

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ACE TOMATO CO., INC.,)	Case Nos. 89-RC-5-VI
)	89-RC-5-1-VI
Employer,)	
)	
and)	
)	18 ALRB No. 9
UNITED FARM WORKERS OF)	(October 20, 1992)
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

On January 15, 1992, Investigative Hearing Examiner (IHE) Robert Dresser issued the attached Decision, in which he dismissed Ace Tomato Co., Inc.'s (Ace or Employer) objections to the conduct of the representation election herein and recommended that the United Farm Workers of America, AFL-CIO (UFW or Union) be certified as the exclusive representative of all of Ace's agricultural employees in the State of California. Thereafter, Ace timely filed exceptions to the IHE's decision.

On August 4, 1989,¹ the UFW filed a petition for certification seeking to represent a bargaining unit comprised of all agricultural employees of Ace in San Joaquin and Stanislaus Counties. On August 8, the UFW filed an amendment to the petition describing the unit as all employees located in San Joaquin County.

¹ All dates herein will refer to 1989 unless otherwise indicated.

An election was conducted on August 10. The amended tally of votes showed the following results:

UFW	160
No Union	49
Unresolved Challenges	<u>103</u>
Total Ballots	312
Void Ballots	2

Thereafter, the Employer filed 38 election objections, of which the Executive Secretary set the following five for hearing:

1. Whether the Regional Director's determination of peak was reasonable;

2. Whether the petition described an appropriate bargaining unit, with an instruction to consider whether a broader unit is necessary;

3. Whether the UFW, through its agents, representatives and supporters, conducted a campaign of violence, threats, property damage, intimidation and coercion which created an atmosphere of fear and coercion rendering free choice impossible;

4. Whether the UFW, through its agents and representatives, violated the Board's access rules and, if so, whether such conduct tended to interfere with employee free choice; and

5. Whether the Agricultural Labor Relations Board (ALRB or Board), through its agents, authorized unlawful work site

access and, if so, whether such conduct tended to interfere with employee free choice.

During the hearing, the Employer contended that it was denied due process of law by some of the IHE's rulings. Our discussion of the due process issue follows our discussion of the election objection concerning alleged access violations.

The Board has reviewed the IHE's decision in light of the record and the exceptions and briefs filed by the parties and affirms the IHE's rulings, findings and conclusions to the extent consistent herewith. The Board has decided to certify the UFW as the exclusive collective bargaining representative of Ace's agricultural employees located in San Joaquin County, the unit described in the amended petition.

Peak Issue

In Adamek & Dessert. Inc. (1986) 178 Cal.App.3d 970, the Fourth District Court of Appeal held, in a past peak case, that Labor Code section 1156.3(a)(1) does not permit averaging of the employees employed during the pre-petition payroll period. Rather, the statute requires the Board to determine the eligibility employment figure from the actual number of persons on the employer's payroll during the eligibility period.

In Triple E Produce Corporation (1990) 16 ALRB No. 14, we considered the impact of Adamek on a prospective peak case. We noted that Adamek had not foreclosed the averaging of peak employment figures, and stated that we would continue to require first a body count comparison of actual employees on the

eligibility and peak period payrolls, and then, if peak was not obtainable by that method, use the Saikhon² method of averaging peak employment, in both past peak and prospective peak cases, as circumstances warranted.

In the instant case, the Employer did not provide a body count figure for its 1988 peak payroll period. Rather, it provided the total number of employees (without names) employed each day and computed an average daily figure of 564. It erroneously averaged its eligibility week employment, also, by totaling all the workers employed on five days (1,074) and dividing by 5 for an average of 215. However, the Regional Director was able to compute the body count for the eligibility week from the Employer's payroll records, which clearly showed the number of different workers employed during that week.³

In a prospective peak case, the standard for determining the propriety of the Regional Director's peak determination is whether in light of the information available to him or her a reasonable peak determination was made. (Triple E Produce Corporation, *supra*, 16 ALRB No. 14; Charles Malovich (1979) 5 ALRB No. 33.) The IHE accepted Ace's projection that because of an increase in the production of cartons per acre and the transplanting of additional tomatoes, the prospective peak in

² The Board's method of averaging peak employment figures was first applied in Mario Saikhon, Inc. (1976) 2 ALRB No. 2.

³ The Regional Director established the eligibility employee count as 382, but the IHE subtracted six employees who were foremen and found the correct body count figure to be 376.

1989 would be 20 percent higher than the 1988 peak. Adding 20 percent to the 1988 average peak figure, he found that 1989 peak would be 676 (564 plus 20 percent). Since 376 was more than 50 percent of 676, the IHE determined that the Regional Director had reasonably established peak.

Ace's contention that Adamek forbids averaging the peak period is erroneous; the court decision merely says that our statute precludes averaging of the eligibility period. Here, it would have been impossible to calculate peak by the body count method, because no employee names were furnished by the Employer and there was thus no way of determining employee turnover. Ace's contention that body count figures from the eligibility period may not validly be compared to average figures from the peak period is unsupported by case law or Board precedent. We therefore affirm the IHE's conclusion that the Regional Director's determination that the Employer was at peak at the time of the election was reasonable.

Bargaining Unit Issue

Labor Code section 1156.2 provides a statutory presumption that the bargaining unit shall be all the agricultural employees of an employer. The same section further provides that if the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the Board shall determine the appropriate unit(s) of agricultural employees in which to conduct the election.

The original Petition for Certification filed by the UFW herein described the bargaining unit as all agricultural employees of the Employer in San Joaquin and Stanislaus Counties. The Amended Petition described the unit as all agricultural employees of the Employer in San Joaquin County, which is the same unit described in the Notice and Direction of Election issued by the Regional Director. No party objected to the scope of the unit as described in the Notice. However, the Board's Executive Secretary set for hearing the question whether the petition described the appropriate unit in light of Dean Janssen's declaration stating that in 1989 Ace was harvesting fields in several counties other than San Joaquin, including Fresno, Sacramento and Solano.

Although the Regional Director appears to have limited the unit herein to Ace's agricultural employees in San Joaquin County, we do not know what factors he might have considered in determining the scope of the unit. Further, we find insufficient evidence in the record to permit us to conclude that a statewide unit would be more appropriate than the unit petitioned for. Thus, we overrule the IHE's recommendation to certify a statewide unit, and we will limit the bargaining unit to employees located in San Joaquin County, the unit described in the Notice and Direction of Election. We note that after issuance of the certification herein any party may file a petition seeking clarification of the bargaining unit pursuant to Title 8, California Code of Regulations, section 20385.

Alleged Incidents of Threats, Violence and Coercion

Incidents of threats and violence often constitute unfair labor practices. If occurring near an election with effects widely disseminated, threats or violence can unduly influence employees' free choice and cause certification of the election results to be withheld by the Board.

In the case before us, two distinct activities were in progress. A strike employing coercive conduct was led by Luis Magana, who was not associated with the Union, with the specific objective of increasing the per-bucket piece rate by ten cents. Shortly after the strike was in progress, and following the most frightening incidents alleged, the UFW intervened to organize the striking employees and to seek an election.

Although the record contains a number of incidents of wholly unacceptable conduct, those events appear related to the strike and not to UFW organizing efforts. Indeed, the record shows the Union to have discouraged violence and to have been relatively successful, since the atmosphere was quelled in the days immediately before and during the election.

Our discussion of specific incidents involving alleged threats, violence or coercion will be limited to those where we have disagreements with the way the IHE reached his conclusions or wish to clarify our basis for affirming them.⁴

⁴ Ace argues in its exceptions brief that the IHE's credibility resolutions have no legitimate basis and demonstrate bias on the part of the hearing examiner. While we are uncomfortable with some of the frequent "stock" phrases used by

(continued...)

On July 24 at Turner Ranch about 30 to 50 strikers came to the edge of the field and started shouting at the workers to leave and support the strike. Most of the workers came out of the field, and many of them actually joined the pickets, but a few people remained and continued to pick. A few strikers entered the field to a limited extent and threw tomatoes, and one woman may have been hit by a tomato. The IHE found that the strikers did not threaten the workers, but simply urged them to stop picking and join the effort to get a pay increase.⁵ He found that the Employer had not established that the workers left the field because of coercion rather than because they were supporting the strike. Noting that deputy sheriffs were present at least part of the time, he concluded that the conduct that

⁴(...continued)

the IHE to discredit witnesses (e.g., stating that a witness "had a story to tell"), and find some inconsistencies in his application of standards, we find that the Employer has exaggerated its claims. The Employer's claim that the IHE discredited every Employer witness in every material respect and credited every UFW witness is incorrect. The IHE's description of testimony as "vague," "rehearsed," or "coached" is in most cases backed up with specific examples of testimony supporting his conclusions. Moreover, such descriptions are exactly the kind of demeanor-based credibility findings which ordinarily should not be disturbed upon our review of the cold record. To the extent that the IHE's credibility resolutions are demeanor-based, the Employer has failed to show that the clear preponderance of all the relevant evidence demonstrates that the findings were incorrect. (Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].)

⁵ The IHE seems to suggest that the throwing of tomatoes is not intimidating unless someone is hit. We condemn any throwing of objects by pickets, but do not believe this incident, which was related to the strike rather than the election, was sufficiently intimidating to interfere with free choice in the election which took place 17 days later.

occurred did not rise to the level which would require the election to be set aside.

On July 26 at Turner Ranch strikers pushed on two vans bringing employees to work, but neither van was in any danger of being pushed over.⁶ Some strikers entered the field, but by that time most of the workers had left. Deputy sheriffs were present immediately after the strikers entered the field, and the IHE found that the police presence substantially reduced the potential for problems or coercion. The IHE found that testimony regarding alleged threats was too vague to support a finding. He also found that no trespasses occurred after UFW representatives arrived at the field in the afternoon.

On July 26 a group of 20 to 40 strikers visited the home of Jesus and Alejandra Medina at Mathews Road Labor Camp to ask them to honor the strike by not working for Ace. The IHE found that no specific threats were made, and that the visit did not constitute the type of aggravated misconduct which would tend to affect the results of the election.⁷ Although Jesus Medina testified that tires on his car and pickup truck were punctured a day or two later, the IHE found that the Employer had failed to

⁶ While any pushing on cars by pickets is not to be condoned and may be somewhat intimidating, we do not believe the pushing in this case constituted the type of aggravated misconduct occurring close to the election that should result in setting aside the election.

⁷ It may be that the presence of a large group of protesters outside one's home is by its nature somewhat intimidating. However, this incident took place before the election petition was filed, and only one worker (Mrs. Medina) was affected. Additionally, there was no evidence of dissemination.

establish that the UFW or any other specific individual or group was responsible for the tire puncturing.

On August 3 at Turner Ranch some strikers entered the field without permission, but the IHE found that witnesses' testimony did not establish that threats were made nor that any coercive atmosphere was created by the access takers.⁸ Moreover, there was no evidence that the UFW participated in or condoned the unlawful access.

The IHE discredited a supervisor's testimony that strikers uttered threats in unison on August 7 or 8 at Dellaringa Ranch, because in his review of video tapes of strikers on the picket line he never heard strikers yelling anything in unison.⁹ He also found that UFW agents who took access to the field did not engage in any misconduct.

The IHE found that the UFW took lawful access at Sanguinetti Ranch on August 8, and that no coercion or any other misconduct occurred which could have affected the election. He

⁸ The IHE properly discredited the testimony of Field Supervisor Mike Stefani about this incident. Stefani claimed to have heard specific threats uttered by strikers in Spanish, but later admitted that he understands only "a little bit" of the language.

⁹ This basis, by itself, would be insufficient for discrediting the testimony of the supervisor, Oscar Equis. However, Equis' testimony was also inconsistent in that he first said one man made a threat that there would "be blood flowing," then that two men made the threat, and still later that a majority of the 45 to 50 strikers were all making the same comment as they approached the field. In addition, Equis testified that at the end of the day, some of the workers gave all the strikers a ride back out to the main road. We find it implausible that workers who were in fact subjected to such threats would later offer rides to the perpetrators.

discredited the testimony of a supervisor's wife that she was threatened by access takers on August 9, because her account of the incident was vague,¹⁰ and appeared to be inconsistent with video tapes of striker activity at the field that day. He further found her testimony unreliable because she had been unable to undergo cross-examination.¹¹

The IHE discredited Oscar Equis' testimony that on August 8 or 9 at Dellaringa Ranch three workers who tried to enter the field on foot were pushed by strikers, in part because he found it implausible that workers would attempt to enter the field on foot rather than by car.¹² Thus, the IHE concluded that the alleged pushing incident did not occur.

Role of the UFW in Strike Activities

Witnesses for both the UFW and Ace testified that the leader of the workers' committee formed on July 20 at Mathews

¹⁰ It is difficult to consider as threats the statements alleged by Medina ("Why are you working here? It's going to cost you the place you're living in.") The statements could merely have been an admonition that she could not afford her home for long at the wage rates Ace was paying.

¹¹ The record indicates that the UFW's attorney may have waived her right to cross-examine this witness by stating that she had only a few questions anyway, and by failing to request a recess for the witness to compose herself. However, the witness' testimony regarding this incident was in any case too vague to justify a finding of a threat being made.

¹² We find that, by itself, this would not be a sufficient basis to discredit Equis. However, the IHE's other reasons do provide adequate grounds for discrediting Equis: his testimony was vague as to when the incident happened and the description of those pushed and those doing the pushing; and, although Equis placed his supervisor Ismael Viveros at the scene, Viveros mentioned nothing about such an incident during his testimony.

Road Labor Camp was Luis Magana. Although UFW representative Efren Barajas was present during the meeting and attended a later wage-request meeting with the Employer, he played a minor role during the meetings, with Magana being the primary spokesman. Both Employer and Union witnesses testified that the UFW did not take over the strike until the afternoon of July 26, when Barajas addressed the workers assembled at Mariposa Ranch and agreed to take over the strike if the workers agreed to follow UFW rules of conduct. We therefore uphold the IHE's conclusion that the UFW was not in charge of strike activities prior to the afternoon of July 26.

The Employer also contended that agents of the UFW participated in violent and coercive conduct after July 24, which was ratified and adopted by the Union. The burden of proof in determining agency is on the party asserting the agency relationship (San Diego Nursery (1979) 5 ALRB No. 43) and the conduct of pro-union employees will be attributed to a union only where the union has "instigated, authorized, solicited, ratified, condoned or adopted" the conduct. (Kux Manufacturing Co. v. NLRB (6th Cir. 1989) 890 F.2d 804 [132 LRRM 2935, 2939].)

The IHE concluded that Ace did not establish that the UFW expressly granted authority to any worker or striker to engage in any misconduct, nor did it establish any apparent authority which would have required some type of ratification or acquiescence by the UFW. The IHE found that the Union had monitored the picket lines and the strike in a reasonable

fashion. He found no evidence of UFW responsibility for or ratification of any pushing of vans, damage to cars, trespasses or threats.

We affirm the IHE's conclusion that the Employer failed to establish any misconduct attributable to Union officials, organizers or agents. Therefore, the third-party standard is applicable to all of the alleged misconduct herein.

Application of the Third Party Standard

Both the ALRB and the National Labor Relations Board (NLRB or national board) give less weight to misconduct attributable to union supporters or workers than to union officials, organizers or agents. The test for setting aside an election because of such third-party conduct is whether the conduct was so aggravated that it created an atmosphere of fear or reprisal making employee free choice in the election impossible. (Triple E Produce Corporation (1991) 17 ALRB No. 15.) The margin of victory is also considered as a factor in assessing whether an election should be set aside on the basis of misconduct. (Id.; Furukawa Farms, Inc. (1991) 17 ALRB No. 4.)

In Steak House Meat Company, Inc. (1973) 206 NLRB 28 [84 LRRM 1200], an employee brandishing a knife threatened a co-worker with death if he voted against the union, and threatened him again a week later. Although the threats were not attributable to the union, the NLRB set aside the election, where the margin of victory was only one vote.

In Sequatchie Valley Coal Corporation (1986) 281 NLRB 726 [123 LRRM 1185], the NLRB set aside an election where a co-worker threatened to "burn out" an employee, another co-worker threatened the same employee that unless he supported the union he would "sick" the threat-maker on him, and a third co-worker told the victim that if the union did not get a contract there would be a strike and "that's when the killing would start." The national board noted that the threats were disseminated among a significant number of employees.

In Teamsters Local 703 (Kennicott Brothers Company) (1987) 284 NLRB 1125 [126 LRRM 1033], union agents threatened an employee who had filed a decertification petition with physical harm, and then brutally assaulted the employer's president and its manager in the presence of fifteen employees and customers. The national board set aside the election, which the union had won by only a 12-10 margin. Similarly, in Sub-Zero Freezer Company, Inc. (1984) 271 NLRB 47 [116 LRRM 1281] the election was set aside based on serious third-party threats including serious threats of physical violence and actual damage to automobiles, where threats were widely disseminated and the margin of victory was only one vote.

Cases in which this Board has denied certification on the basis of violence and threats surrounding the election also show opposite circumstances from the instant case. For example, in Ace Tomato Company, Inc./George B. Lager Farms (1989) 15 ALRB No. 7, the violence was directed at the employer's

position in the election and was continued on the very day of the voting, in the presence of large numbers of eligible employees. In T. Ito & Sons Farms (1985) 11 ALRB No. 36, we refused to certify an election involving a strike that began before the petitioning union intervened, but only because the same threats made in the course of the strike were repeated on the day of the election to large numbers of workers waiting in line to vote. Furthermore, in Ito, as in Ace, the number of employees directly exposed to threats and violence was shown to approach a majority of the eligible voters.

We find that the circumstances of this case are distinguishable from any of the ALRB or NLRB cases in which elections have been set aside for third-party misconduct. Of the ballots counted herein, the UFW's victory was by a margin of 160 to 49. The most unruly striker behavior occurred on July 24 at Turner Ranch before the UFW took over the strike. A majority of the workers at Turner Ranch that day had left the field before any tomatoes were thrown, and many of the employees actually joined the strikers. Although one woman may have been hit by a tomato, the incident was isolated. The strikers were not making serious threats to the workers, but rather were exhorting them to stop picking and join the effort to get a pay increase. The presence of deputy sheriffs for much of the time was another mitigating factor. Further, the incident occurred 17 days prior to the election, before any Union involvement, and 11 days before the Union filed its Petition for Certification.

While we find threats or violence of any kind to be objectionable, we find the conduct in this case to be less likely to have affected free choice than the conduct in the recently-decided Triple E Produce Corporation (1991) 17 ALRB No. 15, wherein we upheld the election. In contrast to cases in which this Board or the NLRB has set aside elections on the basis of third-party misconduct, the evidence herein demonstrates no dissemination of threats among employees,¹³ no threats or other misconduct tied to voting, some pushing of cars but no attempts to overturn them, no vandalism tied to Union agents or supporters, and no misconduct alleged to have occurred on the day of the election. The incidents that did occur were isolated in

¹³ The Employer was unable to establish any actual dissemination to employees of alleged violent, coercive or intimidating conduct on the part of Union supporters, but sought to invoke the NLRB's so-called "small plant doctrine." The doctrine has been utilized by the NLRB in discrimination cases to permit the national board to infer employer knowledge of union or other protected activity based on the smallness of the unit and the resulting close working proximity between employer and employee. (United Broadcasting Company of New York (1980) 248 NLRB 403 [103 LRRM 1421].) We hold that the IHE properly rejected application of the doctrine herein. This case does not involve a small unit, and the margin of victory was large. Moreover, this Board has not specifically adopted the small plant doctrine, but has generally required a factual determination that threats have actually been disseminated. Limoneira Company (1987) 13 ALRB No. 13 is distinguishable, in that it involved employer campaign promises made to an assembly of employees during a regular departmental meeting. The particular circumstances of that case made it reasonable to presume that the employer's promises would have been disseminated and discussed among employees.

As to many of the allegations found by the IHE to be untrue, we note that even if they had been credited they would not have affected the outcome of the election since they were not disseminated among the employees.

what was overall a peaceful atmosphere despite the heightened tensions characteristic of any strike situation.

Thus, in this case, Union discouragement of strike-related threats and violence during its election campaign, and the lack of evidence of the dissemination or effects of any nonunion threats or violence, appear determinative. We conclude that the conduct of third parties herein did not create an atmosphere of fear or reprisal making employee free choice in the election impossible.

Alleged Access Violations

On August 7 or 8 at Dellaringa Ranch, several Board agents discussed Union access with two Ace attorneys, a UFW representative, and several sheriff's officers. Ace attorney Michael Price stated that the property owners had concerns about dust, property damage, and liability problems. The Board agents caucused and decided that the Union was legally entitled to take access. They therefore decided to escort the UFW agents into the field to make sure there would be no damage and a minimum of dust. Board agent Ed Cuellar advised the sheriff and the Employer's attorneys of the decision, and shortly thereafter access was taken by two UFW organizers following the Board agents' car onto the property at less than 5 miles an hour. The organizers remained in the field for 20 to 30 minutes, and then the Board agents escorted the organizers' car out at the same speed. Cuellar emphasized that the strikers were not standing

near enough to hear the access discussion, and he did not tell workers inside the field about it.

It is clear that the Union, having filed its Notice of Intent to Take Access on August 4, was entitled to organizational access on August 7 or 8 at Dellaringa Ranch. However, a separate question is raised by the Board agents' authorization of access over the Employer's objections regarding possible property damage, dust and liability.

In Triple E Produce Corporation (1991) 17 ALRB No. 15 (Triple E), we found that a Board agent should have refrained from injecting himself into a dispute between an employer and a union as to whether the employer could validly suspend access in order to curb alleged violence. We found that the denial of access should properly have been raised before the Board through an unfair labor practice charge or election objection. However, we found that the Board's neutrality was not impaired since the Board agent had correctly stated the law regarding access, and the contents of the access discussion were not disseminated to employees.

In Sam Andrews' Sons (1989) 15 ALRB No. 5 (Sam Andrews'), we set aside an election upon finding that the Board's neutrality was compromised when a Board agent met with pro-union employees to explain the status of outstanding backpay orders, and his comments were later taken out of context in a pro-union flyer distributed to employees before the election. Although the agent's mere appearance at the meeting was not

enough to justify setting aside the election, the union's subsequent dissemination of a misleading version of the agent's statement showed that the agent had allowed himself to be used in a manner that seriously affected the Board's neutrality.

We find that the facts in this case are more closely aligned with Triple E than with Sam Andrews'. Although the Board agents herein should not have made their own decision to overrule the Employer's objections concerning access, it appears that their determination that the Union was lawfully entitled to access was correct. Since the employees were apparently at a distance where they could not overhear the discussion about access, there is no evidence that employees could have perceived any partisan alignment between the Board agents and any of the parties, nor that the Board's neutrality was impaired. We therefore affirm the IHE's conclusion that the Board agents' authorization of access did not tend to affect employee free choice in the election.

Due Process Issue

Ace argues that it was denied due process of law when the IHE: (1) refused to allow it to extend its case-in-chief beyond July 25, 1991, because the Employer had assured him its case would be finished no later than that date, and (2) refused to allow the Employer to call Efren Barajas as its own witness because Barajas was not on the list of witnesses the IHE had requested on July 23, 1991, of the number and identity of

witnesses who would be testifying in order to close the Employer's case.

Title 8, California Code of Regulations, section 20379, provides that in an investigative hearing, a party shall have the right to call, examine and cross-examine witnesses and to introduce documentary evidence into the record. The IHE has a duty to inquire fully into all matters in issue and to obtain a full and complete record. Our investigative hearings on election objections, like those conducted by the NLRB, are considered non-adversary in character and are, in effect, part of the Board's investigation into whether the election should be certified.

In Mid-Con Cables, Inc. (1981) 256 NLRB 720 [107 LRRM 1304], the NLRB held that a hearing officer erred when he refused to permit the employer to cross-examine a union witness. The national board held that where a witness has testified on direct examination, it was not within the discretion of the hearing officer to preclude any and all cross-examination of that witness.

However, in Kux Manufacturing Co. v. NLRB, (6th Cir. 1989) 890 F.2d 804, the court held that an employer was not denied due process when an NLRB hearing officer forced the employer to introduce evidence of alleged misconduct before allowing it to cross-examine a union organizer. The court cited cases holding that an administrative agency's disposition of a case will not be disturbed on the basis of alleged procedural irregularities unless they resulted in actual prejudice. The

court found no prejudice in Kux because the employer had conducted an extensive cross-examination of the union organizer.

In the instant case, the IHE noted that Ace could have subpoenaed the two witnesses who did not appear at the hearing on July 25, 1991, and that they failed to appear even though the IHE held the hearing open for an extra hour. He also noted that the Employer could have subpoenaed Efren Barajas to appear as its own witness. We note, as well, that the Employer did conduct an extensive cross-examination of Barajas. The Employer provided no explanation of why it could not have foreseen earlier a need to call Barajas as part of its case-in-chief, nor did it assert that its opportunity to cross-examine him was in any way curtailed. Further, the Employer did not object when the IHE stated on the record on July 23, 1991, that the Employer had only eight more witnesses and had guaranteed that its case would be finished on July 25, 1991.

Since the Employer could have subpoenaed the two witnesses who failed to appear, it had ample opportunity to cross-examine Efren Barajas (whom it could also have subpoenaed), and the Employer at no time indicated the content or import of these witnesses' testimony, we conclude that the Employer has not shown actual prejudice resulting from the IHE's ruling. Consequently, the Employer was not denied due process of law.

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Conclusion and Certification

We conclude that Ace failed to prove any misconduct which made employee free choice impossible. We therefore order that the results of the election conducted on August 10, 1989, be upheld and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive collective bargaining representative of all of Ace's agricultural employees located in San Joaquin County.

DATED: October 20, 1992

BRUCE J. JANIGIAN, Chairman¹⁴

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

¹⁴ The signatures of Board Members in all Board decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board members in order of their seniority.

CASE SUMMARY

Ace Tomato Co., Inc.
(UFW)

18 ALRB No. 9
Case Nos. 89-RC-5-VI
89-RC-5-1-VI

Background

An election was conducted among Ace's agricultural employees located in San Joaquin County on August 10, 1989. The amended tally of votes showed that the UFW prevailed in the election by a vote of 160 to 49, with 103 unresolved challenged ballots and 2 void ballots. Ace filed 38 election objections. The Executive Secretary set 5 for hearing. The objections alleged that the UFW and its agents had violated the Board's access rules and conducted a campaign of violence, threats, intimidation and coercion, thereby interfering with employee free choice; that the Board, through its agents, had authorized unlawful work site access, thereby interfering with free choice; and that the Regional Director had incorrectly determined that the Employer was at peak employment at the time the petition for certification was filed. The Executive Secretary also set for hearing the question of whether the petition described the appropriate bargaining unit, with instructions to consider a broader unit if necessary.

IHE Decision

The IHE found that the UFW was not responsible for strike activities at Ace until the afternoon of July 26, 1989, when Efren Barajas addressed assembled Ace workers and told them the Union would take over the strike if the workers agreed to follow UFW rules of conduct. He found that the most unruly striker behavior occurred on July 24, 1989, at Turner Ranch before the UFW took over. There were about 30 to 50 strikers present that day, and a few of them entered the field to a limited extent and threw tomatoes. Although one woman might have been hit by a tomato, the incident was isolated, the IHE concluded, and did not affect the atmosphere of the election. He found that the strikers did not make serious threats, but simply urged the workers to stop picking and join the strike, as many of them did. The presence of deputy sheriffs for at least part of the time would, he found, have had a calming effect.

As to subsequent incidents, the IHE found that Ace had not established that strikers or union supporters were acting as agents of the UFW in their strike-related activities. Therefore, in evaluating the strikers' conduct, he applied the NLRB and ALRB test for third-party conduct: whether the conduct was so aggravated that it created an atmosphere of fear or reprisal making employee free choice impossible. He found there were two incidents of vans being pushed, but never any danger of them being pushed over; some incidents of strikers entering fields but no field rushing and no threats by the trespassers; some

incidents of tires being punctured and a windshield and a car window being cracked, but no evidence that strikers or Union supporters caused the damage; and some shouting of profanity and epithets from picket lines but no coercive threats. Comparing the facts of this case to those in NLRB and ALRB cases where elections had been set aside for striker misconduct, the IHE found all of those cases distinguishable because they involved a much more serious level of misconduct. He concluded that no aggravated misconduct had occurred herein, and that Ace's employees were able to exercise free choice in the election.

Regarding the Employer's peak objection, the IHE examined the information available to the Regional Director and determined that he had reasonably concluded that the Employer was at peak employment during the eligibility period. The IHE dismissed the Employer's objection alleging that Board agents authorized unlawful access, finding that the agents' order allowing access was reasonable and correct. On the basis of testimony that Ace employees worked in a number of counties besides San Joaquin, the IHE recommended that the Board certify a bargaining unit consisting of all of Ace's agricultural employees in the State of California.

Board Decision

The Board upheld the IHE's findings regarding alleged striker misconduct, and affirmed his conclusion that the conduct did not tend to interfere with voter free choice. The Board emphasized that the most serious misconduct was distant in time from the election, related to the strike, directed at supervisors, and not disseminated to a significant number of eligible voters. Although it found that Board agents should not have made their own decision to overrule the Employer's objections to Union access, the Board concluded that the authorization of access did not tend to affect employee free choice. The Board affirmed the IHE's finding that the Regional Director had reasonably determined the Employer to be at peak employment at the time of the election. The Board overruled the IHE's recommendation that a statewide unit be certified, because it found insufficient evidence to justify certification of a broader unit than the San Joaquin County unit for which the UFW had petitioned. The Board rejected Ace's contention that it was denied due process, finding that the Employer had ample opportunity to call and examine witnesses, and had not established actual prejudice.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
 ACE TOMATO CO., INC.,)
)
 Employer,)
)
 and)
)
 UNITED FARM WORKERS)
 OF AMERICA, AFL-CIO,)
)
 Petitioner.)
)
 _____)

Case Nos. 89-RC-5-VI
 89-RC-5-1-VI

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I. INTRODUCTION

This case was heard by me on 17 hearing days in Stockton, California, in November of 1990 and during the summer of 1991.¹ Briefs were filed by Ace Tomato Co., Inc. (hereafter Ace or Employer) and the United Farm Workers of America, AFL-CIO (hereafter UFW, Petitioner or Union) in October of 1991.²

Following meetings of agricultural employees (hereafter employees or workers) at Mathews Road Labor Camp in Stockton on or about July 20 and 21, workers at Ace along with workers at Triple E Produce Corporation (hereafter Triple E) and San Joaquin Tomato Growers, Inc., Lagorio Farms, Inc. (hereafter San Joaquin) went on a strike on July 24.³ As will be discussed in greater detail infra, I find that the UFW took over the strike late in the morning on July 26 at Mariposa Ranch (a Triple E field) when UFW organizer Efren Barajas got up on top of a vehicle with Ildefonso, a member of the committee which began the strike on July 24, and announced that since the committee had been unsuccessful in obtaining a wage increase and had now invited the

¹The hearing was held on November 1 and November 2, 1990. The hearing was then continued to June 24, 1991, and was heard on that day and on June 25, June 26, June 27, June 28, July 1, July 2, July 3, July 22, July 23, July 25, July 26, July 31, August 1, and August 5, all in 1991.

²All dates will refer to 1989 unless otherwise indicated.

³Contrary to the Employer's contention made throughout the hearing that there was no strike at Ace in July and August of 1989, I find that there was in fact a strike. The distinctive feature of the strike at Ace was the withholding of labor from the Employer. (See Ace Tomato Company, Inc. (1990) 16 ALRB No. 9 where this Board found that a strike did occur at Ace. Id. at p. 6.)

UFW to take over, the UFW would take over the strike beginning immediately.

Shortly after the strike at Ace began, the Agricultural Labor Relations Board (ALRB or Board) issued on August 2 a Decision revoking the UFW's certification issued in 1986. (See Ace Tomato Company, Inc./ George B. Lagorio Farms (1986) 12 ALRB No. 20.) The UFW then filed a Notice of Intent to Take Access (NA) on August 4 and a petition for certification seeking to represent the employees of Ace in a bargaining unit including all agricultural employees of the Employer in San Joaquin and Stanislaus Counties.⁴ On August 8, the UFW filed an amendment to the petition for certification which described the bargaining unit as all the agricultural employees located in San Joaquin County. (BX 2.)⁵

Pursuant to a stipulation reached at hearing, I hereby admit into evidence the Employer's Response to Petition for Certification, dated August 6, 1989, as EX 15.⁶ I am admitting

⁴Board exhibits are noted herein as "BX". There are 34 Board exhibits. The Employer introduced 17 exhibits which are noted herein as "EX". The Petitioner introduced 22 exhibits noted herein as "UFWX".

⁵The Petition for Certification and Amended Petition for Certification will be referred to herein as the election petition.

⁶This exhibit contains a letter dated August 19, 1991, from Employer attorney Spencer Hipp to me, a declaration of Spencer Hipp dated August 19, 1991, the Employer's Response to Petition for Certification dated August 6, 1989, a position statement signed by Spencer Hipp on August 6, 1989, a declaration of General Manager Dean Janssen of 5 pages dated August 6, 1989 (this declaration is already in the record as an attachment to BX 9), and a declaration of John Bertaina dated August 6, 1989.

as EX 16 an amended response to the petition for certification dated August 7, 1989.⁷ I am also admitting as EX 17 a six-minute video tape taken by the San Joaquin Sheriff's Department on Thursday, July 27, 1989, as described in Mr. Hipp's letter of August 19, 1991.⁸

The Regional Director determined the eligibility period to be July 28 to August 3. The employees employed during that time period were eligible to vote as well as the economic strikers found to be eligible by the Board in its decision on challenged ballots issued on July 12, 1990. (See Ace Tomato Company, Inc. (1990) 16 ALRB No. B.)⁹

The election was conducted on August 10 with the following results:

UFW	71
No Union	45
Unresolved Challenges	<u>212</u>
Total Ballots	328

The original Tally of Ballots (BX 12) also indicates that there were 382 names on the list.

