STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UKEGAWA BROTHERS,		
Respondent,	Case Nos.	75-CE-59-R 75-CE-59-A-R 76-CE-18-R 76-CE-18-A-R 76-CE-49-R
and		
UNITED FARM WORKERS OF AMERICA, AFL-CIO ,	8 ALRB No. 90	
Charging Party.		

DECISION AND ORDER

On July 25, 1980, Administrative Law Officer (ALO) Jennie Rhine issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent each timely filed exceptions and a brief in support of exceptions. Each of the parties also filed a reply brief and a supplementary brief.

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

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs of the parties, and has decided to affirm her rulings, findings, and conclusions as modified herein, and to adopt her recommended Order with modifications.

I. BACKGROUND

Respondent Ukegawa Brothers is a four-person partnership comprised of Hiroshi and Joe Ukegawa, brothers, and their respective wives. The Company's farming operations are located throughout

northern San Diego County on owned and leased parcels of land. Major crops are hillside tomatoes and strawberries. Other crops include cauliflower and green beans. Much of the land cultivated in tomatoes is leased for relatively short periods of time and the total acreage varies from year to year.

Respondent's work force is drawn from two primary sources. Mexican nationals with legal immigration status ("legals") commute to the work site from the border communities of Tijuana and San Ysidro. Undocumented workers ("illegals") live in crude housing of their own making adjacent to Respondent's cultivated fields while in its employ.

The United Farm Workers of America, AFL-CIO, (UFW) conducted a representation drive among Respondent's employees during the late summer and fall of 1975, but did not file a petition for certification.

II. PRELIMINARY MATTERS

The ALO's rulings on the following matters warrant discussion at the outset: conduct which occurred prior to the Agricultural Labor Relations Act (Act), supervisory status of crew foremen, Board agent testimony, discovery orders, and attorney-client privilege.

Pre-Act Conduct. As to those allegations in the complaint which are based on acts and conduct of Respondent which occurred prior to August 28, 1975, the effective date of the Act, the ALO correctly concluded that such conduct cannot be found to constitute unfair labor practices. However, the ALO was of the view that matters fully litigated would support a finding of

anti-union animus. We disagree and therefore we hereby dismiss, for all purposes, all allegations which pertain to pre-Act conduct.

Supervisory Status of Crew Foremen. The ALO found that Respondent's crew foremen are supervisors within the meaning of Labor Code section 1140.4(j). In support of that finding, the ALO reasoned that although crew foremen lacked authority to hire and discharge workers, they did possess sufficient indicia of supervisor status based on other factors. Specifically, she found that crew foremen determined the location and type of work to be performed by each crew, assigned rows to be picked, taught inexperienced workers, checked and corrected work of crew members, reported the crew's attendance and hours to field foremen and sometimes helped distribute paychecks. In addition, she found that they relayed instructions from field foremen concerning such matters as a change in assignment or layoff, when the crew was to start and stop work each day, and what type and color of tomatoes were to be picked. Respondent excepted to the finding that crew foremen are supervisors. We find merit to this exception.

In Rod McLellan Company (Apr. 21, 1978) 4 ALRB No. 22, we held that an individual will be found to be a supervisor where, e.g., she/he exercises independent judgment in directing employees or making work assignments and has authority to effect, or to effectively recommend, hiring and/or discharge. We have also held that evidence that an alleged supervisor assigned rows to employees is not determinative of supervisory status unless it is made clear that the function called for the exercise of independent judgment. (Anton Caratan and Sons (Dec. 21, 1978) 4 ALRB No. 103, citing

Montgomery Ward & Co. (1978) 228 NLRB 759 [96 LRRM 1383].) Otherwise, such duty is of a merely routine or clerical nature. See, e.g., NLRB v. Doctors Hospital of Modesto, Inc. (9th Cir. 1972) 489 P.2d 772 [85 LRRM 2228], cited with approval in Dairy Fresh Co. (Nov. 2, 1976) 2 ALRB No. 55, where the court declared:

> The leadman or straw boss may give minor orders or directives or supervise the work of others, but he is not necessarily a part of management and a "supervisor" under the Act.

The record does not support the ALO's finding that crew foremen independently determined the location and type of work to be performed and there is nothing in their remaining tasks which would warrant investing them with supervisory status. We find that they merely relay to workers instructions which emanate from the field foremen and that they are therefore employees rather than supervisors.

Board Agent Testimony. Respondent excepts to the admissibility of the testimony of Wayne Smith and to the ALO's reliance on such testimony to establish Respondent's awareness of the pro-UFW sympathies of its documented workers. We find merit in the exception.

In November 1975 Wayne Smith, at the time a member of the Governor's Task Force on the ALRB and now Regional Director of the Board's Oxnard Region, telephoned Hiroshi Ukegawa to discuss with him a report of an intra-employee dispute in Respondent's work force. Although Ukegawa subsequently met with Smith, Respondent objected at the hearing, and again in its exceptions, to the admissibility of Smith's testimony on two grounds: first, that

it agreed to meet informally with Smith, but only on the condition that matters discussed would not be used in an unfair-labor-practice proceeding; second, that the discussion was an effort at compromise and settlement of the dispute and thus privileged against disclosure.

As we find that Board Agent Smith's testimony is only cumulative as to the issue of Respondent's knowledge of union activity, we do not rely on his testimony and need not decide whether the parties had set conditions on their meeting or whether such conditions would be binding on the Board. As for Respondent's second argument, we note that no unfair-labor-practice charge based on the dispute had been filed. Therefore, Smith's attempt to mediate the dispute was not an investigation conducted pursuant to the provisions of the Agricultural Labor Relations Act (Act). Absent a charge, or a charge and a complaint, there were no factual or legal issues subject to resolution or settlement through Board processes or procedures.

Production of Documents. Respondent contends that it was wrongfully restricted in the presentation of its defense by an allegedly overbroad discovery Order of the ALO.

During the course of the hearing, shortly after the General Counsel rested his case-in-chief, the ALO required Respondent to immediately prepare for the General Counsel copies of all documents it anticipated using in the presentation of its defense. Respondent contends that the ALO erroneously extended the Board's rules governing prehearing discovery to the hearing itself, and, further, that the scope of the Order; i.e., "any

documents which might be introduced," is vague and could arguably apply to almost every document in any way related to the case. Moreover, Respondent contends the ALO erred in ruling that known documents not provided by Respondent to the General Counsel "forthwith," and previously-unknown documents not provided immediately upon their discovery, "...will later be excluded from evidence." As the decision whether to offer a particular document into evidence is generally not made until after the witness associated with the document has been examined at hearing, Respondent argues that it was forced to prepare its defense under a constant threat that material and relevant evidence would be subject to exclusion by the arbitrary Order of the ALO.

The ALO relied exclusively on Giumarra Vineyards Corporation (Mar. 4, 1977) 3 ALRB No. 21, the Board's definitive response to motions filed by various respondents seeking to obtain prehearing disclosure of documents within the possession of the General Counsel. We provided, inter alia, for "an exchange of documentary evidence, preferably in advance thereof but no later than at a pretrial conference, so long as such disclosure does not involve the identification of individual employees." On that basis, the ALO directed that all documents,

> ...which Respondent thinks it may introduce be turned over to the General Counsel forthwith and the penalty will be that any that are not turned over will later be excluded from evidence if Respondent offers others.[1]/

[1]/We note that the General Counsel, at the time of the ALO's ruling, acknowledged that Respondent had fully complied with a subpoena duces tecum issued by the General Counsel. We also note

(fn. 1 cont. on p. 7.)

> The one exception to the order would be documents whose existence is not known to Respondent at this time, and if any such documents come to Respondent's attention they are to be turned over immediately and Respondent will have the burden of establishing that they were not known at this time...the order extends to documents which you intend or may decide to introduce during the presentation of your case.

We find no error in the ALO's interpretation of Giumarra but we find that her order was overly broad in that it arguably extends beyond that documentary evidence which Respondent, at that point in the proceeding, could reasonably anticipate using. The Order, on its face, contemplates the disclosure of documentary evidence whose mere existence may be known to Respondent even though no determination has been made as to whether it will actually be formally submitted as evidence. However, after a thorough review and evaluation of the entire record in a light most favorable to Respondent, we conclude that Respondent was not prejudiced by the ruling.

Attorney-Client Privilege. Respondent contends that the ALO erred by requiring Respondent's counsel to testify, on cross-examination by General Counsel, as to matters which were clearly protected by the attorney-client privilege. We find merit in Respondent's exception. However, as we do not rely on the disputed testimony, we find that Respondent's case has not been prejudiced by the ALO's error.

(fn.1 cont.)

that Respondent had offered into evidence all documents referred to in its cross-examination of General Counsel's witnesses and, in addition, had provided General Counsel with other materials which it had prepared for use during the presentation of its defense.

William N. Sauer, counsel for Respondent, testified on direct examination with, respect to several matters to which he was a percipient witness, primarily Respondent's meeting with Board Agent Smith (see above) as well as his role in assisting Respondent in securing crop loans, security guards, and gun permits. He also testified that he merely made available to Respondent two printed publications, concerning what an employer can or cannot lawfully do under National Labor Relations Act (NLRA) precedents during the course of a union organizing campaign. The ALO ruled that since the publications represented work Sauer had performed for Respondent as its attorney, he as well as Respondent thereby waived any attorney-client privilege they otherwise could have claimed.

The record is quite clear that Sauer did not reveal any privileged communication or work-product during the course of his direct examination. Yet the ALO found a virtually unlimited waiver and, on that basis, permitted the General Counsel to cross-examine Sauer as to a variety of irrelevant subjects not remotely within the scope of the direct examination.

The attorney-client privilege protects from disclosure a client's communication to the lawyer which the client intended to be confidential, as well as legal opinions formed by the attorney and his or her advice to the client. Communications which concern basic data or noncorsf idential material (such as the Employer Do's and Don'ts Publication herein) are not privileged against disclosure. (Jefferson, Cal. Evidence Benchbook (1972) section 40.41.) Respondent does not contend, and there is no

evidence to suggest, that the documents constituted confidential or work-product communications or advice subject to the attorney-client or work-product privilege. Rather, Respondent argues that the materials which. Sauer made available to his client are identitical to those routinely distributed by labor relations consultants. Therefore, Respondent's voluntary disclosure of the printed data during the course of its direct examination of Sauer would not constitute a waiver of the privilege. There is no evidence that the printed publications delivered to Respondent by its attorney met either the absolute or the conditional definition of work-product in Code of Civil Procedure section 2016(b). (See Jefferson, supra, at 701 et seq.)

Even if the documents at issue herein were protected by the attorney-client or work-product privilege, and even if the privilege was waived by Respondent's counsel's voluntary disclosure of the contents thereof, we would have to conclude that the ALO overstated the extent of such a waiver. Her ruling that the attorney-client privilege should be "strictly construed" against a Respondent, in favor of full and complete disclosure of all facts, does not comport with the California Evidence Code or applicable case law. Waiver, according to California Evidence Code section 192, may be found when any holder of the privilege, without coercion, discloses a significant part of the communication involved. This limited disclosure does not operate as a waiver of the entire attorney-client communication, but operates only as a waiver as to those matters elicited on direct examination. The witness therefore is subject to cross-examination only

as to matters within the scope of the testimony elicited on direct examination. (People v. Pur bin (1965) 232 Cal.App.2d 674; see, also People v. Gardner (1980) 106 Cal.App.3d 882.)

III. GENERAL COUNSEL'S EXCEPTIONS TO THE ALO'S DECISION [2/]

Discharge of Juan Rubalcava. The ALO found that Respondent terminated Rubalcava on December 29, 1975, solely because of his insubordination.[3/] In support of that finding, the ALO noted that Rubalcava could have continued to work had he accepted what she described as a reasonable work assignment. She specifically considered, but rejected, Rubalcava's prior union activity as a basis for the discharge. General Counsel excepted to her dismissal of the allegation. We find no merit to this exception.

General Counsel poses two arguments: first, that Rubalcava was constructively discharged and, secondly, that if his discharge is not found to be a violation of Labor Code sections 1153(c) and (a), it nevertheless should be found to be an independent violation of Labor Code section 1153(a) as the termination would have conveyed to other employees the impression

---

[2]/We hereby overrule the General Counsel's exception to the ALO's finding that Respondent had not, as alleged, isolated Gregorio Reyes for discriminatory reasons. The General Counsel has provided no argument or citation to the record in support of that exception. (Cal. Admin. Code, tit. 8, § 20282(a)(1).)

[3]/We affirm the ALO's additional finding that Respondent failed to reinstate Rubalcava to his former crew foreman status during the 1975 fall tomato harvest season because of his union activity, As we have ruled that crew foremen, such as Rubalcava, were not supervisors, and thus are entitled to the Act's protection, we conclude that Respondent discriminated against him in violation of Labor Code sections 1153(c) and (a) of the Act.

that Respondent retaliated against Rubalcava because of his union support and activity.

There are two elements which must be proved to establish a constructive discharge. First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's protected activities. (Crystal Princeton Refining Co. (1976) 222 NLRB 1068 [91 LRRM 1302].) The National Labor Relations Board (NLRB) discussed that which constitutes "difficult or unpleasant" working conditions in Bechtel Corp. (1972) 200 NLRB 975 [82 LRRM 1215], ruling that the "reasonable person" test prevails; i.e., an employer may make an employee's working conditions so intolerable that no reasonable person could be expected to remain in the employment.

Rubalcava repeatedly rejected Respondent's request that he commence work with a machete, a task he had performed many times in the past and one for which there is every indication in the record that he had special expertise. After rejecting all such requests, he asked for and received a final paycheck. Two members of Rubalcava's crew accepted like assignments at the same time without incident. Later, a third crew member took Rubalcava's place in the new assignment. Under circumstances such as these, we cannot conclude that Respondent deliberately singled out Rubalcava and made his working conditions so intolerable as to force him to quit his job. (J. P. Stevens & Co. v. NLRB (4th Cir. 1972) 461 F.2d 490 [80 LRRM 2609].)

We reject General Counsel's alternative argument that other employees would have interpreted the transfer of Rubalcava as an anti-union retaliation by Respondent and therefore such conduct constitutes an independent violation of Labor Code section 1153(a). Again, the standard must be an objective one. But we cannot base an objective finding of interference, restraint, or coercion on the varying subjective impressions, if any, of employees; rather, we use an objective test, i.e., whether the alleged conduct tends to interfere with, restrain, or coerce employees in their rights under the Act. (Helena Laboratories Corp. (1977) 228 NLRB 294 [96 LRRM 1369]; accord, Jack Brothers & McBurney, Inc. (April 6, 1978) 4 ALRB No. 18.) General Counsel has failed to adduce sufficient evidence to prove that the discharge of Rubalcava was related to his union activity, or that the discharge would be perceived by employees as attributable to his union activities.

Shortened Work Days (August 1975). We find no merit in General Counsel's exception to the ALO's conclusion that Respondent's across-the-board reduction of the work day did not constitute a violation of the Act.

It is undisputed that an undetermined number of documented workers left their work at Respondent's Carlsbad and Camelot ranches earlier than usual on August 28, 1975, in order to attend a UFW-sponsored meeting. The ALO found that documented workers thereafter continued to leave work early, at least through the first week of September, as a means of protesting work days in excess of eight hours without special overtime compensation.

She also found that Respondent, at some undetermined point, shortened the work day for all documented workers while continuing to maintain a nine-hour day for undocumented workers. She concluded that even if Respondent's action was a response to the protest, and for the purpose of discouraging support for the Union, no violation could be found because the workers' concerted activity was not protected. She reasoned that the workers' voluntary early departure from work "was inconsistent with either a genuine strike or the performance of the work normally expected of them, consequently, it is not protected by section 1152."

General Counsel contends that the workers left work on only one occasion, thus preserving the protected nature of their conduct, and that Respondent took retaliatory steps that same day in direct and immediate response to their single union-related work stoppage. General Counsel relies exclusively on the testimony of Silvestre Gonzales. However, that testimony appears not to support the General Counsel's exception. Gonzales was not able to establish that the initial reduction in hours occurred in August. Rather, he testified that it may have occurred sometime in September. He described his unsuccessful efforts to convince other workers to resume working a nine-hour day, suggesting thereby that the workers continued to leave work early for some time after August 28.[4]/ We find that Gonzales's

---

[4]/ We note that General Counsel did not except to the ALO's finding that a similar reduction in hours on the following November 11 likewise was justified by economic conditions.

testimony tends to support Respondent's contention that it was forced to implement a standard eight-hour day for all documented workers when the early departure of some workers left crews shorthanded. We therefore affirm the ALO's conclusion and hereby dismiss this allegation of the complaint.

Denial of Riders to E'fren Romero. General Counsel excepts to the ALO's finding that he failed to establish, by a preponderance of the credible evidence, that employee Efren Romero requested but was denied riders in 1976. We find no merit in the exception.

Pursuant to Respondent's "raitero" system, Respondent compensated Tijuana resident Romero for transporting, to and from work, fellow employees who lived in the same area as he did. In 1976, Romero apparently received compensation only for himself, except for a few days in May of that year when he transported one other worker. The ALO found inconsistencies in Romero's testimonial accounts of his efforts to seek authorization to transport workers earlier that year. She noted that although he testified at one point that he had directed his inquiries only to Hiroshi Ukegawa, he later testified that he made similar inquiries to two field foremen who, he stated, gave him a runaround. The ALO also noted that Romero did not testify, on either direct or cross-examination, that on the occasions when he assertedly sought authority to transport other employees he also requested work for another employee, but he did so testify on rebuttal.

