Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ROBERT ANDREWS, FRED S. ANDREWS, and DONALD S. ANDREWS, dba SAM ANDREWS' SONS, Respondent/Employer, and WESTERN CONFERENCE OF TEAMSTERS, Petitioner/Intervenor, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 75-CE-32-R 75-CE-36-R 75-CE-40-R 75-CE-2-E 75-CE-4-I 75-CE-7-I 75-CE-17-I 75-CE-19-I 75-CE-24-I 75-CE-35-I 75-CE-39-I 75-RC-131-F 8 ALRB No. 58 (3 ALRB No. 45)

SUPPLEMENTAL DECISION AND ORDER

On November 6, 1981, the Court of Appeal in and for the Second Appellate District remanded this case to the Agricultural Labor Relations Board (ALRB or Board) with directions that we conduct a further hearing in this matter in order to determine whether our June 10, 1977, Decision, reported at 3 ALRB No. 45, should be set aside by reason of the March 14, 1980, letter from ad hoc Administrative Law Officer (ALO) Armando Menocal to the Justices in Division Five of the above Court.

We requested the parties and Mr. Menocal to submit briefs on the issues presented by the remand order. We directed the parties to support their conclusions and recommendations with specific citations to the record in the original hearing,

conducted on December 15-19, 1975, and January 5-8, 1976, by ALO Menocal. We also requested the parties to address the question of what further administrative proceedings, if any, were necessary to resolve the question posed by the Court of Appeal.

Sam Andrews' Sons (Respondent), the United Farm Workers of America, AFL-CIO (UFW), and the General Counsel all submitted timely briefs.[1/] Mr. Menocal also submitted a letter brief to the Board on these matters. The Western Conference of Teamsters (WTC) had previously withdrawn from all involvement in the appeal of the ALO's Decision.

In light of the briefs of the parties and our second independent review of the record herein, we have decided that our prior Decision need not be set aside by reason of the ALO's letter of March 14, 1980, to the Court of Appeal. As no party seeks further administrative hearings, and as we find that the original hearing met all the requirements of administrative due process as to each of the parties,[2/] we reaffirm the rulings, findings, and conclusions set forth in our prior Decision and adopt its Order, with modernizing modifications.

In Andrews v. ALRB (1981) 28 Cal.3d 781 [171 Cal.Rptr. 590], the Supreme Court determined that the appearance of bias in an ALO is insufficient to deprive a party of a fair hearing.

[1/]Respondent simultaneously sought to take the deposition of the ALO. For the reasons stated in this opinion and Andrews v. ALRB (1981) 28 Cal.3d 781, 795, that request is hereby denied.

[2/]See, for example, Senate Report No. 152, p. 21 (legislative history, p. 207) 79th Cong.-2nd Sess. 1946, for the congressional discussion of an analagous situation under the Federal Administrative Procedure Act, 5 USC sections 500, 577.

(Id., 28 Cal.3d at 790-1.) As to Respondent's contention that an appearance of bias (now manifested by the language of Mr. Menocal's March 14, 1980, letter to the Court) is sufficient to disqualify an ALO, that argument has already been disposed of by the Supreme Court. The Supreme Court utilized precedents from the judicial rather than the administrative process in its majority opinion because of the nature of the regulation covering pre-hearing disqualification of ALO's. That regulation, the Court noted, was modeled after the relevant provisions of the California Code of Civil Procedure. (Id_. , 28 Cal.3d at 797, n. 2 (Justice Newman concurring).) As the Court decided only the pre-hearing rights of disqualification, and as the Menocal letter represents post-hearing conduct by the ALO, the Court's decision is not dispositive on this matter, although it sets forth general guidelines for analysis of alleged bias and prejudice.

The specific issue before the Board is whether, by his letter of March 14, 1980, which contained strong and forceful language, language that may be characterized as intemperate and pejorative as to Respondent, the ALO has shown such actual, personal bias against Respondent as may have deprived Respondent of a fair hearing four years earlier.[3/]

[3/]See Davis, Administrative Law Treatise (2nd Ed. 1980) V. 3, pp. 371-405. Professor Davis states that the concept of "bias" has several distinguishable shades of meaning; he would call the type that Respondent claims here "personal bias" or "personal prejudice." "[T]hat is, an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough; such partiality may be either animosity or favoritism." (Id. at 371, See also pp. 389-392.)