⁷It includes a position statement of Spencer Hipp dated August 1, 1989, a declaration of Spencer Hipp dated August 7, 1989, and the same declaration from Dean Janssen dated August 6, 1989, and a declaration from John Bertaina dated August 6, 1989.

⁸As Mr. Hipp's letter of August 19, 1991, which mentions the three items identified as Employer's Exhibits 15, 16 and 17, was served on UFW attorney, Ms. Dianna Lyons, and there has been no opposition filed, they are hereby admitted.

⁹See BX 3, the Notice and Direction of Election dated August 8.

Since the unresolved challenged ballots were outcome determinative, the Regional Director conducted an investigation and issued his Report on Challenged Ballots on November 28. In its decision affirming the findings and recommendations of the Regional Director, the Board noted that the UFW had asserted in its election petitions that the number of workers on strike were approximately 400. Pursuant to the Board's Decision, the Regional Director issued an amended tally on September 19, 1990, with the following results:

UFW	160
No Union	49
Unresolved Challenges	<u>103</u>
Total Ballots	312
Void Ballots	2

The amended tally reflected that the UFW received a majority of the valid ballots cast.¹⁰

The Employer on August 16 filed 38 objections to the election, to the conduct of the election and to conduct affecting the results of the election with supporting declarations along with a position statement demonstrating the untimeliness of this petition (a peak objection). The Executive Secretary then issued a notice of objections set for hearing which set five objections for hearing which may be summarized as follows:

¹⁰The Board denied on August 30, 1990 r the Employer's motion for reconsideration of the Board's decision and order on challenged ballots in Ace Tomato Company, Inc. (1990) 16 ALRB No. 9.

1. Whether the UFW, through its agents, representatives and supporters, interfered with the fair operation of the election process by directing against the employees of the Employer and of its labor contractor employees a campaign of violence, threats of violence, property damage, intimidation and coercion which, together, created an atmosphere of fear and coercion rendering a free choice of representative impossible;

2. Whether the UFW, through its agents and representatives, violated the Board's access rules and, if so, whether such conduct had a tendency to interfere with employee free choice to such an extent that it affected the results of the election;

3. Whether the Regional Director's determination of peak was reasonable in light of all the information available to him at the time of his decision;

4. Whether the original and/or amended petition of certification described an appropriate bargaining unit with an instruction to consider whether a broader unit description is necessary in light of the declaration of Dean Janssen indicating that the Company had or would be harvesting tomato fields in calendar year 1989 in several counties, including Fresno, San Joaquin, Sacramento and Solano; and

5. Whether the ALRB, through its representatives and agents, authorized the taking of alleged unlawful work site access and, if so, whether such conduct had a tendency to

interfere with employee free choice to such an extent that it affected the results of the election. (BX 6.)

The Executive Secretary in the same order dismissed the rest of the Employer's objections and advised the Employer of its opportunity to file a request for review.

The Employer filed a request for review on September 18, 1990, and the Board denied it on January 11, 1991. (See BX 18 and 19.)

The UFW filed a motion for summary judgment or in the alternative to dismiss the peak objection on October 19, 1990, within a few days after the Board issued its peak decision in Triple E Produce Corporation (1990) 16 ALRB No. 14. The Union then filed an amended motion for summary judgment on October 19, 1990, to correct an error in the original motion. (See BX 8 and BX 9.)

The Employer filed an opposition on October 26, 1990. (See BX 10.)

This opposition was then addressed by a reply filed by the UFW on October 30, 1990.

The Executive Secretary then issued an order transferring the motion and amended motion as well as the Employer's opposition to the Investigative Hearing Examiner (IHE) assigned to the case for a ruling. (BX 7.)

On June 3, 1991, I participated along with attorneys for the Employer and the Union in a pre-hearing conference call

which had as one of its subjects a discussion of the above-mentioned motion for summary judgment.¹¹

During the pre-hearing conference call, I stated that it appeared from a review of the moving and opposing papers that the Employer may have misunderstood the concept of body count as set forth in the Board's Decision in Triple E Produce Corporation, supra, 16 ALRB No. 14. I specifically left it open for the Employer to clarify its concept of body count before I rendered my decision. As will be discussed infra in my analysis of the peak objection, the Employer failed to take advantage of this opportunity.

During the hearing, I granted the UFW motion for summary judgment regarding peak and I dismissed the peak objection. (See Tr. VIII:1-3.)¹² I will set forth my reasons for dismissing the peak objection infra in the analysis.

¹¹This pre-hearing conference call was recorded but it has not yet been transcribed and I find there is no need to have it transcribed for purposes of resolution of the peak question.

¹²References to the Reporter's Transcript are noted herein as "Tr." followed by the volume number in Roman numerals and the pages numbers in Arabic numerals. Because two different reporting services were used, initially there were two volumes VI and VII. However, the California Reporting Alliance issued corrected pages which reflect that they began their reporting of the hearing on July 1, 1991, with Volume VIII. I have inserted in each of the 17 volumes the corrected facesheet where appropriate. This means that the volumes are numbered I through XVII.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings, including examining witnesses¹³ and filing briefs.

II. EVIDENTIARY RULINGS

Before discussing specific testimony and making my findings of fact, it is first necessary to reconsider several of my rulings. The following represents my final rulings on six evidentiary questions which I addressed during the hearing.

A. The Testimony of Jesus Medina and Alejandra Medina

The two primary questions raised by the testimony of Mr. and Mrs. Medina are first whether, in the absence of established UFW responsibility for events on June 24 at Turner Ranch, it was inappropriate for me to have stricken their testimony regarding those events. The second issue is whether I was correct in refusing to hear testimony concerning offers of proof in which no agricultural employees were either present or alleged, based upon specific representations, to have heard about the alleged misconduct which occurred outside their presence. This raised the "small plant doctrine" which the Employer asserts is mandatory National Labor Relations Board (NLRB or national board) precedent to be followed by this Board.

¹³During that portion of the hearing when Board agents testified, they were represented by an attorney from the General Counsel's office. The record includes the testimony of 22 witnesses called by the Employer, 12 witnesses called by the UFW as well as the various exhibits referred to in Footnote 4.

1. UFW Responsibility

I struck Mr. Medina's testimony regarding events of July 24th at Turner Ranch because his testimony did not indicate that the UFW was responsible for the field rushing and alleged threats. (Tr. I:81.) My review of the Board's Decision in T. Ito & Sons Farms (1985) 11 ALRB No. 36 indicates that my ruling was in error. The Board there set aside an election based in part upon strikers engaging in certain misconduct even prior to the union's involvement. (Id. at p. 19.) Upon reconsideration of my ruling striking the testimony of Mr. and Mrs. Medina regarding events at Turner Ranch on July 24, I shall consider their testimony with regard to those events.

2. Small Plant Doctrine

During the course of the hearing, I struck certain testimony and declined to hear other testimony unless there was a showing that the alleged misconduct or threats had occurred in front of eligible Ace agricultural employees or there were some basis upon which I could reasonably conclude that the alleged misconduct or threats were communicated or disseminated to eligible employees.

The Employer cited a number of decisions including Triple E Produce Corporation v. Agricultural Labor Relations Board (1983) 35 Cal.3d 42 and United Broadcasting Company of New York (1980) 248 NLRB 403 in support of his assertion that the Board should follow the "small plant doctrine" which presumes that threats made to workers may reasonably be expected to have

been discussed and disseminated among all employees. (See Tr. VII:152-168.) I heard additional argument from the UFW and the Employer the following hearing day. (Tr. VIII:4-28.) I ruled that the ALRB has not adopted the presumption that threats are widely disseminated among the electorate without some showing of actual discussion and/or dissemination of such threats to eligible workers. In addition, several of the cases cited by the Employer are distinguishable from the record in this case.

I can find no ALRB decision which has adopted the presumption that a threat is automatically disseminated. Rather, Board decisions seem to require a factual determination of whether threats were widespread. See for example Triple E Produce Corporation (1991) 17 ALRB No. 15 where the Board suggests that whether a general atmosphere of fear and coercion exists depends upon the particular circumstances of a case. The Board in referring to T. Ito & Sons Farms (1985) 11 ALRB No. 36 emphasized that therein the threats were widespread, directed at a large portion of the voting unit, were repeatedly made, all with the purpose of coercing workers to join the strike or, on the day of the election, to vote for the union. (Id. at p. 10 of fn. 4.) The Board in Triple E Produce Corporation, supra, 17 ALRB No. 5, also discussed in the same footnote its decision in Ace Tomato Company, Inc./George B. Lagorio Farms (1989) 15 ALRB No. 7 where there was a pattern of actual, and not just threatened violence, and where the misconduct of union supporters.

was rejuvenated right through the balloting process. (Ibid. at p. 10, fn. 4.)

The NLRB cases are also distinguishable. For example, in United Broadcasting Company of New York (1980) 248 NLRB 403, there was a small unit, a small margin of victory and a threat to blacklist a particular employee. In contrast, the record in the instant matter reveals a large margin of victory, a large unit covering a number of fields in San Joaquin County and, as will be discussed infra, there is no finding that a union organizer or agent made such a serious threat.

In Standard Knitting Mills, Inc. (1968) 172 NLRB 1122, employer misconduct was involved which occurred shortly before the election and included outright threats of plant closure and loss of benefits as a penalty for unionization. In addition, the makers of these threats were persons in positions of substantial authority. In the unit of 3,000 employees, the margin of victory was only 17 votes (or at most 21 votes). Further, in addition to the likelihood that word of the incidents was broadcast, there was a direct indication in the record that such dissemination actually occurred. (Id. at p. 1122-1123.) Again this case is distinguishable from the record in the instant matter. Nor do other NLRB decisions cited by the Employer require adoption by this Board of a presumption of dissemination.¹⁴

¹⁴In Sav-On-Drugs, Inc. (1977) 277 NLRB 1638, there was a small workforce (the unit was 38 employees), there were threats of loss of employment made by union representatives if they did not sign union membership applications, there was a threat that

(continued...)

A review of the cases cited by the Employer in support of its presumption of dissemination indicates that those cases are distinguishable and certainly do not suggest any strong policy considerations for the adoption of such a blanket rule which would so easily result in the setting aside of union wins.

For the above reasons, I uphold my ruling declining to adopt the presumption of dissemination or small plant doctrine urged by the Employer.

¹⁴(. . .continued)

the employer would cooperate with the union in carrying out the threat of loss of employment, and the threats were voiced at the store during working hours, *id.* at p. 1646; in *Sears Roebuck de Puerto Rico, Inc.* (1987) 284 NLRB 258, there was an employer threat, the election was close (91 for and 116 against) and the threat was of a plant close down; in *Steakhouse Meat Company, Inc.* (1973) 206 NLRB 28, the tally showed out of 7 ballots that 4 were cast for the union and 3 were against the union indicating a very small unit as well as a close margin and the threat was of bodily harm and death made to a 16-year-old employee; in *D & D Distribution Company v. National Labor Relations Board* (1986) 801 F.2d 636, the court of appeals enforced an NLRB order against an employer who had committed unfair labor practices and held that the small shop doctrine which enables the national board to infer employer knowledge of union or pro-union activities where the number of employees in the workplace is small was appropriately applied by the administrative law judge and the national board which found employer knowledge of the discriminatee's union activities. The court indicates that "the essence of the small plant doctrine rests on the view that an employer at a small facility is likely to notice activities at the plant because of the closer working environment between management and labor" *id.* at p. 641, fn. 1; in *James Lees and Sons Company* (1961) 130 NLRB 290, there were serious threats of plant closing made in numerous statements and conduct by a number of responsible groups and individuals; in *Chateau de Ville, Inc.* (1977) 233 NLRB 1161, employer unfair labor practices in one unit were well known at another unit because of common labor relations policies and common supervision and an interchange of employees as well as a pre-election meeting of employees from both units; and in *Ara Living Centers Company* (1990) 300 NLRB No. 119, a union victory was upheld in part because the conduct complained of by the employer was not destructive of employee rights (*ibid.* p. 4).

B. Testimony Regarding Subjective Feelings or Reactions

On the first day of the hearing I was presented with the question of whether testimony regarding the subjective reaction (for example, fear) of the witness or of other workers about whom the witness was testifying would be admissible. The Employer cited the California Supreme Court decision in Triple E Produce Corp. v. Agricultural Labor Relations Board, supra, 35 Cal.3d 42, for the proposition that such testimony was not inadmissible hearsay. I reviewed the decision and ruled that such testimony was admissible.

I have now reconsidered and I am hereby reversing that ruling. Therefore in reviewing the testimony, I shall not consider testimony that either the witness or other coworkers were afraid or had some other subjective reaction to alleged threats or alleged misconduct.

The IHE in the recent Board Decision in Triple E Produce Corporation (1991) 17 ALRB No. 15, correctly interpreted what the California Supreme Court intended in Triple E Produce Corp. v. Agricultural Labor Relations Board, supra. He concluded that the California Supreme Court held that such subjective testimony was relevant only to the question of whether "statements made to a handful of employees may reasonably be anticipated to reach a larger part of the work force." (See IHED at p. 6.) The IHE explained that the court in Triple E did not treat the subjective testimony as generally relevant to an

outcome-determinative standard. Otherwise he would be required to ignore the Court's clear statement that:

[in] assessing the effect of [a] threat, we do not inquire into the subjective individual reactions of a particular employee but rather determine whether the statements, considering the circumstances surrounding their utterance, reasonably tended to create an atmosphere of fear and coercion. 35 Cal.3d at 55 (IHED at p. 6.)

He added that the ALRB has declined to read Triple E in the manner sought by the Employer. He cited the Board's decision in Agri-Sun Nursery (1988) 13 ALRB No. 19 where the Board relied upon the Supreme Court case in Triple E to justify its disregarding testimony about the reactions of individual workers.

The Investigative Hearing Examiner's ruling was upheld by the Board in Triple E Produce Corporation (1991) 17 ALRB No. 15 where the Board affirmed his conclusion that the employer failed to establish an atmosphere of fear and coercion.

Nor does the NLRB use this type of subjective testimony in determining whether an election should be set aside. For example, the NLRB in a decision upholding an election won by a union affirmed the following statement of applicable law by the administrative law judge:

On the contrary, the Board 'has consistently taken the view that wrongdoers cannot be the beneficiaries to the wrongdoing irrespective of who the wrongdoers were.' (Cite omitted.) Moreover, a contrary result in this case would run counter to the long established principle that the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.
(Emerson Electric Company (1980) 274 NLRB 1365 at 1370.)

(See also National Labor Relations Board v. Southern Health Corp. (1975) 514 F.2d 1121, 1126; Picoma Industries, Inc. (1989) 296 NLRB No. 69 at p. 4; Electra Food Machinery, Inc. (1986) 279 NLRB 279 at p. 279, fn. 8 and p. 280; NLRB v. Gissel Packing Company (1969) 71 LRRM 2481 at p. 2493.)

In light of the above-cited cases, I will not consider such subjective testimony in determining whether based upon an objective standard the election should be set aside.¹⁵

C. Video Tapes Taken by San Joaquin County Sheriff's Department

I granted the UFW's motion to admit into evidence video tapes taken by the San Joaquin Sheriff's Department regarding strike activity on July 31 and August 1 (UFWX 20), on August 3, 4 and 5 (UFWX 21), and on August 7, 8 and 9 (UFWX 22). (See Tr. XVII:23.) The purpose for these video tapes is to show the general quality of the strike even though only some of the video tapes were taken at Ace fields. The Employer stipulated as to the authenticity of the tapes. (Tr. XVII:24.)

I viewed each of these four tapes (including EX 17) in their entirety and I found no objectionable picketing activity nor did I observe anything in those video tapes which would suggest the type of misconduct which could result in setting aside this election.

¹⁵As an example, I will not consider testimony by Jesus Medina that he was afraid. (See Tr. I:58; I:104.) There were numerous other instances where I erroneously admitted this type of subjective testimony.

D. Employer's Request to Take Administrative Notice of the Employer's Motion for Reconsideration of the Board's Decision in Triple E Produce Corp. (1991) 17 ALRB No. 15

On December 13, 1991, the Employer submitted a written request that I take administrative notice of its motion for reconsideration in Triple E Produce Corp., supra, 17 ALRB No. 15. However, the Board denied the Employer's motion on December 19, 1991.

E. Employer Assertion That It Was Denied Due Process

On July 2, 1991, I specifically stated on the record that beginning on July 22 I wanted a list of witnesses who would be called and that parties serve subpoenas if necessary. I further stated that beginning the 22nd of July I was going to be more strict as to the list of witnesses and require that the listed witnesses be put on absent good cause. (Tr. IX:98.) When the hearing reconvened on July 22, 1991, I asked Employer counsel on the record how many more witnesses he would call to complete his case. I was advised by Employer counsel that there were eight more witnesses. I was literally guaranteed that the Employer's case would be over no later than July 25. (Tr. XI:104.)

It is, therefore, inaccurate to suggest that the Employer was not on notice that stricter guidelines to complete the Employer's case would be enforced beginning on July 22. Once the Employer made the representation that he had eight more witnesses, I held the Employer to that number.

At the conclusion of the hearing day on July 25, 1991, the Employer advised me that two of their scheduled witnesses, Efren Avilas and Fidel Moreno, were unable to be there. Although I held the hearing open for an extra hour, they did not appear. (Tr. XIII:123.)

The Employer also asserted on July 25, 1991, that it wished to call Efren Barajas as its own witness. I responded that it was too late and that the Employer could have subpoenaed Barajas, The hearing began on November 1, 1990, and the Employer had 13 hearing days through July 25, 1991, to subpoena and present witnesses. I reminded counsel for the Employer that I had requested on July 23 the number and identity of witnesses who would be testifying in order to close the Employer's case. That list did not contain the name of Barajas. (Tr. XIII:4-5, 8, 37, 122-125.) When the Employer attempted to put on a witness on the 14th day of hearing, I denied his request to do so. (Tr. XIV:1-2 and XIII:38.)

Based on the above, I find that the Employer was not denied due process.

F. Opinion Testimony

I have reconsidered my rulings excluding testimony that someone was angry, that a vehicle was driven fast, or an object was thrown with certain force. I find that Evidence Code section 800(b) clearly allows lay witnesses to give that type of opinion testimony and I did consider such testimony.

Throughout this decision I have noted the specific transcript references, and have often quoted certain portions of testimony, upon which I have relied in making my findings. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of all the evidence and the parties' post-hearing briefs, I make the following findings of fact and conclusions of law:

III. FINDINGS OF FACT

A. Jurisdiction

The parties stipulated that the Employer is an agricultural employer as defined by Labor Code section 1140.4(c) and that the UFW is a labor organization as defined in Labor Code section 1140.4(f). (Tr. I:9.)

B. Background

Throughout the hearing the Employer asserted that the UFW was responsible for the strike as well as for all of the alleged misconduct including various threats, violence and other forms of coercion. On the other hand, the UFW maintained that it did not take over the strike until late in the morning on July 26. The Union further contends that even after it took over responsibility for the strike the conduct of the picketers and Union supporters was relatively peaceful.

These questions concerning Union responsibility are important in assessing what standard is to be used in analyzing the alleged incidents of misconduct at the various fields, the Labor Camp and at other areas in and around Stockton. The

standards for evaluating party conduct are more stringent than those used in assessing third-party conduct.¹⁶

Each side called several witnesses to testify about the inception of and responsibility for the strike. Many of the meetings of workers leading up to the strike occurred at Mathews Road labor camp (hereafter Mathews Road or labor camp) located on the outskirts of Stockton.¹⁷ Most witnesses testified that the first meeting of the workers at Mathews Road occurred on or about July 20 and I so find.¹⁸ The workers who attended this meeting of July 20 were residents of Mathews Road Labor Camp as well as another labor camp close by and were employed by either Triple E, Ace or San Joaquin, the three tomato growers affected by the strike.

1. Employer Witnesses

Jesus Medina worked as a tomato checker for Earl Hall Labor Contractor which performed services during July and

¹⁶These two standards will be discussed in detail in the Analysis section, infra.

¹⁷Each time I have discovered that there is a misspelling of the name of a field, a person or place, I shall spell it correctly in the body of the decision. An example is Edelfonso, erroneously spelled Edelfonso in some transcripts.

¹⁸As will be discussed infra, I have considered portions of the hearing in Triple E Produce Corporation (1991) 17 ALRB No. 15 which have been introduced by the Employer as an attachment to its Post-Hearing Brief for purposes of impeaching Union organizers Efren Barajas and Augustin Ramirez. These portions suggest that the first meeting at the labor camp may have occurred on July 19. I find that any discrepancy in the date of this first workers' meeting does not affect my findings of fact or conclusions of law. I have declined a request to consider a number of volumes of Triple E transcripts regarding the testimony of Francisco Naranjo as being remote, burdensome and not helpful.

August for Ace. Eduardo Gomez was his crew chief. Medina lived in the Mathews Road Labor Camp. He testified that a meeting of workers occurred on July 20, a Thursday, at Mathews Road. Certain unidentified people were distributing papers and there were approximately 50 people there including workers from Sierra Vista Labor Camp which is also located in the Stockton area. (Tr. I:17.) He recalls two speakers, Luis Magaña and Efren Barajas. He had known Magaña from prior encounters.

Magaña addressed the group and spoke about the need for workers to form a committee to request a raise from Triple E, Ace and San Joaquin. According to Medina, the workers only wanted to have a committee with Luis Magaña. (TR. 1:21.)

Barajas was introduced as a representative of a labor organization and asserted that workers would have a better chance with the Union than with Magaña. (Tr. 1:26.) After Barajas spoke, Magaña said that the persons present should decide if they would rather have Magaña or Barajas talk to the companies. Barajas responded that it was up to the people to decide. Magaña then stated that the people should decide which of the two was to go to meet with the tomato growers. At that point most of the workers in a loud voice said that Luis Magaña should go first. (Tr. I:25-26.)

Somewhat later in that meeting, Medina accused Magaña of having failed in the prior two years of successfully negotiating a raise for the tomato workers and implied that Magaña might have been bought off. At that point all the people

"just started to tell me to go to hell." (Tr. I:29.) Medina went home before the end of the meeting. He testified that during the meeting it was agreed that Magaña would lead a committee to meet with the three companies on Friday and if the companies did not agree to a raise there would be a work stoppage on Monday, July 24. (Tr. I:33.)

Medina also recalled on direct examination that Barajas did predict that the committee was going to fail and that the Union had more strength than the committee. (Tr. I:32.)¹⁹

Medina remembered that the leaflets which were distributed to the houses indicated that the purpose of the meeting was to go and ask for a raise for the tomato pickers. (Tr. I:23.) He stated that Magaña had the backing of all the workers. (Tr. I:32.) In addition, it was Magaña who suggested the work stoppage on the 24th should the employers deny the request for a raise. (Tr. I:33-34.)

According to Medina, Luis Magaña seemed to be in charge of the work stoppage (the first day no one called it a strike). (Tr. II:31.)

He stated that at some point during the strike the committee of workers was dissolved and other coworkers who were supporters of the strike said that the workers now belonged to the Union. (Tr. I:135.) This is further evidence that it was the committee which began the strike.

¹⁹In discussing testimony I may refer to direct examination as "direct," cross-examination as "cross" and redirect examination as "redirect."

Although Medina's testimony with regard to certain events was rather vague, the above testimony was fairly straightforward and credible.²⁰

Tom Guido, the general manager of Triple E in 1989, stated that Barajas had been in a group of some 70 workers including Luis Magana who had met at Triple E offices with him on or about July 20 or 21. Barajas had introduced himself by name but not as a UFW representative. It was later that he became aware Barajas was in fact a UFW organizer. (Tr. VII:24.) Guido testified that on July 26 the UFW took over the strike at Triple E. (Tr. VII:27.) This is consistent with the Union's position.

Dean Janssen testified that he is now and was the general manager for Ace in 1989 and that the work stoppage began on July 24 and ended after the election conducted on August 10. He recalled that 6 to 10 Ace workers came to the Ace office on July 20 or Friday, July 21. Luis Magaña, Jose Andrade and Efren Barajas spoke. There was no main spokesman and he cannot remember who spoke first. (Tr. VII:52, 53.) Someone from that group said that they were there to represent pickers who wanted an increase of 10 cents a ticket. This conversation lasted from 3-5 minutes. (Tr. VII:54-55.)²¹

²⁰Whether the UFW was responsible for events at Turner Ranch on July 24 will be discussed further infra.

²¹I note that Janssen's description of Efren Barajas did in fact seem to describe Barajas. He also described Luis Magana as being shorter than Barajas, having a similar, fairly muscular

(continued...)

Janssen did say on cross that Barajas had not introduced himself by name but he knew him from the strike in 1983 and activities in subsequent years. However, Janssen could not pinpoint anything which Barajas said.

It seemed clear that Barajas was not a leader of this group assuming that he was in fact present. (Tr. XIII:94.) Janssen stated that Magana had been active prior to 1989 in labor unions or groups other than the UFW. In fact, during the meeting, Magaña said that the group was representing Ace workers. (Tr. XIII:90-92.)

2. UFW Witnesses

Board agent Ed Perez testified that he had been employed by the Agricultural Labor Relations Board (hereafter ALRB) for 16 years. He had spoken with Magaña on or about July 24 and Magana told him that Magaña was leading the strike. He testified that Magaña was in charge of a committee (sometimes referred to as "Comite") which was a group of farm worker residents of Stpckton which acts like a union. Magaña was the president of that group and had been active with this committee since 1980 or 1981. (Tr. XIV:174-175.)

Perez testified that he was present at the last official act of that committee which until then had been in charge of the strike. This last official act was a meeting of the committee, including Magana, with Nate Esformes, the head of

²¹(...continued)
build, without a beard in 1989, and having clearer skin than did Barajas.

Triple E, on July 26. The meeting occurred at the staging area by the side of a Triple E field known as Mariposa Ranch at about 10 or 11 a.m. Present at this meeting were Magaña and Barajas, as well as workers from Ace Tomato, Triple E and San Joaquin. (Tr. XIV:128.)

Following this meeting with Esformes, Magaña told Perez that Magaña would no longer be the contact person as the workers had voted and the UFW was now the representative of the workers. (Tr. XIV:128-131.)

According to Perez, Magaña was not at any time a UFW representative. (Tr. XIV:129-133.)

Barajas then told the assembled workers at the staging area at Mariposa Ranch that the UFW would take over the strike but that the workers had to follow a code of conduct. Barajas then began to pass out UFW authorization cards, and workers from the three companies signed them on the spot. Some of the workers helped Barajas pass out these cards, but Magaña did not. (Tr. XIV:132-133.) On cross-examination, Perez recalled that he took back certain ALRB election, access and unfair labor practice forms from Magaña and gave them to Barajas. (Tr. XIV:157.) He testified that he was not aware of any other efforts by the UFW to organize Ace prior to July 26.

Perez was a very credible witness who carefully testified, did not volunteer information and declined to speculate. He was calm in his responses both on direct and

cross. Although he was somewhat hazy on dates, his memory of the events was excellent and I have credited his testimony.²²

Efren Barajas testified that in July and August of 1989 he was a UFW organizer. Prior to the beginning of the July 24 strike at Ace, Triple E and San Joaquin, he attended a meeting on July 20 of workers at Mathews Road at about 6 p.m. UFW vice president Dolores Huerta had asked him to attend this meeting to which she had been invited by a worker but was unable to attend. (XV:5-6.) Close to 100 people were present, most of whom lived at the labor camp.

Magaña conducted the meeting and introduced Barajas as a representative of the UFW. (Tr. XV:5-7.) Magaña was the main speaker and the topic of conversation was getting a better price for picking buckets of tomatoes. At the end of the meeting, the workers voted to strike the three tomato growers for a raise if negotiations failed. (Tr. XV:8.)

During that meeting Barajas told the assembled workers that a strike was not recommended and it would be better to organize and bring the Union in so that it would not be necessary to strike year after year. (Tr. XV:9.) When the employees decided to strike, he wished them good luck. The employees then formed a committee which would go to the three growers to negotiate a wage increase. The members elected to the committee

²²EX 17, the Challenged Ballot List, refreshed Perez' recollection that the Ace election was conducted on August 10, not August 4, which was the date of the Triple E election. (Tr. XIV:165.)

included Luis Magana, Ildefonso,²³ Guillermo Perez, and Martin.²⁴ The committee agreed to first meet with Nate Esformes since Triple E is the biggest tomato grower and generally sets the wage scale for the area. (Tr. XV:9-12.) Toward the end of this meeting, workers asked Barajas if he would accompany the committee members to the meeting with Triple E. Barajas testified he told them he would go but not as a Union representative. He testified that he did not attend the meeting with Ace. (Tr. XV:14.)

On July 24 in the morning, Barajas went to Morada Lane, a Triple E Ranch. He was told earlier that morning at Mathews Road that there would be a strike at Morada Lane. (Tr. XV:14.) Barajas testified that he stayed at Morada Lane Ranch the entire day and did not go to any Ace field on July 24. When asked on direct why he was there at Morada Lane, he testified that he was watching to see what the people were doing and how the committee was conducting the strike. When asked why he was doing that, he credibly testified that it was because he knew that the committee did not have the experience to run a strike and that the Union did not want to see things get out of hand. (Tr. XV:15-17.) I note that Employer counsel stated that this witness had quite a bit of recall and that the witness was testifying in a very calm manner as he did throughout most of his testimony. (Tr. XV:15.)

²³Although Ildefonso's last name was never established in the record, I find he was a member of Magana's committee.

²⁴I find that Martin's last name is Vega based on other testimony in the record.

According to Barajas, the committee and Magaña were in charge of the strike on July 24. He left Morada about 3:30. (Tr. XVII:18.)

On July 26, he left his home in Modesto and arrived at the Mariposa Ranch at about 11 a.m. He stayed there until about 3:30 or 4:00. There were Ace workers present as well as workers from Triple E and San Joaquin. He estimated the total number of workers there as about 700 or 800. (Tr. XV:19.) The committee was meeting with Nate Esformes regarding the raise. Following the meeting, he was told by Ildefonso that the committee did not get the raise. At that point Ildefonso got up on top of a van as did Barajas. Ildefonso told the workers that Triple E refused to grant them the raise and he recommended that the UFW take over the strike. Barajas then told the workers that the UFW would take over the strike if all the workers agreed. Then everybody said yes. Barajas then explained the rules of the strike including no violence, no alcohol, and that everyone had to behave. This testimony came out in a very logical manner and was credible. (Tr. XV:19-24.) When he asked whether the workers were ready to bring in the Union and have an election, the answer was yes. He passed out authorization cards and many of those cards were signed by Ace workers and were then given to the ALRB for the showing of interest. He testified that he did not ask any Ace workers to sign authorization cards before that time on July 26.

He also testified that the first time that he went to an Ace field was after the Triple E election conducted on August 4. (Tr. XV:27.)

Barajas did not remember that the UFW made any leaflets during the strike. However, he did recall that the committee made leaflets near the time when the strike started and actually saw some of the leaflets before July 24 at French Camp. My impression was that this testimony was not rehearsed as he was answering spontaneously. (Tr. XV:41.)

He testified that he was in charge of the strike and that his assistants during the strike with their dates of arrival to Stockton were as follow: Jose Morales (arrived 7/27 or 7/28); Augustin Ramirez (arrived on 7/27); Zeferina Perez Garcia (arrived around 7/26); and Efrael Edesa (arrived the first days of August). (Tr. XV:47-49.) As with much of his testimony, he demonstrated a good memory in response to this set of questions.

During cross-examination Barajas generally testified in a manner consistent with his testimony on direct. Though he was generally a responsive witness on cross as well as on direct, he would occasionally testify in a somewhat argumentative manner.²⁵ However, the instances of argumentative testimony were relatively rare, and for the most part he made a good faith effort to respond to questions on cross-examination. Throughout his testimony he manifested a good memory and was quite

²⁵See, for example, Tr. XV:56, lines 18-25.

articulate in giving his answers. I will briefly discuss below those areas covered in the cross-examination which might differ somewhat from his testimony on direct.

The Employer in its post-hearing brief attached excerpts from the Triple E hearing concerning the testimony of Barajas and Augustin Ramirez and requested that I take administrative notice of such excerpts. I have decided to take such administrative notice and I find that the testimony of Barajas during the Ace hearing is generally consistent with the cited passages of his testimony in the Triple E hearing with some relatively minor variations. These variations are attributable, in my view, to the fact that his testimony at the Triple E hearing was given in October 1990, some 9½ months prior to his testimony in Ace. There is no doubt that his ability to recall would be fresher and crisper at the Triple E hearing than at the instant hearing.

Some examples of the relatively minor inconsistencies are as follow. In the Ace hearing he did not recall attending a meeting of the committee subsequent to the meeting of July 20 and the meeting with Nate Esformes. However, in the Triple E hearing, he apparently testified that he did attend a second meeting of the committee which was held after the first committee meeting. In addition, it appears that the first committee meeting may have been held on July 19 rather than July 20. Although he denied during the Triple E hearing that he had any official role as a UFW representative, he did indicate that he

told the workers at this second meeting that he would go to the picket line on the 24th and try to give advice to the workers or try to control the people if they were breaking rules. It is interesting to note that this second meeting was run by Magaña and it does not appear that Barajas had any leadership role. It appears he was there more as an advisor. (Triple E Hearing, Tr. X:18-19.)