It is the Board's established policy not to overrule

ALO's credibility resolutions when they are based on demeanor unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. (Standard Dry Wall Products, Inc. (1950) 91 NLRB 544 [26 LRRM 1531], enforced (3d Cir. 1951) 138 F.2d 362 [27 LRRM 2631].) We have carefully examined the record and find no basis for reversing the ALO. Accordingly, her findings and conclusions as to Romero are affirmed and that allegation of the complaint is hereby dismissed.

Respondent's Failure to Rehire Consuelo Medina and Toribia Hernandez. The ALO found that neither Consuelo Medina nor Toribia Hernandez made a proper application for work at a time when work was available and that therefore General Counsel had not established discrimination in violation of Labor Code sections 1153(c) and (a). However, under a group discrimination analysis, infra, the ALO reached a different result with respect to both Medina and Hernandez. Accordingly, we shall defer until later in this decision a discussion of the General Counsel's exception to this finding.

IV. RESPONDENT'S EXCEPTIONS TO THE ALO's RULINGS, FINDINGS, AND CONCLUSIONS

Hiring of Uniformed Guard. The ALO concluded that Respondent's mere posting of one daytime guard at its Camelot Ranch beginning in late August 1975 constituted a violation of Labor Code section 1153(a). According to the ALO, the guard carried either a night stick or a handgun and spent most of his time at the entrance to the Camelot Ranch where he controlled ingress and egress of vehicular traffic by raising or lowering a chain

which was suspended across the roadway. She also found that the guard periodically patrolled a public road which bisected the Camelot Ranch and two other ranches. Upon completion of the harvest, he was assigned to guard Respondent's equipment and supplies at another ranch during the day and ultimately was transferred to night duty at a third ranch. We find merit in Respondent's exception to the ALO's conclusion.

This Board has never found that the mere posting of a guard, without more, is violative of the Act, and we have found no National Labor Relations Act precedent to that effect. In Salinas Greenhouse (Sept. 21, 1978) 4 ALRB No. 64, the Board found a violation of its access rule where security guards fully or partially denied access to organizers who were in compliance with the rule. In E & J Gallo Winery, Inc. (Apr. 17, 1981) 7 ALRB No. 10, the Board found Labor Code section 1153(a) violations in the conduct of the employer's guards, who engaged in unlawful interrogation and surveillance of union organizers in the presence of employees.[5]/ Contrary to those two cases, there is no evidence in the instant case of any statement, act, or conduct of the guard in the presence of employees or Union agents which could be

---

[5]/ Jackson & Perkins Company (Apr. 26, 1977) 3 ALRB No. 36, relied upon by the ALO,does not support her conclusion. In that case, the employer's posting of guards at entrances to its property was not alleged in the complaint, or found by the ALO or the Board, to be in itself violative of the Act. Rather, it was part of an overall course of conduct which completely denied access to over 800 employees and successfully disrupted and defeated the union's organizing campaign. We reject the ALO's suggestion that Respondent had an obligation to provide employees with an explanation for the guard's presence or to assure them that the guard would not interfere with organizers' right of access.

interpreted as tending to interfere with, restrain, or coerce employees in the exercise of their Labor Code section 1152 rights. Absent evidence of employer conduct which reasonably tends to interfere with the free exercise of employees' rights under the Act, there can be no violation of Labor Code section 1153(a) of the Act. (Florida Steel Corp. (1976) 224 NLRB 45 [92 LRRM 1266].) Accordingly, we hereby dismiss this allegation of the complaint.

Interrogations, Threats and Promises of Benefits. Numerous witnesses testified credibly that field foreman Seihichiro Tsutagawa either interrogated them about what had transpired at union meetings which they had attended, or created the impression of surveillance by asking them to observe and report back to him on the union activities of their fellow workers, or impliedly suggested to them that they generally could expect to receive a "better deal" with Respondent than they could with the Union.[6]/ In addition, many workers were uniformly

---

[6]/ The ALO found that Tsutagawa's delivery of a prepared speech to a captive audience of employees contained statements which could reasonably be understood by them as threats of reprisals or promises of benefits. She concluded that since the conduct occurred prior to the effective date of the Act, none of it constitutes unfair labor practices, but is indicative of anti-union animus. However, the record reveals that Tsutagawa, by his own testimony, repeated the speech to assembled employees well into the month of September 1975, after the Act went into effect. For that reason, we are compelled to address Respondent's contention that the speech was protected by "free speech." The general thrust of the prepared text was that, once unionized, Respondent's employees would be required to pay union dues and that job placement would be done primarily through a union hiring hall. Employer "free speech" is governed by the general proposition set forth in Gissell Packing Company (1969) 395 U.S. 575, wherein the Supreme Court held in effect that an employer is free to express views about unions or unionization so long as such

(fn. 6 cont. on p. 18.)

subjected to specific promises of benefits or threats of reprisals, particularly in conjunction with Tsutagawa's request that they complete and sign employee information cards for Respondent's records.[7/]

Such conduct clearly tends to interfere with, restrain,

(Pn. 6 cont.)

expressions do not contain any threat of reprisals or promise of benefits. This principle is reflected in section 1155 of our Act. We find that the prepared text of Tsutagawa's speech, standing alone, did not constitute, or contain, any unlawful threat of reprisal or promise of benefit.

[7]/The ALO found that Respondent's requirement that employees complete name-and-address information cards was valid at its inception. Respondent excepts to her further finding that the card solicitations ultimately were converted into an illegal tool for the wide-spread polling of employees' sympathies. The Third Amended Complaint makes no reference to "systematic polling of workers." Rather, separate allegations refer to polling of five individual employees; i.e., Francisca Miranda, Francisco Armenta Esperanza Garcia Diaz, Francisco Carrillo, and Elias Montoya respectively, paragraph numbers 9, 12, 16, 18, 20, and 26. (Armenta and Carrillo were unable to testify as to when they first were asked individually to complete a card.) Respondent points out that General Counsel failed to amend the complaint in order to allege that additional named workers received promises or threats and suggests that any finding that it was used as a widespread and systematic polling device is inappropriate. In our opinion, the incidents involving employees not named in the complaint are sufficiently related to the subject matter of the complaint. We also find that Respondent's conduct in soliciting those employees was fully litigated at the hearing and that Respondent had ample opportunity to offer, and in fact did offer, evidence on that issue. (See Crown Zellerbach Corp. (1976) 225 NLRB 911 [93 LRRM 1030], and cases cited therein at fn. 6.) We make no finding as to whether the cards, by design, were utilized as a polling device but do find that in the process of soliciting compliance, Tsutagawa engaged in conduct proscribed by the Act in Labor Code section 1153(a). For whatever reason, many Tijuana workers uniformly refused to comply with Tsutagawa's request for information, most of them unhesitatingly informing him either that the UFW had warned them against signing anything submitted to them by Respondent or that they had already signed for the Union and therefore could not sign for the Employer as well. In many cases, Tsutagawa countered such resistance by suggesting that employees' cooperation, or lack thereof, could affect them in the form of future benefits or reprisals.

and coerce employees in the exercise of their Labor Code section 1152 rights and is therefore violative of section 1153(a) of the Act. (See C&E Stores/ Inc. (1977) 229 NLRB 1250 [96 LRRM 1276].)

Credited testimony also establishes several incidents in which Tsutagawa implied that the wearing of UFW buttons served no useful purpose. While such comments are arguably a lawful expression of opinion, there are examples in which his repeated references to buttons, under an objective standard, would tend to be coercive. (See, e.g., Capitol Records, Inc. (1977) 232 NLRB 228 [96 LRRM 1503].) One employee testified credibly that Tsutagawa seized and then disposed of Union authorization cards which the employee had been holding. Similar conduct was found to be a violation in Ravenswood Electronics Corp. (1977) 232 NLRB 609 [97 LRRM 1170].

As Respondent suggests, it is clear from the testimony of many of the witnesses that their conversations with Tsutagawa were casual and amicable and therefore did not appear to in fact intimidate them. However, employees' subjective reactions are not necessarily factors in determining whether Labor Code section 1153(a) has been violated. In P. B. & S. Chemical Co. (1976) 224 NLRB 1 [92 LRRM 1268], the national Board stated:

> [W]e first note that the basic premise in situations involving the questioning of employees by their employer about union activities is that such questions are inherently coercive by their very nature.

See also Crown Zellerbach Corp. (1976) 225 NLRB 911, fn. 6 [93 LRRM 1030], wherein the board found that the questioning of employees was unlawful even though it took place in the absence

of a specific threat or promise of benefit by the supervisor.

Although discussions may appear noncoercive on their face, the NLRB has warned of the serious error in finding that a "friendly" interrogation does not tend to interfere with an employee's rights under the Act. In Quemetco, Inc. (1976) 223 NLRB 470 [91 LRRM 1580], the board expressed its concern in this manner:

> A more serious error lies in the premise that a 'friendly' interrogation does not interfere with an employee's Section 7 rights. An employee is entitled to keep from his employer his views concerning unions, so that the employee may exercise a full and free choice on the point, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation may be suave, courteous, and low-keyed instead of boisterous, rude, and profane does not alter the case. It is the effort to ascertain the individual employee's sympathies by the employer, who wields economic power over that individual, that necessarily interferes with or inhibits the expression by the individual of the free choice guaranteed him by the Act.

Similarly, in Florida Steel Corporation (1976) 224 NLRB 45 [92 LRRM 1266], the NLRB held as follows:

> It has long been recognized that the test of interference, restraint, and coercion under Section 8 (a)(1) of the Act does not turn on a respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. It also does not turn on whether the supervisor and employee involved are on friendly or unfriendly terms. Rather, the test is whether the supervisor's conduct reasonably tended to interfere with the free exercise of the employee's rights under the Act.

In accordance with general principles set forth above, and on the basis of the credited testimony, we affirm the ALO's conclusions-that Respondent's numerous, threats, interrogations,

and promises of benefit to employees were violative of Labor Code section 1153(a) of the Act.

Denial of Access's. Respondent excepts to the ALO' s conclusion that it asked two UFW organizers to leave its premises on October 25, 1975, in violation of Labor Code section 1153(a) of the Act. We find merit in the exception.

According to the ALO, October 25 was a nonwork Saturday, except for some limited activity by an unspecified number of irrigators. UFW organizers Javier Zavala and Jose Sandoval took access to the ranch at about noon without incident and thereafter visited with employees who were washing clothes in an irrigation canal which runs through a tomato field. Presumably these were workers who live in the brush adjacent to Respondent's cultivated fields. At about 3 p.m., the organizers stopped to speak with an irrigator. At that point, irrigation foreman Martin Godina summoned field foreman Jose Morrotte. After a short discussion with Morrotte, the organizers elected to leave.

Judging by her analysis, the ALO proceeded on the assumption that the organizers were denied access to employees' "homes," i.e., the hillside area. See, e.g., Nagata Brothers Farming (May 23, 1979) 5 ALRB No. 39, wherein we affirmed the right of workers living in similar circumstances to be visited at their place of abode by union organizers unencumbered by the limitations of our access rule. However, the evidence indicates that the organizers were not seeking access to the campsites where the employees resided when Godina and Morrotte found them in the field. The presence of the organizers at the work site

was not questioned until they were found speaking to an irrigator while he was working, from which we infer that they were on Respondent's premises during work time and therefore outside the protection of the access rule, which provides for one hour of union access to employees before and after their work time, and during their lunch periods at the locations where they eat their lunch. (Cal. Admin. Code, tit. 8, §§ 20900(a)(5) and (h) (1975).) Accordingly, we reverse the ALO's conclusion that Respondent's conduct in this regard was a violation of Labor Code section 1153 (a) of the Act, and we dismiss that allegation of the complaint.

Respondent's Discharge of a Rifle in the Presence of Organizers. As the two organizers named above were walking from the field towards their car, Morrotte fired at least one rifle shot. Respondent excepts to the ALO's finding "of a Labor Code section 1153 (a) violation based on that incident, essentially on the grounds that it was not Morrotte ' s intention to harm or intimidate the organizers. Respondent also contends that the incident could not have interfered with employees' Labor Code section 1152 rights since no employees were present at the time. We find no merit in either argument.

There is considerable testimony on this issue, most of it contradictory, even as between the organizers. Much of the testimony which formed the basis of the ALO's findings is supported by the testimony of Morrotte himself and thus does not require any choice by the Board between conflicting versions of

//////////////

the events in question.[8/]

According to Morrotte, he had been target shooting when Godina summoned him. He placed his rifle in his pickup truck and then drove to where the organizers were gathered. As the latter were walking from the field towards their car, Morrotte followed them in his pickup. He conceded that he stopped at some point, alighted from his truck, and then discharged his rifle, assertedly

---

[8/] Respondent argues that it was prejudiced when the ALO permitted General Counsel to call and examine Jose Sandoval, one of the organizers, as a witness late in the hearing. Since Sandoval's name was omitted from General Counsel's pre-hearing list of non-employee witnesses, the lack of early notice that he would testify allegedly influenced the manner in which Respondent had previously examined several witnesses with respect to matters involving Sandoval. Giumarra Vineyards Corp. (March 4, 1977) 3 ALRB No. 21, requires that the General Counsel provide Respondents with names of non-employee and/or expert witnesses prior to the hearing but did not specify what sanction, if any, would attach for failure to comply. Respondent proposes a remedy in this situation, suggesting that Sandoval's testimony should be stricken in accordance with California Code of Civil Procedure provisions governing expert witnesses. (See, e.g., Code Civ. Proc., § 2037, et seq., Demand to Exchange List of Expert Witnesses.) That section requires early compliance with a demand to produce names of expert witnesses expected to be called, along with a brief narrative statement of the qualifications of such witness and the general substance of the testimony which the witness is expected to give. Upon objection of a party, no party required to serve a list of witnesses on the objecting party may call an expert witness to testify, except for purposes of impeachment. We are not persuaded that Sandoval testified as an expert witness, as that term is used in the civil codes. He was a non-employee organizer for the UFW and testified as a percipient as well as a participating witness to alleged acts of wrongdoing. In any event, Sandoval's testimony as to the access and rifle incident on October 25 actually is surplusage; our review of the relevant events as well as our ultimate findings are based solely on the testimony of field foreman Joe Morrotte. Regardless, therefore, of Sandoval's status, either as an expert or a non-employee witness, Respondent cannot claim in this instance that it was prejudiced by his testimony. Sandoval was involved in another access incident on August 8, 1975. However, that allegation was dismissed as it was based on conduct which occurred prior to the effective date of the Act.

towards a discarged tin can in the opposite direction of the organizers, whose backs were toward him at the time.

In Western Tomato Growers and Shippers, Inc., et al., (June 27, 1977) 3 ALRB No. 51, the Board found that the brandishing of firearms to prevent union organizers from entering a field where employees were working was an unnecessary show of force and coercive because, "Such conduct bore no reasonable relationship to the proper method of asserting a claimed right [Respondent had argued that the organizers took access illegally] and substantially interfered with the rights guaranteed to employees by section 1152 of the Act." In Mario Saikhon, Inc. (June 25, 1979) 5 ALRB No. 44, an employer was found to have interfered with employees' organization rights in violation of Labor Code section 1153(a) by the act of its supervisor in accelerating his truck as he approached an organizer who was speaking to employees, passing close to the organizer, nearly hitting him, and shouting an obscenity.

Both of the factual settings described above are distinguishable from the instant matter in that here the organizers were not attempting access, but were leaving after having been informed that they were taking access illegally, and it does not appear that there were any employee witnesses to the incident. However, it is immaterial whether employees are witnesses to such an event as Labor Code section 1152 affords employees the right to receive information concerning unionization and any interference with the free flow of such information directly affects employees organizational rights.

We need not determine the number of shots fired, the direction of the shot(s), or the distance between Morrotte and the organizers at the time the rifle was discharged. The display and/or discharge of a weapon under the circumstances here would have a tendency to inhibit organizers in their attempt to contact employees and thus constitute interference with employees' rights guaranteed by the Act.

Discharge of Francisca Roman. Respondent excepts to the ALO's conclusion that it discriminatorily discharged and/or refused to rehire Francisca Roman, contending lack of evidence establishing Respondent's knowledge of her union activities. We find this exception to be without merit.

Roman was first hired by Respondent in July of 1975 and was absent from work due to illness from September 11 through 22, 1975. She resumed work in her former crew on September 23, with permission of crew foreman Humberto Vega. When field foreman Tsutagawa spotted her about an hour later, he called her aside to inform her that she no longer had a job due to her failure to notify him as to the cause of her absence. According to Tsutagawa, it was his personal policy to require employees to notify him of absences of more than three days duration, that employees who failed to do so are deemed to have voluntarily relinquished their employment, and that a reinstatement request requires Tsutagawa’s personal approval. The ALO found that although Roman claimed that she had sent Tsutagawa word of her absence through her "raitero," Silvestre Gonzales, Gonzales was not questioned on that point and there was no evidence to

indicate that Respondent had received the message.

Tsutagawa is in substantial agreement with Roman's account of their morning discussion, in which he informed her that she could not resume work, denying only having suggested to her that she "go see Chavez" (UFW President Cesar Chavez). The ALO credited Roman's assertion as to the Chavez comment. Roman described a second meeting with Tsutagawa, also credited by the ALO, which occurred after she had stopped work in the morning. She had remained in the field until after lunch. She said Tsutagwa returned, told her she would have to wait in the parking area, and offered her a lift. Enroute there, according to Roman, he parked for a half-hour during which time he attempted to convince her to reject the Union. Tsutagawa, on the other hand, insists that he never saw her again after discharging her from Vega's crew in the morning.

