Visalia, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

L. E. COOKE COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 80-CE-117-D 81-CE-3-D 81-CE-10-D 8 ALRB NO. 56

DECISION AND ORDER

On November 10, 1981, Administrative Law Officer (ALO) William Resneck issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent, and the Charging Party each timely filed exceptions and a supporting brief, and also a reply brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order as modified herein regarding backpay interest and the alleged discriminatory treatment of Joanne Wild. As to the alleged discriminatory discharge of Roberto Gonzalez, Jesus Meza, Sergio Martinez, and Godofredo Martinez, the Board, for the reasons set forth below, has decided to affirm the ALO's rulings, findings, and conclusions only to the extent that they

are consistent herewith.

Joanne Wild

The record reveals that in early December 1980, Wild quit her job, soon after being transferred to Respondent's shipping yard where she tied together young bare root trees. For the reasons set forth below, we find this work assignment to constitute a constructive discharge.

In Keller Manufacturing Co. (1978) 237 NLRB 712 [99 LRRM 1083], the National Labor Relations Board (NLRB) stated:

> [Constructive discharge occurs when an employee quits [1][because] an employer deliberately makes [his or her] working conditions intolerable ....' (Citations.) It becomes unlawful when this is done because of an employee's union activity. Accordingly, when it is shown that an employer imposed onerous working conditions on an employee it knew had engaged in union activity, which it reasonably should have foreseen would induce that employee to quit, a prima facie case of constructive discharge is established, requiring the employer to produce evidence of a legitimate motivation. (Id., pp. 222-223.)

In the present case, the General Counsel has introduced ample evidence upon which to conclude that a prima facie case for constructive discharge has been made. It is undisputed that Respondent had actual knowledge of Wild's union activities. When Respondent's co-owner, Ludekens, was told of Wild's efforts in initiating a union organization drive in February of 1980, he pounded his fist on a table and proceeded to give an anti-union speech which lasted for three hours. There is also no dispute over the fact that tying trees in the bare root distribution department *is* physically taxing work. Respondent's contention, that it was not aware of Wild's dislike of tying trees is contradicted by

substantial evidence. Wild, in 1978, quit her job with Respondent precisely because of the onerous nature of the yard work, and at that time she informed Respondent's supervisor Van Alien of her reason for quitting. Moreover, Wild emphatically made her return to Respondent's employ in 1979 conditional upon her not being required to perform yard work, a condition which Respondent's supervisor, Land, agreed to. Credited testimony establishes that Wild told Respondent's co-owner, Ludekens, in the spring of 1980, that she never wanted to work in the yard, to which he responded, "Now I know where to put you."

Respondent contends that General Counsel's prima facie case fails in light of the nine-months' interval between Wild's union activities and her alleged discriminatory treatment. We disagree. The mere passage of time between protected union activity and alleged discriminatory treatment, considered alone, "... does not gainsay discriminatory intent." (Butler Johnson Corp. (1978) 237 NLRB 688, 690 [99 LRRM 1041]; American Petrofina, Inc.. (1980) 247 NLRB 183 [103 LRRM 1127]; Lassen Canyon Nursery (Apr. 20, 1978) 4 ALRB No. 21.) Respondent's bare root distribution department is active only in December and January. Therefore, December of 1980 was Respondent's first opportunity, after it learned in February 1980 of Wild's union activities, to assign her to work tying trees. While other forms of discriminatory treatment may have induced Wild to quit her job at an earlier time, tying trees was proven effective in achieving that end.

Respondent's business justification, that a term and condition of employment for all of its employees is that they may

be called upon to participate in the bare root harvest, does not serve to explain why Wild was assigned to such work, instead of one of Respondent's other departments which were operating at that time, especially in view of supervisor Land's prior assurance that she would not be so assigned. For this reason, and for the reasons set forth in the ALO's Decision, we find that Respondent's proffered business justification does not overcome General Counsel's prima facie case. We conclude, therefore, that Respondent constructively discharged Wild by assigning her to work in the tree distribution department because of her union activities, and thereby unlawfully discriminated against her, in violation of section 1153 (c) and (a) of the Act.

The Firefighters

The ALO concluded that the four firefighters were discharged because of their protected union activities. We disagree.

First, the ALO bases his finding that Respondent had knowledge of the firefighters[1] union activities in part on an erroneous reading of the record. The ALO found that, "Ludekens testified that he was aware as early as February 1980 that Gonzalez had been attending union meetings." A more careful review of Ludekens[1] testimony reveals, however, that he stated he first became aware of Gonzalez' participation in the union meetings when he was informed of that fact at the ALRB investigation hearing, which took place in February of 1981, seven months after Gonzalez' discharge.

There is insufficient record evidence to establish that Respondent had knowledge of the firefighters' union activities.