Another minor discrepancy has to do with Barajas' testimony in Triple E that following his presence on the picket line at Morada Lane on July 24, he then attended a meeting of workers directed by Magaña where he did relate some of the things he saw on the picket line that day. During the Ace hearing, he did not recall attending a subsequent meeting. During that meeting, according to his testimony in Triple E, he recommended that the workers not have beer at the picket line and he told the workers he had seen beer on the picket line. At that point Magaña jumped up and tried to push him out of the meeting declaring to workers they did not need Barajas to be telling them how to conduct the strike. Magaña asked him not to talk any more. However, Barajas did tell the workers to stay away from those kinds of problems. He then told the workers that if they needed the Union they would know how to find the Union. Shortly after he left the meeting, some of the people went after him and asked him not to leave and not to pay attention to what happened. He then left the meeting but told them that he would be around the next day in case they needed him for anything.

He also testified that he went to the picket line on July 25 at Morada Lane. He did not observe the workers wearing any type of insignia. (Triple E Hearing, Tr. X:26-32.)

Next the Employer cites in the Triple E transcripts additional testimony regarding the first meeting of the committee held on July 19. During that testimony Barajas stated, consistently with his testimony during the Ace hearing, that there was discussion at this first committee meeting of a 10 cent per bucket raise as well as having more dumpers on top of the trucks. In addition, there was a discussion of a plan to present to the companies and then to have another meeting after that to make their decision of what to do. (Triple E Transcripts, X:162-163.)

Later during cross at the Triple E hearing regarding the second committee meeting which discussed what had happened at the meeting with Esformes, Barajas testified that he was present and he did mention something about signing cards. However, my review of that transcript excerpt indicates that he testified that after the workers decided to go on strike, he did make a recommendation that a strike was not the best thing to do and that rather they should ask the Union to go sign cards and then maybe something better would happen. (See Triple E Transcripts, X:173-174.)

Finally, the Employer cites to the passage in the Triple E transcripts where during cross-examination Barajas testified that on July 24 he believed that workers left the

Morada Ranch at about 2:00. He then testified that he went back to the Morada Ranch on July 25. In the Ace hearing, his memory was not clear as to where he went on July 25.

Given the passage of time between the two hearings, I find that the above minor discrepancies in his testimony at Ace compared with his testimony at Triple E do not affect his credibility.

During cross-examination in this hearing, he asserted that he had no conversation in July of 1989 with Dolores Huerta regarding organizing in San Joaquin County.²⁶

In describing the first meeting of July 20, he referred to pesticide skits involving Magaña and Magaña's friends which lasted an hour. The actual meeting during which the workers elected a committee and decided to strike occurred after the skits. (Tr. XV:55-58.)

The first time that he met with Magaña in 1989 was on July 20, the day of the committee meeting. (Tr. XV:67-69.)

During the meeting of July 20, although he was introduced by Magaña as a UFW representative, Barajas stated that he was not wearing any UFW buttons or his UFW shirt that day. Nor did he have a clipboard or notebook with UFW materials including authorization cards with him at the meeting. In fact, he did not pass out UFW cards or other Union materials at that meeting. (Tr. XV:72-79.)

²⁶The parties stipulated that Barajas was a UFW organizer in 1989.

Regarding the composition of the committee, he recalled that Ildefonso was a committee member and worked at San Joaquin. (Tr. XV-.70.) Guillermo Perez and Martin Vega, members of the committee, worked for Ace Tomato.

Barajas testified that he did not believe that Guillermo Perez was present when the committee met with Triple E. The only comment that Barajas made at that meeting was that the workers deserved a raise. It was Magana who made the presentation to Triple E.

Although he testified that he did not attend any further meetings with the committee, I will, based upon the transcript of the Triple E hearing, find that subsequent to the meeting with Triple E on July 24 he did attend a meeting of the committee where the results of that meeting with Triple E were discussed. However, as stated earlier, I do not find that he intentionally omitted this fact nor do I find that this inconsistency impairs his testimony or credibility.

He testified that there were no UFW organizers or agents present on July 24 at Morada Lane.²⁷ He specifically testified that neither Pablo Segoviano nor John Aguirre were working for the UFW at that time. His answers were crisp and responsive.

²⁷Barajas said that the following people were not present: Zeferina Perez Garcia, Augustin Ramirez, Pablo Segoviano, Francisco Juarez, Alberto Gonzales, Lupe Castillo, John Aguirre and Victor Comacho (or Camacho). There were several other names mentioned that Barajas was not familiar with. The UFW's position is that none of these people were UFW agents except for Zeferina Perez Garcia and Augustin Ramirez.

In answer to a question of how many crop managers the UFW had statewide during the summer of 1989, he estimated that there were approximately 15 crop managers. Four of them (Barajas, Augustin Ramirez, Zeferina Perez Garcia and Efrael Edesa) were present during the Ace strike. The Employer contended that the presence of four crop managers prior to July 26 indicated that the UFW was responsible for the strike from the beginning. I find, however, that Edesa came subsequent to July 26 and that Ramirez and Zeferina Perez Garcia were called after the strike began on July 24 and at a point where it appeared to Barajas that the committee was going to be unable to successfully sustain the strike.²⁸

During cross he did concede that he wasn't sure if he was present at Mathews Road on July 24 after leaving Morada. He recalled that he probably did speak to some workers on the evening of the 24th, but he did not give his phone number to those workers. He was unsure if he spoke to a group of strikers that night. (Tr. XVII:68.) He consistently denied advising or controlling pickets during the picketing at Morada Lane on July 24. (Tr. XVII:72.)

Barajas testified that he did not specifically recall whether he returned to the picket line on July 25, but he believes that he did. (Tr. XVII:78.)

²⁸During the beginning of this day of cross-examination of Barajas, the Employer attempted to ascertain whether Barajas was improperly coached by his attorney or others during the lunch break. I find that Barajas credibly denied being coached and that he was not coached.

Once he got on top of the van and agreed on behalf of the UFW to take over the strike, he explained the rules of the Union for strikes for about five minutes although he did not pass out any written materials that day or on any subsequent day detailing the rules. When asked on cross whether he had banned any picketer or worker from a picket line during the Ace strike, he replied that no one had acted improperly while on the picket line. (Tr. XVII:96-97.)

Though he initially testified during cross-examination that he filed an NA for Ace on July 26th, he changed his testimony during redirect to state that the NA was filed on August 4, two days following the Board's decision in Ace Tomato Company, Inc. (1989) 15 ALRB No. 7. I, therefore, find that the UFW filed an NA for Ace tomato on August 4, 1989, and was then entitled to take organizational access.²⁹

Barajas testified that he did not take access at any Ace field nor did he direct anyone to take access at an Ace field. The concentration was at Triple E. (Tr. XVII:111.)

Magaña asked workers not to sign authorization cards for the UFW. (Tr. XVII:159.) Further, before the UFW took over the strike, Magaña told a group of workers at Mathews Road that they did not need the Union and the Union would not successfully obtain a pay raise. (Tr. XVII:160-162.)

²⁹The Employer did not offer any evidence to rebut the assertion that the UFW filed an NA for Ace Tomato on August 4.

Also during redirect examination, Barajas explained that Victor Camacho did not work for the UFW nor did several other named individuals. (Tr. XVII:165-166.)

Overall, I found the testimony of Barajas to be credible and reliable. He had a good memory for many facts which occurred close to two years prior to his testimony in this hearing. His answers were responsive and articulate.

Guillermo Perez was employed by Ace in 1989 as a tomato picker and lived in Mathews Road. (Tr. XV:293.) His first involvement with the strike was at the meeting of workers on July 20 called by the workers' committee that he, Luis Magaña and others had formed. The meeting occurred at about 6 or 7 p.m. at Mathews Road. Approximately 50 or more people were in attendance. (Tr. XVII:294.) He was one of the committee members selected to be a representative for his crew to advise the crew on July 24 of the strike. Other representatives included Luis Magaña and Martin (Vega). It was really the crew representatives who had organized the strike. The committee prepared flyers so that each representative could distribute the flyers to its crew and inform the crew that work would stop on the 24th. This was all decided at the July 20 meeting. (Tr. XV:295-297.)

According to Guillermo Perez, Magaña said at the meeting that he would talk to Nate Esformes to get an increase. Martin was the first one to mention the possibility of the strike although Magaña approved of a strike if the negotiations failed. Perez himself agreed with the idea of a strike as did Ildefonso.

Luis Maldonado is another committee member who thought a strike was a good idea. Barajas, though, told the committee and the workers that it was not a good idea to strike. However, the committee decided to go on strike if negotiations failed. (Tr. XV:300-305.)

Perez related that Magaña was not a UFW representative. Far from it. Magaña had told workers that the Union was not good for the workers and that the committee should make the effort to get the pay raise so that the Union would not come it. (Tr. XV:310-311.)

The committee met with Triple E one or two days after the July 20 meeting, but Perez did not attend. (Tr. XV:312.) At some point after the meeting with Triple E, there was a meeting at Mathews Road where Magaña informed the 50 or so workers present that Triple E had refused to grant the pay increase. He did not believe that a UFW representative was present at that particular meeting. Though this testimony conflicts with Barajas' testimony during the Triple E hearing, I do not find this to be a substantial discrepancy which would affect the credibility of Perez. (Tr. XV:314.)

When the strike began on July 24, each of the crew representatives went to the field and distributed to their crew the committee's leaflet. Magaña had approved Perez to be a crew representative to the crew of Rafael Limon. (Tr. XVII:316.)³⁰

³⁰Crew representatives for Chino's crew included Luis Maldonado and Enrique Villanueva.

Perez, Maldonado and Villanueva were the three crew representatives for Ace Tomato. (Tr. XV:317-318.)

Crew representatives were also told to inform the crew members that there were certain rules including the ban on violence and bad words. (Tr. XV:319.)

Perez testified that the committee met on the 24th in the afternoon at Mathews Road to advise the rest of the workers what had occurred. No one from the UFW was present. Magaña told the workers that the work stoppage had been a triumph since the majority of the people had gone on strike. (Tr. XVI:5-10.)

Those flyers distributed to the crews on the 24th were made up by Magaña, Guillermo Perez and Celedonio Perez who used Magaña's office to prepare the leaflets. The leaflets were made up sometime between the 22nd and the 24th. This testimony is consistent with that of Barajas who testified that the committee had made flyers regarding the strike.

When Perez arrived at Morada Lane at 11 or 12 a.m., Magaña and Barajas were there. Magaña had an active role and was talking to people whereas Barajas was not seen talking to strikers. (Tr. XVII:24-28.) Perez then left to return to Mathews Road to visit the Medinas.³¹

According to Perez, there were no flags on the 24th at Morada Lane nor were there any buttons. (Tr. XVI:46.)

³¹The incident involving the Medina's at the Mathews Road Labor Camp will be discussed infra.

He then described what occurred on July 26th when all the workers met at Mariposa Ranch. He arrived there at about 9 o'clock in the morning with Magaña. Barajas arrived at about 11 a.m. Ildefonso and Barajas made speeches to the assembled workers from the top of a van, the UFW took over the strike, and Barajas distributed authorization cards. (Tr. XVI-.46-54.) Significantly, Perez testified that Barajas advised the workers of the Union's rules regarding strike conduct. (Tr. XVI:54-56.) Some of those rules included not drinking while on strike, not cursing people or strikebreakers, and treating people politely. Finally, in no case was violence to be used. The witness identified UFW Exhibit 19, a UFW authorization card, as the type of document that was distributed by Barajas on the 26th at Mariposa. (Tr. XVI:57.)

During cross-examination, Perez' demeanor remained about the same as it was on direct and Employer counsel was unable to shake Perez' testimony. There were some discrepancies none of which I find to be major. He generally displayed a good memory as to the events of July and August of 1989. His answers were clear and responsive. (Tr. XVI:104.)

What came across very clearly during cross-examination was Perez' assertion that the committee did not want participation by the UFW. (See Tr. XVI:107, 111, 112.) Since Perez was not present at the meeting with Triple E, I do not consider his testimony that Barajas did not attend that meeting as diminishing the weight of Perez' testimony.

It was the committee which voted as to who would attend the negotiating session with Triple E. (Tr. XVI:115.) It is clear that the committee was making the decisions, not the UFW.

Perez testified that neither Francisco Naranjo nor Victor Camacho were involved as crew representatives for the committee. (Tr. XVI:129-130.) I find that the record does not support a finding that either Francisco Naranjo nor Victor Camacho were members of the committee or agents of the UFW.

During cross, Perez testified that from the time that Barajas went on the roof of the van on July 26 and officially took over the strike, Magaña and Barajas were not together again. To the contrary, Magaña told a number of workers on July 26th that they did not need the UFW and the UFW was not going to get them a raise. (Tr. XVII:222-223.) I note that this is consistent with the testimony of Barajas.

With respect to the picketing at Morada Lane on July 24, Perez stated that he did not see any drinking. (Tr. XVII:230.) This is yet another indication, along with other testimony and my conclusions based upon the sheriff department's video tapes, that this strike was generally peaceful in nature. When asked on cross whether Barajas ever again explained the Union's rules about the conduct of a strike after July 26th, Perez responded that there was no need because, "that day we had behaved ourselves -- conducted ourselves the way that he had told us." (Tr. XVII:235-236.)

Perez also testified that John Aguirre (known as Huero or Guero) was not present during the strike. Nor did Perez ever see him at Mariani's during the strike. (Tr. XVII:251.)³²

At some point after the end of the strike, people who had belonged to the committee, including Perez, invited Aguirre to assist workers at Mathews Road with certain social and economic problems. (See Tr. XVII:257-260.) During redirect, Perez explained in more detail what it was that Aguirre did at Mathews Road in conjunction with the Education and Legal Defense Fund and its administration of the Lupe Plan. (Tr. XVII:275-276.) During recross-examination, Perez testified that he believed that the meeting with John Aguirre to fill out the Lupe Plan occurred after the strike. (Tr. XVII:283-184.) Then, during a second round of redirect, Perez testified that Barajas told him that Chavez needed a representative and Perez recommended Aguirre. This occurred at the end of the strike or after the strike was over. (Tr. XVII:317-318.) When Aguirre came to the camp to talk to the workers, Aguirre talked about the Lupe Plan. (Tr. XVII:320.) Aguirre did not talk about the strike. (Tr. XVII:324.) I find that Aguirre did visit Mathews Road subsequent to the termination of the strike and assisted

³²The Employer raised an issue regarding the alleged involvement of John Aguirre with the strike attempting to establish that Aguirre was a Union agent and was at the scene of some alleged misconduct. I find that John Aguirre was not involved in the strike but, rather, he did begin working for the Education and Legal Defense Fund and began to implement the Lupe Plan at the Mathews Road Labor Camp after the strike ended. (See infra for further discussion.)

resident workers there in filling out forms for the Lupe Plan and that Aguirre did this while acting as a volunteer for the Education and Legal Defense Fund, an organization with its headquarters in Keene, California, where the UFW has its headquarters.

At the conclusion of his cross-examination, Perez reiterated that it was a peaceful strike and he did not see any dirt clods or tomatoes thrown nor did he see any breaking of windows. (Tr. XVII:273.)

During redirect, Perez stated that he recalled at the July 20 meeting some entertainment regarding pesticides which was a theater for young and old and which was very good. He again repeated that the committee did not approve the UFW representing them. (Tr. XVII:278.)

He also testified that Barajas discussed the rules of the strike after the UFW took over the strike during meetings at the Mathews Road Labor Camp. (Tr. XVII:279-280.)

I was very impressed by the demeanor of this witness throughout the three days during which he testified. His direct testimony began on July 31 at 9:40 p.m. He returned two additional days after working full days to complete his testimony. On at least one of those days, he got only 2½ hours sleep. He was even-tempered and demonstrated a very good sense of humor and a great deal of patience during the examination, particularly on July 31 when he testified for a considerable time until midnight. I find that he was a very credible witness with

responsive answers, a calm demeanor, and he did not raise his voice either or direct or cross-examination. He was earnest and forthright in his answers and a very reliable witness.

John Aguirre testified that he began working for the UFW in January of 1990. He was attending an extension course in court interpretation for the University of California at Davis in 1989. The course started in June of 1989 and ended late in August. He worked for the Education and Legal Defense Fund (ELDF). Aguirre denied that he had any involvement with the tomato strike. (Tr. XVII:2-3.)

During cross-examination Aguirre testified that he began survey work for the ELDF in September of 1989 in Stockton. He was interviewed for the position by the director of ELDF in Stockton sometime in mid-September. According to his information, ELDF is separate from the UFW though its headquarters are very close to those of the UFW in Keene, California. (Tr. XVII:6-12.)

In describing himself in 1989, he states that he did not have a beard. He showed a picture of his student identification which was valid for the spring of 1989. The picture on his student identification showed him without a beard.³³

³³When he testified on August 5, 1991, I note that he had a mustache, his hair was reddish-brown, he is about 5'7" to 5'9", he is lean, he was not wearing a beard, and he appeared to be between 30 and 35 years of age.

I credit Aguirre's denial of any involvement with activities on the picket line or in the fields. His testimony that he was attending an extension course from the University of California at Davis in Sacramento which ended late in August is unrebutted. His denial is corroborated by the credited testimony of Efren Barajas and Guillermo Perez.³⁴

Francisco Naranjo testified that in July and August of 1989 he lived in French Camp at 333 West Mathews Road (this is the same as Mathews Road). During his testimony about a visit to a neighbor's home at the Mathews Road Labor Camp (to be discussed infra), he described the committee as a group of six people who were workers and who, "were organized to tell us about certain things." (Tr. XIV:184-185.)

Augustin Ramirez testified that on July 26th he went to Mathews Road in the morning. Thereafter, he went to the Mariposa Ranch. He arrived there at about 6:30 a.m. and Barajas arrived at around 10:30. Ildefonso and Barajas went on top of a vehicle and Ildefonso said that from that moment on the committee will no longer be in charge of the strike, but rather the strike will

³⁴On the day of the hearing, the UFW recalled John Aguirre and he testified that he was registering families for the Lupe Flaii iuostly at French Camp. (Tr. XVII:337.) He started working in this capacity in late September. On cross, he stated that he first met Guillermo Perez in late September when he began registering families for the Lupe Plan and he did not remember meeting Perez before that. (Tr. XVII:338-339.) Though Perez credibly testified that he knew Aguirre and recommended him to Barajas, I do not find this inconsistency significant as I do not believe Aguirre was involved on the picket line or in access taking. I find further that the Employer did not prove that Aguirre engaged in any misconduct connected with the Ace election.

be headed by the UFW. (Tr. XV:222-225.) Barajas stated that the UFW would take over the strike, but that there were certain rules including no violence, no drinking on the picket line, and the need to attempt to gain the respect of workers crossing the picket line. Barajas then asked the strikers to sign authorization cards, which they did. Ramirez testified that he stayed at the Mariposa Ranch until about 1 or 2:00.

3. Findings

The above-credited testimony indicates, and I find, that a committee of agricultural employees was formed on or about July 20 at the Mathews Road Labor Camp and it represented workers from Ace, Triple E and San Joaquin. The head of this committee, Luis Magana, invited Dolores Huerta to a meeting of the committee scheduled for July 20. She could not attend, and she sent Efren Barajas as her representative.

During the July 20 meeting, the committee chose representatives to negotiate a wage increase with the three tomato growers. The committee decided, contrary to the recommendation of Barajas, to strike on July 24 if their requests for wage increases were not granted. Thereafter, some workers asked Barajas to attend the negotiations with Triple E along with the elected representatives of the committee. Barajas attended the meeting with Triple E along with the committee but he played a minor role. It was Magaña who was the main spokesman for the committee. After Triple E refused the committee's request for a pay raise, the committee met with the workers again at Mathews

Road and implemented the plans for a strike to begin on July 24. The committee made up flyers for that strike and instructed certain selected crew representatives to distribute the flyers on the morning of July 24th to various ranches of the three employers. This was done, the strike began on July 24, and there was picketing at Morada Lane. Barajas was present at the picketing at Morada Lane but he did not play a key role.

On July 26th, the committee again met with representatives from Triple E at the staging area by the side of the Mariposa Ranch and Triple E again refused to grant the wage increase. Immediately thereafter Ildefonso, a member of the committee, told Barajas that the committee could no longer sustain the strike and that the UFW should take over. Ildefonso and Barajas then addressed the assembled workers and Ildefonso stated that the committee had failed and that it was now up to the UFW. Barajas said that the UFW would take over the strike if the workers agreed to follow UFW rules regarding the conduct of the strike. The workers agreed that the UFW take over the strike and immediately began signing authorization cards which resulted in the filing of an election petition on August 4.

I find, therefore, that the UFW did not take over the strike and was, therefore, not responsible for strike activities until that moment on July 26th at the staging area at Mariposa Ranch when Barajas agreed that the Union would be responsible for the strike.

C. Alleged Incidents of Threats/ Violence and Coercion

Since the Employer has the burden of proof to persuade the trier of fact to set aside the election,³⁵ I shall address each of the main incidents described in the Employer's post-hearing brief with one modification. The Employer's brief has a separate section on access violations which also discusses to some degree alleged violence, threats and intimidation. I shall, therefore, consider together alleged coercive conduct and alleged access violations when they occur on the same date and at the same ranch.

1. July 24 - Turner Ranch

The Employer offered the testimony of a number of witnesses regarding a field rushing incident at Turner Ranch on July 24. Some of the witnesses sought to identify a leader of the group. What follows is a summary of the relevant testimony.

Jesus Medina testified that he saw cars come into Turner Ranch from Austin Road and Newcastle Road which are to the east of the field located at Turner Ranch.³⁶ He saw 10 or 12 cars which entered the ranch about 12:30 or 1 p.m. and came to a

³⁵I will discuss the nature of that burden in the Analysis section.

³⁶See EX 2, EX 7 and UFWX 1, each of which depicts Turner Ranch. I find that all three exhibits are equally appropriate. However, all three should be reviewed together as they do not each have all the same markings. For example, on UFW Exhibit 1 there has been marked at the southwest corner of the rectangle marked "field" location of workers' cars and strikers' cars. On Employer Exhibit 2 workers' cars are placed on the northeast edge of that same field. The differences between these three exhibits are not significant and no party objected to the use of the three exhibits.

stop on the northwest edge of the field in which workers were picking (see EX 2 for the box indicating where this witness places the cars). When the cars arrived, the people in the cars started shouting for the workers to leave. Luis Magaña was in the front. (Tr. I:53-56.) Medina heard the 30 people shouting that we're brothers and you should get out of the field so we can fight together to beat the Gringos so that they can pay us more. (Tr. I:58.) Although Medina testified that he was afraid, I'm striking this testimony based upon my ruling discussed supra.

Most of the workers inside the field left the field but about 15 or 20 people stayed and continued to pick. (Tr. I:60.) After the majority of workers left the field, the 30 people who had come in the cars to the edge of the field began throwing tomatoes and small balls of dirt. As far as Medina knows, only one worker was actually hit with a tomato and dirt ball. (Tr. I:62.) However, it became clear that Medina did not actually see this worker hit.³⁷ Because Medina was on top of the trailer, it is questionable exactly how much he saw. In addition, he testified that the people throwing the tomatoes and dirt balls were about 200 feet from the people who had remained working. I question how many of those people could effectively throw a tomato or small dirt ball 200 feet. (Tr. I:69.)

When asked if he saw any of these 30 people wearing anything on their shirts or carrying any flags on their cars or

³⁷By the time Medina saw the worker, Tomas Larios, he did not see any object strike Larios, he only heard shouts. (Tr. I:67-68.)

stickers, Medina testified, "On that day, I didn't see anything." (Tr. 1:69.) Clearly this is important evidence that the UFW was not involved on July 24.³⁸

Medina also testified that on the 24th the 30 people were yelling obscenities at the workers. However, it took Employer's counsel two or three efforts to elicit the assertion that obscenities were being yelled. (See Tr. I:59-68.) Initially, the witness testified that the 30 people were shouting such things as we're all brothers, we can therefore fight

³⁸At this point, the Employer attempted to introduce evidence about another incident at Turner Ranch on July 24. I would not allow the Employer to do so since I had decided that the failure to tie in the UFW to the events on this day would preclude the introduction of additional evidence. As discussed supra, I have reconsidered that ruling and reversed myself. The Employer made an offer of proof about the additional incident which is as follows: Members of the group who were throwing tomatoes and dirt balls came into the field and went over to Mr. Medina's car and violently shook it as if to roll it over. The next incident in the offer of proof was that as a result of the tomato and dirt clod throwing and the vehicle shaking, Medina and the remaining 15 or 20 workers stopped working and left the field. However, the Employer said that the offer of proof would not identify the perpetrators of the car rocking incident. (Tr. I:74-76.) I discount the offer of proof regarding the car rocking incident in light of Medina's testimony that many of the people who were involved in this July 24 incident are people who lived in the camp where he lived as well as the camp next to the jail and that "we know each other." (Tr. I:71.) Given Medina's apparent familiarity with a number of these individuals, the fact that the offer of proof would not identify the perpetrators of the car shaking incident leads me to conclude that it did not happen as set forth in the offer of proof. In addition, I note that Medina testified he did return to work on July 26. Most importantly, however, is my finding that the UFW was not responsible for the activities on July 24 and I shall evaluate the events of July 24 by a third party standard to be discussed infra. Further, after the Employer introduced other evidence by different witnesses attempting to tie the UFW to events of July 24, I note that the Employer did not make an effort to recall Medina.

together so that they can pay us more. (Tr. I:58.) If, indeed, the 30 people were yelling insults, it appears from Medina's own testimony that they were a couple hundred feet away. I do not find that the yelling of obscenities, even if it did occur, is the type of misconduct which would justify setting aside the election.

The Employer's next witness was Alejandra Medina, the wife of Jesus Medina. As I have decided to reconsider my ruling not to hear evidence of events on the 24th because of the failure to tie the UFW into those events, I shall now consider the Employer's offer of proof regarding Mrs. Medina's proposed testimony regarding events on July 24.

The Employer stated that Mrs. Medina would testify that she saw 10 or 15 cars approach the Turner Ranch field, 30 or 40 people got out of the cars and began shouting at the people to stop working and join them. They shouted some obscenities. They then began to throw tomatoes at those individuals who did not stop working, and some of the 30 or 40 went over to Mr. Medina's car and began to rock it back and forth because they would not stop working. There is no indication, however, that anyone was in Mr. Medina's car at the time. In fact, I find that no one was in the car in light of the absence in the offer of proof of assertions from Mr. Medina or Mrs. Medina that anyone was in the car.

Further, the offer would indicate that one of the unidentified and unnamed individuals took a knife and pointed it

at Mrs. Medina. I find that this proposed testimony is too vague to support a finding that a knife was in fact pointed at Mrs. Medina. More importantly, I have discredited Mrs. Medina because of her overly emotional testimony and she was unable to undergo cross-examination, meaning that the Union was unable to test her recollection and credibility. (Tr. II:74-75; 108-109.)

Gracielo Viveros testified that he worked in 1989 as a supervisor with Ace. (Tr. V:5.) On July 24, he was at Turner Ranch and he suddenly saw "a lot of cars" coming from the east side of the ranch. These cars stopped by the cars of the workers near the field. There were approximately 150-200 people in the cars. People got out of the cars and began to shout. They shouted that they belonged to and were representatives of the Union. They told the people to stop. (Tr. V:6-8.) However, the workers kept picking. Viveros testified that these people had black eagles and some little flags and that they represented Cesar Chavez' Union. The strikers then started throwing tomatoes. Viveros does not know, however, if anyone was hit with tomatoes. The supervisors then sent them home. (Tr. V:10-12.)

As he exited from the field, some unidentified people stopped his van and said that they were from the Union. They started moving his van (it does not appear from his testimony that they were trying to turn over his van or moving it in a forceful fashion). (Tr. V:12-13.) These people did allow his van and the other vehicles to go through since "there were a lot of policemen around." (Tr. V:13.)

After exiting, a car in back of him pulled in front of him and three men got out and said that they were Union representatives. These unidentified men told them not to work or they would have to "pay the consequences." (Tr. V:14.) These men had buttons with little eagles. There were 15 people in his van.³⁹

On cross, Viveros testified that each of the 6 or 7 times he was threatened during the strike the person making the threat started out by saying that they were a UFW representative. (Tr. VI:23.) I find this incredible. Further, each time he was threatened, the persons making the threat said that they not only represented the Union but they also represented Chavez. (Tr. VI:23.) I also find this to be incredible. These are examples of what I consider to be rehearsed testimony.

He also testified on cross that there is nothing unusual about the cars that entered Turner Ranch on July 24. From this I infer there were no Union flags on the vehicles.

He then testified that between 150 to 200 people came walking into the field very fast shouting or screaming. (Tr. VI:47-48.) This testimony differs substantially from that of Medina and Schenone. Viveros was not sure who was in charge on the 24th and he testified that no one made a speech. Everyone was talking, not just one person. This is different than the testimony of Schenone who identified a leader. It also differs

³⁹See Tr. V:18, where he testified there were 15 people in his van on July 26th. I assume, though the record is not clear, that there were 15 people in his van on July 24.

from Medina's testimony as well. When these 150 to 200 strikers stopped from 20 to 25 feet away from the 150 pickers, they all said that they were from the Union. Viveros further testified that not one of the 150 pickers left the field to join the strikers. (Tr. VI:51-52.) This seems to conflict with Schenone's credited testimony that at least 40 pickers left the field to join the strikers.

Interestingly, Viveros conceded that none of his people were hit with tomatoes and that in fact the strikers were not throwing the tomatoes very well. (Tr. VI:84.) He also testified that the tomato throwers were saying to the pickers not to be stupid but to join us and get more money. (Tr. VI:87.) Even were I to credit this witness, his testimony does not indicate that the strikers made coercive threats. It appears rather that the strikers were soliciting the pickers to leave the field and join the strike. But even the throwing of tomatoes could not be construed here as coercive conduct given the bad aim of the strikers and the fact that no one was hit.

When asked on cross about the 20 people who pushed on his van,⁴⁰ he conceded that the pushes on both the 24th and the 26th lasted a very short time and that the van was pushed once and perhaps at most three times. He added that when they were pushing his van they were trying to talk to him. (Tr. VI:79.) This is contrary to his testimony on direct when he described a violent pushing incident. I am discrediting his testimony

⁴⁰Tr. V:86-87.

regarding the pushing of his van on both the 24th and the 26th. I find that the contact described was not a violent pushing and would not tend to coerce workers. Further, the van was never close to being turned over and there was no damage to the van either time. (Tr. VI:83.)

He did not remember if he voted and he was not even sure if there was an election. I note that his frame appears to be on EX 9a, the eligibility list. However, he is listed as a foreman. In light of his testimony that he hired people and directed the work of employees (Tr. VI:13), I find that he was a supervisor.

On redirect, Viveros testified that some of the strikers who entered Turner Ranch on July 24 had UFW flags and the ones that did not have flags had UFW insignias. (Tr. VI: 112-113.) This testimony is certainly different than that of Medina and Schenone.⁴¹

Testimony of this witness was quite vague and seemed rehearsed. For example, he often referred to being told that workers would have to pay the consequences. I find it unlikely that the strikers would be saying the same thing time after time. Frequently his answers were not clear, and he sometimes appeared to be confused. Further, the incidents he described did not appear to be very severe in nature and I note that he did testify

⁴¹As an example of the type of subjective reaction to the strike or to threats which I have not considered, see Tr. VI: 157-160, regarding alleged statements of fear of passengers of Viveros¹ van or unidentified other workers.

that there were a lot of deputy sheriffs on July 24. I find that he was generally not a credible witness.

Jerry Schenone testified that he had been employed with Ace for 10 years. In 1989 he was a supervisor and was responsible for supervising the overall picking of all the crews and the scheduling of the fields prior to the harvest. The supervisors working under him were Mike Stefani, Frank Canchola, Carl Armstrong and Ismael Viveros. (Tr. V:113.)

He arrived at Turner Ranch on July 24 at 7:00 a.m. He stated that there were two No Trespassing signs in 1989, one at Dump Road and another on a dirt road. That morning at about 10 a.m. after the workers had begun picking, he saw 5 or 10 cars with a pick up truck pulling a house trailer come into the ranch via the entrance on French Camp Road. The vehicles traveled north along the main road which is also identified on Employer Exhibit 2 as the "wavy road." Apparently there was not a no trespassing sign where the main road intersected French Camp Road, i.e., the entrance to the ranch. These vehicles parked on the east side of a walnut orchard about 1/8 of a mile west of the field where 140 pickers were working. (Tr. V:128.)

About 60 or 70 people got out of the vehicles and began shouting huelga or strike. These strikers came to the northeast corner of the field where the pickers were and stopped about 100 feet from Schenone. He conceded that he did not understand much Spanish, but the group was yelling huelga, hijo de putas, and vamanos which means "let's go." Hijo de putas is a swear word or

insult and it is the only swear word that he could recall. They were shouting these words in a loud tone of voice. (Tr. V:128-135.)

At this point, a majority of the tomato pickers stopped working, stood up and looked. Workers then began leaving the field. (Tr. V:137-138.) He estimated that perhaps 20-30 of the 140 went over and joined the strikers and about 70 or 80 went to their vehicles which were just north of the field. The remaining workers either listened or continued working. Then about 10 strikers went into the field and started throwing green pear-shaped tomatoes. They came 2 or 3 rows into the field and they threw these tomatoes at the remaining workers who were about 100 feet away. He estimated about 4 or 5 workers were hit with tomatoes, the tomato throwing lasted for 30 seconds, and each of the 10 strikers threw from 5-10 tomatoes. Some of the pickers continued to work. An elderly lady was hit on the side of the face but he did not see her reaction. At that point he started blowing the horn of his pickup truck and soon everyone left the field. (Tr. V:137-140.) He described the field as containing from 300-400 rows of tomatoes with about 5½ feet between the rows. (Tr. V:144.)