In Kawano, Inc. (July 15, 1977) 3 ALRB No. 54, the Board held that antiunion statements accompanying a discharge demonstrate employer knowledge of the discriminatee[1]s union sympathies or activity and are evidence that the discharge is in violation of Labor Code sections 1153(c) and (a). Ms. Roman's claim that Tsutagawa asked her why she supported the UFW would indicate that he was aware of her prior union sympathy or activity. Such knowledge by a supervisor is generally imputable to Respondent. The ALO found Ms. Roman's demeanor, in general, to be that of a credible witness and we find no basis in the record for rejecting the ALO's credibility resolutions in this regard.

(Standard Dry Wall Products, Inc. (1950) 91 NLRB 544 [26 LRRM 1531], enforced (3d Cir. 1951) 188 F.2d 362 [27 LRRM 2631.])

Discriminatory Formation and Isolation of Crews. The ALO concluded that Respondent violated Labor Code sections 1153(c) and (a) of the Act by intentionally segregating known union supporters, singling them out for disparate treatment by assigning them to certain crews, and then isolating the crews in order to impede their contact with other employees and thus frustrate their organizational efforts. We find no merit in Respondent's exception to this conclusion.

In her Decision, the ALO described a pattern whereby Respondent initially formed a small "descojollar"[9/] crew at the Camelot Ranch in August 1975 and later expanded that crew with the addition of more union supporters as the crew progressed first into cauliflower planting and ultimately into tomato-harvest operations. In reaching her conclusion, the ALO credited employee witnesses and discredited Respondent's witnesses. An examination of the relevant portions of the record upon which her reliance is placed reveals no basis for overturning her credibility resolutions.

The relevant facts, more fully set forth in the ALO's Decision, are summarized here. For several years Respondent has fielded a small "descojollar" crew consisting of no more than a dozen workers. Tsutagawa testified that the initial core of crew

---

[9/]"Descojollar" denotes the task of hand-pinching new growth on tomato plants in order to stunt overall plant development, prevent plant ranginess, and thus encourage or facilitate production of larger tomatoes.

members was selected in July 1975 before the workers had publicly manifested any indication of their support for the UFW. However, seven of the affected workers[10]/ testified credibly that their assignments to the crew occurred at various times in August of that year, after they had begun to wear UFW buttons and/or to distribute union authorization cards.

Martha Rubalcava testified that crew foreman Humberto Vega explained to her that she was to work with' the crew "because of [her] being Chavista." Silvestre Gonzales said he joined the crew after his return from the UFW convention in mid-August and the affixing to his van of UFW bumper strips. Antonio Herrera had never before worked in the crew, but was assigned to it after Tsutagawa had seized union authorization cards he had been holding. Glafira Andrade testified that she was assigned to the crew just one day after she had offered Vega a UFW authorization card. According to Francisco Carrillo and Jose Perez Serrano, they had begun to wear UFW buttons regularly prior to their late August transfer to the crew.[11]/

With respect to the planting of cauliflower, which commenced on October 3, after the "descojollar" work had been completed, the ALO found that the crew numbered 30 at its largest

---

[10]/ Two other crew members did not testify. They were Rosa Pastor and Delia Martinez. However, other witnesses attested credibly to their having worn union buttons prior to joining the crew. The crew is augmented from time to time with irrigators or sprayers.

[11]/ Respondent did not expressly except to the ALO's further finding that Carrillo and Serrano previously had been assigned to a two-week fertilizing task for discriminatory reasons.

and that known union support or activity had been established for at least 21 of the workers, including the nine "descojollar" crew members, and that four more of the workers were sons or daughters of known UPW supporters. She found also that this crew was particularly isolated vis-a-vis other crews employed by Respondent at the same time. Of particular significance in the ALO's determination was the fact that this was the first time that Respondent had assigned documented workers to plant cauliflower. She rejected as hearsay Tsutagawa's claim that undocumented workers, who had previously done that work, had refused to do so in the relevant year because they were fearful that the location of the cauliflower field made them particularly vulnerable to potential raids by the U. S. Immigration and Naturalization Service. She also found unpersuasive additional reasons offered by Tsutagawa for the selection of the particular crew members, noting that the proffered reasons amounted to a shifting rationale for the utilization of documented rather than undocumented workers, and thus was not credible.

The last of the issues in this category concerns the formation of a tomato-harvest crew, under the direction of Francisco Armenta, with a disproportionate number of union supporters as compared to other harvest crews and the assignment of that crew to what the ALO described as the most isolated field at the Carlsbad Ranch. She found that Respondent had knowledge of the demonstrated union support of at least 70 percent of the 40 members of Armenta's crew, 23 of them having previously worked in "descojollar" as well as cauliflower planting.

In our view, the facts as found by the ALO plainly show that Respondent attempted to dilute the efforts of the most active of the union supporters in its employ by the formation and isolation of three crews discussed above. We reject the contention that Respondent, in good faith, selected employees at random without any regard for their union support, which was overtly demonstrated prior to or contemporaneously with their respective assignments.

Termination of Field Workers on January 19, 1976. Respondent excepts to the ALO's finding that it would not have laid off 20 Tijuana workers, who usually worked year-round, but for their union activity and thereby violated Labor Code section 1153(c) and (a) of the Act. We find no merit in this exception.

The ALO found that between the end of Respondent's tomato-harvest operations in January of each year, and the start of its cauliflower harvest, usually later that same month, or the start of the strawberry harvest in March, "most workers, documented and undocumented are laid off ... [but] the uncharacteristic feature of the January 1976 layoff was the inclusion of Tijuana workers who had previously worked year-round."

As discussed in the ALO's Decision, Respondent's preference has been to continue assigning work to documented workers from Tijuana, although on a reduced-hours basis, in order to maintain year-round employment for them. Respondent does not dispute the ALO's finding that certain Tijuana commuters had worked during the January-February slack period in previous years, primarily pulling, tying, and storing tomato stakes. It does

claim, however, that the 1975-76 slack season was different in that work usually done during that period had been completed ahead of schedule established in previous years.

The ALO found that every one of the laid-off workers hired prior to 1975 had been employed year-round, several of them for many years. She found that only one of them was rehired by Respondent and that undocumented workers were hired in their place shortly after the layoff. She also found that Respondent's proffered business justifications for the mass layoff does not withstand scrutiny. She found that Respondent had knowledge of the union sympathies and/or union activity of each of the discriminatees and concluded that Respondent took advantage of the relative lack of work during that period as a pretext to rid itself of the Tijuana employees who were union supporters.

Upon the record as a whole, and after full consideration of all relevant factors involved, we find that Respondent's past practice was to provide year-round employment for the Tijuana employees[12]/ and that Respondent altered this practice in 1976 for discriminatory reasons, and thereby violated Labor Code sections 1153(c) and(a) of the Act.

Had the affected employees been able to continue

---

[12]/ The ALO recommended dismissal of allegations as to three additional employees named in the complaint on the basis that it had not been shown that they had worked year-round for Respondent in prior years; all were initially hired by Respondent after February 8, 1975. They are Moises Ramirez Santana, Remegio Hernandez, and Esteban Avila Ortiz. It is clear, however, that, had Respondent adhered to past practice, these crew members, as part of the 1976 crew, would have been retained in year-round work. Accordingly, we shall not dismiss them from the complaint. Rather, we shall provide for them in our remedial Order.

working during the slack season, albeit on a reduced-hours basis, they would have progressed directly into the next phase of production. Instead, they were discriminatorily laid off and thereafter placed in the tenuous position of having to affirmatively make applications for rehire.

Failure to Rehire Former Tijuana Employees. General Counsel alleged in the complaint that Respondent refused to rehire 48 documented workers from the Tijuana-San Ysidro border communities in 1976 because of their support for the UFW.

The ALO determined at the outset that Respondent manipulated its hiring system in the pertinent year in order to avoid rehiring the entire group of alleged discriminatees for anti-union reasons. She ruled that such conduct established the existence of unlawful discrimination towards a class of employees and therefore General Counsel was relieved of the usual burdens which otherwise obtain in refusal-to-rehire cases. Specifically, she held that General Counsel need not prove: that each of the former employees applied for work at a time when work was available; that the position formerly held by a discriminatee was later filled by a non-union applicant; and that Respondent's refusal to rehire any employee was based on its knowledge of the employee's union sympathies or activities.

In the event that the Board, on review, declined to adopt her group-discrimination analysis, the ALO permitted General Counsel to examine, and Respondent to cross-examine, each of the individuals named in the complaint in order to develop a record as to the standard elements of proof noted above. On the basis of

the evidence so adduced, she concluded that General Counsel had shown, by a preponderance of the credible evidence and without reference to a group-discrimination theory, that Respondent had discriminatorily refused to rehire 34 of the documented workers but had not established a violation with respect to the remaining 14 alleged discriminatees.

Respondent excepted to the ALO's utilization of a group-discrimination theory and to virtually all of her findings with respect to the individual workers, contending in the main that she erred in finding that each of the 34 alleged discriminatees for whom she found a violation made a proper application for work, and in finding that Respondent had knowledge of their union activity.

It is well-settled that in order to establish a discriminatory refusal to rehire, General Counsel generally must prove that the alleged discriminatee made a proper application for work at a time when work was available, but was refused or denied rehire because of his or her union activity or other protected concerted activity. (Prohoroff Poultry Farms (Feb. 7, 1979) 5 ALRB No. 9.) To prove that an employer discriminatorily failed to recall a laid-off employee, the General Counsel must establish that the employer did in fact have a policy or practice of recalling former employees as suitable openings arose, but did not do so with respect to alleged discriminatees because of their union activity or other protected concerted activity. (Sam Andrews' Sons (Nov. 30, 1979) 5 ALRB No. 68; Winter Garden Citrus Pro-ducts: Corp. (1956) 116 NLRB 738 [38 LRRM 1354].)

It is equally well-settled that proof of a discriminatory hiring practice creates exceptions to the established rule that a vacancy must exist at the time application is made. Since prospective employers must consider all applications for work in a nondiscriminatory manner, "... the question whether an application has been given such consideration does not depend on the availability of work at the time an application for employment is made." (Shawnee Industries, Inc. (1963) 140 NLRB 1451 [52 LRRM 1270], revd. on other grounds (10th Cir. 1964) 333 F.2d 221 [56 LRRM 2567].) Thus, an applicant who applies for work at a time when no openings are available is relieved of the duty to reapply when work subsequently becomes available if his or her knowledge of the employer's discriminatory hiring practice would lead him or her reasonably to infer that further efforts to seek work would be futile. (Abatti Farms, Inc. (May 9, 1979) 5 ALRB No. 34; Apex Ventilating Co., Inc. (1970) 186 NLRB 534 [75 LRRM 1462]; Elsa Canning Co. (1965) 154 NLRB 1696 [60 LRRM 1202].)

This Board followed a similar analysis in Kawano, Inc. (Dec. 26, 1978) 4 ALRB No. 104 affd. (June 12, 1980) 16 Cal.App.3d 937. We found that 53 former employees had been discriminated against in 1976 because the employer's decision to refuse to rehire the class[13]/ of employees to which they belonged was based on anti-union considerations. All of the discriminatees were

---

[13]/We made clear that our reference therein to "class" was not used in the context of "class action" within the meaning of Federal Rules of Civil Procedure, rule 23(a), or California Code of Civil Procedure section 382 and, further, that our regulations make no provision for such an action, and that a formal definition or class certification was neither possible nor necessary.

legal (documented) aliens who resided in the border communities in and around Tijuana, Mexico, and had in the past commuted to and from the employer's San Diego County work sites with "raiteros," that is, fellow employees who transported such workers in private vehicles.

We found that the employer in that case had instituted marked changes in its hiring practices for the 1976 season. Specifically, the employer effectively discontinued its raitero system, reducing the 1975 contingent of ten drivers to one, and eliminating the ride subsidy which it had paid. In addition, the former hiring authority of the field foremen was taken away from them and vested solely in John Kawano, Respondent's principal, who testified that it was his preference that year to hire undocumented "illegal" workers to the exclusion of the Tijuana "legals."

What emerged from the record was evidence of the employer's demonstrated hostility towards the Tijuana "legals" as a class of employees because of their pro-union sympathies. In giving effect to its anti-union animus, the employer systematically denied further employment to members of that class or group. First, without notice, the employer altered the established method by which such employees normally applied for rehire. Next, it instituted a new application procedure, but again failed to notify the affected employees of the change.

All of the alleged discriminatees in Kawano, Inc., supra, 4 ALRB No. 104, testified concerning their unsuccessful attempts to apply for work in the customary manner or to find a

viable alternative method of application. On those facts, we found that those workers were denied employment as a result of the discriminatory hiring practices directed towards the Tijuana "legals" as a class or group of workers.

In affirming our conclusions, the court of appeals noted that while not all workers were equally persistent in their efforts to apply for work, there was sufficient evidence to establish Respondent's unlawful resistence to the "legals" as a group. Thus, the court, in its recognition of the futility doctrine, found that it was not necessary for the General Counsel to show, in every instance, that a worker attempted to seek employment in the customary manner.

Change in Respondent's Hiring Practices. The ALO observed that the operations of Respondent in the instant matter were virtually identical to those of its neighboring grower, Kawano, Inc. She found that Respondent altered its hiring procedures in 1976 in much the same manner, and for the same purpose, as did Kawano, in order to frustrate the reemployment efforts of a class of employees, namely the pro-UFW Tijuana workers.

Indeed, there are strong similarities between Respondent and Kawano. Both employers produce similar crops, utilizing like cultivating practices according to a common seasonal schedule, and drawing from the same sources for their labor supply. Respondent, like Kawano, employs a substantial complement of undocumented alien workers as well as the Tijuana "legals" who commute to and from work via a raitero system.

In years prior to 1976, according to the ALO, Tijuana

workers secured reemployment with Respondent through these methods: occasionally Respondent recalled former employees by sending someone to their homes; other employees had a raitero, a friend, or an already-employed family member secure work for them by making an application in their behalf to a field foreman before reporting to the work site; more often workers in Tijuana or San Ysidro learned by word-of-mouth that work was available and then went to Respondent's ranch with a raitero in order to make a personal application to a field foreman. She concluded that Respondent had discontinued all of those methods of employment in 1976, particularly the raitero system, which she found had been the key to employment for most of the commuter employees. Our review of the record, to test the validity of the-ALO's findings that Respondent altered its hiring procedures in the relevant year, reveals no substantial differences in hiring practices between 1975 and 1976. But see J. R. Norton Company (Oct. 13, 1982) 8 ALRB No. 76, wherein we upheld the ALO's group discrimination theory based on a change in hiring practices.

Virtually every one of the worker-witnesses attested to having utilized one or more of the methods described above in years past in order to make known to Tsutagawa their desire to resume work, indicating thereby their awareness of the fact that it was he who was primarily responsible for the hiring of field workers.[14]/

---

[14]/Hiroshi Ukegawa explained that it was necessary, as a practical matter, for field foremen to have sole authority for the hiring of field workers since they were in daily contact with the field operations. Therefore, again as a practical matter, field foremen

(fn. 14 cont. on p. 38.)

Applications in the Field. Antonio Herrera testified that he spoke to Tsutagawa each year before resuming work. He said he knew when it was an opportune time to go the field to see him because he knew when the crop was planted and therefore the approximate time Respondent could expect to commence harvesting. Occasionally he would check with the raiteros for a more precise work schedule. Ernesto Palomarez said he went directly to the field in 1974 in order to personally speak to Tsutagawa who told him there was "no work available, it was slow." Two weeks later he asked his brother to check with Tsutagawa and at that time was instructed to "wait a week and then come."

Recall of Workers. Tsutagawa testified that while it was not his policy to recall workers, he had done so on occasion. The ALO credited the testimony of three witnesses who were contacted at their homes in 1975 and notified that Tsutagawa had sent for them. She also found that Francisco Armenta was recalled by Tsutagawa in mid-January 1976 and immediately reported to work. She discredited Tsutagawa"s testimony that he attempted to recall five additional workers that year. She found that four of them

(fn.14 cont.)

were to decide how many workers were needed as well as the crew and field to which they were to be assigned. Tsutagawa became field foreman in 1966. He testified that thereafter he hired all field workers, particularly the Tijuana commuters. He also testified that no field worker was hired at any location other than the fields with one exception when, in 1966, he went to Tijuana to personally recruit crew foremen. He also testified that Hiroshi Ukegawa had not hired any workers since 1965. Joe Ukegawa, on the other hand, was closer to the field operations and, according to Tsutagawa, may have hired as many as ten workers in any given year prior to 1971. He also indicated that field supervisor Doi may have hired some workers in the strawberries.

credibly denied being contacted and that no message reached the fifth worker.

Job Applications Through Relatives or Friends.

Tsutagawa noted that it was commonplace for currently-employed workers to solicit work in behalf of relatives and friends. He said he always inquired as to the identity of the prospective employee(s) as well as their past experience. If he didn't know the job seeker from a prior employment history with Respondent, he would direct that he or she be brought to the field for an interview. It was his practice to give such applicants work on a trial basis. Raitero and crew foreman Juan Rubalcava said he brought his wife and another relative to the field for a personal interview with Tsutagawa. When raitero Francisco Perez informed Tsutagawa that his brother, Jose Perez, had just obtained a green card and would like to work for Respondent, the field foreman replied that he would like to look him over first. Francisco added that some of the new people whom he brought "couldn't make it ... over 10 days {trial period]." Francisco also secured work for his sister, Virginia, and another brother, Jose de Jesus Perez, in the same manner.