Gonzalez testified that he distributed union leaflets after work in Respondent's parking lot on one occasion. There is, however, no evidence that Gonzalez was observed leafletting by any of Respondent's supervisorial personnel. Moreover, Gonzalez, Meza, and Martinez all testified that they did not wear union emblems to work, and that they did not inform management of their union activities. Finally, the alleged discriminatesʹ testimony that foreman Hernandez allegedly made threatening statements in response to their lunch time union discussions was not credited by the ALO.

The preponderance of the evidence does not support the ALO's finding that Respondent had actual knowledge of the fire-fighters' union activities. Nor can such knowledge be inferred in this case upon the theory expounded by the ALO, that where discharges are motivated by anti-union sentiments, the requirement of employer knowledge is satisfied, citing, Rock Tenn Co. (1978) 234 NLRB 823 [97 LRRM 1505] and Dillingham Marine & Mfg. Co. v. NLRB (5th Cir. 1980) 610 F.2d 319 [103 LRRM 2430]. In both of those cases, the employer discharged a number of employees, some with known union sympathies and others without known union sympathies, in order to discourage union activities. The theory underlying the NLRB's and Court's finding of violations as to all who were discharged in those cases is that the discharged "innocent" employee must be found to be a discriminatee where his/her discharge is inextricable from the discriminatory discharge of known union adherents. That theory is clearly inapplicable to the instant case as Respondent had no knowledge of any of the discrirainatees' union activities.

Even if there were evidence to support a finding of employer knowledge of the alleged discriminatee's union activities, that would not affect our disposition of this case as we find merit in Respondent's business justification for the firefighters' discharges. Under applicable National Labor Relations Act (NLRA) precedent, *a* reasonable change in employment policies in support of a legitimate business objective does not violate the Act in the absence of a duty to bargain over that change. One such legitimate business objective is the deterrence of excessive absenteeism. (Jack in the Box (1972) 199 NLRB 109 [81 LRRM 1235]; Franklin Stores Corp. (1972) 199 NLRB 52 [81 LRRM 1650]; The Meat Cleaver (1972) 200 NLRB 960 [82 LRRM 1054].) Moreover, the fact that an employee has been specifically warned about absenteeism is strong evidence in support of the employer's position. (Producers Rice Mill, Inc. (1976) 222 NLRB 875 [91 LRRM 1414]; Trailways, Inc. (1978) 237 NLRB 654 [99 LRRM 1052].) Here, the firefighters were absent from work for an entire week in June of 1980, in order to combat a forest fire. Upon their return, Respondent's co-owner, Daniels, confronted them and warned that if they abandoned their jobs to fight another fire they would be discharged. The alleged discriminatees all testified that they understood what Daniels told them. Two weeks later they left work to fight a forest fire. Under these circumstances, we find that Respondent had a legitimate business motivation for discharging them.

The Charging Party's contention that the alleged discriminatees were treated differently from other workers who missed work is not supported by the record. Two workers, Alvarado and

Hernandez, appeared to have quit their jobs and were later rehired by Respondent. Their situation is clearly distinguishable from that of the firefighters, who, rather than terminating their employment with Respondent, attempted to maintain two sources of income, despite the unequivocal warning by Daniels that any further absence due to firefighting would lead to discharge.

In light of the foregoing, we hereby dismiss the allegations of the complaint as to the discharges of Roberto Gonzalez, Jesus Meza, Sergio Martinez, and Godofredo Martinez.

Backpay Interest

After consolidating this case for oral argument with two other cases in which the General Counsel sought an increase in the interest rate which we impose on monetary awards, we announced today in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, our decision to adopt the NLRB's Florida Steel Corporation [1/] formula for computing interest on backpay. Accordingly, we have ordered seven percent interest payable on backpay dating from the unlawful constructive discharge of Joanne Wild to the date of issuance of the Lu-Ette Decision, at which point the current NLRB rate will be applied.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board orders that Respondent L. E. Cooke Co., its officers, agents, representatives, successors, and assigns shall:

[1/] Florida Steel Corporation (1977) 231 NLRB 651 [96 LRRM 1070].

1. Cease and desist from:

(a) Discharging, suspending, or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any activity protected by Labor Code section 1152.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

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

(a) Immediately offer to Joanne Wild who was constructively discharged by Respondent on or about December 1, 1980, full reinstatement to her former job or equivalent employment without prejudice to her seniority or other employment rights or privileges.

(b) Make whole Joanne Wild for all losses of pay and other economic losses she has suffered as a result of her discharge by Respondent, reimbursement to be made according to Board precedent, plus interest thereon computed according to our Decision in Lu-Ette Farms, Inc. (Aug. 18 , 1982) 8 ALRB No. 55 .

