of outbursts. Hernandez, one of Respondent's few year-round employees, worked as a tractor driver for more than three years before his discharge. Respondent considered him to be a very satisfactory worker. Considering all the above circumstances, we find that Hernandez' conduct during his protest—engaging in a short, heated argument provoked by the supervisor's actions—was not so egregious as to warrant depriving him of the Act's protection.

Respondent asserted an additional reason for discharging Hernandez. Earlier in the morning of May 23, Miguel Mora, who directed the crew to a limited extent, asked Hernandez to move an artichoke truck. Hernandez refused, saying that he did not know how long he would be working in the fields that day. This was the first time Hernandez had picked artichokes in two months; foreman Kloncz came later in the morning to tell Hernandez to drive a tractor. Respondent used an informal arrangement in moving the

trucks, whereby certain reliable employees, including Hernandez, were entrusted to perform this task. It was the practice for the person who moved the trucks at the beginning of the day to continue doing so throughout the day. On the morning of May 23, another worker had been moving the trucks; he continued to do so throughout the remainder of the day. Therefore, Mora was deviating from the standard company practice by asking Hernandez, who had not initially moved the trucks that morning, to do this job.

This incident was not the primary reason asserted by Respondent for the discharge. The incident was minor and the issue appeared to be settled at the time when Kloncz and Hernandez resolved their dispute over Mendez, with Hernandez agreeing to move the trucks in the future. The record shows that Hernandez[1] discharge was triggered by, and centered around, the Mendez incident. We therefore affirm the ALO's conclusion that Respondent violated Section 1153(a) of the Act by discharging Hernandez for protesting the supervisor's treatment of co-worker Mendez.[2/]

We also affirm the ALO's conclusion that Respondent violated Section 1153(a) by questioning Hernandez about his union support. On May 19, 1979, John Giannini, Sr., a supervisor and

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[2/]The ALO concluded that Respondent also violated Section 1153(c) of the-Act by discharging Hernandez. Since we have found that Respondent violated Section 1153 (a) by the discharge and since the remedies for a violation of Section 1153 (c) would, in this case, be essentially the same as those included in our Order herein, we do not reach the issue of the Section 1153(c) violation. We note that Respondent's eviction of Hernandez from company housing was a direct result of his unlawful discharge. We shall therefore order Respondent, as part of the remedy, to offer Hernandez housing to restore, insofar as possible, the status quo prior to Respondent's illegal action.

partner in Giannini & Del Chiaro, approached Hernandez and stated, "You're a Chavista." As Giannini appeared to be waiting for a reply, Hernandez responded, "Yes, I'm a Chavista." This conduct constitutes unlawful interrogation. Rod McLellan Company (Aug. 30, 1977) 3 ALRB No. 71, review den. by Ct. App., 1st Dist., Div. 4, Nov. 8, 1977, hg. den. Dec. 15, 1977.

Unfair Labor Practices Not Alleged in the Complaint

Respondent excepts to the ALO's conclusion that Respondent violated Section 1153(a) by summoning sheriff's deputies to Respondent's labor camp on May 24, 1979. We find no merit in this exception.

On May 23, Jon Giannini, Jr. discharged Hernandez and ordered him to vacate his company-owned house within a week. The next morning before work, Hernandez went to the labor camp to ask the other employees to speak as a group to John Giannini, Sr. about his discharge. Hernandez[1] house, which was near the houses of the elder Giannini and Miguel Mora, was 50 to 75 feet from the labor camp. Foreman Kloncz, upon seeing Hernandez talking to the workers, radioed Jon Giannini, Jr., who testified that he thereupon called the sheriff because Hernandez' mood on the previous day caused him to be concerned. Two deputy sheriffs came out to the camp.

The workers demanded that John Giannini, Sr. rehire Hernandez. Giannini told the deputies that Hernandez had been fired. One deputy went through Hernandez' wallet to obtain identification, instructed him to keep his green card with him at all times, and said there was work at a neighboring farm. When

Jon Giannini, Jr. said that Hernandez had refused to take his check upon his discharge the evening before, the deputy took the check from Giannini, gave it to Hernandez, and ordered Hernandez to vacate his house immediately. Giannini told Hernandez he could have more time to find housing. Giannini refused the workers' demand to rehire Hernandez and instructed them to go to work. The workers refused and went to seek help from the Union.

Respondent excepts on the grounds that, because this incident was not specifically alleged in the complaint, it cannot be the basis for a finding of a violation. We disagree. The record shows that the incident was fully litigated and that there was no dispute as to the essential facets of the event. The incident was connected with the chain of events alleged in the complaint and the misconduct was by the parties involved in the alleged incidents; it was therefore closely related to the subject matter of the complaint. Under these circumstances, a finding of a violation is proper. See Prohoroff Poultry Farms (Nov. 23, 1977) 3 ALRB No. 87, enf'd sub nom., Prohoroff Poultry Farms v. Agricultural Labor Relations Board (June 3, 1980) Cal. App. 3d, 4 Civ. No. 16995; Rochester Cadet Cleaners, Inc. (1973) 205 NLRB 773 [84 LRRM 1177]; National Labor Relations Board v. Thompson Transport Co. (10th Cir. 1970) 421 F.2d 154 [73 LRRM 2387].

We affirm the ALO's conclusion that Respondent violated the Act by its conduct during, this incident. When Respondent called in the sheriffs, the workers were gathered peacefully, before work, to discuss Hernandez[1] discharge and their possible courses of action. There was no indication that the presence of

Hernandez at the camp and the meeting of the employees were in violation of any law or that the meeting was anything other than peaceful. Furthermore, the deputies, after speaking with the Gianninis, went through Hernandez[1] wallet and ordered him to vacate his house. We find that Respondent's summoning the deputies to the camp during the meeting of the employees, and the deputies' subsequent conduct toward Hernandez, tended to have a chilling effect on the exercise of the employees' Section 1152 rights and that Respondent's conduct therefore violated Section 1153 (a). Anderson Farms Co. (Aug. 17, 1977) 3 ALRB No. 67; Int'l Agricultural Corp. (1939) 16 NLRB 176 [5 LRRM 222].

We are of a different opinion, however, as to the remaining violations found by the ALO which were not specifically alleged in the complaint. The ALO found that Respondent violated the Act by a supervisor's conduct in photographing picketers and by the presence of sheriffs at the picket line on May 25 and 26 prior to the expedited election. In this consolidated hearing, the issues alleged in the unfair labor practice complaint were litigated separately, before the election objections were addressed. Evidence concerning these incidents on the picket line, on which the ALO based his findings, was presented in the representation proceeding, after the close of the unfair labor practice portion of the hearing, when General Counsel was no longer involved in the case. As General Counsel took no part in litigating these incidents during the hearing and did not allege them as violations in the complaint, Respondent was not on notice that the conduct involved might be held to be in violation of the Act. Under these

circumstances, we find that the issues were not fully litigated and we therefore reject the ALO's conclusion that Respondent's conduct during these incidents violated the Act.

REPRESENTATION ISSUES

The Employer objected to the election on the grounds that the Board Agent improperly refused to accept attempted challenges to voters made by the company observer and improperly failed to segregate ballots of challenged voters. We find no merit in this objection.

The Employer's employees went out on strike to protest Hernandez' discharge on May 24, 1979. The Regional Director determined that a strike was in progress, and an expedited election was held pursuant to 8 Cal. Admin. Code Section 20377. The strike continued up to the time of the election. At the election, the company observer attempted to challenge 18 employees who were on the eligibility list on the grounds that they had voluntarily quit employment on May 24, 1979, and were therefore no longer agricultural employees of the Employer. The Board Agent found that anyone who was on the eligibility list or who had worked during the eligibility period was eligible to vote, and that the observer had not presented a proper challenge. The Agent therefore refused to accept the challenges and did not segregate the ballots of the 18 voters.

We uphold the ALO's conclusion that the Agent acted properly, but we do so on different grounds. The voters whom the Employer wished to challenge were employed by the Employer during the payroll period preceding the filing of the petition. Their

eligibility to vote is thus determined by Section 1157 of the Act, which reads in pertinent part:

> All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote.3/

The fact that an employee who was employed during the eligibility period has voluntarily quit or has gone on strike at some time before the election does not constitute a legitimate challenge to his or her eligibility. ALRB Regulation 20355 (a) sets forth a complete list of the types of challenges to voter eligibility which the Board will entertain. As the company observer failed to produce a proper challenge under the regulation, the Agent acted properly in rejecting his challenges.4/

The Employer also objected to the election on the grounds that picketing by the UFW following the filing of the petition and prior to the election prevented the Employer from communicating with its employees. We find no merit in this objection.

On May 25 and 26, 1979, employees and supporters carrying UFW flags peacefully picketed the Employer's premises until the

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3/ The ALO relied on George Lucas & Sons (Feb. 1, 1977) 3 ALRB No. 5, which held that a person whose name appears on the payroll immediately preceding a strike is presumptively eligible to vote. However, George Lucas is not determinative of the issue before us. That case dealt with the eligibility of economic strikers engaged in a labor dispute which commenced prior to the effective date of the Act and involved an interpretation of the second paragraph of Section 1157 of the Act.