Witnesses who had obtained jobs for or through relatives or friends in prior seasons stated that it was necessary to secure advance authorization from Tsutagawa. Each year that his wife worked for Respondent, Efren Romero had first asked Tsutagawa for a job for her. Adolfo Palomarez said his father, Salvador Pastor, spoke to Tsutagawa in his behalf before he was permitted to start work. In later years, according to Adolfo,

he would check with Tsutagawa beforehand, to see "if he could give some work to some relatives of mine." Salvador Pastor spoke to Tsutagawa before bringing his wife to work. Jesus Perez said he did not report to the ranch until after his brother, Francisco, had returned with word that Tsutagawa had approved his hire. Antonio Herrera always spoke to the field foreman to request work for his wife and daughters. Whenever Glafira Andrade was ready to return to work, she relied on her son, Pablo, to so notify Tsutagawa. In 1974, Esperanza Garcia Dias asked Juan Castalanos to check with Tsutagawa. Castalanos informed her the next day that Tsutagawa had said he had work for her. Martha Mota got Tsutagawa"s authorization to come to work through her friend, Aurora Rice. Mota then informed raitero Silvestre Gonzales that she had a job and wanted to know if she could ride to work with him. In July 1976 Modesta Cruz asked her friend, Carmela Lujano, to tell Tsutagawa that she was no longer ill and would like to return to work. Carmela came to her house to tell her that "[T]sutagawa told me to come and get you." Modesta resumed work two days later. In years prior to 1976, Matilda de Aravalo asked her friend, Anita Gonzalez, or her son, Jesus Aravalo, to ask Tsutagawa when she could hope to come to work.

Applications to Crew Foremen and Raiteros. The raitero system, according to the ALO, was the principal means by which Tijuana-San Ysidro border area workers obtained work with Respondent. She found that contacts with crew foremen or raiteros at the various border pickup points constituted proper applications for work since, in each instance, one of two factors

attached. First, Respondent's raiteros serve the same function, and in the same manner, as Kawano's raiteros and therefore they are, in effect, "mobile personnel officers," a characterization adopted by the ALO and affirmed by the Board in Kawano, Inc., supra, 4 ALRB No. 104. Secondly, Respondent had authorized crew foremen to hire field workers in prior years and that it "appears" that such authority continued through the 1976 season. In this regard, the ALO reasoned that it would be immaterial whether Respondent had actually stripped crew foremen of such authority in 1976 because if it had, it did so without proper or adequate notice to the Tijuana workers who would have been directly affected by such a change in established hiring procedures. She concluded that, "Having clothed its crew foremen and raiteros with ostensible if not actual hiring authority, the Company was bound by the agency it created so long as it did not give notice of a change. "

Unlike the ALO, we do not find that either crew foremen or raiteros had authority to actually hire border applicants on their own initiative. As discussed above, we found that crew foremen were not supervisors within the meaning of the Act as they lacked authority to independently hire, fire, assign or discipline workers. The Kawano court rejected our finding in that case that raiteros, similar to those utilized by Respondent, served as "mobile personnel officers" vested with authority to hire prospective employees at the border pickup points. In the words of the court:

////////////////

> ... over the years [legal aliens] have developed their own transportation arrangement, referred to as a 'raitero' system. The system is an employee-organized car pool. Drivers, or raiteros, are persons who have vehicles. These drivers have established pickup points .... There workers seek out rides and pay the raitero to bring them to the Kawano fields. (Kawano, Inc. (June 12, 1980) 106 Cal.App.3d 937.)

There is nothing in the testimony of the raiteros themselves to indicate that they believed that they actually possessed hiring authority. Francisco Perez said he received many job inquiries at the San Ysidro pickup point which he frequented but always checked with Tsutagawa before bringing any workers and that such requests often were denied. Consequently, "I would tell [the prospective employee] I talk to the boss or foreman." Juan Rubalcava said he always spoke with the field foreman in advance about particular workers. Efren Romero never brought a worker to the field unless he had first sought and received Tsutagawa's approval. In 1975, when Salvador Pastor told Tsutagawa he would like to bring more riders, he was advised to check back a week later. Francisco Armenta said he asked for work only for his "acquaintances" and that when Tsutagawa did approve such a request, he was instructed as to which crew and field to take the new workers. He said Tsutagawa sometimes responded "no" or "wait." The ALO noted that Francisco Armenta had implied that on one occasion in 1975, Tsutagawa requested that he bring specific persons to begin work. Silvestre Gonzales always spoke to Tsutagawa before bringing workers "when we knew that he needed more people." Tsutagawa would respond, "You can bring them, but make sure they are good workers."

Gonzales described a time when Tsutagawa rejected the prospective workers he brought and scolded him for recommending persons whom the foreman believed did not meet the Company's standards.

Even those worker-witnesses who relied on the raitero system for transportation or news of job availability indicated that their job request had to be acted upon in the field. For several years, Esperanza Ramos had asked raiteros for rides to the ranch where she ultimately obtained work only after direct application to Tsutagawa. In 1975, Elisa de Cerda met Manuel Panuelas at the border. In response to her question whether "there would be work," he advised, "Well, let's go, you might be able to get some work since they know you." That same year, Andrea Rios asked raitero and crew foreman Juan Rubalcava if he knew whether work was available at the time. She said she was told," Yes, for me to go, to see if there was work." Also in 1975, Dolores Estrella rode to the field with raitero Efren Romero. Once there, she spoke to crew foreman Humberto Vega who told her "to wait" for Tsutagawa. She did and was hired only after she met with the field foreman. She said this was the same procedure she had used in previous years. In 1974, Ildefonso Rodriguez rode to the ranch with Adolfo Palomarez where he spoke to Tsutagawa and then was hired. Francisca Miranda rode to the field with Silvestre Gonzales and three other potential employees in 1974 or 1975. She said Tsutagawa hired her but turned down her companions. Also that year, Antonia Ruiz rode to the field with Jose Arrendondo, but once there was informed by

crew foreman Marcario that he "didn't know if [Tsutagawa] would let me stay or not because he didn't know if he was going to take in any people."

We find, as did the ALO, that Respondent's raiteros were both a source of transportation for commuter employees and a conduit of information with the field foreman. Unlike the ALO, however, we find nothing in the record to support a conclusion that they also hired workers.

Decline in Number of Raiteros. A major change in hiring practices, according to the ALO, is reflected in the decline of the raitero system by 1976. She found that whereas Respondent had employed 16 raiteros during the 1975 peak season, that number "appears to have dwindled to five or six" in the following year. She also found that virtually all of the eliminated raiteros were union supporters who had previously provided transportation for up to 130 of the Tijuana commuters. She concluded that the decline in the rider system reduced access to jobs for the Tijuana union supporters and thus was a major contributing factor to the overall reduction in the number of "legals" hired in 1976.

Significantly, it was Kawano's "dismantling" of its raitero system which figured prominently in the Board's finding, in that case, of discrimination towards a class of employees. (Kawano, Inc. (Dec. 26, 1978) 4 ALRB No. 104, affd. (June 12, 1980) 106 Cal.App.3d 937.) As discussed more fully above, we found that Kawano had eliminated all but one raitero, and had discontinued paying the ride premium.

Respondent herein acknowledges the reduction in its 1976 contingent of drivers but contends that, unlike Kawano, it neither eliminated the raitero system nor abandoned its established policy of compensating drivers for transporting workers. Respondent further suggests that it was not responsible for the decline since many raiteros allegedly chose not to return to work in 1976.

While the ALO estimated that there were 16 drivers in 1975, we note that General Counsel's Exhibit 42 lists 20 employees who doubled as drivers during the payroll periods which ended on July 31 and October 2, 1975. However, three raiteros did not receive credit for transporting workers during the July payroll period; three different raiteros were in a similar position during the latter payroll period.

Four names on the list are those of employees who clearly served as raiteros in 1976. They are Jose Arrendondo, Abibon Velasquez, Rafael Ochoa and Manuel Panuelas. Six of the 1975 raiteros are not among the alleged discriminatees and it is not clear whether they were employed in 1976 or, if so, whether they continued to transport workers. They are Vicente Morales, Benjamin Monroy, Ponciano Gallegos, Marcelino Martinez, Rodolfo Moreno and Juan Dias. The ALO implied that none of these six was employed in 1976 but observed that, in his testimony, Tsutagawa made several references to Martinez which indicated that he was a raitero in 1976.

The ALO found that one of the 1975 raiteros, Juan Rubalcava, had been discharged for cause in December 1975, and

another, Efren Romero, although employed by Respondent in 1976, had not requested authorization to carry riders that year. The eight remaining names belong to workers whom we have found were discriminatorily laid off in January 1976. They are Francisco ,Perez, Silvestre Gonzales, Ildefonso Rodriguez, Adolfo Palomarez, Francisco Armenta, Antonio Herrera, Reymundo Mejorado and Salvador Pastor. The ALO found that neither Herrera, Mejorado nor Pastor had applied for work in 1976. She found that Perez, Gonzalez, Rodriguez, Palomarez and Armenta had made proper applications for work at various times during the 1976 season but were denied rehire because of their union activity. Rodriguez, Palomarez and Armenta did not make an initial application until sometime in July, several months later than they had normally resumed work.

Respondent asks us to consider that the delay in seeking rehire by certain of the raiteros caused a reduction in the number of drivers, as did Francisco Armenta's decision to take a leave of absence shortly after his January 1976 recall. Respondent also contends that Rosalio Perez was a raitero although his name does not appear on the General Counsel's roster. Perez testified that he did not intend to return to Respondent's employ in 1976.

On the basis of the above, we find that there was a marked decline in the number of raiteros in 1976 as compared with 1975 and that eight of them had been discriminatorily eliminated. However, we cannot conclude that Respondent, like Kawano, "eliminated" its raitero system and thereby effectuated a substantial change in hiring practices.

Applications for Employment. The ALO found that Respondent implemented the use of employment application forms for the first time in 1976, thereby effecting yet another change in hiring practices. Respondent challenged the finding within the context of its general contention that it effected no change in hiring practices for the 1976 season.

The cards in question measure approximately three inches by five inches. On one side is a printed list of conditions of employment. On the other is space for the employee's name, address, telephone number, social security number, birth date and signature. In addition, there are spaces to be filled out by the field or crew foreman noting date of hire and crew to which assigned. The ALO observed that,

> As a rule the applications were used only for record-keeping purposes and were not filled out until the applicant was hired, but when some union supporters applied for work they were given the applications to complete even though they were not hired, and in some instances the implication was that they were not supporting the company by completing the application.

Adolfo Palomarez testified that Tsutagawa handed him a card when he applied to the field foreman in August 1976. Palomarez filled out the card and returned it immediately but was not recalled. The ALO discredited Tsutagawa's claim that he had instructed Palomarez to report for work the following Sunday. Rosalio Perez described an incident at the Carlsbad packing shed in May 1977. He said Wayne Nakaji gave him a card, along with a pen, and requested that he fill it out. Perez was told he would be called for the picking operation in about two weeks. Perez

said he kept the card and took it to the UFW office in San Ysidro where he received assistance in filling it out, "8 or 9 days later." He asked Efren Romero to return the card to Respondent but there is no evidence as to whether Romero later submitted the card to Respondent. Perez was not thereafter recalled to work.

Elizabeth Montoya received a card after she was hired but was required to fill it in before actually commencing to work.[15/] Esperanza Diaz, on the other hand, declined an opportunity to resume work rather than submit to Respondent's card requirement.[16/]

The ALO correctly finds that completion of the information forms became a mandatory procedure in the 1976 season, and, to that extent, constituted a change in employment procedures. Contrary to the ALO, however, we do not find that use of the cards constituted a discriminatory change in hiring practices. As a general rule, cards were submitted to applicants who actually had been hired or who Respondent had promised to notify when work

///////////////

///////////////

[15/] In April 1976 at her request, raitero Abibon Velasquez asked Tsutagawa whether she could return to work. Velasquez informed her the next day that Tsutagawa had work for her. While enroute to work with Velasquez the first day, she filled out an employee information card he had been instructed to give her.

[16/] In May 1976 Esperanza asked a neighbor to tell Tsutagawa she would like to return to work. The neighbor returned with an affirmative response provided she sign "those papers." Esperanza asked the neighbor whether the foreman meant "only me or all [workers]" and when advised that all employees had to "sign for the boss,"she sent back word that she would rather not work.

became available.[17/]

Refusal to Rehir'e T'ijuaria Workers, Individual Analysis.

Absent sufficient evidence to support the ALO's class-discrimination theory, we consider below her alternate findings as to each of the alleged discriminatees in conformity with the standard elements of proof in the usual refusal-to-rehire case.'

The ALO found that the General Counsel had established by a preponderance of the credible evidence that 34 of the Tijuana workers had properly applied for work at times when work was available, had engaged in union activity with Respondent's knowledge and were denied rehire for that reason in violation of Labor Code sections 1153(c) and (a) of the Act. Respondent excepted to all of the findings, contending in the main that the General Counsel had not established proper applications for work and/or Respondent's knowledge of the employees' union activities. The ALO also dismissed allegations, for failure of proof, concerning the remaining 14 workers who were named in the complaint and who testified at the hearings. General Counsel excepted to two of those findings.

According to the ALO, Respondent hired field workers

[17/] As discussed previously, we are cognizant of the circumstances attending Respondent's efforts to obtain similar data in the prior season. We also recognize that certain employees, pro-UFW sympathizers such as Esperanza Diaz, for example, continued to resist "signing for the boss" because they believed the act would constitute a rejection of the Union. However, given the Labor Code section 1157.3 proviso that employers maintain employee addresses, we cannot fault Respondent's reasonable measures in support of its statutory obligation.

in the following time periods during the 1976 season:

1. End of January to beginning of May.
2. Mid-June through first week in August.
3. Last week in August through third week in September.
4. Last two weeks of October.

Work-force figures reflected in Respondent's Exhibit No. 40, as duplicated by the ALO in her Decision, reveal a steady increase in the overall number of field workers hired between February 4, 1976, (108 field workers employed at that time) and October 26 of that year (687 field workers). The increase in the work force far exceeds the total number of alleged discriminatees.

The ALO found that each of the discriminatees had engaged in union activity and that Respondent had knowledge thereof. She relied, in part, on evidence which established that the Tijuana workers, as a group, were among the most active and vocal of the UFW supporters in Respondent's employ during the 1975 union organizing drive. She also found that many of the discriminatees had worn union buttons, distributed union literature, or had rejected Tsutagawa's offer of an employee information card during the 1975 season, explaining to him at the time either that they were acting on instructions from the UFW or had already signed for the Union. There is ample record support for all of those findings.

Set forth below, seriatim, is a brief description of the individual efforts by Tijuana workers to secure employment with Respondent at various times throughout much of the 1976 season. We find that each of them had worked for the Employer in the 1975

season, most of them for several years prior to 1975, and thus were experienced and qualified to fill the positions for which they applied. We also find that each of them was familiar with Respondent's standard hiring practice and had obtained work in the past in accordance with that practice, i.e., by directing their applications to field foremen, either directly or indirectly

No Applications For Work. The ALO found that 14 of the alleged discriminatees made no application for work, did not make a proper application, or did not apply at a time when work was available.[18/] As no party excepted to 12 of these findings, we adopt them pro forma. General Counsel excepted to the ALO's inclusion of Consuelo Medina and Toribia Hernandez within this category. We find no merit in either of the exceptions.

Consuelo Medina is the wife of Efren Romero. As discussed previously, the ALO discredited Romero's testimonial claim that he sought Respondent's authorization to transport workers in March. At issue here is Romero's testimony that he unsuccessfully sought work for Consuelo at the same time. Having discredited Romero's testimony concerning his purported request to transport riders, the ALO said she was compelled to find that his claimed application for work in behalf of Consuelo likewise was not proved. General Counsel suggests only that the ALO should have credited all of Romero's testimony, including of

---

[18/] Ernestina de Carrillo, Angela Herrera, Gregorio Reyes, Antonio Herrera, Virginia Perez, Ramona Ruiz Vasquez, Salvador Pastor, arid Santiago Moreno Garnica, Andrea Rios, Elisa Cerda, Dolores Estrella, Luis Lopez Aguila, Consuelo Medina, and Toribia Hernandez.

course the reference to Consuelo. We find nothing in the General Counsel's argument, or in the record, which would warrant our reversing the ALO's credibility resolutions. (Standard Dry Wall Products, Inc. (1950) 91 NLRB 544 [26 LRRM 1531], enforced (3d Cir. 1951) 188 F.2d 362 [27 LRRM 2631].)

Toribia Hernandez testified that she applied for work on four separate occasions. The ALO found her testimony "too vague and improbable to be credited." Again, for the reasons stated above, we decline to reverse the ALO's resolution of Ms. Hernandez's credibility.

