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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

V. B. ZANINOVICH AND SONS, Respondent, and ANTI-RACIST FARM WORKERS UNION, Charging Party.	Case No. 81-CE-184-D 8 ALRB No. 71

DECISION AND ORDER

On December 31, 1981, Administrative Law Officer (ALO) Beverly Axelrod issued the attached Decision and recommended Order in this proceeding. Thereafter, Respondent and General Counsel each filed exceptions and a supporting brief, and Respondent filed a reply brief.

The Agricultural Labor Relations Board (Board or ALRB) has considered the record and the attached Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALO as modified herein, and to adopt her recommended Order, with modifications.

We find no merit in Respondent's arguments that it did not have an obligation to submit a pre-petition list to the Anti-Racist Farm Workers Union (Union) and that an employer's failure to submit such a list does not constitute an unfair labor practice. As explained by the ALO in her Decision, similar arguments have been rejected by the Board.

General Counsel excepts to the ALO's refusal to award

litigation costs and fees against Respondent. We find no merit in the exception.

Section 1021 of the Code of Civil Procedure states,

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties ....

This section has long been recognized as codifying into California law the rule of procedure that attorney's fees may not be awarded in civil actions, unless provided for by a contract[1/] between the parties or specifically provided for by an act of the Legislature. (Bauguess v. Paine (1978) 22 Cal.3d 626.) In addition, certain other exceptions are judicially recognized as an exercise of the equitable power of tribunals to award attorney's fees.

Code of Civil Procedure section 1021 has been applied in determining the powers and scope of orders of an administrative agency. (See Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal.3d 891.) Accordingly, we regard Code of Civil Procedure section 1021 as applicable to the exercise of powers by this Agency. As discussed below, we find that none of the exceptions to the Code of Civil Procedure apply, and that we therefore lack the necessary power to order litigation costs and attorney's fees.

The judicially created equitable exceptions apply when

[1/] As there is no legally enforceable agreement between the parties providing for attorney's fees in unfair-labor-practice matters between Charging Party and Respondent, the contract exception obviously does not apply.

there is an award from a "common fund," where the action results in a "substantial benefit" to a class of persons, or where the claimant acts as a "private attorney general." (See Bauguess v. Paine, supra, 22 Cal.3d 626.) Several distinctions between these equitable exceptions and cases before the ALRB indicate that it would be clearly inappropriate for this Board to exercise similar equitable power pursuant to one of the established equitable exceptions. Common to all the exceptions is the fact that the complaining litigant is a private party or entity who undertook at private expense, litigation which benefits other persons as well as the plaintiff or complainant. Thus, the award of attorney's fees merely compensates private parties for expenditure of their own resources. By contrast, the expense of investigation, prosecution and litigation of ALRB complaints is provided for by legislative appropriation. There appears to be no case in which attorney's fees, pursuant to one of the equitable exceptions, have been awarded to a California State agency where litigation costs were furnished through public appropriation. Further, the awards of attorney's fees under the equitable exceptions to the Code of Civil Procedure section 1021 are not punitive as to the unsuccessful litigant. The award is customarily made from sums recovered, and the amount recovered for the beneficiary or beneficiaries would be reduced by the amount of the attorney fee award. As we noted in Neuman Seed Company (Oct. 27, 1981) 7 ALRB No. 35, the judicially created equitable exceptions to the Code of Civil Procedure section 1021 "are based upon a policy recompensing beneficent conduct, rather than of sanctioning improper conduct."

For that reason, we observed, the equitable exceptions are not an appropriate basis for fee awards in ALRB cases.

General Counsel cites to our Decision in Western Conference of Teamsters (July 21, 1977) 3 ALRB No. 57 in support of its request. In that case, in dicta, the Board indicated its view that it was empowered "to award attorney's fees, at least to the extent the NLRB has that power." For the reasons that follow, we reach a contrary interpretation of our powers and find we lack the power to award such fees.

Labor Code section 1160.3[2/] provides in pertinent part,

> ... If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part ....

It was implicit in the reasoning of Western Conference of Teamsters, supra, 3 ALRB No. 57 that section 1160.3, confers sufficiently broad and general powers on this Board to award attorney's fees as part of a remedial Order. Further, it may be argued, such power is conferred, albeit indirectly, by Labor Code section 1148, which requires this Board to "... follow applicable

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[2/] Unless otherwise specified, all code sections herein are to the Labor Code.

precedents of the National Labor Relations Act, as amended," especially since the remedial provision, section 10(c), of the National Labor Relations Act (NLRA) is essentially the same as section 1160.3 of the Agricultural Labor Relations Act (ALRA). We reject such reasoning. Although section 1148 requires us to follow applicable precedents of the NLRA in the area of substantive labor law, we are not bound by administrative or procedural practices or policies of the National Labor Relations Board (NLRB), (See ALRB v. Superior Court (1976) 16 Cal.Sd 392.)

NLRB and federal court decisions providing for award of attorney's fees indicate that a purpose of that policy is to relieve the crowded court dockets. The NLRB has stated that "the policy of the NLRA to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded board and court dockets is available." (Tiidee Products, Inc. (1972) 194 NLRB 1234 [79 LRRM 1175], Supp. Dec. enforced in part (D.C. Cir. 1974) 502 F.2d 349, cert. den. (1974) 94 Supreme Ct. 2629.)[3/] The award of attorney's fees in appropriate cases, the NLRB reasoned, tends to discourage frivolous litigation which would otherwise merely clutter its docket. While the line between substantive law and adjective law or procedural policies is not always easily distinguished, the matter of a tribunal's management of its docket is clearly procedural.

As section 1148 does not require us to follow the NLRB's practices with respect to awarding attorney's fees and cost in

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[3/] See also Hecks, Inc. (1974) 215 NLRB 765 [88 LRRM 1049] (2d Supp. Dec.).

"frivolous litigation" cases, we now consider whether section 1160.3 gives us the authority to provide such relief. Although that section contains no specific provision on the point, the authority to order such a remedy may be inferred, it may be argued, from the language in section 1160.3 requiring this Board "... to provide such other relief as will effectuate the policies of [the Act]."

The placement of section 1160.3 in Chapter 6 ("The Prevention of Unfair Labor Practices") clearly indicates that the Board's remedial power exists mainly for the purpose of preventing and deterring the commission of unfair labor practices, not for the purpose of deterring frivolous litigation. In the instant case, General Counsel does not seek the award of attorney's fees and litigation costs as a means of remedying any unfair labor practice committed by Respondent, or as a means of discouraging or deterring Respondent, or others, from violating the Act, but rather as a means of deterring Respondent, and others, from engaging in what the General Counsel considers to be frivolous litigation. Any authority of this Board to award such fees and/or costs could not therefore be based on its powers to remedy and prevent unfair labor practices, but would have to derive from the language of section 1160.3 providing that, in addition to certain specified remedies, this Board must "provide such other relief as will effectuate the policies of [the ALRA]." In the NLRB cases noted above, comparable language in section 10(c) of the NLRA, ("... and to take such affirmative action ... as will effectuate the policies of this Act ....") is cited as

the national Board's authority for awarding attorney's fees and litigation costs.