(c) Preserve and, upon request, make available to the Board and its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination by the Regional Director of the backpay period and the amount of backpay and interest due to

Joanne Wild under the terms of this Order.

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

(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 during the period from December 1, 1980, until June 1, 1981.

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

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to Respondent's assembled employees on company time and property at time(s) and place(s) 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 in order to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter at the Regional Director's request, until full compliance is achieved.

Dated: August 18, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, L. E. Cooke Company of California, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we violated the Agricultural Labor Relations Act by requiring Joanne Wild to tie trees in the bare root distribution department in retaliation for her participation in union activities. The Board has ordered us to post this Notice and to mail it to those who worked for us between December 1, 1980, and June 1, 1981. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

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

WE WILL offer Joanne Wild her old job back and we will pay her any money she lost, plus interest, as a result of our discrimination against her.

WE WILL NOT discharge or otherwise discriminate against any agricultural employee with respect to his or her job because he or she belongs to or supports the UFW or any other union.

Dated: L. E. COOKE COMPANY

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is 805/725-5770.

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

L. E. Cooke Company

8 ALRB No. 56
Case Nos. 80-CE-117-D
81-CE-3-D
81-CE-10-D

ALO DECISION

The ALO found that the Employer violated sections 1153(c) and (a) by changing the working conditions of, and ultimately failing to recall, a union activist and by discharging a second union activist and four other employees after they returned from a week's absence from the job, during which time they worked as firefighters. The ALO rejected the General Counsel's request to order increased interest on backpay awards.

BOARD DECISION

The Board adopted the ALO's findings regarding the discriminatory treatment of the first union activist, but analyzed the change of working conditions as a constructive discharge. The Board dismissed the allegation of the complaint relating to the discharge of the four firefighters. The Board found that the ALO had erroneously read the record as it related to the timing of Employer knowledge of the second activist's participation in union activities. The Board found merit in the Employer's business justification for changing its policy regarding leave allowed for firefighting and found that the firefighters received adequate prior warning that they would be discharged if they left to fight another fire.

Finally, the Board ordered backpay with interest at the increased rate adopted in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, applying the NLRB's Florida Steel Corporation interest rate.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of L.E. COOKE CO., Respondent, v, UNITED FARM WORKERS of AMERICA, AFL-CIO Charging Party.	Case No. 80-CE-117-D, et al.

APPEARANCES

Carl G. Borden
1601 Exposition Boulevard
Sacramento, CA 95815
On Behalf of Respondent

John Moore
ALRB Fresno Regional Office
1685 "E" Street
Fresno, CA 93706
On Behalf of Charging Party.

DECISION

WILLIAM A. RESNECK
Administrative Law Officer:

STATEMENT OF THE CASE

This case was heard before me in Visalia, California on May 18, 19, 20 and 21, 1981, and arises out of unfair labor practice charges filed on August 4, 1980, January 5 and January 23, 1981 with the Agricultural Labor Relations Board by the United Farm Workers of America, AFL-CIO (hereinafter referred to as "UFW" or "the Union") against L.E. Cooke (hereinafter referred to as "the Respondent", the "Company" or the "Employer"). The first charge alleges that the Respondent through its agents on July 31, 1980 fired four employees because of their Union activities in support of the UFW. The second charge contends that on or about November 1, 1980 the Respondent discriminatorily changed the wages and working conditions of JOANNE WILD because of her Union activities in support of the UFW. The final charge alleges that on or about January 19, 1981 and continuing thereafter Respondent refused to recall Ms. Wild because of her Union activities and because she had filed an unfair labor practice charge with the ALRB.

A complaint was issued on April 7, 1981 incorporating the three charges and alleging violations of Sections § 1152, § 1153(a), § 1153(c) and § 1153(d) of the Agricultural Labor Relations Act (hereinafter referred to as "the Act").

On the first day of the hearing the complaint was amended without objection to allege that the following individuals were supervisors within the meaning of Labor Code Section § 1140.4(j) and agents of Respondent, PETER RODRIGUEZ-Agent, LARRY LAND-Manager, MIKE WILLIAMS-Foreman, DAMON VAN ALLEN-Supervisor, ED CLARK-Manager and CLAUDIO HERNANDEZ-Foreman.

Respondent, in its answer of April 15, 1981, admitted service of the charges; admitted that it was an agricultural employer within the meaning of Section § 1140.4(c) of the Act; and admitted that the UFW was a labor organization within the meaning of Section § 1140.4(f) of the Act. It denied committing any unfair labor practices.

All parties were given a full opportunity to participate in the hearing, and the general counsel and employer were all represented at the hearing. After the close of the hearing, general counsel and the employer filed briefs.

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

FINDINGS OF FACT

I. JURISDICTION

Employer has stipulated that it is an agricultural employer within the meaning of Section § 1140.4(c) of the Act and that the UFW is a labor organization within the meaning of Section § 1140.4(f), and I so find.