4/ We reject the ALO's statement that Hernandez' ballot was properly challenged. Hernandez worked during the eligibility period also. The fact that he was subsequently discharged, whether or not in violation of the Act, is irrelevant to his eligibility.

time of the election. Jon Giannini, Jr. testified that he did not want to approach the employees to talk to them during the picketing and that he made no attempt to speak with them. There were some shouts of "huelga" from the picket line, but there were no incidents of violence throughout the two days of picketing. As there was no evidence presented as to UFW interference with communication by the Employer to its employees, we affirm the ALO's conclusion and dismiss the objection.

The Employer's objections are hereby dismissed, the election is upheld, and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of Giannini & Del Chiaro Co., for the purpose of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, working hours, and other terms and conditions of employment.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Giannini & Del Chiaro Co., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for engaging in concerted activities for the purpose

of collective bargaining or other mutual aid or protection.

(b) Interrogating any employee concerning his or her union affiliation or sympathy.

(c) Summoning peace officers to its premises as a means of restraining employees in the exercise of their rights to discuss or present grievances or to engage in other peaceful union activities or protected concerted activities.

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

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

(a) Immediately offer Jose Luis Hernandez reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay or other economic losses he has suffered as a result of his termination, together with interest thereon at a rate of seven percent per annum.

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

(c) Offer to Jose Luis Hernandez housing on the terms and conditions in effect prior to his eviction by Respondent, and make him whole for any losses including, but not limited to, rental and utilities payments and relocation expenses, which he may have

suffered as a result of said eviction, plus interest on such losses computed at seven percent per annum.

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

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed by Respondent at any time from and including May 23, 1979, until the date of issuance of this Order.

(f) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for 60 days, 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.

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

time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: July 17, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

RALPH FAUST, Member

NOTICE TO EMPLOYEES

After a charge was filed against us by the United Farm Workers Union and 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 rights of our workers to help one another as a group 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 farces you to do or stops you from doing, any of the things listed above.

Especially:

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

WE WILL NOT summon peace officers to our premises to restrain employees from exercising their right to present or discuss grievances about their working conditions.

WE WILL NOT discharge or otherwise discriminate against any employee because he or she exercised any of these rights.

As the Board has found that we discharged Jose Luis Hernandez and evicted him from company housing in May 1979, because he engaged in activity protected under the Act, WE WILL offer him his former job, and offer him housing on the same terms and conditions in effect prior to his eviction, and will reimburse him for any loss of pay and rental, utilities, moving costs and any other expenses he has suffered as a result of his discharge and eviction.

Dated: GIANNINI & DEL CHIARO CO.

By: _____
Representative Title

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

Giannini & Del Chiaro Co. (UFW) 6 ALRB No. 6 ALRB No. 38
Case Nos. 79-CE-123-SAL
79-RC-5-SAL

ALO'S DECISION

The ALO concluded that Respondent violated Section 1153(a) of the Act by discharging employee Jose Luis Hernandez for protesting a supervisor's abusive treatment of a co-worker, violated Section 1153 (c) and (a) by discharging Hernandez, and violated Section 1153 (a) by questioning Hernandez about his union sympathies. The ALO also found violations based on incidents which were not specifically alleged in the complaint.

In the representation portion of the case, the ALO found no merit to the Employer's objection that the Board agent had improperly refused to accept challenges by the company observer. These challenges to 18 voters were on the grounds that the employees, who worked during the eligibility period, had quit when they went on strike and were therefore ineligible to vote. The ALO, relying on George Lucas & Sons (Feb. 1, 1977) 3 ALRB No. 5, found that the workers were presumptively eligible to vote, and that there was no evidence presented as to abandonment of the strike. The ALO also found no merit to the Employer's objection that the UFW interfered with the Employer's attempts to communicate to the workers, finding that the existence of a peaceful picket line presented no such interference.

The ALO recommended dismissal of the election objections and certification of the United Farm Workers.

BOARD DECISION

The Board affirmed the ALO's conclusion that Respondent violated Section 1153 (a) by discharging Hernandez, finding that protesting a supervisor's abusive treatment of an employee constitutes protected concerted activity. The Board declined to reach the Section 1153(c) issue, as the remedy therefor would be essentially the same as for a Section 1153(a) discharge. The Board ordered Respondent to restore Hernandez to company housing as well as offer him reinstatement, since Hernandez' eviction was a direct result of the unlawful discharge.

The Board also concluded that Respondent's questioning of Hernandez as to his union sympathies constituted unlawful interrogation.

The Board affirmed the ALO's conclusion that Respondent violated Section 1153(a) by summoning sheriffs to its labor camp where employees were peacefully gathered before work to discuss the discharge of Hernandez. The sheriffs, in the presence of management

personnel, went through Hernandez' wallet and ordered Hernandez to vacate his house. Although this incident was not specifically alleged in the complaint, the Board found that it was fully litigated and that there was no dispute as to the essential facts. Since the incident was connected with the chain of events alleged in the complaint and the misconduct was by parties involved in the alleged incidents, it was closely related to the subject matter of the complaint.

The Board rejected the ALO's conclusion as to certain other violations not specifically alleged in the complaint, on the grounds that the evidence concerning these incidents was presented only during the representation portion of this consolidated hearing, when General Counsel was no longer involved in the case. The Board noted that Respondent was not on notice that the conduct might be held to be in violation of the Act and found that the issues were not fully litigated.

As to the representation issues, the Board affirmed the ALO's conclusion that the Board agent acted properly in refusing the company observer's challenge to the 18 voters, but did not rely on the ALO's reasoning. The Board found that the voter's eligibility was determined by Section 1157, which provides that all agricultural employees whose names appear on the payroll for the period immediately preceding the filing of the petition are eligible to vote. The Board found that the observer failed to present a proper challenge under Board Regulation 20355 (a); the fact that an employee employed during the eligibility period has quit or gone on strike before an election is not a legitimate challenge to his eligibility.

The Board also affirmed the ALO's conclusion that there was no evidence of interference by the UFW with the Employer's efforts to communicate with its workers during the picketing activity preceding the election.

The Board dismissed the Employer's objections, certified the UFW as the collective bargaining representative, and issued an Order providing remedies for the unfair labor practices which occurred.

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

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the matter of GIANNINI & DEL CHIARO CO., Employer-Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner-Charging Party.	Case No. 79-CE-123-SAL 79-RC-5-SAL ADMINISTRATIVE LAW OFFICER'S DECISION

James Schwefel, NOLAND, HAMERLY, ETIENNE & KOSS, Salinas, California, for Employer-Respondent.

Robert Carrera, of Salinas, California, for the Petitioner-Charging Party.

Constance Carey, of Salinas, California, for the General Counsel

STATEMENT OF THE CASE

RICHARD DOCTOROFF, Administrative Law Officer: This case, consolidating election and unfair labor practice issues was heard by me on July 10, 11, 12, 16, 17, 18, 1979, in Salinas, California. (Unless otherwise stated, all; dates herein refer to 1979). On May 25, The United Farm Workers of America, AFL-CIO (hereafter "UFW") filed an unfair labor practice charge against Giannini & Del Chiaro Co. (hereafter respondent, employer or company) alleging that the company had fired Jose Luis Hernandez on May 23 and ordered him out of company housing for union activity and engaging in protected concerted activities. A Complaint was served on June 7 and a First Amended Complaint was served on June 11 alleging violations of Sections 1153(a) and 1153(c) of the Agricultural Labor Relations Act

(hereafter described as ALRA or Act). Respondent answered on June 15, denying all allegation of unfair labor practices.

On May 24 the UFW filed a Petition for Certification with the Agricultural Labor Relations Board (hereafter described as ALRB or Board) so that an election could be conducted among the agricultural employees of the employer. Because the Regional Director determined that a protected strike activity was in progress, an expedited 48 hour election was held on May 26, pursuant to 8 Cal. Admin. Code Section 20377. The tally of the ballots showed these results:

number of eligible voters	22
number of voters	20
United Farm Workers of America, AFL-CIO	19
no union	1

Subsequent to the election, the respondent filed timely objections. On June 26, the Executive Secretary ordered that a hearing be held to determine the following election issues:

"a. Objections II.C., II.D., and III.B., whether the Board agent improperly failed to segregate ballots of challenged voters or refused to recognize attempted challenges by the employer's observer, and if so, whether such conduct affected the outcome of the election.

b. Objection IV.A., whether picketing activity by the UFW at the employer's premises following the filing of the petition and prior to the election operated to prevent the employer from communicating with its employees, and if so, whether such conduct affected the outcome of the election."

The Executive Secretary dismissed respondents other election objections, and respondent's request for review of that dismissal was denied by the Executive Secretary by Direction of the Board on July 10.

Pursuant to 8 Cal. Admin. Code Sec. 20355, the Executive Secretary consolidated the election case, 79-RC-5-SAL with the Unfair Labor practice case, 79-CE-123-SAL.