The purpose of this inquiry then, is to answer the question left expressly open in the Supreme Court's decision.

> Petitioners also contend that the use of intemperate language and pejorative terms may show bias on the part of an ALO. Without deciding the merits of this contention in the abstract, we find it clear on the face of the record that the ALO used no intemperate language or pejorative terms herein. (Andrews v. ALRB, supra, 28 Cal.3d at 796, no. 7.)

Assuming that the Menocal letter includes intemperate and/or pejorative terms, may sentiments expressed four years after the hearing and three years after the writing of an opinion show sufficient bias to establish a denial of administrative due process at the earlier hearing?

The analysis of this question must start with the presumption of honesty and integrity that applies to administrative adjudicators. (Withrow v. Larkin (1974) 421 U.S. 35; United States v. Morgan (1940) 313 U.S. 409; Prygoski, Due Process and Designated Members of Administrative Tribunals (1981) 33 Adm.L.Rev. 441, 449.) The fact that Mr. Menocal practices in a particular area of the law, or, even that he may have, and has, expressed a particular philosophy, is insufficient to demonstrate that Respondent was denied a fair hearing. Andrews v. ALRB, supra, 28 Cal.3d at 790-1, Prygoski, supra, at 441-444.[4/] Any appearance

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[4/] Professor Prygoski analyzes the fact pattern presented in Pitoniak v. Borman's, Inc. (1981) 104 Mich.App. 718. Under the Michigan Workers Compensation statutory scheme, the Workers Compensation Appeals Board (WCAB) is composed of six members to represent employee interest, six members to represent employer interest, and three to represent the public. Panels of three are designed randomly and in Pitoniak the panel was exclusively composed of employee representatives. Although the panel was obligated by statute to have a certain philosophical outlook, no due process was denied the employer by this scheme.

of bias from Mr. Menocal's chosen field of practice and philosophical orientation has been clearly ruled to be insufficient to render his failure to recuse himself enough to taint this record. (Andrews v. ALRB, supra, 28 Cal.3d 781.) Therefore, the duty of the Board on remand is to scrutinize the record for evidence of actual personal bias and/or actual personal prejudice in light of the intemperate and pejorative language of the Menocal letter.

Before examining this record again for evidence of hearing officer partiality, a task we perform with no specific instances of misconduct or improper conduct cited by any of the parties,[5/] it is necessary to establish some criteria of post-hearing bias against which to measure the ALO's conduct of the hearing and his decision. In establishing such criteria, absent any regulation(s) covering such situations, we are guided by section 1148 of the Agricultural Labor Relations Act (Act)[6/] which mandates that applicable precedents of the National Labor Relations Act (NLRA)[7/] be applied.

[5/] The lack of specific instances of partiality in the conduct of the hearing is not unexpected, for, as Justice Newman noted:

> Justice Mosk's opinion shows, I believe, that no evidence supports a finding that Mr. Menocal did not perform his duties in an objective and impartial manner. The alternate charge, that in fact he was not without prejudice, is answered in the Mosk opinion's discussion of "bias" and "appearance of bias" (ante, pp. 789, 791, 792, and 795). (Andrews v. ALRB, supra, 28 Cal.3d at 797 (Newman, J., concurring).)

[6/] All code citations are to the California Labor Code unless otherwise stated.

[7/] 29 USC sections 151 et seq.

Respondent cites NLRB v. National Paper Co. (5th Cir. 1954) 261 F.2d 859 [35 LRRM 2117] in which the Court refused to give the hearing officer's report the "full measure of the usual presumption of correctness" because of his intemperate language and his refusal to credit uncontradicted evidence. The intemperate language of the hearing officer occurred in the proposed decision and was "understandable" according to the Court because of the supposed evidence of perjury by an employer witness, evidence which was subsequently rejected on appeal.