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II. THE EMPLOYER'S OPERATIONS

Respondent is a corporation engaged in the sale of wholesale nursery products in Tulare County, California. It commenced operations in 1944 on 80 acres and today operates approximately 550 acre of land. Its employees have never been organized or represented by a union.

Respondent's president and general manager is ROBERT L. LUDEKENS: its vice president and production manager is GEORGE DANIELS; and its controller is DAVID HENRY COX.

Respondent's operation is separated into various departments, two of which are involved in this present hearing. The production department produces shade trees, grape vines, flowers and shrubs for distribution to retail nurseries and nursery supply outlets. The supply department produces various items used by nurseries in-eluding a garden tie called "Miracle Garden Tape". The tape is cut and packaged in an area called the Tape Room.

Mr. Ludekens oversees the company's office sales and supply departments, while Mr. Daniels is in charge of the production de-partment.

III. THE UNFAIR LABOR PRACTICES

The alleged unfair labor practices involve two separate events: the change in working conditions and ultimate failure to recall JOANNE WILD; and the discharge of four employees - ROBERTO GONZALEZ SERGIO MARTINEZ, GEOFREDO MARTINEZ, and JESUS MESA on July 31, 1980. The testimony concerning the activities of JOANNE WILD and the other four individuals will be separately examined.

A. JOANNE WILD

Joanne Wild was first hired in July 1977 to work in the tape room. When the tape room was shut down in October, 1977 due to a seasonal fall-off in production, she was transferred along with the other tape room employees to work in the yard. She quit her job January 9, 1978 because she did not like the yard work, specifically tying trees in the mud and the rain.

In July of 1979 Sarah Hale, Joanne's sister, who was then working in the tape room, told Mr. Ludekens that Joanne wanted to go back to work. An additional employee was needed in the tape room at that time and Ludekens gave authorization to Larry Land, who was in charge of hiring for the tape room, to offer Joanne a Job.

Joanne testified that when Land offered her a job he guaranteed her that she would not have to work in the yard. Ludekens disputes any knowledge or authorization of this "guarantee". Land, who no longer works for Respondent, did not testify at the hearing.

Joanne began work in the tape room on August 1, 1979 and worked there continuously during the 1979-1980 season except for two weeks in January 1980 when the tape room closed. During that period, she checked out orders in the yard, a record keeping job. Checking out orders was not a physically demanding job, and she specifically did not have to tie trees.

Joanne continued to work in the tape room throughout 1980 and was considered a good worker by the company. During the first or second week in October, 1980 her job assignment changed while

normal operations in the tape room were customarily suspended. Initially, she was sent to the office to work on labels. Then she was sent to work underneath a shed clipping roots of the berries. After that she returned to the office to assemble berry orders. She was then sent to the field to work on bamboo. Following that assignment, she was sent out to tie trees in the yard. After working on tying trees- for two or three days, around December 1, 1980, she called in sick and told them she could no longer work in the yard. Instead, she expressed a preference to work in the tape room when it reopened.

Around mid-December Ludekens called her at home to inquire when she was returning to work. She told him about Land's guarantee that she would not have to work in the yard. She stated that she would return to work as soon as the tape room opened up in January. Joanne testified that Ludekens stated he would check with Land and get back to her. Ludekens' version is that he told her that she was hired as a year round employee, and that she had to come back to work immediately. In any event, there was no further conversation between them, and in January when the tape room reopened someone else was hired to take her place.

B. THE FOUR FIREFIGHTERS

The other four discriminatees were all discharged on July 31, 1980 allegedly for leaving work without permission to fight a forest fire for the U.S. Forest Service. Three of the four discriminatees testified: Robert Gonzalez, Jesus Mesa and Geofredo Martinez. No explanation was offered for the failure of the fourth

discriminatee, Sergio Martinez, to testify at the hearing. Gonzalez has worked for Respondent since November 1978 and had worked in Ruben Martinez' crew tying trees. In addition, Martinez and he have fought fires for the U.S. Forest Service for seven years During the 1979 season, Martinez spoke with George Daniels for permission for Gonzalez, Gonzalez' brother and himself to fight fires during that season. They were granted permission and left during the season on four or five occasions to fight fires, including seven days in Oregon.

Jesus Mesa has worked for Respondent since November - December of 1978. He first started fighting fires in 1980. Geofredo Martinez has worked for Respondent since May of 1975 and was one of those who left during 1979 to fight forest fires. The other discriminatee, Sergio Martinez, is Geofredo's brother and also went with him to fight fires.