On July 9 a Second Amended Complaint was served, which contained the added allegation that four days before the discharge of Hernandez, John Giannini, Sr., interrogated him concerning UFW sympathies and thereby created an impression of surveillance of his union activities. The Second Amended Complaint further modified the remedy and asked that Hernandez be restored to company housing. Respondents objected to these amendments, and all parties were given the opportunity to be heard. Respondent could not establish surprise or prejudice and the amendments were allowed, since the subject matter relates directly to the original complaint.

All parties were given a full opportunity to participate in the hearing. The UFW, the charging party, was allowed to intervene in the unfair labor practice portion of the case. All evidence directed primarily at the unfair labor practice issues was presented by all parties first and then evidence concerning the election objections was presented by the employer and the UFW. After the close of the hearing, all parties filed post hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration

of the briefs and arguments of the parties, I make the following:

FINDINGS OF FACT

JURISDICTION

Giannini & Del Chiaro Co. is a partnership engaged in agriculture in Monterey County, California and is admitted to be an agricultural employer within the meaning of Section 1140.4(c) of the Act. It was also admitted that the UFW is a labor organization within the meaning of Section 1140.4(f) of the ALBA.

ALLEGED UNFAIR LABOR PRACTICES

The complaint as amended alleges in paragraph 5, "on or about May 23, 1979 respondents through its agents John Kloncz and Jon Giannini, Jr., discharged Jose Luis Hernandez because he engaged in protected concerted activity and because of his UFW sympathies; in paragraph 6, "on or about May 24, 1979, respondent through its agents John Giannini, Sr., and Jon Giannini, Jr. ordered Jose Luis Hernandez to leave his company owned housing because he engaged in protected concerted activity and his UFW sympathies;" in paragraph 7, "on or about May 19, 1979, respondent through its agent John Giannini, Sr. interrogated Jose Luis Hernandez regarding his UFW sympathies and thereby created an impression of surveillance of his union activities."

Respondents denied the unlawful interrogation and contend that the discharge of Jose Luis Hernandez and subsequent order to leave company housing was for acts and omissions unrelated to protected concerted activity and UFW sympathies.

BACKGROUND OF RESPONDENTS OPERATIONS

Giannini & Del Chiaro Co. is a partnership in which Jon Giannini Jr. and John Giannini Sr., his father, are among the partners. The company has been in the business of raising artichokes for some thiry-five to forty years. It is situated, on approximately 350 acres at 161 Espinosa Road, Salinas, California.

Jon Giannini Jr. is the manager of Giannini & Del Chiaro Co. His father, John Giannini Sr., is semi-retired, but still occupies a key supervisory role in the operation. John Kloncz is a foreman at Giannini & Del Chiaro Co., with supervisory status. All three are supervisors as defined by the Act. Miguel Mora is an agricultural employee, who, while he has no authority to hire or to fire or otherwise to discipline employees, sometimes directs their work in the absence of the supervisors.

At peak season, the company employs between fifteen and twenty-five farm workers. This figure drops to as few as three to five employees during winter months, and ten to eleven during other periodic lulls. The sole duty of most of the employees is to pick and stump artichokes and to irrigate the fields. Certain employees are responsible for driving tractors in the field; at peak season there may be as many as five tractor drivers in addition to the assistance provided by the supervisory staff in this capacity. Sometimes, the tractor drivers move trucks in the course of operations at the company. All employees of Giannini & Del Chiaro Co., including foreman John Kloncz, engage in picking and stumping artichokes when they are not occupied in their other roles.

Stumping refers to the task of removing dead stumps from harvested artichoke plants to prevent worms and to allow new shoots to grow from the plant.

EMPLOYMENT OF JOSE LUIS HERNANDEZ

Hernandez was employed at Giannini for approximately three years and two months as a full time employee prior to &is termination on May 23, 1979. He was an experienced senior employee employed as a tractor driver. After approximately a year and one half at Giannini, Hernandez asked Jon Giannini Jr. if he could live with his wife and two children in a vacant company house in the vicinity of the home occupied by John Giannini Sr. Jon Giannini Jr. told Hernandez that the house referred to was not in good shape and that he really did not want Hernandez to live there. Nevertheless, because Hernandez had a family, had accrued some seniority, and was a tractor driver, Jon Giannini Jr. rented him the house. Hernandez testified that he agreed to put the house in repair and Jon Giannini Jr. said that he could have the house and extra work hours if there was no union. Jon Giannini testified that the agreement was that Hernandez make the repairs to the house and occasionally arrive at work early in order to position work vehicles before work began.

On this occasion and throughout this case I have decided to credit the testimony of Jose Luis Hernandez against that of Jon Giannini Jr. where the testimony is in conflict. Jose Luis Hernandez was a consistent and credible witness whose testimony throughout the case was corroborated by

other testimony and other evidence. Jon Giannini Jr.'s testimony throughout the case was marked by internal contradiction and discrepancies with his own prior statements. He also admitted to violations of the Act discussed later in this decision. While all these inconsistencies cause me to have suspicions of Jon Giannini Jr.'s credibility and they will be discussed further in this decision, the key factor causing me to discredit his entire testimony concerns his testimony about his knowledge of Hernandez being a UFW sympathizer. In his initial testimony, Jon Giannini, Jr. claimed emphatically that he did not know and never had been told that Hernandez was a union sympathizer. Later, after Miguel Mora testified as respondent's own witness that he had named Hernandez as a Chavista in response to Jon Giannini's question, Giannini recanted his previous sworn testimony and conceded that Mora had told him about Hernandez's sympathies. At the' time he recanted, Giannini, Jr., tried to indicate that any conversation regarding the union was casual and informal. Respondent argues that Hernandez's testimony concerning the requirement to remain nonunion to get the house should not be credited because a union contract was in force at the time. I am unconvinced, since the Teamster contract in effect would expire approximately six months from the time he got the house and the UFW appeared to be the only union remaining for field workers; this was recognized by both workers and the employer.

TEAMSTER CONTRACT

Between July 15, 1975 and July 15, 1978, respondent was

a party to a three year collective bargaining agreement with the Teamsters, "The General Field Agreement 1975-1978." After the ALRA became effective in August 1975 an election was held at the company. Both the UFW and the Teamsters were on the ballot and the Teamsters won. Although the UFW filed objections to the election with the Board they were never resolved and the case was closed in 1978.

During the period of the Teamster contract, sometime in late 1976 or early 1977, Jose Luis Hernandez testified that he went to the Teamsters and complained about the workers being given only half of a bonus due them. He further testified that when John Giannini, Sr. learned of his contact with the Teamsters about this matter he became angry and said, "I don't want anybody to talk with that fucking union." John Giannini, Sr. denied ever telling workers not to talk to the union. I credit Hernandez in this matter for two reasons. Because Giannini, Sr. also denied knowing of Hernandez's UFW sympathy prior to May 24, 1979 although his son and business partner, Jon Giannini, Jr. at this small family operation reluctantly admitted that he was told of such sympathy several months earlier by Miguel Mora. Further, when Giannini, Sr. was examined concerning his May 19 questioning of Hernandez regarding Hernandez's UFW sympathy, Giannini denied he had any conversation whatsoever, although Hernandez's testimony concerning the May 19 conversation is corroborated by Juan Cuevas, a current company employee.

MEETING AT TERMINATION OF THE TEAMSTER CONTRACT

At the time that the Teamster contract expired on July 15, 1978, Jon Giannini gathered the company workers for a

meeting to discuss what would occur without a contract. Giannini explained that the workers would essentially receive the same wages and benefits as they did under the Teamster contract. The primary factual dispute which appears in the testimony concerning this meeting involves the union dues and pension. According to Jose Luis Hernandez, Giannini Jr. told the workers that they would now no longer have union dues deducted and they would receive one half the amount previously paid into the Teamster pension fund on the condition that they remained non-union. Jon Giannini explained at the hearing that he only wished to describe the factual situation which would exist without a union. He claimed "it was assumed" that these conditions would operate in the absence of a union. For reasons previously stated I credit Hernandez's testimony.

Something else happened during the meeting at the expiration of the Teamster agreement that I find significant. Certain workers were selected to act as worker representatives in dealing with the company. It was undisputed and Jon Giannini, Jr. admitted that following his suggestion to select representatives, the workers selected representatives while he was still present and according to criteria that he presented to them. Miguel Mora, Jose Flores, and Ventura Velasquez were selected as workers' representatives. Giannini, Jr. wanted the three to represent workers' interests and come forward with workers' complaints and problems whenever the occasion arose. He specifically mentioned insurance and problems in the fields. Although Mr. Giannini Jr. first

denied on cross examination that he had any input into the decision of how representatives were selected on recross by the General Counsel he stated that he had mentioned "leaders," "people with seniority," "older workers," "the people who could speak for them."