He recognized a leader who he described as having thick black hair, a black beard, about 5'8" and weighing 180-190 pounds. The leader was husky and muscular and was wearing a red shirt. He later found out that this leader was Luis Magaña. He thought that Magana represented the UFW. In no other way does

Schenone tie the UFW to this incident. He found out it was Magaña from some of the workers who had been there. Though he remembered that this person had a red shirt on, he did not mention that there was a button, an eagle or other Union insignia on the shirt or on this person.

There is no testimony as to the velocity of the thrown tomatoes or where they might have hit the 4 or 5 other men who were allegedly struck. Nor is there any identification of the woman or of the men who were hit with tomatoes.

Although Schenone did not mention that this person's red shirt had an eagle on it, he testified that on July 27th the red shirt did have an eagle. Further, whereas there is no mention of a button being worn by this person on July 24, Schenone's testimony was that this person did have a button on in addition to the red shirt with an eagle on July 27. (Tr. V:145, 148.) But he did not, unlike Guido, remember Barajas wearing a white UFW ID card.

On Wednesday, July 26, he saw the same person whom he still believed was Magaña at a Triple E field. On July 27, he went to another Triple E field and talked to Tom Guido, the General Manager of Triple E. Guido pointed out Efren Barajas to Schenone and it was then that Schenone concluded that the guy he saw at Turner Ranch on July 24 was really Barajas. (Tr. V:146-148.)

Later in the hearing, Schenone was called as a rebuttal witness and testified that he had just seen Barajas outside the

hearing room and it was indeed Barajas who was present at Turner Ranch on July 24. (Tr. XVI:86.)

Schenone confirmed that he had called for sheriffs and a deputy sheriff did arrive on July 24. About 20 pickers continued to work after the strikers had left. (Tr. V:150.)

During cross, Schenone again said that on the 24th the leader, was wearing a shirt that had no writing. (Tr. V:179.) On the 24th he talked with a group of 6 or 7 pickers who identified this person as Magaña. (Tr. V:181.) The workers also said that Magaña was a UFW leader.

When discussing how he and Guido were within 10 feet of Barajas on July 27, Schenone testified that Guido asked this guy if he was Efren Barajas. As will be discussed infra, Guido testified that he did not. This inconsistency coupled with the fact that 6 or 7 Ace workers identified the person in question on July 24 at Turner Ranch as Luis Magana raise questions about the reliability of the subsequent identification of this "leader" as Barajas. (Tr. V:185-186.)

With respect to the existence of a strike, Schenone testified that many workers had left Turner Ranch by 10:30 or 11 a.m. and that everyone had left except for the 20 remaining pickers by 2:30. (Tr. V:189.) It certainly appears from Schenone's testimony that the majority of workers at Turner Ranch on July 24 left voluntarily and were not coerced to go on strike.

Schenone also conceded that he was aware that workers had gone out on strike not only at Turner Ranch but also at Dellaringa

Ranch and the Tully Road Ranch. (Tr. V:192-193.) He further testified that approximately 50 percent of the workers that left the field at Turner Ranch on July 24 returned on July 26. (Tr. V:193.)

Schenone stated that though he would not call the strike in 1989 very peaceful, he was able to walk around amongst the strikers or drive through the strikers on his way into the ranch with no problem. (Tr. V:198.)⁴²

The Employer called Guido to confirm Schenone's version of the identification of Efren Barajas. He testified that Schenone came over to Triple E Ranch on July 27 and, pointing to Barajas, asked if it was Magaña. It was then that Guido told Schenone that it was Barajas, not Magaña. When asked if there was any conversation between the three of them, Guido said no, other than as Barajas walked by Guido said, "Good morning, Efren" and Efren turned and then walked away but that was it. Guido was quite sure Barajas was wearing on his shirt his white access card, about 2½" by 3" or 4" with a UFW eagle on it. (Tr. VII:28-29.) On cross-examination, Guido testified that when he greeted Barajas, Barajas smiled. He further stated that he and Barajas got along and respected each other. Nor did Barajas made any

⁴²The UFW introduced into the record as UFWX 2 Viveros' 1989 calendar and claimed that Viveros' wrote something having to do with when the strike began on the back of the May and June sheet of paper. Though I find that he was evasive in responding to questions as to when he made these notes on his calendar (Tr. VI:17) and although it may be that a portion of the front page of the calendar was torn off very close to the time of his testimony (Tr. VI:21), I have not relied upon this calendar in making my credibility determinations regarding Viveros.

unfriendly gesture that day. (Tr. VII:34, 35.) This version of the encounter with Barajas is somewhat different than Schenone's. I credit Guide's version of the encounter over Schenone's.

Guido also testified that the last of the pickets and the remaining workers left the Triple E field at Morada Lane on July 24 by about 11 a.m.

Lorena Vriseno picked tomatoes for Ace in the 1989 harvest. She testified that after lunch on July 24 she saw several vehicles stop a block away from the field and 80-100 people got out and shout that they should stop work and that Cesar Chavez is coming. Nothing else was said. There were no threats at this point. Some of the pickers stopped and the rest kept picking. (Tr. VI:178, 179.)

Some of the strikers began throwing tomatoes at the pickers and one lady was hit on the cheek. She only saw the one lady struck by a tomato. In less than clear testimony she claims that she saw 2 or 3 red flags with black eagles and that some of the strikers carried buttons with the black eagle located on the buttons. (Tr. VI:180-181.) She said that the workers stopped picking after the tomato-throwing incident.

On cross, she manifested a poor memory. She was 18 at the time he testified and she was 16 when she was working at Turner Ranch. She cannot remember the first year she worked at Ace. When asked if she voted in the election, she asked what election and stated that she never heard about an election. This displays a total unawareness of what going on and adversely

affects her credibility. (Tr. VI-.209-210.) She seemed confused in responding to a question as to whether she had talked to anyone before she came in to testify. First she claimed never to have talked to anyone. Then she conceded that she had talked to her attorneys. But she denied that her attorneys talked to her about what they were going to ask her or try to find out what her answers might be. (Tr. VI:210-213.)

She did testify, consistently with Jesus Medina, that on July 24 no one appeared to be the leader of the strikers. (Tr. VI:215.) She also testified that all of the strikers, or at least most of them, said that "Cesar's coming tomorrow." (Tr. VI:221.) She testified that about 6 of the strikers actually came into the field and the rest waited by the side of the field. (Tr. VI:224-225.)

I find that generally her testimony is unreliable and it is marked by a less than clear memory and a certain vagueness. I do not believe that all or any of the strikers were shouting that Cesar Chavez is coming tomorrow. Her testimony in this regard seemed rehearsed.⁴³

Eduardo Gomez testified that he worked as a general foreman for Earl Hall, a labor contractor, who worked for Ace. On July 24 he worked at Turner Ranch and had a crew of about 140 workers. About 10-12 cars came to the edge of the field and about 40 people got out and began yelling for his workers to stop

⁴³She testified that she worked in the crew of Eduardo Gomez.

work. They used some swear words and they said that if you don't stop, Cesar Chavez will come and make you stop. He could not identify any of these strikers. (Tr. XI:39-40.)

He then described a man with a beard, a red T-shirt, black pants, black hair and short-sleeved shirt which had a button and a flag with an eagle on the shirt. It's obvious that he's attempting to describe Barajas though he did not identify the person.

Some of the strikers began throwing pieces of dirt and green tomatoes at the workers. He asserts that a big woman was hit with a tomato or a stone. He does not know who the woman is though she worked in his crew. (Tr. XI:41.)⁴⁴

My notes indicate that Gomez was very agitated, was gesticulating a lot, and his testimony seemed rehearsed in that he appeared to have a story to tell.⁴⁵

I also discounted Gomez' testimony that certain workers including Jesus Luna and Jesus Medina told Luna about alleged incidents of threats or coercion. Not only was this testimony hearsay or double hearsay, but it also appears to be part of the rehearsed testimony which I find most unreliable. Further, these individuals did testify and were subjected to cross-examination. The same is true with Gomez' testimony about a conversation he

⁴⁴I have not considered his testimony that workers in his crew wanted to leave the field because they were afraid.

⁴⁵I had to request that he stop tapping his sun glasses on the table since the reporter could not hear the testimony. (Tr. XI:53.)

had with Gracielo Viveros regarding alleged threats to Viveros' family. Gomez testified that Antonio Mendes, an alleged worker, also related to Gomez threats that had been made against Mendes. This testimony was very vague and did not indicate who had made the threats. I found it unreliable. In addition, the name of Antonio Mendez is found on the Earl Hall crew sheet (EX 9a) where he is listed as a foreman. During cross it became obvious that Mendes (or Mendez) was able to effectively recommend workers to be hired. (Tr. XI:73-75.) This confirms my finding that he is a supervisor. The hearsay testimony by Gomez about the alleged threats to Mendez could not support any finding even were the testimony reliable.

On the 24th, everyone left the field at Turner by 11 or 11:30. (Tr. XI:79.) When Gomez was asked on cross the name of the man with the beard whom he tried to identify as a leader, he testified that he did not know his name and he never saw him again. This was a further indication that this man was not Efren Barajas.

During cross he identified several foremen who worked under him including Gracielo Viveros. In addition he testified that he supervised the truck drivers who took tomatoes from inside the field to the edge of the field.

During cross, as on direct, he was quite nervous.

Based upon his vague and rehearsed testimony, and his demeanor, I have generally discredited this witness.⁴⁶

Jesus Luna testified that he was a picker working for Eduardo Gomez during the strike in 1989 and that he lived at the Mathews Road Labor Camp. Before the strike began, at some unspecified time, two unidentified individuals came to his house to ask him to "join us" for higher wages. They showed him cards and said they belonged to the Chavez union. He does not remember anything else they said. This displays not only a vague recollection of events, but also a selective memory and I accordingly discount this testimony. (Tr. XII:2-3.)

Luna then attempted to describe an incident at an almond orchard at a field near French Camp Road. I find that he was referring to Turner Ranch though he did not recall its name. He testified that 300 men entered the field (I am assuming that he is referring to July 24 but that is not clear from his testimony) and hurt pickers with green tomatoes and dirt clods. These unidentified strikers told the pickers it was not good for them to work and that if they did not leave the field, the strikers would take them out. It is unclear to whom these words were addressed except for the total group of pickers. Though initially he did not mention anything about flags or UFW buttons, he does state that some of the strikers had red buttons with an eagle. (Tr. XII:6.) This was the first time any witness

⁴⁶In addition, during cross he was somewhat recalcitrant and non-responsive in answering questions regarding how many hours he worked during certain periods of the strike. (Tr. XI:80-83.)

asserted that such a large number of strikers was present at Turner Ranch on July 24. The testimony seems incredible.

Luna testified that there were about 80 in his crew and that these events occurred between 11 a.m. and noon. Some of the strikers had sticks and ropes which they used to threaten. There were many bad words spoken. Luna kept repeating the phrase used by the strikers that the strikers would "take us out by force." There were a number of non-responsive answers which I struck and it was difficult to make sense of much of his testimony on direct. (Tr. XII:6-14.)

When asked what the strikers did, he said that they took us out by force and that there were blows from tomatoes and dirt clods. Again the testimony was scattered and unreliable. He claimed that there was a rain of dirt clods which hit everyone and that he himself was hit by several as well as by hard tomatoes. He then testified that everyone got hit by tomatoes until we left. At some point the police took out the strikers.⁴⁷ I note that he's the only witness that testified that so many people got hit with dirt clods and/or tomatoes. Again, he has a story to tell and he volunteered a number of unresponsive answers. It is also important to consider that his declaration does not mention the field incidents. (See UFWX 6.) In addition, his testimony was vague and there was no date or day of the week identified. Further, a number of leading questions

⁴⁷See examples of non-responsive answers at Tr. XII:6-15, 23, 42.)

were used to elicit his testimony and he frequently gave unresponsive answers. He had a story to tell and his memory was rather selective in that he was generally very vague except as to a few points, most of which were very prejudicial to the Union position.

During cross Luna testified that the entire field was surrounded on July 24. Again, he's the only witness to so testify. He does identify his supervisors to include Antonio Mendes, Gracielo Viveros, Antonio Marquez, and Eduardo Gomez. (Tr. XII:68-69.)

He also claimed that the 300 strikers all came into the field to a distance of about 10 feet from the pickers. He stated that Eduardo Gomez was present and called the police. Contrary to the other witnesses describing this event, he incredibly testified that no strikers stayed at the edge of the field but rather they all entered the field for a distance of at least 75 yards. (Tr. XII:75.)

He further testified that all the strikers had a button. Again, this is inconsistent with the other Employer witnesses.

He did testify that there was no spokesman for the group. When asked how many ropes he saw, he answered that there were 3 ropes which are used to lasso cattle. However, he did not see anyone lasso any workers. Nor could he specifically describe the three persons who had the ropes. He also claimed that everyone left the field in 2 or 3 minutes. (Tr. XII:75-78.)

I have discounted his testimony about the fear he experienced due to this incident. I do note that he testified that he did return to work there a couple of days later. He also took his two sons with him. (Tr. XII:83-84.)

He did not vote in the election.

Luna said that he knew Magaña and that Magaña was the leader and was united with Chavez. However, an unidentified person told him that Magaña was connected with the UFW and I do not credit this statement. It was Magaña who invited the workers to meetings so that they could get a pay raise. (Tr. XII:97-98.)

Regarding the visit by the two men prior to the beginning of the strike, his testimony was confused. (See Tr. XII:98-102.) I discredit this testimony.⁴⁸

J. Jesus Medrano Alcaraz (hereafter Jesus Medrano or Medrano) testified that he is the son of supervisor Antonio Medrano and that he worked for Eduardo Gomez on July 24 as a checker (he would give out a ticket for every two buckets of tomatoes).

At about 10:30 a.m., he saw about 15 cars with red flags with black eagles. They were from the "UFLC." Some of those people left the cars and some went on top of a car. They screamed for the workers to leave the field and that they were from the Union. A "short guy" was doing most of the talking.

⁴⁸Luna also testified that if he had gotten involved with the strike it would have been the end of his job as Eduardo Gomez would not have accepted a strike. Whether or not this statement reflects the feelings of Gomez, it certainly describes the impressions of Luna and might well have affected his testimony.

The witness did not recognize any of the strikers but he did remember that some strikers said "We will take you out." Further, there was some striker twirling a rope. (Tr. XII:126-128.)

Although some of the workers near the strikers stopped picking, more people inside wanted to fill their buckets. A heavy-set lady was hit on the head with a green tomato. He did not identify her. He estimated that about 5 strikers threw tomatoes. He could see this as he was standing on top of his truck but at some point he sat down inside the truck.

When on August 3 he and his father went to Marianis, he recognized one of the strikers as the short one with the beard who had talked at Turner field on the 24th. This man had a bull horn and was yelling that the workers should not go pick tomatoes and that he was from the Union. This is an obvious effort to tie in Barajas to the events of the 24th, but it does not hold up.

On cross, he testified that he did not know the men who were driving the cars. He claimed that each car had a flag and he is the only Employer witness to so testify. (Tr. XII:145-148.) I note that he was a very dramatic witness using a number of gestures. Again, it appeared to me that he had a story to tell and was somewhat rehearsed.

When asked to describe the stout man who was the apparent leader on July 24, he said that this man had a blond beard. This could not be Barajas who has a dark beard and is not short but is between 5"10" and 6'. Medrano could not give

further details about the description of this man. Nor did he see this man throw anything nor use a rope. I find that the vague description of this so-called leader does not describe either Barajas or John Aguirre.

He testified that the strikers were talking to workers and the workers kept picking for about 15 minutes but that they stopped when the lady was hit in the head. He does not know her name and could not identify her. His testimony seems rather confused at this point. (See Tr. XII:149-153.) He also claimed that he doesn't know if any Ace supervisors were present on the 24th. Again, I find this hard to understand.

He stated that he voted unchallenged in the election.

In summary, I found Medrano not to be a reliable witness. In addition to the reasons already stated, I note that several times he gave non-responsive answers where he volunteered information referring to alleged violence. (See, for example, Tr. XII:154-156.)⁴⁹

Javier Luna Barrios testified that he worked as a picker for Eduardo Gomez at Turner Ranch. He could not remember the day of the week, but it was sometime during the strike. He does not remember if he worked the first day of the strike. (Tr. XII:165.)

⁴⁹I have also discredited his testimony regarding two cars which were allegedly hit by strikers with their hands and feet and whose drivers were threatened that their cars would be burned if they came back. The testimony seemed rehearsed. (Tr. XII:132.)

There were 80 workers in his crew and he remembers on an unspecified day that about 30 or 40 vehicles came to the field where he was picking and from 250-300 strikers got out of the cars. The vehicles had red flags with black eagles. (Tr. XII:166.)

The strikers told the workers to get out of the field and if not "We'll take you out." He was at the edge of the field, about 20 feet away from the strikers, whereas the rest of the crew was in the middle of the field. He recalls some unidentified strikers saying that we will break your cars and your face. He also claims to have seen baseball bats, sticks and ropes. Some of the strikers were wearing buttons and almost all the strikers threw tomatoes, or at least 200 of them. His testimony is very similar to that of his father, Jesus Luna. He is the first witness to testify that he saw baseball bats. He also claims that a truck driver named Tomas and a lady were hit by tomatoes. (Tr. XII:166-168.) I find it is rehearsed testimony.

He did testify that he was not hit and beside the truck driver and the lady, no others were hit. It was when the police came that the strikers left and the police escorted the strikers out of the field. On voir dire, he testified he did not vote because he was not an eligible voter. (Tr. XII:168-170.) He is the first Employer witness to testify that police cars escorted the strikers out rather than the workers.

On cross, Luna testified that he worked in the same field the next day. July 24 was the only day that he saw strikers throw tomatoes and/or come into the field. (Tr. XII:186.)

When asked about the ropes that he saw, he became somewhat hostile and was unable to describe the strikers who were in possession of the ropes. (Tr. XII:188.)

When asked what any of those 250-300 strikers were wearing, he answered "All I know is they were wearing those buttons. I don't know, they were wearing just clothes, their clothes." (Tr. XII:190.) This manifests a selective memory. He finally conceded that he had no idea of how many of this larger group of strikers were wearing buttons. (Tr. XII:191.)

Nor could Luna describe the persons who were holding the baseball bats. He did concede that nothing was done with the bats. Though he testified that everyone threw tomatoes and threw them about 20 feet and that some of the people lived at his camp, he could not identify any of the tomato throwers.⁵⁰

For reasons described above, I generally do not credit Luna's testimony as I found him to be an unreliable witness.

a. Summary of Findings

Based upon my review of the credited testimony, I find that the UFW was not involved regarding any of the incidents at

⁵⁰Both Javier Barrios Luna and Jesus Luna Rodriguez were recalled to establish that they had used different names which appeared on the Employer's payroll list, that their names do in fact appear on the eligibility list and that they were eligible workers and I so find. (Tr. XIII:20, 21, 27.)

Turner Ranch on July 24. The weight of the evidence is that Barajas was not at that ranch despite Schenone's testimony. I find it more likely that the workers at Turner Ranch with whom he spoke that day and who identified the so-called leader in question as Magaña were probably accurate. Barajas denied that he was at the ranch. His denial was credible given the fact that the UFW did not take over the strike until July 26th, that no other Employer witness expressly identified Barajas as being present, that Medina's credited testimony does not identify Barajas, and it appears that there might have been some overlap between the time all the picketers and workers had left Morada Lane on July 24th and the time that these incidents were alleged to have occurred at Turner Ranch on July 24.

I further find that a majority of the workers at Turner Ranch on July 24 had left before tomatoes were thrown. I find that many of those workers actually joined the pickets and that most of the rest of the workers left the field. It's not been established by the Employer that they left because of coercion. Just as likely an explanation is that they were supporting the strike.

I find that the strikers who did go to that field were there under the direction of Magana and the committee. There were approximately 30 to 50 strikers and a few of them entered the field to a limited extent and threw tomatoes. Though one woman might have been hit by a tomato, I find it somewhat unusual that the witnesses, including the supervisors, could not identify

that woman and that the Employer was unable to call her to testify. I find the Employer has not established that other workers were hit by tomatoes or dirt clods. Schenone's testimony really focused on the one woman and was not specific about the 4 or 5 men. The testimony about the truck driver was vague and non-specific and I find no truck driver was hit. I do not believe that the strikers who were there engaged in serious threats to the pickers, but rather exhorted them to stop picking and join the effort to get a pay increase. Many did.

Though there may have been a trespass, I do not believe that the type of conduct which occurred rises to the level which would require the election to be set aside. I also find that deputy sheriffs were present at least for part of the time that strikers were on the property and were present when the workers were leaving the property.

2. July 26 - Turner Ranch

Jesus Medina testified that on July 26th at Turner Ranch he saw strikers carrying flags and with Union buttons. (Tr. I:69.)⁵¹ He saw about 20 cars coming toward the field from the eastern part of the ranch at about 11:30 a.m. He then said it was not in the morning. (Tr. I:87-89.) He did not see Luis Magaña that day at Turner Ranch with the strikers. (Tr. I:71.)

⁵¹ As I have already evaluated the credibility of a number of witnesses who will be testifying about this incident as well as additional incidents to be discussed infra, I will not repeat my credibility comments. Rather, I will point out any new credibility issues not already discussed.

He asserted that there were three sheriff's patrol cars trying to block the cars from coming in off of Austin Road. Most of the strikers' cars then turned around and tried to get in through the main entrance off of French Camp Road. These cars were waving red flags with eagles. Most of the cars finally reached the field where he was located. He then testified that most of the crew left the field when they first saw the strikers' cars. (Tr. 1:90-97.)

Medina testified that about 15 or 20 people got into the fields but he did see the sheriff stop some of the cars. Some unidentified person said that we're going to kill you and burn your car and we know where you live. It is unclear who made these comments or to whom these comments were directed. About 15 or 20 people remained in the field when the strikers came in and most of them were families of supervisors. (Tr. I:100-103.)

The foreman said that it was not necessary to stay because they were not going to do more work. (Tr. I:103.)

No striker said anything to Medina.⁵² He left with his brother.

Medina's testimony is too vague to support a finding of coercion. He fails to identify any of the strikers even though some of them were from the labor camp where he resided. It is unclear to whom the threats were made and the record is devoid of any substantial evidence as to how close or how far away the

⁵²I am not considering testimony about the subjective reaction of the workers in his crew that day.

strikers were from the workers who were threatened. Further, Medina testified he did not remember any more specific regarding the threats. I have, therefore, discounted Medina's testimony concerning events in the field at Turner Ranch on July 26.

As he was exiting from Turner Ranch, there were some 60 or 70 strikers along French Camp Road. These strikers carried indicia of the UFW such as buttons, flags and bumper stickers. About 50 feet before leaving the ranch, as most of the strikers knew him, they began to punch his car and threaten to kick his ass and bother his family. He said the people were acting crazily and that they were speaking in a violent tone of voice. However, he did not stop his car and he did not see what strikers might have done to other cars. There was no damage to his car. His failure to identify the strikers who made these threats puzzles me since he testified that he knew them because sometimes they worked together. (Tr. I:113.)

On cross, he identified Antonio Mendez, Gracielo Viveros and Modesto Viveros as some of the foremen who were present at Turner Ranch on July 26th. He estimated that the crew numbered about 150.

Of the 15 or 20 who entered the field, he recalled that one of them was Juan Manuel Naranjo and another was Francisco Naranjo. However, he does not indicate that either of those two individuals made any specific threat. (Tr. II:39-40.) He did not remember seeing Barajas there that day. (Tr. II:41.)

He saw 5 or 6 sheriff's cars at Turner Ranch. When asked who hit his car, he gave a couple of nicknames but he stated he could not recall their regular names (though later he recalled one name) nor could he describe the others. (Tr. II:50-51.) This appears to be an isolated event.

Robert Carrol, the Employer's lead counsel, testified that when he arrived at Turner Ranch between 12:45 and 1 p.m., there were a number of pickets at the entrance and he had to slow down in order to get into the ranch. He recognized Zeferina Perez Garcia, a stipulated UFW agent (I will refer to her as either Perez or Zeferina). Carrol testified that Perez "seemed" to be gesturing and yelling some things but he couldn't hear her very well. I find this too vague to support any finding.

He did state that at some point 8-10 vehicles, 2 of which had flags, passed by and that there were a couple of sheriff's cars in the same procession of cars in front and behind. (Tr. III:55-56.) Carrol heard a lot of derogatory comments and epithets from the vehicles with the UFW flags. However, it is unclear in the record exactly who was yelling and to whom the derogatory remarks were addressed, though Carrol suggests they were addressed to Company representatives. The epithets were also directed at workers and sometimes the deputy sheriffs. Though he heard pounding sounds, he can't say what they were. (Tr. III:81-82.)⁵³

⁵³I am striking and not considering Carrol's testimony that he was advised by Schenone that some of the workers were very

(continued...)

Carrol then related a discussion he had with Perez who had on a UFW organizer badge. There were epithets spoken by a group of strikers nearby. Sheriffs were 15 to 100 feet away from the point from which the caravan of cars was leaving.

It appears from Carrol's testimony that Perez was not taking access, but rather was on the picket line. He did not testify as to any violence or threats.

On cross, Carrol indicated that Perez was from 45 to 60 feet from French Camp Road when he talked to her and that he was about 30 feet away. It appears that the distance from French Camp Road to the field where people were working is about 3/4 of a mile and that the first bridge is from k to § mile north of French Camp Road. (Tr. III:123-125.) Carrol also saw approximately 15 UFW picket signs at the edge of the ranch on French Camp Road.

I generally credited Carrol's testimony which establishes that Perez was present, there were some picket signs on French Camp Road and some strikers were wearing UFW buttons that afternoon. Though I credit his testimony that a deputy sheriff advised him that the deputies were in the process of evicting 10 of the cars from the premises, it is hearsay and cannot by itself establish that there were 10 carloads of trespassers or UFW trespassers on the property at that time.

⁵³(...continued)
scared. This is consistent with my earlier ruling. I have not considered such subjective testimony and I have footnoted just some of the examples of that subjective testimony which I have struck.

Without more, however, Carrol's testimony, as previously alluded to, does not establish the type of misconduct which would require setting aside this election. Nor does Carrol's testimony prove that the carloads of strikers were UFW agents. There is no proof that any strikers who entered the field that day did so with UFW approval or subsequent ratification.

Gracielo Viveros, whose testimony I have found to be unreliable, testified that on July 26th there were about 15 people in his van when 5 unidentified men who said they were from the Union or representatives of the Union began to move his van. He then drove the van and workers home at their request. (Tr. V:19-20.)⁵⁴ On cross, Viveros testified that this pushing incident occurred on Little Road which is found on UFW Exhibit 1 on the west side of Highway 99. The pushing occurred at about 7 or 7:30 a.m. Five people pushed the van, but the van was never turned over as it was too heavy and the five strikers were attempting to talk to him and persuade him not to go into work and to join the strike. Further, "They only pushed a couple of times." (Tr. VI:82.) He could not identify the strikers.⁵⁵

⁵⁴I have struck Viveros' testimony regarding the subjective reactions of the workers in his van to the alleged pushing of the van.

⁵⁵I also find that the pushing of his van on July 24 in the afternoon at Turner Ranch was not coercive either. There was only pushing for a very short time and the van was pushed once or perhaps at the most three times.

I find that Viveros' testimony, even where credited, does not establish any aggravated misconduct requiring the election to be set aside.

Lorena Vriseno described a similar incident involving a van. She was in a van driven by Modesto Viveros, the brother of Gracielo Viveros. There were 14 or 15 workers in the van. When the van tried to enter the main entrance, it was blocked by some 50 or 60 strikers. She saw two or three UFW flags with bumper stickers which were stuck on the shirts of some of the strikers. Some of these strikers who were blocking the entrance said not to go to work and if they did go to work there was going to be blood running in the field and that they would get hurt. They also threatened to burn the houses and the vans. She was inside the van when this threat was allegedly made. Several strikers started to push the van back and forth. There were four or so strikers on each side of the van. At some point, Modesto Viveros told the strikers to stop as he was not going to go to work. The pushing of the van stopped. The van then exited. However, the van did return with the workers later in the day through the same entrance. (Tr. VI:184-189.)

While she was at work later that day, she saw about three cars come to the edge of the field. However, she does not recall what the two men said when they allegedly tried to start a fight. Her testimony was very vague and there is no credible basis upon which to conclude that these men were trying to pick a fight. There may have been loud arguing, but nothing more. She

testified that she believed that Victor Camacho was one of the two men. However, she did not hear him say anything and she cannot identify the source for her belief that Camacho was one of the two men. There is, therefore, no evidence that Victor Camacho was involved in this incident or that he did anything improper. (Tr. VI:192-194.) Nor is there any evidence that Victor Camacho or the other person were agents or representatives from the UFW.

As she left work that day at about 2 p.m., she saw 50 or 60 strikers, some of whom said not to come back to work or we'll burn your houses and vans and we won't be responsible. Strikers pounded on the van. I don't credit this testimony as it is too vague to rely upon. It also sounds similar to her description to what occurred that morning and sounds rehearsed. In any event, there was no damage to the vans.

During cross, when asked about what occurred on the morning of July 26th when the van she was riding in attempted to get into Turner Ranch, all she heard the striker tell Modesto Viveros, the driver, was that they should not go to work and that "we don't want you to go to work." (Tr. VI:236.) She was unable to identify the person or persons who made the threat that blood would, be running if the van entered the field to work. Only one person made this threat, but she did not see him. (Tr. VI:240.) This was the same person who allegedly said that "we are not going to be responsible." She conceded that she did not hear of anybody's house or van getting burned during the strike. (Tr.

VI:241.) On recross-examination, Vriseno testified that the van was being pushed by strikers on both sides. It appears, therefore, that there was never any imminent danger that the van would be overturned and I so find. If it did occur, this was an isolated incident. As previously discussed, she was an unreliable witness.

Jerry Schenone testified that at about 1 o'clock he heard from Dean Janssen that a fight had broken out. He arrived at the field at about 1:30 or 1:45. He saw two sheriff's cars escorting 5 or 6 cars from the field and no one was working. (Tr. V:150-153.) He spoke with 10-15 workers, but he does not recall their names. (Tr. V:165.)⁵⁶ Schenone then asked Rob Carrol by telephone to call the sheriff and the sheriffs did come out. The deputy sheriffs then escorted 15-20 cars out of the field, about half of which were escorted down the main road south to the entrance on French Camp. From Schenone's testimony, it does not appear that the deputy sheriffs were escorting alleged UFW supporters from the field at this time. It appears that most of Schenone's testimony regarding these events were based on hearsay or on otherwise inadmissible evidence.

Jesus Medrano testified that he attempted to go into Turner Ranch on July 26th to work, but that the presence of 10 strikers at the entrance who warned him not to go to work

⁵⁶I struck Schenone's testimony about the subjective reactions of these workers.

dissuaded him from entering the ranch and working. There is no allegation of blocking, threats or coercion. (Tr. XII:135.)

The UFW called two witnesses. Zeferina Perez Garcia testified that she was present at an Ace field on July 26th where she saw Employer attorney Carrol at about 3:30 or 4:00 in the afternoon. Though she did not know the name of the field, it was near "the almonds." According to Perez, Carrol told her that she was on private property. She responded that she was not on private property as she was not in a field and that she was on a road used by the workers to reach a field. (Tr. XV:144-145.) The tomato fields were quite far away from where she was. The workers were coming out from the fields. She testified that when the workers' cars stopped, she and other unidentified strikers would talk to the workers. They would ask the workers to support the Union and not return to work. (Tr. XV:46.) According to Perez, the employees with whom she spoke said that they hoped it went well and wished her good luck. (Tr. XV:147.) I find that the ranch about which she was testifying is Turner Ranch.

On cross, she did not recognize anything on the map of the Stockton area since it was her first time there. (Tr. XV:162.)

Regarding the day that Carrol spoke to her, she recalls that when they were talking there were about 30 or 35 UFW supporters in the general vicinity. (Tr. XV:167.) She testified that Carrol had not arrived when she first reached the ranch. When asked if the UFW supporters who were standing out on the

road were carrying UFW flags and banners and wearing UFW buttons, she responded, "We didn't have anything, neither them nor I. We didn't have anything of that." (Tr. XV:168.) The witness recalled seeing about 15 or 20 cars out on the road but she did not recall seeing a single UFW banner or flag. She also recalls that at the time she and Carrol spoke, cars were leaving from the field. Before speaking with Carrol she recalled she saw at least 10 or 15 cars. (Tr. XV:168-174.)

Perez denied hearing any insulting words yelled by UFW supporters as workers were exiting the field. And she denied that UFW supporters were blocking exiting vehicles. (Tr. XV:173-174.) Perez agrees that she was in charge of the UFW pickets. She claims that she was sent there to put order on the picket line and prevent UFW supporters from hollering bad things. (Tr. XV:175.) Perez also indicated that some of the exiting workers stopped their cars and appeared to park on the public road near the exit. (Tr. XV:178-179.)

Perez stated that when she arrived at the field that afternoon, neither Barajas, Augustin Ramirez nor any other UFW agent was there. (Tr. XV:184.)

Perez did not recall whether, when Carrol addressed her, she turned to other UFW supporters and asked them if they had heard that and telling them that he was a lawyer for the Company. (Tr. XV:186.) What she does remember is that Carrol had asked her to get out because it was private property. This was a spontaneous reaction to a question on cross-examination

asking, "You just don't remember much about what we discussed, do you?" (Tr. XV:186.)

When Carrol asked if she recalled that UFW supporters started using epithets against him, she claims that she did not hear anybody say "those bad words." (Tr. XV:187.) While Carrol was asking that question, the witness crossed herself, perhaps because of the swear words and had a rather shocked expression on her face. (Tr. XV:187-188.) She appeared genuinely offended by hearing those swear words.