As we noted, the national Board's award of fees and costs was essentially an exercise of its powers to control, administer and supervise its docket in the interest of expediting the resolution of unfair labor practice cases. The award of such fees and costs would not generally constitute a tangible benefit to the Charging Party or the discriminatees involved. The thrust of the NLRB's order therefore was clearly to discourage the respondent, and other respondents in other (future) cases, from presenting a frivolous defense. (See also Hecks, Inc. (1974) 215 NLRB 765 [88 LRRM 1040] (2d Supp. Dec.).)

California case law clearly rejects the exercise of the inherent supervisory and administrative powers of the courts to impose a fee sanction against a respondent, even where it has litigated in bad faith or engaged in "vexatious and oppressive conduct." (Bauguess v. Paine (1978) 22 Cal.3d 626.)[4/] This is

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[4/] In Young v. Redman (1976) 55 Cal.App.3d 827, 128 Cal.Rptr. 86, 94, cited with approval by the court in Bauguess, the court explained its characterization of our award of fees and costs against an unsuccessful respondent, which litigated a claim frivolously and in bad faith, as a sanction. The discussion acknowledges that such an award could have a compensatory effect. The court stated:

> It may well be advisable in light of the foregoing and the ever-increasing cascade of civil litigation that the power to impose such sanctions in California's trial courts should exist, thus adding a much needed element of discipline on the trial court level toward a reduction in the burning up of valuable court time handling frivolous, "bad faith" matters devoid of merit and make whole litigants who were forced to expend

(fn. 4 cont. on p. 8.)

true, the court noted, even where such inherent supervisory and administrative powers of courts are recognized in legislative enactment.[5/] The teaching of such cases as these is that authorization to impose a fee sanction pursuant to Code of Civil Procedure section 1021 must be specific. Section 1160.3 of the ALRA does not meet that test. As noted, the unfair-labor-practice remedies specified in that section do not include the award of litigation fees. The "... such other relief as will effectuate the policies of [the Act]," while clearly not specific, may most reasonably be interpreted to refer to other remedies of a primarily compensatory or restorative nature, in keeping with other section 1160.3 remedies, and not to punitive sanctions. In view of the extremely general nature of the "such other relief" provision and the judicial direction against awarding litigation fees as an exercise of inherent, supervisory powers of a tribunal, we conclude that the statutory language of section 1160.3 of the ALRA is not a specific statutory provision, within the meaning of

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(fn.4 cont.)

> money on legal fees to meet such unfounded positions. However, absent legislative action, for us to declare that the trial court has inherent power to impose such sanctions takes a giant step in expanding the power of the court with sweeping ramifications. Such power in the trial court, unfettered and unbridled, without appropriate safeguards and guidelines, could cancel out any benefits derived to the judicial process by generating a proliferation of appeals. We therefore are of the view that any power of the trial court to impose such sanctions should be created by the legislative branch of government with appropriate safeguards and guidelines developed following a thorough in-depth investigation.

[5/] See Code of Civil Procedure section 128.

Code of Civil Procedure section 1021, for awarding attorney's fees in unfair-labor-practice proceedings or other litigation before this Board.

The Dissent cites to Consumers Lobby Against Monopolies v. Public Utilities Commission, supra, 25 Cal.3d 891, as authority for the proposition that an administrative agency endowed with a general grant of authority but not specific provision for awarding attorney's fees, is nonetheless empowered to award them. We do not regard the court's decision in that case as controlling authority concerning our power to award attorney's fees against an unsuccessful Respondent absent specific statutory authorization. (See our Decision in Neuman Seed Company, supra, 7 ALRB No. 35.) In that case, we noted that in Consumers Lobby Against Monopolies v. Public Utilities Commission, supra, the issue was whether the Public Utilities Commission (PUC) had the power to award attorney's fees under the common fund exception to Code of Civil Procedure section 1021. We do not regard that case as authority for the power of an administrative agency to award attorney's fees as a sanction. In contrast to the well-established equitable exceptions such as the "common fund" situation, California courts have rejected the fee sanction as a further equitable exception to Code of Civil Procedure section 1021. (See Bauguess v. Paine, supra, 22 Cal.3d 626.)

For all of the above reasons, we find that the award of attorney's fees as a sanction against an unsuccessful Respondent for litigating a frivolous defense is beyond our authority under applicable California law, notwithstanding the practice of the

NLRB to award such fees in certain circumstances. Our reading of Labor Code section 1160.3 does not provide authority for us to award such fees against the clear prohibition set forth in Code of Civil Procedure section 1021.

We find no merit in Respondent's exceptions to some of the provisions of the ALO's recommended Order. In Laflin and Laflin (May 19, 1978) 4 ALRB No. 28, we provided remedies in a case where an employer has refused to provide an employee list. We shall apply those remedies in the instant case.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board or ALRB) hereby orders that Respondent, V. B. Zaninovich and Sons, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to provide the ALRB with an employee list as required by California Administrative Code, title 8, section 20910(c).

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

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

(a) Execute 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.

(b) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property 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.

(c) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during August or September 1981.

(d) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on Company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading(s), 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 and/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 in order to compensate them for time lost at the reading(s) and during the question-and-answer period.

(e) Provide the Regional Director with an employee list forthwith, as required by California Administrative Code, title 8, section 20910(c).

(f) Provide the Regional Director with an employee list as required by California Administrative Code, title 8,

section 20910(c) if the Anti-Racist Farm Workers Union (Union) files a Notice of Intent to Take Access in accordance with California Administrative Code, title 8, section 20900(e) during the next growing season. The list shall be provided within five days after service on Respondent of the said Notice of Intent to Take Access.

(g) Allow representatives of the Union, during the next period during which it files a Notice of Intent to Take Access, to organize among Respondent's employees during the hours specified in California Administrative Code, title 8, section 20900 (e) (3), and permit the said Union, in addition to the number of organizers already permitted under California Administrative Code, title 8, section 20900 (e) (1) (A), one organizer for each 15 employees.

(h) Grant to the Union, upon its filing a written Notice of Intent to Take Access pursuant to California Administrative Code, title 8, section 20900(e)(1)(B), one access period in addition to the four periods provided for in California Administrative Code, title 8, section 20900(e) (1) (A).

(i) Provide representatives of the Union with one hour of access to Respondent's employees during regularly-scheduled working time, during which hour the Union may disseminate information to and conduct organizational activities among Respondent's employees. The Union shall present to the Regional Director its plans for utilizing the said one-hour period. After conferring with both the Union and Respondent concerning the Union's plans, the Regional Director shall determine the most

suitable times and manner for such contact between organizers and Respondent's employees. During the time of such contact no employee will be required to engage in work-related activities, or to be involved in the organizational activities. All employees shall receive their regular pay for the one hour away from work. The Regional Director shall determine an equitable payment to be made to nonhourly wage earners for their lost production time.