During 1980, all four of them left to fight fires for three days in June. When they returned, George Daniels, through another employee Peter Rodriquez who acted as an interpreter, told them that if they left to fight any more fires they would be fired. All of them indicated to Daniels that they understood, but Gonzalez, Geofredo Martinez and Mesa all testified that they did not believe Daniels because Ruben Martinez said that Daniels told him the same thing in 1979.

Gonzalez testified that at the end of July he was notified at 11:00 p.m. on Saturday night of another fire. He left at 2:00 a.m. that Sunday morning and had his wife call in sick for him. All

four were gone for three days during the latter part of July to fight forest fires.

Upon their return, Daniels testified he fired them because they left in the middle of the busy season and because it was necessary to hire replacement workers to take their places. Daniels named Aristeo Alverado, Rafael Rivera and Jesus Alonso as the replacement workers. However, the records contradicted Daniels and indicated that the three individuals had already been employed prior to that time, and no new replacement workers were hired during the three days the four were absent.

Daniels and Ludekens both testified that a new leave of absence policy had been implemented in June, and suggested that another reason for their discharge was their failure to request a leave of absence. However, in fact, the leave of absence policy was apparently honored more in the breach. In fact, numerous examples were offered of employees who left without requesting leaves of absence. Respondent's counsel characterized the leave of absence policy as a "red herring". Respondent then apparently does not rely on the leave of absence policy to justify the discharges.

C. THE UNION ORGANIZING CAMPAIGN

General counsel contends that the treatment of the five discriminatees was based not on any valid company policy but in response to union organizing activities instigated at the company. These activities may be summarized as follows:

When Joanne Wild returned to work for the company in the Fall, 1979 she became upset because she felt a fellow worker,

Frank Solario, had been unjustly discharged. She made her dissatis faction known to such an extent that her supervisor, Ed Clark, confronted her about it and told her that Frank had quit and was not fired. At that point Joanne volunteered that maybe the company needed a union. Clark responded by indicating his distaste of unions.

In early January, 1980 Joanne believed she and other workers were entitled to overtime pay. She initially complained to Ludeken and then to the Labor Commissioner without any results. Finally she went to the UFW and decided to call a meeting to discuss worker complaints at her house. The first meeting was held at her house on the second Monday in February. About a week before this meeting she told Ludekens when he came to the tape room that she was organizing on behalf of the union. Ludekens became quite agitated, banged his hand on the table and gave what Joanne characterized as a passionate anti-union speech lasting approximately three hours. Other employees present during this time were Adeline Garcia, Willie James and Mike Williams.

Adeline Garcia, who admitted to being a close friend of Joanne's, corraborated her version of the incident. She testified that Ludekens was there for a "good couple hours", called Cesaer Chavez "a crook" and made various anti-union remarks. Moreover, immediately prior to Ludekens' confrontation with Joanne he had called Ms. Garcia into his office for a private chat to state that he could not afford a union. During that conversation, Ludekens told her that he regretted hiring Joanne, that she had a big mouth

and that she was always talking about the union. Ms. Garcia testified that her conversation with Ludekens lasted about forty-five minutes and concerned solely Joanne and the union.

Ludekens did not deny the incident in the tape room nor Garcia's version of their conversation. However, he characterized his efforts as a response to complaints he had heard that there were production troubles in the tape room and were attempts to find out the employees' sources of dissatisfaction. He also testified that he had favorable things to say about unions in general, and in fact 10 had been a union member himself. However, he did not feel that the UFW was a good union.

Approximately a week after the incident in the tape room, the first union meeting was held at Joanne's house with seven workers in attendance, including Roberto Gonzalez. Gonzalez also invited Jesus Mesa, Geofredo and Sergio Martinez, the other alleged discriminatees, to attend the union meetings, and they attended union meetings with him.

A second union meeting was held in March, again at Joanne's house. About twenty workers attended this meeting. Joanne testified that two days after the first union meeting, she got a ten cents an hour pay raise. Ludekens testified that this was because she was a crew leader in the tape room. Joanne denied any knowledge of this "leadership position".

The third and fourth union meetings were held at a hall downtown on Court Street. Joanne wrote up flyers to announce the meeting and handed them out. Roberto Gonzalez also handed out

notices of the union meetings at the company parking lot. Approximately forty-two to forty-five workers attended each the third and fourth meetings.

Also attending these early union meetings was Peter Rodriguez who is considered one of the most respected and influential workers by all concerned. Rodriguez has worked as a heavy-equipment operator for Respondent for nine years. He is a minister in the community and often acts as an interpreter for the employees and Respondent, since he is fluent in both English and Spanish. He attended both the second and fourth union meetings, and was quite happy at the fourth union meeting since he had received a bigger raise than expected. The next day, George Daniels told him that the raise had been a mistake and rescinded part of it. Rodriquez attended no more union meetings.

