STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, Respondent, and GUILLERMO VIRGEN, GERARDO MENDOZA, and All Others Similarly Situated, Charging Parties.	)	Case Nos. 04-CL-1-VI (OX) 04-CL-1-1-VI (OX) 05-CL-2-VI (OX) 33 ALRB No. 2 (February 16, 2007)

DECISION AND ORDER

Background

On November 7, 2006, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above-referenced case, in which he found that United Farm Workers of America (Respondent) violated section 1154, subdivision (a)(1) of the Agricultural Labor Relations Act (ALRA or Act) by failing to give adequate information in the notices required by, and to follow the objections procedures set forth in *Breaux v. Agricultural Labor Rel. Bd.* (1990) 217 Cal.App.3d 730 before a union security clause is

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applied to employees subject to the Act.[1] The ALJ found that Respondent violated section 1154(a)(1) because of deficiencies in the information distributed to the workforce employed by Pictsweet Mushroom Farms - Ventura until December 6, 2004, and thereafter by The California Mushroom Farm, Inc. and by failing to promptly process objections that were made by employees, escrow disputed amounts, and to refund the part of the dues paid by the objectors not expended on direct representation of the bargaining unit. The ALJ also found that Respondent requested the discharge of employees who had not paid union dues during the term of the contract without following the *Breaux* requirements in violation of section 1154(b).

The ALJ dismissed the remaining allegations in the Second Consolidated Complaint including finding the manner of delivery and the format of the *Breaux* notices were sufficient under standards set forth by the National Labor Relations Board (NLRB) in its decision in *California Saw & Knife* (1995) 320 NLRB 224.

General Counsel timely filed one exception arguing that the ALJ's conclusion that Respondent's manner and means of serving the *Breaux* notice on employees was sufficient to bring the notice to their attention under the *California Saw & Knife* standard. The Charging Parties and Respondent timely filed replies to the General Counsel's exception.

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[1] The rights to be informed, to object, and in objecting, not be obligated to pay nonrepresentational dues were spelled out in *Chicago Teachers Assn. v. Hudson* (1986) 475 U.S. 292 and *Breaux v. Agricultural Labor Rel. Bd.* (1990) 217 Cal.App.3d 730. The complex of rights and union duties will be referred to herein as *Breaux* in the ALRB context and as *Hudson* in the Federal context.

Respondent hand delivered its *Breaux* notice to employees. The notice was covered by a letter from the union discussing its initiatives in the preceding months. The letter did not refer to the attached notice and employees were not orally advised to read the notice packet. Respondent testified that approximately 10 percent of the employees asked questions about the packet. The General Counsel's exception argues that the notice should have been mailed rather than hand delivered. It further argues that the notice should have been more visible.

Charging Parties' reply brief contends *Breaux* holds that the notice is constitutionally required, therefore the ALJ applied a lower and invalid standard in finding that the notice was adequate in service and format based on the statutory duty of fair representation standard utilized in *California Saw & Knife*.

Respondent's reply brief argues that the ALJ correctly applied the NLRB's standard stated in *California Saw & Knife*: if the notice's format is such that a "reasonable perusal" would disclose that it was about *Hudson/Breaux* rights, it is sufficient. Respondent contends that because the cover letter was only two pages and the *Breaux* notice was clearly titled "Your Rights and Obligations Under Union Security" in underlined bold type and was the dominant item in the package, it was therefore "well marked" and that a reasonable perusal would have disclosed the presence of the notice. Respondent also argues that in California's migrant agricultural workforce, Respondent's experience is that the best way to give notice is by hand delivery, and that extensive staff training and use of hand delivery of *Breaux* notices was uniformly implemented statewide and monitored for compliance.

Analysis and Discussion

In addressing the adequacy of the manner in which Respondent distributed its *Hudson/Breaux* notice, we are bound to apply the standard enunciated in *Breaux*, a decision of the California Court of Appeal. In *Breaux*, the court grounded its statutory analysis in the union security language of section 1153, subdivision (c), construing the requirement of "reasonable terms and conditions" of membership to include the various principles set forth in the seminal decisions of the United States Supreme Court regarding agency fees.[2] As a result, under the ALRA, a union's "agency" or "fair share" fee procedures are "reasonable" if they comport with the principles of those seminal decisions.

In contrast, the NLRB in *California Saw & Knife* evaluated the adequacy of the notice in that case under the traditional standard pertaining to a union's duty of fair representation, i.e., whether the union's conduct was "arbitrary, discriminatory, or in bad faith." This approach was taken, no doubt, because the seminal case involving the National Labor Relations Act (NLRA), *Communication Workers of America v. Beck*

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[2] Contrary to the Charging Parties' argument that *Breaux* holds that the notice is constitutionally required, the *Breaux* court held that: "Mindful of the general rule that a court will not reach constitutional questions unless required to do so to dispose of the matter before it (*Cumero v. Public Employment Relations Bd.*, *supra*, 49 Cal.3d 575, 566; *People v. Williams* (1976) 16 Cal.3d 663, 667; *People v. Buckley* (1986) 183 Cal.App.3d 489, 495), we shall next consider whether the approved settlement agreement would be valid, in challenged respects, under the Act itself," (*Breaux*, *supra*, 217 Cal.App.3d at 745) and "[b]ecause we conclude the approved settlement agreement does not meet *statutory* standards, we need not reach the question whether it would satisfy *constitutional* standards. (Cf. *Cumero v Public Employment Relations Bd.*, *supra*, 49 Cal.3d 575, 586; *Ellis v. Railway Clerks*, *supra*, 466 U.S. 435, 444-445.)" (*Breaux, supra,* 217 Cal.App.3d at 758; emphases in original.)

(1988) 487 U.S. 735, grounded its analysis in the duty of fair representation. It is at least arguable that the NLRB applied a more relaxed standard than required for the ALRA under *Breaux*. For that reason, we do not view *California Saw & Knife* as controlling authority.

Therefore, the test of the adequacy of the distribution and form of the notice is whether the method used to distribute it was "reasonably calculated" to inform employees of their rights under *Breaux*. We find that attaching the notice in an undifferentiated manner to an unrelated letter making no mention of the notice was not reasonable. We believe there was an unacceptable likelihood that the recipients would not be alerted that the packet contained the notice. We do not suggest that there is only one acceptable manner in which the notice may be distributed. Nor do we find that hand delivery itself suffers any infirmity; indeed, in the farm labor setting hand delivery often is more effective than mailing in ensuring receipt. Rather, we hold only that where the notice is attached in an undifferentiated manner to a cover document, the face of the package must alert the reader, in a prominent manner in all appropriate languages, that the notice is attached.

We therefore reverse the ALJ on this issue and find that Respondent violated the Act by attaching its *Breaux* notice in an undifferentiated manner, in a packet covered by an unrelated letter.[3]

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[3] In this decision we address only the findings and conclusions as to which the exception was filed. The remaining findings and conclusions of the ALJ constitute the law of the case and may not be cited as precedent in future cases.

ORDER

Pursuant to Labor Code section 1160.3, Respondent, United Farm Workers of America, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing to notify unit employees, when it first seeks to obligate them to pay fees or dues under a union security clause, of their right to remain financial core members; and of the rights of financial core members under *Breaux v. ALRB* (1990) 217 Cal.App.3d 730, to object to paying for union activities not germane to Respondent's duties as bargaining agent, and to obtain a reduction in fees for such activities.

(b) Failing to give potential objectors an adequate explanation for the fee.

(c) Collecting or attempting to collect dues or fees from objecting financial core members that are attributable to nonrepresentational expenses.

(d) Failing to process the objections made by unit employees.

(e) Informing employees that they are not entitled to a reduction in fees, if they choose to object to paying for nonrepresentational expenses.

(f) Seeking the discharge of employees for failing to pay dues or fees, prior to giving them proper notice of their rights and obligations with respect to such assessments.

(g) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Notify all unit employees, and all former employees of Pictsweet Mushroom Farms – Ventura (Pictsweet) or The California Mushroom Farm, Inc. (CMF) who were employed on or after September 23, 2003, except those who did not make payments under the union security/checkoff clauses, in writing, of their right to be or remain financial core members; and of the rights of financial core members under *Breaux v. ALRB*, *supra*, to object to paying for union activities not germane to Respondent's duties as bargaining agent, and to obtain a reduction in fees for such activities. A copy of the attached Notice to Agricultural Employees shall be enclosed with the *Breaux* notice.

(b) Provide all potential objectors with an adequate explanation for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and to have an escrow established for the amounts reasonably in dispute while such challenges are pending.