In a later case, Helena Laboratories Corp. v. NLRB (5th Cir. 1977) 557 F.2d 1183 [96 LRRM 2101], the same Court clarified its earlier decision and stated that intemperate language coupled with credibility resolutions adverse to the employer do not demonstrate bias. Rather, the Court searched for record evidence of partiality, defined by the Court as the lack of an even hand in ruling on objections, or discourtesy or lack of patience on the part of the Administrative Law Judge (ALJ). Finding no such evidence, the Court concluded that the hearing could not be characterized by "fell expedition or determined purpose to reach *a* predetermined end or ... with suppression and exclusionary rulings and actions designed to prevent and preventing a fair hearing." (Id. at 96 LRRM 2105. See, Continental Box v. NLRB (5th Cir. 1940) 113 F.2d 93, 96 [6 LRRM 824]; Mid-South Towing Co. v. NLRB (8th Cir. 1971) 436 F.2d 393 [76 LRRM 2312].)

Factually similar to the instant matter is A. O. Smith Corp. v. NLRB (7th Cir. 1965) 343 F.2d 103 [58 LRRM 2643], cited by the General Counsel herein. However, in Smith Corp.,

the hearing officer, unlike Mr. Menocal, was found to have: (1) explicitly discredited every employer witness whether or not contrary evidence existed; (2) ignored contrary evidence in crucial areas; (3) quoted testimony out of context; and (4) used intemperate and emotionally charged language during the hearing and in his subsequent decision to describe the employer and the union alleged to have received support from that employer. The court stated that those factors were insufficient to show bias, noting the uselessness of requiring the protracted matter to be heard again. (Id. at 58 LRRM at 2648.) Specifically referring to the intemperate language in the hearing officer's decision, the court stated:

> This, it may be said, shows that the judge is "hostile," but even if this be true, the hostility was shaped by the trial, rather than vice-versa. Bias or prejudice or hostility becomes a justiciable issue only as it bears on the fairness of the hearing. It cannot be imputed to the fact-finder retroactively as it were, because his mind has absorbed the impressions left by a full and fair hearing. (Id. 25 2648, citing Gellhorn & 3yse, Administrative Law (4th Ed. 1960) at p. 951.)

In the case authority arising under the NLRA, the focus of the inquiry into hearing officer bias has been on a showing that the finder of fact in some manner deprived a party of the opportunity to present evidence.[8/] Neither the discrediting of

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[8/] Doral Building Service, Inc. (9th Cir. 1982) 666 F.2d 432 [109 LRRM 2342]. See also Oneonta Dress Co., Inc. v. NLRB (2nd Cir. 1964) 331 F.2d 1 [56 LRRM 2498]; NLRB v. Ebner Bros. Packers (5th Cir. 1966) 364 F.2d 565 [62 LRRM 2422]; Roger W. Wheeler v. NLRB (D.C. Cir. 1963) 314 F.2d 260 [52 LRRM 2138]. But see, NLRB v. Aluminum Cruisers, Inc. (6th Cir. 1980) 620 F.2d 116 [105 LRRM 2337].

all witnesses of one party,[9/] allowing amendments or belated presentation of evidence,[10/] taking judicial notice of prior hearings,[11/] engaging in extensive cross-examination,[12/] nor making rulings adverse to a particular party with alarming frequency[13/] is sufficient to demonstrate that a party was deprived of a fair administrative hearing.

In light of the above authority, it is clear that bias, prejudice, or partiality sufficient to set aside a hearing mustbe reflected in the conduct of a hearing that deprived a party of an opportunity to present and/or argue evidence.[14/] That this is a particularly apt model for the legislative scheme of our Act is shown by the fact that if a full and fair hearing is conducted by

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[9/](NLRB v. Tonkawa Refining Co. (10th Cir. 1971) 452 F.2d 900 [79 LRRM 2103].) The fact that the hearing officer generally credited all of the General Counsel's witnesses does not imply bias and lack of impartiality. (See also NLRB v. Federal Dairy Co. (1st Cir. 1961) 297 F.2d 487 [49 LRRM 2214]; NLRB v. Superior Sales, Inc. (8th Cir. 1966) 366 F.2d 229 [63 LRRM 2197]; Bituminous Material & Supply Co. v. NLRB (8th Cir. I960) 281 F. 2d 365 [46 LRRM 2770].)