(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 therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: October 5, 1982

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

MEMBER WALDIE, Dissenting and Concurring:

I respectfully dissent from the conclusion that this Board does not have the authority to impose the remedy of litigation costs and attorney's fees against a respondent. In Western Conference of Teamsters (July 21, 1977) 3 ALRB No. 57, this Board concluded that it was empowered to make such an award. I am not persuaded by the majority's conclusion that our decision in Western Conference of Teamsters, supra, is in error.

In Western Conference of Teamsters, supra, 3 ALRB No. 57 and in Neuman Seed Co. (Oct. 27, 1981) 7 ALRB No. 35, the Board examined the general rule concerning attorneys fees, embodied in Code of Civil Procedure (C.C.P.), section 1021, that such fees are not ordinarily recoverable by the victorious litigant in the absence of a statute or enforceable contract which provides for such an award. The Board concluded that none of the non-statutory exceptions to C.C.P. section 1021 apply to awards of attorneys fees and litigation costs against a Respondent, Western Conference of Teamsters, supra,

or against the General Counsel, Neuman Seed, supra. However, in Western Conference of Teamsters, supra, the Board went on to conclude that the Agricultural Labor Relations Act (ALRA or Act) provides a statutory basis for the award of such fees within the express exceptions of C.C.P., section 1021. The Board noted that the National Labor Relations Board (NLRB) has construed its act to authorize the award of attorney's fees and litigation costs in appropriate cases. The Board next looked at the NLRB's statutory scheme and rationale for utilizing such an award and concluded they were similar to those of the ALRA. Finally, the Board adopted the NLRB's "frivolous/debatable" approach to the question of an award of fees and costs.

Since the Board's Decision in Western Conference of Teamsters, supra, 3 ALRB No. 57, the Board has decided five cases which presented the question of an award of attorney's fees against a Respondent.[1/] In only one of those cases, Teamsters Union Local 865, supra, 3 ALRB No. 60, did the Board find Respondent's litigation posture frivolous and award attorney's fees and costs against it.

NLRB Precedent

For many years, the NLRB refrained from awarding attorney's fees and litigation expenses against an employer, in compliance with the National Labor Relations Act's (NLRA) requirement of remedial, rather than punitive remedies. However, that principle

[1/] Teamsters Union Local 865 (July 28, 1977) 3 ALRB No. 60; Tenneco West, Inc. (Apr. 5, 1978) 4 ALRB No. 16; Adam Dairy (Apr. 26, 1978)4 ALRB No. 24; American Foods, Inc. (May 23, 1978) 4 ALRB No. 29; San Diego Nursery Co. (Nov. 20, 1978) 4 ALRB No. 93.

was modified when the NLRB decided that imposing such expenses might be appropriate in certain specific situations. In Tiidee Products, Inc. (1972) 194 NLRB 1234 [79 LRRM 1175], Supp. Dec. enforced in part (D.C. Cir. 1974) 502 F.2d 349, cert. den. (1974) 94 S.Ct. 2629, the NLRB ordered reimbursement of litigation expenses after finding that the employer had engaged in "frivolous" litigation. The NLRB stated at page 1236:

> We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board has recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board. (Citation omitted)
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> We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available.

The NLRA's remedial provision, section 10(c), empowers the NLRB "to take such affirmative action as will effectuate the policies of the Act." Similarly, section 1160.3 of the ALRA empowers this Board "to provide such other relief as will effectuate the policies of this part." The Board in Western Conference of Teamsters, supra, 3 ALRB No. 57, thus concluded that our statute is at least as expansive in its grant of remedial power as that of the NLRA and that when the Legislature enacted the ALRA, it granted to this Board a power to award attorney's fees at least to the extent that the NLRB has that power.

The California Supreme Court has had occasion to examine the statutory grant of power of a state commission. In Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal.3d 891, the Court concluded that the commission had the authority to award attorney's fees under the common-fund exception to C.C.P. section 1021 to the same extent as a court. In examining the Legislature's grant of power, the Court observed that Public Utilities Code (PUC) section 701 confers on the PUC "expansive authority to 'do all things, whether specifically designated [in the Public Utilities Act] or addition thereto, which are necessary and convenient[1] in the supervision and regulation of every public utility in California" (emphasis is the Court's). (Consumers v. PUC, supra, at 905.) The Court noted that the PUC's authority has been liberally construed and concluded at page 906:

> Several results follow from the Legislature's open-ended grant of authority to the commission. First, the grant negates the contention of Pacific and the commission that the Tatter lacks power to award attorney's fees because there is no_express statutory authorization therefore. Similarly, little persuasive value is left to their argument that recent legislation specifically authorizing courts to award fees (citations omitted) evinces an intent, by negative implication, that the commission be denied the power to award fees under section 701.... (Emphasis added.)

Section 1160.3's authorization for this Board to "provide such other relief as will effectuate the policies of this part," similarly manifests the Legislature's intent to grant the Board broad remedial authority. As discussed above, the NLRB interprets section 10 (c) of its act as a broad grant of authority, enabling it to award attorney's fees and litigation expenses against respondents

in certain situations. I would conclude that section 1160.3 which is similar to NLRA section 10 (c) and PUC section 701, grants us the authority to award attorney's fees and litigation expenses against respondents who present frivolous defenses.

I view the interest of the NLRB and the ALRB as identical in this matter. Both boards are mandated to remedy the effects of unfair labor practices, and both are enjoined from engaging in purely punitive impositions unrelated to remedying specific conduct and its effects. Under either the NLRA or the ALRA the ultimate consideration is whether the award in a particular case effectuates the policies of the statute. Under either statutory scheme the implementation of the legislation is dependent in the first instance upon the agency's ability to utilize effectively its resources, unfettered by trial calendars crowded with meritless litigation. (Western Conference of Teamsters, supra, 3 ALRB No. 57.) I conclude that the NLRB's approach in this area constitutes applicable precedent which we are mandated to follow under section 1148 of the Act. Accordingly, I would reaffirm our decision in Western Conference of Teamsters, supra.

The majority attempts to circumvent the mandate of section 1148 that this Board follow applicable precedents of the NLRA by categorizing the award of attorney's fees as procedural in nature. However, an element or theory of damages is a substantive rather than procedural matter and therefore encompassed by the mandate of section 1148. (Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55; ALRB v. Superior Court of Tulare County (1976) 16 Cal.3d 392.) An award of attorney's fees to a party as a means of making it whole

for the frustration of its assertion of statutory rights occasioned by the delay resulting from a respondent's frivolous litigation posture cannot be relegated to "procedure" without doing violence to the legislative intent embodied in the language of section 1160.3. The majority has not pointed to any factors in the agricultural setting which would render the award of attorney's fees an "inapplicable" remedy. (See ALRB v. Superior Court, supra.)