One of the items of discussion at the union meetings was the institution of a health plan. Rodriquez testified that he told George Daniels that this item had come up for discussion after the second union meeting in March. Daniels testified that the company started reinvestigating an employee health plan about this time. An employee health plan was instituted on June 1 effective July 1.

Also discussed at union meeting was the securing of a pay telephone in the yard. A petition was presented to Damon Van Alien, a company supervisor, in July. A telephone was put in the yard by the company that Fall.

Gonzalez testified that about a week after he handed out notices of the March union meeting in the company parking lot he was

transferred to Santiago Hernandez' crew along with Genaro Alverado, Ezequiel Gonzalez and Jesus Mesa. All had attended union meetings at Gonzalez' urging. All four workers discussed the union at work, and all testified that Santiago Hernandez (their foreman) would interrupt their discussions to state that if the union came in the employer would plant alfalfa. Hernandez testified and denied making these statements. There was also testimony concerning an incident with a lizard which was taped on Roberto Villa's van with a sign hung around its neck stating "por chavista" and "por huevon". Gonzalez, Martinez and Mesa all testified that Santiago Hernandez taped the lizard to Villa's van and put the sign on it. Hernandez denied committing the act. In fact, Roberto Villa then testified at the hearing that he had put the lizard on the van along with the sign. Accordingly, on the basis of this contradiction in testimony, I find that Santiago did not tape the lizard to the van and that general counsel did not prove by a preponderance of the evidence that Santiago made the statements concerning the employer's planting alfalfa.

During the spring and summer while the union organizing campaign was continuing, Joanne testified that Mike Williams told her that Ludekens was going to get her for causing trouble. Williams did not testify as a witness.

The 1st union meeting was held in August, and only fifteen people attended. Prior to that, the four fire fighters had been discharged, including Roberto Gonzalez, who had attended union meetings from the first. It was decided then to postpone

any more meetings until November.

ANALYSIS OF ISSUES AND CONCLUSIONS OF LAW

1. Whether Respondent discriminatorily changed the working conditions of Joanne Wild because of her union activities;

2. Whether Respondent discriminatorily refused to recall Joanne Wild because of her union activities;

3. Whether Respondent fired Roberto Gonzalez, Sergio Martinez, Geofredo Martinez and Jesus Mesa because of their union activities.

I conclude that Respondent is guilty of all the unfair labor practices charged.

I THE APPLICABLE GOVERNING LAW

In the absence of any unlawful discrimination against union activities, the ALRB has no control over an employer's business policies. Further, mere employee participation in union activities does not insulate the employee from discharge for misconduct or confer immunity from routine employment decisions. Martori Brothers Distributors v. ALRB (1981) 29 Gal.3d 721. Thus, the inquiry is whether the employee would have been retained but for the protected activity.

The standard now used in evaluating evidence was first established by the NLRB in Wright Line, a Division of Wright-Line, Inc. (1980) 251 NLRB NO. 150, 105 LRRM 1169:

> When it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activity 105 LRRM at 1174-1175.

This standard has been specifically adopted by the ALRB. Nishi Greenhouse (1981) 7 ALRB No. 18; Verde Produce Company (1981) 7 ALRB No. 27. Moreover, the California Supereme Court has specifically sanctioned its use. Martori Brothers, supra at 730.

The General Counsel in order to establish a prima facie case of discriminatory discharge or failure to rehire must demonstrate by a preponderance of the evidence that "the employee was engaged in protected activity; that Respondent had knowledge of such activity; and that there was some connection or causal relationship between the protected activity and the discharge or failure to rehir ". Verde Produce Company, supra at 2-3. Once the General Counsel establishes that protected activity was a motivating factor in the employer's decision, the employer then has the burden to prove it would have reached its decision in the absence of such protected activity. Verde Produce Company, supra at 3.

II. THE DISCRIMINATORY TREATMENT OF JOANNE WILD

No dispute exists that Joanne engaged in protected activity, nor that Respondent had knowledge of such activity. Almost singlehandedly she was the impetus behind the union organizing campaign. Her initial militancy started when she perceived injustice in the treatment of a fellow worker, Frank Solario, and in the awarding of overtime pay. The hostile reaction accorded to her by her supervisor Ed Clark and by the company president, Robert Ludekens, when she raised these issues only strengthened her resolve. Despite her confrontation in the tape room with Ludekens prior to the first

union meeting, she persisted in her efforts and held the first two meetings at her house. She wrote up and handed out flyers for the subsequent meetings, and at all times was highly visible in her organizing efforts.

Similarly, no dispute exists as to the employer's knowledge of her activities. In fact, Ludekens testified that he was aware of the early union organizing meetings at her house. Thus, the issue is whether any causal connection exists between the protected activity and the allegedly discriminatory conduct.