The witness also recalled that Carrol said to her that all the UFW supporters would have to leave. (Tr. XV:189.) She said this in a spontaneous and a convincing manner, and I credit her testimony on this point. However, the witness does not remember anything more that occurred in the conversation of some 5-10 minutes between them. The witness candidly stated that if the hearing had occurred sooner, she would have remembered more of what happened. (Tr. XV:192.) When asked on cross whether she really did not remember that the UFW supporters said anything derogatory or used epithets, her response was that when she is in charge, she never allows it because "I am very close to the church." (Tr. XV:193.) She emphatically denied that epithets were used. (Tr. XV:193.) The witness also testified that after Carrol left the vicinity, quite a few new people had joined the picket line area. (Tr. XV:196.)

When asked how many times she took access to any ranch in the area during the strike, she testified she took access

twice, but she did not know if it was a Triple E or an Ace field. She also testified that she does not know Jose Andrade. (Tr. XV:210-214.)

Although Perez did not have a very good memory for detail, she does appear to me to be an honest witness. She did not have a good grasp of the name and location of Ace fields contrasted with Triple E or San Joaquin fields. It's not clear that she ever took access to an Ace field, and I find based on this record that she did not. On the other hand, she was very definite about her memory that Carrol told her that she and the UFW supporters on the picket line were there illegally and would have to leave. I credit her testimony on that point.

A more perplexing question is raised by her assertion that she did not hear any epithets or insults spoken by UFW supporters to departing workers or to Carrol. Although I have no doubt that she made a good faith effort to control picket line conduct (a video tape shows her making efforts to keep pickets out of a public road so they would not block traffic), I doubt whether there was an absence of epithets or insults spoken by Union supporters as workers departed from the field. My doubt is based upon Carrol's testimony that there were such insults and epithets which he heard. Perez testified that only a few cars stopped to talk to the UFW supporters. More than 20 exited without stopping. It may well be that the workers in the few cars that did stop wished the Union luck. However, Medina's testimony that he was threatened as he exited from Turner Ranch

on that day leads me to conclude that not all the workers wished the strikers success. Yet, Perez seemed spontaneous and sincere when she crossed herself upon hearing swear words and epithets in the questions asked her on cross-examination. I do not think that she was pretending. I find, therefore, that her testimony tends to establish that the atmosphere on the picket line was somewhat controlled and was not coercive. This finding is supported by the presence of deputy sheriffs at the ranch and specifically at the point where the workers exited onto French Camp Road.

Augustin Ramirez was the next witness called by the UFW. There was a stipulation that during the strike he was a Union agent. (Tr. XV:222.) At the time of this hearing, he was not working for the UFW but was rather working for another union.

He arrived in Stockton on July 25. The first time that he went to an Ace field was on July 26th after leaving Mariposa Ranch where the UFW took over the strike.

He arrived at Turner Ranch between 1 and 2 p.m. when pickers were coming out of work. Referring to UFWX 1, he identified Turner Ranch and stated that he was right beside the almond orchard which is just to the west of the main road which goes north into the ranch toward the field from French Camp Road. (Tr. XV:228-229.) He was there with between 20 and 25 of the strikers. He testified credibly that as the workers who were picking tomatoes came out from the field and were exiting from the ranch, he and the UFW supporters would ask them not to break

the strike since the strike will benefit all the workers that pick tomatoes. None of the workers who were leaving and to whom he made this request to honor the strike said anything to him. He was there from 15-20 minutes. He did not see Robert Carrol there. (Tr. XV:229, 230.) He and the 20 or 25 UFW supporters or strikers left Turner Ranch together. (Tr. XV:231.) He does not indicate that Zeferina Perez Garcia was there.

On cross he testified that there were police cars at Turner Ranch on July 26th when he arrived. There were approximately two or three sheriff's vehicles with five or six deputies. He testified that sheriffs were everywhere. (Tr. XV:257-258.) I credit this testimony because he was an honest witness and the video tapes showed a significant presence of police at the various ranches.

Ramirez testified that he saw 5 or 10 cars come out of the fields to exit the ranch. He also remembered seeing Carrol there at the ranch speaking to the deputy sheriffs. (Tr. XV:263-264.) Though Ramirez remembers that there was a police vehicle in back of the last car he saw exiting, he would not describe it as a caravan.

This witness testified in a straightforward manner. He was articulate and responsive and I found him to be a credible witness.

On cross-examination he testified that he went to the Mathews Road Labor Camp during the evening of July 25th upon his arrival.

The Employer in its brief attached excerpts from the Triple E hearing of the testimony of Ramirez in an effort to discredit him. The specific passages quoted from Volume VII of the Triple E hearing held on October 4, 1990, referred to Ramirez' testimony on cross regarding when he first arrived in Stockton. He testified in Triple E that he was in Stockton on July 24 as that was the date that he met Luis Magaña and apparently attended the meeting of the committee that afternoon at Mathews Road Labor Camp. (Triple E hearing, Tr. VII:59.) Ramirez also testified that he believed that Magaña was representing the workers who were on strike on July 24. (Triple E hearing, Tr. VII:61.)

I do not find that these transcript passages from the Triple E hearing adversely affect the credibility of Ramirez. That hearing was held some 9| months before the hearing in the instant matter. Obviously memories would be better at the Triple E hearing than in the instant hearing. Nevertheless, I find that Ramirez was an articulate, responsive and credible witness. He answered in a forthright manner and he appeared to me to make an effort to give responsive answers both on direct and on cross.

a. Summary of Findings

Based upon the above credited testimony and my review of the record, I find that the UFW did not arrive at Turner Ranch on July 26th until 1:00 or 2:00 p.m. The UFW was not responsible for incidents that morning. Nor did the UFW authorize access that day at Turner Ranch. I note that Barajas

testified that he never authorized access at any Ace Ranch (although the UFW did take access on August 7 at Dellaringa Ranch). The testimony of Zeferina Perez Garcia and Augustin Ramirez indicate that they were on the picket line attempting to persuade exiting workers not to return to work the next day and to honor the strike.

The 15 or 20 strikers who went onto the property at Turner Ranch during the morning of July 26, were not UFW agents. Rather, they were strikers and their conduct will be evaluated by the third-party standard. I find that they did not have permission to be present. However, I discount Medina's vague and non-specific testimony as to the nature of the threats made by the 15 or 20 strikers who came into the field. I note that Medina did not testify that the only two persons whom he identified by name, i.e., Juan Manuel Naranjo and Francisco Naranjo, made the threats about killing and burning a car. The substantial majority of the crew had already left the field. It appeared that the remaining workers were families of the foremen and supervisors. There was no tomato throwing or dirt clod throwing, and there were no assaults or batteries. Despite some hearsay testimony regarding a possible fight in the fields, I find that there was no fight in the fields. Further, there was a presence of deputy sheriffs who came onto the scene immediately after the strikers entered the field. I note that the deputy sheriffs had already prevented a number of cars from even

reaching the field. With this police presence, the potential for problems or coercion was substantially reduced.

I find that the UFW was not responsible for the pushing of vans which occurred the morning of July 26th. The pushings of Gracielo Viveros' van were minor incidents. They would not tend to coerce workers. The pushing of Modesto Viveros' van appeared to be a more substantial incident, but I note that the van was never in danger of being pushed over and it is not the type of aggravated misconduct which should result in the setting aside of an election. Again, the presence of sheriff's vehicles at Turner Ranch would tend to reassure workers.

I do not believe that the Employer carried its burden of establishing that there were trespasses after the UFW arrived at Turner Ranch between 1 and 2 p.m. The testimony of Carrol was based primarily on hearsay regarding the sheriff's statements about possible trespasses. Further, the testimony was not clear that there was actually a caravan of strikers' cars being escorted off the premises by the sheriffs. I note also that the Employer did not call the deputy sheriff involved in the conversation with Carrol nor any other percipient witnesses who allegedly observed the sheriffs removing strikers from the ranch.

I further find that threats made during the morning were not attributable to the UFW and I discounted much of the testimony for lack of foundation.

Nor have I considered alleged threats against supervisors not made in the presence of eligible workers absent reliable testimony that the workers learned about these threats.

3. Visit to Home of Jesus and Alejandra Medina at Mathews
Road Labor Camp

Jesus Medina testified that after he left the Turner Ranch during the afternoon of July 26, he was sitting at a table in his home for about an hour when 30 or 40 persons led by a lady who appeared to him to be a leader of the Union came to his house. This unidentified woman had a button, a cap, and papers. Once the group calmed down, the woman gave Mrs. Medina a Union membership form. Some of the people in the group started shouting that Mr. Medina was a son-of-a-bitch and a chicken. Only Mrs. Medina went out to talk to the assembled group. (Tr. I:117-118.) Mr. Medina's brother was also present. Although this group beat on the windows of his brother's room, they did not break the windows. His wife did bring in forms given to her by the woman. This incident lasted for about a half-an-hour. Thereafter he became their enemy. (Tr. I:118, 126.)

When asked if any workers were in the vicinity when this incident occurred, he was not very specific. Instead, he began talking about how groups of two or three workers started conversing with each other. But the testimony does not make sense. He further testified that the 30 or 40 persons included some of the same ones who were at the entrance to the Turner Ranch. This part of his testimony regarding whether workers

talked about this incident appeared to me to be rehearsed or coached.

(Tr. I:126.)

I note that there were no specific threats made by any persons in this group of 30 or 40. There certainly were insults about Mr. Medina being a chicken and a son-of-a-bitch. However, his wife did go outside of the house to address the group and though there was a lot of emotion within the group because the Medinas were not honoring the strike, it does not appear from Mr. Medina's testimony that any threats were made. Further, there is no indication that any other Ace workers either observed or found out about this incident.

At some point after that encounter, a member of the committee, Alfredo Naranjo, came to Medina's house and talked to him and his wife to try to convince them it would be better not to go to work but to honor the strike. Naranjo did this in "a good way, in a good manner -- (English) good manners." (Tr. I:127.) Naranjo also attempted to get him to sign with the Union.

Within a couple of days of the encounter with the group of 30 or 40 strikers, Medina discovered that one of the tires on his car was punctured. He did not see who did this. He claims that he then talked about this with Alfredo Naranjo and Gustavo Camacho. The conversation occurred at the labor camp on the same day he discovered that his tire had been punctured. He accused them of puncturing his tire. Naranjo told him that it was not a good idea for him to go to work. Naranjo then said that Medina

should just tell us where he would be going so that we could come over. Then Medina said he forgot to testify earlier that while he was talking with Naranjo, Naranjo said that this was a sample for what would continue to happen to him. (Tr. I:131-134.) I note that this testimony does not establish that the Union, the committee or any specific individual actually punctured the tire.

Medina then testified that two of his car tires and two of his pickup tires were also punctured although he did not see who did it. (Tr. I:137-138.)

During the conversation with Naranjo following the puncturing of the first car tire, Alfredo Naranjo said that they were all now members of the Union. Medina concluded that the committee had by that point been dissolved. (Tr. I:135-136.) Both Naranjo and Gustavo Camacho lived at the same labor camp as did Medina. Again, I am unable to find that the Union or Union agents were responsible for the puncturing of the tires of the car or truck. Nor, without more, can I find that Union supporters punctured the tires.

On cross, when asked who visited his house on July 26, he testified it was some picketers, that only a couple of them lived at camp including Manuel Naranjo and Francisco Naranjo. However, he also indicated that Manuel Naranjo and Francisco Naranjo were not really close in proximity to the group but rather they were watching. However, they were part of the group that was shouting at him. (Tr. II:51-52.) There is also someone named Perez there and I find it is Guillermo Perez whose

testimony I will consider infra. He stated that the group was about 20 feet from his house.

Medina also testified on cross that he heard nothing from Jose Andrade who was present with the group. (Tr. II:54.)

In evaluating Medina's testimony, I note that he candidly admitted that following the incident at his home on July 26, he "became an enemy of theirs, I became their enemy." (Tr. I:126.) Although I have found his testimony regarding the events of July 24 to be generally believable, it may be that his expressed bias against the UFW and UFW supporters somewhat colored his testimony regarding events on July 26, both in the fields and at his home. However, I found him to be a more reliable witness than Mrs. Medina. But, I did not find him to be as reliable as Guillermo Perez.

The next Employer witness was Alejandra Medina. She testified that on July 26, about fifty (50) people came to her house and that they were shouting for her husband to come out. They called her husband an "ass hole" and "chicken" and said that they were going to "give it to you."⁵⁷ (Tr. II:87.) She claimed that these people were wearing Union buttons and that they had some Union flags. The group was mad and they were shouting. Then a lady came up to her and began to talk to her. This lady gave her some forms or cards to sign. The lady wore a

⁵⁷ The interpreter agreed that this phrase meant "kick your ass." I note further that Mrs. Medina also stated that some unidentified person from the group said that someone was going to punch them. I discount this threat as the testimony is vague and this witness is not a credible witness. (Tr. II:88)

cap with a red button with a black eagle. Her name was Zeferina. The forms were union forms because they had the same insignia as the button. (Tr. II:88-89.) Mrs. Medina did not fill out the forms.

When asked if any other people knew about this incident she said that all the people came out to see what happened. However, she failed to identify these people and she did not know how many, if any, actually worked for Ace. In fact, she testified that none of those people worked for Ace in her crew. (Tr. II:92-93.)

Mrs. Medina testified that later that day Alfredo Naranjo came to apologize for the threats. He said that they made a mistake in coming to the house. (Tr. II:100.)

Very soon after cross began, Mrs. Medina began to cry and was very distraught. This was not the consequence of any especially tough cross-examination. We went off the record. Thereafter the UFW agreed that there would be no more cross-examination. I find that her credibility was severely weakened by her request not to go forward with cross-examination. I did not find that she was a reliable witness. She was too emotional and did not fully comprehend the process.

The UFW called two witnesses. Guillermo Perez testified that on July 24, after leaving Morada Lane at about 1:00 p.m., he and some others went to visit the Medinas at Mathews Road. Luis Magaña was present as were between 20 and 30 supporters of the strike. They tried to speak with Mr. Medina

but instead his wife came out. The Medinas live in the same camp as does the witness. Magaña spoke to her and asked to speak to her husband to support them in the strike. Others present were Alfredo Naranjo, Martin (Vega), and Luis Maldonado, as well as Maldonado's wife and daughters. (Tr. XVI: 26-30.) Perez testified that Magaña asked Mrs. Medina to "do us the favor of supporting us in the strike to please tell her husband." (Tr. XVI:30.) Mrs. Medina responded that her husband was not going to support them because he was a checker. Perez testified that Mr. Medina's brother was present in the house. Mrs. Medina appeared angry even though "we never said a bad word to her." (Tr. XVI:33.)⁵⁸

Perez testified that no one had either buttons or flags when they visited Mrs. Medina. Perez also testified that no one from the Union was present at the house. Further, Mr. Medina's brother told them to get out because he was going to continue to work. Thereafter the group left and each went to their own homes. (Tr. XVI:45.)

When asked on cross why Perez went to the Medina's in a group of 20 or 30, he answered that since it was voluntary to go visit Medina, they really couldn't say how many could go and how many could not go. (Tr. XVI:147.) He testified that after

⁵⁸I did not rely on the exhibition or demonstration used by Perez to demonstrate the appearance of Mrs. Medina. (Tr. XVI: 42-44.)

Magaña talked to her that he also asked Mrs. Medina to please support the strikers.

I find that his testimony on cross was generally consistent with his testimony on direct. I note that this was the second day of the witness' testimony and I felt that he did a good job of testifying despite having testified late into the evening and not having gotten much sleep the night before. He also displayed a good sense of humor and he was patient and not argumentative.

The problem with his testimony is that he says this incident occurred on July 24, not July 26 as Medina testified. If the event occurred on July 26, then it is unlikely Magaña was present because by that time the UFW had taken over the strike.

The next UFW witness was Francisco Naranjo. He testified that he lived at Mathews Road in July of 1989 and throughout the strike. (Tr. XIV:180.)

He testified that he did not on July 26, or at any other time during the strike, take access with UFW representatives to talk to workers inside Ace Tomato fields. (Tr. XIV:81.)

When asked if he knows Jesus Medina, he answered yes, they are people who live in the same labor camp and he has known them since 1985. When asked whether at anytime during the strike in 1989, he talked to Alejandra Medina about the strike Naranjo answered, "Never." (Tr. XIV:182-183.)

Naranjo was then asked whether he was ever present when

anyone else talked to Alejandra Medina about the strike. He answered yes and that occurred on the day when we went to her house. However, he did not recall the date. He testified that there were about 100 persons in the group and that they were all workers. They lived in the two camps including Mathews Road. When asked how many of them lived in Mathews Road he said between 50 and 70. (Tr. XIV:182-184.) When asked who was doing the talking from amongst the group, he said that it was a worker.⁵⁹ He testified that some members of the committee were present at Medina's house as members of the group. (Tr. XIV:185.) He does not recall the name of the person who was speaking. He does testify that the only thing that was said to Medina was a request for support of the strike. He also recalled that Mrs. Medina's brother-in-law was in the house. He testified that the brother-in-law yelled out the window, "what the hell do you want here, get out of here." (Tr. XIV:185.) He denied that anyone from the group said anything about burning a house down. (Tr. XIV:186.) He also denied that anyone from the group said anything about doing any harm to the Medinas or their property. (Tr. XIV:186.)

When asked whether Alfredo Naranjo, his brother, was present he answered yes but that Alfredo did not say anything to Mrs. Medina. He also testified that his brother Alfredo was

⁵⁹Initially he testified that it was a Union representative but he defined Union representative as a worker who belonged to the committee. (Tr. XIV:184.)

studying law at the time of the hearing in Guadalajara, Mexico.⁶⁰

The witness said that he was not present during any conversation between Alfredo Naranjo and Jesus Medina. Further, Naranjo claims that he was never aware during the strike that Mr. Medina's tires were punctured. (Tr. XIV:187.)⁶¹

Naranjo then recalled that it was Luis Maldonado who was doing the talking at the Medina house. He testified that Guillermo Perez did not say anything to Mrs. Medina. Nor did Manuel Naranjo, his brother. Nor did Jose Andrade. (Tr. XIV:199.)

He testified that Barajas arrived later for a meeting. He initially answered yes to the question whether Zeferina Perez Garcia was present. He later changed his testimony to say that he was not sure whether she was present. (See Tr. XIV:191-193.) I note that this is the type of shifting testimony which weakens the reliability of this witness' testimony. I did not have the sense that Naranjo was intentionally misrepresenting, but his memory was not always clear. The witness was rather soft spoken and almost subdued at times and yet he seemed definite about his answers.

⁶⁰I assume that this evidence was introduced to show that Alfredo Naranjo was unavailable to testify.

⁶¹I will not consider evidence of Alfredo Naranjo's character as an indication that he did not puncture Mr. Medina's tires. (Evid. Code § 1101.)

An example of a difficulty with part of Naranjo's testimony is found when he was asked whether a UFW person was in the group which had the conversation with Mrs. Medina. He said that there were about five of his work buddies speaking. When asked if they were UFW representatives, he answered no, "they were like commissioned by a friend (sic) (meaning Efren), he put them there." (Tr. XIV:197.) He identified those individuals as including his brother Manuel Naranjo, Jose Andrade and Guillermo Perez. It is clear from this testimony that these individuals were agricultural workers and not UFW organizers. It is unclear what, if anything, Barajas commissioned them to do. The testimony is too unclear to allow me to find that these individuals were UFW agents.

Another example of a confusing aspect of Naranjo's testimony is when he was asked whether Guillermo Perez, Jose Andrade, or Manuel Naranjo had any role in the committee. Naranjo answered, "Now, no." (Tr. XIV:199.) But when asked what about in July of 1989, he answered that they were just some of the ones who took access to the fields. (Tr. XIV:199.) It is unclear whether he is asserting that they took access to any Ace field on behalf of the Union.

Interestingly, the cross helped to flesh out Naranjo's testimony on direct and answered some of my questions. He testified that he believed the conversation at the Medina's home occurred on July 26th. (Tr. XIV:200.) Though he also believed that the meeting occurred some ten or fifteen days after the

beginning of the strike (which would place it sometime in August) his testimony does corroborate that of Mr. Medina who was clear that the event occurred on July 26th. This is in contrast to Guillermo Perez whose testimony I generally credit. Although the record is not clear, I do find that the visit and the conversation at Medina's home took place on July 26th.

Although Naranjo on cross seemed to reiterate that the group which congregated in front of Medina's home numbered about 100, I am more inclined to credit Guillermo Perez and Jesus Medina, who indicated that the group was anywhere from 20 to 40.

Naranjo testified that present in the group were Guillermo Perez, Luis Maldonado, Jose Andrade, Alfredo Naranjo, Jesus Naranjo, Santiago Naranjo and others. He demonstrated a good memory in answering these questions. Santiago is his father and Jesus is his uncle. Alfredo, Juan and Manuel are his brothers. (Tr. XIV:202.)

He testified that Manuel Naranjo, Guillermo Perez and Jose Andrade took access at Triple E, not Ace. (Tr. XIV:203; 211-212.)

He remembers that only two or three members of the group talked to Mrs. Medina, and those three included Luis Maldonado and Jose Andrade. I note that he does not mention Magana, contrary to the testimony of Guillermo Perez. However, he does not recall a lady in the group asking Mrs. Medina to sign a card. Based upon Zeferina Perez Garcia's denial that she visited any homes on July 26th and the fact that I tend to

generally discredit the testimony of Mrs. Medina for her failure to undergo cross examination as well as for a reasons stated supra, I find that no one asked Mrs. Medina to sign a UFW authorization card during that visit. I also note that such a card was not produced as evidence at the hearing.

Naranjo also recalled that only one person knocked at the door and asked if Mr. Medina was in. He testified that the group was some five meters (15 or 20 feet) away from the house and he was located in the middle of the group. (Tr. XIV:205.)

During cross, his testimony was that Zeferina Perez Garcia was not at the Medina's home. (Tr. XIV:209-210.) He does recall Zeferina Perez Garcia at meetings of workers telling the workers to deal peaceably and to talk one at a time and calmly. (Tr. XIV:208-209.) He further testified that she was only at the picket lines and, as far as he knew, did not take access.

When asked if Barajas arrived at the labor camp while the conversation with Mrs. Medina was going on, Naranjo testified that he believed so. When asked if Barajas said anything to Mrs. Medina, Barajas said no but that he "just removed us from there." (Tr. XIV:210-211.) Although Naranjo's testimony is not very clear, he certainly does not place Barajas in the conversation as a participant. Assuming Barajas arrived at the camp around 6 o'clock, I find it highly unlikely that the meeting with the Medinas had lasted until that time and I therefore find

that Barajas was not involved in this visit to the Medina's house.⁶²

Naranjo testified that he was aware that Medina's tires had been punctured and that he found out when he saw Medina returning with four tires and Medina told him that he had bought more tires so that the "sons of bitches" could continue to flatten the tires again. (Tr. XIV:207-208.) He denied that anything further was stated in that conversation. He also testified that the UFW was not involved in any kind of violent activity during the strike. (Tr. XIV:208.)

During redirect, Naranjo testified that Barajas spoke everyday about the need of non-violence and the need to be calm as the picketers talked to people as they left the fields. In fact, it appeared to Naranjo that Barajas was talking about nonviolence every five minutes. (Tr. XIV:219-221.)

Contrary to Naranjo's testimony on redirect that he believed that the majority of the workers at the labor camp worked for Ace, I find, based upon EX 9A and EX 9B (the eligibility list), and other parts of the record that relatively few of the 96 families living at the Mathews Road were employed by Ace.

I also credit Naranjo's testimony that he was not present at any Ace picket line. (Tr. XIV:231.)

⁶²Naranjo testified he worked at San Joaquin and not Ace in 1989 and I so find.

a. Summary of Findings

Based upon the above-discussed credited testimony, I find that a group of from 20 to 40 strikers and UFW supporters visited the Medina home at Mathews Road on July 26th in the middle of the afternoon. I find that no one from the UFW was present and that the UFW was not responsible for the visit by the strikers. The purpose of the visit was to ask Mr. Medina and his wife to honor the strike and not to work for Ace.

Though I find that there were shouts by some of the strikers to the effect that Mr. Medina was chicken, and though I find that a number of the workers were unhappy with the Medinas, I do not find that they made specific threats against Mr. or Mrs. Medina either to their persons or to their home, or to their property. I find that the incident was over in less than fifteen minutes and that the visit did not constitute the type of aggravated misconduct which should result in setting aside the election.

I further find that the Employer failed to establish that the UFW was responsible for the puncturing of Mr. Medina's tires. Nor did the Employer establish that any other specific individual or group was responsible for the puncturing of the tires. There is no question but that during his testimony, Mr. Medina was mad at his co-workers who supported the strike, Magana, and the UFW. However, there is an absence of specific evidence indicating that a group of strike supporters did

anything more than request his support of the strike and engage in name calling when that support was not forthcoming.

4. Gracielo Viveros - Threats to Family and Home

On July 26th, after work, Gracielo Viveros testified he went to a store in Stockton where Jose Andrade and Ezequiel Nunez, who identified themselves as UFW representatives, told him that they wanted him to stop taking people to work at Ace. This incident occurred at the Delta Store. The two individuals told him that if he continued to take workers in his van to the fields, that "they were going to burn my house with my whole family." (Tr. V:25.) I find that there is no credible evidence that the workers in the van heard what was said to Viveros. (Tr. V:28.) In fact, Viveros testified that the two individuals told the workers that they should unite with them to get a higher rate of pay for their work in the tomato fields. (Tr. V:28-29.) The Employer did not sustain its burden of proving that the workers in the van heard whatever it was that was said to Viveros by Andrade and Nunez.

Thereafter, the Employer sought to elicit testimony regarding what happened when Viveros went home and spoke with his daughter. I ruled this type of testimony inadmissible since there were no agricultural employees present during whatever discussion Viveros had with his daughter in his home and

secondly, there is no reliable evidence that the threats were communicated to agricultural employees.⁶³

On cross, Viveros testified that he had known Andrade since Andrade was fifteen years of age and that Andrade is related to him in a distant manner. (Tr. V:97.)

In addition to my ruling which sustained an objection to testimony regarding what occurred when Viveros returned home because of the absence of any Ace employees, I do not believe that Viveros was a credible witness and I do not credit his testimony that Andrade and/or Nunez either made the threat to his daughter or told Viveros at the Delta Store that they had made such a threat. Nor did they threaten him at the store.

When Viveros' daughter, Elsa Viveros, began to testify, Employer's counsel conceded that she was not an agricultural employee, that her father was a supervisor, and no agricultural employees were present when the alleged threats were made. Based on these representations and consistent with my prior ruling, I sustained an objection to her testimony since it was not relevant.^{64/65}

⁶³See Tr. V:38-41 for the offer of proof regarding the alleged threat.

⁶⁴See Tr. XI:121-122 for the offer of proof regarding the testimony of Elsa Viveros.

⁶⁵I note that Gracielo Viveros continued working and continued to take workers in his van throughout the strike.

a. Summary of Findings

Based on the above discussion of the testimony, I find that the threat and incident described by Gracielo Viveros regarding the burning of his home did not occur. Even if such a threat were made, it was directed at a supervisor and there were no employees present. Nor is there reliable evidence that this threat was disseminated to agricultural employees employed by Ace.

5. Incident Involving Antonio Medrano's Van

Medrano testified that during the strike he was employed by Earl Hall and was foreman for a crew. When he worked at Ace during the strike, he had a total of about 200 workers. He was one of about five or six foremen in charge of that crew. He also drove a van carrying eight or nine workers to the fields during the strike. (Tr. VII:10-12.)

He and 10 or 11 members of his crew stopped at Peter's Market on July 26th, about 2:30 in the afternoon. He was not working at Ace that day. (VII:14-16.) As he left the store, he saw his friend, Robert Perez, and another man he identified as Francisco Naranjo. Naranjo came up to him and called him some ugly words because he was working during the strike. He claimed that Naranjo was wearing a UFW button. Medrano was offended by Naranjo's bad language and he gave a strong response to Naranjo. (Tr. VII: 42-45.) Although Francisco Naranjo testified that though he knows Medrano, he did not talk to Medrano regarding the strike or picking tomatoes (Tr. XIV:189), I credit Medrano's

version because his detailed accounts of Naranjo's comments and his own response to that comment demonstrated a certain amount of emotion which I found credible. Medrano then went back to his van and left.

a. Summary of Findings

There is no indication that Naranjo threatened Medrano or that the workers in Medrano's van saw or heard exactly what occurred. Even though Medrano told the workers what had occurred, I do not believe Naranjo's words constituted a threat. I note that on July 26th, Medrano and the workers in his van were not Ace employees. Several days later, in early August, they became Ace employees. I further find that Naranjo was not a UFW agent at any time during the strike.

Medrano than testified that he began to work for Ace on August 2nd at Sanguinetti Ranch. (Tr. VII:54.) He described an incident which occurred at Mariani's Store in Stockton where on August 3rd, early in the morning, people from the strike asked him where he would be going to work. He estimated that were about 15 people from the strike present at the Mariani's and they were carrying 3 or 4 flags and some of them had UFW buttons. He did not recognize these strikers. When he said that he was going to hoe, some of them said that they did not believe him. (Tr. VII:62-67.)⁶⁶

⁶⁶Initially, he testified that he did not recognize anyone from the local area. His memory was later refreshed and he then answered he did recognize some. (Tr. VII:66.)

He then left with 10 workers to get gas. When his van was stopped at a light, he heard a noise. Another car passed by and Medrano's son said that that car had shot the front windshield of the van. Medrano does not know who fired the shot nor did he see the alleged shot fired.

At the suggestion of his son, he followed the car which was a small orange and yellow car. Although he did not recognize anyone in the car, he got the license plate number.⁶⁷ The Employer introduced EX 8, a form from the Department of Motor Vehicles (DMV) which indicates Juan M. Naranjo, with a street address of 333 West Mathews was the purchaser of the automobile.⁶⁸ Medrano than presented the DMV form to the Stockton Police Department. He testified that Sergeant Theodore Montes did an investigation.

Medrano worked the next day for Ace at Sanguinetti Ranch and he also worked on August 5th. In fact, he worked for Ace at several fields until they finished the harvest in October. His crew also worked, with one possible exception, at Ace subsequent to this incident. (Tr. VII:87.)

When asked what strikers were saying at Mariani's from August 2 to August 10, Medrano replied that an unidentified clean shaven man had a bullhorn and would say, "Don't pick tomatoes

⁶⁷The license number is 2HEK387. (Tr. VII:78.)

⁶⁸I find that there were some typographical errors in EX 8 and that the buyer was Juan M. Naranjo and his address was 333 West Mathews Road.

because we are on strike and we want them to pay us well for our work." (Tr. VII:94.)

I inspected the windshield and the glass was not shattered. There was a mark in the middle of the windshield and there were thin cracks, spiraling out in all directions from the mark.

Medrano also testified that he never saw any strikers at Ace fields who had been at Mariani's. In fact, the only strikers he saw were at Mariani's except on August 2nd where he saw some strikers at Farmington Road. (Tr. VII:99.)

During cross, Medrano said that he had not repaired the window and that no one had ever recovered any bullet or other projectile. Nor did the workers in his van comment to him regarding the windshield incident although one allegedly got out and said that he was leaving. This worker said nothing else. (Tr. VII:100-101.)

Regarding the incident at Peters Market, he said that Robert Perez, a striker, was his friend.

He also testified that he did not know of the 1989 election and that his boss, Eduardo Gomez, did not tell him of any access rights of the Union. In fact, he has never heard of a Union's right to access. He insisted that he did not know that there was an election in 1989 and I find this rather incredible. It raises a question of whether he had a selective memory though I have credited some of his testimony. I also note that when he was asked whether he had ever fired anyone, he was rather evasive

about his authority to fire, but finally on recross examination, he conceded that he did have the authority to fire. I find that Medrano was a supervisor in 1989 during the strike.

The next Employer witness was Medrano's son, Jesus Medrano. I have already noted that I did not find Jesus Medrano to be a credible witness. He testified on direct that the van was waiting to make a turn when he heard a loud noise. He then noticed the impact on the window. I find he did not see the launching of any projectile. He did not identify nor was he able to describe any of the occupants of the small red car.

Jesus Medrano was later recalled as a rebuttal witness and he testified that on July 24th at Turner Ranch, he saw someone whom he identified at the hearing as John Aguirre. He also claimed to have seen this man on August 3rd at Marianis just before the incident involving the window of the van. He further testified that he does not know who Efren Barajas is and that he had never seen Efren Barajas on July 24th at Turner Ranch or anywhere else. (Tr. XVI:176.)

During cross, he was asked why he was present to testify. He replied that Eduardo Gomez had called him to be available to testify this evening. I note that there are questionable answers regarding why he was present this night. He further testified that no one told him about what he might be asked. Based on my prior findings regarding this witness's credibility as well as his answers on cross-examination during rebuttal, I find that his testimony can not be relied upon to

establish that John Aguirre was at Turner Ranch on July 24th or at Marianis on August 3rd.

The next Employer witness was Sgt. Theodore Montes. After receiving Medrano's complaint, Montes went to 333 West Mathews Road to contact Francisco Naranjo who was listed as a "possible suspect" in the DMV Report. Montes testified he spoke with an unidentified woman and does not recall her relation to the Naranjos. He described the car as a small red compact with a license number the same as on the report. There was no further follow-up and there was no request from Medrano to file a criminal complaint. (Tr. XI:2-6.)

Montes testified that there was no evidence of casings or weapons inside the car. Though he did not qualify as an expert witness, he gave his opinion that the cause of the crack in the window was a lower velocity rock or pellet gun and nothing higher than that. (Tr. XI:12.)