The majority labels the award of attorney's fees a "sanction" and concludes that such a "sanction" is punitive in nature. In my opinion, such a broad interpretation of what a punitive measure is would encompass even our standard remedial provisions. As noted earlier, the NLRB modified its position that such an award was punitive in 1972. The majority ignores ten years of NLRB precedent.

Respondent herein also excepts to the ALO's finding that its defenses were frivolous. For the reasons explained below, I would find this exception to be without merit and award attorney's fees against Respondent.

The NLRB has decided cases wherein it has articulated the distinction between defenses that are "debatable" rather than "frivolous." The NLRB's position was clearly set forth in Heck's Inc. (1974) 215 NLRB 765 [88 LRRM 1049] (2nd Supp. Dec.).

> [O]ur intent [is] to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful,' where the defenses raised by the respondent are 'debatable' rather than 'frivolous.' (Heck's Inc., supra, 215 NLRB 765 at 767.)

(See also Winn-Dixie Stores, Inc. (1976) 224 NLRB 1418 [92 LRRM 1625]; J. P. Stevens & Co. (1978) 239 NLRB 738 [100 LRRM 1052].) The Supreme Court has expressly approved the Board's "frivolous-debatable" standard. (NLRB v. Food Store Employees Union (1974) 417 U.S. 1, 8-9 [86 LRRM 2209].)

The NLRB has not clearly defined what it means by a "frivolous" defense. However, a frivolous defense is described as one which obviously lacks merit, is not debatable, and not one which fails simply upon the Administrative Law Judge's resolutions of conflicting testimony. (NLRB Remedies for Unfair Labor Practices, University of Pennsylvania, Philadelphia, Pennsylvania, 1976.)

While setting forth its policy concerning litigation costs and attorney's fees in Heck's, Inc., supra, 215 NLRB 765, the NLRB explicitly reserved the power to consider applying a more definitive criterion than the distinction between "frivolous" and "debatable" defenses which it had thus far been utilizing. (Heck's, Inc., supra, at 768.) In addition, the NLRB stated that it did ..."not imply that the need for additional or expanded remedies may not be established by the degree of repetition of misconduct." (Heck's, Inc., supra at 768, footnote 23.)

In sum, the NLRB has determined that it will award litigation costs against a respondent where the respondent's litigation posture is frivolous rather than debatable. In addition, such an award may be appropriate even where the meritless defenses were arguably non-frivolous in cases of flagrant, aggravated, persistent, and pervasive employer misconduct where the litigation expenses are the direct consequence of the respondent's unlawful behavior.

Recently, the California Supreme Court defined what a frivolous appeal is for purposes of Code of Civil Procedure section 907 which permits reviewing courts to award "such damages as may be just" when they determine that an appeal was frivolous. The Court stated:

> [A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit. (Emphasis added.) (In re Marriage of Flanerty (1982) 31 Cal.Sd 637 at 650.)

Even under this standard, I would find Respondent's position to be frivolous.

General Counsel's complaint was based on the theory that an employer's refusal to provide a pre-petition list, as provided in the Board's Regulations, 8 California Administrative Code section 20910, interferes with and restrains worker rights in violation of section 1153 (a) of the Act. This was certainly not a novel theory. In Henry Moreno (May 11, 1977) 3 ALRB No. 40, the Board held that an employer's refusal to supply an employee list as required under section 20910 of the Regulations constitutes a violation of the Act. The Board noted that withholding such a list not only interferes with and restrains employees' rights to organize and to communicate with labor organizers, it also hampers the Agency's ability to efficiently conduct representation elections. Since Henry Moreno, supra, the Board has consistently held that pre-petition list violations constitute an unfair labor practice. (E.g., Tenneco West, Inc. (Apr. 5, 1978) 4 ALRB No. 16; Laflin and Laflin, et al.

(May 19, 1978) 4 ALRB No. 28; Ranch No. 1, Inc. (Jan. 22, 1979) 5 ALRB No. 3.)

Respondent concedes that ALRB cases have previously held that refusal to provide a pre-petition list violates the Act. However, Respondent contends that those cases were decided in error. Respondent's argument is that since the NLRB has never held that failure to provide employee lists constitutes an unfair labor practice, ALRB cases to the contrary are erroneous.

This argument is also without merit. In Point Sal Growers and Packers (Feb. 1, 1979) 5 ALRB No. 7, the Board rejected the same argument noting that such an argument fails to give effect to the term "applicable" in section 1148 of the Act. (See ALRB v. Superior Court (1976) 16 Cal.3d 128.)

In finding Respondent's defense frivolous, I am not, as Respondent suggests, concluding that it is frivolous for a litigant to argue that a prior Board Decision was incorrectly decided. I believe that the parties who practice before us have the right to present such arguments. However, in the instant case, the arguments pressed by Respondent to support its contention were clearly without merit and frivolous. First of all, the California Supreme Court has approved of the Board's interpretation of section 1148 as permitting it to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California agricultural scene. (ALRB v. Superior Court, supra, 16 Cal.3d 392, 413.) Furthermore, Respondent overlooks the court of appeals' approval of the pre-petition list regulation in San Diego Nursery Co. v. ALRB (1979) 100 Cal.App.3d 128, wherein the court

quoted approvingly this Board's 1977 Decision in Henry Moreno, supra, 3 ALRB No. 40. I therefore conclude that this is an appropriate case for the award of litigation costs and attorney's fees against Respondent.

Dated: October 5, 1982

JEROME R. WALDIE, Member

ACTING CHAIRMAN PERRY, Dissenting and Concurring:

While I agree with the dissenting opinion of Member Waldie and would award attorney's fees to remedy frivolous litigation, I do not consider this an appropriate case for such an award, and therefore concur in the result reached by the majority. I concur with Member Waldie's well-reasoned analysis of the relevant case law under the National Labor Relations Act and California precedents. However, I find in the instant matter that the General Counsel has not established that Respondent's litigation was frivolous. I consider Respondent's attempt, without citation or authority, to question prior decisions of this Board and to seek excessively technical compliance with Board regulations to be meritless but arguably non-frivolous. (J. P. Stevens & Co., Inc. (1979) 244 NLRB 407 [102 LRRM 1039].) In the present situation, where a respondent's position does not indisputably lack merit (see, In re Marriage of Flanerty (1982) 31 Cal.3d 637, 650), but does not require resolutions of conflicting testimony, I would require some

showing of exacerbation, such as repeated misconduct, to warrant the extraordinary remedy of attorney's fees for resorting to the statutory processes of appeal contained in the Agricultural Labor Relations Act. (See, Heck's Inc. (1975) 215 NLRB 765, 768 n. 23 [88 LRRM 1049] (2nd Supp. Decision).)