(c) For all employees of Pictsweet who paid dues or fees, commencing September 23, 2003, as nonmembers or under protest, refund the portion of their dues or fees, proportionate to Respondent's nonrepresentational expenses for those accounting periods, as determined by Respondent, if no challenges to Respondent's calculations are filed, or by the objections/challenge procedure. The refund shall also include interest to be determined in the manner set forth in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(d) For all employees of Pictsweet and CMF who, with reasonable promptness after receiving the notices prescribed in paragraph 2(a), elect to file *Breaux* objections, process the objections, as well as any challenges to Respondent's chargeability contentions, as required by law.

(e) Upon completion of the objections/challenge procedure, for the period commencing September 23, 2003, refund that portion of the objectors' dues or fees, proportionate to Respondent's nonrepresentational expenses, plus interest.

(f) In order to facilitate the calculation of the refunds due under this Order, for the period commencing September 23, 2003, preserve and, upon request of the Visalia Regional Director, make available to the Board or its agents, for examination and copying, all records, including records showing the receipt of dues or fees from the employees affected herein, or by way of dues or fees checkoff authorizations. Upon the request of the Regional Director, records shall be provided in electronic form if customarily retained in that form.

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

(h) Post copies of the attached Notice, in all appropriate languages, in conspicuous places at Respondent's business offices, meeting halls, and bulletin boards provided to Respondent by CMF, for 60 days, such places to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered,

defaced, covered or removed. Pursuant to Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of the Notices.

(i) Arrange for a representative of Respondent or Board agents to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the CMF bargaining unit, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agents shall be given the opportunity, outside the presence of Respondent's representatives, to answer any questions the employees may have concerning the Notice and their rights under the Act. Should any employee lose wages from CMF for time lost during the reading of the Notice and the question-and-answer period, Respondent shall reimburse such losses. The Regional Director shall determine a reasonable rate of compensation to be paid to all non-hourly employees.

(j) Mail copies of the attached Notice, in all appropriate languages, within 30 days after this Order becomes final, or when directed by the Regional Director, to all employees of Pictsweet who paid dues or fees commencing September 23, 2003, and to all CMF employees for whom Respondent sought dues or fee payments.

(k) Provide a copy of the Notice to each agricultural employee hired to work for CMF during the twelve-month period following the date this Order becomes final.

(l) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically thereafter in writing of further actions to comply with the terms of the Order.

Dated: February 16, 2007

IRENE RAYMUNDO, Chair

GENEVIEVE SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a Complaint alleging that we had violated the law. After a hearing at which all parties had the opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act by failing to advise bargaining unit employees of their right to object to their dues or fees being used for nonrepresentational purposes, by collecting full dues and fees from objecting employees, and by seeking the discharge of employees who did not pay dues or fees prior to receiving proper notice of their right to object to paying for our nonrepresentational activities.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act (Act) is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join or help a labor organization or collective bargaining representative;
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 ALRB;
5. To act with other workers to protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT fail to notify unit employees, when we first seek to obligate them to pay dues or fees under a union security clause, of their right to be and remain financial core members under *Breaux v. ALRB* (1990) 217 Cal.App.3d 730, to object to paying for union activities not germane to our duties as bargaining agent, and to obtain a reduction in fees for such activities.

WE WILL NOT fail to give unit employees, when we first seek to obligate them to pay dues or fees, an adequate explanation for the basis of the fee.

WE WILL NOT inform unit employees that objectors must pay the same percentage of their wages as fees, as dues-paying members.

WE WILL NOT fail to provide unit employees who have filed a *Breaux* objection with information about the percentage of the reduction in dues and fees charged to *Breaux* objectors, the basis for that information and the right to challenge these figures.

WE WILL NOT seek to have employees discharged for failing to pay dues or fees until we have properly informed them of their rights under *Breaux v. ALRB,* and given them sufficient information to enable them to decide whether to object to the fees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce agricultural employees in the exercise of the rights under the Act.

WE WILL notify unit employees, in writing, of their right to be and remain financial core members, and of the rights of financial core members under *Breaux v. ALRB*, *supra*, to object to paying for union activities not germane to our duties as bargaining agent, and to obtain a reduction in fees for such activities.

WE WILL give unit employees, when we first seek to obligate them to pay dues or fees, an adequate explanation for the basis of the fee, a reasonably prompt opportunity to challenge the fee before an impartial decision maker and to have an escrow established for such amounts reasonably in dispute while challenges to the fee are processed.

WE WILL process the *Breaux* objections of those employees who elect financial core member status and file such objections with reasonable promptness after receiving notice of their right to object.

WE WILL reimburse for all unit employees who have, or in the future do file *Breaux* objections with us, for any dues and fees exacted from them for nonrepresentational purposes, with interest, for each accounting period since September 23, 2003.

DATED: _____ UNITED FARM WORKERS OF AMERICA

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at Visalia, California. The telephone number is (559) 627-0995.

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

United Farm Workers of America
(Guillermo Virgen, et al.)

Case Nos. 04-CL-01-VI(OX)
04-CL-01-1-VI(OX)
05-CL-2-VI(OX)
33 ALRB No. 2

Background

Pursuant to a mandatory mediation proceeding, a collective bargaining agreement came into effect covering the employees at the mushroom farm operated by Pictsweet which included a union security clause. The agreement was adopted by successor California Mushroom Farms (CMF). Respondent Union solicited employee signatures on checkoff authorizations. The documents the Union gave to the employees included notices of their rights under *Breaux v. Agricultural Labor Rel. Bd.* (1990) 217 Cal.App.3d 730 to object to portions of dues that were attributable to Union expenses other than the costs of representing the bargaining unit. The complaint alleged that the notice was deficient in several respects.

Administrative Law Judge's Decision

The Administrative Law Judge (ALJ) found that while the Union's manner of delivering the notices to employees was sufficient using the duty of fair representation standard applied by the National Labor Relations Board in *California Saw & Knife* (1995) 320 NLRB 224, even though the notice was distributed under a cover letter that gave no indication that the notice was attached. The ALJ found that the information contained in the notices was insufficient to enable employees to assess their rights to object and that Respondent failed to process objections that were voiced to paying full union dues. The ALJ ordered that the Union distribute a new fully compliant notice allowing all employees who had paid dues to object, to promptly process their objections and to refund amounts of dues proportional to the Union's expenditures on expenses not incurred in the direct representation of bargaining unit members.

Board Decision

The only exception filed was General Counsel's contention that the Union's manner of serving the notice and the cover letter's lack of reference to the *Breaux* notice failed to give employees sufficient notice of their right to object. The Board reversed the ALJ's finding that the notice was adequate, holding that under the ALRA's requirements as clarified in *Breaux*, the front page of the packet had to prominently and in all appropriate languages draw employees' attention to the notice of *Breaux* rights.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 04-CL-1-VI (OX)
	)	04-CL-1-1-VI (OX)
UNITED FARM WORKERS OF AMERICA,	)	05-CL-2-VI (OX)
	)	
Respondent,	)	
	)	
and	)	
	)	
GUILLERMO VIRGEN, GERARDO MENDOZA, and All Others Similarly Situated,	)	
	)	
Charging Parties.	)	

Appearances:

Thomas P. Lynch
Marcos Camacho, A Law Corporation
Bakersfield, California
For Respondent

Stephanie Bullock and Francisco T. Aceron
Visalia ALRB Regional Office
For General Counsel

W. James Young
National Right to Work Legal Defense Foundation
Springfield, Virginia
For the Charging Parties

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: The unfair labor practice hearing in the above-captioned case was conducted before me in Oxnard, California on June 12-16, 2006. These proceedings are based on charges filed by Guillermo Virgen and Gerardo Mendoza, alleging that United Farm Workers of America (hereinafter Respondent or Union) violated sections 1154(a)(1) and (b) of the Agricultural Labor Relations Act (Act) by requiring employees of Pictsweet Mushroom Farms – Ventura (Pictsweet) and The California Mushroom Farm, Inc. (CMF) to pay dues and fees to Respondent, without complying with its associated legal obligations, by coercing them to sign dues/fees checkoff authorization forms, and by seeking the discharge of employees who refused to pay dues or fees prior to giving them proper notice of their objector rights. The Charging Parties have intervened in these proceedings. The General Counsel of the Agricultural Labor Relations Board (hereinafter Board) issued a series of complaints, culminating with the Second Amended Consolidated Complaint (herein referred to as the complaint), alleging said violations. Respondent filed answers to the complaints,[1] denying the commission of unfair labor practices and alleging affirmative defenses. The parties filed post-hearing briefs, postmarked October 10, 2006, which have been duly considered. Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, and the oral and written arguments of counsel, the undersigned makes the following findings of fact and conclusions of law.

[1] The new allegations in the Second Amended Consolidated Complaint were deemed denied.