Applications For Work By Members of the Armenta Tomato Harvest Crew. We have found, above, that Respondent discriminatorily laid off the entire 23-person crew of Francisco Armenta on January 19 and 21, 1976. The ALO found that 18 members of the crew applied for reemployment in subsequent 1976 seasons and that 15 of those applicants were discriminatorily rejected.[19/] We affirm the ALO's findings. However, regardless of the ALO's findings regarding the date on which their applications for work were discriminatorily rejected, our remedial Order will require

---

[19/] The ALO found violations with respect to the following 15 crew members: Francisco Armenta, Francisco Carrillo, Pedro Chaires, Apolonio Estrada, Juan Manuel Estrella, Silvestre Gonzales, Ildefonso Rodriguez Gomez, Remigio Hernandez, Elias Montoya, Esteban Avila Ortiz, Adolfo Palomarez, Francisco Perez, Rosalio Perez, Jose de Jesus Perez, and Moises Ramirez Santana. Although three members of the crew testified that they also sought rehire, the ALO dismissed allegations as to them for various reasons. They are Luis Lopez Aguila, Santiago Moreno Garnica and Gregorio Reyes. The five remaining members of the crew made no attempt to seek employment with Respondent in the 1976 season: Jose Aguirre, Aurelio Munoz Galvan, Reymundo Mejorado, Jesus Lupercio Morales, and Ernesto Palomarez.

Respondent to offer each of them reinstatement and to pay backpay for the period commencing on the day each was laid off.

Applications To Field Foreman Tsutagawa. The ALO found, and we agree, that applications to Tsutagawa, directly or indirectly were a proper method of seeking employment. We affirm her findings that ten prospective employees directed their applications to him in the field, five of them in person and the remaining five through crew foremen. We also affirm her findings that each of the ten was discriminatorily denied placement on the pretextual ground that no work was available.

Esperanza Ramos testified that she obtained a ride from the Mexican border to the San Luis Rey Ranch on the morning of July 10, 1976, with two men and two other women and that the group parked alongside cars "of all the raiteros who drove workers to [Respondent's] ranch from Tijuana." Her fellow riders immediately entered a field and commenced working. Esperanza, however, remained behind, in the car, from where she observed that a separate group of four women spoke to Tsutagawa for awhile and then were directed to a field. At that point, she approached Tsutagawa to ask whether she also could start work. She said he gave her an application form (employee information card), which she filled out on the spot, and asked her to return in about two weeks. When she returned, Tsutagawa told her she would have to wait another two weeks.

Francisca Miranda paid a neighbor to drive her to one of Respondent's ranches on or about July 20, 1976. Although she saw about 25,women picking tomatoes in the field at the time,

Tsutagawa told her that "[his] boss didn't want anymore women."

Jose Perez Serano testified that his last day of work was December 10, 1975. He said Tsutagawa had granted his request for a leave of absence in order to visit relatives in Mexico and promised him that he would have work upon his return. But when he made application directly to Tsutagawa the following May, he was told "There wasn't any [work]."

Illness forced Efren Flores to leave Respondent's employ on January 12, 1976. He made a trip to raitero Rafael Ochoa's house the following April to request that Ochoa speak to Tsutagawa on his behalf. Ochoa informed him the next evening that Tsutagawa had suggested that Flores wait awhile. When Flores called on Ochoa again two or three weeks later, Ochoa offered to take Flores to the ranch in order that he might speak with Tsutagawa directly. Flores did so the next morning and testified that Tsutagawa told him there was no work because "there were too many people and waiting."

Antonia Ruiz is the last of the group of workers who made application directly to Tsutagawa. She had worked for a neighboring grower from March through June and, because of family problems, did not thereafter seek immediate reemployment. She met Efren Romero (employed by Respondent at the time, but no longer serving as a raitero) in July and asked him to give her a ride to the ranch. She said Rqmero agreed, but cautioned her that such a trip would be of no use because, "Tsutagawa didn't want any women." Upon her arrival at the ranch, Antonia simply entered a field and began picking tomatoes along with the rest

of the crew. A short while later, Tsutagawa called her out of the field, stating that there was no work. When Antonia pursued her plea for work/ Tsutagawa asked her for her social security number and the name of her raitero. She told him it was Rafael Ochoa. Tsutagawa then promised to let Ochoa know when there would be work for her. Antonia went to Ochoa 's house three days later to learn if Tsutagawa had sent for her, but Ochoa suggested that she "Forget it, there are a lot of Alambres [illegals] working there."

The five applications discussed below were relayed to Tsutagawa through crew foremen.

Although Angel Ortiz Muro's testimony does not establish precisely when he applied for work, it does appear that all of his efforts to secure reemployment occurred on the same day. He testified that he spoke to three Ukegawa employees one morning at the border and attempted to make contact with Tsutagawa later that same day. He testified initially that this occurred in "September or October, or thereabouts," but later placed the incident "in June or July." The ALO found that he had applied in September at a time when Respondent was hiring field workers. When he spoke to crew foreman Alfonso Ortega in Tijuana, he was referred to a "Marcileno." The latter, in turn, suggested that, "Jesus Sanchez is the one who would know for sure." Marcileno drove Ortiz from Tijuana to San Ysidro where he asked the crew foreman if he thought Tsutagawa had work for him. He said Sanchez replied, "I will tell him, but I don't think so because he hasn't taken any

////////////////

people."[20/] Two days later, Sanchez informed him that, as he had promised, he had spoken to Tsutagawa in his behalf, but the foreman had said there was no work for him.

Leonidas Ruelas testified credibly that in early April he asked Ortega to inform Tsutagawa that he and his family had returned from Guadalajara and were ready to resume work. He said Ortega told him that evening, after speaking to Tsutagawa, that there wasn't any work, "not for you and not for your family. For you and for Chavistas there's no work at all." He said Ortega expressed disbelief that he would have "gone and joined that Union" and then said to him,"I believe if you sign [an employee information card], you will have a job whenever you want." We affirm the ALO's finding that employment was discriminatorily denied to Leonidas, his wife Rosario, and his two daughters, Miargarita and Olivia.

Border Application's to Raiteros. The ALO found that prospective employees who sought work directly from raiteros at various border locations in the Tijuana-San Ysidro area made proper applications for work.

We have already determined that raiteros lacked authority to hire workers on their own initiative. We agree, however, with the ALO's description of the raiteros as one link between prospective employees and the field foreman. As she said:

[20/] Ortiz took a bus in Carlsbad immediately after speaking to Sanchez. While standing in or near the edge of one of Respondent's tomato fields, he attempted, unsuccessfully, to flag down Tsutagawa who was driving by.

> When the raitero had already been authorized to bring more workers, a person's employment was virtually assured upon the raitero agreeing to take him or her to the ranch .... If they were not already authorized to bring more workers, occasionally they brought people to the ranch anyway, but more often, they checked first with a field foreman and then reported back to the person who had asked about work.

In these circumstances, the raiteros' lack of actual hiring authority should not obscure the fact that, at least to the commuter employees, they had become an important means by which to apply for work, either directly or indirectly. Some workers relied on them for transportation to the field in order to apply to Tsutagawa. Others counted on them to ask the field foreman for work on their behalf. Once hired, many Tijuana workers were dependent upon raiteros to get them to and from work. More importantly, commuter workers relied on the raiteros for their appraisal of Respondent's hiring situation.

In 1976, several of the raiteros or crew foremen responded to job inquiries from the Tijuana workers with such answers as "Yes, there is work, but not for Chavistas." The question is whether such statements carried legal significance.

We find it unnecessary to determine whether Respondent had authorized the raiteros to make the statements attributed to them, or whether such statements are authorized admissions within the meaning of the Evidence Code.[21/] Moreover, since the raiteros

---

[21/] Evidence Code section 1122(a) requires that the person be "authorized by the party to make a statement or statements for him concerning the subject matter of the statement ...." Authority which is apparent is not sufficient for purposes of the Evidence Code, it must be express or implied. (See Witkin, Cal. Evidence (2d ed. 1966) Restatement of Agency, § 286, p. 489.)

lacked authority to hire, their rebuff of a prospective employee cannot be deemed a violation of an employer's duty to treat all applications for work in a nondiscriminatory manner. (Shawnee Industries, Inc. (1963) 140 NLRB 1451 [52 LRRM 1270] revd. on other grounds (10th Cir. 1964) 333 F.2d 221 [56 LRRM 2567].)

For many years, Respondent benefited from the raitero system. Drivers who were able and willing to provide car pooling services made it possible for Respondent to count on a sizable and readily available pool of border-area residents who otherwise might not have been able to travel to and from the work site. The importance of a reliable work source in a seasonal industry cannot be underestimated. Respondent described the impact of frequent raids by the Immigration and Naturalization Service, after which its complement of illegal alien workers was virtually depleted. Given the necessity of fielding an adequate work force to handle a harvest-ready crop, as well as other season chores, when the calendar or weather conditions dictate, it is apparent that the Tijuana employees were a significant factor in the success of Respondent's operations. Moreover, as the record reveals, Respondent viewed the Tijuana labor pool as a source of experienced and dependable employees. It was the "legals," immune from immigration forays, who performed important pre-season tasks, e.g., employee Francisco Armenta was asked to return in order to survey and mark furrows preliminary to the planting of strawberries. Moreover, it was the Tijuana employees who were assigned to year-round work, and Tsutagawa testified that he personally went to Tijuana one year to recruit crew foremen.

On the basis of the record evidence, we find that while perhaps organized initially by the employees as a car pool, the rider or raitero system was endorsed and encouraged by Respondent. Each driver received a per-day allowance and, in addition, was compensated by Respondent for each rider transported. Often, when Respondent needed additional workers, word was sent to them at home through a raitero. To employees, the significance of the raitero, as a source of information emanating directly from Respondent was self evident. We find that it was reasonable for border area applicants to assume that a raitero's assessment of the hiring situation was accurate and to be guided by the raitero"s statements and advice, i.e., that it would be futile for them to go to the field in order to make application to the field foreman. In reaching this conclusion we find no conflict with Kawano, Inc. (1980) 106 Cal.App.3d 937. In that case, the court found that because the raitero system had been discontinued, prospective employees made repeated attempts to apply for work by whatever means they could find. The controlling difference here is that workers were still able to make contact with a raitero and, based on the responses they received, reasonably believed that further efforts to secure work would be futile. The governing, principle is to hold Respondent liable where the raiteros conveyed to applicants the impression that further efforts to secure work would be futile. We find this principle applicable to the five workers discussed below and therefore they were relieved of having to apply for work in the customary manner. The question of job availability is relevant only with respect to

the employer's backpay obligation. (Anchor Rome Mills, supra, 288 F.2d 775.)

Esperanza Diaz testified credibly that when she spoke to raitero Jose Arrendondo at the border during the last week in March 1976 he told her, "Esperanza, there is work, but...you see, you are from the [U]nion, they don't want you anymore." The ALO found that when Pedro Chaires asked Arrendondo to check with Tsutagawa for him, the raitero declined since, as he explained to Chaires, "they were not taking any people, they were not taking immigrated people, least of all if they were one of Chavez's.",[22/]

The ALO found that Maria Garcia also was discriminatorily rebuffed by Arrendo who informed her that, "They [Respondent] didn't want any women." The ALO found that response was similar to the explanation Arrendondo gave Pedro Chaires in that he told Maria "in essence that the Company was not hiring Chavistas." The ALO also found that the raitero's statement that Respondent was not hiring women was a pretext since women were employed and Arrendondo himself was transporting some.

The ALO credited the testimony of Amparo Moreno Villacana who said that when she asked raitero Abibon Velasquez about her chances for work, he told her, "No, man, forget it. The boss doesn't want any Chavista people." Anita Palamino testified credibly that she contacted raitero Rafael Ochoa at his house on two different occasions. In April, he told her that, "We were

[22/] Because Chaires was a member of the Armenta crew, Respondent's backpay liability to him commenced on January 19, 1976, and therefore his name appears only in the attached Appendix A (Armenta Crew).

not going to be given work anymore because we were Chavistas."

Miscellaneous Applications For Work. The five remaining applicants described their efforts to seek work from field foremen, or raiteros at various field and border locations to no avail. The ALO found that each of them had made a proper application for work, when work was available, and were discriminatorily denied employment.

Matilda de Arevalo went to Respondent's strawberry field in April when a number of women were working in the harvest. Field foreman Hiroshi Doi told her he didn't have any work for her because she was not on the list of workers Tsutagawa had given him. The ALO did not address the witness's further contention that she made a subsequent application, for work at the Carlsbad packing shed. She did not see any workers in the field or the shed on that occasion, nor did she specify to whom she may have directed her application. In any event, she did testify that although she was aware that Tsutagawa was foreman of the Carlsbad operations, she did not seek him out for work as she had in years past because of a comment she overheard him make in a "laughing" manner on the last day of the previous season, to the effect that there would be no more work for women, particularly "Chavista" women. In light of Matilda's perception of Tsutagawa[1]s attitude towards the Tijuana workers, based on the above-described incident, we find that her failure to make a direct application to him was based on a reasonable perception that such an act would be futile. We affirm the ALO's finding that Matilda's field contact with field foreman Doi constituted a proper application for work. We also find that Doi's response,

in those circumstances, relieved Matilda of reapplying for work when work was available. (Shawnee Industries, Inc. (1963) 140 NLRB 1451 [52 LRRM 1270], revd. on other grounds (10th Cir. 1964) 333 F.2d 221 [56 LRRM 2567].)

The ALO found that Virginia Salazar, along with Martha de Mota, below, had made a valid application for work to crew foreman Alfonso Ortega at a Safeway store in San Ysidro. The two women had gone to the store in order for Martha to cash a paycheck. Virginia testified credibly that Ortega promised to let them know when work was available, but never did. Martha, on the other hand, also testified credibly that in response to their question concerning job availabilities, Ortega said, "Not now, later." Martha testified that the incident occurred in August while Virginia had placed the incident in July. Given the availability of work during both months, we find this discrepancy in their testimonial accounts immaterial. However, we find that the General Counsel has not established a violation. Ortega lacked authority to hire and there is nothing in his response to the women that would indicate that further applications for work would be futile.

Martha de Mota testified that she sought work to no avail on two occasions. We find no violation with respect to her second application, discussed above. Three or four months earlier, in March, her husband accompanied her to the Carlsbad office where he asked Joe Morotte, Tsutagawa's assistant, whether he had any work for her. Martha testified that Morotte had said that he didn't have any work then, but urged her to

return in two or three weeks. Martha said she did not return at the time proposed by Morotte because she "already knew that since they didn't want to see us around there, they wouldn't give us any work." Unlike the situation of Martha de Arevalo, described above, the General Counsel has not established that there was a reasonable basis for Martha de Mota's failure to reapply for work in accordance with Morotte's suggestion and we find nothing in his response to her which would suggest that re-application would be futile.

Jose Zuniga Rios, like Martha de Mota, testified that he attempted to get work at the Carlsbad shed "more or less around March" from an unidentified man who told him he didn't know anything about work availabilities. Zuniga said the ground was bare as it had not yet been planted and he didn't see a single worker, either in the shed or in the field. When Jose announced that he would like to pick up his income tax forms, the man accompanied him to the office, where only Hiroshi Ukegawa was present. Jose was not able to locate his papers, but later learned that they had been mailed to his house. He did not indicate whether he said anything to Ukegawa about work. We find no violation.

Jesus Ansaldo Carrillo described his two efforts to seek reemployment with Respondent: in late March 1976, while he was wearing a UFW button; and about 14 months later at a grocery store near the Carlsbad Ranch. He said he made contact with the same "young Japanese" employee on both occasions, but was unable to provide further identification. Rosalio Perez accompanied

Ansaldo on the 1977 trip. He testified that they spoke to Hashimo (Jaime) Tashiro, an apprentice foreman hired in April 1975 to assist Tsutagawa and Doi in the San Luis Rey portion of Respondent's operations. Perez also testified that Tashiro asked the applicants to complete an employee information card and return in two weeks.

The latter application was not discussed by the ALO. She found, however, that Ansaldo's 1976 application had been directed to Wayne Nakaji, a management trainee. She also noted that although Nakaji was not specifically authorized to hire field workers, Respondent was augmenting its work force at the time and therefore he could have referred Ansaldo to a field foreman. His failure to do so, she reasoned, constituted a discriminatory refusal to rehire.

Ansaldo testified that his first application, whether directed to Nakaji or Tashiro, was rejected on the grounds that no work was available at the time. Given the fact that work was then available, we find that whether the application was directed to Nakaji or Tashiro is immaterial, and affirm the ALO's finding that he was discriminatorily denied rehire.

Summary and Remedy. We have concluded herein that Respondent, Ukegawa Brothers, Inc., engaged in numerous violations of Labor Code sections 1153(c) and (a) and various independent violations of Labor Code section 1153(a) of the Act, as follows: by its supervisor's discharge of a rifle as UFW representatives were leaving its premises, thereby tending to intimidate them and to interfere with the employees' right to be contacted by union agents for the purpose of organizing; and by numerous instances of

unlawful surveillance, interrogation, threats of reprisals, and promises of benefits by field supervisor Seihichiro Tsutagawa.

In addition, we have concluded that Respondent discriminated against employees because of their participation in union activities, in violation of Labor Code sections 1153(c) and (a) of the Act, as follows: by its transfer and demotion of Juan Rubalcava in September 1975; by its transfer of Elias Montoya to the Camelot Ranch in 1975; by its assignment of Francisco Carrillo and Jose Perez Serrano to a fertilizing task for a two-week period in August 1975; and, by its assignment of a disproportionate ratio of union supporters to descojollar, cauliflower and tomato crews in the summer and fall of 1975 and isolation of those crews in order to impede the organizing efforts of the individual crew members.

We have also concluded that Respondent violated Labor Code sections 1153(c) and (a) of the Act: by its discharge of Francisca Roman on September 23, 1975; by its mass layoff of the 23-member Armenta tomato harvest crew in January 1976;[23/] and by its subsequent refusal to rehire former Tijuana workers during the 1976 season because of their support for the UFW.

Accordingly, our Order herein will provide appropriate remedies for each of the violations described above.