AGREEMENT AMONG WORKERS TO GO TO THE UNION

Jose Luis Hernandez testified that sometime after the expiration of the Teamster contract a majority of the workers reached an agreement among themselves at several meetings that they would bring their work problems first to Jon Giannini, Jr. and if they go-t no satisfaction they would go to the UFW. This agreement was not transmitted openly to the company. Hernandez's testimony concerning this agreement is corroborated by that of Jose Flores. Both of these workers further testified that in February, 1979 after a dispute arose with John Kloncz concerning whether six workers, Miguel Mora, Arnulfo Fernandez, Armando Flores, Miguel Nambeo, and Jose Luis Hernandez, and Jose Flores should pick cannery artichokes and stump plants at the same time, all these workers except for Miguel Mora agreed that if any worker was unjustly fired they would go to the union and go on strike. At this time Hernandez actually contacted the UFW. Respondents presented Miguel Mora and two other worker witnesses to disprove the existence of any agreement to contact the UFW. Mora denied he knew of such an agreement. And while Hernandez believed that Mora knew of the agreement Flores testified that Mora did not since he occupied a middle ground between workers and management, so he did not. Also, Mora testified he

never seriously considered talk about the union and reduced all of it to "casual" "informal" talk. The two other workers who testified for the respondent concerning the agreement were not employed by the company during the time that the agreement was made in early 1979. Luis Mariscal did not work from December 1978 through April 18, 1979. Salvador Cortez was hired until the end of April, 1979. Although I have no problem with these witnesses' credibility, their testimony does little to disprove the existence of the agreement, only that they did not learn about it.

In March 1979, Jose Luis Hernandez discussed the UFW and the major lettuce strike occuring in the Salinas Valley, at other farms, with his fellow employees. He told them he had joined his brother-in-law on a UFW picket line at Coastal Farms towards the end of February or the first part of March. He made an additional contact with the UFW which did not organize at that time.

Also between March 18 and March 25, 1979, John Kloncz asked Mr. Hernandez to come to work early in the mornings. An argument ensued with Mr. Kloncz taking the position that other companies expected tractor drivers to work earlier than other employees without extra pay. When Mr. Hernandez suggested that it might be a good idea to bring in the UFW to resolve the question, Kloncz responded, "Oh, shit." Kloncz's testimony concerning this incident paralleled Hernandez's except that Kloncz recalled no discussion of extra pay for the extra work and he denied mention of going to the UFW and his response of "Oh, shit." For reasons that will be dis-

cussed in detail later in this decision, I do not consider John Kloncz a credible witness both because of his demeanor while testifying and contradictions in his testimony; consequently I credit Jose Luis Hernandez's testimony concerning this incident and find that Kloncz made those statements attributed to him.

MAY 19, 1979 -- INTERROGATION

The Saturday before Mr. Hernandez's discharge, Giannini, Sr. said to him, "You are a Chavista," and he answered, "Yes, I am a Chavista." Juan Cuevas, a fellow worker, was present and testified to Mr. Giannini's statement, although he did not hear Hernandez's reply. I credit Hernandez for the reasons previously stated, despite Giannini, Sr.'s denial.

MAY 22, 1979 -- NEWSPAPER HEADLINE

The day before the discharge, both John Kloncz and Jon Giannini, Jr. spoke to Mr. Hernandez about an article in the Salinas Californian regarding strike related violence.(General Counsel Exhibit 10). The headline of the article is "UFW activists charged with having firebomb." Both Mr. Kloncz and Mr. Giannini commented that those people must be crazy and Hernandez agreed. Arnulfo Fernandez was also present and corroborated Hernandez's testimony. Although Hernandez's understanding of English is limited, he testified he understood the message of the picture and headline. John Giannini, Jr. testified that he did not show Hernandez the article but showed it to Kloncz alone, and Hernandez may have inadvertantly seen

it because he was close by in the shop. Further, Giannini, Jr. first said he could not remember and then denied that Arnulfo Fernandez was present. Kloncz did not testify to this matter although he was present. I credit 'Jose Luis Hernandez's testimony here for two reasons. First, because of Arnulfo Fernandez's corroborative testimony. Secondly this testimony by Jon Giannini occurred during the first part of the hearing before he recanted his testimony denying Jose Luis Hernandez's UFW sympathy. It is completely consistent that if Giannini believed Hernandez to have union sympathy he would show him the article perhaps to show the error in his support of the UFW. I believe that Giannini denied showing the article to Hernandez for fear that it would be considered evidence of knowledge of union sympathy.

MAY 23, 1979

A. TRUCK INCIDENT

On May 23, 2979, Jose Luis Hernandez picked artichokes, for the first time in two months. Miguel Mora, a co-worker with fifteen years seniority, asked Mr. Hernandez to move a truck. Mr. Hernandez refused, stating that Mr. Mora should get someone else since he didn't know how long he would be working in the particular field. The person who drives the truck into the field in the morning usually moves it for the rest of the day. Raymundo Hernandez had driven a truck in the morning, and Raymundo without being asked drove the truck in question upon Jose Luis Hernandez' refusal.

At 9:30 a.m. John Kloncz arrived in the field after the workers began picking. He had brought down stumping knives so that the workers could stump the plants when

picking was finished. He also wanted to tell Mr. Hernandez that he had tractor work for him to do. When he gave Mr. Mora the stumping knives, Mr. Mora told Mr. Kloncz that Hernandez had refused to move the truck in the morning. Mora denied that Jose Luis Hernandez gave him any explanation whatsoever for refusing to move the truck. Mora explained that this was totally inconsistent with Hernandez's past behavior. Although Hernandez refused to ever acknowledge any degree of supervisory status of Mora, despite the consistent credible testimony of many other witnesses in the case, I still believe that he did give Mora an explanation for his refusal. Mora initially could not remember who drove the truck to the fields that day, then claimed that Jose Flores drove the truck in dispute and not Raymundo Hernandez, who Mora described as a bad driver. It is clear from Flores's own testimony that he did drive a truck that day, but after Jose Luis Hernandez's refusal to drive the truck, Raymundo Hernandez, who was standing nearby, testified that he continued to drive the truck in question, as he had done earlier that day. In addition, the explanation offered by Jose Luis Hernandez that he expected to be called from the field they were in and be unavailable later in the day is totally consistent with John Kloncz's "statement to Mora that he wanted Jose Luis Hernandez to do tractor work.

B. CONFRONTATION BETWEEN JOSE LUIS HERNANDEZ AND JOHN KLONCZ

1. DISCHARGEE'S VERSION

Immediately after Kloncz and Mora first spoke the morning of May 23, Kloncz went to check on the men while they were

working nearby. He approached Santiago Toro Mendez and they exchanged a few words of greeting. Jose Luis Hernandez was picking two rows away -- eighteen feet. When Kloncz asked Mendez how he was, Mendez replied, "A toda madre." Mr. Kloncz testified that he did not know that that expression means "real well or perfectly well."

Seconds later Mendez jokingly suggested to Mr. Kloncz that he get a basket and pick artichokes with the rest of the men. When Mendez made the remark to Kloncz, Kloncz became angry and said that that was no way to speak to the boss. What was said next is disputed, but Hernandez testified that Kloncz then said, "You talk too much, you and Luis, you both talk too much. And all your talk is just plain shit." Mendez responded in English, "I don't know, I don't know." Although Victor Medina was present only briefly he corroborated these exact words. Mr. Kloncz then said, "Yes, you know. All of you have your head just full of shit, and you talk too much." At that point Mr. Hernandez entered the conversation by saying to Mr. Kloncz, "Hey, stop and think what you're saying and pay attention to what you say."; He went on to explain to Mr. Kloncz that he had a right to correct them in their work but not to speak to the men in the way he had. Mr. Kloncz then said once more, "You talk too much" and added, "You are fired because I am the boss here." At that point, Mr. Hernandez testified he said, in Spanish "A mi me vale madre. Aqui y en la tierra de los indios soy el mismo." This was translated to mean "I don't give a damn. Here in the land of the Indians, I am the same person."

Hernandez said Kloncz called him a bastard after firing him.

There is no dispute that after that discussion Kloncz went over to his pickup truck. Hernandez believed Kloncz went to the truck to determine Hernandez's time and in fact Hernandez testified he asked Kloncz for his check while both were over by the truck. Hernandez followed Kloncz to the truck and called other workers in the field to come to him so that he could explain what happened. Hernandez asked Jose Flores to interpret for him so that he and Mr. Kloncz could understand each other, since Kloncz speaks almost no Spanish and Hernandez speaks very little English. Hernandez told Flores he had been fired and Kloncz told Flores that Hernandez had insulted him by saying something about his mother. And Hernandez said to Flores that Kloncz had said something about Hernandez's mother also. Then each said to the other, "We are even then and we've no more problems." John Kloncz told the rest of the crew to return to work because everything was all right. Victor Medina confirmed this fact. Kloncz also mentioned to Hernandez' the truck incident with Mora, and both Hernandez and Flores agreed to move the truck when asked to do so in the future. Mr. Hernandez returned to work, and nothing more was said to him while he was working, although he saw Mr. Kloncz and Jon Giannini, Jr. in the fields later that day.

Although Mr. Hernandez admitted that he had an artichoke knife in his possession since he had been using it to pick the artichokes, he denied threatening Kloncz with it or waving it in his hand during the argument.