FINDINGS OF FACT

Jurisdiction

Respondent is a labor organization within the meaning of section 1140.4(f) of the Act. Pictsweet was an agricultural employer within the meaning of section 1140.4(c) of the Act, and CFM, the successor to Pictsweet, is an agricultural employer. Pictsweet and CFM have been engaged in the cultivation and harvesting of mushrooms in Ventura, California. The employees of Pictsweet and CFM, including the Charging Parties, are agricultural employees within the meaning of section 1140.4(b).

The Alleged Unfair Labor Practices

Coerced Dues/Fair Share Authorization Forms

Respondent was certified as the exclusive collective bargaining representative of a predecessor to Pictsweet in Case No. 75-RC-1-M. A collective bargaining agreement between Pictsweet and Respondent, effective for the period January 1, 2004 through December 31, 2006 was issued in Case No. 2003-MMC-02, pursuant to the Board's mandatory mediation authority, as set forth in sections 1164, et seq. and California Code of Regulations sections 20400, et seq. The agreement contains provisions for the payment of Union dues or fair share agency fees by employees after 31 days of employment, and a voluntary dues or fair share checkoff system. When CMF became the successor to Pictsweet, in about November 2004, it assumed the bulk of the collective bargaining agreement, including the dues/fair share and voluntary checkoff provisions.

Lauro Barajas is Respondent's Regional Director covering Pictsweet/CMF employees, and an admitted agent of Respondent. Barajas has been attempting to obtain

signed dues/fair share authorization forms from employees. The complaint alleges that in the course of these efforts, Barajas coerced employees into signing forms on several occasions, by telling them they had to sign forms as a condition of continued employment, telling employees they would or could be discharged if they refused to sign the forms, and that by signing the forms, employees would be assisted in efforts to obtain amnesty. No testimony was presented concerning the amnesty allegation.

Barajas testified that he conducted an employee meeting in the Pictsweet upstairs dining hall, he believes in late February 2004. Notices of the meeting had been posted and/or distributed at the facility, and attendance was voluntary. About 150 employees attended, which represented about one-half of the bargaining unit. Barajas testified he told the employees that the contractual raises would be paid retroactively to January 1, 2004, the effective date of the collective bargaining agreement. Barajas then said that dues deductions would not begin until March, and "[t]hat in order for the deductions to take place, we needed authorizations with their signatures." Barajas then gave dues checkoff forms, with English and Spanish translations to assisting employees, who distributed them to the others. Apparently, many employees signed dues checkoff forms at the meeting. On the other hand, some workers said they did not want to sign the forms. Barajas testified he did not reply to those who objected.

Charging Party, Guillermo Virgen, testified that he attended a general meeting at this time, which is found to be the same meeting referred to by Barajas.[2] According to

[2] General Counsel suggests that Virgen might have been referring to a different general meeting conducted while Pictsweet operated the business. The only other general meeting at that time mentioned at the hearing was conducted to discuss health benefits and sign enrollment forms. It is highly unlikely that only half the bargaining unit would have attended such a meeting, and Charging Party, Gerardo Mendoza testified that the subject of dues

Virgen "they" gave the workers a form that they "had to sign." Virgin testified that Barajas told the employees they had 30 days to sign the forms, or they "could have trouble with [their] employment." Barajas denied saying anything about 30 days or that there could be employment-related trouble for those who did not sign. Barajas' version of the meeting, generally corroborated by several other worker witnesses, is credited.[3] He came off as more sincere and accurate than Virgen, and generally was a very credible witness.

Virgen signed a dues checkoff authorization, dated March 15, 2004. He wrote, in Spanish, "Under Protest, Non-Member" on the form.[4] Virgen testified he signed the form, because otherwise, he would be discharged. Respondent did not process Virgen's objection, or that of any other objecting Pictsweet employee.

Employee witnesses credibly testified that after this meeting, they obtained blank dues checkoff forms, and solicited employees to sign them. There is no testimony showing what instructions, if any, they received for distributing the forms. Some of General Counsel's witnesses, in response to leading questions as to the date, testified that Barajas also conducted crew meetings in February, where he solicited employees to sign the dues checkoff forms. Some of these witnesses steadfastly maintained the meetings

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checkoff forms was not raised at the medical plan meeting. Furthermore, Virgen did not testify that medical benefits were discussed at the meeting he attended.

[3] General Counsel and Respondent put on a parade of witnesses to support their leading players. For the most part, these witnesses demonstrated fragmentary recalls, and the poor quality of their testimony was compounded by their biases, and superficial, or non-existent witness preparation by Respondent. This resulted in sometimes damaging, but not necessarily credible, admissions contrary to the interests of the party putting the witness on the stand. Virtually any conceivable combination of events can be supported by one or more of these witnesses. While the denials of Respondent's supporting witnesses, as to the making of threats by Barajas, lend support to his testimony, the credibility findings herein are primarily based on a comparison of Barajas' testimony to that of his accusers.

[4] Employee, Ernesto Xicotencatl also signed a Pictsweet dues checkoff authorization on March 15, under protest and noting he was a non-member. Xicotencatl testified he was given the form in the lunch area by a "Union" employee, but not Barajas. Xicotencatl testified he signed the form, because he heard "rumors" he would be discharged if he refused.

took place at that time, while others either gave testimony indicating or, in fact, changed their testimony to state that the meeting they attended took place in late 2004. Charging Party, Virgen, testified that the crew meetings did not take place until CMF assumed control of the business. Barajas did not testify concerning any crew meetings in early 2004, but he could not specifically deny that he solicited dues checkoff forms during Pictsweet crew meetings in early 2004. Nevertheless, it is concluded that crew meetings to discuss dues checkoff forms did not occur at this time. [5]

Employee, Benjamin Villanueva, in response to a leading question from General Counsel as to the date, initially testified that he attended a crew meeting called by Barajas in February 2004. Villanueva testified he was on Crew Five at the time of the meeting. Villanueva later testified that the meeting he attended was when CMF was the employer, which would have been much later in the year.

The parties agree that Barajas distributed authorization forms to employees in crew meetings, after CMF assumed control of the operation, which the evidence shows took place on December 6, 2004.[6] Apparently, CMF required Respondent to obtain new checkoff authorizations once it assumed control of the business. These forms, printed in English and Spanish, contained three documents. The first two were English and Spanish language authorizations for "dues checkoff or agency fee," with no designation of which option the employee was choosing. The third was a bilingual membership form to join Respondent's labor organization.

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[5] Two of Respondent's worker witnesses testified that Barajas also solicited signatures on Pictsweet dues checkoff forms other than at the meeting in the dining hall. One testified this occurred at a meeting where representatives of the health plan spoke to the employees, while the other said it was at crew meetings, the details of which he was totally unable to furnish. Their testimony concerning when these meetings took place is not credited.

[6] Villanueva testified this was the form distributed by Barajas at the meeting he attended.

Barajas also distributed a notice of employees' rights to object to paying for other than representational expenses. The notice only set forth the total alleged chargeable and non-chargeable expenses, with no breakdown of the figures. The notice did not contain a verification from an auditor confirming that the expenses had been made, even though the exhibits show the expenses had been audited. The notice did state that Respondent spends more on representational expenses than it receives from employee dues, setting forth the figures. For this reason, Respondent, in the notice, stated that those opting to pay agency fees instead of dues would have to pay the same amount (two percent of their wages) as dues-paying members. Those who opted not to have their dues or fees deducted through checkoffs would face termination from employment if they did not pay them to Respondent within five days of receiving their wages. Most importantly, the notice was only in English, which Respondent concedes invalidated the effectiveness thereof.

Returning to Villanueva's testimony, Barajas arrived with some papers and a chalkboard. According to Villanueva, after using the chalkboard to make a presentation regarding employee wages under the contract:

> [They] told us after that, they told us to sign them [the dues checkoff forms] and he gave them to somebody and he told them to distribute them. And one of the words that I remember that he used, "Sign them for me. I've already got all your information. Because the owner called me." And whoever was to deny signing would be fired. For us to sign it. They had spoken with the owner, and whoever didn't sign them could be fired.

Having accused Barajas of threatening employees with discharge, Villanueva, responding to a question from General Counsel, then testified he asked Barajas if it was "necessary" that he sign the form. Barajas replied, "No, it is not necessary. Give it to me

later." Villanueva did not sign the form, and Respondent did not seek his discharge at that time.[7] Villanueva also testified that the only other papers Barajas asked him to sign were for the medical plan.

Charging Party, Guillermo Virgen, testified he was on Crew Five when the crew meetings were conducted under CMF. After the chalkboard wage presentation, Barajas had the dues checkoff/fair share authorization forms passed out, and purportedly told the crew members they had to sign it, and had five days to do so. Virgen told Barajas that the crew members needed time to read the authorizations and decide if signing would benefit them. Barajas did not respond. Virgen never signed the CMF authorization form, and Respondent did not seek his discharge at that time.