Six of the employees listed in the attached Appendix A, and so designated therein, had served as raiteros during the 1975

[23/] Francisco Perez and Juan Manuel Estrella were laid off on January 21, 1976, the remaining 21 crew members had been laid off two days earlier, on January 19.

season. In order to restore those employees as nearly as possible to the situation they would have been in but for Respondent's discriminatory actions, we shall direct Respondent to compensate them for all economic losses they have suffered as a result of their layoff and their inability to continue transporting other workers. Computation of losses in that regard will be deferred ' to the compliance stage of this proceeding.

We shall require Respondent to make whole employees Juan Rubalcava, Elias Montoya, Francisco Carrillo and Jose Perez Serrano for all losses of pay and other economic losses they have suffered as a result of their unlawful demotion and/or transfer during the 1975 season. We note that Respondent's backpay liability to Rubalcava ceased on December 29, 1975, the date on which he was discharged for cause.

With respect to the Notice to Employees attached hereto, we feel that special circumstances here warrant consideration of a potentially more expeditious manner of notifying employees of the outcome of this proceeding. Accordingly, we shall provide for a choice, to be determined by the Regional Director, between our usual requirement that notices be mailed to employees and the utilization of commercial radio time to serve the same purpose. Several factors appear to favor the latter approach, specifically the passage of time since the conduct at issue herein occurred, the difficulties inherent in the task of developing a reliable address list for the vast number of workers employed in 1975 and

///////////////

///////////////

subsequent seasons,[24/] and, as suggested by the record, word-of-mouth is a particularly viable communication tool among residents of the Tijuana-San Ysidro border communities.

Respondent excepts to the ALO's failure to make a finding on its affirmative defense of laches, contending that such failure affects its backpay liability. In the alternative, Respondent urges us not to exceed the remedy provided in Kawano, Inc., supra, 4 ALRB No. 104, wherein Respondent contends we limited the employer's backpay obligation to the period between 1976 and 1977 in order to compensate for administrative delays in determining backpay liability.[25/]

In Southeastern Envelope Co., Inc. (1979) 246 NLRB 423 [102 LRRM 1567], the national Board rejected the employer's argument that laches and considerations of equity precluded enforcement of the backpay remedy because five years had elapsed between the issuance of the NLRB's Decision and Order in the original proceeding and the issuance of the backpay specifications in the ancillary hearing. The board affirmed the ALJ's finding that, "it is well settled that the doctrine of laches is not a defense to a backpay obligation ...." In an action for injunctive

---

[24/] As revealed in many of the proceedings before this Board, illegal alien workers are reluctant to reveal their true addresses and in many instances have supplied a false address to the employer. We note that Respondent employs a substantial number of undocumented workers.

[25/] Contrary to Respondent's interpretation of the backpay remedy provided in Kawano, Inc., supra, 4 ALRB No. 104, our Decision and Order in that case included no limitation on backpay. Rather, we held that the backpay due for 1976 and 1977 could be computed with reference to the employees' pre-violation average earnings during 1975.

relief, a federal district court rejected that defense, noting the employees who are entitled to backpay suffer as much by board delay as does the employer and should not be denied relief on that ground when they have vigorously pursued redress. (Mayco Plastics, Inc. (D.C. Mich.) 472 F. Supp. 1161 [101 LRRM 2815]. See also NLRB v. J. H. Rutter-Rex Manufacturing Co. (1969) 396 U.S. 258 [72 LRRM 2881].) We find Southeastern Envelope Co., supra, dispositive and reject the applicability of the concept of laches to Respondent's backpay liability.

Respondent excepts to the ALO's recommendation of a broad cease-and-desist order, contending that such an order is punitive in nature where, as here, there is no prior history of unfair labor practices. The exception lacks merit. In M. Caratan, Inc. (March 12, 1980) 6 ALRB No. 14, we held that the broad cease-and-desist order is warranted in two specific circumstances: where a respondent has been found to have repeatedly engaged in violations of the Act, i.e., has demonstrated a proclivity to thwart its statutory obligations, or where a respondent has engaged in widespread acts and conduct of such an egregious nature that it thereby demonstrates to employees a general disregard for their rights under the Act. We are persuaded by the number of violations found herein, the long period of time during which such misconduct occurred, and particularly the number of employees affected by such conduct, that this is the type of case of egregious and widespread misconduct for which the broad cease-and-desist order was intended.

Respondent excepts to the ALO's recommended remedy of expanded access, in order to allow the UFW two thirty-day periods of access by an unlimited number of organizers in addition to the access provided by our access regulation. (Cal. Admin. Code, tit. 8, § 20900, et seq.) The only limitation imposed by the ALO is that the organizers not interfere with Respondent's operations. We find merit in this exception. General Counsel alleged that Respondent had denied access to UFW organizers on two occasions, August 8, 1975, and October 25, 1975. We summarily dismissed the allegation as to the August 8 incident, because the conduct alleged therein, even if true, occurred prior to the effective date of the Act and therefore could not constitute an unfair labor practice. As to the October 15 incident, we have found that the UFW organizers, not Respondent, were in violation of the access rule.

Respondent excepts to the provision in the ALO's recommended Order which directs that field supervisor Tsutagawa read the attached Notice to Agricultural Employees and to publicly apologize to the employees. We find merit in the exception. Our standard remedial provision requiring the distribution and reading of notices to assembled employees on company time confers upon an employer the option of directing one of its own agents or representatives to distribute and read the Notice or requesting that a Board agent do so. We see no reason to depart from that practice.

Respondent excepts to the ALO's inclusion in her proposed Order of a provision which directs Respondent to cease

and desist from discriminatorily refusing to rehire any employee based on the applicant's alien status or place of residence. We find merit in the exception. Labor Code section 1153(c) prohibits discrimination which tends to encourage or discourage membership in any labor organization and does not contemplate the additional factors specified by the ALO.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Ukegawa Brothers, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of employees' union activities.

(b) Interrogating any employee(s) concerning their union activities or the union activities of other employees.

(c) Soliciting any employee(s) to spy on the union activities of any other employee(s).

(d) Threatening employees with loss of work or other reprisals for joining or supporting the United Farm Workers of America, AFL-CIO, (UFW) or any other labor organization.

(e) Promising employees wage increases, more work, or other employment benefits to induce them to reject the UFW or any other labor organization.

(f) Discriminating against any agricultural employee in regard to assignment or transfer, or any other term or condition of employment, or demoting any employee, or isolating any employee

from fellow workers because he or she has engaged in any union activity.

(g) Informing employees that they need not apply for work because of their union membership, union activities, or union sympathies.

(h) Discharging employees because of their membership in or activities on behalf of the UFW or any other labor organization.

(i) Refusing to hire or rehire any agricultural employee because of his or her union membership, union activity, or union sympathies.

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

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Agricultural Labor Relations Act (Act):

(a) Offer to Francisca Roman, who was discharged on September 23, 1975, and to the members of the Armenta tomato-harvest crew who were laid off on January 19, and 21, 1976, and whose names appear in the attached Appendix A, and to the employees who were discriminatorily refused rehire in 1976, and whose names appear in the attached Appendix B and Appendix C, immediate and full reinstatement to their former or substantially equivalent positon(s), without prejudice to their seniority or other rights or privileges.

(b) Make whole Francisca Roman and all employees

whose names appear in Appendices A, B, and C, attached hereto, for all wage losses and other economic losses they have suffered during the period from the date of their termination-, or Respondent's failure or refusal to rehire them, to the date on which Respondent offers them full reinstatement, together with interest on said sum computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55. Backpay shall be computed in accordance with established Board precedents and shall begin: from their respective dates of termination for Francisca Roman and the members of the Armenta crew who are listed in Appendix A; from the respective dates on which they were discriminatorily refused rehire for the workers listed on Appendix B; and from respective dates on which each of the workers listed in Appendix C would have been employed by Respondent absent its discriminatory hiring practices.

(c) Reimburse the workers designated as raiteros in Appendix A for all losses of wages and other economic losses they incurred as a result of their discharge by Respondent and their resultant inability to continue transporting other workers to and from the work site, plus interest on such amounts computed in accordance with our Decision and Order in Lu-E'tte Farms, Inc., supra, 8 ALRB No. 55.

(d) Make whoel Juan Rubalcava, Elias Montoya, Francisco Carrillo and Jose Perez Serrano for all wage losses and other economic losses they have suffered as a result of their discriminatory demotion and/or transfer by Respondent, plus interest on such amounts-computed in accordance with our Decision

and Order in Lu-Ette Farms, Inc., supra, 8 ALRB No. 55.

(e) Preserve, and upon request, make available to this Board or 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 period and amount of backpay due under the terms of this Order.

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of the issuance of this Order, to all employees employed by Respondent at any time between August 28, 1975, and the date of the mailing. In the alternative, and at the discretion of the Regional Director, sponsor commercial radio announcements summarizing the contents of the attached Notice, including informing discriminatees of their right to reinstatement and backpay. Pursuant to a schedule to be determined by the Regional Director, spot announcements are to be broadcast three times daily during two one-week periods (which need not be consecutive but which should coincide with Respondent's major hiring seasons) on a radio station or stations which has or have a market or coverage area most conducive to maximizing the probability that such information will be received by Respondent's present and former employees.

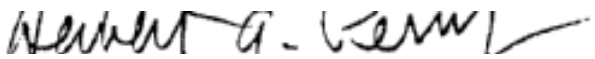
(h) Post copies of the attached Notice in all

appropriate languages for 60 days in conspicuous places on its premise, 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.

(i) 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 agricultural 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 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 Respondents to all nonhourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

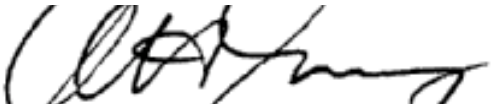
(j) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply herewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: December 17, 1982



HERBERT A. PERRY. Acting Chairman

JHON P. MCCARTHY. Member



ALFRED H. SONG. Member

APPENDIX A

Aguirre, Jose

Armenta, Francisco*

Avila Ortiz, Esteban

Carrillo Gutierrez, Francisco

Chaires, Pedro

de Jesus Perez, Jose

Estrada, Apolonio

Gonzales, Silvestre*

Hernandez, Remigio

Lopez Aguilar, Luis

Lupercio Morales, Jesus

Manuel Estrella, Juan

Mejorado, Reymundo*

Montoya, Elias

Moreno Garnica, Santiago

Munoz Galvan, Aurelio

Palomarez, Adolfo*

Palomarez, Ernesto

Perez, Francisco*

Perez, Rosalio

Ramirez Santana, Moises

Reyes, Gregorio

Rodriguez Gomez, Ildefonso*

---

*/ Denotes raiteros.

APPENDIX B

Ansaldo Carrillo, Jesus

Flores, Efren

Miranda, Francisca

Ortiz Muro, Angel

Ramos, Esperanza

Ruelas Rodriguez, Jose Leonidas

Ruelas Saldana, Maria Esther

Ruelas, Maria Rosario

Ruelas, Olivia Margarita

Ruiz, Antonia

Serrano, Jose Perez

APPENDIX C

de Arevalo, Matilde

Diaz, Esperanza

Garcia, Maria

Moreno Villacana, Amparo

Palamino, Anita

MEMBER McCARTHY, Dissenting:

I dissent from that portion of the majority opinion which attaches an interpretation to Giumarra Vineyards (Mar. 4, 1977) 3 ALRB No. 21, which was not intended by the Board when it issued its Decision in that case.

The Board's Decision in Giumarra was nothing more, or less, than a carefully considered response to various employer-respondents who had filed motions for the prehearing production of documents in the possession of the General Counsel. There is no intrinsic or extrinsic indication that the Board intended its Decision in Giumarra to apply or extend beyond that narrow issue.

The Decision itself, reasonably construed, supports such a conclusion.[1/] Moreover, our Order in Giumarra dispels ambiguity,

---

[1/] Giumarra Vineyards, supra, 3 ALRB No, 21, at footnote 5, refers to five proposals advanced in 1976 by the Chairman's Task Force of the National Labor Relations Board (NLRB). Specifically, they are Task Force Study Recommendations 31 through 35, inclusive.

(Fn. 1 cont. on p. 80.)

if any, as to the scope of the Decision as it specifies in its entirety, only that, "The General Counsel is hereby ordered to comply with the specificity and clarification requirements and also to disclose to respondents the materials as listed above." (Giumarra Vineyards, supra, 3 ALRB No. 21, slip opn. at p. 10.)

Given the broad investigative and subpoena authority of Labor Code section 1151(a), and the related enforcement mechanism of Labor Code section 1151(b), which enable the General Counsel to gather information for investigatory or adjudicatory purposes, it was not required that the Giumarra Board confront the issue of the production of documents by a respondent and I expressly decline to decide that question in this context. While the Board has the prerogative of developing rules governing the conduct of its hearings, I reject doing so in the manner which the majority has done here. I believe that changes of policy and/or procedures with broad application in unfair-labor-practice proceedings are preferably reserved to the Board's rule-making authority pursuant to Labor Code section 1144 so that adequate input may be obtained and

(fn. 1 cont.)

(Correspondingly, numbers 1 through 5, Giumarra Vineyards, slip opn. at p. 9.) (See 1976 Labor Relations Yearbook (Bureau of National Affairs) 327.) Giumarra issued on March 4, 1977. One month later, on April 12 and 15, the NLRB voted (5-0) merely to "note with approval" Recommendations 31 through 34 "on the basis that they are primarily the General Counsel's responsibility." With regard to number 35 (the extent of General Counsel's disclosure requirements in backpay proceedings, see (Giumarra, No. 5 at p. 9 of slip opn.), two members voted to note, one voted to adopt, and two voted not to consider on the grounds that it deals with a substantive matter and is not an appropriate matter for inquiry in the administrative context. (See 1977 Labor Relations Yearbook (Bureau of National Affairs) 329.)

considered from the labor bar and the public we serve with respect to such important changes.

Dated: December 17, 1982

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the San Diego Regional Office, of the Agricultural Labor Relations Board (ALRB or Board), the General Counsel of the ALRB issued a complaint alleging that we, Ukegawa Brothers, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by practicing surveillance interrogating employees, threatening reprisals against employees who supported the United Farm Workers of America, AFL-CTO, (UFW) and promising benefits to employees who rejected the UFW. In addition, the Board found that we isolated employees, discharged or laid off employees, and refused to rehire employees because of their union activities, and thereby interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Labor Code section 1152 of the Agricultural Labor Relations Act (Act). The Board has ordered us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relaitons Act is a law that gives you and all other farm workers in California these rights:

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

Because 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.

WE WILL NOT practice surveillance or interrogate employees about their union activities.

WE WILL NOT threaten employees with reprisals, or promise or grant benefits to employees, to induce them to reject the UFW or any other labor organization.

WE WILL NOT transfer or assign or isolate employees because of their union activities.

WE WILL NOT lay off, discharge, demote, or refuse to rehire any employee, or otherwise discriminate against any employee, because of his or her membership in, or activity on behalf of, the UFW or any other labor organization.

WE WILL offer immediate reinstatement to the employees named below, without loss of seniority or other privileges, and we will reimburse them for any pay, or other money, plus interest, they have lost because we unlawfully terminated their employment:

Aguirre, Jose
Armenta, Francisco
Avila Ortiz, Esteban
Carrillo Gutierrez, Francisco
Chaires, Pedro
de Jesus Perez, Jose
Estrada, Apolonio
Gonzales, Silvestre
Hernandez, Remigio
Lopez Aguilar, Luis
Lupercio Morales, Jesus
Manuel Estrella, Juan
Mejorado, Reymundo
Montoya, Elias
Moreno Garnica, Santiago
Munoz Galvan, Aurelio
Palomarez, Adolfo
Palomarez, Ernesto
Perez, Francisco
Perez, Rosalio
Ramirez Santana, Moises
Reyes, Gregorio
Rodriguez Gomez, Ildefonso
Roman, Francisca

WE WILL offer immediate employment to the following employees, and reinstate them to their former or substantially equivalent positions, without loss of seniority or other privileges, and we will reimburse them for any pay, or other money, plus interest because we unlawfully refused to rehire them.

Ansaldo Carrillo, Jesus
Flores, Efren
de Arevalo, Matilde
de Ruelas, Rosario S.
Diaz, Esperanza
Garcia, Maria
Miranda, Francisca
Moreno Villacana, Amparo
Ortiz Mure, Angel
Palamino, Anita
Ramos, Esperanza
Ruelas Rodriguez, Jose Leonidas
Ruelas Saldana, Maria Esther
Ruelas, Maria Rosario
Ruelas, Olivia Margarita
Ruiz, Antonia
Serrano, Jose Perez

WE WILL reimburse Juan Rubalcava, Elias Montoya, Francisco Carrillo, and Jose Perez Serrano for any pay, or other money, plus interest because we unlawfully demoted or transferred them.

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 1350 Front Street, San Diego, CA 92101 and another located at 319 Waterman Avenue, El Centro, CA 92243. The telephone numbers are San Diego: (714) 237-7119; El Centro: (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

Ukegawa Brothers, Inc.

8 ALRB No. 90
Case Nos. 75-CE-59-R
75-CE-59-A-R
76-CE-18-R
76-CE-18-A-R
76-CE-49-R

ALO DECISION

The ALO concluded that Respondent engaged in numerous violations of Labor Code section 1153(a). Specifically, she found that Respondent intimidated UFW organizers, denied them access, posted a guard at the entrance to one of its premises in order to discourage the taking of access, interrogated employees about their union sympathies and then either threatened them with loss of work or promised them benefits depending upon their responses to such inquiries.