Dated: October 5, 1982

HERBERT A. PERRY, Acting Chairman

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 had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by refusing to provide a pre-petition employee list as required by the Board's regulations. The Board ordered us to provide such a list to the Union. 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 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.

Because this is true, we promise that:

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

Especially:

WE WILL NOT refuse to provide the Agricultural Labor Relations Board with a current list of employees when the Anti-Racist Farm Workers Union or any union has filed a "Notice of Intent to Organize" our agricultural employees.

Dated: V. B. ZANINOVICH & 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 627 Main Street, Delano, California. 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

Z. B. Zaninovich and Sons
(Anti-Racist)

8 ALRB No. 71
Case No, 81-CE-184-D

ALO DECISION

The ALO concluded that Respondent violated section 1153 (a) of the Act by refusing to provide a pre-petition employee list as required by section 20910 (c) of the Board's Regulations after the Anti-Racist Farm Worker's Union filed a Notice of Intent to Organize (NO) Respondent's employees. Although the Union did not send a confirming telegram as required by the Regulations, the ALO concluded that Respondent had actual notice of the filing of the NO since the Union personally served it on Respondent's office manager.

The ALO found that one of Respondent's defenses was frivolous and concluded that an award of attorney's fees against Respondent would be appropriate under Western Conference of Teamsters (July 21, 1977) 3 ALRB No. 57. However, noting this Board's disinclination to award attorney's fees, the ALO declined to make such an award.

BOARD DECISION

The Board unanimously upheld the ALO's finding of an 1153 (a) violation in Respondent's refusal to provide the pre-petition employee list and provided its standard cease-and-desist, posting, mailing, and reading remedies. In addition, it provided the remedies deemed applicable in Laflin and Laflin (May 19, 1978) 4 ALRB No. 28 for cases of employer refusal to provide pre-petition lists. However, there were three separate opinions regarding the question of attorney's fees.

Members McCarthy and Song concluded that the ALRB is not empowered to make an award of attorney's fees, finding that such an award does not fall within any of the equitable exceptions to Code of Civil Procedure, section 1021 which states that attorney's fees are not recoverable unless they are specifically provided for by statute. In addition, they concluded that such fees are primarily punitive in nature and not specifically provided for by the ALRA's remedial section 1160.3. They further found that the NLRB's occasional practice of awarding attorney's fees is not binding precedent pursuant to Labor Code section 1148 since the NLRB practice is essentially of a procedural character.

Members Waldie and Perry concluded that the ALRB does have the authority to award attorney's fees. Relying on NLRB precedent, they concluded that this Board was correct in holding in Western Conference of Teamsters, supra, 3 ALRB No. 57, that the Board could award attorney's fees against a Respondent for pursuing frivolous defenses. Member Waldie examined the NLRB's frivolous-debatable standard for awarding attorney's fees and concluded that Respondent's defense in the instant case was frivolous. Member Perry, however, was of the opinion that Respondent's litigation posture in this case was not frivolous and, on that basis, joined in refusing to award attorney's fees.

* * *

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

* * *

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD,

In the Matter of: V.B. ZANINOVICH AND SONS, Respondent, and ANTI-RACIST FARM WORKERS UNION, Charging Party.	Case No. 81-CE-184-D

Robert L. Ford, Esq.

Seyfarth, Shaw, Fairweather & Geraldson, of Los Angeles, California, for Respondent

John Patrick Moore, Esq.

of Fresno, California, for the General Counsel

DECISION

Statement of the Case

BEVERLY AXELROD, Administrative Law Officer: This case was heard before me on November 3, 1981 in Delano, California. The Complaint was issued on September 4, 1981 and amended on

October 22 and November 3, 1981.[1/] The Complaint alleges a violation of Section 1153 (a) of the Agricultural Labor Relations Act, herein called the Act, by V.B. Zaninovich and Sons, herein called Respondent. The Complaint is based on a charge filed on August 31, 1981 by the Anti-Racist Farm Workers Union, herein called the Union. Copies of the charge were duly served upon Respondent.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel and Respondent each filed a brief in support of its respective position.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law.

Findings of Fact I.

Jurisdiction

V.B. Zaninovich & Sons is engaged in agriculture in the State of California, and is an agricultural employer within the meaning of Section 1140.4 (c) of the Act. The Anti-Racist Farm Workers Union is a labor organization representing agricultural employees within the meaning of 'Section 1140.4 (f) of the Act.

1/ General Counsel's oral motion to amend the Complaint the second time was granted at the end of the hearing. Tr: 56-57. (References to the Reporter's transcript are given "Tr:", followed by the page number.) The written Second Amended Complaint was filed November 16, 1981.

II. The Alleged Unfair Labor Practice

The General Counsel alleges that Respondent violated Section 1153 (a) of the Act by refusing to provide the Union with a list of its employees (usually referred to as a "pre-petition list") after the Union filed a Notice of Intent to Organize the employees at Respondent's premises. Respondent asserts that it was never properly served with the Notice of Intent to Organize. Respondent also asserts that in any event its refusal to provide the employee list is not an unfair labor practice under the Act.

The General Counsel called two witnesses at the hearing. Respondent did not call any witnesses. Respondent did not introduce any exhibits. The facts as presented by the General Counsel's witnesses were not disputed.

Mr. Marcial Gonzales testified that he is an employee at the Respondent's premises. His job is picking grapes and pruning grape vines. On August 30, 1980 he and other workers at Respondent's premises organized the Union.[2/] There were approximately fifty workers at the meetings of the Union which were held in summer and fall of 1980. Mr. Gonzales was elected secretary-treasurer of the Union.

In December, 1980 the Union members decided to start an organizational drive at Respondent's premises. After discussion, this drive began in August, 1981. On August 4, 1981 Mr. Gonzales filed a Declaration By Representative

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2/ By-laws of the Anti-Racist Farm Workers Union were admitted into evidence. General Counsel's Exhibit No. 2. (References to General Counsel's exhibits are hereafter designated "GCX".)

Of Purported Labor Organization with the Agricultural Labor Relations Board (hereafter "ALRB" or "Board"). (GCX:3).

On August 4, 1981, Mr. Gonzales also filed a Notice Of Intent To Take Access with the ALRB's Delano office. (GCX:4). This Notice stated the Union's intent to take access to the Respondent's premises pursuant to the Act.

After the Notice Of Intent To Take Access was filed with the ALRB, Mr. Gonzales personally served a copy on Mr. Richard Widhalm, the Office Manager of Respondent's business. This was served on Mr. Widhalm in his office at Respondent's premises. It is stipulated by the parties in this case that Mr. Widhalm is the Office Manager of Respondent, and is not an officer, owner, or director of Respondent, (Tr: 56).