Respondent contends that since it became aware of Joanne's union activities as early as August, 1979 and at least by February, 1980, and that since the alleged discriminatory conduct did not occur until December 1980, no causal connection can be inferred when such a long period has elapsed. (Brief, pp. 24-25) In support of this contention, Respondent cites Lassen Canyon Nursery (1978) 4 ALRB No. 21, ALO'S decision, p.9. However, although the ALO there did recommend that a more stringent standard be adopted to prove discriminatory conduct when a substantial period of time has elapsed, the ALRB specifically rejected that suggestion. 4 ALRB No. 21, p.2. Accordingly, discriminatory treatment is unlawful no matter when it occurs.

A. THE DISCRIMINATORY CHANGE IN HER WORKING CONDITIONS

The issue here is whether Joanne's transfer in December, 1980 from record-keeping work to work in the yard tying trees would not have taken place but for her union organizing activities. The

evidence overwhelmingly supports the discriminatory nature of this transfer, and the employer has not shown any legitimate business justifications for the transfer.

Ludekens testified that he assumed that Joanne quit her job in 1978 because she did not like working outside in the rain, thus corroborating Joanne's testimony. Moreover, Ludekens testified that tying trees is a manual, physical job, and that seasonal employees are hired every November and December to do that work, although at least half of the regular work force also does this work.

Further, when Joanne was asked to come back to work in July, 1979 by Larry Land, she testified that he "guaranteed" she would not have to go back out in the yard. Although Ludekens admitted that Land was authorized to offer Joanne a job on the company's behalf, he claimed no knowledge of this "guarantee". However, the evidence demonstrated that during the winter of 1979-1980, while the tape room was closed, she was given only record-keeping work. Accordingly, I do not find it necessary specifically to decide whether the employer guaranteed that Joanne would not have to perform physical manual labor. It is clear that other employees were available to do this work, that Joanne was considered a valuable employee in the tape room because of her prior experience, and that there was alternative work available. Accordingly, I specifically find that the increasingly physical tasks assigned to Joanne in December, 1980, culminating in the tree tying assignment, would not have occurred but for her union organizing activity. Employer

knew that Joanne objected to these tasks and offered no explanation why other seasonal employees could not have performed these tasks while Joanne continued to do record-keeping as she did the prior year. Accordingly, the transfer was a discriminatory change in her work assignment when other less objectionable work was available.

B. THE DISCRIMINATORY REFUSAL TO RECALL

It is undisputed that Joanne expressed her desire to return to work in January, 1981 when the tape room reopened during her telephone conversation with Ludekens in mid-December. Respondent's justification for failing to recall her since she was hired as a year-round employee is especially unconvincing when coupled with the fact that tasks assigned Joanne in December forced her to quit. Joanne was an experienced employee in the tape room, and even paid an additional ten cents an hour over other employees because of her experience from February to September, 1980. Accordingly, Respondent has offered no legitimate business justification for the failure to rehire her on January 19, 1981 when the tape room reopened.

III. THE DISCHARGE OF THE FOUR FIREFIGHTERS

The evidence here is that the four individuals who left to fight fires were all engaged in protected union activity. Each of the four attended union mettings, and one of them, Roberto Gonzalez, was quite visible in his efforts. Gonzalez attended union meetings right from the start, handed out notices of meetings in the company parking lot and was instrumental in convincing his fellow workers

to attend. In fact, Ludekens testified that he was aware as early as February, 1980 that Gonzalez had been attending union meetings.

Respondent contends that there is insufficient evidence to demonstrate that it was aware that the reamining three employees, Jesus Mesa, Geofredo Martinez and Sergio Martinez, were engaged in any union activities. However, if it can be demonstrated that the discharges were motivated by anti-union sentiments, then the requirement of employer knowledge is satisfied.

In Dillingham Marine (5th Cir.1980) 610 F.2d 319, 87 L.C. ¶ 11,799, 15 employees were laid off. Respondent contended that employer's knowledge of union activity must be shown on the part of each discharged employee. In rejecting that contention, the Fifth Circuit held that if it is found that the layoff is motivated by union organizing activity, then that satisfies the requirement that each individual discharge was caused by union activity.

Similarly, in Rock Tenn Co. (1978) 1978 CCH NLRB t 18,973, an administrative law judge found two employees unlawfully discharged for union activity and rejected Respondent's contention that the layoff was motivated by slack work. However, he dismissed the charges concerning a third employee laid off at the same time on the grounds there was no substantial evidence of his involvement with union activity.

The NLRB reversed as to the third employee, holding that:

> Where a layoff such as here is for the purpose of discouraging union membership and activities in general and is not necessarily directed at the activities of particular individuals [f.n. omitted], all victims of such a layoff are en titled to the same treatment and relief without regard to the extent of their union activi ties... and whether Respondent was aware of [his] union sympathies.
>
> 1978 CCH NLRB at 31,517.