Employee, Ernesto Xicotencatl testified he was on Crew Five when Barajas solicited his crew to sign the CMF authorizations. According to him, Barajas told the workers, "that we *could* fill it out; for us to fill it out." (Emphasis added.) All they had to do was sign, because he had all of the other information. Xicotencatl testified that Barajas said nothing else, and in fact, said very little about the forms. Xicotencatl also denied that any worker responded to Barajas. He testified that Villanueva was on his crew at the time of the meeting, but could not recall if Virgen was present.

Employee, Monaco Sandoval Ruiz (Sandoval) testified he was on Crew Five when Barajas solicited the workers to sign authorization forms. Sandoval had previously signed a Pictsweet authorization form, dated March 13, 2004, designated under protest, and as a non-member. He was given the form by a co-worker, who told him he could

[7] Villanueva further testified that an employee asked him to sign a dues checkoff form when Pictsweet operated the facility. He signed that form, marking on it that he objected. According to Villanueva, he signed the form because he heard rumors that employees who did not sign would be discharged.

protest paying dues by marking it as he did. Sandoval testified that at his crew meeting, Barajas told the workers they "*needed*" to sign the (he believes) CMF dues checkoff/agency fee forms. [Emphasis added.] Villanueva was present. Sandoval reported no threats by Barajas at the meeting.

Employee Rafael Puga Diaz (Puga), again in response to a leading question from General Counsel, initially testified that he attended a crew meeting (Crew Six) conducted by Barajas in February 2004, which would have been when Pictsweet ran the company. Puga then testified that Barajas, at the meeting, told the crew members that the *new* company, CMF, had given him a paper (e.g. the dues/agency fee authorization) to give to them. In fact, the dues/agency checkoff authorizations were generated by Respondent, and not CMF. Puga then testified that the crew meeting did not take place in February 2004.

According to Puga, Barajas told the crew to sign the form, and those who did not, would be fired. Barajas told the crew just to sign the form, because he had all the information. Puga did not sign the form, and there is no evidence that Respondent requested his discharge at that time. On cross-examination, Puga initially denied receiving the English-only version of dues objectors' rights at the crew meeting. When shown the document, Puga admitted it was distributed at the meeting.

Employee Raul Gutierrez Orosco (Gutierrez) testified that he was on Crew Six when Barajas spoke with his crew, and Puga was present. With respect to who owned the company when he attended the meeting, Gutierrez vacillated between CMF and

Pictsweet, but he identified the CMF form as the one distributed. According to Gutierrez, the only thing Barajas said when he passed out the authorization form was, "Sign this paper." Several employees said they did not have their social security numbers, and Barajas replied he already had that information. All but one employee signed the form. Gutierrez did not corroborate Puga's testimony, that Barajas stated employees who did not sign the form would be discharged.

Gutierrez signed the Pictsweet dues checkoff authorization, on March 16, 2004, and the dues/agency fee portion of the CMF form, on December 6, 2004. The words, "Under protest," are written on the March 16 Pictsweet authorization, in Spanish. Gutierrez denied, and then admitted, he wrote this. In the interim, he claimed he wrote "Under protest," on the CMF authorization, although no such notation appears thereon. Gutierrez testified Villanueva gave him the Pictsweet form, and he returned it to him.

Charging Party, Gerardo Mendoza, again in response to a leading question from General Counsel, testified that Barajas met with his crew (Crew Two) in February 2004. According to Mendoza, "[T]hey told us it was a requirement, that there was an arrangement made, and we had to sign." In response to another leading question from General Counsel,[8] Mendoza testified, "[T]hey said it was a requirement to sign it if we were to work there." Mendoza testified that he signed the form at the meeting, noting it was under protest.

[8] Without exhausting the witness' memory as to what Barajas said at the meeting, General Counsel asked, "Did Mr. Barajas say what would happen if you did not sign the form?"

Mendoza went on to testify that after CMF took over the operation, Barajas again met with his crew.[9] According to Mendoza, after presenting the chalkboard wage information, Barajas stated that "somebody" had given him forms to distribute, and they all had to sign. Mendoza testified that he and a co-worker refused to sign the form, and he asked Barajas how much time they would have to comply. According to Mendoza, Barajas said five days.

Employee, Juan Amaro Sandoval (Amaro), called as a witness by General Counsel, testified he was also on Crew Two in February 2004, and attended a crew meeting with Barajas at that time. Amaro initially testified that Barajas distributed a form that "seems like" the Pictsweet dues checkoff form. When shown both the Pictsweet and CMF forms, Amaro testified it was the CMF form that was distributed at the meeting he attended. Amaro testified that Barajas told the workers to sign the forms and turn them in. When asked if Barajas said anything further about the forms, Amaro replied he did not, thus failing to corroborate Mendoza's accusation. Employee, Roberto Aguilar Herrera (Aguilar), called by Respondent, testified that he attended this meeting with Mendoza. The meeting took place in December 2004. Aguilar denied that Barajas threatened employees at this meeting, or that he witnessed this at any other time.

Rodrigo Rigosa testified that he was on Crew Four when Barajas distributed the CMF authorization form. According to Rigosa, Barajas said they had to sign the forms, or they could be discharged in five days. Only two or three of the crew members signed.

Barajas testified that he used an easel and butcher paper to make the wage

[9] Mendoza did not state which crew he was on at the time. Other witnesses testified that CMF substantially rearranged the crews.

presentation, and not a chalkboard. The wage presentation differed from crew to crew, because some worked piece rate, while others were on salary. Barajas distributed the English-only notice regarding objector rights at all of the meetings. His solicitation of employees to sign CMF authorization forms was uniform. Barajas explained that CMF was not accepting the Pictsweet dues checkoff authorizations, and was requiring new executed forms. For this reason, he was asking them for their signatures. He and some of Respondent's employee committee members then distributed the forms. Barajas denied saying anything further about the forms, and specifically, making any threats.

According to Barajas, one entire crew of seven told him, at the outset of the meeting, that they were not going to sign the forms. Barajas did not respond. Barajas testified that when he met with Crew Five, Charging Party Virgen said he would not sign, and that others were refusing to sign as well. Barajas told the workers that those who disagreed did not have to return the forms to him -- that it was fine. Barajas could not recall any other meetings where employees objected to signing the forms. Respondent called many employee witnesses who attended these meetings. They all denied that Barajas made any threats, although one was led into admitting, in response to a compound question, that Barajas said they had to sign the forms.

Barajas' testimony concerning these meetings is credited over General Counsel's witnesses, and over those portions of Respondent's employee witnesses that are in conflict. On a one-to-one comparison, Barajas exhibited a more sincere and confident demeanor than any of his accusers. Beyond that, almost all of General Counsel's

witnesses displayed confusion[10] and made serious contradictions within their own testimony. As the above discussion demonstrates, the contradictions are substantially increased when their testimony is compared with that of General Counsel's other witnesses. Finally, although noting that Respondent's supporting cast was not significantly, if at all, more impressive than General Counsel's employee witnesses, many employees flatly denied any threatening statements by Barajas.

The complaint alleges coercive conduct in conjunction with the signing of dues checkoff/agency fee authorizations by Pictsweet/CMF employees, alleged to be agents of Respondent. Roberto Aguilar is alleged to have threatened employees with discharge if they did not sign Pictsweet dues checkoff authorizations, and that until they signed such forms, their hours worked would not be counted toward eligibility for health care benefits. Aguilar has worked as a picker for 16 years. He denied that he was on Respondent's employee committee, or that he assisted Barajas in distributing forms to employees. Aguilar testified that Doroteo Rodriguez, another employee on his crew, was the crew's employee delegate in Union-related matters. In response to a leading and compound question from Respondent, Barajas included Aguilar as an employee who assisted him in distributing Union-related materials, such as authorization forms.

Charging Party, Gerardo Mendoza, initially testified, "I knew through the comments that he [Aguilar] was the delegate to the crew." Mendoza later testified he did not know if Aguilar was on the committee. Still later, Mendoza identified employee, Doroteo Rodriguez, as his crew's Union delegate. Mendoza testified he does not know

[10]At best, the accusers were confusing the statement in the notice, that those opting not to have their fees or dues deducted from their paychecks would have to make the payments to Respondent within five days or face discharge, with what Barajas said about the dues/agency fee checkoff forms.

Doroteo Rodriguez, as his crew's Union delegate. Aguilar's denial is credited, inasmuch as he was a credible witness from the standpoint of his demeanor, and would be more aware of his Union activities than Barajas. As noted above, Barajas' allegation regarding Aguilar's Union activities came in response to a leading, compound question. Mendoza's testimony on this issue was vague, and appears to be based on hearsay.