On August 24, 1981 Mr. Gonzales filed a Notice Of Intent To Organize with the ALRB's Delano office. (GCX:5). Mr. Gonzales submitted 82 union authorization cards along with the Notice of Intent to Organize. (GCX:5). The cards were collected in July and August, 1981 among employees at Respondent's premises. On the same date, August 24, 1981, Mr. Gonzales personally served a copy of the Notice Of Intent To Organize on Mr. Widhalm, at the latter's office at Respondent's premises. Mr. Gonzales did not send a telegram or letter to any of Respondent's owners or officers, informing them of his service of the Notice upon Mr. Widhalm.

On August 25, 1981 the Delano Regional Director of the ALRB sent a letter to Respondent informing Respondent that

a Notice Of Intent To Organize had been filed, and stating that Respondent was obligated to submit to the Regional Office a list of all current agricultural employees. (GCX:5). It is stipulated by the parties that this letter was sent to Respondent.

Ms. Bea Espinoza testified that she is a field examiner for the ALRB, working in the Delano office. She testified that she received the Notice Of Intent To Organize, along with 82 authorization cards, filed by Mr. Gonzales with the ALRB. After she received the Notice and the cards, she called Mr. Vincent Zaninovich, a shareholder of Respondent, and informed him that a Notice Of Intent To Organize had been filed. She told him that Respondent had to submit a pre-petition list of employees with the ALRB within five days. Mr. Zaninovich stated that he was aware of this requirement and of the procedures involved.

Ms. Espinoza then personally delivered a copy of the Notice of Intent to Organize with Mr. Widhalm, Respondent's Office Manager, at his office. Several days later she also sent a letter to Mr. George Preonas, an attorney for Respondent, The letter contained a copy of the Notice Of Intent To Organize, She sent a copy to Mr. Preonas because she had called him to tell him about the Notice, and he had stated that he had not received a copy of the Notice.

On August 29, 1981, five days after the Notice Of Intent To Organize was filed, Ms. Espinoza had not received the pre-petition list of employees from Respondent. She called

Mr. John Zaninovich, a shareholder of Respondent, and told him the list was due that day. He replied that his son, Vincent Zaninovich, handled those matters and that she should call him.

Ms. Espinoza then called Respondent's offices and left a message for Vincent Zaninovich that the pre-petition list was due. She also called Mr. Preonas and told him that the list was due.[3/]

It is undisputed that at no time has Respondent sent a list of its employees to the ALRB or to the Union.

In addition to the above testimony concerning the filing of the Notice Of Intent To Organize, Mr. Gonzales testified about the Union's subsequent efforts to organize Respondent's employees. He stated that the Union did take access at Respondent's fields throughout the period August 9 September 9, 1981, but that the employees were reluctant to talk with the Union organizers in the fields. He stated that it would have been important to the Union's organizational drive to be able to talk to the employees in their homes, but that this was not possible due to Respondent's failure to provide a list of the employees and their addresses. Mr. Gonzales stated that the Union's drive therefore lost momentum, and that the Union stopped trying to organize Respondent's employees in that harvest season.

3/ Ms. Espinoza testified that Mr. Preonas stated to her during the call that Respondent would refuse to submit a list, and that the Act did not "require the company to submit a list to a union that was racist or communist." (Tr: 50). This testimony was not contradicted by Respondent. However, I have not found it necessary to rely on this testimony in reaching my decision in this case.

Discussion of Issues and Conclusions of Law

The Board's regulations explicitly require that a list of employees be sent to the ALRB's regional office within five days of the filing of a Notice Of Intent To Organize:

> "Within five days from the date of filing of the notice of intention to organize, the employer shall submit to the regional office an employee list as defined in section 20310 (a) (2)." (8 Cal. Admin. Code Section 20910 (c)).[4/]

It is undisputed that Respondent has refused to comply with this requirement. Respondent makes two arguments to justify its refusal. First, Respondent argues that refusal to comply with this requirement does not constitute an unfair labor practice under Section 1153 (a) of the Act. Second, Respondent argues that is was under no obligation to provide a list because the Notice Of Intent To Organize was not properly served on Respondent since the Union did not send a telegram to Respondent's owners.[5/]

4/ Section 20310 (a) (2) of the Regulations provides in part: "A complete and accurate list of the complete and full names, current street addresses, and job classifications of all agricultural employees, including employees hired through a labor contractor, in the bargaining unit sought by the petitioner in the payroll period immediately preceding the filing of the petition. The employee list shall also include the names, current street addresses, and job classifications of persons working for the employer as part of a family or other group for which the name of only one group member appears on the payroll." (8 Cal. Admin. Code Section 20310 (a) (2)).

5/ Respondent also argues that the Notice Of Intent To Take Access was not properly served because the Union did not send a telegram to Respondent's owners; therefore, Respondent argues, the subsequent Notice Of Intent To Organize was deficient. Although I do not believe this latter conclusion

Respondent's first argument, that refusal to provide a list cannot be an unfair labor practice, is directly contrary to the Board's holding in Henry Moreno, 3 ALRB No. 40. Section 1153(a) of the Act is designed to protect workers' rights to organize under Section 1152 of the Act. In Henry Moreno the Board discussed at length, and rejected, the identical contention that Respondent makes here:

> "Labor Code Section 1152 provides that employees have the right to 'self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities ....' Implicit in these rights is the opportunity of workers to communicate with and receive communication from labor organizers about the merits of self organization. In the agricultural field, both practical considerations and our statute dictate that these rights become most meaningful, and our duty to protect them most pressing, during the short periods of time around seasonal peaks. Since the ALRA became effective August 28, 1975, the Board's efforts to protect employee access to all legitimate channels of communication under these circumstances have been directed at facilitating employee ability to receive information both at the work site and in their homes.... Our decision to enact Section 20910 reflected our evaluation of experience with those efforts." (3 ALRB No. 40, pp. 3-4).
>
> "While we have emphasized the purpose of Section 20910 et seq. in protecting and encouraging employees in the exercise of Section 1152 rights, we also note the critical role of these sections, and particularly of Section 20910, as an aid to the Board's regulation of the election process itself." (3 ALRB No. 40, pp. 5-6).

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would follow from a defect in service of the Notice To Take Access, in any event the same method of service was used for both Notices and, for the reasons given in text, I find that the technical defect in the manner of service did not remove Respondent's obligation to provide the employee list.

> "We hold that it is a violation of Labor Code Section 1153 (a) for an employer to refuse to supply a list of his employees as required by Section 20910 of our regulations. Such a refusal in itself interferes with and restrains employees in their exercise of Section 1152 rights.... Refusal to provide the list required in Section 20910 substantially impedes the ability of employees to exercise their Section 1152 rights, and it further impedes the reasonable attempt of the Board to carry out its statutory duties to protect those rights in a manner which is realistically responsive to the setting in which these rights are exercised. We cannot conceive of any relevant defenses to a flat refusal to comply with the requirement...." (3 ALRB No. 40, pp. 9-10).