In our present case the record is replete with the employer's anti-union animus. Commencing with Ludeken's angry confrontation with Joanne Wild in the tape room in February, 1980, there was no question that Respondent opposed the UFW. Moreover, as the union organizing effort gained steam increasing the number of employees from seven at the initial meeting to 40 to 45 during the third and fourth meetings, the employer also increased its reactions.

One of the focuses of employee discontent was the absence of a health plan. George Daniels, Respondent's production manager, said the company had been considering one for 2-3 years but never found a suitable one. However, when Peter Rodriguez informed Daniels that this was a topic of discussion at the union meeting in March, Daniels immediately acted by investigating health plans. The result was the implementation of a health plan in June. Moreover, Rodriguez was invited to a special meeting of select employees in May to discuss the provisions of the health plan. As a result, Rodriguez, one of the most respected workers, stopped going to union meetings at the same time.

No contention is made that the implementation of the health plan was an unfair labor practice, and I make no finding on this issue. But it does serve to demonstrate the knowledge of Respondent as to not only who was active in the union organizing drive, but what was being discussed. Rodriguez' participation in union meetings illustrated to employer the strength of the union organizing movement, and Respondent reacted accordingly. However, in addition to these positive steps, Respondent also looked for methods

of eliminating the key employees behind the union organizing drive. Roberto Gonzales was one of these key employees.

Accordingly, when Roberto Gonzalez and his firefighting companions left to fight a fire in June, Daniels, with Rodriguez acting as interpreter, told them they would be discharged if they left to fight fires again. Respondent's only justification for this sudden change of policy from past seasons when they were allowed to leave to fight fires is that workers were needed.

When the four firefighters left again to fight a fire on July 28, 29 and 30, they found upon their return on July 31 they had been discharged. Daniels' reason was that it was necessary to replace them immediately and upon their return there was no work for them. Unfortunately for Respondent the records indicated exactly the opposite: no employees had been hired to take their place. Thus, Respondent has not demonstrated any legitimate business reasons for their discharge.

Instead, I find that Roberto Gonzalez was fired because of his known and outspoken support for the union, and the remaining three individuals, all of whom attended union meetings with him, were fired for the same reasons.

CONCLUSIONS OF LAW

Based on the foregoing, I make the following conclusions of law:

1. L.E. Cooke Co. is a California corporation engaged in agriculture and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

2. United Farm Workers of America, ALF-CIO, is a labor organi zation within the meaning of Section 1140.4(f) of the Act.

3. The Employer engaged in unfair labor practices within the meaning of Sections 1152, 1153(a), 1153(c) and 1153(d) of the Act.

4. The unfair labor practices affected agriculture within the meaning of Section 1140.4(a) of the Act.

REMEDY

General Counsel argues that the current seven percent rate of interest on backpay is insufficient in light of present inflationary trends. Instead, it urges the adoption of the sliding interest rate charged or paid by the Internal Revenue Service on the underpayment or overpayment of taxes. That rate was adopted by the NLRB in Florida Steel Corporation (1977) 231 NLRB 651, and the current rate on NLRB awards is 12 percent per year.

Although general counsel's arguments are well-taken, they are better addressed to the ALRB. Current ALRB precedent dictates a seven percent rate of interest, and I am bound to follow that precedent.

Accordingly, upon the basis of the entire record and of the

Findings of Fact and Conclusions of Law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to hire or rehire, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any union activity or other concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them 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 to Joanne Wild, Roberto Gonzalez, Jesus Mesa, Geofredo Martinez and Sergio Martinez full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

(b) Make whole Joanne Wild, Roberto Gonzalez, Jesus Mesa, Geofredo Martinez and Sergio Martinez for any loss of pay and other economic losses they have suffered as a result of their discharge, reimbursement to be made according to the formula stated in J. & L. Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon

at a rate of seven percent per annum.

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

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

(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 during the period from December 1980 until the date on which the said Notice is mailed.

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

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at time(s) and place(s) 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 in order to compensate them for time lost at this reading and during the question-and-answer period

(h) Notify the Regional Director in writing, within 30 days after the issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: November 10, 1981

William A. Resneck

WILLIAM A. RESNECK
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging four of our employees in July, 1980 and by refusing to rehire one of our employees during January, 1981 because of their union activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

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

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to discharge Roberto Gonzalez, Jesus Mesa, Geofredo Martinez and Sergio Martinez and to refuse to rehire Joanne Wild. WE WILL NOT hereafter discharge or refuse to rehire any employee for engaging in union activities .

WE WILL reinstate Joanne Wild, Roberto Gonzalez, Jesus Mesa, Geofredo Martinez and Sergio Martinez to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their discharge.

Dated: L.E. COOKE CO.

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board.

DO NOT REMOVE OR MUTILATE.