On cross he testified that he did not determine who launched the low velocity rock or the pellet. I credit Montes' testimony and find that the crack was caused either by a rock or pellet. I also find that the Employer has not carried it's burden of establishing that any of the Naranjos were responsible for causing the crack in the window.⁶⁹

⁶⁹The Employer's next witness was Detective Armando Mayoya who testified about an arrest made near Triple E ranch on or about July 28th. The arrest concerned the Camacho brothers, Arnold and Victor. There's an offer of proof that UFW agent Zaferina Peraz Garcia interceded with the two detective on behalf of the Camacho brothers. Further, Mayoya stated that

(continued. . .)

Efren Barajas testified that the first time he went to Marianis was probably around July 27th at about 4:00 a.m. He went there because Ace and other companies got workers from Marianis. Barajas would ask workers not to pick tomatoes but rather pick other crops such as cucumbers. He used the bullhorn. He was there on a daily basis after July 27th for some 7-10 days. (Tr. XV:42-46.) UFW supporters who were also present at Marianis were Guillermo Perez, Luis Maldonado, Alfredo Naranjo and Ildefonso. However, he denied that John Aguirre or any UFW agents were present at Marianis. (Tr. XVII:135-138.)

The UFW called John Aguirre who testified that he never went to Marianis in 1989 in any matter related to the strike nor did he have a beard in 1989. To corroborate this last statement, he showed a picture of a student identification card which was in use for the spring of 1989 and was valid until June 1, 1989. The picture on the card did not show a beard. (Tr. XVII:13-16.)

Guillermo Perez testified that he never saw John Aguirre at Marianis during the strike. (Tr. XVII:251.)

b. Summary of Findings

Based upon the above-credited testimony, I find that the Employer has failed to establish who fired the pellet or threw the rock which caused the crack in the Medrano windshield.

69(...continued)

Arnoldo told him that both were union members and they had UFW I.D. cards pinned to their shirts. However, he could not locate the cards to bring to the hearing. I did not find his testimony to be helpful with respect to evaluating conduct affecting the Ace election. The offer does not establish, even if credited, that the Camacho brothers were Union agents at Ace.

There is no evidence that any agent of the UFW was responsible. Nor is the evidence clear that either Juan or Francisco Naranjo or any other UFW supporter was responsible for the incident. It does not appear that workers in the van discussed this incident nor does it appear that they were deterred from working at Ace subsequent to this incident. This incident occurred far from any Ace field, and I decline to recommend that the election be set aside based upon an incident where responsibility for a cracked window has not been established.

6. July 27- Turner Ranch

Jesus Medina testified that he worked at Turner Ranch on July 27th but he went in by a dirt road and not by the main entrance. (Tr. II:14.) He did not use the main entrance because there were strikers there.

Gracielo Viveros testified that three men got out of a car and identified themselves as being from the Union. They wore Union buttons. He does not know their names. These three men said that Viveros and his workers would have to "pay the consequences." I note that having to pay the consequences is a continuing theme in Viveros' testimony. Further, almost everyone he met during the strike would always say that they were from the Union and repeat the same threat. I find his testimony rehearsed and incredible. I have therefore discredited his testimony of threats made by these unidentified individuals. (Tr. V:41-55.)

Lorena Vriseno testified that on July 27th she rode to

work in Modesto Viveros' van. At first she said that there was no one else in the van, but then she remembered that there were 10 or 14 workers. This is an example of the witness often failing to understand the question. This has affected her reliability. Modesto's van entered Turner Ranch using a dirt road off of Highway 99. She saw Gracielo Viveros' van there as well. They could not get into the field as there was a red car blocking their way. Two or three people got out of the car and said they did not want anything to happen to Modesto so the workers should not come back. She remembers nothing more. But then she testified that the strikers threw dirt or rocks at the van and that one of them had a red button. (Tr. VI:202-204.) A window of the van was cracked. I found her testimony to be rather vague. I also note that Modesto Viveros was not called to testify.

On cross she did not see who threw the dirt rocks nor did she remember from which side the rocks came. I find this testimony too unreliable to support a finding regarding the breaking of the van window. (Tr. VI:245-247.)

My viewing of the video tape of a 10-minute period from 1:55 p.m. to about 2:05 p.m. located at the main entrance to Turner Ranch off French Camp Road (EX 17) showed at least 8 deputy sheriffs watching over a group of pickets along French Camp Road. Although there is a brief segment showing several pickets entering the orchard area of the ranch where sprinklers are turned on, the video does not show where they went or whether

pickers were nearby. Nor does it appear that any of the deputies pursued the pickets.

a. Summary of Findings

I find that the Employer has not carried it's burden of establishing that the window of Modesto Vivero's van was broken by strikers. Nor am I able to find based on the record evidence that any other misconduct affecting the election occurred on July 27th at Turner Ranch. The video tape establishes at most a de minimus trespass at 2 p.m. by a small number of pickets. But it does not prove that aggravated misconduct occurred.

7. Jesus Luna - Black Van and Tire Slashing

Luna testified that on some unspecified day during the first week of the strike some men were drinking beer by the side of a black van parked in front of his house. He claims that he had seen these men when they "attacked" the field. It is unclear what day or date this occurred. He identified two of the men by the side of the van as Manuel Naranjo and Francisco Naranjo. There were 10 strikers present. At some point the strikers said they wanted to talk to him but he declined as they were getting drunk. According to Luna, Francisco Naranjo called him a "son-of-a-bitch". At that point Luna went into the house. Francisco knocked on the door hard and damaged the screen door. The unidentified driver of the van then went to the van and took out 2 pistols. The group then went to the back of the house. There was no testimony that anyone pointed the pistols at him or at the house. He was very vague when asked to describe the men who had

the guns. He was also rather vague as to the time when this occurred. There is no evidence that eligible workers observed this incident.

Later some unidentified person said that they would damage the cars. On some unspecified day during the first or second week of the strike he claimed that the two back tires of his van and one tire of his truck were slashed. However, he does not know who did it. When asked upon what basis he believed that strikers were responsible, he answered "Manuel Naranjo was making signals to this mute person and that he would tell him that at night that he should slash the tires." (Tr. XII:45.) After his tires were slashed he went to work with Eduardo Gomez.

On cross he testified that Manuel Naranjo lived in the same building but next door to his housing unit (a duplex). It would therefore appear that if Manuel was drinking, he was drinking in front of his own house. (Tr. XII:57-58.)

I find that the 10 strikers including Francisco and Manuel Naranjo were drinking beer in front of Manuel Naranjo's house.

Initially the witness did not remember if the incident involving the van occurred before or after the tomato throwing incident about which he testified earlier. (Tr. XII:60.) He then testified that the van incident occurred before the tomato throwing incident. However, on re-direct he changed the sequence of events. Again this is an example of his unreliable and sometimes shifting testimony. (Tr. XII:50, 106.)

When asked who amongst the group of 10 strikers near the van did the talking, he responded it was the unidentified driver of the van, not the Naranjos. He was shown his declaration and it was admitted as UFWX 6. The declaration indicates that the two men were carrying guns when they first approached the house. On direct examination, however, he testified that the two men went back to the van to retrieve guns and then went to the back of the house. Again this type of inconsistency adversely affects his credibility. (Tr. XII:95.) I further note that the declaration does not indicate that the two men wearing pistols brandished, held or pointed the guns or in any manner threatened Luna or anyone else.

Luna's testimony suffers from the same defects as did his earlier testimony about the tomato throwing incident. His testimony is generally vague, frequently non-responsive and also demonstrates a selective memory. I am unable to give much weight to his testimony and I certainly do not credit his description of the gun incident.⁷⁰

Javier Luna, the son of Jesus Luna, testified about the same event which he placed on the second or third day of the strike about 5:00 or 6:00 in the afternoon. According to Javier, some unidentified people told his father that they were going to "break his face" if they caught him picking tomatoes. Though he

⁷⁰The witness testified that he and Jesus Medina were the only Ace workers in the labor camp who were not supporting the strike. When asked which workers he told about the incidents regarding the van and the guns, he could only remember the name of "Efren." He also stated that he told Mr. Medina.

mentions that Juan Naranjo and Francisco Naranjo were present, he doesn't recall who made the threat. (Tr. XII:177-179.) When describing the gun incident, he said that "then these 2 guys went around and took two pistols, put them in their belts, and then they just went behind the house." (Tr. XII:179) Again there is no indication that whatever happened was directed toward Jesus Luna or anyone else in his family (apparently his son was across the street in a parking lot).

Although Javier claimed that workers in their houses looked through the windows, I find his testimony too vague to support a finding that other Ace employees were witnesses to this incident. In answer to a question of with whom he discussed this incident, Javier testified that he told unidentified friends in the Ace fields but does not recall the dates or the names of the fields nor more than a couple of names of friends that he allegedly told. I find that he has a less than adequate memory and that his testimony is unreliable.

a. Summary of Findings

I find that no striker threatened Jesus Luna or any member of his family with guns at the labor camp during the strike. I further find that the strikers connected with the black van were drinking beer in front of the house of Manuel Naranjo. Although Francisco Naranjo knocked hard on the door of Jesus Luna and caused some minor damage to the screen, I do not find that Naranjo or any other strikers threatened Luna or any member of his family. Further, I find that no other agricultural

employees from Ace were percipient witnesses to these events. I discount the vague testimony of Mr. Luna and his son about discussing these events with other Ace workers.

8. July 28-Turner

Jesus Medina testified that on July 28th at Turner Ranch he did not try to get in the main entrance because other workers told him that strikers were present. (Tr. II:15-16.) Gracielo Viveros testified that he worked at Turner Ranch on July 28th. He went to work with his brother Modesto. He had someone named Efren drive his van. When he arrived at the ranch he saw Efren who told him that some unidentified "Union people" told him that they were going to burn Gracielo's van and puncture his tires. This testimony was very confused and vague. (Tr. V:60-85.) The testimony is basically hearsay and is much too vague to support any findings of misconduct. Further, Lorena Vriseno testified that on July 28th when Efren was driving Gracielo's van, nothing happened. (Tr. VI:205-207.)

a. Summary of Findings

I find that the Employer failed to prove that any misconduct affecting the election occurred at Turner Ranch on July 28th.

9. July 27th - Dellaringa

Mike Stefani, a field supervisor for Ace, testified that he worked on July 27th at the Jerry Dellaringa Ranch.⁷¹

⁷¹The witness used EX 1, a map of the general Stockton area to point out the location of the Dellaringa Ranch. It is right

(continued...)

Picking was occurring on field #1 (See EX 3) when a group of about a dozen individuals appeared at 8:30 a.m. The group grew to some 50 strikers by 9:30. The people were carrying a UFW flag on a pole. An unidentified lady talked to him and he advised her that there was no trespassing. Then a man identified as Jose Andrade joined the woman and they went under the gate at the entrance to the field. The rest of the strikers followed them. Thereafter most of the crew stopped picking on field #1. Stefani estimated that it took about ½ hour to reach the staging area adjacent to field 1 from the locked gate at the entrance. Stefani followed them into the field and he remained about 100 yards behind them. By the time he arrived at field #1 workers had stopped picking. (Tr. IV:148-159.)

The strikers went into the staging area adjacent to the field. The strikers then talked to the pickers to tell them why they should not work. The talking was done in a loud but unemotional tone. There were no threats. Nor was there any blocking of the pickers substantially delaying their leaving the staging area although some pickers could not immediately get to their cars. At some point the pickers left and the strikers

⁷¹(...continued)

next to the Stefani Ranch and across from the Celli Ranch. All three ranches are located west of Highway 5 along Eight Mile Road. He also referred to EX 3, which is a diagram prepared by the Employer of Dellaringa Field (also referred to as Dellaringa Ranch).

walked back to the road though some of them received rides from a picker or worker driving a pick up.⁷²

Stefani testified that the strikers were in the field for 2½ to 3 hours.

During cross Stefani testified that Eight Mile Road is a public road and it crosses a levee. It took the strikers about 45 minutes to walk past the locked gate to the staging area next to the field. They arrived at the staging area at about 10:10 a.m. There were anywhere from 35 to 50 access takers and they talked to the workers for 10 minutes. When asked what the access takers said, he replied that they told the workers to stop working that they would get them more money. (Tr. IV:202-206.)

Stefani testified that he had no idea if a strike occurred in 1989 nor did he have any idea of the percentage of workers who did not work in 1989. I find this testimony difficult to credit. Nor did Stefani know the name of the driver of the pickup which was allegedly commanded to drive the UFW persons out of the field. Stefani further testified that he did not recall if anyone joined the strike. At this point his testimony became somewhat hostile and wasn't credible. He finally conceded that on several occasions workers did leave the field in 1989. (Tr. IV:207-211.)

⁷²The witness related the hearsay testimony that the driver claimed that the 4 UFW persons demanded that he drive them. However, this is inadequate to support such a finding.

a. Summary of Findings

Based on the above-credited testimony, I find that the UFW supporters who entered the Dellaringa Ranch on July 27th did not threaten workers in their efforts to persuade workers to join the strike. There is no testimony that the strikers entered the field or engaged in any field rushing. Basically the workers had stopped working by the time the strikers reached the staging area. The workers were able to leave in their cars shortly after the strikers reached the staging area. The strikers talked to workers for about 10 minutes.

However, the strikers did not have permission to enter the property. The supervisor, Stefani, expressly responded to their request for access by stating that he did not want them to come onto the field. I further find that the Employer did not prove that any UFW agent was present during this improper access. At the time of the access, the UFW was still the certified bargaining representative, but as I understand the record there is no claim that the Union was attempting to take strike access. Rather it appears that Union supporters and strikers went onto the property without permission and without the knowledge of Efren Barajas or other UFW agents or representatives. I do not find that Jose Andrade is a union agent. The question remains whether the unauthorized access should result in setting aside the election. I find that since the Employer did not prove that

any coercion or threats occurred, this incident may not be used as a reason to set aside the election.

10. August 3- Turner Ranch

Ace supervisor Mike Stefani testified that there were a number of Sheriff cars by the main entrance about 8 a.m. He observed 5 cars coming from the eastern part of the ranch toward the field. He parked on a bridge in order to block access to the field. The occupants of the cars got out of the vehicles. Stefani told them that they were trespassing. There were "maybe a few swear words" uttered by the strikers and they proceeded past him toward the field where the workers were picking. (Tr. IV:173-182.)⁷³

Some of these strikers had UFW stickers on their shirts and one of them carried a UFW flag. (Tr. IV:182.) There is no indication that any agricultural employees of Ace witnessed this particular incident where the strikers walked past Stefani.

Stefani then called Dean Janssen, as well as the sheriff. Another dozen cars came from the Newcastle Road area and went to the same point at the northwest edge of the field. The workers stopped picking when they saw the cars approaching. Approximately 40 to 50 UFW supporters drove to the edge of the field. One of the UFW supporters got up on a van and asked the workers to stop working so they could get more money and advised

⁷³At this point Employer's counsel and the witness are referring to EX 7 as well as EX 2.

the workers that they were hurting the strikers' cause by continuing to work. (Tr. IV:189.) The majority of the crew began walking towards their cars when the presentation was finished and some 5 or 6 workers continued to pick. Some unidentified person told people that if they did not stop picking "things were going to happen, and do you think you're safe here?" (Tr. IV:191.) At that point a sheriff's vehicle drove up, things calmed down and the sheriff's vehicle escorted a green van carrying the 5 or 6 workers who kept picking during the presentation of the strikers out of the field. (Tr. IV:194-198.) Stefani estimated that UFW vehicles were on the property from 2 to 2½ hours.

On cross Stefani testified that there is a county dump on the north-east part of Turner Ranch and that part of the road leading to the dump is public. (Tr. IV:202.) He asserted that neither Austin Road nor Newcastle Road actually reach Turner Ranch.

The access takers reached the workers at about 11:10 or 11:15 a.m. They stopped talking to the workers about 11:30 am. Work that day started at about 8:30 or 9:00 a.m. He testified that workers eat whenever they choose and there may be as many as 60 or 70 separate times when workers break for lunch. (Tr. IV:213.)

When asked to describe the man who addressed the workers from the vehicle, he could not identify him nor could he describe him very well. He did not recall that this man had any

facial hair or beard. (Tr. IV:214-216.) He testified that the workers left at about 12:30 p.m. to 1:30 p.m. and the green van exited at about 1:15. By 1:30 everyone had left. Between 11:30 a.m. and 12:30 p.m. the workers were walking around, engaging in conversation, eating lunch and there were people in the parking lot who had congregated. He testified that the cars that had entered from the east had also left by 1:30. There were a couple of sheriff's squad cars present. (Tr. IV:226-228.)⁷⁴

His testimony does not establish that any threats were made or that any coercive atmosphere was created by the access takers. Rather it appears that the majority of the workers left the field probably in support of the request of the strikers and in support of the strike itself. The remaining 5 or 6 workers who proceeded to pick until the end were safely escorted off the property by a sheriff's patrol car.

a. Summary of Findings

I find that the Employer did not establish that any specific threats were made nor that an atmosphere of coercion was created by the events described above. However, there was unauthorized access. Again there does not appear to be evidence that UFW agents were present. Rather, I find that those who engaged in the unauthorized access were UFW supporters and strikers. There is no evidence that the UFW condoned or instigated this access. I also note, though I do not rely on

⁷⁴Stefani was somewhat hostile during cross-examination. However, I did credit most of his testimony regarding the Turner Ranch August 3rd incident.

this, that the video tape introduced into evidence as UFW 21, which shows activity along a picket line at an Ace Ranch on August 3rd (which may well be Turner Ranch) did not indicate any course of misconduct by the pickets. Rather, it appeared that the picket line was orderly.

11. August 4 - Tully and Comstock

Oscar Eguis testified that in 1989 during the tomato harvest he worked for RLC, which is a contractor used by Ace. He was a truck driver and his duties entailed picking up tomatoes in the field and taking them to the side of the field where he would unload the trailers and return for additional trips. He was also a checker when he was not driving the truck. His supervisor was Ismael Viveros. He worked at the Tully-Comstock Ranch (hereafter Tully or Tully Ranch) on Friday, August 4. (See EX 6.)

He saw strikers after he arrived. There were some 200 strikers and more than 20 carried UFW flags and signs. The strikers arrived between 8:00 a.m. and 10:00 a.m. and placed themselves on the side of the field adjacent to Tully Road. The strikers were a fairly short distance (30-40 meters) from the workers in the field. Since he was frequently away from the workers when he was delivering his loads of tomatoes to the side of the field by Tully Road, sometimes he came within several feet of the strikers. He heard strikers say that the free-loaders should leave, that the workers were dumb and various insults and

and epithets directed to the workers in the field. He asserts that the strikers were angry and upset. His cousin, Alejandro Solorio, is also a trucker. (Tr. IX:7-10.)

Some unidentified strikers threw either a dirt clod or a nut at Solorio and hit Solorio on the right cheek below his eye. Eguis testified that he did not see who threw the dirt clod or nut but that it came from the side where the strikers were. Solorio was in a truck when he was hit. Previously, some unidentified strikers said that they would hit them if they did not stop the truck and did not stop working. (Tr. IX:17-18.) He heard his cousin say "They hit me. They hit me." (Tr. IX:16.) Some dumpers (agricultural employees) were about 15 meters away.

Upon completion of his work at about 2 or 3 p.m., he went to his pickup and discovered that the window on the passenger side was broken. (Tr. IX:19.) He found a ball bearing on the front seat, but he has no idea who threw the ball bearing. Since there were many sheriffs present in the area, he called one and made a report. He also advised Viveros as well as the contractor. He testified that although he did not see his window being broken, strikers who were patrolling Tully Road were in the vicinity. (Tr. IX:29-30.)

The witness further testified that all the workers knew about this incident with Solorio because supervisor Viveros told them after Solorio had told Viveros in front of a couple of workers who may have overheard the conversation. He testified that he heard the majority of workers discuss the incident

involving his cousin. (Tr. IX:36.) I find it unlikely that he heard a majority of workers discuss the dirt clod or nut hitting his cousin.

During cross, his testimony was somewhat confused when he was describing how much time he spent taking loads of tomatoes out of the field compared to how much time he spent working as a dumper where he received buckets from workers and then quickly dumped the buckets into a container while he was on top of a platform. (See Tr. IX:6 and 7; IX:15 and 16; X:66-67; X:68-73.) It appears that in a seven-hour day, which is approximately what he worked on August 4, he would dump tomatoes for two or three hours and then spend four or five hours engaging trailers and driving them in and out of the field to the side of the field. (Tr. X:73.) It would appear, therefore, that since the function of emptying buckets requires constant effort and movement and since he spent 4 or 4½ hours driving the trailers that he would not have an abundance of time to be conversing with scores of workers about their reactions to his cousin having been hit.

Further, his testimony on the subject was somewhat inconsistent. For example, when asked if he generally goes into the field while he's waiting for his trailer to be filled with tomatoes and just walks along the rows and chats with workers, he answered yes. He claimed that the boss did not get mad about that. But on August 4, he testified he did not do that but rather stayed by the truck. It is unclear, therefore, when he had the opportunity to talk to scores of workers regarding the

incident involving his cousin. (Tr. X:9.) Yet he testified that he spent about an hour-and-a-half talking to workers on August 4. Since the workers are paid on a piece-rate basis and immediately after dumping their buckets begin another row, it seems unlikely they would be spending much time talking with Eguis. (Tr. X:11.) In fact, he is so busy when he is dumping, he doesn't have much time to view his own truck and, in fact, he forgot about his own truck that day. (Tr. X:15.)

On direct examination, Eguis testified he saw Solorio hit with the nut or dirt clod. (Tr. IX:13.) But on cross, he testified that he did not see an object hit his cousin. (Tr. X:19-20.) Then the witness, attorneys Carrol and Lyons, and I engaged in a effort to determine how Solorio's face was turned in relation to the strikers on Tully when he was allegedly hit by the dirt clod or nut. What I learned from this demonstration was that the thrown object was more likely to have hit his cousin on the left side of the face rather than the right side. (Tr. X:24.) Even more significant is the fact that the declaration of Oscar Eguis dated August 5, 1989, and introduced as UFWX 5, does not mention the incident where Solorio was struck by a dirt clod or nut. I, therefore, tend to discount the assertion that Solorio was in fact hit.

When asked about the constant shouting from the picket line, he testified he could not tell if the shouts were directed at him or not. Then he testified he did not recall exactly if his cousin was in the truck or outside of the truck when his

cousin was hit. Again, his memory is not very precise, and this is another reason I will discount the incident involving his cousin.

He testified he continued working for Ace through the rest of the tomato season. All of the crew finished the season and some of them voted. He did not vote in the election of August 10 because he did not want to vote. (Tr. X:28-29; X:103.)

The next Employer witness regarding these events was Ismael Viveros. He supervised the workers employed by labor contractor Rafael Limon. (Tr. VIII:114.)

On August 4, he was working at the Tully field when strikers came to the field. He saw two UFW flags before lunch. The 80 or more strikers were on the rim of the field along Tully Road. The pickers were about 300 feet from the strikers. (Tr. VIII:122.) He heard the strikers say that the workers should not be stupid, that the workers should get out of the field, and should unite with the strikers. There were also some epithets. (Tr. VIII:131.) Initially, the workers paid no attention. At some point three workers stopped working and left the field. (Tr. VIII:133.)

About 2:00 p.m. at the close of work, the witness was advised that a truck driver from Rafael Limon's crew had the window of his pickup truck struck by a pipe or a stick and broken. (Tr. VIII:140.) There were four other drivers present when the conversation occurred. The witness then claimed that the incident about the pickup truck window being broken was

discussed by workers the next day. The workers included three or four truck drivers, and they discussed that somebody had to pay for the broken window. There were no pickers nearby. (Tr. VIII:143-144.) Viveros identified the owner of the pickup as Oscar and I find that it is Oscar Eguis. I then struck the testimony regarding the conversation on Saturday, August 5, among the three truck drivers to the effect that someone would have to pay for the damage to the window as being superfluous and not relevant to any issue set for hearing. (Tr. VIII:146.)

On cross, Viveros testified he did not vote in the election but he knew there was an election. After Viveros was shown his declaration dated August 5, 1989, I admitted it into evidence as UFWX 4. His declaration is inconsistent with a portion of his testimony in that his declaration does not mention the broken window of Oscar Eguis' pickup truck. Nor was the declaration translated from English to Spanish. This is important because the witness testified in Spanish through an interpreter and, although he did understand some English as manifested by his responses on voir dire, there is no indication that he could read and write English. (Tr. VIII:168-169.) In fact, during cross, he was asked whether he could read the declaration and he said no. He was then asked whether all of the things that he had testified about at the hearing happened before he signed the declaration, and he said not everything. (Tr.

Jerry Schenone testified that he was out at Tully Ranch on August 4 and about 1 p.m. received a report from Mike Stefani that one of the GI drivers had a window of his pickup truck "broke out." (Tr. V:170.) It was a vehicle driven by Oscar Eguis. There was a big crowd by the vehicle when it was observed by Schenone. There were about 120-150 UFW supporters present. In addition, he recognized Dolores Huerta and Efren Barajas at the picket line. (Tr. V:167-172.) However, on cross-examination, he conceded that he did not know how the window got broken. (Tr. V:209.)

a. Summary of Findings

Based on the above-credited testimony, I find that the Employer failed to prove that Solorio was hit by a tomato or nut. This incident is not mentioned in either the declaration of Oscar Eguis nor in the declaration of Ismael Viveros. The testimony of Eguis shifted with respect to whether Solorio was in a truck or outside of the truck when he was hit and to whether Eguis had actually observed Solorio being struck by something. Further, Solorio was not brought in to testify. I am not convinced that this incident occurred.

I further find that the passenger window of Eguis' truck was broken, but it is not clear how it was broken or by whom. Eguis testified that it was broken by some type of ball bearing. Viveros claims that he was told it was broken by a pipe or a stick. Schenone does not know how it was broken. There is absolutely no evidence that a gun was used, contrary to the

assertion found in the Employer's brief. There is no evidence that any worker observed the window being broken. Nor is there any evidence that a UFW agent knew about, authorized or ratified the breaking of the window. Under these circumstances, even if some of the workers found out about the broken window, I do not see how this could create a coercive atmosphere. Further, I find that only a few workers found out about the broken window.

Nor do I find that the messages and epithets shouted by the strikers to the workers created an atmosphere of fear and coercion. The workers were from 50 to 300 feet from the pickets. There was a substantial police presence. It is unclear that there were specific threats directed against specific employees. What we have is typical picket line activity with some profanity and epithets but no coercive threats.⁷⁵

12. August 7 - Celli Ranch

Jesus Medina testified that he worked on August 7 at David Celli Ranch located on Eight Mile Road west of I-5. He saw 15 to 20 strikers at the entrance close to Eight Mile Road. They had red flags with the black eagle. Some of the strikers came in. According to Medina, some court had given them permission to talk at the beginning of the work day that morning. (Tr. 1:142-143.) One of the strikers identified himself as Israel. This person said that he was working in Salinas as a lead man of a

⁷⁵Based on the testimony of Employer attorney Michael Price, there is no indication of any improper conduct and certainly no indication of any conduct which was coercive in nature. (Tr. IV:6-13.)

crew. (Tr. I:143.) Israel talked about all the benefits that a Union member had and "all the dangers that the persons that did not follow them, it can happen to them." (Tr. I:143-144.) Only four access takers came onto the property that morning. Medina then asked this person whether if his Union is such a good thing how is it possible that "you could be causing me so much damage?" (Tr. I:148.) It was then that Medina claims he told Israel that his people had punctured five of his tires. Israel responded that Medina could now see that if one doesn't belong to the Union it could happen to that person and it is going to continue to happen. (Tr. I:148.) Medina testified that Israel identified himself as an agent of the Union. I note that this is hearsay as to whether Israel is an agent of the Union. I am unable to find an agency relationship absent additional evidence. There is an inadequate foundation to allow me to conclude that Israel was an agent of the Union and I find that the Employer has not proven that Israel is Efrael Edesa. On cross, Medina testified that it was he, Medina, who started the argument with Israel. The rest of Medina's testimony on this subject was either vague or non-responsive.

a. Summary of Findings

I find that the Employer did not establish that a UFW agent made the remarks testified to by Medina. Further, considering the fact that Medina testified he began an argument and made certain accusations, I find that the coercive nature of the remarks was somewhat diminished. It wasn't as though the

person who made the remarks had singled out Medina. Rather, it was Medina who began the exchange. I find that the testimony of Medina regarding this incident is too vague and unreliable to support a finding that anyone make the threat testified to by Medina.

13. August 7 - Stefani Field

The Employer produced several witnesses who spoke about an incident involving a brown van where the UFW allegedly blocked the van from gaining entrance to Stefani Field and coerced the driver to leave the ranch.

Joe Sanchez testified that he is a labor management consultant hired by Ace for the election. He went to Stefani Ranch on August 7th at about 5 in the morning.⁷⁶ About 15 or 20 workers had reported to work. He estimated there were some 15-20 striker vehicles on the north side of Eight Mile Road some of which had UFW flags. Some of the strikers were wearing UFW buttons. He recognized Efren Barajas and someone named Francisco.⁷⁷

The witness saw a brown and white van approach the entrance and turn in. At that point Barajas, Francisco and some pickets got in front of the van and stopped it. However, Sanchez did not hear what Barajas or the other strikers said to the

⁷⁶See EX 1 and Ex 4 for location and diagram, respectively, of Stefani Ranch.

⁷⁷I find that this person named Francisco is not Francisco Naranjo but rather Francisco Serna who was not a UFW agent during the 1989 strike.

people in the van. Nor did he believe that whatever was being shouted from the picket line was anything extraordinary. (Tr. VIII:44-48.)

The van began to back up and then parked at the corner. The driver and a couple of workers got out, though most of the workers stayed in the van. At some point later, the van made a U-turn on Eight Mile Road and went away. (Tr. VIII:48-54.) He also testified that there were 6-8 deputies close to Eight Mile Road. It appears that there were no arrests and there was no violence.

The witness also stated that some pickets stood in front of another vehicle which had 4 or 5 passengers. Barajas and Francisco were in that group shouting for the car not to go in. Then Sanchez testified that some unidentified person said that if the vehicle went in, "we're going to hurt you." (Tr. VIII:60.) However, he could not be specific about who was shouting this. And then the pickets backed off and the car left the ranch. However, Sanchez conceded that though there were attempts to block, nothing serious occurred since deputies were there. It does not appear that any cars were damaged. (Tr. VIII:65.)

During cross, he did not remember very much about the stopping of the brown and white van and he was unable to describe the driver of the van very well. In fact, the van was between him and the strikers and there was a pickup blocking his way. He could not describe what kind of van it was. Because his

testimony is not very specific and since he did not hear what was said by the pickets to the van, his testimony cannot establish that the driver and occupants of the van were threatened by the strikers. Further, Sanchez testified that when the van parked on the south side of Eight Mile Road, the persons who got out of the van were not being bothered by UFW pickets. (Tr. VIII:102.)

Regarding the beige car that was stopped, he was unable to describe the driver or other passengers. Nor did he hear what Barajas said to the driver.⁷⁸

Sanchez also testified that Barajas was wearing a red T-shirt and that he wore such a red T-shirt 90 percent of the time during the strike. (Tr. VIII:94.) However, my review of several days of video tapes of the strike (covering picket line activities at Triple E, San Joaquin and Ace) indicates that most of the time Barajas was not wearing a red T-shirt.

Michael Buda testified that he went to Stefani Ranch on August 7 early in the morning. He worked as an attorney for Ace

⁷⁸The UFW called Sanchez as its witness and asked him whether the Francisco that he testified about was really Francisco Serna. Sanchez testified that he did not know. He was then asked whether Francisco Serna was an agent of another union during the 1989 strike. Sanchez testified he had no idea. Sanchez had testified that he had known this Francisco for five years and had recommended him for a job, though he maintained that he could not remember his last name. The UFW called Mary Mecartney who testified that she had telephoned Paramount Citrus where Francisco worked and was told that he last name was Serna. (Tr. IX:77-78.) There was then a stipulation that the Francisco referred to by Sanchez is Francisco Serna and that Francisco Juarez is the Francisco that worked with the UFW out of the Watsonville office. I find that Sanchez manifested a selective memory when he claimed he did not know the last name of Francisco, the man whom he had known for 4 or 5 years and recommended for a job.

Tomato during the strike. I struck his testimony concerning certain events at Stefani Ranch on August 7 because there was no work there that day and there was no access taken. Further, the testimony did not describe any misconduct that could have affected the results of the election. (Tr. III:164, 168.)⁷⁹

Michael Price testified that he was employed as an attorney for Ace during the strike and he came to Stefani Ranch on August 7 at about 5:15 a.m. where he noticed some workers parked along the entrance. It was raining off and on and he parked 50 feet from the entrance and walked back toward Eight Mile Road where he saw strikers waving red banners with black eagles. There were some 10 to 15 striker vehicles with 50 to 60 strikers.

When asked to describe the content of the shouts uttered by the strikers, he conceded that he is not fluent in Spanish but he did recognize words such as huelga (meaning strike) and pendejo (the parties stipulated that this was an insult). (Tr. IV:18-20.)

He testified that from 20 to 25 vehicles carrying workers entered the property. He described an incident where a van was blocked from entering the property and then exited and parked on Eight Mile Road. However, he did not hear any of the conversations between the strikers and the occupants of the van. (Tr. IV:28.) Augustin Ramirez was present during this incident.

⁷⁹Although he made a good effort to recall events, Buda's testimony was somewhat hampered by an inability to recall events with the type of specificity demonstrated by Carrol and Price.

He also testified that Efrael Edesa was present along with Efren Barajas on the picket line. Jose Sanchez may have also been there. (Tr. IV:25.)

Aside from the incident involving the van, Price saw no other incidents of blocking. (Tr. IV:36.)