Mendoza testified that after Barajas solicited employees to sign the Pictsweet dues checkoff form, Aguilar told him, in the presence of two other workers, that if he did not sign the form, he would be fired, or would not receive insurance benefits. As Mendoza signed his authorization at the earlier meeting, it does not appear that Aguilar was asking him to sign a form at the time. Aguilar denied that he made these statements. Aguilar was a more credible witness than Mendoza, and his denial is credited.

Employee, Monaco Sandoval Ruiz (Sandoval), testified, "I would hear people, that we were no longer going to have insurance if we didn't sign it. . . . Because I was hearing that people that were going to Mexico were no longer working, and then they would come back and they no longer had insurance." Sandoval did not identify who made these statements.

The complaint alleges that Doroteo Rodriguez told employees that until they signed a dues checkoff authorization, their hours worked would not be counted toward health insurance eligibility. As noted above, Barajas and Mendoza identified Rodriguez as a crew delegate on Respondent's employee committee, but there is no evidence he is paid or employed by Respondent, or plays any role in setting Respondent's policies. Rodriguez did not testify. Employee Amaro testified that in February 2004, he heard

Rodriguez tell another worker he had to sign "the form." Amaro did not contend that Rodriguez was soliciting the employee's signature on a form at the time. No other testimony was presented concerning Rodriguez's conduct.

Employee, Porfilio Hernandez Garcia (Hernandez) testified that "someone" from the Union, but not Barajas, gave him the Pictsweet authorization form and told him he had to sign it. There is no other evidence that anyone employed by Respondent, other than Barajas, distributed the Pictsweet forms. Hernandez went on to testify that "someone" from the Union gave him a CMF dues/agency fee checkoff form in December 2004, and told him to sign it. When Hernandez said he was not going to sign, this individual purportedly told him that he had to sign, "or something else would happen later."

Barajas is the only employee of Respondent established to have been present at CMF's facilities in December 2004. Jose Manuel Ramirez, then Respondent's Contract Administrator, was present commencing in March 2005. The complaint does not allege any unlawful conduct by him. Ramirez credibly testified that the reason he was present at the plant was to distribute objector rights notices, which required no signature. Ramirez also credibly denied making any threats.

The complaint alleges that Respondent unlawfully posted a workplace notice stating that dues would be two percent of the employees' wages, and would be payable to Respondent. In fact, Respondent's dues are two percent of employees' wages, and are paid to Respondent, either directly, or through dues checkoffs. Only one employee, Mendoza, testified that he saw such a notice. According to Mendoza, a Spanish-language notice was "hanging" near the employee punch-in clock, at some unidentified time while

Pictsweet operated the business, stating that dues would be two percent. No evidence was presented as to the author of the notice.

Finally, the complaint alleges that Respondent, acting through its alleged agent, Fidel Andrade, a former employee, told employees that they had to sign dues checkoff authorization forms as a condition of continued employment. No evidence was presented in support of this allegation.

Violations Based On The Failure To Give Objector Rights Notice:

The complaint alleges that Respondent violated the Act by failing and refusing to provide Pictsweet and CMF employees with required information of their right to not pay dues or fees for nonrepresentational purposes. The complaint further alleges that Respondent unlawfully required employees to pay dues, without complying with such obligations, and asked CMF to discharge employees based on non-compliance with the defective notices.

Respondent admits that it provided no such information to Pictsweet employees, and that the information provided to CMF employees at the crew meetings on December 6, 2004 was inadequate, because it was provided only in English.[11] In addition, the December 6 notice did not explain Respondent's non-chargeable expenses, did not contain a verification from an auditor that the expenses were actually incurred, and stated that since Respondent's income from dues and fees was substantially less than its expenditures, dues and objector fees would be the same.

[11] Respondent's officer in charge of creating the notice testified that the failure to translate the notice into Spanish was inadvertent. The undersigned must express skepticism on this point, since several individuals, including Barajas, were involved in the production and/or distribution of this document, and surely at least one of them must have noticed the omission.

Respondent contends, and the credible evidence establishes that Jose Manuel Ramirez and Lauro Barajas attempted to personally serve all of the CMF employees with a second packet of notices of their obligations and rights under union security in March and April 2005, and had served virtually all of such employees as of the date of the hearing. Respondent submits that these distributions established compliance with its obligations, and subsequent attempts at enforcement were, therefore, proper. General Counsel and the Charging Parties dispute this contention on various grounds.[12]

Attached as an Exhibit to Respondent's answer to the complaint are the documents purportedly distributed to the employees. Included is a letter, explaining objector rights as Respondent believes is required under the law. The letter refers to "non-participating members," rather than objectors, and states that while they may receive a reduction in dues, they lose important rights associated with full union membership. It further states that bargaining unit members may object to paying full union dues, and those objecting will be sent a copy of the independent audit of expenses. The letter explains the objections/challenge procedure, but then states that since Respondent's income from dues and fees is less than its representational costs, there will be no difference between full union dues and fair share fees. The letter is silent as to whether Respondent set up an escrow account to hold funds received for disputed items alleged to be chargeable, and the record does not establish whether such an escrow was established.

[12] The testimony of several witnesses for Respondent conflicts with Respondent's records as to who gave them the packet. This is not surprising, given the poor recall and witness preparation by Respondent of many who testified. General Counsel also points to a few instances where Respondent's records do not show that workers were served with the notices.

The letter is followed by a one-page auditor's report, in which the auditor states that based on his sampling of Respondent's expenses, they are fairly represented in Respondent's Statement of Expenses, including Respondent's allocations of expenses between chargeable and nonchargeable.[13] The Statement of Expenses itself contains an admittedly novel dual categorization of "expenses not allocable" and "non-chargeable" items. Respondent's witnesses testified this was done, because of Respondent's "unique" status as both a labor union and social service agency. Evidence at the hearing suggests these "expenses not allocable" refer to those social services of Respondent that are not union related, while the "non-chargeable" column refers to traditional union expenses not made on behalf of the bargaining unit employees. "Expenses Not Allocable" is a major item in the Statement, amounting to $2,545.552.00, and well over one-third of the total expenses for 2003. There is no explanation of what this category means, and no listing of the types of expenses listed therein, or any specific expenditure made. It appears that the "expenses not allocable" are not credited as deductions for objectors.

Another category listed is "affiliations." The Statement attributes a total of $170,030.00 in affiliate expenses for 2003, of which $35,933.00 is "not allocable," $23,220.00 is "non-chargeable," and $110,877.00 is "chargeable." The Statement does not identify the affiliates, or break down the expenses for them.

Until well into the hearing, Respondent contended that the attachment to its answer was what was distributed to employees. As it turns out, these documents were preceded by English and Spanish versions of a letter from Respondent's President, Arturo

[13] The undersigned is willing to conclude that the letter from the auditor constitutes a verification.

S. Rodriguez, totally unrelated to the issue of objector rights. There was testimony at the hearing indicating that some employees, upon receiving the packet, quickly discarded it, which could well be attributed to the unrelated material preceding the notice.

The second CMF notice repeated Respondent's assertion that dues and objector fees would be the same, based on its income from these sources. The accuracy of this contention was supported by witness testimony, and General Counsel does not dispute the claim. Respondent continues to maintain this position, while General Counsel and the Charging Parties contend that Respondent must apportion the objectors' obligations by the ratio of its chargeable to nonchargeable expenses (including expenses not allocable), irrespective of its income level from dues and fees.

Respondent stipulated that it began sending employees dues delinquency notices in February 2005, along with the dues/agency fee provisions of the contract, providing for discharge in the event of nonpayment. Letters were introduced into evidence showing that Respondent, after sending the letters, requested that CMF discharge non-complying employees. CMF refused to discharge the employees, pending the outcome of this litigation, among other reasons.

General Counsel called employee witnesses who were hired after December 6, 2004, and an employee who was not working at CMF on December 6, 2004, but was approached by Barajas after he returned. Some of these witnesses denied receiving the objector rights packet. Some of the new hires testified that when Barajas told them to sign the CMF forms, he said he would explain what they meant later. Barajas never returned to give an explanation.

Barajas testified that CMF informs Respondent of new hires. Barajas would then attempt to find the employee at the facility or, in some cases, the new hire would find him. Barajas explained the contractual wage, holiday, medical plan and vacation provisions. He also provided the new employees with the collective bargaining agreement and objector rights notice, including the statement that both objectors and non-objectors would pay the same two percent of their wages, and with the cover letters from Arturo Rodriguez. In response to a leading question from Respondent, Barajas testified that he presented the new employees with CMF authorization forms, and asked them to sign. Barajas did not deny telling some of these employees he would explain what the forms meant later, or that he subsequently failed to do so. When employees refused to sign immediately, he responded, "That's fine."