The ALO also concluded that Respondent violated Labor Code section 1153(c) by assigning UFW supporters to particular crews, by isolating those crews in order to prevent the crew members from organizing other employees, by demoting or transferring two workers, by discharging a third worker, and by laying off an entire crew of workers because of their union activities. All of the foregoing violations occurred during an organizational drive by employees in the late summer and fall of 1975 but no election petition was filed.

The ALO found that in 1976 Respondent altered its established hiring procedures in order to prevent documented workers from the Tijuana-San Ysidro border communities, who were the most active of the Union supporters, from applying for reemployment in the usual manner. The ALO found that the most significant of several changes in hiring practices was the dismantling of the "raitero" system by which Respondent had in the past compensated certain workers for transporting the Tijuana "legals" to and from work. She also found that Respondent had stripped the raiteros as well as crew foremen of their former authority to hire commuter workers at the various border locations. She found that field workers were thus prevented from applying for work in the usual manner and that no new method of application was made available to them because of Respondent's discriminatory treatment of the class or group of Tijuana workers. She ruled that in such cases of class or group discrimination, General Counsel need not show, as in the usual refusal-to-rehire case, that prospective employees made proper applications for work at times when work was available, or that the employer had prior knowledge of the particular applicant's protected activity. She found that 48 Tijuana workers who were named in the complaint and who testified at the hearing were members of the class of Tijuana discriminatees and thus were all entitled to reinstatement and backpay.

Alternatively, in the event the Board failed to affirm her class-discrimination analysis, the ALO examined each of the alleged discriminatees in accordance with the standard elements of proof in refusal-to-rehire cases. Pursuant to such an analysis, she found that 34 of the alleged discriminatees had made proper applications for work at times when work was available but were denied reinstatement because of Respondent's knowledge of their prior manifestations of UFW support. She dismissed allegations as to the remaining 14 employees on the grounds that they had not made a proper application for work or had not applied for work when work was available.

BOARD DECISION

The Board rejected the ALO's findings of Labor Code section 1153(a) violations except these: surveillance and/or interrogations of employees concerning their union sympathies followed by threats of reprisals or promises of benefits as well as a supervisor's discharge of a rifle in the vicinity of union organizers who were in the process of leaving its premises. The Board affirmed the ALO's conclusions that Respondent violated Labor Code section 1153(c) by its discriminatory formation and assignment of various crews, demotion or transfer of four workers, discharge of one worker, and mass layoff of an entire crew, having found all actions to have been based on the affected employees' union activities.

The Board also rejected the ALO's class-discrimination theory which was based on her finding of a change in hiring practices. The Board concluded that only field supervisors, not crew foremen or raiteros, had ever been authorized to hire field workers and that such hirings took place in the field rather than at the various border pick-up points for the commuting workers from the Tijuana-San Ysidro area communities. Adhering therefore to the standard elements of proof, the Board found that 34 of the 48 alleged discriminatees had made proper applications for work, at times when work was available, but had been discriminatorily denied reinstatement because of their union activity. The Board issued a remedial cease-and-desist Order, with provisions for reinstating the 34 discriminatees with backpay plus interest, as well as similar provisions covering the 24 workers who were discriminatorily discharged and 4 workers who were discriminatorily transferred or demoted.

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 915 Capitol Mall, 3rd Floor, Sacramento, CA 95814.

On December 17, 1982 I served the within Decision - 8 ALRB No. 90 Ukegawa Brothers, Inc., 75-CE-59-R; 75-CE-59-A-R; 76-CE-18-R; 76-CE-18-A-R; 76-CE-49-R on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follows :

CERTIFIED MAIL

Gray, Gary, Ames & Frye
Building
Diego, CA 92101

United Farm Workers
Legal Office
Post Office Box 30
Keene, CA 93531

William N. Sauer, Jr. , Esq
Sauer 1350 Front Street
Room 2056
92101

REGULAR MAIL

Ukegawa Brothers 2100 Union Bank
4220 Skyline San
Carlsbad, CA 92008

United Farm Workers
Post Office Box 2715
San Ysidro, CA 92073

San Diego ALRB Field Office Swirsky &
Post Office Box 1185
Carlsbad, CA 92008 San Diego, CA

HAND DELIVERED

General Counsel (2)

Oxnard ALRB Regional Office 528 South "A"
Street Oxnard, CA 9303

Executed on December 17, 1982 at Sacramento, California.
I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Esther M. Torres

Esther M. Torres
Secretary to the Board

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATION BOARD

NOTICE TO EMPLOYEE

After investigating charges "that were fiied in the San Diego Regional Office of the Agricultural Labor Relations Board (ALRB or Board), the General Counsel of the ALRB issued a complaint alleging that we, Ukegawa Brothers, Inc., had violated the law. After a hearing at which each side had an opportunity to present - evidence, the Board found that we did violate the law by practicing surveillance, interrogating employees, threatening reprisal against employees who supported the United Farm Workers of America, AFL-CIO,(UFW) and promising benefits to employees who rejected the UFW. In addition, the Board found that we isolated employees, discharged or laid off employees and refused to rehire employees because of their onion activities, and thereby interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Labor Code section 1152 of the Agricultural Labor Relations Act (Act). The Board has ordered us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act_is a law that gives you and all other farm workers in California these rights:

1. TO ORGANISE YOURSELVES;
2. TO FORM, JOIN OR HELP UNIONS;
3. TO VOTE IN A SECRET BALLOT ELECTION TO DECIDE WHETHER TOO 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 WELL HOT do anything in the future that forces you to do, or stops you from doing any of the things listed above.

WE WILL NOT practice surveillance or interrogate employees about their union activities.

WE WILL NOT threaten employees with reprisals, or promise or grant benefits to employees, to induce then to reject the UFW or any other labor organization.

WE WILL NOT transfer or assign or isolate employees because of their union activities.

WE WILL SOT lay-off, discharge, denote, or refuse to rehire any employee, or otherwise discriminate against any employee, because of his or her Membership in, or activity on behalf of, the UFW or any other labor organization.

WE WTLL offer immediate reinstatement, to the employees named below, without loss of seniority or other privileges, and we will reimburse them for any pay, or other money, plus interest, they have lost because we unlawfully terminated their employment:

8 ALRB HO. 90 (eont'd next page)

SATE OF CAL1FORN.

AGRICULTURAL LABOR RELATIONS BOARD

NOTICE—TO-EMPLOYEES

---------Page 2----------

Aguim, Jose
Amenta, francisco
Avila Ortix, Estaba
Carrillo Gutierzex,
Francisco Chaires, Pedro
De Jesus Peres, Jose
Bstxada Apolonio
Gonxalea, Silvestxe
Bernandex, Reaigio
Lopes Aguilar, Luis
Luperçio Morales, Jesus
Manuel Bstrella, Juan
Mcjorado, Raymindo
Montoya Zlias
Monos Carnics, Santiago
Munos Galavan, Auretlio
Palomaris, Adolfo
Paloauurvs, Eresto,
Peres Fxaacisco
Peros, Resalio
Ramiers Santana, Moiese
Reyes, Gregorio,
Rodrigues Gomez, Idefonso
Roman, Prancisca

WE WILL offer ianediate eatployaent to the following employees and reinstate-them, to their foroer-or substantially equivalent positions, without loss of seniority or other privileges,, and we will reimburse them for any pay, or other money, plus interest because we unlawfully refused to rshire

Ansaldo Carrillo, Jesus
Flores, Efren
De Arevalo, Matilde
De Ruelas,
Rosario S.
Diax, Esperanxa
Garcia, Maria
Miranda, Francisca
Moreno Villacana, Amparo
Ortix Muro, Angel
Palaaino, Anita
Raaoe, Esperaza
Ruelas Rodrigues, Jose Leonidas
Ruelas Saldana, Maria Esther
Ruelas, Maria Resario
Ruelas, Olivia Margarita
Ruiz, Antonia
Serrano, Jose Percx

WE WILL reiatourse Juan Robelcava, Slias Moatcya, Francisco Carrillo, and Jose Perez Serrano for any pay, or other money, plus interest because we unlavfolly demoted or transferred them.

If you have a question about your rights as fan workers or about this notice, you Bay contact any office of the Agricultural Labor Relations Board. One office is located at 1350 front Street, San Diego,CA 92101 and another located at 319 Waterman Avenue, El Centre, CA 92243. The telephone atmbers are: San Diego: (619) 237-7119. El Centxo:(619) 353-2130.

UKGAWA BROTHERS, INC.

DATED:_____ BY:_____

8 ALRB Ho. 90

THIS IS AN OWC1AL NOTJC5 OF THE AGRICULTURAL LABOR RELATIONS BOARD OF THE BOARD Of THE STATS OF CALIFORNIA AND IS NOT TO BE REMOVED DESINED.

ESTADO DE CALIFORNIA

CONSEJO DE RE1ACIONES DEL TRABAJO AGRICOLA

AVISO A LOS TRABAJADORES

Daapuea da investigar cargo que fueroa preaentadoa en la Oficiana Ragional da San diego del Consejo de Relaciones dal Trabajo Agricola (ALRB or Conaejo), el Fiacal General dal ALRB emitio una queja alagada que nosotras, Ukegawa Brothers, Inc., hemos violado la ley. Despuses da una audiancia and donda cada parts twala opor-tunidad da presentar eyidencia, enconaejo que Deasoatro vilolence in la lay por ejtereget trabenjodras, aseazer con represenlies an contra de trabajadores quienen apoyaron a la Union de Compesinos de America, AFT-CIO,(UFW), y prosentsdo benificious a trabajadores quiences rechararon a la UFW... In adieion, el Consejo quo nosotros asislanod a trabajadpres despedimcs o rembajoas, a reemplear a trambajodores por sus actividence da union, y con io cual ienterferimos con, restrigiendo y coerciendo a trabajadores en el ejercicio de loa derachoas garantizados a allos dos ha Codigo Labori section 1152 de el (Acts)El Consenjo KM ha ordenado de publicar y ponar an aitio visible eate Ariso. Hosotros hareamos lo que el Consenjo nos ha ordinardo._ Hostros trmbion queramos

El Acta de Ralaciones dal Trabajo Agricola es una les da a ustes y a todos los trabejodores del carpo en California estos derechos:

1. A ORANISERS FOR USTEDES MISAMOS
2. A FORMAR, UNIRES, 0 A AYUDAR UNIONS;
3. A VOTAR EN UNA ELSCCION DE BALOTA SECRETA PARA DECIDIR SI USTEDES QUIEREI UHA PARA QUE LOSS REPRESENTE;
4. A TRAYAR CON SD PARRON ACERCA DE SUS Y CONDITIONS DE TRABAJO POR MEDIO DE UNA UNION ESCOGEDA POR MAYORIA IS LOS TRABAJADORES Y CERTIFICADA POR EL CONSEJO;
5. A ACTUAR JUNTO CON OTROS TRA&AJAOORBS PARA AYUDARSE Y PROtEGERESE LOS UNIS A LOS OTROS;
6. A DECIDIR NO HACER HINGULA DE ESTAS COSAS.

Porque esto es verded, nosotros prometeos que:

NOSTROS NO harmos nada en el futuro qoe los feurezes hacer, o les prohiba hacer cealesquiera da las cosas Bencinadas arriba.

NOSTROS DO enjercermos vigilancia o interogaramos a trabajadores acerca de sos actividades de union.

NOSTROS NO amenazaremoa a trabajadores con represalias, o prometeremos o daremoa beneficios a trabajadores, para inducirolos a rechazar a la 0FW o cualguiar otra organizacion loboral.

NOSTROS NO transforiramos o asignarados o aislaremos a traba-jadores por sus actividades de union.

NOSTROS NO rebajaremos, despedireimos, rebajaremos de categeria, o rehusaremos a remplear a cualquier trabajador, o de otra manera discriminaremos en contra de cualquier trabajdor, por su sociedad ea, o actividad en o activated, favor da la UFW o cualquier organizacion laboral.

ESTO ES UN AVISO OFICIAL DE CONSEJO DE RELATIONS DEL TABA

ESTADO DE CALIFORNIA

CONSEJO DE REIACIONES DEL TRABAJO AOfllCOLA

AVISO A LOS TRABAJADORES

----------Page 2----------

MOSOTROS ofrencerémos inadlata reinstalacion a los trabajadores Bencionados abajo, sin perdida de seniridad u otros privilegios y nosotroa remmoboisaremos a ellos por cualquier pago, a otro dinero, was intereres, que allos hayan perdido porque nocodros los deapedimos illegamente de sus trabajos.

Aguirre, Jose
Armenta, Francisco,
Avila Ortix, Estaban
Carrillo Gutierses,Franciso
Cheries, Pedro
de Jesus perez Jos
Estrada, Apolonio
Gonzales, Silvestra
Hornadez, Ramigio
Lopez Agullar, Luis
Luperciò Morales, jejus
Manuel Estralla, Juan
Mejorado, Ramindo
Nontoya, Elias
Moreno Garnica, Santiago
Munos Galvan, Aorelio
Paloares, Adolfo
Paloares, Ernesto
Peres, francisco
Peres, Rosalio
Remires, Santana, Moises
Reyes, Gregorio
Rodrigues Gomes, Ildefonso
Roman, Francisco

NOSTROS ofracermaos trabajo inediato a los siguietas trabajadores, y los reinatalaremos a sus antiguos o substancialmente a un trabajo equivalente, sin perdida de senioridad a otros privilegios, y nosotros les reemolsaremos por cualquier pago, u otros dinero, nas interes porque nostros rehusamos a reemplearlos ilegalmente.

Anaaldo Carrillo, Jesus
Frores, Efren
de Arevalo, Matilde
Je Rnelas, Rosario S.
Diaz, Esperanza
Garcia, Maria
Miranda, Francisca
Moreao Villacana, Amparo
Ortiz Muro, Angel
Palamino, Anita
Ramos, Esperansa
Rulelas Rodriguez, Jose Leonidas
Rulelas Saldana, Maria Esther
Rulelas Maria Rosario
Rulelas, Olivia Margarita
Ruiz, Antonia
Sarrano, Jose

NOSOTROS rembolsaremos a Juan Rubalcava, Elias Montoya, Francisco Carrillo y Joae Perez Serrano por cualquier pago, u otro dinero, mas interes, porque nosotrpmos de categoria o los transferimos ilegalments.

Si ustades tienen alguna pregunta acefa de sus trabajoderos del compo o acerca de eata Aviso, ustedea pueden ponerse en contacto con cualquier oficina del Cosejo de Relaciones del Trabajo Agricola. Una oficina esta en 1350 Front Street, San Diego, CA 92101 y la otra esta en 319 Westernan Avenue, El centro CA 92243. El numero de telefono en San Diego es: (619) 237-7119 y en El Centro es: (619) 353-2130.

UKEGAWA BROTHERS, INC.

DATE: BY:

8 ALRB No.90

ESTO ES UN AVISO OFICIAL DE CONSEJO DE RELACIONES DEL TRABAJO AGRICOLA DEL E5TAOO DE CALFORRNIA Y NO DE PUEOE QUITAA. ESTROPEAR O DEFORMAR EN NINGUNA MANERA.

Exhibit "B"

DATE: 08-11-87 MICHAEL SGOBBA, MARSHAL

LC03-D05

STIRLING/DAVE,GENERAL COUNSEL
319 WATERMAN AVE
EL CENTRO CA 92243

VISTA
325 S. MELROSE
VISTA, CA 92083
DEPARTMENT OF THE MARSHAL
COUNTY OF SAN DIEGO
ARING DATE: 08-25-87 CERTIFICATE OF SERVICE

URT: NORTH COUNTY SMALL CLAIMS-VISTA CASE NO. 37765

RI .TURAL LABOR RELATIONS VS UKEGAWA/HIROSHI, ET AL
PLAINTIFF DEFENDANT

I, THE UNDERSIGNED, MARSHAL OF THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA
DO HEREBY CERTIFY THAT A. ALBRIGHT
DID SERVE THE BELOW LISTED PROCESS

DER TO SHOW CAUSE
PLICATION FOR JUDGMENT AND ORDER OF ENFORCEMENT
CLARATION OF STEPHANIE BULLOCK
CLARATION OF RICHARD DELGADO
CLARATION OF ENRIQUE GASTELUM
CLARATION OF HOMER T BALL, JR
IORANDUM OF POINTS AND AUTHORITIES

Y DELIVERY AT: (BUS) PALOMAR AIRPORT RD/OCEANSIDE/CA

N: 08-04-87 AT: 19:30 , IN THE COUNTY OF SAN DIEGO, STATE OF
ALIFORNIA, ON THE WITHIN NAMED INDIVIDUAL OR ENTITY:
IROSHI UKEGAWA

Y DELIVERING TO AND LEAVING WITH
AI DEFENDANT/PETITIONER/RESPONDENT PERSONALLY, A COPY THEREOF.

1.