2. RESPONDENT'S VERSION

According to Kloncz, after Santiago Torro Mendez asked him to get an artichoke basket and start picking, Kloncz became upset and admitted saying, "I am not going to take this shit from you."

Miguel Mora, who was near Mendez and Kloncz at this time, testified that Kloncz's exclamation was not directed against Hernandez and that Mendez appeared to take no offense by it. Mora testified that Hernandez then approached Kloncz and said to him, "Why do you discriminate against him, using those words?" Kloncz testified that Hernandez jumped in and said, "You can't tell us not to talk and all this." Kloncz responded, "I never said that you guys couldn't talk." Since Kloncz believed Hernandez challenged his authority as boss, Kloncz stated, "Hey, I am the boss." Hernandez responded, "No, you are not the boss. You are nobody." Kloncz and Mora testified Hernandez proceeded to call Kloncz "chinga tu madre," which means "motherfucker" or "fuck your mother" in Spanish. During this exchange, Kloncz said Hernandez had an artichoke knife in his hand, and Kloncz did not. Kloncz claimed Hernandez was waving his hand with the artichoke knife in it, although made no direct threat with it.

At this time, Mora testified he moved the truck, in which workers were dumping artichokes, nearer to where they would finish picking their rows. Kloncz testified he intended to go over to his own pickup and to write out a

warning to Hernandez and denied he fired Hernandez at this time. Hernandez then began shouting to the other workers, waving at them to come over to where he was. Kloncz testified he began to "get scared" as the workers approached and he was dissuaded from writing out the warning to "let it cool down." Mora returned to the scene within a half a minute and noticed that Kloncz was pale as he retreated to his truck. Mora sensed that he was frightened.

Kloncz tried to radio Jon Giarmini. Jr. from his truck, but couldn't reach him. After Hernandez shouted to and beckoned the workers to come, Jose Flores came to the scene and to some extent acted as a go-between and translator. Mora came back at the spot where the conversation was ensuing. Kloncz testified that he was unsure of what might happen if the workers sided up with one another. Mora testified that he thought there might be a fight from the tone of Kloncz and Hernandez' voices.

Kloncz told the men to return to work. Not until Mora said to the men, "Let's go back to work" did they slowly return to their jobs, within three to five minutes. After the men returned to work, Kloncz questioned Hernandez in regard to his earlier refusal to drive the truck at Mora's request. Mora said Hernandez did not reply.

3. ADMINISTRATIVE LAW OFFICER'S FINDINGS

It is unfortunate that Santiago Torro Mendez, whose innocuous joking remark ignited the whole incident, was not available to testify. Although Miguel Mora and Jose Flores testified at some length about the matter, their testimony alone is insufficient to resolve all the discrepancies

between the dischargee's and the employer's positions. Victor Medina, Luis Valdez Mariscal, and Salvador Cortez testified about the argument but were not present to hear most of what was said between Kloncz and Hernandez. Consequently, much of my resolution of this issue was based upon my evaluation of Kloncz's poor credibility.

Although Mora did testify to having heard Hernandez call Kloncz a motherfucker after Kloncz had announced he was boss, he indicated that these were the only things that he really remembered at that portion in the conversation since both men were quite angry and talking at the same time, in English and Spanish, and Mora left to move the truck after he heard "motherfucker." It is apparent from this testimony that it would have been quite likely that Mora did not hear all that was being said, including mention of firing, about which he never testified. It is noteworthy that although Miguel Mora testified for the employer, Mora repeatedly stated that soon after Hernandez entered the conversation with Kloncz, Kloncz told Hernandez that "his talk was nothing but a bunch of shit" -- virtually the same words that Hernandez himself testified to. This was clearly different from what Kloncz claimed he said. It is also clear from Mora's testimony that this remark by Kloncz was made immediately before Hernandez questioned Kloncz's status and called him a motherfucker. Mora's attempt to characterize Kloncz's remark as "a common thing" "just a word to end the conversation, just like you would say, 'That's it,' " is quite unconvincing in view of the provocative language used and the

tension that already existed. Mora seemed to make a habit of trying to minimize the impact of any of his testimony that was damaging to the employer, since he also indicated that he treated talk among the workers about the UFW as a joking matter and never paid much attention to it. Although Hernandez's response was strong it was not unprovoked.

Mora's claim that Hernandez made no response to Kloncz at the end of the argument, when Kloncz asked why he did not follow Mora's earlier request to move the truck, was never confirmed by Kloncz. Hernandez's testimony that he would do this in the future when asked was corroborated by Jose Flores. And in light of Mora's inconsistent testimony on the truck incident described earlier in this decision, I cannot believe Hernandez did not make a reply.

While Jose Flores, an employee for three years, impressed me as an honest man, much of what he testified to was based on statements that Hernandez and Flores made to him, since he was present only after the initial confrontation. What was particularly significant in his testimony was that he believed that the incident was resolved when Hernandez and the other men returned to work that day, and Kloncz and Hernandez were speaking in a non-hostile manner.

In addition Flores testified that Hernandez had told him that he had called. Kloncz a motherfucker, and that Kloncz had said Hernandez's "head was full of shit." Although Hernandez denied he made the "motherfucker" remark, I credit Flores and Mora on this issue. Hernandez also told Flores that Kloncz had fired him. It is unclear from Flores's

testimony alone what the sequence of these statements were. But in light of the Mora testimony coupled with that of Hernandez himself it appears most likely that Hernandez made the motherfucker remark after Kloncz cursed him and said he was fired. The primary factor which caused me to make this determination was the serious question I had concerning Kloncz's credibility.

The demeanor of John Kloncz provided a prime example of the criteria used in discrediting testimony. He was defensive, frightened, self-serving, and frequently incoherent. On cross-examination he appeared angry and heated. His bias is obvious. He is related to the Gianninis, had worked for them for about eight years and six months before May 1979 he had assumed a predominantly supervisorial role. Kloncz had the ability to hire and fire; yet, Kloncz had never fired anyone before. I believe that Kloncz overreacted to a casual remark by Santiago Torro Mendez. When Jose Luis Hernandez spoke to protect Torro, Kloncz became more angry. He felt that his authority was threatened. He fired Hernandez but he backed down and later claimed that he planned only to give him a warning. Although Kloncz claimed to be a calm man, it is clear from those facts not in dispute that he was easily upset. He admitted he became upset when Mendez jokingly suggested he get a basket and pick artichokes with the men, even though it was not unusual for him to pick artichokes. Jon Giannini, Jr. testified to an incident where Kloncz became overly upset while he was taking pictures of pickets when a woman cussed and he had to be calmed.

The testimony of John Kloncz is replete with the expression, "you know," which seems to be used to avoid responding directly to questions. Throughout his testimony Kloncz would answer many questions with an affected long overly exagerated "no-o-o-o" both on direct examination and cross-examination, particularly when asked about his knowledge of UFW activity.

He was vague in matters of which he should have had certain knowledge. When asked how long he worked as a regular picker, he answered, "Oh, I would say a good five or six years -- seven years, somewhere in there." He was unable to pinpoint when he was given supervisorial authority although he believed Jon Giannini had given him warning slips to use at his discretion about six months previously.

At one point, when discussing the incident which led to Mr. Hernandez's firing, Kloncz says in one sentence that Hernandez was sitting when he called the men over and in the next sentence that he was standing when he called the men.

Also, Kloncz's credibility is also suspect because of his inability to understand what was really happening in the field, because his Spanish was so limited, and Hernandez spoke to Kloncz in Spanish. When certain of the phrases used by Hernandez were read to Kloncz, the only word he understood was "mother." His insecurity and fear of loss of authority with the men were clear, yet all day on the day in question the men continued working. None challenged his authority. And when Hernandez called the men over, they all went back to work within three to five minutes when told

to do so by Kloncz and Mora.

Kloncz's denial of knowledge that Jose Luis Hernandez supported the UFW is not credible at all, considering that the work force was very small and that his relative, Jon Giannini Jr. admitted he questioned Miguel Mora as to the Chavistas in the crew, and learned of Hernandez's sympathy.

His denial of having fired Hernandez in the field also is suspect. He testified he told Hernandez he was going to give him a warning, but neither he nor anyone else had ever given written warnings to workers, and the workers were unaware that there were warning slips in the truck. He did not actually give a warning nor did he tell Flores in the field that he planned to give Hernandez a warning. At one point he said that his was the first time he ever fired anyone and later he said that Jon Giannini Jr. was the one who decided to fire Hernandez.

The Kloncz declaration submitted by respondent in support of their objections to the election is in evidence. Respondent Exhibit F. Paragraph 3 of that declaration states that "Hernandez proceeded to curse in Spanish, using many obscene and dirty words." Mr. Kloncz did not testify at hearing to any more than one expression which could be considered obscene. Although Paragraph 4 of that declaration claims Hernandez was insubordinate before, there was no testimony regarding any prior episodes of insubordination. In fact there was testimony by employer witness Miguel Mora that Hernandez was a very good and willing worker and that

he "always maintained a good composure." It is difficult to believe that there had been any prior incidents.