Although it is troubling that Respondent chose to lead Barajas through potions of this testimony, the undersigned is still satisfied that he did distribute the packet to at least most of the new employees, as shown by the records he kept. As noted above, Barajas was generally a very credible witness from the standpoint of his demeanor. He also appeared to be someone who avoids confrontations, and it appears that Respondent's strategy was not to personally challenge employees, but to send them written notices of dues/fair share delinquencies.

ANALYSIS AND CONCLUSIONS OF LAW

Coerced Dues/Fair Share Checkoff Forms:

Section 1152 of the Act grants agricultural employees the right, inter alia, to support or not support labor organizations. Section 1154(a)(1) makes it an unfair labor

practice for a labor organization to restrain or coerce employees in the exercise of the rights set forth in section 1152. Although section 1153(c) of the Act permits agricultural employers and unions to enter into agreements requiring employees to become union members, this section has been interpreted to prohibit labor organizations from requiring employees subject to such an agreement to pay dues for nonrepresentational purposes. *Breaux v. ALRB* (1990) 217 Cal.App.3d 730 [265 Cal.Rptr. 904].

By choosing to sign, or not to sign such forms, employees are choosing to support, or not support their representative. In addition, since the agreements between Respondent and Pictsweet/CMF provided for voluntary checkoff authorizations, those choosing not to sign the forms were exercising a contractual right, which is considered protected activity. *Transpac Fiber Optics & Telecommunications, Inc.* (1991) 305 NLRB 974 [139 LRRM 1072]. By coercing employees to give up rights established by a collective bargaining agreement, a union acts in derogation of an important policy objective, the promotion of collective bargaining. *Brewery, Soda and Mineral Water Bottlers of California, Local No. 896 (Anheuser-Busch, Inc.)* (2003) 339 NLRB 769 [172 LRRM 1411]; *Stationary Engineers, Local 39* (1979) 240 NLRB 1122 [100 LRRM 1388]. For all these reasons, if Respondent made the threats attributed to it to coerce employees into signing the Pictsweet or CMF checkoff forms, it violated the Act. *Association for Retarded Citizens Employees Union (New York State Association for Retarded Children)* (1999) 327 NLRB 463 [169 LRRM 1231].

Since Barajas' denials of having made the statements attributed to him in the complaint have been credited, those allegations will be dismissed.[14] With respect to the allegations against the employees allegedly making threats, two Board cases would apparently find them not to be Union agents. In *San Diego Nursery Co., Inc.* (1979) 5 ALRB No. 43, employees on a union organizing committee, who passed out authorization cards and solicited employees to support the union, were found to be non-agents. They were not employed by the union, only acted on its advice, and exercised no real or apparent authority to act on the union's behalf. In *Security Farms* (1977) 3 ALRB No. 81, employee-members of an in-plant organizing committee were found not to be agents of the union, where they were not paid by the union and were not formally associated with it.

Subsequent cases by the National Labor Relations Board, however, would appear to find employees who solicit signatures on dues checkoff authorization forms to be special agents of Respondent for that purpose. In *University Towers, Inc.* (1987) 285 NLRB 199 [126 LRRM 1127], cited by General Counsel, employees given union authorization cards by a union agent were found special agents of the union for distribution of the cards, and the union was held responsible for their misconduct.

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[14] In her brief, the Assistant General Counsel urges the undersigned to consider whether it was an unfair labor practice for Barajas to tell employees they had to sign the checkoff forms, and whether under all the circumstances presented, they were coerced. Neither was alleged as an independent violation, and the undersigned declines to consider them as such at this point. Having taken this position, it is still noted that the CMF authorizations are defective, because they do not adequately distinguish between whether an employee is signing as a regular or financial core member. No unfair labor practice will be found, because this aspect of the notices was not alleged as such in the complaint, and employees who signed them, under this Decision, will be given a second chance to become financial core members. If Respondent continues circulating such forms and collects full dues, however, the undersigned would not consider them binding as showing assent to full Union membership.

In *Teamsters Local 738 (E.J. Brach Corporation, et al.)* (1997) 324 NLRB 1193 [157 LRRM 1049], the union was held responsible for coercive conduct by an employer representative in obtaining signed dues checkoff authorizations from employees, where the authorizations had been provided to them by the union. The employer representative was held to be a special agent of the union for the purpose of obtaining the authorizations.

Assuming the Board would adopt these decisions, the evidence fails to establish that the Pictsweet employees violated the Act. No evidence was presented with respect to Fidel Andrade. Roberto Aguilar's denial that he solicited employees to sign dues checkoff forms has been credited, so he would not be a special agent of Respondent under the NLRB cases. In any event, his denials of having engaged in misconduct have been credited. The one witness testifying to misconduct by Doroteo Rodriguez, Amaro, did not allege that he told any employee he would lose health insurance benefits for failing to execute the form. Assuming Rodriguez did tell an employee he had to sign an authorization, this was not alleged, in itself as a violation in the complaint. In addition, even if by passing out checkoff forms, Rodriguez became a special agent of Respondent, Amaro's testimony fails to establish that he was soliciting a signature at that time. Furthermore, the NLRB cases on this issue are divided. See *Teamsters Local 738 (E.J. Brach Corporation, et al.)*, supra. It is clear that Amaro only testified as to a small portion of the alleged conversation Rodriguez had with the employee. Therefore, it is impossible to gauge the context in which the statement, if made, occurred. Given the

limited nature of Sandoval's testimony, the undersigned would not find a violation even if the allegation had been properly raised.

The remaining testimony concerning alleged threats by employees fails to even identify the proponent. Similarly, the allegation that Respondent posted a coercive notice is not supported by testimony establishing Respondent as the author of the notice, and the undersigned also fails to see what would be coercive in truthfully informing employees that Respondent's dues are two percent of wages, without a statement therein that all employees were required to pay that amount.[15] Accordingly, these allegations will be dismissed as well.

Violations Based on the Failure to Give Objector Rights Notice:

As noted above, the California Court of Appeal, in *Breaux v. ALRB,* supra, held that under the Act, employees cannot be compelled to pay dues for a union's nonrepresentational purposes. In doing so, the Court interpreted the Act so as to find a line of court cases interpreting the National Labor Relations Act and National Railway Act to be applicable. See, for example, *Ellis v. Brotherhood of Railway, Airline and Steamship* Clerks (1984) 466 U.S. 435 [116 LRRM 2001] and *Communications Workers of America v. Beck* (1988) 487 U.S. 1233 [128 LRRM 2792]. Under those cases, and as specifically required by *Breaux,* before a labor organization may require or obligate employees to pay dues, it must give those who might object information sufficient to permit an informed decision whether to object. Thus, the union must give an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the

[15] As discussed below, the statement in the second CMF notice, that members and objectors would both have to pay two percent of their wages is an entirely different matter.

amount of the fee before an impartial decision-maker, and establish an escrow for the amounts reasonably in dispute while such challenges are pending. *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, at page 310 [121 LRRM 2793].

The Pictsweet contract, adopted in pertinent part by CMF, requires employees to pay dues or fair share agency fees. Based on Barajas' credited testimony, it cannot be said that Respondent *required* or *obligated* employees to sign the Pictsweet dues checkoff forms, as those terms might be defined in a dictionary. Nevertheless, even though this terminology repeatedly appears in the seminal court cases, the more recent decisions have held that by merely soliciting employees to become members and pay dues, a union is requiring or "seeking to require" them to comply, thus triggering the *Breaux/Hudson* obligations. *California Saw & Knife* (1995) 320 NLRB 224 [151 LRRM 1121], enfd. (CA 7, 1998) 133 F.3d 1012 [157 LRRM 2287]; *The L.D. Kichler Company* (2001) 335 NLRB 1427 [168 LRRM 1376]; *Wallace v. Valdez American Federation of Teachers* (2005) USDC (Alaska) Docket A04-256 CV (JWS) [(2005) USDC LEXIS 41455]. Furthermore, although Respondent only solicited employees to sign Pictsweet dues checkoff forms, and not agency fee authorizations, this distinction has been rejected as a defense to a union's obligation to give objector rights notice at or before the time it makes the solicitation. *The L.D. Kichler Company,* supra.[16] Accordingly, Respondent violated section 1154(a)(1) of the Act, by failing to give *Breaux/Hudson* rights notice to Pictsweet employees at or before the time it solicited them to execute dues checkoff

[16] Although *Kichler* specifically dealt with the rights of a new employee, its rationale applies herein, because the Pictsweet employees had no prior experience with the then recently negotiated union security clause.

authorizations. It further violated the Act by failing to process the objections made by Pictsweet employees.