[10/] (NLRB v. Frazier, Inc. (8th Cir. 1969) 411 F. 2d 1161 [71 LRRM 2466] .)

[11/] (NLRB v. American Art Industries, Inc. (5th Cir. 1969) 415 F.2d 1223 [72 LRRM 2199].)

[12/] (Tele-Trip Co. v. NLRB (7th Cir. 1965) 340 F.2d 575 [58 LRRM 2298]. See also NLRB v. Air-Flow Sheet Metal, Inc. (7th Cir. 1968) 396 F.2d 506 [68 LRRM 2329].)

[13/](Harowe Servo Controls, Inc. (1980) 250 NLRB 958 [105 LRRM 1147] .)

[14/]See Davis, Administrative Law Treatise (2nd Ed. 1980) V. 3, pp. 382, 392; Cinderella Career and Finishing Schools, Inc. v. FTC (D.C. Cir. 1970) 425 F.2d 583, for discussions of other circumstances, not here presented, of denial of administrative due process.

the ALO and the Board errs in concluding that the evidence does or does not support a finding of a violation of the Act, Respondent may demonstrate to the appellate courts that the Board's findings are not supported by the evidence. (Andrews v. ALRB, supra, 28 Cal.3d at 795.) However, when the ALO deprives a party of the opportunity to argue and/or present evidence, the matter must be set aside on request, for appellate review then becomes an insufficient cure. The courts would be unable to engage in an adequate scrutiny of the Board's findings, absent the relevant evidence wrongfully excluded or limited. (NLRB v. Doral Building Service, Inc., supra, 666 F.2d 432; NLRB v. Aluminum Cruisers, Inc., supra, 620 F.2d 116 den. enf. to (1978) 234 NLRB 1027 [98 LRRM 1167]; A-l Janitorial Service Co. (1976) 222 NLRB 666 [91 LRRM 1210].)

On review of the entire record herein, especially as it pertains to the conduct of the hearing officer at the hearing, we find (and no party disputes) that the ALO ruled with impartiality, sometimes for and sometimes against Respondent, WCT, the General Counsel, or the UFW, explaining his rulings and offering counsel opportunity to argue those rulings. He allowed Respondent, WCT, the General Counsel, and the UFW to explore areas that he saw as only marginally relevant and excluded no evidence.

The letter from the ALO to the Court of Appeal contains comments hostile to Respondent. However, such hostility has not been shown to be other than hostility created by the fact that the ALO's mind has absorbed the impressions left by a full and fair hearing. (A. 0. Smith v. NLRB, supra, 58 LRRM at 2648.) The

fact that the letter follows the hearing by over four years renders the commentary even less likely to have permeated the conduct of the hearing or the decision-making process herein, and aids in reaching the conclusion that our prior decision need not be set aside in light of that letter.

We therefore reaffirm our prior rulings, findings, and conclusions in this matter, and hereby issue a remedial Order modified to conform with present standards.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Sam Andrews' Sons, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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

(b) Denying access to Respondent's buses and premises to union organizers engaging in organizational activity in accordance with the Board's access regulations. (8 California Administrative Code sections 20900 and 20901 (1980).)

(c) Interrogating its employees regarding their union membership, activities, and sympathies.

(d) Surveilling, and creating the impression of surveillance of, its employees' union activities.

(e) Denying access to places where employees reside on Respondent's premises, including its labor camps, to United Farm Workers of America, AFL-CIO (UFW) agents or any other union representatives who are attempting to contact or communicate with employees residing therein.