Of all the witnesses who testified about the incident, only Kloncz testified that Hernandez waved a knife in his hand during the argument. Although Mora testified that Hernandez had the knife because he had been picking, no mention was made of waving it in hand or making any type of threatening gesture. Judging the comparative physical sizes of Hernandez and Kloncz, at the hearing, I find it would be quite unlikely that Hernandez would want to initiate a fight with Kloncz who appeared much taller and heavier. Kloncz was approximately six feet four inches and weighed about 240 pounds -- Hernandez was approximately five feet ten inches and weighed only about 175 pounds.

C. MAY 23, 1979 - EVENING

In-the afternoon after the confrontation with Hernandez John Kloncz met with Jon Giannini, Jr. According to their testimony it was at this time that Giannini decided to fire Hernandez upon Kloncz's recommendation. Both because Hernandez had "cussed out" Kloncz and refused to move the truck when asked to do so by Mora.

Hernandez believed that the problem had already been resolved in the field and he was surprised when, after work, John Kloncz, Jon Giannini, Jr. and Miguel Mora appeared at the door of his house. Giannini, Jr. had a check in his hand. He asked whether Hernandez had had problems with Kloncz. Hernandez replied that he had and that he wanted to talk with Jon Jr. about it in order to explain what had happened.

Giannini replied that there was no more work for Hernandez and no explanation was necessary. He also told him he would have to leave his company house. Hernandez refused the check offered by Giannini and followed him to get an explanation when Giannini turned to leave. Giannini just repeated that Mr. Hernandez was fired.

That night Mr. Hernandez and Arnulfo Fernandez contacted the UFW. Mr. Hernandez also met with his fellow employees to enlist their support in the action they had planned three months earlier should any employee be fired unjustly.

MAY 24, 1979 - DEMAND FOR REINSTATEMENT AND WORK STOPPAGE

On the morning of May 24, 1979, Jon Giannini, Jr. received a call from John Kloncz, who informed him that Jose Luis Hernandez was in the company camp near Hernandez's house with the workers. Jon Giannini, Jr. testified he telephoned the Sheriff's Department to avoid a possible bad incident, although nothing seemed amiss at the time.

Two Deputy Sheriffs were present' at the camp when Jon Giannini, Jr. arrived. When the employer told the workers it was time to go to work, they said they would not work unless Hernandez was rehired. Not only was Hernandez not rehired, he was given several different deadlines of five hours to two weeks to get out of his house by both Gianninis and a Deputy. When Jon Giannini, Jr. refused to rehire Hernandez, all of the workers present refused to work. They said they were going to the UFW

and did so. Later that day they went to the office of the ALRB where the UFW petitioned for an election.

EMPLOYER NOTIFICATION OF ELECTION

Jon Giannini, Jr.'s wife received a telephone call from the ALRB during the afternoon of May 24 from Mr. Viniegra, a Board agent, who asked that his call be returned and made mention of a petition for election. Jon Giannini, Jr. contacted his attorney, James D. Schwefel, when he received this message from his wife, and he and Mr. Schwefel contacted the ALRB office later that afternoon and learned that an election had been scheduled for Saturday, May 26, 1979.

PICKETS

The next day, Friday, May 25, the employees and supporters carrying UFW flags picketed the company premises until the pre-election conference conducted by the ALRB late that afternoon. The pickets returned the next morning, May 26, and picketed until the time of the election, at noon. After the election there was no further picketing at any time.

During the picketing there was no violence on the picket line. Sheriff's deputies, called by the employer, simply as a safeguard, were present approximately 90% of the time. The only incident that occurred involved picketers who cussed John Kloncz as he photographed them and other employees and non-employees on the picket line.

EMPLOYER'S ELECTION CAMPAIGN

Jon Giannini, Jr. testified that on the morning of May 24, 1979, he was unable to effectively express his views as to how he felt about the misunderstanding between management

and employees. This was largely due to a language barrier that could not be surmounted by the partial bilingual abilities of anyone present. He testified that the only time he saw the workers assembled after the morning of May 24 was on the picket line and not all of the workers picketed. He first testified that his employees are well scattered in terms of where they live. But on cross examination he conceded that most of the men live in close proximity to the company, in Castroville and Salinas. Jon Giannini, Jr. testified that his attempt to use a hired spokesman to communicate with the workers was ineffective since he was unable to do so until late Friday, May 25, 1979, after the pre-election conference, and then the spokesman had difficulty and was unable to talk with many of the workers that evening about the election held the next day. Jon Giannini, Jr. was preoccupied with harvesting his crop during the work stoppage between May 24 and May 26 and testified that the tense situation on the picket line and the presence of nonemployees made it even more difficult to attempt to communicate his views.

THE ELECTION - MAY 26

When the petition for an election was filed with the Salinas regional' office of the ALRB on May 24, 1979, Luis Viniegra was the Board Agent assigned to the case. Because a declaration was included with the petition stating that-a majority of the workers were on strike, he conducted a further investigation to determine if an expedited election within 48 hours, pursuant to 8 Cal. Admin. Code Section 20377 was required. After reviewing the declaration and

response made by the company through their attorney, James Schwefel, and after consulting legal counsel of the ALRB and the supervising field examiner, Viniegra determined that a strike existed, warranting an expedited election. Such an election was ordered by the Regional Director.

Miguel Mora acted as company observer for the election on May 26. He was asked by Jon Giannini, Jr. to challenge the eligibility to vote of the first 18 names on the list which was admitted into evidence as Respondent's Exhibit C. Mora challenged these ballots on the basis that these persons had voluntarily quit work on May 24, 1979 and were not agricultural employees of the employer. Luis Viniegra, who was the ALRB agent in charge of conducting the election, testified that Mora did attempt to challenge the ballots of the 18 persons referred to above. Viniegra further testified that since all eighteen were on the eligibility list because they had worked the week before the election, and because, all had signed a declaration attesting to the fact they they were on strike, already corroborated by his own investigation, he determined that the workers were not subject to a challenge of this nature.

RETURN TO WORK

Striking workers did not work on Saturday, the day of the election. Sunday was a normal day off. Monday, May 28, was Memorial Day, a holiday. Tuesday, May 29 respondent

notified all the employees except Hernandez that they could return to work the next day, which they did on Wednesday, May 30.

During the time that the employees were not working, they were given forms prepared by the employer never before used indicating that they had quit. General Counsel Exhibit 12.

CONCLUSIONS OF LAW

RESPONDENT VIOLATED SECTION 1153 (a) OF THE ACT BY DISCHARGING JOSE LUIS HERNANDEZ AND EVICTING HIM FROM COMPANY HOUSING.

Jose Luis Hernandez intervened on behalf of a co-worker Santiago Torro Mendez who was being verbally assaulted by foreman John Kloncz because of Kloncz's overreaction to Mendez's innocent joke about work. While Kloncz's angry abusive remarks were directed initially toward Mendez there was credible evidence that they were also directed to Hernandez himself and other workers. It is my considered opinion that this act of coming to the aid of a fellow worker is precisely one of the "concerted activities for ... mutual aid or protection ..." that is protected by Section 1152 of the Act. Inasmuch as Hernandez's subsequent firing and loss of housing stemmed directly from his attempt to aid his co-worker, those employer responses violate Section 1153(a) of the Act, which makes it an unfair labor practice "to interfere with, restrain, or coerce, agricultural employees in the exercise of their rights guaranteed in Section 1152." Resetar Farms 3 ALRB 18. (1976)

The fact that Hernandez himself resorted to abusive

language after the discussion became heated and Kloncz used provocative words and told him he was fired does not create any justification for the employer's action. It appears from the reconciliation in the field between Kloncz and Hernandez, that Hernandez's name calling was an unfortunate spontaneous outburst provoked by Kloncz's own abusive language and his stated firing of Hernandez. It did not appear to be a conscious decision to degrade the supervisor or undermine his authority. See Max Factor & Co. 100 LRRM 1023 (1978); Thor Power Tool Co. 57 LRRM 1161 (1964), enforced 60 LRRM 2237 (7th Cir. 1965).

In any event the employer's stated justification for for the discharge was not limited to only the name calling. The employer also objected to Hernandez's calling other workers to witness the argument causing a momentary work stoppage. Although the employer attempted to characterize Hernandez's call to other workers as intimidating to Kloncz and a challenge to his authority, no violence occured and the workers soon returned to work when asked to do so.

Since Hernandez himself was attempting to obtain aid from other workers in his own dispute with the foreman, such action is itself protected by Section 1152 of the Act and cannot be used as a justification for his discharge and loss of housing. It is clear that workers have the right to protest their working conditions in concerted fashion, whether or not such protests result in brief work stoppages. Resetar Farms, supra. Rather than possibly creating violence,

the arrival of other workers brief as it was appeared to cool the dispute and prevent violence.

The ALRB has found an eviction to be a violation of the Act and has ordered reinstatement to company housing plus all costs incurred by the employee because of his enforced move. McAnally Enterprises, Inc. (1976) 3 ALRB No. 82, Felice Estate Vineyards (1977) 4 ALRB No. 81.

