Tracy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRIPLE E PRODUCE CORPORATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 78-CE-10-S 6 ALRB No. 46 (5 ALRB No. 65)

SUPPLEMENTAL DECISION AND REVISED ORDER

Following the decision of the Supreme Court in J. R. Norton Co. v. Agricultural Labor Relations Bd. (1980) 26 Cal. 3d 1, the Court of Appeals, Third Appellate District has remanded for reconsideration our remedial Order in Triple E Produce Corp. (Nov. 1, 1979) 5 ALRB No. 65. In that Decision, we concluded that Respondent had failed and refused to bargain collectively in good faith with its employees' certified representative, the United Farm Workers of America, AFL-CIO (UFW), in violation of Labor Code section 1153 (e) and (a), and we ordered Respondent to reimburse its employees for any loss of pay and other economic losses they suffered as a result of Respondent's unfair labor practices.

In J. R. Norton Co. , supra , 26 Cal. 3d 1, the Supreme Court held that imposition of the make-whole remedy was not warranted in every case where the employer refuses to bargain in order to obtain court review of a Board certification. The Court held that such a per se rule would defeat the purpose of the

Agricultural Labor Relations Act (Act) to promote collective bargaining by the employees' freely chosen representative. Therefore, we impose the make-whole remedy only if we find that at the time of the refusal to bargain Respondent, in contesting the certification of the Union, did not have a reasonable good-faith belief that the election was conducted in a manner which did not fully protect employees' rights, or that misconduct occurred which affected the outcome of the election. J. R. Norton, supra, 26 Cal. 3d at 39.

After an election conducted among Respondent's agricultural employees on October 24, 1975, the official tally of ballots indicated the following results:

UPW	131
No Union	46
Void	1
Challenged Ballots	66
Total	244

Respondent filed 24 objections to the election. Five of them were dismissed by the Regional Director of the Sacramento Region without hearing, seventeen more were dismissed by the Executive Secretary without hearing, and two were set for an investigative hearing. After an evidentiary hearing, the Investigative Hearing Examiner (IHE) recommended dismissal of those two objections. After considering the record, the IHE's decision, and Respondent's exceptions, the Board dismissed the objections and certified the UFW as the employees' exclusive collective bargaining representative in Triple E Produce Corp. (April 13, 1978) 4 ALRB No. 20.

Respondent subsequently refused to bargain with the UFW in order to obtain judicial review of its election objections, and was found by the Board to have violated Section 1153(e) and (a) of the Act in Triple E Produce Corp. (Nov. 1, 1979) 5 ALRB No. 65.

Upon review of our decision in light of J. R. Norton Co., supra, 26 Cal. 3d 1, we conclude the Respondent's litigation posture was reasonable. In reaching this conclusion, we acknowledge that in our earlier decision we failed to properly consider the allegation that UFW organizers threatened Respondent's workers during a period of "excess access."

The two election objections litigated at the hearing alleged that UFW organizers took access to Respondent's fields on the day before and the day of the election in excess numbers and at times that violated the limits set by the Board's access regulation, 8 Cal. Admin. Code Section 20900(e)(3) and (4), and that this conduct affected the outcome of the election.

The testimony adduced at the hearing supported the IHE's conclusion that the access rule was violated by UFW organizers. To determine whether those violations affected the outcome of the election the IHE allowed Respondent to present testimony that, during the period of excess access, organizers made statements to workers which threatened loss of employment if the workers failed to vote for the UFW. The IHE found that these statements were not threats, but merely references to the hiring practices which would exist under a union security clause in a collective bargaining agreement. She therefore concluded that the statements could not have affected the outcome of the election and recommended

dismissing the objections.

In our representation decision, we held that Respondent's allegations regarding UFW threats of job loss were not the subject of any objection filed within the five-day period specified by Labor Code Section 1156.3(c). We therefore refused to consider those allegations, and rejected the IHE's findings, conclusions, or recommendation on the issue of threats.

Upon reconsideration, we now conclude that it is necessary to evaluate the conduct of union organizers during the access violation in this case in order to determine whether the election has been affected. Therefore, since the objection alleges an access violation which could have affected the outcome of the election, we will consider organizer conduct during such access, even though such conduct was not specifically pleaded.

After review of the record, we now consider the merits of the threats issue. The testimony of four witnesses indicates that UFW organizers spoke to employees in their cars as they waited for work to begin on the day before and the day of the election. During these brief conversations about the benefits of unionization, approximately ten employees were told that if they did not vote for the UFW they would be replaced on their jobs by union people. [1/] Although the witnesses consistently reported hearing the same statement, they did not explain their understanding of the statement or the context in which it was made.