On cross, Price conceded that he did not talk to the people in the van nor was he able to see clearly the vehicle when it was parked because of other vehicles between him and the van. (Tr. IV:102-104.)

He testified that it did not take the vehicles which entered Stefani Ranch more than 15 seconds to enter the property and park inside some 30 yards from Eight Mile Road. (Tr. IV:110-111.) This hardly indicates that UFW pickets were blocking the entrance to any substantial degree or that there was an atmosphere of fear or coercion.⁸⁰

Ismael Viveros testified about the events at Stefani on August 7th but he did not describe any misconduct nor did he have any first-hand knowledge of significant events. Further, I have not found him to be a credible witness. (Tr. VIII:157-159.)⁸¹

The UFW called several witnesses regarding this incident.

⁸⁰Price testified on re-direct that workers were streaming into the field before the van incident and the van incident did not block any vehicles. (Tr. IV:130.)

⁸¹He did testify that work began that day at Stefani at about 10 a.m. However, there is no evidence that access violations occurred that day.

Francisco Naranjo denied being on any Ace picket line. (Tr. XIV:230.)

Efren Barajas testified that the first time he went to an Ace ranch was three or four days before the Ace election conducted on August 10. He thought it was either Stefani or Dellaringa. He then identified Stefani Ranch on EX 4. (Tr. XV:30-34.)

When he arrived that morning at about 6 a.m., strikers were present as was Joe Sanchez. Barajas testified that he stayed at Stefani Ranch three or four hours and asked people not to pick tomatoes. He was located near an entrance and when prospective pickers drove up, he would speak to those who wanted to stop and talk. Guillermo Perez was with him. Some of the workers agreed not to pick. He identified a brown van and another car as those vehicles that did not go in to pick. With regard to the people in the van, he said that after he spoke with the occupants of the van, the van went across the street down Eight Mile Road and stopped at a fire since it was cold. (Tr. XV:35-40.)

He testified that it was he and Guillermo Perez that did most of the talking. (Tr. XV:141.) He further testified that Francisco Juarez was not present at the picket line.

He testified that there were no deputy sheriffs there and he remembered no sign or flags. Though there is a discrepancy between this testimony and that of some of the Employer's witnesses, it is not significant as I find that there

was a UFW picket line but there was no misconduct. The witness also testified that Joe Sanchez did not complain that day regarding the pickets. (Tr. XVII:170.)

Augustin Ramirez testified that he and 20-25 workers who are UFW supporters went to an Ace field on August 7 located on Eight Mile Road. When shown EX 3 and EX 4, he believed that it was Stefani Ranch (EX 4.) He arrived there with Barajas. It was sprinkling a little, and he and the UFW supporters were on the opposite side of Eight Mile Road from the ranch warming themselves by a fire. Barajas and another person were waiting at the side of the entrance to ask workers not to break the strike. However, he could not hear what was being said. (Tr. XV:233-234.)

When a van arrived, Barajas talked to the occupants of the van and the van turned around and the workers joined them at the fire. (Tr. XV:235.) According to Ramirez, the workers from the van said that the Union was doing this for the well-being of the workers, and that they supported the strike. (Tr. XV:235.)⁸²

On cross, he testified that he went to Stefani on August 7 because workers said that they were going to be picking there that day. He recalls that day as it was the only day it rained during the strike and there was a fire at the side of the road. (Tr. XV:269.) The Employer attempted to show that the

⁸²During his testimony, Ramirez would frequently take time to answer questions and would proceed to answer them in a thoughtful manner.

witness did not really know whether these events occurred at Stefani Ranch or Dellaringa Ranch. The witness consistently testified that he believed that events occurred at the Stefani Ranch even though there was no bridge drawn on EX 4. I find that the events described by Ramirez did occur at Stefani Ranch and that his testimony in that regard is consistent with that of the other witnesses.

Guillermo Perez testified that on August 8 (I find the incidents about which he testified occurred on August 7) he was at a ranch on Eight Mile Road with Barajas speaking with people at about 5 in the morning. Joe Sanchez was there. It was also raining and there was a fire. (Tr. XVI-.70-72.) He credibly testified that when he asked people not to go to work he said please. He said that there were 10 people in a brown van which began to enter the ranch and then turned back after talking with the strikers. The van drove to the fire on the side of the road. They said that they were in favor of the strike. (Tr. XVI:74-76.)

Perez also testified that he was not a Union representative nor was Luis Maldonado or Francisco Naranjo. He said that the Union representatives were Efren Barajas and Zeferina Perez Garcia. (Tr. XVI:81.) He also testified that Francisco Naranjo was not present. Finally, he did not see any violence during the 1989 strike and it was a peaceful strike. (Tr. XVI:82-84.)

a. Summary of Findings

Based on the credited testimony, I find that the brown and white van was not blocked and that its occupants voluntarily chose to honor the strike. I further find that the pickets did not engage in any misconduct. Finally, I find that no access was taken at Stefani Ranch on August 7.

14. August 7 -or August 8 - Dellaringa

The Employer contends that Board agents improperly allowed UFW access takers to take access on either August 7 or 8 at the Dellaringa Ranch and that this improper conduct of Board agents should result in setting aside the election.

Oscar Eguis testified that on August 7 or 8 he arrived at the Dellaringa Ranch (see EX 3) at about 6 a.m. Later, about 40-45 strikers came to the edge of the field though they did not come inside of the field. (Tr. IX:39.) There were about 180 workers in the field. Some of the strikers wore UFW buttons and some carried UFW flags, one big flag and other small ones. (Tr. IX:41-42.) The Employer had placed a Caterpillar on the dirt road used to enter the ranch from Eight Mile Road into fields No. 1 and 2. The witness testified, therefore, that the strikers had walked in from Eight Mile Road to field No. 1. They apparently formed a picket line around the edge of the field.

According to Eguis, the strikers yelled that people should leave and stop working or there's going to "be blood flowing." (Tr. IX:42.) The strikers also used some profanity. There was some vague reference about "they were going to be struck", but there is an insufficient foundation to make any

finding regarding any threats of striking or hitting anyone. (Tr. IX:44.)
The workers began yelling bad words and epithets toward the strikers. (Tr. IX:43.)⁸³

Work stopped about 40 minutes after the strikers began yelling. Based upon this witness' testimony that the strikers were outnumbered about four to one and that the pickers were shouting profanities at the strikers, I am not persuaded that a coercive atmosphere has been established by his testimony.

During cross, he testified that the strikers stayed at the edge and did not come into the field. He also testified that there were no sheriffs there. When asked how many workers were yelling bad words to the strikers, he testified that more workers were yelling than strikers. He estimated that about half the workers yelled bad words at the strikers. (Tr. X:34-38.) Some of the workers told the pickets that they were cabrones (which has a number of means including "asshole" and cuckold) and that they were going to "take them out." Some of the strikers said something about blood, but he could not be specific. (Tr. X:41, 49, 50, 51.) Then he testified that all of the strikers were yelling the same thing: that the workers should leave or blood

⁸³I did not consider the witness' testimony that some of the workers said that they were going to leave the field because they were afraid of something happening to them. As stated supra, I have not considered testimony regarding the subjective reactions or statements of workers. Further, I did not credit his testimony that he heard 40 or 50 different workers express such feelings of fear. He had previously testified that these comments regarding fear were made by workers in little groups. There was an inadequate foundation that Eguis was present during each of these group conversations.

would be flowing. (Tr. X:51.) From my review of the sheriff's tapes introduced as UFW Exhibits 20, 21 and 22, and Employer's Exhibit 17, I never heard strikers on the picket line yelling the same thing in unison. I find the witness' testimony in this regard not to be credible.

Michael Buda testified that he was present at a conversation regarding access on Monday, August 7, at the entryway to the Dellaringa Ranch. He recalls that Board agents Ed Perez and Ed Cuellar were present and he believed that Barajas and possibly Michael Price as well as Joe Sanchez were there. The conversation occurred around 10:30 or 11 a.m. (Tr. III:170-173.) Buda testified that there was some type of access agreement which allowed the UFW access for 30 minutes one time during the work day. It was a voluntary access agreement. However, that day there was no access to the field at 10:30 and he did not know why not. (Tr. III:172-173.) When asked what Board agent Cuellar said, he replied that Cuellar was upset but he cannot remember the specific language.⁸⁴

Cuellar then informed Buda that the Board agents were going to allow the UFW to take access thereby overruling the Employer objections. (Tr. III:174.) Buda rejected a suggestion that Ace vehicles be used to allow the Union access takers to go into the field. (Tr. III:175.) Thereafter, Cuellar and Perez informed Buda that they would drive their cars and lead the

⁸⁴I again note that Buda's memory of events was not as sharp as that of other witnesses including Cuellar and Price.

access takers onto the ranch property. This access occurred at about 1:30 p.m. at which time ALRB Board agents instructed the UFW access takers to follow them in. There were deputy sheriff vehicles present at the ranch at this time. Buda testified that the owner of Dellaringa Ranch had objections to UFW access, but it is unclear from the record whether the owner or Buda communicated that objection to the UFW or to the Board agents. (Tr. III:176.)

Buda followed the cars of the Board agents and the UFW access takers into the field, keeping about a half-a-mile distance between them. The access takers were in the field 40 to 45 minutes. At the end of the 45 minutes, Cuellar and Perez motioned for the access takers to leave the field. Although they did not leave immediately, they did not misbehave, and they left within 10 or 15 minutes to leave the field. All the cars then left the field. (Tr. III:180-183.)

On cross, Buda testified that about one hour passed between the time the access takers left Eight Mile Road and the time they returned to Eight Mile Road. (Tr. III:205-206.) The access takers and Board agents were driving very slowly because they were on top of a levee. He estimated it was one-half mile from Eight Mile Road to the field house and at least another half-mile from the field house to field No. 1 where the workers were working.

Michael Price testified that when he arrived at the Dellaringa Ranch, Mr. Dellaringa told him he did not want any

vehicles on his property which were not involved in the harvest because of liability concerns. The parties entered into a stipulation that Dellaringa and other private land owners involved in the Ace harvest told Ace to advise the ALRB that they did not want UFW vehicles or other non-company vehicles on their premises. (Tr. IV:46-47.)

Later in the day, at about 12:30 p.m., Price returned to Dellaringa and he met with Barajas who asked him how many workers were present and when the Union could take access. It was then that Price told Barajas that no cars would be allowed. (Tr. IV:65.) At this point several Board agents arrived on the scene and Cuellar stated in a neutral voice that the UFW cars could take access. (Tr. IV:61-69.) Barajas then asked when the cars could go in. At no point did anyone from the Employer agree or acquiesce to access being taken. (Tr. IV:67-71.) Price testified that at the time this conversation occurred at the entryway to the ranch (see EX 3), workers were picking in fields 1 and 2 located at quite a distance from the entryway. (Tr. IV:70.) I find, based on Price's testimony, that no agricultural employees heard this exchange about access. Price then left Dellaringa Ranch. (Tr. IV:72.)

Later that day, Price became aware of an alleged access agreement when speaking on the telephone with another attorney in his law firm, Karen Mathis. This agreement called for access to be taken at 10:30 in the morning for one-half hour. It was to be the only access taken during the day. Price was not aware of any

other access agreement related to the Dellaringa or Stefani Ranches. (Tr. IV:72-73.)

On cross, Price testified that there were three or four sheriff vehicles with eight deputies present at about 12:30 p.m. when the above-mentioned access discussions occurred. In fact, someone from the sheriff's department said that access was to be allowed. (Tr. IV:113-115.) This occurred following Cuellar's statement that access would be allowed. Price also testified that no one from the UFW ever said to him or anyone else in his presence that the Union agreed to limit access to once a day at 10:30. (Tr. IV:116, 117.) Nor did any Board agent ever agree to such a limitation on access. (Tr. IV:117.) Since Price's testimony regarding this purported access agreement is based on hearsay, I am unable to find that the UFW entered into such a limited agreement for access.

Board agent Cuellar has been employed by the ALRB since 1982 and has been the Regional Field Examiner since 1989. In that capacity, he supervised the Board agent in charge of the election.

Cuellar recalled that he discussed access for the first time on August 7 or 8 in the presence of several Board agents, several representatives of the sheriff's department, and Ace attorneys Michael Price and the younger attorney (I find this attorney to be Michael Buda). (Tr. XIV:4-7.) Price spoke first and said that the property owner had concerns about access being taken. The concerns were about property damage, dust and being

on the property without permission. The ALRB Board agents then caucused. Although Cuellar believed that the conversations occurred by the Stefani Ranch, I find that this conversation occurred at the entrance to the Dellaringa Ranch which is very close to the Stefani Ranch. (Tr. IV:11-12.)

During this caucus of Board agents, there was discussion of the Employer's concerns as well as the right of agricultural employees to have access. Juan Ramirez, an attorney with the Visalia Regional Office, stated that it was legally permissible to allow access under these circumstances. Perez suggested that Board agents escort the UFW agents to ensure there would be no damage and a minimum of dust. Cuellar made the decision to allow UFW organizers to take access. (Tr. XIV:11-15.) Cuellar then advised the sheriff and the Employer's attorneys of his decision to allow access. Cuellar testified that no one objected to his announced decision. Right after his decision was made, access was taken by Efren Barajas and another UFW organizer, possibly Augustin Ramirez. Board agents Perez and Cuellar escorted the UFW organizers onto the property at a very slow pace, less than 5 miles an hour. The Board agents drove the first car and the UFW organizers were in the second car. The Board agents drove their car to the edge of the fields from a half-mile to three-quarters of a mile from the entrance and about 75 yards from where workers were working. The two Union organizers then went into the field but Cuellar was unable to hear what they said to workers. The organizers were in the field

for 20-30 minutes. They then returned to their car and the Board agents escorted the organizers' car out of the ranch at the same speed. There was no damage to property. Nor were there any complaints by Ace representatives regarding the access after Cuellar's announced decision. Access was taken several times. (Tr. XIV:18-21.)

During his direct examination, Cuellar displayed a good memory, was responsive and was careful in answering questions.

On cross, Cuellar testified that there were 25-30 UFW supporters across the street, at least 20 yards away from where the Board agents met with the sheriff's representatives and the Employer's attorneys. He testified that Price tried to get the Board agents to change their minds regarding their decision to allow access. (Tr. XIV:43-46.) He further testified that no one from the ALRB talked to workers about access that morning. Cuellar did not recall hearing any statements or chants from the UFW group that was across the street at the time that the access was going to be allowed or taken. (Tr. XIV:57-61.) Cuellar reiterated on redirect examination that UFW strikers could not hear the access discussion between the Board agents, the Employer's attorneys and the sheriffs. (Tr. XIV:79.) He further testified on redirect that he did not tell workers inside the fields about the circumstances leading up to the taking of access that day. (Tr. XIV:80.)

During cross, Cuellar's demeanor was similar to that he manifested during direct. He was a good witness, even-tempered,

and not argumentative. He demonstrated a good memory regarding the events of that day.⁸⁵

Barajas testified that no one from the Company advised him of any access problems at Ace. (Tr. XV:47.) Although he testified that he did not remember taking access to any Ace fields, I find that he did take access to the Dellaringa field on August 7 pursuant to Board agent Cuellar's decision.⁸⁶

a. Summary of Findings

Based on the above-credited testimony, I find that the 40-45 strikers who went to the field where workers were picking at Dellaringa Ranch on August 7 did not create an atmosphere of coercion. Although they did trespass onto the Employer's property, the evidence does not support a finding that they engaged in coercive behavior which would justify setting aside the election.

I further find that an NA was filed by the UFW on August 4 thereby giving the Union a right to take access at Dellaringa Ranch. Board Agent Cuellar's order allowing access

⁸⁵Cuellar testified in response to a question on cross-examination that he was a member of the UFW for two years beginning in 1973. He further testified on redirect that his prior UFW affiliation did not affect the decisions he made as the Regional Field Examiner with respect to the Ace election. I credit the testimony of this witness in light of his candid and forthright testimony. The fact that he was a UFW member some 14 years prior to this election is remote in time and did not affect either his actions during the election or his testimony at the hearing.

⁸⁶Barajas explained during cross-examination that the main focus of access efforts during the tomato strike were at the Triple E Ranch and that his advice to access takers primarily concerned the Triple E Ranch. (Tr. XVII:109-111.)

was therefore reasonable and correct. In addition, Cuellar consulted with other Board agents and with an attorney from the Visalia Regional Office before making his decision. When he communicated his decision, I find that no agricultural employee or UFW supporters overheard the conversation between the Board agents, the Employer attorneys and sheriff representatives. Nor did any workers overhear any conversation during the caucus of Board agents nor any statements made during any of the meetings between the Board agents, the Employer attorneys and the sheriffs that day at Dellaringa.

I further find that the UFW access takers were in the field talking to workers no more than 30 minutes and they did not violate the access regulation. Nor did the UFW access takers engage in any type of misconduct which could be the basis to set aside the election.

15. August 8-9 - Dellaringa

Oscar Eguis testified that one or two days after the events he described as occurring on either August 7 or August 8 at Dellaringa, UFW pickets came back to Dellaringa Ranch. Strikers would not let people come in. When asked on direct what happened, he answered, "They did not allow people to come in because they were talking to them." (Tr. IX:57.) He testified that about 40 pickets would get in the way of the trucks blocking their entrance. He then testified that the pickets would push workers that wanted to get through. He testified that he saw two or three workers pushed. (Tr. IX:61.) He was unable to identify

the workers who were pushed. He recalled hearing the strikers tell the two or three workers that were pushed that "They had already won." The strikers also said that Triple E had accepted what they had wanted. (Tr. IX:63.) I note that his testimony on direct was vague and seemed to indicate that workers were attempting to enter the field on foot rather than in their cars. I find this unlikely based upon the testimony of other witnesses that ordinarily workers would drive into a field where they were going to be picking.

On cross, he was unable to more specifically identify the day on which the alleged pushing occurred. Although he demonstrated that he saw a "strong shove" of three workers, he was rather evasive when answering exactly how many workers were pushed. However, these workers did not fall when shoved. (Tr. X:54-60.) These events occurred after his declaration executed on August 5 and apparently there was no other declaration executed by this witness which described the pushing incident. When asked who was pushed, he testified he did not recall their names although he did state that the three went back to work the next day.

a. Summary of Findings

Eguis' testimony about the pushing incident was too vague to support a finding. Further, it is unlikely that workers would get out of their blocked vehicles to attempt to cross a picket line of 50 UFW supporters and I find that this incident

did not happen.⁸⁷ I also find it curious that Ismael Viveros, the supervisor of Oscar Eguis, did not testify about the pushing incident. Eguis had testified that Viveros had told the workers on the day of the pushing incident that there would be no work that day because strikers were there. (Tr. X:60-63.) Yet Viveros, when testifying about events at Dellaringa on August 8, mentioned nothing about a pushing incident. Nor did he testify about any similar type of event which occurred on August 8 or later. If the pushing incident had actually occurred, it would seem as though Viveros would have known about it and been asked to testify about the incident.

As I have discredited the testimony of Oscar Eguis regarding the pushing incident on August 8 or 9 at Dellaringa, I find that no such pushing incident occurred.

16. Sanguinetti Ranch - August 8

Michael Price testified that he was at the Sanguinetti Ranch on August 8 when at about 10 a.m. Efrael Edesa and Zeferina Perez Garcia approached him on foot and said that they were going to take access now. Price told Edesa that they could not go on the property yet since it was not 10:30. A few moments later, Edesa drove his car up to the entrance. It was 10:20 so Price told him he could not yet enter. Edesa then drove the car in

⁸⁷During redirect examination, the witness demonstrated the intensity of the alleged pushes by pushing Employer counsel Carrol very hard against the wall. Had these pushing incidents actually occurred and had the pushes been as forceful as demonstrated by Eguis against Carrol, I find it unlikely that none of the three workers pushed would have fallen.

"kind of laughing." He stopped the car about 40 feet into the ranch and then proceeded to drive further into the ranch. (Tr. IV:75-81.) Price estimated that Edesa and his passenger, Zeferina Perez Garcia, came off the property at about 11:05 a.m. He estimated that they were on the property approximately 45 minutes. He observed Edesa park the car at a staging area which is some 75 yards from the entrance and then walk into the field. There were workers in the tomato fields located about 10 yards from the staging area. At the point when Edesa drove the car out of the ranch at 11:05 a.m., Price left the area. (Tr. IV:80-84.)

On cross, Price testified that when Edesa drove onto the field, he was going anywhere from 5 to 15 miles an hour. His maximum speed when driving toward the field was 25 miles an hour. (Tr. IV:120-121.) A review of Price's testimony does not indicate that Edesa disrupted work or caused any damage to the property. (Tr. IV:121-123.)

Employer attorney Buda testified that on August 8 at the Sanguinetti field there were some 100-150 workers picking in the field. He asserted that there was a voluntary access agreement in effect which allowed access one time a day at 10:30 a.m. for 30 minutes. He became aware of this agreement from an attorney in his office, Karen Mathis. (Tr. III:187.) Buda then described essentially the same instance of access taking testified to by Price involving Efrael Edesa. (Tr. III:187-194.)

As workers were leaving the field at about 4 p.m., he testified that he observed Zeferina Perez Garcia shouting at workers as they exited and holding a pad and pen while looking at rear license plates of the exiting vehicles. I declined to take further testimony on this subject as I held that it did not constitute the type of conduct which could result in the setting aside of an election.⁸⁸

Gracielo Viveros, an Ace supervisor, testified that he worked at Sanguinetti two or three days but that the police were there and the strikers did not bother the workers. In fact, there was more order at Sanguinetti. (Tr. VI:91-92.)

Board agent Abraham Mendoza testified that on August 8 or 9 he met Employer attorneys Price and Buda at Sanguinetti Ranch. He testified that Board agents on that day passed out notices and direction of election. (See BX 3 and 4; Tr. XIV:100-101.)

a. Summary of Findings

Based on the above-credited testimony, I find that UFW agents had a right to take access at Sanguinetti on August 8. Although the record does not indicate whether workers were in

⁸⁸The Employer then made an offer of proof which indicated that Ms. Zeferina Perez Garcia was standing close to each vehicle as it departed, was looking at license plates, and then made a writing motion on a pad as if to write down the license plate of each of the cars. (Tr. III:203-204.) I note that the Board did not disturb the ruling of the Investigative Hearing Examiner in Triple E Produce Corporation (1991) 17 ALRB No. 15 when he ruled that the apparent taking down of a license plate of a van carrying workers could not have affected the outcome of the election. (See Triple E IHED, p. 27.) I further note that the employer did not cite any case to the contrary.

fact eating lunch at 10:20 a.m. when the UFW agents took access, it appears from the testimony of Employer witnesses that the Employer was willing to have access taken at 10:30. As the access takers did not remain on the ranch for more than a total of about 45 minutes, part of which time was spent in reaching and leaving the field where the workers were picking, it certainly does not appear that there was more than a de minimus access violation. Clearly, there was no coercion established or any other misconduct which could result in the setting aside of an election.

Nor did the Employer establish that Zeferina Perez Garcia engaged in misconduct when she was observed looking at license plates and making writing motions on a pad of paper.

17. August 9 - Mrs. Medina

Alejandra Medina testified that she was working at an Ace field on August 9 when 4 people entered the field and talked for 15 minutes. She stated that these four individuals were representatives of the Union and they were carrying flags. One of the unidentified persons asked her why she was working there and stated that it would cost her the place where she lived. She also speculated what the person meant by the comment. (Tr. II:101-107.) She then testified that she went behind a truck.

a. Summary of Findings

Her testimony was too vague to support any finding and based upon my viewing of the video tapes, it is unlikely that access takers entered the field carrying flags. In any event, I

have already discussed how her inability to undergo cross-examination resulted in my concluding that her testimony is unreliable. Combined with the vagueness of the testimony regarding this particular event, I do not believe that she was threatened or coerced on August 9.

D. Peak Objection

In its Amended Motion for Summary Judgment (BX 9), the UFW relies on the Tally of Ballots and the Amended Tally of Ballots (BX 12, BX 5) to establish the body count for the eligibility period of July 28 through August 3, 1989. Both the Tally and the Amended Tally state that the number of names on the eligibility list is 382. This number is obtained from the Employer's summary of its agricultural employees for that time period. In fact, the Employer supplied to the Regional Director prior to the election a summary including the names, addresses, social security numbers and job classifications for each of the workers supplied by its two labor contractors, Earl Hall and LCL Labor Service (see EX 9a and 9b which together comprise the eligibility list).

The Employer did not contest the Union's assertion that the body count for the eligibility period is 382. Nor did the Employer avail itself of the opportunity to clarify concerns I raised during the June 3, 1991, prehearing conference call regarding whether the Employer had provided actual body count figures in its opposition to the Union's motion for summary judgment (see ALRB 10, the Employer's Opposition).

During the prehearing conference call conducted on June 3, 1991,⁸⁹ I specifically questioned whether the figure of 3,381 used in the Employer's Opposition (BX 10) and in Dean Janssen's declaration dated August 6, 1989, was an accurate number. I stated during the conference call that I would entertain during the upcoming hearing a clarification of whether the Employer really believed that it had 3,381 different workers employed during its 1988 peak.

During the fifth day of hearing, I summarized on the record that pursuant to the prehearing conference call of June 3, 1991, I had wanted a clarification of the Employer's definition of body count. Rather than clarify whether it correctly provided the body count in its opposition, the Employer declined to do so and instead argued that there is no authorized procedure for a motion for summary judgment during a representation proceeding. (Tr. V:225-228.)

My review of Dean Janssen's declaration of August 6, 1989, which was presented to the Regional Director as part of the Employer's Response to Petition for Certification (see EX 15 and 16 which are the Employer's response to the election petition and the Employer's amended response to the amended election petition), indicates that on page 2 thereof it did not provide the body count for its peak period in 1988, October 7 through October 13. Rather, it totaled up the number of workers who were

⁸⁹Although this conference call was recorded, it has not been transcribed.

employed each day and stated that that was the body count without providing information as to whether there was any employee turnover. It committed the same error with respect to computation of the alleged body count for the eligibility period of July 28 through August 3, 1989, at page 4 of the declaration where it states that there was a total of 1,074 workers who picked during the eligibility period. However, its own payroll summaries (EX 9a and 9b) used for the eligibility list as well as the actual payroll records for its two labor contractors during the eligibility period (see EX 11 and 13) clearly establish that the number of different workers employed during the eligibility period, i.e., the body count, was in the neighborhood of 382 rather than 1,074.⁹⁰

I find that the Regional Director was provided with the employee summaries which constituted the eligibility list (EX 9a and 9b) and reasonably concluded that the body count for the eligibility period was 382.

Janssen's declaration sets forth on page 2 that the 1988 peak of season occurred from October 7 through October 13 and consisted of a daily average of 564 positions (3,381 divided by 6). I find that this is the accurate way to calculate the

⁹⁰I totaled the names appearing on EX 11 and EX 13 and came up with a figure of 443 which does not take into account possible duplication of names or whether some of the names were supervisors or otherwise ineligible workers. I find that the Employer failed to establish that the body count for the eligibility period is other than 382, the figure set forth in the Tally of Ballots and the Amended Tally of Ballots as well as in the eligibility lists (EX 9a and 9b).

average number of daily positions. Janssen then estimated, based upon figures set forth on page 3 of his declaration, that the 1989 peak would be 20 percent higher than in 1988. He estimated the 1989 peak to be 676 average daily positions for the 1989 peak period which would also occur in October. I accept his projection that because of an increase in the production of cartons per acre and the transplanting of additional tomatoes with a resulting increase of 100 acres to harvest in October of 1989, the number of positions required to harvest the increased production would be 20 percent higher than the peak employment figure for 1988.⁹¹

Janssen's calculations that the average number of daily positions for the eligibility period of July 28 through August 3, 1989, was 215 is correct but not relevant for reasons to be explained in the analysis, infra.

a. Summary of Findings

I find that the body count for the eligibility period is 376 rather than 382 as I have not counted the 6 foremen identified on Employer's Exhibit 9a. I also find that consistent with the declaration of Dean Janssen the average number of daily positions during peak for 1989 was 676.

⁹¹Interestingly, Jerry Schenone testified on cross that the highest number of workers employed in 1989 when the payroll was at its highest was 450-500. (Tr. V:198-199.) Although in a prospective peak case, such as this one, the Board does not use hindsight to determine what the peak body count was in a particular year, this testimony supports, though it is not conclusive, a conclusion that the peak body count for 1989 was probably not more than 500 pickers.

E. Bargaining Unit

In the original Petition for Certification the UFW described the bargaining unit as all agricultural employees of the Employer in San Joaquin and Stanislaus Counties. (BX 1.) In the Amended Petition for Certification, the Union describes the bargaining unit as all agricultural employees of the Employer in San Joaquin County. (BX 2.) The Notice and Direction of Election issued by the Regional Director describes the bargaining unit as all agricultural employees in San Joaquin County. (BX 3.) The Employer filed an objection which in essence asserted that at least 20 tomato transplanting employees were disenfranchised when the Regional Director directed an election "for all agricultural employees in San Joaquin County, which was overbroad." (Employer Objection No. 38 contained in Employer's Objections to Election dated August 16, 1989.) The Executive Secretary set for hearing whether the petitions for certification described an appropriate bargaining unit in light of Dean Janssen's declaration of August 6, 1989, which stated that Ace in 1989 had and would be harvesting fields in several counties other than San Joaquin including Fresno, Sacramento and Solano. Pursuant to the Notice of Objections Set for Hearing, I took evidence on the bargaining unit issue.⁹²

⁹²At the hearing, the Employer's position was that there was no Employer objection regarding unit set for hearing and that the hearing should not cover the bargaining unit question.

During the Employer's case-in-chief, I allowed the Union to elicit testimony relative to the bargaining unit question.

Gracielo Viveros testified that some 200 workers picked tomatoes in Mendota for Ace. I note that Mendota is in Fresno County. (Tr. V:104.)

Antonio Medrano picked tomatoes for Ace in Mendota, Three Rocks, Kernan (all in Fresno County), in Sutter Creek and Plymouth (in Amador County), and in Solano County. (Tr. VII:103-109.)

Eduardo Gomez also worked in Mendota for Earl Hall. (Tr. XI:82-93.)

Although I have discredited much of the testimony of these three witnesses, I credit their testimony with regard to the unit question as their testimony was responsive, candid and without the infirmities associated with much of their testimony on other subjects.

The UFW called Dean Janssen as its witness and he testified that in July of 1989 Ace employed about 20-25 workers other than the workers provided by labor contractors Earl Hall and PLC. These workers did transplanting work in San Joaquin County and Fresno County. (Tr. XIII:74.) He confirmed during his direct testimony that Ace workers were employed in Fresno, Solano, Contra Costa, Sacramento and San Joaquin Counties. (Tr. XIII:98-99.) He also believed that the transplant workers were on the list provided to the Regional Director. (Tr. XIII:80.)

Efren Barajas testified that despite the language in the original RC petition and the amended RC petition, he was really seeking a state-wide unit. (Tr. XVII:150-153.)

a. Summary of Findings

I find that the Employer did not prove that the transplant workers were disenfranchised or that they comprised a large enough group to have affected the outcome of the election. I further find that Ace did employ workers in 1989 at the counties described in the above testimony. In addition, many workers who were employed in Mendota also worked in San Joaquin County. It appears that a substantial number of workers worked for Ace in more than one county in 1989.

IV. ANALYSIS

A. Alleged Incidents of Threats, Violence and Coercion

The burden of proof in an election proceeding under Labor Code section 1156.3(c) is on the party seeking to overturn the election. (TMF Farms (1976) 2 ALRB No. 58; Bright's Nursery (1984) 10 ALRB No. 18; NLRB v. Golden Age Beverage Company (5th Cir. 1969) 415 F.2d 570.) The Board has long recognized that this is a heavy burden, requiring an objecting party to come forward with "specific evidence that misconduct occurred and that this misconduct tended to interfere with Employee free choice to such an extent that it affected the results of the election." (Bright's Nursery (1984) 10 ALRB No. 18, pp. 6-7; see also Agri-Sun Nursery (1987) 13 ALRB No. 19, p. 5.)

In Kux Manufacturing Co. v. NLRB (6th Cir. 1989) 890 F.2d 804

[132 LRRM 2935], a court of appeals stated that,

'[B]allots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees.' NLRB v. Zelrich Co., 344 F.2d 1011, 1015 [59 LRRM 2225] (5th Cir. 1965). Thus, the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.' Harlan §4 Coal Co. v. NLRB, 490 F.2d 117, 120 [85 LRRM 2312] (6th Cir.), cert. denied, 416 U.S. 986 [86 LRRM 2156] (1974); see also NLRB v. First Union Management Inc., 777 F.2d 330, 336 [120 LRRM 3437] (6th Cir. 1985) (per curiam). This burden is not met by proof of misconduct, but '[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.' NLRB v. Bostik Div. USM Corp., 517 F.2d 971, 975 [89 LRRM 2585] (6th Cir. 1975) (quoting NLRB v. White Knight Mfg. Co., 474 F.2d 1064, 1067 [82 LRRM 2762] (5th Cir. 1973)).
(Id. at 808 [2939].)

In light of the Employer's position that certain strikers and UFW supporters were agents of the Union, it is necessary to briefly review what is required to establish agency. The Board has held that the burden of proof in determining union agency is on the party asserting the agency relationship. (San Diego Nursery (1979) 5 ALRB No. 43, p. 7.) The Board held in San Diego Nursery that the fact that employees sought advice and met with UFW officials during the organizing campaign is insufficient to establish apparent authority under the ALRA. (Id. at p. 7.) Otherwise, the ability of unions, "to advise and encourage workers wishing to seek Union representation" would be hindered because of the potential liability for the misconduct of

individual employees and would also infringe employees' section 1152 rights to self-organization. (Id. at p. 7.)