SECTION 1153(c) VIOLATIONS

Section 1153(c) of the ALRA which is identical to Section 8(a)(3) of the NLRA makes it an unfair labor practice for an agricultural employer, "By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." For a discharge to violate section 1153(c), there must be discrimination, and the purpose of the discrimination must be to encourage or discourage union membership, Radio Officers' Union, 347 U.S. 17, 42-43, 33 LRRM 2417 (1954). Specific evidence of intent to encourage or discourage is not an indispensable element of proof; where encouragement or discouragement is a natural and forseeable consequence of the employer's action it is presumed that the consequence was intended. Id., 347 U.S. at 44-45. Where an employee is allegedly discriminated against because of his or her union activity, employer knowledge must be shown. Bruce Church, Inc. 5 ALRB No. 45 (1979)

After the General Counsel has introduced evidence that the employer has engaged in conduct that could adversely affect employee rights, the employer has the burden of proving that it was motivated by legitimate business objectives. NLRB v.

Great Dane Trailers, Inc. 388 U.S. 26,65 LRRM 2465 (1967). Maggie-Tostado, Inc. 3 ALRB No. 33 (1977).

A derivative violation of section 1153 (a) necessarily follows from a violation of section 1153 (c) Maggio-Tostado, Inc. Id.; Tex-Cal Land Management, Inc. 3 ALRB No. 14 (1977).

Focusing on the issue of anti-UFW motivation, there is ample evidence to support such a finding. Before the discharge, Jon Giannini, Jr. conditioned giving Hernandez a house on his not organizing the company. Similarly, the receipt of benefits after the expiration of the Teamster contract was conditioned on there not being a union. Kloncz's exclamation of "shit" when Hernandez announced he planned to contact the UFW concerning work complaints in March is additional evidence of such animus. Even after the discharge occured there was evidence of further anti-union animus implicit in the unlawful surveillance of employees on the picket line, and the unwarranted presence of Sheriff's deputies.

While the question of employer knowledge of Hernandez's union activity was first denied by all company spokespeople, Jon Giannini, Jr. recanted his testimony during the hearing and admitted such knowledge. Inasmuch as the company is a small family operation such knowledge can be imputed to the two other supervisors in the company, John Giannini, Sr. and John Kloncz. C. Mondavi & Sons dba Charles Krug Winery, 5 ALRB no. 53 (1979).

Although insubordination may be a valid justification for the discharge of an employee associated with a union, in this instance the alleged insubordination occured as Hernandez was engaged in protected concerted activity and must be considered pretextual. Further, the added fact that Jon Giannini, Jr. refused to even listen to any explanation for Hernandez's alleged insubordination when it was clear that the dispute involved two people speaking different languages causes me to further doubt the employer's explanation. In an NLRB case, a principal in-plant organizer was fired after being informed of charges against him which would be grounds for dismissal. His request for an investigation based on his good faith belief that the charges were false was denied. The court upheld the Board's ruling that a union leader was entitled to an investigation of those charges. NLRB v. Jackson Tile Mfg. Co. (5th Cir. 1960) 46 LRRM 2817

RESPONDENT UNLAWFULLY SPIED UPON THE UNION ACTIVITIES OF ITS EMPLOYEES.IN VIOLATION OF SECTION 1153(a)

A. PHOTOGRAPHING

Surveillance of employee activities which has a reasonable tendency to affect employee exercise of statutory rights violates Section 1153(a). Proof that the surveillance did interfere with employees' union activities is not necessary. Merzoian Bros, et. al. (1976) 3 ALRB No. 62 see also P.P. Murphy Produce Co. Inc., dba O. P. Murphy and Sons, 4 ALRB No. 106 (1978).

In this case the employer engaged in unlawful surveillance by taking photographs of striking employees. An

employer violates the Act by photographing employees engaged in peaceful picketing. Glomac Plastics, Inc. (1978) 234 NLRB No. 199, 97 LRRM 1441. The only possible defense to such a charge is the need for evidence to document violence. By the employer's own testimony the picket line activity was not violent. Therefore the taking of pictures of peaceful picketing constituted an act of unlawful surveillance. When, as here, pictures are taken by management of employees on a picket line in the early part of a strike and there has been no reason to anticipate violence, the NLRB has held that the "picture taking was calculated to create and did create an impression of management surveillance of protected and peaceful activity carrying with it the implicit threat of possible future retaliation." Larand Leisurelies, Inc. (1974) 213 NLRB No. 37, 87 LRRM 1129

Although this matter was not charged as a violation, all of the elements of the violation were introduced and proven by respondent in its own case. Therefore no surprise or prejudice can be shown. Since the facts forming the basis of the violation are not in dispute and were litigated, a violation can be found. Anderson Farms Company, (1976) 3 ALRB No. 67, footnote #6.

B. PRESENCE OF SHERIFF

The employer, Jon Giannini, Jr. volunteered in his testimony at the hearing, that on the mere suspicion that violence might occur, he called the sheriff on two occasions, and deputies arrived each time. On Hay 24 the sheriff was called as the workers were peaceably assembled before work

to demand that Hernandez be rehired. On May 25 and May 26 the sheriff was called again and deputies were present 90% of the time that the employees and supporters picketed the employer's premises. The presence of law enforcement officials at the employer's premises as the workers were engaging in protected concerted activities has an intimidating and chilling effect on the full exercise of their rights. While such interference by a sheriff would be appropriate where violence or concrete threats of violence were evident, in this case this was not true, and the sheriff's presence resulted in unwarranted interference with employee rights in violation of Section 1153(a). Anderson Farms, 3 ALRB No. 67, (1977). Although this matter was not charged as a violation, the matter was admitted by the employer in its own case and never disputed, consequently it is appropriate to find such a violation. Anderson Farms, Id.

C. JOHN GIANNINI, SR.

When Mr. John Giannini, Sr., told Mr. Hernandez that he was a Chavista, he was creating the impression of surveillance since Mr. Hernandez had not knowingly communicated his union support to Mr. Giannini. When an employer gives the impression he has knowledge of union activities of an employee when those activities have not been overt, the comments would reasonably be expected to create in the employee's mind the conclusion that his activities were known to the employer and that the knowledge was obtained through surveillance. Armaudo Bros. Inc. 3 ALRB No. 78 (1976).

EMPLOYER DOMINATION AND INTERFERENCE OF LABOR ORGANIZATION

Section 1153(b) of the Act provides that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

After the expiration of the Teamster contract on July 15, 1978 John Giannini admitted at the hearing that he was present at the time when employee representatives were selected by their co-workers to speak in behalf of workers' interests with the company. He had direct input into how such representatives would be selected. It is evident that such involvement with employee organizations would be a violation of Section 1153(b) were it not for the six month limitation imposed by Section 1160.2 of the Act. Superior Farming Company, Inc. 5 ALRB No. 6 (1979) However, since there is no substantial evidence of what the employer's continued involvement in worker organization within the appropriate six month period is, no such specific finding will be made. However, this admitted behavior is clearly corroborative evidence of Hernandez's testimony concerning the meeting, and the employer's anti-union sentiments at that time.

THE BOARD AGENT'S REFUSAL TO ACCEPT THE CHALLENGES OF THE EMPLOYER'S OBSERVER AND FAILURE TO SEGREGATE THE BALLOTS OF CHALLENGED VOTERS WAS WARRANTED AND DID NOT AFFECT THE OUTCOME OF THE ELECTION

It is undisputed that Board Agent Luis Viniegra refused to accept the challenges of employer's observer, Miguel Mora, that eighteen voters were not eligible to vote since they were

not agricultural employees of the employer. Further, it is undisputed that he did not segregate any ballots in the election, as provided by 8 Gal. Admin. Code Section 20355. Viniegra explained at the time of the election and again at the hearing that according to his understanding of the Regulations and the Act, employees who would otherwise be eligible to vote, since all their names were on the eligible voter lists, could not be rendered ineligible simply because they were on strike. He determined that these particular employees were strikers from his review of the employees' declaration submitted with the election petition attesting to that fact, UFW - Exhibit 101, and his own ivestigation

It is abundantly clear from the testimony and documents received in this case that eighteen of twenty-two workers of the employer were on strike to challenge the unlawful discharge of Jose Luis Hernandez at the time of the election. The fact that they returned to work soon after the election is not determinative of their striker status. Consequently, had the challenges been permitted to be entered and the ballots segregated, subsequent investigation pursuant to 8 Cal. Admin. Code Section 20363, would have shown that the challenged voters were strikers and thus eligible to vote. In George Lucas and Sons, 3 ALRB No. 5 (1977) the Board stated at page 6: "We hold today that a person whose name appears on the payroll immediately preceding the strike is presumptively eligible to vote in the election." See also Kellburn Manufacturing Co., Inc., 11 LRRM 142 (1942).

Although the Board in George Lucas recognized that it

was possible to overcome this presumption with evidence of abandonment of the strike at the time of the election, no such rationale was presented to the Board agent at the election, nor was any such evidence presented during the hearing before me. Pacific Tile & Porcelain Co., 50 LRSM 1394(1962).