Exhibit "C"

FILED
NORTH COUNTY BRANCH

AUG 19 1987

ROBERT D. ZUMWALT
CLERK

LC03-D05

STIRLING/DAVE,GENERAL COUNSEL
319 WATERMAN AVE
EL CENTRO CA 92243

VISTA
325 S. MELROSE
VISTA, CA 92083
DEPARTMENT OF THE MARSHAL
COUNTY OF SAN DIEGO
CERTIFICATE OF SERVICE

RING DATE: 08-25-87

RT NORTH COUNTY SMALL CLAIMS-VISTA CASE NO. 37765

ICULTURAL LABOR RELATIONS VS UKEGAWA/HIROSHI, ET AL
PLAINTIFF DEFENDANT

I, THE UNDERSIGNED, MARSHAL OF THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA
O HEREBY CERTIFY THAT J. JIMENEZ
ID SERVE THE BELOW LISTED PROCESS

ER TO SHOW CAUSE
LICATION FOR JUDGMENT AND ORDER OF ENFORCEMENT
LARATION OF STEPHANIE BULLOCK
LARATION OF RICHARD DELGADO
LARATION OF ENRIQUE GASTELUM
LARATION OF HOMER T BALL, JR.
ORANDUM OF POINTS AND AUTHORITIES

Y DELIVERY AT: (RES) 1535 LAUREL RD/OCEANSIDE/CA/

: 08-05-87 AT: 13:00 , IN THE COUNTY OF SAN DIEGO, STATE OF
ALIFORNIA, ON THE WITHIN NAMED INDIVIDUAL OR ENTITY:
INE UKEGAWA

L IVERING TO AND LEAVING WITH
ID DEFENDANT/PETITIONER/RESPONDENT PERSONALLY, A COPY THEREOF.

Exhibit "D"

MIC: 08-11-87 MICHAEL SGOBBA, MARSHAL

C03-D05

FILED
NORTH COUNTY BRANCH
AUG 14 1987
ROBERT D. ZUMWALT
CLERK

STIRLING/DAVE,GENERAL COUNSEL
319 WATERMAN AVE
EL CENTRO CA 92243

VISTA
325 S. MELROSE
VISTA, CA 92083
DEPARTMENT OF THE MARSHAL
COUNTY OF SAN DIEGO
ING DATE: 08-25-87 CERTIFICATE OF SERVICE

:T: NORTH COUNTY SMALL CLAIMS-VISTA CASE NO. 37765 0

CUI TURAL LABOR RELATIONS VS UKEGAWA/HIROSHI, ET AL
PLAINTIFF DEFENDANT

I, THE UNDERSIGNED, MARSHAL OF THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA,
HEREBY CERTIFY THAT T. ELLISON
D SERVE THE BELOW LISTED PROCESS

R TO SHOW CAUSE
ICATION FOR JUDGMENT AND ORDER OF ENFORCEMENT
ARATION OF STEPHANIE BULLOCK
ARATION OF RICHARD DELGADO
ARATION OF ENRIQUE GASTELUM
ARATION OF HOMER T BALL, JR
RANDUM OF POINTS AND AUTHORITIES

DELIVERY AT: (RES) 4218 SKYLINE RD/CARLSBAD/CA/92008

: 08-03-87 AT: 14:48 , IN THE COUNTY OF SAN DIEGO, STATE OF
LIFORNIA, ON THE WITHIN NAMED INDIVIDUAL OR ENTITY:
JAKO UKEGAWA

DELIVERING TO AND LEAVING WITH
D DEFENDANT/PETITIONER/RESPONDENT PERSONALLY, A COPY THEREOF.

WILLIAM N. SAUER, JR.
Attorney at Law
2910 Jefferson Street, Suite 200
Post Office Box 1185
Carlsbad, California 92008
Telephone: (619) 729-1197

Attorney for respondents, HIROSHI UKEGAWA/ MIWAKO UKEGAWA JOSEPH UKEGAWA, AND JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a general partnership; and UKEGAWA BROTHERS, INC., a corporation.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In The Matter Of: HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a general partnership; and UKEGAWA BROTHERS, INC., a corporation, Respondents and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	Case Nos. 75-CE-59-R 75-CE-59-A-R 76-CE-18-R 76-CE-18-A-R 76-CE-49-R (8 ALRB No. 90) RESPONDENTS REPLY TO GENERAL COUNSEL'S POINTS AND AUTHORITIES; DECLARATION OF WILLIAM N. SAUER, JR., IN SUPPORT OF RESPONDENTS MOTION TO STRIKE

In response to the opposition of general counsel, respondents/ HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA and JUNE UKEGAWA, respectfully represent:

1. The only order that has ever been made in this case is against UKEGAWA BROTHERS, INC., a California corporation. No one else was mentioned in the Board's Order dated December 17, 1982. The fact that this is bifurcated court proceeding in and of itself does not allow general counsel to change captions whenever they feel

the need arises. This is a single proceeding wherein there has been an adjudication against UKEGAWA BROTHERS, INC., only. There is no other order at this point concerning the individuals. A motion to strike is extremely appropriate under the circumstances.

2. Equitable grounds do exist to prohibit general counsel from naming the four individuals. General counsel has raised the point that enforcement proceedings were commenced in Superior Court against the individuals and that they were served with these enforcement proceedings. The respondents point out that this did not occur until July 31, 1987. It should be pointed out to the Board that the respondents immediately filed Points and Authorities and Declarations herein in that Superior Court action. A copy of these Points and Authorities is attached hereto, marked Exhibit "A" and incorporated by reference.

3. As soon as respondents filed their proceeding, general counsel immediately withdrew its enforcement proceedings and took them off calendar. The reason they did so is because the Board's Order only named the corporation. There should be no difference in these proceedings.

4. None of the individuals were ever served with the Board's Order. None of them had any opportunity to reinstate workers or to cause them to be reinstated if indeed they could. Now they are being asked to respond to over two million dollars in damages for failure to reinstate. That alone is equitable reason enough to prohibit general counsel from proceeding against them at this time.

WHEREFORE, Respondents, HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH

UKEGAWA and JUNE UKEGAWA, request that the Motion to Strike be Granted.

Dated: 6.8.88

WILLIAM M. SAUER, JR
Attorney for respondents

WILLIAM N. SAUER, JR.
Attorney at Law
2910 Jefferson Street Post
Office Box 1185
Carlsbad, California 92008

Telephone: (619) 729-1197
Specially appearing as
Attorney for Respondents

SUPERIOR COURT Of THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

In The Matter Of: AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, Applicant ORDER OF ENFORCEMENT and HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a Partnership Respondents	CASE NO. N 37765 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION FOR JUDGMENT AND Date: August 25, 1987 Time: 2:00 p.m. Department: D

I

THE SUPERIOR COURT DOES NOT HAVE JURISDICTION OVER THESE RESPONDENTS TO ENFORCE THE ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD WHICH RELATES TO UKEGAWA BROTHERS, INC., WHO IS NOT A PARTY TO THIS ACTION. As pointed out in the applicant's Points and Authorities, this Court has jurisdiction to enforce the order of the Agricultural Labor Relations Board in this case. The Order of the Agricultural Labor Relations Board is clearly directed to Ukegawa Brothers, Inc. Alll of the correspondence was directed to Ukegawa Brothers, Inc.

There is simply no evidence that there was an order directing these individuals to comply or that the respondent's ever refused to comply with such an order. The individuals have never had notice or an opportunity to be heard in the original action before the Agricultural Labor Relations Board. All of the proceedings involve the corporation.

II

IN A PROCEEDING TO ENFORCE THE ORDER OF AN AGRICULTURAL LABOR RELATIONS BOARD, THE DEFENDING PARTY MAY RAISE DUE PROCESS ISSUES SUCH AS NOTICE, OPPORTUNITIES TO BE HEARD, AND THE LIKE.

Agricultural Labor Relations Board vs. Abatti Produce, Inc.
(1985) 214 Cal. Rptr. 243, 168 CA 3rd 504.

III

A corporation as a legal person or entity recognizes having an existence separate from that of its shareholders.

Erkenbrecher vs. Grant (1921) 187 C. 7, 9, 200 P. 641.
Hollywood Cleaning Etc. Company vs. Hollywood Laundry Service, (1932) 217 C. 124, 129, 17 P. 2d . 709

A corporation is a person within the meaning of the due process and equal protection clauses of the Federal Constitution and similar provisions of the California Constitution and within the meaning of Code provisions (See CC 14; Penal Code, Section 7).

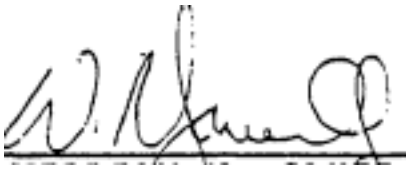
CONCLUSION

Based on this Points and Authorities and the Declarations of Hiroshi Ukegawa, Miwako Ukegawa, Joseph Ukegawa, and June Ukegawa, it is obvious that the Agricultural Labor Relations Board made an Order only against Ukegawa Brothers, Inc. It now seeks to enforce that order against Hiroshi Ukegawa, Miwako Ukegawa, Joseph Ukegawa, and June Ukegawa and Ukegawa Brothers, a Partnership. It is

respectfully submitted that this Court lacks jurisdiction to make any of the requested Orders against those individuals. It is respectfully requested that the Court find that it is without jurisdiction over these parties and based on that finding, deny the request for relief.

Dated: August 15, 1987

Respectfully submitted,



WILLIAM N. SAUES, JR.
Attorney for Respondents

WILLIAM N, SAUER, JR.
Attorney at Law
2910 Jefferson Street/ Suite 200
Post Office Box 1185
Carlsbad, California 92008
Telephone: (619) 729-1197

Attorney for respondents, HIROSHI UKEGAWA, MIWAKO UKEGAWA JOSEPH UKEGAWA, AND JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a general partnership; and UKEGAWA BROTHERS, INC., a corporation.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In The Matter Of-:	Case Nos. 75-CE-59-R 75-CE-59-A-R 76-CE-18-R 76-CE-18-A-R 76-CE-49-R (8 ALRB No. 90)
HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a general partnership; and UKEGAWA BROTHERS, INC., a corporation, Respondents and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	DECLARATION OF WILLIAM N. SAUER, JR.

I, WILLIAM N. SAUER, JR., declare as follows:

1. I am an attorney at law, licensed to practice in the State of California. I represent HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA and JUNE UKEGAWA, UKEGAWA BROTHERS, a general partnership and UKEGAWA BROTHERS, INC., a corporation.

2. The Board issued its decision and order in 8 ALRB No. 90, on December 17, 1982, against UKEGAWA BROTHERS, INC., only.

3. No one has represented the respondents individually during

these proceedings .

4. All of the documentation in the proceedings have been directed at UKEGAWA BROTHERS, INC.

5. On August 17, 1987, I filed a response on behalf of the four individuals to the enforcement proceedings in the San Diego County Superior Court, North County Branch, Case No. N 37765.

6. Shortly after filing the response, which is attached hereto, marked Exhibit "A" and incorporated by reference, Stephanie Bullock telephoned me and told me that since the Board's Order was against the corporation only, they were taking the matter off calendar.

7. To my knowledge, that is the only time the individual respondents have been served with any notices in connection with this matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this 8 day of June, 1988, at Carlsbad, California.

WILLIAM N. SAUER, JR.

WILLIAM N. SAUER, JR.

Attorney at Law
2910 Jefferson Street
Post Office Box 1185
Carlsbad, California 92008

Telephone: (61-9) 729-1197

Specially appearing as
Attorney for Respondents

SUPERIOR COURT Of THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

In The Matter Of: AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, Applicant and [Labor Code, Section 1160.8] HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a Partnership Respondents	CASE NO. N 37765 ANSWER OF HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA TO APPLICATION FOR JUDGMENT AND ORDER OF ENFORCEMENT (8 ALRB NO. 90) Date: August 25, 1987 Time: 2:00 p.m. Department: D

Respondents, HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a Partnership, respond to the application for judgment and order of enforcement of a final order of the Board as follows:

1. In answer to the allegation of paragraph 1. of the application, respondents admit each and every allegation contained therein.

2. In answer to the allegation of paragraph 2. of the application, respondents deny that this Court has jurisdiction of these respondents either individually or doing business as UKEGAWA

BROTHERS, a Partnership by virtue of Section 1160.8 of the Act.

3. In answer to the allegation of paragraph 3., respondents deny that they were at all times material herein, the agricultural employer within the meaning of Section 1140.4(c) of the Act.

4. In answer to the allegation of paragraph 4., respondents deny that they maintain an office and transact business in the City of Carlsbad, County of San Diego.

4. In answer to the allegation of paragraph 5., respondents admits that the United Farm Workers of America is and at all times material herein was a labor organization within the meaning of Section 1140.4(f) of the Act.

5. In answer to the allegation of paragraph 6., these answering respondents deny that complaint was ever issued against them individually or doing business as a partnership.

6. In answer to the allegation of paragraph 7., these answering respondents deny that notice was ever timely issued or served prior to any administrative hearing.

7. In answer to the allegation of paragraph 8., respondents deny that the Agricultural Labor Relations Board ever issued its decision 20 or order involving these answering respondents. Respondents affirmatively allege that a decision or order was issued against Ukegawa Brothers, Inc., a California corporation. Respondents refer to page 70 of Exhibit A of petitioner's application wherein the Board orders that respondent, Ukegawa Brothers, Inc., its officers, agents, successors and assigns, shall do certain things.

8. In answer to the allegation of paragraph 9., respondents deny that a petition for review is filed by Ukegawa Brothers, a partnership, and affirmatively allege that a petition for review was

filed by Ukegawa Brothers, Inc., with the California Court of Appeal, Fourth Appellate District.

9. In answer to the allegation of paragraph 10., respondents deny that a petition for hearing was thereafter filed by Ukegawa Brothers, a partnership with the California Supreme Court and affirmatively ‘allege that a petition for hearing was thereafter filed by Ukegawa Brothers, Inc., a California corporation, with the California Supreme Court.

10. In answer to the allegation of paragraph 11., these answering respondents deny that the aforesaid order of the Board was issued pursuant to procedures established by the Board in connection with these answering respondents.

11. In answer to the allegation of paragraph 12., these answering respondents deny that the aforesaid order of the Board constitutes a final order within the meaning of Section 1160.8 of the Act in connection with these answering respondents.

12. In answer to the allegation of paragraph 13., respondents deny that the aforesaid order of the Board requires these answering respondents to take certain affirmative actions. These answering respondents affirmatively allege that the Board order directs Ukegawa Brothers, Inc., a California corporation to take certain affirmative actions. The respondents affirmatively allege in addition, that all correspondence in connection with this matter has been directed to Ukegawa Brothers, Inc., a California corporation and no correspondence has been directed to these individual respondents. Respondent requests that the Court note that all correspondence in connection with this matter has been directed to Ukegawa Brothers, Inc." Please refer to the declaration of Richard

Delgado in support of the application for judgment and order of enforcement and the attached exhibits which are all directed to Ukegawa Brothers, Inc.

WHEREFORE, respondents pray as follows:

1. That this Court refuse to issue a Judgment and Order of Enforcement against these answering respondents;

2. That after hearing on said Order to Show Cause, this Court refuse and decline to enter Judgment in favor of applicant and against these answering respondents;

3. For costs of suit herein;

4. For such other and further relief as this Court deems proper.

Dated: August 15, 1987

WILLIAM N. JSAUER, JR.
Attorney for Respondents

VERIFICATION

I, HIROSHI UKEGAWA, say:

I am one of the respondents in the above-entitled matter, and as such as authorized to make this verification. I have read the foregoing Answer of Hiroshi Ukegawa, Miwako • Ukegawa , Joseph Ukegawa, and June Ukegawa to application for Judgment and Order of Enforcement, and know its contents. The matters tated in the foregoing document are true of my own knowledge, except as to those matters which are stated on information believe and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed this 15 day of Aug, 1987, at Aug, California.

HIROSHI UKEGAWA

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	FOR COURT USE ONLY
TLE OF CASE (Abbreviated) F oshi Ukegawa, etal vs. United Farm Workers of American, AFL-CIO	
TORNEY(S) NAME AND ADDRESS illiam N. Sauer, Jr. 910 Jefferson Street, Suite 200, PO Box 1185 arlsbad, California 92008	TELEPHONE 619-729-1197
TORNEY(S) FOR: espondents	HEARING DATE-TIME-DEPT
CASE NUMBER 75-CE-59-R; 75-CE-59-A-R; 76-CE-18-R 76-CE-A-R; 76-CE-49-R; 8 ALRB No. 90	

DECLARATION OF SERVICE BY MAIL

I, Julie M. Nolan declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am

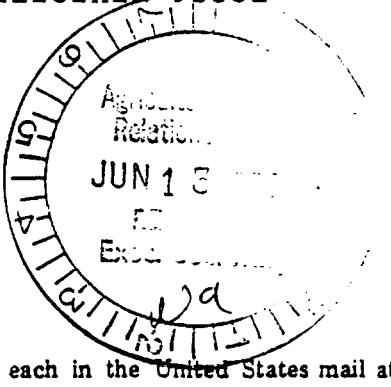
employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred. My business (Residence/Business) address is 2910 Jefferson Street, Suite 200, Carlsbad, (No., Street) (City, State). I served the following document(s) Respondents Reply to General Counsel's Points and Authorities; (set forth exact title of documents(s)) Declaration of William N. Sauer, Jr., in Support of Respondents Motion to Strike

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Executive SEcretary (5)
Agricultural Labor Relations Board
915 Capital Mall, Third Floor
Sacramento, California 95814

United Farm Workers of America (1)
AFL-CIO, Legal Department
Post Office Box 30
Keene, California 93531

Mr. David Stirling, General Counsel (1)
Ms. Stephanie Bullock, Assistant General Counsel
Agricultural Labor Relations Board
El Centro Regional Office
319 Waterman AVenue
El Centro, California 92243



I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at Carlsbad California, on June 8 19 88.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 8, 19 88

Julie M. Nolan
(Signature)

PROOF OF SERVICE BY MAIL