Respondent in its Post-Hearing Brief (pp. 13-15) acknowledges the holding of Henry Moreno, but states that "the Moreno decision was decided in error.... [The] ALRB's decision in Henry Moreno simply cannot withstand judicial scrutiny." I feel, on the contrary, that the decision in Henry Moreno amply points out the reasons why refusal to provide the employee list hurts the efforts of workers to organize. The facts in this case reinforce that conclusion, as Mr. Gonzales testified that the Union's drive was severely hampered by the refusal to provide the employee lists. The decision in Henry Moreno has been followed subsequently without exception, see, e.g., San Diego Nurseries Co., Inc., 4 ALRB No. 93; Laflin and Laflin, 4 ALRB No. 28, and I follow it in this case. Accordingly, I find and conclude that a refusal to provide the Section 20910 employee list, absent a justification for that refusal, is an unfair labor practice in violation of Section 1153 (a) of the Act.

The only justification Respondent offers for its refusal to provide the employee list is that the Notice Of Intent

To Organize was not served in compliance with all the specific requirements of the applicable Board regulation. Section 20910 (a) of the regulations (8 Cal. Admin. Code Section 20910(a)) specifies that service of the Notice Of Intent To Organize shall be made in the same manner as service of a Petition for Certification. Section 20300(f) of the regulations provides the manner for such service:

> "Service on the employer may be accomplished by service upon any owner, officer or director of the employer, or by leaving a copy at an office of the employer with a person apparently in charge of the office or other responsible person, or by personal service upon a supervisor of employees covered by the petition for certification. If service is made by delivering a copy of the petition to anyone other than an owner, officer or director of the employer, the petitioner shall immediately send a telegram to the owner, officer, or director of the employer declaring that a certification petition is being filed and stating the name and location of the person actually served." (8 Cal. Admin. Code Section 20300 (f)).

In this case it is undisputed that Mr. Gonzales personally served the Notice on Respondent's office manager, but he did not send a telegram to an owner, officer or director of Respondent informing them of the service of the Notice. Thus the requirements of Section 20300 (f) were not fully met.

However, it is also undisputed that Respondent 'had actual notice and knowledge of the filing of the Notice. The testimony of Ms. Espinoza shows that two owners of Respondent were told by her of the filing of the Notice. A letter was sent by the ALRB to Respondent informing it of the filing of the Notice. Further, Mr. Vincent Zaninovich acknowledged

to Ms. Espinoza that he knew the procedures involved in such proceedings and that he understood that a list of employees was required to be sent. It is clear from the testimony in this case that Respondent had the fullest possible actual knowledge of the filing of the Notice Of Intent To Organize.[6/]

In addition to Respondent's actual knowledge, there is no showing that Respondent suffered any possible prejudice from the Union's failure to send a telegram. Respondent offered no testimony indicating any conceivable manner in which it might have been prejudiced. Rather, all the facts in this case indicate that Respondent clearly had actual knowledge of the filing of the Notice, was repeatedly informed of its obligation to send the employee list, and refused to comply without offering any explanation until, at the hearing and in its post-hearing brief, it offered the technical justification of the failure to send a telegram.

Thus, the question in this case is: where there is personal service of a Notice Of Intent To Organize on Respondent's office manager, and actual knowledge by Respondent of the filing of the Notice, and actual knowledge by Respondent of the obligation to provide an employee list following the filing of a Notice, and no prejudice to Respondent from any defects in service of the Notice, failure to send a telegram notifying Respondent of service of the Notice a justification for

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6/ The same is true of the Notice Of Intent To Take Access. Personal service was made on Respondent's Office Manager, and the Union did take access in Respondent's fields throughout a one-month period. Respondent's actual notice of the filing of a Notice To Take Access removes any effect from the Union's technical defect in not sending a telegram. See Frudden Enterprises, Inc., 7 ALRB No. 22, and discussion in text <u>infra</u>.

Respondent's refusal to provide the employee list specified in Section 20910(c) of the Board's Regulations? I find and conclude that failure to send the telegram in these circumstances was purely a technical defect in service of the Notice, and does not provide a justification for refusal to provide the employee list.

The Board in Henry Moreno, supra, discussed at length the importance of the employee list to the rights of workers to organize under the Act. Here, Respondent relies solely on a technical defect in service of the Notice, in spite of its repeated actual knowledge of the Notice, for its refusal to provide the list. This is counter to the basic purpose of the Act to protect substantive rights of agricultural employees.

In many contexts the Board has held that purely technical procedural matters should not be allowed to interfere with the substantive rights the Act seeks to protect. The Board had held that where the employer is not prejudiced, the Act and regulations should be construed broadly to reach substantive matters. Thus, for example, defects in pleading by the General Counsel in an unfair labor practice case are not a bar to litigating a matter where the employer is not prejudiced, The Board has held that even where an unfair labor practice charge has not been pleaded at all, the ALRB may rule on the violation if it was fully litigated. Anderson Farms, Co., 3 ALRB No. 64; Prohoroff Poultry Farms, 3 ALRB No. 87; Highland Ranch, 5 ALRB No. 54. Similarly, the Board has held that untimely service upon an employer of a petition, absent

prejudice, does not require dismissal of the petition. Souza & Boster, Inc., 2 ALRB No. 57. See also, Agro Crop, 3 ALRB No. 64.

In view of these holdings by the Board that procedural matters will not take precedence over substantive rights where there is no prejudice to a party, it is not surprising that the Board in Frudden Enterprises, Inc., 7 ALRB No. 22, affirmed the decision of the Investigative Hearing Officer that failure to send an employer a telegram notifying the employer of service of a Notice To Take Access, where the employer had actual knowledge and where there was no prejudice to the employer, was not a valid objection to certification of an election.

Considering the holding of the Board in Frudden Enterprises, supra, and considering the general policy of the Board concerning substantive rights vis-a-vis technical procedural matters, I have no trouble concluding here that Respondent's technical defense to its obligation to provide employee lists is completely without merit. Given Respondent's actual knowledge of the filing and service of the Notice, and its actual knowledge of the requirement to provide an employee list, I conclude that Respondent's technical reliance on the Union's failure to send a telegram was a dilatory tactic to frustrate the Union's organizational drive, a tactic which met with a large measure of success.

Accordingly, I find and conclude that the Union filed and served upon Respondent a valid Notice Of Intent To Organize, and that Respondent, without justification, refused to

provide the employee list required by Section 20910 (c) of the Board's regulations, in violation of Section 1153 (a) of the Act.

The Remedy

The Board in Laflin and Laflin, 4 ALRB No. 28, has set out the remedy applicable to a case where the employer refuses to provide employee lists. The General Counsel argues that in addition to the Laflin remedy, I impose the sanction of litigation costs and attorney's fees against Respondent.