[1/] Although there is evidence that other employees were spoken to in their cars by the organizers, there is no indication that a significant number of Respondent's employees heard the questionable statement.

This Board has interpreted alleged threats by organizers in past cases. Jack or Marion Radovich (Jan. 20, 1976) 2 ALRB No. 12; Patterson Farms, Inc. (Dec. 1, 1976) 2 ALRB No. 59. In those cases, we found that the organizer's statements were non-threatening descriptions of hiring practices under a union security contract provision. Here, the statements indicate that the employee will be replaced simply for voting against the union. The implication is that the union knows how the workers vote and that the union somehow has power over job tenure or discharge, regardless of whether it wins the election.

The NLRB has held that organizer statements, which are not accompanied by some indication of the union's ability to carry out the suggested threat, are not likely to affect the employees' free choice of representative. Central Photocolor Co. (1972) 195 NLRB 153 [79 LRRM 1568]; Stimson Lumber Co. (1976) 224 NLRB No. 66 [92 LRRM 1452]. Given the circumstances herein and the character of the statements made, we find that such statements would be viewed by the employees as campaign propaganda, which the Union could not effectuate. Further, the record shows that only a small number of employees heard the statements. Therefore, we conclude that such statements did not influence or affect the employees in their choice of a bargaining representative. We therefore dismiss the Employer's objections.

The Remedy

Because we failed to consider the threats issue in our representation decision, we hold that Respondent's appeal was reasonable. Therefore we shall not impose the make-whole remedy

for the period prior to the date of this decision, during which Respondent litigated our failure to consider the threats issue. [2/] However, since we have considered the merits of the threats issue for the first time herein, this case has taken on the unique character of a representation decision incorporated in a decision on remand of an unfair labor practice case. We therefore will not attempt to determine the appropriateness of the make-whole remedy from this day forward, under the standard set forth in J. R. Norton Co. v. ALRB, supra, 26 Cal. 3d 1, since Respondent has not yet had the opportunity to conform to our decision and commence bargaining in good faith.

Our Revised Order will also include a change in paragraph l(b),substituting the phrase "in any like or related manner" for "in any other manner," consistent with the language of our Decision and Order in M. Caratan, Inc. (Mar. 12, 1980) 6 ALRB No. 14.

REVISED ORDER

By authority of Section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board hereby orders that Respondent, Triple E Produce Corporation, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Section 1155.2(c) of

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[2/]As we now decline to impose the make-whole remedy in this matter prior to the date of this decision, the UFW's Request for Reconsideration of the date on which make-whole should begin is hereby denied.

the Act, with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees.

(b) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Section 1152.

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

(a) Upon request meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees and, if an agreement is reached, embody the terms thereof in a signed contract.

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

(c) Post copies of the attached Notice at conspicuous places on its premises 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.

(d) Provide a copy of the attached Notice to each employee hired by Respondent during the 12-month period following the issuance of this Decision and Order.

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance

of this Order, to all employees employed by Respondent at any time from April 21, 1978, until the date of issuance of this Order.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

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

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one

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year from the date on which Respondent commences to bargain in good faith with said Union.

Dated: August 21, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

A representation election was conducted by the Agricultural Labor Relations Board among our employees on October 24, 1975. The majority of the voters chose the United Farm Workers of America, AFL-CIO (UFW) to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our employees on April 13, 1978. When the UFW then asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election.

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain collectively with the UFW. The Board has ordered us to post this Notice and to take certain additional actions. We will do what the Board has ordered, and also tell you that:

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

1. To organize themselves;

2. To form, join, or help any union;

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

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

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

Because this is true, we promise you that:

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

Dated: TRIPLE E PRODUCE CORPORATION

BY: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Triple E Produce Corporation (UFW)

6 ALRB No. 46
Case No. 78-CE-10-S
(4 ALRB No. 20)

BOARD DECISION

This case was remanded to the Board from the Third District Court of Appeals to reconsider the remedy in light of J. R. Norton Co. v. ALRB (1980) 26 Cal. 3d 1.

On reconsideration, the Board determined that its prior representation decision (4 ALRB No. 20) had failed to consider an allegation of threats by union organizers. As the previous decision was subject to reasonable challenge on that ground, the Board declined to apply the make-whole remedy for the period prior to the date of the decision on remand.

After reviewing the merits of the threats allegation, the Board found that the organizers' statements were not of such character as would tend to affect the outcome of the election. The two objections involving threats were therefore dismissed and the certification upheld.

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