Respondent admittedly spends a portion of its income on nonrepresentational functions, and it is undisputed that Respondent did not discount the fees charged to employees who protested signing the Pictsweet checkoff forms. By protesting the authorizations and stating they were signing as non-members, those employees gave Respondent sufficient notice that they wanted nonrepresentational costs deducted from their dues obligations. Absent a legally sufficient reason for failing to instruct Pictsweet to discount the deductions, or to make partial refunds itself, Respondent also violated the Act.

Respondent argues that because its income from employee dues and other assessments is less that its chargeable expenses in representing the Pictsweet and CMF employees, it is entitled to collect full dues from objectors, because none of their payments will be used for nonrepresentational purposes. Nevertheless, the cases to date have uniformly required an apportionment. In fact, the United States Supreme Court has repeatedly considered similar arguments by other unions to be "of bookkeeping significance only rather than a matter of real substance." *Retail Clerks v. Schermerhorn* (1963) 373 U.S. 746 [53 LRRM 2318]; *Railway Clerks v. Allen* (1963) 373 U.S. 113 [53 LRRM 2128]. In those cases, the unions, who presumably collected dues and assessments equal to or in excess of their representational costs, agreed that they would spend none of the objectors' dues on nonrepresentational matters, and use only non-objector dues and income from other sources for such extra-representational activities.

The argument was rejected on the ground that the objectors would thus be paying a disproportionate share of the unions' representational costs. The undersigned believes the factual setting herein does not adequately rebut the proportionality arguments made in similar cases, and that it would be up to the Board to create an exception herein, based on the facts presented.

Respondent further contends that if it is required to reduce the fees of objectors, it and charitable contributors to Respondent will be forced to support the anti-union views of the objectors, thus violating their constitutional free-speech rights. In support of this contention, Respondent cites *Liegmann v. California Teachers Association* (N.D. CA, 2005) 395 F.Supp.2d 922 [178 LRRM 2343], a case where objectors sought to compel a union to place all of its dues increase collections into escrow. The District Court held that this would presume all members and non-objecting members would object to the use of the increased dues for nonrepresentational purposes, and as such, the action infringed on the rights of the union and its supporters to engage in political activities. Respondent also cites cases where governmental limitations on the fees charged by solicitors for charities and other organizations, and other restrictions on charitable solicitations were held to unconstitutionally limit the free speech rights of those entities.

The cases cited by Respondent do not show that the constitutional rights of it or its supporters would be violated herein. No funds are required to be placed in escrow for non-objectors. No limitation is made on its right to solicit donations. By reducing the monetary obligations of objectors, no specific anti-union cause is being supported. Respondent can easily permit its donors to designate their contributions for specific

purposes. While the fee reduction may impact on the amount of funds Respondent has to spend on nonrepresentational purposes, and may encourage bargaining unit employees to object, this is also the case where dues and fees receipts equal or exceed representational costs. As the result, Respondent's argument is rejected for the purposes of this Decision. Having rejected this argument, it is concluded that Respondent violated section 1154(a)(1) by causing Pictsweet to deduct full dues from objecting Pictsweet employees and by failing to refund the portion of their payments which are proportionate to Respondent's nonrepresentational expenses.

Respondent concedes that the objector rights notice distributed to CMF employees who attended the December 6, 2004 meetings was defective, because it was only provided in English. The notice was also ineffective because it failed to itemize expenses, and thus did not provide employees with sufficient information to enable them to decide whether to object. The notice further did not contain an auditor's verification, and demanded that objectors pay the same amount as non-objecting members. Respondent admits that it accepted the full membership dues amount from all CMF employees who signed the forms. Accordingly, Respondent violated section 1154(a)(1) of the Act by said conduct.

It is undisputed that Respondent sent dues delinquency notices to employees, commencing in February 2006, citing contractual provisions for discharge if they failed to pay the delinquencies. Respondent demanded that all of the employees pay two percent of their wages, on the basis of its rationale discussed, and rejected above. A number of the employees signed form letters and sent them to Respondent, denying they

had ever been informed of their Breaux/Hudson rights, or given the opportunity to object. The record does not show that any employee actually objected to paying for Respondent's nonrepresentational functions, and the parties agree that no challenge has been filed contesting Respondent's allocation of expenses. Respondent further requested that CMF discharge employees for nonpayment of the fees. It is a violation of section 1154(b) for a labor organization to cause, or attempt to cause an agricultural employer to discriminate against an employee for the exercise of the employee's statutory rights under the Act.

Respondent contends it was privileged to engage in the above conduct because it personally served all affected employees with the second CMF notice, thus satisfying its obligations under *Breaux*. At the outset, it appears that Respondent began sending the demand letters before it distributed the second CMF notice packet. If so, it was basing the demands on the now admittedly defective first notice.

The undersigned does not dispute that, even if some employees did not actually receive the second CMF notice, Respondent's method of distribution was reasonably calculated to accomplish full service, and satisfied its legal obligation in that respect. The notices, however, stated that since Respondent's income from employee dues and other assessments were less than its representational expenditures, dues and objector fees would be the same.

A union, in its initial *Breaux/Hudson* notice, is obligated to inform employees of the percentage their fees will be reduced if they object to nonrepresentational expenditures. *Thomas v. NLRB* (CA D.C., 2000) 213 F.3d 651 [164 LRRM 2577]. It

follows that the information must be reasonably accurate. Since Respondent, in its notice, stated that dues and objector fees would be the same, based on the grounds rejected herein, the statement was not reasonably accurate. Furthermore, in making the statement, Respondent unreasonably discouraged employees from filing objections. Accordingly, the notices were invalid, for this reason in itself.

General Counsel and the Charging Parties also contend that the second CMF notice was inadequate due to the confusing double-breakdown of non-allocable and non-chargeable expenses, the failure to give an itemized listing of expenses for this category, and the failure to itemize affiliate expenses. The judicial and NLRB decisions are not uniform in what satisfies a union's duty to give "an adequate explanation for the basis of the fee," in an initial objector rights notice. At the lowest level of obligations, all that unions need provide are the major categories of expenses and a verification by an independent auditor. Other cases require substantially more in the way of disclosure.

Tierney v. City of Toledo (C.A. 6, 1990) 917 F.2d 927 [135 LRRM 3246], cited by the Charging Parties, makes it clear that affiliate expenses must be identified in detail for a notice to be valid. On the other hand the "expenses not allocable" category is unprecedented, and must be judged on the general standard of whether the information is adequate to give potential objectors sufficient information to decide whether to object. This category, used in conjunction with nonchargeable expenses, is highly confusing. The expenses not allocable were a major item in the notice, and the total failure to explain what these were, or to give more than a bare figure for them, rose to the level of

giving an inadequate explanation for those trying to decide whether to object. Therefore, the notice was also invalid on these grounds.[17]

Inasmuch as Respondent was requiring potential CMF objectors to pay full dues, without affording them effective notice of their right to object, Respondent thereby violated section 1154(1)(a) of the Act. By attempting to cause CMF to discharge non-complying employees, in light of the ineffective notice and demand for payment of full dues, Respondent further violated section 1154(b).

In *The L.D. Kichler Company,* supra, the National Labor Relations Board held that new employees must be provided with *Hudson* notice before a union seeks payment of dues/fair share fees, to avoid confusion as to their obligations. This would appear applicable to agricultural employees under *Breaux.* Although Respondent did make a reasonable attempt to provide such notice to new hires at CMF, it distributed the same packet as it did to continuing employees, which has been found ineffective herein.

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[17] General Counsel and Respondent object to the covering up of the second CMF notice with the letters from Respondent's President, and General Counsel further objects to the failure of Ramirez or Barajas to specifically notify employees that the packet they distributed contained important information concerning their right to object. The undersigned also finds the covering up of the notice material objectionable and, absent precedent to the contrary, would invalidate the notices on this basis. Nevertheless, in *California Saw & Knife,* supra, the National Labor Relations Board held that by inserting the *Hudson* notice into one issue per year of the union's monthly magazine, mailed to all unit members, without a statement on the magazine cover that the *Hudson* notice appeared therein, the union still satisfied its *Hudson* obligations. See also *Polymark Corporation* (1999) 329 NLRB 9 [162 LRRM 1033]. Thus, even if all of the employees did not read the notices, the manner of distribution was held reasonably calculated to give such notice. If anything, the unannounced insertion of the notices into the magazines would appear less calculated to give notice to unit members than the means chosen herein by Respondent. The Charging Party also contends the notice was ineffective because Respondent referred to objectors as non-participating members, and stated they would lose rights by opting out of full membership. Respondent may be creating some confusion among objectors as to their dues obligations by using this term, but the undersigned sees nothing unlawful in its use, per se. While the language contained in section 1153(c) of the Act contains membership language distinct from the National Labor Relations Act, it has been found that agricultural employees have the same objector rights as those covered by the national legislation. It follows that unions operating under our legislation have the same authority to limit the participation of objectors in internal union affairs. Accordingly, the notice was not defective on this basis. General Counsel contends that the notice was also defective, since Respondent did not set up an escrow account for disputed allocations. While the objector rights letter did not state that such an escrow had been established, the record does not establish that, in fact, Respondent failed to do so.