(f) 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 the following named employees full reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other employment rights and privileges:

Miguel Q. Chavez	Francisco Orozco
Marcelina Espinoza	Eva Quesada
Jose Flores	Raul Quesada
Eduardo Godoy	Jesus Zamora
Ricardo Medina	

(b) Immediately offer to Mario Contreras employment as assistant foreman or other substantially equivalent job, without prejudice to his seniority or other employment rights and privileges.

(c) Make whole each of the employees named above in subparagraphs 2(a) and (b) for all losses of pay and other economic losses they have suffered as a result of Respondent's discrimination against them, computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982)

(d) Make whole the members of Crew No. 2 for all losses of pay and other economic losses they have suffered as a result of Respondent's discrimination against them on November 24, 1975, by depriving them of three hours work, computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(e) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying, and otherwise copying, all payroll records and reports, and all other records relevant and necessary to a determination by the Regional Director, of the backpay, makewhole awards, interest, and other amounts due employees under the terms of this Order.

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

(g) Post copies of the attached Notice in conspicuous locations on its premises for 60 days, the period(s) and place (s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed at any time between October 13, 1975, and the date on which said Notice is

mailed.

(i) Arrange for a representative of Respondent or a Board agent to read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time, at such time(s) and place(s) as are specified by the Regional Director. Following the reading, Respondent shall provide the Board agent an 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 work-time lost during the reading of the Notice and the question-and-answer period.

(j) 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 with it and, upon request of the Regional Director, notify him or her periodically thereafter in writing as to what further steps it has taken in compliance with this Order.

Dated: August 30, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties were given an opportunity to present testimony and other evidence, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by interfering with our workers' rights to a free election by interrogating workers about their support for the United Farm Workers of America, AFL-CIO (UFW), by laying off and demoting employees who supported the UFW, by denying UFW organizers access to your residences at our labor camp and preventing access to our property and buses when the law allows it, and by shortening the work hours of workers because they supported the UFW.

The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a lav; 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 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 this is true, we promise that:

WE WILL NOT ask you whether you belong to any union or support any union, or how you feel about any union.

WE WILL NOT fire, lay off, demote, or shorten the work day of any employee because of his or her union activities.

WE WILL NOT prevent union organizers from coming onto our property and buses when the law allows it to tell you about the union.

WE WILL offer Mario Contreras immediate reinstatement to his job as assistant foreman and we will pay him any money he lost because we demoted him from assistant foreman to thinner.

WE WILL offer Miguel Q. Chavez, Eva Quesada, Eduardo Godoy, Ricardo Medina, Raul Quesada, Jose Flores, Francisco Orozco, Marcelino Espinoza, and Jesus Zaraora immediate reinstatement to their old jobs and we will pay each of them any money they lost, plus interest at seven percent per annum, because we laid their, off.

WE WILL pay each of the employees who worked in Crew No. 2 on November 24, 1975, three hours pay plus interest.

Dated: SAM ANDREWS' SONS

By: _____
(Representative) (Title)

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. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is 714/353-2130.

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

Sam Andrews' Sons

8 ALRB No. 58
75-CE-32-R, et al.
(3 ALRB NO. 45)

PRIOR COURT DECISION

On remand from the California Supreme Court (Andrews v. ALRB (1980) 28 Cal.3d 781), to consider the merits of the Board's Decision in Sam Andrew's Sons (June 10, 1977) 3 ALRB No. 45, the Court of Appeal remanded the matter to the Board to determine whether the prior Decision should be set aside based on a letter of March 14, 1980, written by the ALO who heard the underlying matter to the justices of the Court of Appeal.

BOARD DECISION

Although recognizing that the letter contained intemperate and pejorative references to Sam Andrews' Sons, the Board ruled that its prior Decision need not be set aside. The Board found that under the Agricultural Labor Relations Act (and the National Labor Relations Act), the bias, prejudice, or hostility of an ALO becoir.es a justiciable issue only when it deprives a party of the opportunity to fully present and argue evidence. Therefore, the Board, noting that the ALO's letter was sent three years after his Decision, reviewed the record of the hearing and found that the ALO had conducted the hearing in *a* fair and impartial manner and that no party had been deprived of an opportunity to fully present or argue the evidence.

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