In order to make a proper challenge 8 Gal. Admin. Code Section 20355(a) provides:

> Any party or the Board agent may challenge for good cause shown, the eligibility of any person to cast a ballot. Good cause shown shall consist of a statement of the grounds for the challenge, which shall be supported by evidence submitted subsequent to the closing of the polls.

Simply contending that a person is not an agricultural employee of the employer when it is apparent to all parties involved that such a worker is an unfair labor practice striker, fails to provide sufficient "good cause" upon which a proper challenge can be based. "It is equally well settled that a mere denial that evidence is true is insufficient to raise a factual dispute." George Lucas & Sons, 3 ALRB No. 5 p. 5 (1977), citing, Erickson v. United States,340 F.2d 512 (5th dr.,1965) and NLRB v. Smith Industries, Inc.. 403 F.2d 889, 69 LREM 2660 (5th dr., 1968). Consequently, the Board Agent was correct in refusing to entertain the challenge and segregate the ballots, according to 8 Cal. Admin. Code Section 20355(d), except for one ballot.

Of the eighteen ballots cast by the workers, only one should have been challenged, the ballot cast by Jose Luis Hernandez. He was discriminatorily fired for engaging in

concerted activities, and a discharged employee may vote subject to challenge. Koehring Co. (1971) 193 NLRB 513, 78 LRRM 1278. However, failure to challenge Hernandez's ballot did not affect the outcome of the election because Hernandez's discharge is found to be the result of an unfair labor practice, and challenge would ultimately fail. His vote would be tallied.

Employer argues that the Board agent's unilateral determination that the employees in question did not have to vote challenged, denied it procedural due process. Employer further argues that it was denied the right to a full investigation, the right to an evidentiary hearing pursuant to 8 Gal. Admin, Code Section 20363(a), the receipt of a copy of the Regional Director's report, and the opportunity to benefit from procedural guarantees.

Assuming arguendo that the Board agent's conduct denied Respondent of procedural due process, it was not without redress. Respondent was afforded a due process hearing in this consolidated hearing, and was allowed the full opportunity to present evidence and testimony in objecting, to the conduct of the election or conduct affecting the results of the election. George Lucas & Sons, Supra. at p. 5.

Even if the Board agent's failure to segregate ballots of challenged voters and his refusal to recognize attempted Employer challenges is deemed to be improper, such conduct did not affect the outcome of the election. Such conduct did Hot interfere with the employees' free choice. Harden Farms of California, 2 ALRB No. 30 (1976). See also, Kavano Farms, Inc. 3 ALRB No. 25 (1976). Employer's objections II.C., II.D.,

and III.B. should be dismissed.

NO INTERFERENCE WITH EMPLOYER'S CAMPAIGN - PICKETING

To answer the question of "whether picketing activity by the UFW at the employer's premises following the filing of the petition and prior to the election operated to prevent the employer from communicating with its employees. . .," one is required to examine corresponding First Amendment rights of the employer and the union. It has been held since Thornhill v. Alabama, 310 U.S. 38 (1940) that peaceful picketing activity in the course of a labor dispute, is protected by the First Amendment. Schwartz-Torrance Investment Corp. v. Bakery and Confectionary Workers' Union, Local No. 31, 61 Gal. 2d 766 (1964). Similarly, the First Amendment right of employers is directly recognized by Section 1155 of the Act. As long as the picketing is peaceful and the employer's speech contains "no threat of reprisal or force, or promise of benefit "both must be able to exist simultaneously.

Unlike the situation in The William Mosesian Corporation 4 ALRB No. 60 (1978), there was no evidence that UFW sympathizers physically interfered with any attempt of the employer to speak with his employees or otherwise communicate with his employees. The simple fact is that while the employees and their supporters were actually on the picket line, the employer made no attempt whatsoever to communicate with the striking employees either individually or at a meeting close to the picket line or some other location. The employer had ample time and opportunity to invite the

employee picketers to a meeting to hear the company position and chose not to do so. Company spokespeople could have spoken to picketing employees but did not. John Giannini's contention that the situation on the picket line was tense and the presence of non-employees on the picket line precluded him from communicating with the employees is not convincing. No violence was ever claimed, and the only incident of friction testified to involved the employer's unlawful photographic surveillance and the picketers' immediate response to it. In any event, sheriff's deputies called by the employer were present 907o of the time that the picketing occurred. Had the employer attempted to call a meeting to discuss his position on the election or tried to speak to individuals, their presence would likely deter actual violence or other interference on the picket line.

Between the time the employer learned of the election on May 24 and the election on May 26 the employer made no effort to communicate to the striking workers by means of written propaganda. Employees on the picket lines could have been handed leaflets without difficulty. Since most of the employees lived in close proximity to the employer's premises in either Gastroville or Salinas, those not on the picket line could have received hand delivered propaganda. See addresses on list of voters attached to Respondent's Exhibit C. Those few who lived as far as Seaside could have received telegrams. A total of only twenty-two workers were eligible to vote. Furthermore, because of the limited

distances involved it was possible for representatives of the employer to visit the employees at their homes to communicate the company position.

The employer argues that problems of time and language prevented him from taking any of these steps. Although the employer offered testimony that no Spanish spokesperson was available to speak to the workers until the night before the election, this was clearly no fault of the UFW. Since 8 Cal. Admin. Code Section 20377 provides for elections in strike situations within 48 hours of the filing of a petition, the employer is necessarily required to have or obtain translators and other management personnel necessary to wage his campaign within that time period. Employer's argument that the strike made the harvest more difficult is no excuse for his own failure to mount an election campaign.

The only actual steps that the employer took to communicate with the employees came the night before the election, when a company spokesperson described only as "Jamie" was able to speak to unspecified numbers of workers to present the company position.

What the employer is contending is that the very existence of a peaceful picket line prevented communication with workers and that is not supported by the evidence. Were I to hold that peaceful picketing in response to an unfair labor practice cannot occur in the time period before an expedited election, it would be a direct violation of the First Amendment rights of the picketers. I recommend, therefore, that the employer's objection IV.A. be dismissed.

The employer was not prevented by anyone from communicating with his employees; it simply did not do so.

RECOMMENDATION IN REPRESENTATION CASE

I recommend that United Farm Workers of America, AFL-CIO be certified as the exclusive collective bargaining agent of all the agricultural employees of the Employer in the State of California.

REMEDY IN UNFAIR LABOR PRACTICE CASE

Having found that the employer violated Section 1153(a) and 1153(c) of the Act, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act as delineated in the following order.

ORDER

Respondent Giannini & Del Chiaro Co., their owners, partners, officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Interfering with, restraining and coercing employees in the exercise of their right to engage in union activities or other concerted activities for the purpose of mutual aid and protection, and from discriminating against employees to discourage their union activities by way of discharge or any other manner, except as permitted by agreement of the type authorized by Section 1153(c) of the Act.

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

a. Offer Jose Luis Hernandez full and immediate reinstatement to a tractor driver's job or comparable employment, without prejudice to his seniority of other rights and privileges.

b. Reinstate Jose Luis Hernandez to the same or equivalent place of residence and make him whole for any loss suffered by reason of his move from company property, plus interest thereon computed at the rate of 7% per year.

c. Make whole Jose Luis Hernandez for any loss of pay or other economic losses suffered by reason of his termination, plus interest thereon computed at the rate of 77_a per year, and reimburse him for travel expenses or other expenses he has incurred in his efforts to obtain interim employment.

d. Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay and reinstatement rights due under the terms of this order;

e. Allow the UFW access to its bulletin boards to post union notices.

f. Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into all appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth herewith.

g. Within 30 days after issuance of this Order, mail a copy of the attached Notice in appropriate languages to each of the employees on its payroll at any time during the period of time from July 15, 1978 to the present time, and also provide a copy to each of its employees employed at any time during its 1980 peak season;

h. Post copies of the attached Notice in all appropriate languages, for one year in conspicous places on its properties, 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;

i. Arrange for a representative of Respondent in the company of a Board Agent to distribute and read the attached Notice in English and all other appropriate languages, to its employees assembled on company 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 non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period;

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

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

Dated: October 10, 1979

RICHARD M. DOCTOROFF
Administrative Law Officer

NOTICE TO EMPLOYEES

After charges were made against us by the United Farm Workers Union and a hearing was held where each side had a chance to present its side of the story, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers to freely decide whether they wanted a union and to act together to help one another as a group. The Board has ordered us to distribute 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 to choose whom they want to speak for them;

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

5. To decide not to do any of these things.

Because this is true, we promise that:

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

Especially:

WE WILL NOT fire, lay-off, evict, question or spy on any employee because he or she joined or supported a union or acted together with other employees to help and protect one another.

WE WILL offer Jose Luis Hernandez his job and his house back, and we will pay him any money he lost because we fired and evicted him, plus interest thereon at 7 percent per year.

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One is located at 112 Boronda Road, Salinas, California 93907; telephone (408) 443-3160.

Dated: GIANNINI & DEL CHIARO CO.

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.