Inasmuch as the notice has been held ineffective, Respondent violated section 1154(a)(1) when it sought the payments from the new employees.

THE REMEDY

Having found that Respondent violated sections 1154(a)(1) and (b), I shall issue an order requiring it to cease and desist from such conduct, and to comply with various affirmative remedial obligations. General Counsel and the Charging Parties contend that the appropriate make whole remedy is the refund of all dues and agency fees paid by all employees of Pictsweet and CMF, commencing six months before the filing of the first charge. Most of the seminal cases provide that the appropriate remedy is a new opportunity to object, and the refund of payments in the proportion of chargeable to nonchargeable costs, although one or two contain language that could be construed to support their position. *International Association of Machinists v. Steel* (1961) 367 U.S. 740 [48 LRRM 2345]; *Railway Clerks v. Allen* (1963) 373 U.S. 113 [53 LRRM 2128]; *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 [95 LRRM 2411]. The great majority of more recent cases, including several cited by General Counsel and the Charging Parties in support of their other contentions, have expressly rejected the interpretation sought by them, and have found a proportional refund of dues and agency fees collected as the appropriate remedy. See e.g. *Kroger, Inc.* (1999) 377 NLRB 123 [167 LRRM 1309]; *Prescott v. County of El Dorado* (C.A 9, 1999) 177 F.3d 1102, at page 1109, vacated and remanded on other grounds (2000) 528 U.S. 1111 [163 LRRM 2320], reinstated in pertinent part (C.A. 9, 2000) 204 F.3d 984 [163 LRRM 2994];

Wallace v. Valdez American Federation of Teachers, supra.[18] In light of these decisions, and because a full refund of all payments made would fly in the face of the collective bargaining agreement, full restitution will not be ordered.

There remains the issue of the obligations of those who have not paid any dues or fees since December 6, 2004, when Respondent first sought these assessments under CMF's control of the business, and distributed the first *Breaux/Hudson* notice. The Ninth Circuit has stated that if a union has acted in good faith to comply with its *Hudson* obligations, a proper notice will be given retroactive effect to earlier solicitations, even though the notice given earlier was ineffective. *Cummings v. Connell* (C.A. 9, 2003) 316 F.3d 886 [171 LRRM 2707]. The undersigned has considerable difficulty in finding that Respondent has acted in good faith. As the Charging Parties point out, Respondent far too long delayed giving *any* notice of objector rights. The notice of December 6, 2004 was grossly defective, and the second notice has also been found ineffective.

Respondent's apparent desire to "test the waters" by arguing for exemptions and favorable interpretations under our Act is ill advised under this backdrop. The use of unheard of expense categorizations and strange constitutional arguments do little to show good faith in complying with well-established notice requirements. In the meantime, the potential financial obligation for payment of back objector fees is steadily mounting, now approaching two years. Thus, while excusing the objectors' repayment obligations will, in effect, give them a "free ride" on their normal responsibility to pay their fair share of

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[18] The undersigned believes that *Elvin v. Oregon Public Employees Union* (1990) 793 P.2d 338 [102 Or.App. 159], affd. (1992) 140 LRRM 2347 [313 Or.165], cited by the Charging Party and decided by the Oregon state courts, is less controlling as authority for this jurisdiction, and that case issued before the cases cited above. More importantly, the undersigned believes the decision to be in error.

Respondent's representational costs, this has largely been caused by Respondent's foot-dragging and misconduct, and to rule otherwise would impose harsh, lump-sum financial obligations. Accordingly, no back dues or fees will be required from objecting CMF employees who have made no payments, and their fair share obligations shall commence once Respondent gives them proper *Breaux/Hudson* notice. Those objectors who have made payments shall be entitled to a pro-rata refund of the non-chargeable amounts, plus interest, once that amount is determined by Respondent, or the challenge procedure.

With respect to the Pictsweet employees, Respondent will be ordered to refund the pro-rata share of the payments made by those employees who objected to signing the dues checkoff forms, plus interest, upon completion of the objections/challenge process. Inasmuch as Pictsweet no longer operates the business, Respondent will be required to provide *Breaux/Hudson* notices only to those Pictsweet employees who made payments under the union security/checkoff clauses while Pictsweet operated the business. The makewhole period shall commence on September 23, 2003, six months prior to the filing of the charge in case No. 04-CL-1-VI(OX), thus covering the aforementioned payments under the Pictsweet/CMF agreement, effective January 1, 2004.

On the basis of the entire record, the findings of fact and conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent, United Farm Workers of America, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing to notify unit employees, when it first seeks to obligate them to pay fees or dues under a union security clause, of their right to remain financial core members; and of the rights of financial core members under *Breaux v. ALRB* (1990) 217 Cal.App.3d 730, to object to paying for union activities not germane to Respondent's duties as bargaining agent, and to obtain a reduction in fees for such activities.

(b) Failing to give potential objectors an adequate explanation for the fee.

(c) Collecting or attempting to collect dues or fees from objecting financial core members that are attributable to nonrepresentational expenses.

(d) Failing to process the objections made by unit employees.

(e) Informing employees that they are not entitled to a reduction in fees, if they choose to object to paying for nonrepresentational expenses.

(f) Seeking the discharge of employees for failing to pay dues or fees, prior to giving them proper notice of their rights and obligations with respect to such assessments.

(g) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by section 1152 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Notify all unit employees, in writing, of their right to be or remain financial core members; and of the rights of financial core members under *Breaux v. ALRB*, supra, to object to union activities not germane to Respondent's duties as bargaining agent, and to obtain a reduction in fees for such activities.

(b) Provide all potential objectors with an adequate explanation for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and to have an escrow established for the amounts reasonably in dispute while such challenges are pending.

(c) For all employees of Pictsweet Mushroom Farms – Ventura (Pictsweet) who paid dues or fees, commencing September 23, 2003, as nonmembers or under protest, refund the portion of their dues or fees, proportionate to Respondent's nonrepresentational expenses for those accounting periods, as determined by Respondent or the objections/challenge procedure. The refund shall also include interest to be determined in the manner set forth in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(d) For all employees of Pictsweet and The California Mushroom Farm, Inc. (CMF) who, with reasonable promptness after receiving the notices prescribed in paragraph 2(a), elect to file *Breaux* objections, process the objections, as well as any challenges to Respondent's chargeability contentions, as required by law.

(e) Upon completion of the objections/challenge procedure, for the period commencing September 23, 2003, refund that portion of the objectors' dues or fees, proportionate to Respondent's nonrepresentational expenses, plus interest.

(f) In order to facilitate the calculation of the refunds due under this Order, for the period commencing September 23, 2003, preserve and, upon request of the Visalia Regional Director, make available to the Board or its agents, for examination and copying, all records, including records showing the receipt of dues or fees from the employees affected herein, or by way of dues or fees checkoff authorizations.

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

(h) Post copies of the attached Notice, in all appropriate languages, in conspicuous places at Respondent's business offices, meeting halls, and bulletin boards provided to Respondent by CMF, such places to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed. Pursuant to Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of the Notices.

(i) Arrange for a representative of Respondent or Board agents to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the CMF bargaining unit, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agents shall be given the opportunity, outside the presence of Respondent's representatives, to answer any questions the employees may have concerning the Notice and their rights under the Act. Should any employee lose wages from CMF for time lost during the reading of the Notice and the question-and-answer period, Respondent shall reimburse such losses. The Regional Director shall determine a reasonable rate of compensation to be paid to all non-hourly employees.

(j) Mail copies of the attached Notice, in all appropriate languages, within 30 days after this Order becomes final, or when directed by the Regional Director, to all

employees of Pictsweet who paid dues or fees commencing September 23, 2003, and to all CMF employees for whom Respondent sought dues or fee payments.

(k) Provide a copy of the Notice to each agricultural employee hired to work for CMF during the twelve-month period following the date this Order becomes final.

(l) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically thereafter in writing of further actions to comply with the terms of the Order.

3. The remaining allegations in the Second Amended Consolidated Complaint are hereby dismissed.

Dated: November 7, 2006

Douglas Gallop
Administrative Law Judge, ALRB