Again, the Kux decision is instructive,

'Generally, a union is not responsible for the acts of an employee, unless the employee is an agent of the union.' Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 355 [114 LRRM 2233] (6th Cir. 1983). The conduct of pro-union employees will only be attributed to a union where the union has 'instigated, authorized, solicited, ratified, condoned or adopted' the conduct. Id. 'The test of agency in [a] union election context is stringent, involving a demonstration that the union placed the employee in a position where he appears to act as its representative; it is not enough that the employee unilaterally claims representative status.' Tuf-Flex Glass v. NLRB, 715 F.2d 291, 296 [114 LRRM 2226] (7th Cir. 1983) (emphasis in original) (citation omitted).

(Kux Manufacturing Co. v. NLRB (6th Cir. 1989) 890 F.2d 804, 809 [132 LRRM 2935, 2939].)

The Employer here did not establish that the UFW expressly granted authority to any worker or striker. Rather, Efren Barajas' testimony is unrebutted that the only authorized UFW agents besides himself in the Ace election were Zeferina Perez Garcia, Augustin Ramirez, Efraiel Edesa and Jose Morales. Nor has the Employer established apparent authority which would require some type of ratification or acquiescence from the UFW. (Furukawa Farms, Inc. (1991) 17 ALRB No. 4, pp. 15-18.)

In Kux, a union organizer had employees form an In-plant Organizing Committee (IPOC) for the purpose of soliciting union authorization cards and persuading employees to vote for the union. The committee members solicited support for the union at work and attended organizational meetings where they assisted the union organizer in answering employee questions. In

addition, the organizer told workers that they could contact one of the committee members if they could not reach the organizer. Some committee members engaged in threats of job loss once the union got in as well as physical threats. However, the court affirmed the Board's ruling that since membership in the IPOC was open to all interested employees and its sole function was to distribute information and solicit authorization cards, the IPOC members had so few responsibilities and such limited authority that no one would mistake them for agents. (Id. at p. 29-39.)

Similarly, after the Union took over the strike late in the morning of July 26, some members of the committee then became UFW supporters and helped to gather support for the Union regarding the strike and, presumably, for the election. There is no substantial evidence that Barajas authorized the strikers to be in a position where they would appear to be representatives of the Union. Nor is there evidence that Barajas or other Union agents ratified, condoned or adopted the conduct of the strikers.

In Kux, the company also argued that an employee who is not a member of the IPOC was an agent of the union because he was so active and vocal in his support for the union. The court held, however, that there was no evidence that the union organizer ever authorized this employee to speak on behalf of the union, nor was there evidence that he endorsed any of the employee's statements or that he even knew that the employee was making such statements. "Evidence which merely shows that an employee spoke and acted in support of unionization on his own

initiative does not demonstrate agency status." (Id. at p. 2940.)

In a recent decision, this Board has found pickets who are UFW supporters not to be Union agents. (Triple E Produce Corporation (1991) 17 ALRB No. 15.) The facts in Triple E were very similar to the ones in the instant matter. There was a strike situation which was the product of independent employee action implemented prior to the intervention of the UFW. As was the case with Triple E, the strike at Ace included picketing, epithet calling, and demonstrations of hostility toward replacement employees. It is also accurate that when engaged in picket line activities, the striking Ace employees were acting in the same manner basically as they had prior to the involvement of the Union. And, some of the pickets, like the Triple E pickets, did wear UFW buttons and carried UFW flags after the Union took over the strike.

In Triple E, the Board held that, "the pickets comprised a 'large and amorphous' group whose members were not necessarily viewed as Union agents by nonstriking employees. Campaign activity alone does not establish the requisite close connection with the Union. (Certain-Teed Products Corp. v. NLRB (7th Cir. 1977) 562 F.2d 500, 509-510 [96 LRRM 2504].)" (Id. at p. 8; see also Pleasant Valley Vegetable Co-op (1982) 8 ALRB No. 82 where the Board stated it would not base a finding of agency on weak evidence because "the consequences of Union agency by 'apparent authority' often are contrary to the self-

organization rights guaranteed under section 1152 of the Act." Id. at pp. 7-8; see Agri-Sun Nursery (1987) 13 ALRB No. 19 at p. 6; Matsui Nursery, Inc. (1983) 9 ALRB No. 42 at p. 4.)⁹³

In Stripco Sales v. NLRB (7th Cir. 1991) 137 LRRM 2544, the court of appeals rejected an employer's claim that a union had engaged in intimidation and coercion of workers by vandalizing the automobiles of a bargaining unit employee who refused to sign a union card and a supervisor. Both individuals told other workers that the union was responsible for the property damage. The worker's car was vandalized in the employer's unfenced parking lot and the supervisor's car was vandalized in front of his home, both incidents occurring about a month before the election. However, the employer was unable to persuade the NLRB that there existed a sufficient connection between the vandalism and the union. The court agreed with the NLRB that the union was not responsible for acts of vandalism and the court upheld the election. (Id. at p. 2548.)⁹⁴

⁹³In Certain-Teed Products Corp. v. NLRB (7th Cir. 1977) 562 F.2d 500, the court held that members of the in-plant organizing committee who were involved in leafleting and encouraging employees to sign authorization cards were not union agents. There were no specific members of the in-plant organizing committee, and anyone who attended a meeting could be a member. In addition, union organizational literature and buttons were available to all employees to take. Nor did the union organizer ask specific employees to solicit cards or leaflets. Although this case did not involve threats but rather related to comments about the waiver of initiation fees, it is instructive for its discussion of union agency. (Id. at pp. 509-510.)

⁹⁴The Employer cites Avis Rent-A-Car System, Inc. (1986) 280 NLRB 580 for the proposition that pickets are held to a very

(continued...)

In Kitchen Fresh, Inc. v. NLRB (6th Cir. 1983) 716 F.2d 351, the court of appeals upheld the NLRB's finding that a principal of the in-plant organizing committee was not an agent of the union regarding the circulation of certain rumors. The court states that the party seeking to prove that a worker is a union agent must show that the union instigated, authorized, solicited, ratified, condoned or adopted the employee's actions or statements. (Id. at p. 355.) To clothe an employee with apparent authority to act on behalf of the union, the party seeking to hold the union responsible must show that the employee received from the union sufficient authority to create a perception among the other workers that the employee acts on behalf of the union and that the union failed to repudiate or disavow the worker's statements or actions. (Id. at p. 355.) Finding that the principal in the in-plant organizing committee was not an agent of the union, the court noted that the worker held no formal position with the union. Even though the record established that the worker was clothed with some authority to

⁹⁴(.. .continued)

high standard of conduct and that unions have an affirmative obligation to control the actions even of unidentified pickets and cannot escape responsibility by simply asserting that the union agents were not present when the misconduct occurred. (Id. at p. 580, fn. 3.) In that case, the NLRB found the union responsible for certain picket line misconduct and applied a stricter standard in evaluating the misconduct than would have been applied had only third parties or union supporters been found responsible. The IHE in Triple E Produce Corp., *supra*, specifically held Avis to be inapplicable precedent under the ALRA. The Board obviously agreed with the IHE's conclusion. I therefore decline to apply Avis.

act on behalf of the union, it appeared that the union disavowed the rumor.
(Id. at p. 355.)

At different points in the hearing, the Employer asserted that such individuals as Francisco Naranjo, Juan Naranjo, Alfredo Naranjo, the Camacho brothers, Jose Andrade and John Aguirre were agents of the UFW. There was, however, a failure of proof to establish that the Union through Efren Barajas or any of the other four Union agents (Augustin Ramirez, Zeferina Perez Garcia, Efraiel Edesa or Jose Morales) expressly granted authority to any of these individuals or to anyone else. According to Barajas' credited testimony, only he and the four aforementioned individuals were Union agents or representatives during the Ace election campaign.

Nor did the Employer establish that any of the alleged agents had apparent authority to bind the Union. Board precedent is clear that strikers and workers on the picket line do not become union agents without more. (See Triple E Produce Corporation, supra.)

As the Employer has failed to carry its burden to demonstrate that certain named individuals were Union agents, it must now be determined which standard to use to evaluate the conduct of the Union supporters and strikers. Of course, where a party is involved and found responsible for certain activity, a stricter standard will be applied. For example, if the misconduct is attributable to the union, an election will be set aside if it may reasonably be said to have affected the outcome

of the election. (See Baja's Place (1984) 268 NLRB 868.) Where, however, there is no substantial evidence of union responsibility or complicity, then the Board applies a third-party standard. "The test for setting aside an election because of third-party conduct is whether the conduct was so aggravated that it created an atmosphere of fear or reprisal making employee free choice impossible." (Triple E Produce Corporation, supra; id. at pp. 8-9.) In other words, both the ALRB and NLRB give less weight to misconduct attributable to Union supporters or workers than to Union officials, organizers or agents. (T. Ito & Sons Farms (1985) 11 ALRB No. 36 at p. 10; see also Agri-Sun Nursery (1987) 13 ALRB No. 19.)

I note that in two recent Board decisions the margin of victory is considered as a factor in assessing whether the election should be set aside. (Triple E Produce Corporation, supra, see IHED at p. 50; Furukawa Farms, Inc. (1991) 17 ALRB No. 4 at p. 33.)

The Employer cites in its brief several cases which should be discussed. In Steak House Meat Company, Inc. (1973) 206 NLRB 28, the union received four votes and no union received three. A 16-year old part-time employee was threatened with death by a co-worker if he voted against the union. The co-worker brandished a knife at the time. A week later and a week prior to the election, the same co-worker threatened the employee again. Several days prior to the election, the young worker who had been threatened was again threatened by another co-worker if

the union lost the election. As a result of these threats, the young worker did not vote.

Although none of the threats were attributable to the union, the national board set aside the election because of threats of bodily harm and reprisals directed at a 16-year old employee with the obvious aim of influencing him to vote for the union. The national board found that under the circumstances the character of the misconduct was so aggravated that it created an atmosphere of fear and reprisal rendering a free expression of choice impossible. (Id. at p. 29.)

In Sequatchie Valley Coal Corporation (1986) 281 NLRB 726, the national board set aside the election based upon third-party conduct which included a threat to a co-worker to "burn him out." The threat was followed within a couple of days by the perpetrator of the threat visiting the homes of the neighbors of the victim bragging about burning out the victim and his wife. The victim of the threats spoke with six other employees about this threat.

Another co-worker threatened the same individual by stating that unless he supported the union, he would "sick" the maker of the threat on him.

Yet another co-worker told the victim that if the union did not get a contract within a couple of months, there is going to be a strike and "that's when the killing would start." The co-worker then elaborated that "Union people have people in the woods to do that." (Id. at p. 726.)

There were yet other threats of violence including shooting and choking. The union's margin of victory was 31 to 19.

In light of this series of serious threats which were disseminated among a significant number of employees, the national board found that the cumulative effect of these threats created an atmosphere of fear and coercion which precluded a fair election.

In Teamster Local 703 (Kennicott Brothers Company) (1987) 284 NLRB 1125, union agents threatened an employee with physical harm and then brutally assaulted the employer's president and its manager in the presence of approximately 15 unit employees and customers. The national board set aside the election even though the incidents of threats and violence occurred three months prior to the election. The union had won the decertification election by a 12-10 margin.

In Sub-Zero Freezer Company, Inc. (1984) 271 NLRB 47, the NLRB set aside an election based on third-party threats of a very serious nature. The threats included threats of physical violence and damage to automobiles. The threats occurred in the context of a significant amount of property damage and the man making the threats was much larger than the two women against whom the threats were made. In addition, the person making the threats underscored the threats when he waited outside the lunchroom on election day, "scrutinizing the voters." (Id. at p. 1523.) Further, many employees were aware of the threats and

the election was so close that a change in just one vote would have resulted in a different outcome.

In light of my findings that no Union agent made any threats and that no third party made any threats comparable to the ones discussed in the above-cited NLRB cases and considering the Union's large margin of victory, I find those cases distinguishable and inapplicable to the facts of the instant matter.

Likewise, the two ALRB decisions cited by the Employer are also distinguishable. In T. Ito & Sons Farms, supra, there were threats of job loss, threats to call the migra (the Immigration and Naturalization Service), and threats made on election day. The threats in Ito had two purposes which were to coerce workers to join the strike and, on election day, to vote for the union. (Id. at p. 16.) The Board found that, "the threats were widespread, directed at a large portion of the voting unit (i.e., nonstrikers), repeatedly made, accompanied by some acts of force, and made during the time workers were waiting in line to vote." (Id. at p. 16.)

In the instant matter, I have found that threats were not widespread, were not repeatedly made, nor were they accompanied by some acts of force. Further, there were no allegations of threats made on election day and I find that none were made on election day or the day before the election. Nor were there any threats to call the migra or that replacement workers would lose their jobs. (Id. at p. 16.) Finally, there

was no rejuvenation of threats at or near the time of the election.

In Ace Tomato Company, Inc. (1989) 15 ALRB No. 7, the Board found that incidents of actual, as opposed to merely threatened, violence occurred on the day of the election itself and within the three days leading up to the election. (Id. at p. 4.) The Board pointed to an incident where three days before the election Union supporters bombarded the car of a labor consultant with tomatoes and hard dirt rocks, surrounded it while pounding on it with their fists, and rocked the car as if intending to overturn it. This occurred before a substantial portion of the work force. Further, on the same day strikers bombarded some crew members with hard dirt clods and unripe tomatoes. Some of the workers who were struck with the clods and/or tomatoes actually cried out in pain. At least 150 persons observed this assault. (Id. at p. 6.) Then on the day of the election, a car containing an employer labor consultant was surrounded in or around the polling area by 70 union adherents who attacked the car with hard dirt clods and unripe tomatoes. The car was then rocked by 30-35 of the union supporters. The Board pointed out that these incidents of violence and assaults were witnessed by a very substantial number of employees.

In the instant matter, no such violent conduct occurred. There were no instances of violence or assaults against Employer labor consultants. Nor was there any improper conduct on election day. Further, whatever tomato or dirt clod

throwing incidents occurred took place before the UFW assumed control of the strike on July 26. Based on the record testimony and my viewing of the video tapes provided by the sheriff's department, I find that the UFW made efforts to monitor picket lines and control the pickets. On several occasions I observed Efren Barajas and Zeferina Perez Garcia waive pickets back to the edge of the street and away from the field. After the UFW took over the strike, there was no repetition of the type of field rushing that occurred on July 24 prior to the time the UFW took over. Although I have found that one woman may have been hit by a tomato on July 24 (although neither the supervisors nor co-workers were able to identify this woman and she did not testify), I find that this incident is isolated, occurred before the UFW took over the strike, and did not affect the atmosphere of the election. Unlike the situation in Ito where the Board found that four strikers punctured the tire of a vehicle of a non-striker parked at the edge of the field, I am unable to find on the credited testimony that strikers caused vehicle damage to replacement workers.

Though the above two cases are clearly distinguishable from the instant matter, it is important to note that in both of those decisions the Board used an objective standard by which they evaluated and measured the misconduct. For example, in Ito the Board held that the subjective reaction of the employer's general manager to an assault was "irrelevant to a determination as to whether Vasquez' actions would reasonably tend to coerce

the 50 employees who witnessed the incident or those who may have heard about it. (See Triple E Produce Corp., supra, 35 Cal.3d 42.)" (T. Ito & Sons Farms, supra, 11 ALRB No. 36 at p. 15, fn. 14.) In other words, the subjective reaction of a person threatened or otherwise coerced is irrelevant to whether the election should be set aside. (Id. at pp. 10-11.) Similarly, the Board in Ace Tomato Company, Inc., supra, relied on the Ito decision.

The Board's recent decision in Triple E Produce Corporation, supra, where the Board upheld a strike election in a very similar factual setting is clearly applicable precedent. Based upon my findings, the two factual situations compel the same result. And I have not found direct evidence of Union complicity in the misconduct which did occur.

Based upon the credited testimony as well as my review of the video tapes, there was a very substantial police presence at Ace fields as well as other fields throughout the strike. I have found that the UFW monitored the picket lines and the strike in a reasonable fashion and that the atmosphere actually improved after the Union took over. I have further found that whatever misconduct did occur was not in close proximity to a Union presence and was not ratified nor instigated by the Union. I have, therefore, applied the third-party standard to the misconduct which occurred on July 24 and July 26 as well as to other misconduct I have found on subsequent days. I have also found that, similar to the finding in Triple E Produce

Corporation, in the instant matter, "There was no consistent pattern of conduct revived through the election or designed to influence the manner in which employees would vote or whether they ultimately would vote at all. At most, the record reveals isolated and unconnected incidents in which striking employees sought to persuade their replacements to withhold labor in support of the strike." (Id. at pp. 10 and 11, fn. 4.)

I also note that the Union enjoyed a substantial margin of victory in the instant election similar to that found in Triple E.

Application of the appropriate legal principles discussed above to the specific findings I have made indicate the following.

The most unruly striker behavior occurred on July 24 at Turner Ranch before the UFW took over. I have found that the Union was not involved regarding any of the incidents at Turner Ranch and that Efren Barajas was not present at the ranch. I further found that a majority of the workers at Turner Ranch had left the field before the tomatoes were thrown and that many of these workers actually joined the strikers. The Employer did not prove that the workers were coerced out of the field. Luis Magafia and the committee were leading the strikers who did go into the field on that date. Of the 30-50 strikers who came to the field, only a few of them actually entered the field to any substantial extent and engaged in throwing tomatoes. Although one woman might have been hit by a tomato, the incident was

isolated. I have found that the strikers who went to that field were not engaged in making serious threats to the pickers but rather exhorted them to stop picking and join the effort to get a pay increase. Another mitigating factor is the presence of deputy sheriffs for at least part of the time that the strikers were on the property and their presence when the workers were leaving the property. Applying the third-party standard to these incidents, I find that they do not rise to the level requiring that the election be set aside either when considered individually or cumulatively.

I have found that as the UFW did not arrive at Turner Ranch on July 26 until 1 or 2 p.m., the Union was not responsible for the incidents that morning when 15 or 20 strikers went onto the property. I therefore apply a third-party standard to events that occurred that morning, and I find that although there was a trespass, I have discounted Medina's testimony about certain alleged threats. There was no tomato throwing or dirt clod throwing and there were no assaults or batteries. There was a presence of deputy sheriffs who came onto the scene immediately after the strikers entered the field, and they succeeded in preventing a number of strikers cars from even reaching the field.

The UFW was not responsible for the pushing of vans which occurred that morning and the van pushing incidents were relatively minor in nature and would not tend to coerce workers. They were also isolated. Although the pushing of Modesto

Viveros' van appeared to be a more substantial incident, I have found, given the presence of sheriff's vehicles at Turner Ranch, and in light of the fact that the van was never in danger of being pushed over, that this incident did not produce a coercive atmosphere. Relatively few workers were affected.

I further found that the UFW did not authorize any type of access that day at Turner Ranch. Nor did the Employer establish that trespasses occurred onto the property after the UFW arrived between 1 and 2 p.m. Applying the third-party standard to incidents at Turner Ranch on July 26th, I find that they are insufficient to result in the setting aside of the election when considered either separately or cumulatively.⁹⁵

As to the visit to the home of Jesus and Alejandra Medina on July 26th in the middle of the afternoon, I found that the group of from 20-40 strikers and UFW supporters had a purpose of asking the Medinas of honoring the strike and not working for Ace. Since I found that the UFW was not present at nor did the UFW instigate the home visit, I have applied the third-party standard. Though there were shouts by some of the strikers calling Mr. Medina a chicken and although there was unhappiness with the Medinas for working during the strike, I found that no

⁹⁵In a case where two pre-election threats were made in the presence of an alleged supervisor, the Board did not presume that such threats were disseminated to the electorate. Rather, the Board found that the threats were isolated and not disseminated to more than one or two bargaining unit employees. The Board further held that in light of the Union's large margin of victory in the election that the threats could not be deemed to have affected the results of the election. (Sandyland Nursery Company, Inc. (1986) 12 ALRB No. 1.)

specific threats were made against the Medinas or to their property. Applying the third-party standard,⁹⁶ I find that the home visit was not so aggravated so as to require that the election be set aside. I also have found that the Employer failed to establish that the UFW was responsible for the puncturing of Mr. Medina's tires nor did the Employer establish that any other specific individual or group was responsible for the puncturing of the tires. Although the puncturing of Mr. Medina's tires is unfortunate, I cannot set aside the election based upon the tire damage. (See Avis Rent-A-Car System, Inc. (1986) 280 NLRB 580 where even in a case where the union was held responsible for damage to cars, including tire damage, the national board found such instances to be isolated and upheld the election. Id. at pp. 581 and 582; see also Stripco Sales v. NLRB (7th Cir. 1991) 137 LRRM 2544 where the national board upheld an election despite the vandalizing of the cars of a worker and a supervisor in the absence of a sufficient nexus between the vandalism and the union. Id. at pp. 2547-1548.)

⁹⁶Where the misconduct is not attributable to a union official, organizer or agent but rather is attributable to union supporters or workers, the test is whether, "It is so aggravated that it creates a general atmosphere of fear or reprisal rendering employee free choice impossible." (T. Ito & Sons Farms, *supra*, at p. 10.) Further, as previously discussed, "Whether a statement is coercive does not turn on an employee's subjective reaction but instead depends upon whether the statement reasonably tends to coerce an employee." (T. Ito & Sons Farms, *supra*, at pp. 10 and 11.)

I have found regarding the alleged threats to the family and home of supervisor Gracielo Viveros that such threats did not occur. Even if such a threat had been made, it was directed at a supervisor and there were no employees present. Nor was there reliable evidence that the threat was disseminated to agricultural employees. I decline to find that news of the threat was disseminated. (See Sandyland Nursery Company, Inc., supra.)

I have applied the third-party standard to evaluate the allegations regarding Mr. Medrano's van. Since there is no indication that Francisco Naranjo threatened Medrano or the workers in his van at Peters Market on July 26, I find there is no misconduct there. Regarding the firing of a pellet or the throwing of a rock causing a crack in Medrano's windshield, I have found there is no evidence that any agent or representative of the UFW was responsible for the incident. I further found that the evidence is not clear that either Juan or Francisco Naranjo or any other UFW supporter was responsible for the incident as neither Mr. Medrano nor his son were able to identify any of the passengers or the driver of the car which was in close proximity to the van when the incident occurred. Even were this windshield incident to be attributable to a UFW supporter or striker, it does not appear that workers in the van discussed the incident nor were they deterred from working at Ace subsequent thereto. Another factor is that this relatively minor incident occurred far away from any Ace field. (See also Avis Rent-A-Car

System, Inc., supra, 280 NLRB 580 and Stripco Sales v. NLRB, supra. 137 LRRM 2544.)

The Employer did not carry the burden of establishing that the window of Modesto Viveros' van was broken by strikers. Nor did it establish that the Union was in the vicinity or in any way responsible for the alleged breaking of the window. Further, using the third-party standard, I do not find that any aggravated misconduct occurred on July 27 at Turner Ranch.

No striker threatened Jesus Luna or any member of his family with guns at the labor camp during the strike. As the Union was not connected with this event, in applying the third-party standard I do not find that the strikers connected with the black van incident were engaged in any aggravated misconduct. Though damage to Jesus Luna's screen door caused by Francisco Naranjo is not to be condoned, the damage was minor and I do not find that Naranjo or any other striker threatened Mr. Luna or any member of his family during this incident. In addition, there were no other agricultural employees from Ace who were percipient witnesses to these events. Mr. Luna's testimony, as well as that of his son, that these incidents were discussed with other workers was unreliable. Nor do I find that damage caused to his tires is attributable to the Union or to any identified Union supporter or striker. (See Avis Rent-A-Car System, Inc., supra, 280 NLRB 580; and Stripco Sales v. NLRB, supra, 137 LRRM 2544.)

The Employer did not establish that any misconduct affecting the election occurred at Turner Ranch on July 28th.

Regarding events at the Dellaringa Ranch on July 27, I find that there was a trespass but that the strikers who reached the edge of the field did not enter the field or engage in any field rushing or the throwing of tomatoes or dirt clods. I further find that the trespass was without the permission and probably without the knowledge of Barajas or the UFW agents. There was no aggravated misconduct at this site.

Nor did the Employer prove that any specific threats were made or that an atmosphere of coercion was created by the unauthorized access which occurred at Turner Ranch on August 3. There does not appear to be a presence of Union agents, and I have therefore applied the third-party standard. I note that there was a substantial presence of deputy sheriffs and in fact a sheriff's vehicle escorted a van of 5 or 6 workers out of the ranch. As no threats were made, I find that this incident considered either separately or cumulatively should not result in the setting aside of the election.

I have also found with respect to events at the Tully and Comstock Ranch on August 4 that the cousin of Oscar Eguis was not hit by a tomato or nut. Although the passenger window of Eguis' truck was broken, it was not clear how it was broken or by whom. There is certainly no evidence that a gun was used contrary to the assertion found in the Employer's brief. Nor is there any indication that any worker observed the window being broken or that a UFW agent knew about or authorized the breaking of the window. Only a few workers found out about the broken

window and I don't see how that could affect that outcome of the election.

(See also Avis Rent-A-Car System, Inc., supra, 280 NLRB 580, and Stripco Sales v. NLRB, supra, 137 LRRM 2544.)

Applying the third-party standard, I have concluded that the messages and epithets shouted by strikers to the workers did not create an atmosphere of fear and coercion. For most of the time the workers were a substantial distance away from the pickets and there were a number of police vehicles. My review of video tapes indicates that at many of the picket sites there were Highway Patrol vehicles present in addition to sheriff's vehicles. At this particular ranch there were a number of police vehicles. Instead of aggravated misconduct, what occurred at this ranch was typical picket line activity with some profanity and epithets but no coercive threats.

The Employer did not establish the a UFW agent made the remarks testified to by Mr. Medina at Celli Ranch on August 7. As it was Mr. Medina that began whatever exchange occurred, I find that the access taker was not singling out Mr. Medina. Further, Medina's testimony was too vague and unreliable to support a finding that anyone made a threat to him.

Although Union agents (Barajas and Augustin Ramirez) were present on August 7 at Stefani field, I have found that Union agents did not make any threats and that the brown and white van was not blocked but rather its occupants voluntarily chose to honor the strike. Nor did any pickets engage in any

misconduct. I note that there was no access taken that day at Stefani Ranch.

On August 7 or August 8 at Dellaringa, 40-45 strikers entered the ranch and went to the field where workers were picking. Although they did trespass onto the Employer's property, the evidence does not indicate that they engaged in any coercive behavior of an aggravated nature which would justify setting aside the election.⁹⁷

In a separate incident on or about August 7 when the UFW had a valid NA on file, Board agent Cuellar's order allowing access was reasonable and correct. The UFW access takers who went into the field pursuant to Cuellar's order talked to workers for no more than 30 minutes and they did not violate the access regulation. I find they did not engage in any misconduct which could be the basis to set aside the election.

The record evidence concerning events at Dellaringa on August 8th or 9th does not support a finding that UFW supporters pushed three workers trying to enter the property on foot. First, it is rather unlikely that if, in fact, a worker's vehicle was blocked by a number of pickets, that the workers would get out and try to enter on foot. Eguis' testimony about the incident was too vague and unreliable to support a finding. Further, the failure of Ismael Viveros, Eguis' supervisor, to

⁹⁷Oscar Eguis testified that some of the workers who departed the field gave rides to the strikers. He then stated that all of the strikers were given rides by the workers. This is yet another indication that there was not an atmosphere of coercion. (Tr. X:106-107.)

testify about the alleged pushing incident raises additional questions as to whether it actually occurred. I have found that no such pushing incident occurred.

As I found that the UFW had a right to take access at Sanguinetti on August 8, I find that the Employer has not established any access violation. Part of the 45 minutes spent by the access takers on the property was spent getting to and leaving the field where the workers were. At most, there was a de minimus access violation, but certainly there was no coercion involved. Nor did the Employer establish that Zeferina Perez Garcia engaged in misconduct when she was observed looking at license plates and making writing motions on a pad of paper.

Finally, I have found Mrs. Medina's testimony regarding alleged threats on August 9th at some Ace field to be too vague and unreliable to support a finding.

1. Conclusion

Based upon my findings of fact and analysis, I have concluded that no aggravated misconduct occurred and that workers were able to freely decide whether or not to select the Union during the election. No UFW organizer or agent made any threats nor did Union supporters or strikers make threats. There is no evidence that any worker failed to vote and it does not appear from the record that any arrests were made.

Whatever relatively minor misconduct occurred was probably not disseminated to a significant segment of the work

force. I, therefore, recommend that this objection be dismissed.⁹⁸

B. UFW Access Violations

The Employer has asserted that the UFW engaged in a number of violations of the Board's access rule. Title 8, California Code of Regulations, section 20900, et seq. sets forth the rights and responsibilities as well as limitations when a Union wishes to take access onto an employer's property. If the Union takes excess access or otherwise violates the Board's access rules, an election can be set aside if the Board determines that such conduct affected the results of the election.

In Ranch No. 1, Inc. (1979) 5 ALRB No. 1, the Board stated that it has refused to set aside elections where there was minimal or insubstantial encroachment upon the employer's premises beyond the scope of the access rule. (Id. at p. 6.) In refusing to find that the excess access in that situation required the setting aside of the election, the Board stated that there was no evidence to indicate that the violations were of such a character as to create an intimidating or coercive impact on the employees' free choice of a collective bargaining representative. (Id. at p. 6.) Similarly, in the only instance

⁹⁸The Employer asserts at p. 60 of its brief that counsel for the UFW made racist remarks. (See p. 60, fn. 37.) Had I believed that any racist remarks were made by any party representative, I would have quickly admonished such representative to refrain from making inappropriate remarks. My review of the record clearly indicates that counsel for the UFW did not make any racist remarks.

where the Employer has established that Union access takers may have exceeded the Board's access rule (at Sanguinetti Ranch on August 8), I find that whatever violations may have occurred were de minimus and did not establish a coercive atmosphere.

Although I have found that strikers did trespass on Ace fields several times during the strike (July 24 at Turner Ranch; July 26 at Turner Ranch; July 27 at Dellaringa Ranch; August 3 at Turner Ranch; and August 7 or 8 at Dellaringa Ranch), I have found that the Union did not initiate or authorize such trespasses nor did the Union condone or ratify these trespasses. I have previously discussed each of these incidents in detail and I have found that none of them constituted the type of aggravated misconduct which would require the setting aside of the election either considered individually or cumulatively.

I therefore recommend that the Employer's objection regarding UFW access violations or trespasses be dismissed.

C. ALRB Agents Authorizing the Taking of Access

The Board addressed an allegation in Triple E Produce, Inc., supra, that a Board agent displayed bias by authorizing work site access notwithstanding the employer's denial of such access due to alleged violence. The Board held that the Board agent's ruling could not have affected the results of the election. (Id. at p. 3.)

In the instant matter, there is no evidence that the Employer was opposed to access because of alleged violence. Rather, the owner of Dellaringa Ranch told attorney Price that he

did not want any vehicles on his property not involved in the harvest because of liability concerns. In any event, because the UFW had filed a valid NA, it was entitled to take access at that ranch on that date. Therefore, Board agent Cuellar's order allowing access was reasonable and correct. Neither the discussions or caucuses leading up to Cuellar's advising the Employer that access would be permitted were overheard by any workers nor were they communicated to any workers or strikers. I will therefore follow the Board's decision in Triple E Produce Corporation, supra, and recommend that this objection be dismissed.

D. Peak Objection

When the Executive Secretary transferred the Union's motion for summary judgment regarding peak to the investigative hearing examiner, I reviewed the motion and all of the supporting and opposing pleadings to determine if there was a prima facie case requiring that objection be heard. This was analogous to what the Executive Secretary does when initially screening an objection. (See Cal. Code Regs., tit. 8, § 20365.) Although the Executive Secretary had previously set the peak objection for hearing, the Union's motion for summary judgment based upon a new intervening Board decision, Triple E Produce Corporation (1990) 16 ALRB No. 14, made it necessary to reexamine the Employer's objection in light of the new Board decision.

In Triple E the Board specifically held that because of the court of appeal's decision in Adamek & Dessert, Inc. v. ALRB

(1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366], the Board could no longer average the pre-petition or eligibility payroll employment figures. The Board therefore invalidated Title 8, California Code of Regulations, section 20310(a)(6)(B). The Board also found that the Adamek decision would apply to a prospective peak case, such as the instant case, as well as a past peak case. The Board went on to hold that, "We will continue to require first the 'body count' comparison of actual employees on the eligibility and peak period payrolls and then, if a finding of peak is not obtainable by that method, the Saikhon approach approved in Adamek or other appropriate methodologies, in both past and prospective peak cases as the nature of the circumstances warrants." (Id., at p. 6.)

As I have found that the body count for the eligibility period is 376 and that the projected average number of daily positions during the 1989 peak was estimated at 676 and since 376 is more than 50 percent of 676, I find that the peak requirement was met and that the Employer's objection should be dismissed.

E. Bargaining Unit

The Board has stated that it has a preference for state-wide bargaining units. (See Prohoroff Poultry Farms (1983) 9 ALRB No. 68 and Foster Poultry Farms (1987) 13 ALRB No. 5.)

As I have found that Ace did employ workers in 1989 in a number of counties in the San Joaquin Valley and Sacramento Valley areas, and because a significant number of these workers worked at Ace's operations in San Joaquin County and worked for

some of the same labor contractors and supervisors, I recommend that the Board certify a bargaining unit consisting of all the agricultural employees of the Employer in the State of California.

RECOMMENDATION

I recommend that all five of the Employer's objections set for hearing be dismissed and that the UFW be certified as the collective bargaining representative of the Employer's agricultural employees in a unit consisting of all the Employer's agricultural employees in the State of California.

Dated: January 15, 1992



ROBERT DRESSER
Investigative Hearing Examiner