In Western Conference of Teamsters, 3 ALRB No. 57, the Board held that where a Respondent's litigation position is "frivolous" such a remedy may be imposed:

> "The NLRB, with judicial approval, has construed its power ... to authorize the award of attorneys' fees and litigation costs in appropriate cases. When the Legislature enacted the ALRA, ... it granted to this Board a power to award attorneys' fees at least to the extent that the NLRB has that power.
>
> The question of this Board's power aside, the rationale for the utilization of such an award must be considered. We view the interests of the NLRB and this Board in this connection as identical. Both the NLRB and this Board are mandated to remedy the effects of unfair labor practices, but both are enjoined from engaging in purely punitive impositions unrelated to remedying specific conduct and its effects, Under either the NLRA or the ALRA the ultimate consideration is whether the award in a particular case effectuates the policies of the statute. Under either statutory scheme the implementation' of the legislation is dependent in the first instance upon the agency's ability to utilize effectively its resources, unfettered by trial calendars crowded with meritless litigation. In specific cases there arises the need for the agency to fashion remedial orders which conform to the realities of the harm created by the totality of the respondent's conduct, including the effect of its litigation posture and conduct on the other parties. For 'effective redress for a statutory wrong should both compensate the

party wronged and withhold from the wrongdoer the "fruits of the violation". Montgomery Ward & Co. v. NLRB, 330 F. 2d 889, 894, 58 LRRM 2115 (6th Cir. 1965). Against these factors must be balanced the right of a respondent to offer all legitimate defenses and arguments.

Our evaluation of these factors indicates the desirability of our adoption of the NLRB's approach to this question. The NLRB holds the appropriateness of this remedy to be dependent upon a characterization of the respondent's litigation posture as either 'frivolous' or 'debatable'. Where the former is found, the award may be made; in the latter situation, it is not warranted. Neither 'frivolous' nor 'debatable' are self-explanatory. Their recitation does not account for the important distinctions which may derive from the uniquely public nature of the unfair labor practice process: the general counsel is not a private litigant, but a public officer vindicating important public policy pursuant to statutory directive. However, the terms do provide a framework for analysis, and as we are progressively enlightened in our case-by-case approach to this question, they will acquire a more definite content. We therefore propose to adopt these categories in this and future cases presenting the question of such awards." (3 ALRB No. 57, pp. 6-8).

In this case Respondent argues that it has two defenses to its refusal to provide the employee lists: (1) refusal to provide a list is not an unfair labor practice under Section 1153(a) of the Act; and (2) the failure to send a telegram eliminated Respondent's obligation to provide the list.[7/]

I find and conclude that Respondent's first defense, which goes squarely against the Board's established and fully reasoned holding in Henry Moreno, supra, 3 ALRB No. 40, is frivolous.

I find and conclude that Respondent's second defense is purely technical, without merit, and was used simply as a

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7/ The facts in this case were not disputed, and Respondent presented no witnesses or exhibits at the hearing.

dilatory tactic to avoid Respondent's obligations under the Act and to frustrate the Union drive on Respondent's premises. I further find and conclude that this dilatory refusal to provide the employee list did have the desired effect of frustrating and thwarting the Union's efforts to organize Respondent's employees.

In view of these findings and conclusions, this case may well be an appropriate one for the imposition of the remedy of litigation costs and attorney's fees against Respondent. However, the Board, despite its statements in Western Conference of Teamsters, supra, has evinced a disinclination to actually apply such a remedy. See, e.g., San Diego Nursery Co., Inc., 4 ALRB No. 93; Neuman Seed Company, 7 ALRB No. 35 (concurring opinion). Accordingly, I decline to impose such a remedy here. I restrict the remedy to that imposed in Laflin and Laflin, supra.

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

ORDER

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

1. Cease and desist from:

(a) Refusing to provide the ALRB with an employee list as required by 8 Cal. Admin. Code Section 20910(c).

(b) In any other manner interfering with, restraining, or coercing any employee in the exercise of rights guaranteed by Section 1152 of the Agricultural Labor Relations Act.

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

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

(b) Post copies of the attached Notice for a period of 90 consecutive days, to be determined by the Regional Director, at places to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, or removed.

(c) Mail a copy of the Notice, in all appropriate languages, to each of the employees in the bargaining unit, at his or her last known address, not later than 31 days after the receipt of this Order.

(d) Provide for a representative of the Respondent or a Board Agent to read the attached Notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have

concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(e) Provide the ALRB with an employee list forthwith, as required by 8 Cal. Admin. Code Section 20910 (c).

(f) Provide the ALRB with an employee list as described by 8 Cal. Admin. Code Section 20910(c) if, during the next growing season of the Respondent the Anti-Racist Farm Workers Union files a Notice of Intent to take Access as described by 8 Cal. Admin. Code Section 20900(e)(1)(B). The list shall be provided within 5 days after service on Respondent of the Notice of Intent to take Access.

(g) Allow representatives of the Anti-Racist Farm Workers Union, during the next period in which the Union files a Notice Of Intent To Take Access, to organize among Respondent's employees during the hours specified in 8 Cal. Admin. Code Section 20900 (e) (3), and permit the Union, in addition to the number of organizers already permitted under Section 20900(e) (4) (A), one organizer for each fifteen employees.

(h) Grant to the Anti-Racist Farm Workers Union, upon its filing a written Notice Of Intent To Take Access pursuant to 8 Cal. Admin. Code Section 20900 (e) (1) (B), one access period during the 1982 calendar year in addition to the four periods provided for in Section 20900 (e) (1) (A).

(i) Provide for the Anti-Racist Farm Workers Union access to Respondent's employees during regularly scheduled work hours for one hour, during which time the Union may disseminate information to and conduct organizational activities among Respondent's employees. The Union shall present to the Regional Director its plans for utilizing this time. After conferring with both the Union and Respondent concerning the Union's plans, the Regional Director shall determine the most suitable times and manner for such contact between organizers and Respondent's employees. During the times of such contact no employee will be required to engage in work-related activities, or forced to be involved in the organizational activities. All employees shall receive their regular pay for the one hour away from work. The Regional Director shall determine an equitable payment to be made to non-hourly wage earners for their lost production time.

(j) Notify the Regional Director in writing, within 31 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him/her periodically thereafter in writing what further steps have been taken to comply with this Order.

Dated: December ,1981

Beverly Axelrod
Administrative Law Officer

Appendix A

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to send out and post this Notice.

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

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

(1) to organize themselves;

(2) to form, join, or help unions;

(3) to bargain as a group and choose whom they want to speak for them;

(4) to act together with other workers to try to get a contract or to help or protect one another;

(5) to decide not to do any of these things. Because this is true we promise that:

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

Especially:

WE WILL NOT refuse to provide the Agricultural Labor Relations Board with a current list of employees when

the Anti-Racist Farm Workers Union (ARFU) or any union has filed its "Intention to Organize" the employees at this ranch.

V.B. ZANINOVICH & SONS
(Employer)

DATED: ______________________

By: ______________________
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE