Morgan Hill, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

STEAK-MATE, INC.,	Case Nos.	
Respondent,	80-CE-210-SAL	80-CE-309-SAL
and	80-CE-211-SAL	80-CE-312-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	80-CE-213-SAL	80-CE-318-SAL
Charging Party.	80-CE-214-SAL	80-CE-319-SAL
	80-CE-215-SAL	80-CE-320-SAL
	80-CE-217-SAL	80-CE-321-SAL
	80-CE-240-SAL	80-CE-322-SAL
	80-CE-242-SAL	80-CE-323-SAL
	80-CE-243-SAL	80-CE-324-SAL
	80-CE-244-SAL	80-CE-325-SAL
	80-CE-247-SAL	80-CE-326-SAL
	80-CE-248-SAL	80-CE-327-SAL
	80-CE-274-SAL	80-CE-328-SAL
	80-CE-275-SAL	80-CE-333-SAL
	80-CE-276-SAL	80-CE-335-SAL
	80-CE-277-SAL	80-CE-336-SAL
	80-CE-281-SAL	80-CE-339-SAL
	80-CE-289-SAL	80-CE-340-SAL
	80-CE-290-SAL	80-CE-341-SAL
	80-CE-291-SAL	81-CE-4-SAL
	80-CE-294-SAL	81-CE-5-SAL
	80-CE-295-SAL	81-CE-6-SAL
	80-CE-296-SAL	81-CE-8-SAL
	80-CE-297-SAL	81-CE-12-SAL

9 ALRB No. 11

DECISION AND ORDER

On August 17, 1981, Administrative Law Judge (ALJ)[1/] Joel Gomberg issued his attached Decision in this proceeding. Thereafter, Steak-Mate, Inc. (Respondent) and General Counsel each timely filed exceptions to the ALJ's Decision and an accompanying brief. The United Farm Workers of America, AFL-CIO (UFW or Union), the Charging Party, timely filed a brief in reply to Respondent's

[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

exceptions.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

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

Denial of Access to Board Agents

General Counsel excepted to the ALJ's conclusion that Respondent did not violate the Agricultural Labor Relations Act (Act or ALRA) by denying access to Board agents who attempted to enter Respondent's property on September 16, 1980, to advise employees about the filing of an election petition and to distribute information concerning the election. We find merit in these exceptions.

On September 12, 1980, the UFW filed a petition for certification as the exclusive collective bargaining representative of Respondent's agricultural employees. On the morning of September 15, Board agent Luis Viniegra spoke with Judd Brown, Respondent's general manager, stating that he was the agent in charge of investigating the petition for certification, and that he wanted to visit the plant and talk to employees. Brown indicated that he wanted to contact his attorney. Later that morning, a representative of Respondent telephoned Viniegra and advised him

[2/] All section references herein are to the California Labor Code unless otherwise specified.

that Respondent felt Viniegra did not have the legal authority to take access to Respondent's property. When Viniegra replied that he did have that right, he was told to contact Robert McIver at Respondent's Morgan Hill plant.

Viniegra and Board agent Luis Lopez met with Judd Brown at about 11:00 a.m. on the same day and showed him the election literature they wanted to distribute and read to the employees, including a notice of the filing of the petition, information relating to rights guaranteed to farm workers by the ALRA, and a handbook of employee rights, which includes a general description of the functioning of the Board. When McIver arrived shortly thereafter, the Board agents explained the election process to him and showed him the literature. McIver said he would be glad to post the literature, but would not allow Viniegra to read it to the employees. The Board agents were not allowed to distribute any literature on September 15,[3/] but they were permitted to address some employees and to distribute literature to employees on September 16 and 17.

Although the ALJ found that Respondent denied access to the Board agents and that Respondent's tone in discussion with Board agents could be characterized as "hostile" or "stonewalling," he concluded that Respondent had the right to deny the Board agents

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[3/] Viniegra testified that Respondent prepared its own written interpretation of the notice of the filing of the petition and posted it on September 15. When Viniegra observed one of the notices posted on a bulletin board, he explained to McIver that it did not include the information the Board agents wished to distribute. Viniegra also said that he did not want Respondent to interpret the Board's notice, but wanted to give the employees the Board's official notices personally.

access in the absence of a regulation authorizing such access. In support of his conclusion, the ALJ cited San Diego Nursery Co. v. Agricultural Labor Relations Bd. (1979) 100 Cal.App.3d 128. In that case, Board agents attempted to enter an employer's property, after the union filed a notice of intent to take access and a notice of intent to organize, but before a petition for certification was filed, in order to advise and educate the employer and its employees as to their rights and obligations under the Act. The court held that an appropriately drafted Board regulation authorizing such prepetition access for a limited purpose would not be prohibited by the Act, or by other state law, but that the Board agents could not take access absent such a duly promulgated rule, and that the employer therefore did not violate the Act by denying the Board agents access.

Contrary to the ALJ, we find that San Diego Nursery is inapposite here, since the Board agents in that case attempted to take access before a petition for certification was filed. In the instant matter, the UFW filed its petition on September 12, 1980, and the Board agents thereafter attempted to take access on September 15, to announce the filing of the petition. The Board agents sought to take access pursuant to section 20350(c) of the Board's regulations, which provides that:

> All parties shall be required, upon request by the regional director or his or her agent, to cooperate fully in the dissemination to potential voters of official Board notices of the filing of a petition and official Board notices of direction of an election and any other notices which, in the discretion of the regional director or his or her agent, are required to fully apprise potential voters of the time and location of an election.

In order to ensure a fair election in which employees can express a free and uncoerced choice, it is imperative that the employer as well as any labor organization(s) involved cooperate fully with the Board agents in the dissemination of Board notices concerning the election. The Board's desire to encourage such cooperation led to the promulgation of section 20350(c) of the regulations, cited above.

We find that the attempts of Board agents Viniegra and Lopez to take access to Respondent's property on September 15, to read and distribute the notice of the filing of a petition, were proper and authorized by section 20350(c) of the regulations.

The ALRA was enacted in 1975. Farm workers, who were excluded from coverage under the National Labor Relations Act, have had limited experience with the collective bargaining process and the rights guaranteed by the Act. Therefore, in order to conduct an election in which a maximum number of employees may participate, the Board must ensure that workers are notified when an election petition has been filed. So important do we consider this responsibility that we find it appropriate for Board agents to undertake such notification themselves, rather than relying solely on the parties to do so. Proper notification may necessarily call for entry by Board agents onto the employer's property, and our regulation section 20350(c) implicitly contemplates providing access to Board agents as an essential form of cooperation. We conclude that Respondent's denial of such access to Board agents in this matter tended to interfere with the employees' right to receive information concerning the filing of an election petition

and their right to vote for or against a union in a Board-conducted election, and therefore constituted a violation of section 1153(a) of the Act.[4/]

The Increase in Warnings and Suspensions

We affirm the ALJ's finding that General Counsel failed to prove that, after the election, Respondent increased the number of suspensions and warnings issued to employees because their boxes of mushrooms did not weigh enough. The ALJ found that three employees were suspended for low weights from the time Respondent installed scales, in the early months of 1980, until June 20, 1980, and that there were no further suspensions for low weights until September 30, shortly after the election. The ALJ also found that four employees received suspensions after the election. In her exceptions to the ALJ's findings, counsel for the General Counsel argued that there were six suspensions after the election, a 100 percent increase over the number of suspensions issued before the election. General Counsel's exhibit 26 shows that, from January 1, 1980, through September 19, 1980 (the day of the election), there were six warnings for low weights and three suspensions. From September 20, 1980, to the end of February 1981, there were eleven warnings and six suspensions. However, of the six suspensions,

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[4/] We reject Respondent's argument that it was required only to post and/or distribute the notice to its employees. We have elsewhere noted that because a high percentage of agricultural workers cannot read, the distribution or posting of notices, without an oral reading thereof followed by a question-and-answer period, makes it difficult to communicate adequately with agricultural employees. (See M. Caratan, Inc. (1980) 6 ALRB No. 14; Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal.3d 392.)

two employees each received two of the suspensions, and the ALJ therefore correctly stated that four employees received suspensions. We agree with the ALJ that the increase in warnings and suspensions for low weights after the election was insufficient to warrant an inference that Respondent increased the number of warnings and suspensions in retaliation for the Union's victory in the election.

We also affirm the ALJ's conclusion that Respondent violated section 1153(c) and (a) by disciplining its employees for mixing mushrooms and leaving long stems on the mushrooms, in retaliation for the workers' support for the Union in the election.[5/] We do not, however, believe that it was necessary for the ALJ to discuss each individual warning or suspension to determine whether the recipient employee had engaged in union activities, whether Respondent knew of the activities, and whether there was a causal connection between the union activities and the subsequent warning or suspension. Based on the evidence in the record and on The Larimer Press (1976) 222 NLRB 220 [91 LRRM 1379], enforced sub nom. M.S.P. Industries, Inc. v. NLRB (10th Cir. 1977) 568 F.2d 166 [97 LRRM 2403], the ALJ found that Respondent changed its standards for imposing suspensions and issuing warnings for mixing

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[5/] Respondent argued in its exceptions brief that it was never put on notice that it would have to justify any statistical disparity between warnings and suspensions issued prior to and subsequent to the election. We disagree. In its first amended consolidated complaint issued February 17, 1981, General Counsel alleged that since the September 19, 1980 election, Respondent had "instituted changes in work requirements and conditions, and embarked on a discriminatory course of conduct directed against UFW supporters and activists." We find that that allegation was sufficient to put Respondent on notice that the increase in suspensions after the election would be lititaged at the hearing.

mushrooms and leaving long stems in retaliation for the employees' support for the Union. By that conduct, he concluded, Respondent violated section 1153(c) and (a) of the Act, since it tended to discourage employees from supporting the UFW, and to interfere with and restrain employees in the exercise of their section 1152 rights:

> ... Respondent was not so much concerned with the individual activities of the employees involved as with the fact that a majority of the employees had voted in favor of the Union, and that it was determined to punish the employees for exercising their right of self-determination. Its change of policy, therefore, affected both prounion employees and those whose union sympathies were unknown, and thus discouraged union activities of all employees, union or non-union. The Larimer Press, supra, 222 NLRB at p. 240.

In order to find a violation of section 1153(c) and (a) for specific warnings and suspensions, it was not necessary that the ALJ find that each employee involved had engaged in union activity or other protected concerted activity, but only that the warnings or suspensions would not have been issued absent Respondent's change in its warning and suspension policy because of the Union victory in the election.

The ALJ did, however, discuss each employee individually, and concluded that the warnings and suspensions issued to Basilio Banuelos, Alfredo Bustos, Juventina Chambers, Juana Duran, Amalio Garcia, Salvador Garcia, Alfredo Hernandez, Luis Mejia, Miguel Rivera, and Antonio Tovar violated section 1153(c) and (a) of the Act, based on his finding that Respondent would not have issued the warnings and suspensions absent the employees' union activities. We affirm the ALJ's conclusions, as they are fully supported by the

record.

ORDER

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

1. Cease and desist from:

(a) Discharging, suspending, issuing warning notices to, or otherwise discriminating against any agricultural employee because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Interfering with, restraining, or coercing agricultural employees in the exercise of their right to communicate with union agents by denying agents access to its property in accordance with Board regulations.

(c) Interfering with its employees' right to receive information concerning the filing of a petition for certification and their right to vote for or against a union in a Board-conducted election.

(d) Changing its mushroom picking practices or any other term or condition of employment without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with respect to such changes.

(e) Threatening its agricultural employees with reprisals for supporting the UFW.

(f) In any like or related manner interfering with,

restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Offer to Refugio Franco and Jose Mendoza immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Reimburse the following-named employees for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55:

Basilio Banuelos	Jose Mendoza
Juventina Chambers	Inocencio Nunez
Juana Duran	Rogelio Parada
Refugio Franco	Miguel Rivera
Salvador Garcia	Antonio Tovar
Alfredo Hernandez	

(c) Expunge from its personnel records all notations concerning the disciplinary actions taken against the above-named employees and employees Alfredo Bustos, Amalio Garcia, and Luis Mejia, which we have found to be discriminatory in our Decision in this matter.

(d) If the UFW requests, rescind the changes Respondent instituted on November 23, 1980, in its mushroom picking practices, and, upon request, meet and bargain with the UFW concerning those changes and any other changes in its employees' terms and

conditions of employment.

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

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from July 1, 1980, until the date on which the said Notice is mailed.

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

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent

shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

Dated: March 17, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Steak-Mate, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by warning and suspending employees because of their support for and activities on behalf of the United Farm Workers of America, AFL-CIO (UFW), by warning and suspending employees because they engaged in a work stoppage to protest a change in their working conditions, by issuing warnings and suspensions for long stems and mixed weights because of our employees' support for the UFW in the election, by not allowing representatives of the UFW to enter our property to speak to our employees about the election, by not allowing Board agents to read and distribute a notice of the filing of an election petition, by threatening employees, by discharging Refugio Franco and Jose Mendoza because of their union activities, and by changing our mushroom picking practices without giving the UFW notice and an opportunity to bargain over the change. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because it is true that you have these rights, we promise that:

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

WE WILL NOT discharge, suspend, issue warning notices to, or otherwise discriminate against any agricultural employee because he or she has engaged in union activity or any other protected concerted activity.

WE WILL offer to rehire Refugio Franco and Jose Mendoza to their former jobs and will reimburse them for all losses of pay and other economic losses they have suffered as a result of our discrimination against them, plus interest.

WE WILL reimburse Basilio Banuelos, Juventina Chambers, Juana Duran, Salvador Garcia, Alfredo Hernandez, Inocencio Nunez, Rogelio Parada, Miguel Rivera and Antonio Tovar for all losses of pay and other economic losses they have suffered because we discriminatorily suspended them, plus interest.

WE WILL remove from the personnel records of the above-named employee, and employees Alfredo Bustos, Amalio Garcia, and Luis Mejia, all notations concerning the discriplinary actions taken against them.

WE WILL NOT threaten any agricultural employee with reprisals for supporting the UFW.

WE WILL NOT interfere with, restrain, or coerce agricultural employees in their right to communicate with union agents by denying such agents lawful access to our property.

WE WILL NOT interfere with the attempt of any Board agent to take access to our property in order to inform our employees about the filing of an election petition and their right to vote in a Board-conducted election.

WE WILL, if the UFW requests, rescind the changes we made in our mushroom picking practices, and we will, upon request, bargain with the UFW over those changes and any other changes in our employees' terms and conditions of employment.

Dated: STEAK-MATE, INC.

By: _____

Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California, 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Steak-Mate, Inc.
(UFW)

9 ALRB No. 11
Case Nos. 80-CE-210-SAL, et al.

The ALJ concluded that Respondent violated section 1153(c) and (a) when, after the Union won an election, it changed its standards for issuing warnings and imposing suspensions for mixed mushroom boxes and long stems. However, the ALJ recommended dismissal of the allegation that Respondent also violated the Act when, after the election, it issued more warnings and suspensions for mushroom boxes with low weights, and the allegation that the changes in warnings and suspensions affected union supporters more than other employees. The ALJ also concluded that Respondent violated section 1153(c) and (a) by issuing warnings or suspensions to, or discharging, certain employees because of their protected concerted activity, but that Respondent warned, suspended, or discharged other employees for legitimate business reasons.

The ALJ concluded that Respondent violated section 1153(a) of the Act by sending its employees a newspaper article which suggested that Respondent would close its mushroom operation if the Union won an election, by telling employees that a strike was inevitable if the Union won and that it would not agree to a contract but would replace strikers, and by telling employees they needed an excuse signed by an administrative law judge in order to be absent from work. However, the ALJ concluded that a foreman's instruction to employees not to speak about politics, religion, or sports during working hours did not violate the Act, and also recommended dismissal of allegations involving other alleged threats, changes in work rules, and the construction of a fence around Respondent's parking lot.

The ALJ concluded that Respondent violated section 1153(a) by interfering with a union representative's attempts to take access to Respondent's property, but dismissed charges alleging that Respondent interfered with union access on another occasion and unlawfully denied Board agents access to its premises.

The ALJ also concluded that Respondent violated section 1153(e) by unilaterally changing the duties of the mushroom pickers after the election, but found that no change was made in the punchers' duties. The ALJ found that the punchers were supervisors and recommended dismissal of all allegations pertaining to them.

BOARD DECISION

The Board affirmed the ALJ's conclusions, except his conclusion that Respondent did not violate the Act by denying the Board agents access to its property to advise employees about the filing of the election petition. The Board found that the Board agents' attempt to take access was proper and authorized by section 20350(c) of the

Board's regulations, which requires the parties to cooperate with the Board in disseminating to potential voters notice of the filing of an election petiton. The Board held that the regulation implicity requires employers to permit Board agent access as an essential form of cooperation, and concluded that Respondent's denial of Board agent access violated section 1153(a) of the Act because it tended to interfere with the employees' right to receive information concerning the filing of a petition and their right to vote for or against a union in a Board-conducted election.

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board
AUG 3 1 1981
RECEIVED
Exec. Secretary

In the Matter of:	)	Case Nos.
	)	
STEAK MATE, INC.	)	80-CE-210-SAL 80-CE-309-SAL
	)	80-CE-211-SAL 80-CE-312-SAL
Respondent	)	80-CE-213-SAL 80-CE-318-SAL
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and	)	80-CE-215-SAL 80-CE-320-SAL
	)	80-CE-217-SAL 80-CE-321-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO	)	80-CE-240-SAL 80-CE-322-SAL
	)	80-CE-242-SAL 80-CE-323-SAL
	)	80-CE-243-SAL 80-CE-324-SAL
	)	80-CE-244-SAL 80-CE-325-SAL
Charging Party	)	80-CE-247-SAL 80-CE-326-SAL
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		80-CE-296-SAL 81-CE-8-SAL
		80-CE-297-SAL 81-CE-12-SAL

APPEARANCES:

Arocoles Aguilar and
Maria Elva Maldonado
of Salinas
For the General Counsel

Michael Alden and
Robert Maxwell
of St. Louis
For the Respondent

DECISION

Joel Gomberg, Administrative Law Officer: These cases were heard by me on 14 hearing days from February 23 through March 26, 1981, in San Jose, California. A pre-hearing conference was held on February 3, 1981. The first complaint in this matter was issued on November 26, 1980. Complaints alleging additional violations of the Agricultural Labor Relations Act (hereafter the "Act") were issued on December 16, 1980, and January 24, 1981. Finally, a number of additional cases were consolidated with those already the subject of the earlier complaints in a First Amended Consolidated Complaint,[1/] dated February 17, 1981. The Complaint is based upon charges filed by the United Farm Workers of America, AFL-CIO (hereafter "Union" or "UFW") between September 8, 1980, and February 2, 1981. Each of the charges was duly served on the Respondent, which filed a timely answer to the Complaint and each of its predecessors.

During the course of the hearing, I granted General Counsel's motion to dismiss Cases 80-CE-210-SAL and 80-CE-276-SAL on the grounds of insufficient evidence. The allegations in the Complaint pertaining to these cases, Paragraphs 7(a) and (e), respectively, were also dismissed. The General Counsel also moved that Case 80-CE-297-SAL be severed as a result of the unavailability of the alleged discriminatee. I granted this motion. Paragraphs 7(y) and (bb) of the Complaint, which relate to this severed case, were dismissed without prejudice. Paragraph 7(r) of the Complaint was dismissed for lack of specificity. I denied the

1/For simplicity, I will refer to this document as "the Complaint."

General Counsel's request, made after the conclusion of its case-in-chief, to consolidate several other cases. I permitted the General Counsel to make a number of corrections and several amendments to the Complaint. These were reduced to writing and admitted into evidence during the hearing.

All parties were given a full opportunity to participate in the hearing. The UFW appeared informally at the pre-hearing conference, but chose not to intervene in the proceeding. The General Counsel and Respondent filed post-hearing briefs pursuant to Section 20278 of the Board's Regulations.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

The essential jurisdictional facts are undisputed. Respondent has admitted that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act, and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices.

As the 45 remaining charges indicate, the Complaint alleges that Respondent has committed numerous unfair labor practices, involving violations of Sections 1153(a), (c), (d), and (e). Most of the allegations relating to independent violations of §1153(a) involve events prior to the representation election of September 19, 1980,[2/] while most of the remaining alleged

2/All dates refer to 1980, unless another year is specified.

violations took place after the election. Respondent denies that it has violated the Act in any manner. With respect to the allegation that it discriminatorily discharged, suspended, demoted, or warned 23 employees, because of their participation in Union or other protected concerted activities, in violation of §§1153(a) and (c), Respondent contends that each employee would have received the same discipline whether or not he or she had engaged in such activities.

A. The Company's Operations

Steak Mate, a subsidiary of Ralston Purina Company, grows, packs and ships mushrooms at its plant in Morgan Hill. Of its approximately 300 employees, 120 are mushroom pickers, divided into 12 10-person crews. Another 50 to 60 employees work in the packing operation. The remainder of the employees are involved in the cultivation of the mushrooms, transporting materials from one part of the plant to another, maintenance, security, and supervision. The plant is run by a general manager, Jud Brown, who reports to Ralston Purina headquarters in St. Louis. He is assisted by a number of department heads, including the personnel director, Edward Perez; the production manager, John Stout; and the chief picking supervisor, Robert Lopez.

Lopez oversees the picking operation with the assistance of three plant supervisors, Frank Morado, Ramon Sosa, and Eddie Pena. Sosa became a plant supervisor on September 5, while Pena assumed that position on December 1. In addition to the 10 pickers, each of the 12 picking crews has an employee referred to as a "crew supervisor" by the Company and as a

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"puncher" by the mushroom pickers.[3/]

The term "puncher" is derived from one of his principal duties: punching a picker's time card to indicate the quantity of mushrooms picked. The card is used to determine both the picker's compensation under the piece rate system and to keep track of production. The punchers also assign the pickers to particular mushroom beds, direct those who finish their beds early to help slower employees, tell employees when they may move from one growing room (mushroom house) to another, and monitor the quality of the work being performed. They may order an employee to repick a bed and at times report bad work to their superiors. Punchers are also required to report the names of absent or tardy employees to the picking office. Although they have no authority to discipline employees, their recommendations are considered by Lopez, Perez, and the plant supervisors in making disciplinary determinations.

B. The Pre-Election Period

1. Early Talk About The Union:

Although Respondent's employees did not make contact with the Union until August 3, there was some discussion of unionization at the plant as early as June. Refugio Franco, a picker, spoke to his co-workers, including Rogelio Parada and Jose Mendoza, about the desirability of organizing on several occasions. Franco also solicited the support of his puncher, Jose Lozano. Lozano testified that Franco asked him if he would like to sign an authorization card. He refused, but he did sign one in September when Ramon Contreras offered him one. He did

3/ I will use the term "puncher" for the sake of brevity.

not tell any of his superiors about this conversation until the day of his testimony. Franco never mentioned in his testimony that he solicited the signing of authorization cards. Lozano remembered this conversation as having occurred early in July.

In mid-June, Perez had Morado summon Parada to his office to discuss Steak Mate's wage scale in relation to that of Monterey Mushroom, a company which had a collective bargaining agreement with the Union. According to Parada, Perez wanted to discuss some statements Mendoza had been making that morning. Perez told him that it "was not a convenient thing for me to be talking about the union . . . during working hours." Perez's version of the conversation is somewhat different. He acknowledged that he called Parada to his office because he had heard that Parada had been saying that irrigators were better compensated under the Monterey Mushroom contract than were the Company's workers. Perez denied that Mendoza's name had been mentioned and claimed that the word "union" came up only with reference to the Monterey Mushroom contract.

I credit Parada's testimony on this issue. Whether Mendoza's name was mentioned or not, it seems unlikely that Perez would have been informed of the name of only one of the persons involved in the discussion of wage rates. Moreover, it appears that the discussion must have involved more than the pay scale for irrigators, since neither Mendoza nor Parada was an irrigator and no other testimony concerning irrigators was taken in the course of a rather lengthy hearing. Further, Perez's warning not to talk about union matters during working hours is consistent both with the Company's no-solicitation rules and a number of

other similar statements admittedly made by Perez.

Alex Cortez, who has been employed by Respondent since 1977, testified that he had a conversation with Perez, around June, 1980, in which Perez questioned him about the Union and made a number of anti-Union statements. Perez stated that he had talked to Cortez many times, but never about the Union. Cortez was a rather combative witness and had more than the usual difficulty with remembering names and dates. The reference to June, 1980, was supplied by the attorney for the General Counsel conducting the direct examination. Cortez simply agreed that it was more or less around June. It seems highly unlikely that Perez would have developed an anti-Union argument which sounded like an election statement, in June, when there was no organized union activity in the plant. Perez rarely made a flat denial that a conversation involving him took place. Cortez's credibility is further undermined by his testimony that not a single puncher attended the Union organizing meetings in August, when there was much credible testimony from a number of employee witnesses that as many as half the punchers attended. I find that Perez did not speak to Cortez about the Union around June, 1980.

Luis Mejia, an employee of the Company for about eight years, testified that he was called to Perez's office where Perez questioned him about statements he had been making about unionization, compared the Company's benefits with those the Union had to offer, and cautioned him that it was not convenient to talk about these matters at work. Mejia was vague about the date of this conversation, but indicated that it took place more than a year before the hearing, which was held in

March, 1981. Perez testified that he had talked to Mejia many times over the years and had probably discussed the Union with him, although he could not recall any particular conversation. The pattern of this episode is strikingly similar to the one testified to by Parada.

2. The Discharge Of Refugio Franco:

Franco began working for the Company in 1977. At the time of his discharge, he was a picker, but he had previously been employed as a puncher and as a forklift driver.

As I have already noted, Franco discussed unionization with some of his co-workers and offered an authorization card to his puncher.

Prior to March 31, when he was issued a written warning for being absent and not calling in, Franco had not received any discipline from the Company. Although Franco was asked a number of questions about tardiness on cross-examination, Respondent introduced no evidence that Franco had a problem getting to work on time, with the exception of some vague references by Perez. On April 21, Franco was suspended for three days for unexcused absence and leaving the job without permission.

On June 28, following the Company's call-in procedure, Franco telephoned Lopez and sought permission to miss work because his pregnant wife was sick and might have to go to the hospital. Lopez gave his permission, but told Franco to bring a note from the doctor. Lopez's memory of this conversation was vague. He could not be sure whether Franco phoned or spoke to him in his office. Lopez remembered Franco saying that his wife had an appointment with the doctor. According to Franco, he

telephoned the doctor's office about 9:00. It was only then that he realized that the office was not open on Saturday. His wife soon felt better, so no further medical attention was sought. Franco returned to work the next day. He did not bring a note from the doctor, but no supervisor mentioned the incident to him. Meanwhile, the matter was brought to the attention of Perez, who telephoned the doctor's office and spoke to a nurse who told him that the office had been closed on Saturday and that Mrs. Franco had not been seen by the doctor. Perez then issued Franco a five-day suspension. The notice is dated July 1. Franco testified that he received the suspension notice on July 5, while Perez stated that he believed that Franco must have gotten it on July 1, 2, or 3.

On July 4, Franco was late to work. He telephoned Morado at about 6:20 and asked whether he would be allowed to come to work. Morado told him that it would not look good for him to be permitted to come to work late on a holiday. Respondent's practice with respect to permitting tardy employees to work has varied over time. According to Perez, until very early July, employees were sent home if they arrived late on a good picking day, but required to work if they were tardy on a slow day, in order to ensure that employees were not manipulating the piece rate system to their own advantage. However, because the system caused bad feelings among the employees, it was decided that all tardy workers would be permitted to work, with disciplinary decisions coming later. At least one employee, Jose Mendoza, was sent home when he arrived late in August.

Franco's five-day suspension was scheduled to run

from Monday, July 7, through Friday, July 11. Tuesday, July 8, was his crew's day off. Franco testified that he called Morado on Sunday, July 6, to clarify his suspension. He wanted to know if the day off was included in the five days. Morado replied that it did not count as a day of suspension and that he would have to take an extra day off. Franco elected to take July 6 off. Morado denied that this conversation took place and Franco was charged with another unexcused absence. It is clear that it is Respondent's policy not to count non-working days in calculating the length of a suspension. Therefore, Franco's suspension, as noted on the suspension form, only included four days. Perez testified that the suspension was scheduled to begin July 7 because it was convenient to have suspensions begin on a Sunday and run through the week. In fact, July 7 was a Monday, which lends some support to Franco's testimony that the situation required clarification. On the basis of these considerations, I find that Franco did speak to Morado on July 6 and that Morado told him to include that day in his suspension.

Perez testified that he decided to fire Franco on July 4 or 7. He determined that Franco was incorrigible and that a five or 10-day suspension would not improve his behavior. Respondent's clearly articulated policy in cases of absence or tardiness calls for a progression in discipline beginning with a warning, followed by suspensions of three, five and 10 days, and culminating in a discharge, provided that all the offenses occur in a six-month period. In his testimony, Perez seemed to place reliance on two other factors to support the departure from the Company's fixed policy. First, Mrs. Franco had twice sought Perez

out to ask for his assistance in finding her husband. One of these occasions was in late June, but there is no indication that Franco missed work in June, except on the 28th. Mrs. Franco, who was also employed by Respondent at the time, did not testify to rebut Perez's statements. While this evidence may support a contention that Franco was having marital problems, it does not reflect on his work performance. There was no testimony from any Company witness to dispute that Mrs. Franco was pregnant in June or to establish that she worked on the 28th. Perez, who testified that he generally investigated before issuing suspensions, did not speak to Franco concerning his absence from work on June 28. On the other hand, there is no evidence that Franco protested the suspension.

Perez also appeared to rely on problems that Franco was having getting to work on time. He testified that Franco had probably asked to switch from driving a forklift to being a picker because of this problem. Again, the record shows no discipline to Franco except for the two unexcused absences in March and April. According to Perez, he asked Priciliano Garcia, a puncher who was Franco's godfather, to warn Franco that his attendance problems were jeopardizing his job. Garcia testified that he did warn Franco that he was in trouble "because he missed an awful lot." A few days later he found out that Franco had been terminated. Perez testified that he spoke to Garcia about Franco in early or mid-June and explained that Mrs. Franco had complained that he was not at home and that Franco had been reported drunk in a car.

Franco was not informed that he had been fired until

he returned to the plant on July 11 to pick up his paycheck. He spoke to Perez, Morado, and Lopez in an effort to get his job back, but his efforts were unsuccessful. Franco said that Perez had agreed to rehire him if Morado concurred. Franco got Morado's permission but was not rehired. Perez and Morado denied that any such promises were made.

Franco testified that after he was fired he was told by Garcia that Perez had said that he had been fired because of his Union activities. Garcia testified that he had asked Perez why Franco had been fired and that Perez had said that with a record like his, Franco would have been fired with or without the Union. Perez testified that he was unaware of Franco's Union activities at the time of the discharge, but that after the election people began to say that Franco had been fired because of the Union. A few days after the election Perez told Garcia that these rumors were unfounded and that Franco would have been fired because of his bad record, regardless of his Union activities. On rebuttal, Franco testified that he spoke to Garcia about two weeks after he had been fired. In resolving the conflict in the testimony on this point, the Respondent urges me to bear in mind that at the time Perez spoke to Garcia in September, charges had already been filed alleging that Franco's discharge was discriminatory. In fact, the charge on this issue was not filed until October 2. I find that Garcia asked Perez about Franco's discharge shortly after it occurred. It simply makes no sense for Garcia to have brought up the matter more than two months later. Further, there is a conflict between Garcia and Perez about who initiated the conversation. It is far more likely that Garcia

would have been making inquiries on behalf of his godson immediately after he was fired than that Perez would bring up the subject after the election but before any charges had been filed. I do not credit Franco's testimony that Garcia reported that Franco had said that he had been fired because of his Union activity. Perez testified for about a day. I had ample opportunity to observe the caution with which he speaks and I find it incredible that he would have made such a damaging admission, either before or after the election.

3. Respondent's Prohibition Of Talk About Politics, Religion, And Sports:

Sometime in July, Perez went from crew to crew to tell the employees that they were to save discussions of politics, religion, and sports for non-work time, such as breaks and lunch. He cited the presidential campaign, boxing matches, and the offering of meat to Hindu employees, as examples of subjects that could lead to disputes and injuries on the job. Unionization was not mentioned.

Perez's testimony concerning the genesis of his visit to the crews is hard to follow. Apparently, there had been solicitation by Avon salespeople as well as jewelry salespeople among the Company's office employees, in violation of the Company's no-solicitation rule (an exception is made for the United Way). The resulting interference with work upset Jud Brown, who asked Perez to deal with the situation. This, according to Perez, was the impetus for reminding the pickers of the no-solicitation rule. The connection between the two events eludes me.

The Company has a separate no-solicitation rule by employees, as opposed to outside organizations, which prohibits solicitation for any cause during working hours. Again, the connection between no-solicitation rules and Perez's talk to the employees is hard to fathom. While Perez did not mention the Union, he did stress that working time was meant for work and not talk about other subjects. At that time, a garlic strike in the Gilroy-Hollister area was a topic of discussion among the employees. When Morado was asked about Company rules pertaining to what workers should not talk about, he replied: "no union activities, or politics, or things like that."

4. The Union Organizing Effort:

The garlic strike was big news in the Morgan Hill area. It involved several thousand employees and was in the headlines every day. Twenty-two representation elections were held and the organizing campaign spread from garlic to mushrooms. Although Perez denied it, I find that he questioned Parada about the cause of the strike.

In August, after Franco contacted John Brown, a UFW organizer, four or five organizational meetings were held among Respondent's employees. On September 4, the employees decided to sign authorization cards in the plant the next day, even if the Company found out. It is clear that the employees had not made their campaign open at the plant until this time, although Perez and Morado testified that they were aware of it by mid-August. Captains were named for each crew and job classification in the plant. Their duties included distributing authorization cards and literature, as well as speaking about the Union to fellow

employees and informing them about the time and place of meetings.

5. The Suspensions And Discharge Of Jose Mendoza:

Mendoza began working for Respondent in 1977. Prior to September, 1980, he had received several warnings for unexcused absences or being late to work, but he had never received a suspension. Mendoza was one of the employees with whom Franco spoke about the Union before his discharge.

On August 31, Mendoza arrived at work about 10 minutes late. He asked his puncher, Ramon Sosa, if he should punch in. Sosa told him to punch his card and then reported Mendoza's late arrival to Lopez. Mendoza testified that he asked Sosa whether he should punch in because, in the past when he had arrived late, he had been sent home. A warning notice issued to Mendoza on August 4 supports this testimony, despite Perez's assertion that workers who arrived late were never sent home after early July. When he was allowed to work, Mendoza assumed that his excuse (car trouble) had been accepted, but on September 2 he received a three-day suspension.

On Friday, September 5, the last day of his suspension, Mendoza came to the plant to get his paycheck and distribute authorization cards to crew captains. Without getting into unnecessary detail concerning his movements within the plant, it is clear that Mendoza was on both sides of the plant, including the wharf area, where straw from racetracks is delivered to the plant for eventual use as a growing medium. The wharf is off-limits to most employees because of the risk of the unsterile straw contaminating mushrooms in the growing rooms. The primary danger is that nematodes would be carried by foot to production

areas of the plant.

According to Mendoza, he requested and received permission from Lopez to visit a friend in the plant. Lopez denied that Mendoza asked for permission. I doubt that Mendoza asked Lopez for permission because he testified that he was unaware of any rule prohibiting his entry into the plant. Yet, Mendoza testified that he waited in the parking lot for the packing workers to take their break because he did not want to cause any trouble with the supervisors.

The Company's Employee Relations Manual contains a rule prohibiting employees from being present on Company property without express permission "except during working hours and reasonable periods before and after." That this rule was not always obeyed or enforced is evidenced by a memorandum from Perez to all the supervisors on August 11, exhorting them to: "remind our employees that they are not allowed on company property after work or on their day off (see Employee Relation [sic] Manual)."

Whether Mendoza asked for Lopez's permission to enter the property or not, it is clear that he did not ask to be permitted to distribute Union authorization cards. Mendoza no doubt understood that such a request would have been denied. Lopez testified that he asked Mendoza to leave on two separate occasions. First, Lopez stated that he found Mendoza crawling under a door in the case preparation area, where the growing conditions require strict sanitation procedures, including the filtering of the air. According to Lopez, he simply told Mendoza that: "I thought I told you to leave," without asking Mendoza what he had been doing. About an hour later Lopez encountered

Mendoza near the wharf and made an identical statement to him, again without inquiring of Mendoza why he was still in the plant or what he was doing there. In light of Lopez's insistence on the paramount importance of sanitation procedures, I do not credit his testimony that he found Mendoza leaving the case preparation area. If he had, he certainly would not have permitted Mendoza to continue walking about the plant for another hour. Mendoza's suspension form mentions neither the wharf nor the case preparation area.

The next morning Lopez handed Mendoza a 10-day suspension. The suspension form indicates that the "employee was told by his supervisor at about 9:00 A.M. that he was not allow [sic] in the plant while he was on suspension. The employee was seen again back in the Company area at 10:00 A.M. (rule #10 of the handbook)." An argument ensued between the two men in the presence of Eddie Pena and several other employees. Mendoza wanted his suspension reduced to five days. He wanted to know when the rule had gone into effect. According to Mendoza, Lopez replied that it was a new rule, which had just been decided upon the day before. At some point, Mendoza said "you're a bunch of liars." Finally, Mendoza either asked if he was going to be fired or asked to be fired. Lopez, who said that Mendoza was "almost yelling" and that he did not have to take it, fired Mendoza for insubordination.

Lopez said that he did not know what Mendoza was doing at the plant on September 5. He testified variously that he first learned authorization cards were being signed the following week and later that he knew they were being signed on

September 5. He admitted that he testified at Jose Mendoza's unemployment insurance hearing that he was unaware of union activity at the plant until September 12. On this and other matters, Lopez was not a credible witness.

Despite the existence of the rule in the employee manual, there is no record that Respondent has ever before disciplined an employee for being on Company property outside of working hours, either while on suspension or on his day off. On Monday, September 8, Perez reviewed and confirmed Lopez's decision to fire Mendoza. Perez had previously warned Mendoza not to argue with Lopez after Mendoza had complained about an earlier warning for being two minutes late to work.

6. The Suspension Of Mario Rodriguez And Warning To Alfredo Bustos:

On September 5, authorization cards were signed all over the plant. Bustos, who also worked under the name of Francisco Navarro, was the organizing captain of the crew in which Rodriguez was the puncher. The crew members gathered to sign the cards in a mushroom house, apparently soon after taking their morning break. Rodriguez returned from the cafeteria as the signing was taking place and also signed a card. At this moment, Perez, who testified that he was taking a walk, entered the room, approached Bustos and asked him if he was signing a Union card. Perez told him there was nothing wrong with signing a card, except that it should not be done during working hours. He then ordered Bustos to accompany him to his office. When he arrived at the office, Lopez cited two Company rules to him, and told him that he was violating the rule prohibiting talking about

religion or politics. Lopez told him that he would either be suspended or fired. But, later in the day, Bustos was given a warning notice instead. Lopez told him that he was only being warned because he had been signing the cards together with other workers.

Later in the morning, Lopez told Rodriguez that it was wrong for him to have allowed the crew to sign cards during work. Rodriguez asked what Lopez was going to do about it. Lopez said that he might demote him to picking, but that Perez or Stout might even fire him. Later that day, Lopez phoned Rodriguez at home and said that he should take the following day off as a suspension. According to Lopez, he made the decision to suspend Rodriguez in conjunction with Perez because Rodriguez had permitted the crew to gather together during work time. There is no written record of the suspension. The entire signing ceremony took about five to 10 minutes.

7. The September 5 Suspension Of Vicente Prado:

Prado began working for the Company as a picker in 1977. He testified that he engaged in Union activity during the organizing campaign such as attending meetings, wearing a Union button at work, passing out flyers in the presence of Sosa and Pena, and being part of a group which served unfair labor practice charges on Company representatives. While no dates were given for these activities, it is reasonable to assume that they did not take place until after September 5, because little in the way of open campaigning occurred until after the authorization cards were signed.

On September 5, Prado, who had been home with an

injury to his arm, came to the plant, at the invitation of Perez, to perform some work less strenuous than picking. Lopez instructed Prado to wash and grease an estimated 40 to 50 picking carts on the west side of the plant. Prado testified that he finished this task (he estimated that he washed and greased about 20 carts) about noon and went to the picking office, which is also located on the west side, to look for Lopez, in order to find out what his next instructions would be. Prado asked Hunter where Lopez was; Hunter replied that he might be on the east side. Prado crossed the street and entered the east side of the plant. A Company guard informed Perez that a worker with an injured arm had entered the east side of the plant without any picking cart or equipment. Perez told Sosa to investigate. Meanwhile, Prado, who usually worked on the east side, had met some of his friends. They asked about his health and what he was doing. Prado responded and one of the workers asked him to grease his cart.

Sosa soon arrived and asked Prado what he was doing. According to Prado, Sosa said that authorization cards were being signed and Perez might believe that Prado had gone to the east side to deliver some. Prado told Sosa that he had come to look for Lopez. He testified that he was greasing a cart when Sosa arrived. Sosa denied that he said anything to Prado about the Union. He testified that when he arrived, Prado was chatting with friends and that Prado told him that he had come to the east side to grease some carts. According to Prado, he had already finished the work Lopez had given him. Lopez stated that the assignment would have taken much more than one day to complete. Prado was given a three-day suspension for leaving the job without

permission. The notice states that Prado told the east side guard that he had to work on that side. Prado did not testify about what, if anything, he said to the guard, but he did state that he did not ask the guard if Lopez was on the east side.

I find that Sosa's version of their conversation is more credible than Prado's. The statements attributed by Prado to Sosa concerning the Union sound more like a legal theory than the words of a supervisor. More fundamentally, Prado's account of greasing carts on the east side is hard to believe. He originally testified that he was looking for Lopez. In that case, there would have been no reason for him to have carried grease and whatever other supplies were required in the greasing of carts from one side of the plant to the other. Without this equipment, it is hard to believe that Prado was, in fact, greasing carts on the east side. Prado's own testimony supports the contention that he was making no very serious attempt to find Lopez, but was actually talking to his friends. Prado never filed a charge concerning this incident, even though he filed one after his September 29 suspension. Prado was evasive in answering questions about why he did not file a charge. He finally stated that "I didn't want to do it." Taken as a whole, Prado's testimony was not credible. He was often inconsistent and much of his testimony on cross-examination in connection with his movements on September 5 appeared to be improvised as he went along. In November, 1979, Prado had received a written warning for leaving work before assigned duties were finished.

8. <u>The September 8 Warning To Luis Mejia</u>:

Mejia's role in the organizing campaign was to name

captains for each of the classifications of hourly workers at the plant and to be in charge of speaking about the Union to the hourly workers. Mejia also was involved in distributing and collecting authorization cards. He generally performed this work during lunch and breaks, but sometimes during working periods as well. He would turn over signed authorization cards to Amalio Garcia.

On September 8, Mejia was looking for Garcia when he was intercepted by Lopez. Lopez asked what Mejia was doing. Mejia replied that he was looking for a friend. Lopez ordered him to return to his work area. Later that day Robert Vantassal, Mejia's supervisor, informed him that Lopez had reported the incident to him. Vantassal told Mejia that he was forbidden to leave his work area to go to other areas even during lunch or breaks. Because Mejia's record was good, Vantassal told him that he would be forgiven. There is a warning notice in Mejia's file "for roaming the production area with no reason without permission." The notice states that Mejia did not accept a verbal warning, but the notice itself is marked "verble" [sic]. It is Respondent's policy to place written notations of verbal warnings in employees' personnel files in order to have a memory aid. Several employees testified credibly that they were unaware of this policy.

C. <u>The Election Campaign</u>

Once the authorization cards were signed, the Union began to campaign openly in the plant. On September 6, a large group of workers served approximately four unfair labor practice charges on Robert Lopez. On September 8, the Union filed a Notice of Intent to Take Access. Four days later a Petition for

Certification was filed.

In August, the Company hired full-time guards to regulate entry to the plant and movement from one side to the other. The decision to have guards posted during the day, rather than just at night, as was the previous practice, was motivated in part by a fear of labor unrest. The guards' instructions included directions concerning notification of key supervisors in the event of labor trouble.

Although identification cards had been issued to employees in 1979, they apparently were not used to control entry to and movement within the plant until the guards were hired. Employees were then required to wear the I.D. badges at all times and to show them to the guards on request. Clearly, the Company was alert to the possibility that the garlic strike might spread to mushrooms.

On September 10, Parada used the Company intercom system to announce to captains that a meeting was to be held that evening. According to Parada, employees had been permitted to use the intercom system to speak with supervisors, the office, or fellow employees. The next day the intercom stopped working. Several days later, when the system began to function again, it was Parada's belief that the numbering system had been changed, although Parada did not actually attempt to use it. Instead, the employees bought walkie-talkies in order for workers on the east side of the plant to communicate with those on the west side. The Company did not interfere with the employee's use of the walkie-talkies. Perez and Jud Brown testified credibly that the intercom system often malfunctioned because the equipment was in an

unair-conditioned area. They denied that the numbering system was changed after early 1980.

Respondent began waging its no-union campaign in earnest the week before the election. It mailed two letters signed by Jud Brown to all the employees urging a no-union vote and responding to what it considered to be Union misrepresentations. Respondent also mailed to the employees the first page of an article from the September 10 Morgan Hill Times headlined "Alpine (Mushroom Culture) Closes After 25 Years." The article reported that the UFW had won a representation election at Alpine, that the owners refused to say whether they would agree to the Union wage demands, and that one owner stated: "Alpine Mushrooms is closed after 25 years and the future is uncertain." This quotation is highlighted in yellow in the copy admitted into evidence. It is not clear whether the emphasis was supplied by the Company. Jud Brown testified that he decided to send the article to "show employees what might happen if the union made excessive demands."

Sometime during the week before the election, Mejia and other workers had several conversations about the Union with their supervisor, Ruben Arias. According to Mejia, Arias told the workers that they were provoking or causing a strike, that the Company would never accept a contract with the Union, and that the Company might replace them with 200 Indians. Arias also told the crew members that there was a sickness in the mushroom area affecting the heads of the workers.

Arias admitted talking with the employees about the Union. He told them that the Company was going to put up as much

resistance as possible to keep the Union out, that as long as there was no contract the Company could run the plant as it wished, and that, while the Union could offer employees the world, when it came down to negotiations it would all be different, since both the Company and the Union were big enterprises acting in their own interests, without considering the people. Arias testified that he had been authorized by Company management to talk to the employees about the Union, and specifically to make them understand that when it came to negotiations the situation would be different. Arias denied saying that the employees were provoking a strike and that they might be replaced. I find that Arias did make these statements. Mejia was a credible witness who testified in detail about events he remembered, but did not hesitate to admit that he could not remember when Perez had spoken to him about the Union. Arias was forthcoming up to a point, but he was evasive concerning the instructions given him by management concerning what to say to employees about the Union.

On September 13, Respondent put up a fence around the parking lot on the east side of the plant. Most of the plant had previously been enclosed by fences. The decision to enclose the parking lot was motivated in part by the Company's desire to be able to maintain operations during a strike or other labor dispute. Employees would be able to enter Company property in their cars and enter the plant without leaving the fenced-in area.

On September 15, Luis Viniegra, a Board agent from the Salinas Regional Office, contacted Jud Brown in order to gain access to the plant for the purpose of conducting worker

education. Brown replied that he wished to speak to his attorney first, and that the attorney would be arriving from St. Louis later that day. Over the next two days, there were a number of meetings between representatives of the Board and the Company in which the Board agents tried to convince the Company that they had statutory, regulatory, and/or judicial authority to speak to the workers inside the plant concerning their rights under the Act. The Board representatives even contacted the Santa Clara County Sheriff's Department in their effort to persuade the Company. Among the authorities relied upon by the Board was the decision of the Court of Appeals in San Diego Nursery v. A.L.R.B., 100 Cal.App.3d 128 (1979), which clearly stands for the proposition that the Board has no authority to take unconsented access for the purpose of worker education in the absence of a duly promulgated regulation. On September 16, the Company did permit Board agents to distribute literature and speak to employees in the parking lot. Viniegra was permitted to speak to employees over the Company intercom system during the afternoon. Several employees testified that Viniegra's speech was cut off abruptly while he was speaking in Spanish. Viniegra first spoke in English. Company officials denied that Viniegra had been cut off.

The next day Viniegra and other Board agents arrived at the plant to distribute election notices to the employees. Apparently, the Board agents arrived after the employees' break had ended. After some heated discussion, the Company permitted the Board agents to distribute the notices to the employees in their work areas.

On September 16, workers gathered at 9:30 to wait for a visit either from state agents or from John Brown, the UFW organizer. According to Parada and Amalio Garcia, Lopez had told them that he would arrange for the visitors to come at that time. However, John Brown did not actually arrive until 11:30 a.m. He took access on the west side of the plant, but representatives of the east side picking crews testified that they were not permitted to join that meeting. Brown arrived at the east side parking lot at about 12:15. He entered the gate. Perez demanded that he ride in a Company car to the cafeteria to meet with the employees because, according to Perez, Brown had failed to adhere to their voluntary access agreement the day before, and had wandered in unauthorized areas of the plant. Brown refused, left the parking lot, and returned a few minutes later on top of a car to address the group from outside the fence. Perez and other supervisors told the workers that their break was over and threatened them with discipline and possibly arrest if they did not return to work. Brown was able to continue to address the employees and none was disciplined. Other than this incident, there were no allegations of denials of access to the UFW.

On September 16 or 17, the Company picking clerk, Julio Ogarre, also known as Eduoardo Hunter, gave an anti-Union speech over the intercom system. The speech was authorized by the Company, read in advance by management and legal counsel, and similar to one that was originally intended to be delivered by Jud Brown.

Several supervisors notified employees that they were about to be addressed by a state agent. Hunter then began

to speak. He did not identify himself as a state agent, but rather as a fellow worker. He warned the employees about the dangers of having a union and urged them to reject the Union at the election. Hunter's voice, which is distinctly South American, is well known throughout the plant, partly because he typically delivered disciplinary notices to employees. Most of the employees who testified about this incident acknowledged that they immediately recognized that the speaker was Julio and stopped listening. The Company denies that it deliberately tried to mislead the employees into believing that Hunter was a Board agent. Ramon Sosa said that he was under the mistaken impression that the speech was going to be made by someone from the state. I find it inherently incredible that the Company would have attempted to pass off a clearly anti-Union speech by an employee with a distinctive, well-known, and easily recognizable voice, as coming from a neutral state agent.

The election was held on September 19. The UFW received about two-thirds of the vote. The Company filed objections to certification of the results. After these objections were resolved, the UFW was certified as the employees' collective bargaining agent on December 31.

D. <u>The Post-Election Period</u>

After the election, the number of disciplinary notices issued to employees, including warnings and suspensions, increased substantially over the rate of the previous one and one-half years. The General Counsel argues that the increase in suspensions was retaliation for the Union victory in the election. The Respondent maintains that all of the discipline was meted out

for cause.

As direct evidence of discriminatory intent on the part of the Company, General Counsel points to a conversation between Perez and Ezequiel Hernandez which occurred one or two days after the election. Ezequiel is the brother of Alfredo and the son of Carlos Hernandez.

Hernandez asked Perez for permission to go to Mexico because his brother-in-law had died. Perez expressed his condolences and granted the leave. He asked Hernandez if the people were happy about the results of the election. Hernandez replied that they were. Perez stated that things were not settled yet, because no contract had been signed. According to Hernandez, Perez then said that things were going to be a little harder than before. After being asked exactly what Perez had said, Hernandez testified: "Something about--something like pressure. Q. What kind of pressure? A. That there were going to be more penalties" (Tr. VII, p. 67). Perez denied making such a statement. Both men characterized the conversation as friendly. Perhaps because of this friendship, Hernandez appeared to be a reluctant witness, quick to minimize Perez's statements on cross-examination. While, given the context of the conversation, it is easy to imagine Perez saying that negotiating a contract was going to be harder for the employees than winning the election had been, I do not find that Perez said that there were going to be more penalties. It is not clear from Hernandez's testimony whether Perez actually made such a statement, or whether Hernandez later read this implication into Perez's remarks, in light of the increased discipline.

1. The Discharge Of Armando Lemus:

Lemus worked for Respondent for a year prior to his discharge. He worked as a picker and a sweeper before accepting a transfer to the fill line cleaning crew in late August. Lemus said he wanted to transfer from picking work in order to earn more money. Perez, who advised Lemus to transfer after another job possibility in the plant was taken by a worker with greater seniority, stated that he suggested a night job to Lemus because Lemus told him he was having difficulty waking up in the morning. Prior to the transfer, Lemus had received a warning in May for turning off lights in a growing room, a three-day suspension in June for an unexcused absence, a five-day suspension a week later for the same reason, and a 10-day suspension in August for tampering with his time card. At the time of the suspension, he was warned that the next infraction would result in his discharge. The record amply supports Perez's contention that Lemus had an attendance problem.

Before the transfer, Lemus attended four or five Union meetings and spoke to employees, including Hunter, about the Union. After the transfer, he would arrive early to tell the day workers about upcoming meetings. No supervisors were present when Lemus spoke about the Union and Perez disclaimed knowledge of Lemus's Union activities.

On September 25, Lemus received a warning for poor work performance and insubordination to his lead man, evidently one of the other two employees who worked cleaning the fill line. Lemus testified that Russell Moriaka, the supervisor who gave him the warning, said that Perez would fire him if he found out

about the warning. Perez's initials appear on the warning, as they do on virtually every disciplinary notice.

On Sunday, September 28, Lemus testified that at about 2:00 p.m. he called the plant three times to find out when he should report to work. This was the required call-in procedure. Lemus was supposed to speak to Geronimo Ponce, a supervisor on the line, to determine his reporting time. Lemus testified that the operator answered the phone and twice told him that Ponce's line was busy. When she told him this a third time, he asked to be transferred to the picking office, which is on the opposite side of the plant from Ponce and the line. Roberto Naranjo, who was working as the picking office clerk at the time, answered the phone. According to Naranjo, Perez, and Juana Duran, an alleged discriminatee called as a witness by the General Counsel, no operator is on duty on the weekends. Lemus asked Naranjo if he knew when Lemus was to report. Naranjo said that he did not, but would ask Morado, who was sitting in the office. Here, the accounts of Lemus and Naranjo diverge. According to Lemus, Naranjo told him that Morado had talked to Lemus's supervisor, Larry Edwards, and that Lemus should report at 5:30 to 6:00 p.m. Lemus said that Naranjo told him he had also checked with Ponce to confirm this. Naranjo and Morado testified that Lemus was told by Naranjo to report at 5:00 p.m. Naranjo said that he never talked to Ponce. Ponce testified that somebody, who he thought was Naranjo, had called between 4:00 and 4:30 to ask what time the line would finish and that he told the caller the work would end at 5:30 to 6:00. He told the other two workers when they called that the line would end at 5:00 to 5:30. The

other two workers arrived at 5:00. Lemus testified that he arrived about 5:30. He worked that night and was fired the next day.

Perez testified that on September 28, he was returning to Morgan Hill from a hunting trip at a few minutes before 6:00 p.m. when he saw Lemus driving to work in the car immediately ahead of his. He followed Lemus to the plant and saw him run in. The next morning he checked Lemus's time card and realized it had been tampered with, since it had been punched at about 5:30. He spoke to Edwards, determined that Lemus had been late, and discharged him. Perez claimed that he did not take into consideration the fact that he had seen Lemus arriving at 6:00 p.m., except to the extent that it caused him to investigate the matter.

I find that Lemus knew that he should have reported to work at 5:00 p.m. Because no operator is on duty on the weekends, Lemus's testimony is particularly dubious. The other two employees on the clean-up crew arrived at 5:00 after being instructed to do so by Ponce. Lemus did not ask Naranjo to transfer the call to Ponce and there is no reason why Naranjo should have done so after Morado had given Lemus a reporting time. Lemus's account has Naranjo first checking with Ponce and then confirming the time with Morado. Again, Naranjo would have had no reason to double-check the reporting time. As his testimony continued, Lemus moved back his reporting time to 6:00. I credit the testimony of Naranjo and Morado that Lemus was told to report at 5:00. In the absence of a conspiracy not to inform Lemus of the proper reporting time, there is no reason why Naranjo would have misled him.

2. The Suspension Of Vicente Prado:

Prado received a five-day suspension on September 29 for playing with the lights in a growing room. Prado testified that he finished picking in one room and was sent by his puncher, Jose Lozano, to the next house. Prado was unsure of which house to go to next, so he asked Morado, who directed him to an empty house. Prado then asked Morado if he should turn the lights off and Morado replied that he should. Morado directed Prado to a second house which also seemed empty and, with Morado's permission, turned off half the lights. He went into a third house where he picked for a few minutes before being told by another worker that his crew was in the second house. Teresa Correa, a member of the crew, yelled at him for playing with the lights.

Morado testified that he did not recall the incident, but that he sometimes told employees what rooms to pick in, but never told them to turn off the lights, especially if there were workers inside. Morado had previously issued a warning to Armando Lemus for playing with the lights. Jose Lozano testified that the order in which rooms were picked by his crew had not changed in weeks and that it was the same on September 29 as on other days.

I do not credit Prado's testimony about this incident. I have already found him to be a less than credible witness with respect to his earlier suspension. It makes no sense that a picker would suddenly forget which house to pick next, but, even assuming that he was confused, it is hard to understand why he would have turned off the lights in two empty houses and begun

picking in a third, when he claimed to be looking for a house with other members of his crew. At the least, Prado was guilty of an act of carelessness which had the potential of injuring other workers.

3. The Suspensions Of Ramon Contreras:

Contreras is a picker who has worked for Respondent since 1976. During the Union organizational campaign, he was his crew's captain. As such, he spoke about the Union in the presence of his puncher, Jose Lozano, distributed flyers, and served several charges on Company representatives, as a member of a large group of employees. When authorization cards were distributed to the crew members, Lozano signed one.

In May, not long after Respondent began to use scales in the growing rooms to weigh mushrooms, Contreras was suspended for not filling his baskets to the proper weight. Each set of four small picking baskets is supposed to contain at least 13 pounds. At times, even full baskets will not yield 13 pounds, because of a lower moisture content in the mushrooms. In such cases, pickers are required to fill baskets to the top, but are not expected to reach a certain weight. The suspension indicates that Contreras's baskets weighed only 12 pounds. Contreras testified that the suspension was unfair, although there is no contention that it related to Union activity, which had not yet begun.

Contreras testified that in late September Lopez told him that it was time to take some action, and that he (Contreras) believed that Lopez meant there would be more penalties because of the Union. He also testified that during the

same period Sosa looked at the mushrooms in his basket and said: "This is the way I want them" and assured Contreras that he understood that the mushrooms were light in weight. Sosa testified that he warned Contreras that his baskets were under-weight. He said that because Contreras had been in his crew when Sosa was a puncher he wanted to give him a warning rather than suspend him. There is a warning in Contreras's personnel file dated September 27 and marked "verbal" which states that Sosa had told Contreras to fill his baskets or receive a suspension.

On September 30, Contreras received a five-day suspension for a number of picking quality violations, including low weights, long stems, and mixing No. 1 (closed veil) with No. 2 (open veil) mushrooms. The suspension notice indicates that Contreras had been warned the day before about low baskets. Neither Contreras nor Lozano testified about this warning. Contreras testified that he had never before been warned or otherwise disciplined with respect to the quality of his picking. Neither Contreras nor any supervisor testified about the quality of Contreras's picking on September 30.

On November 13, Sosa and Jose Quintanar, Contreras's puncher, weighed his baskets and found them to be light. Contreras received a 10-day suspension. Carlos Hernandez, who was in the same crew, received a suspension for low weights on the same day. Contreras testified that after Sosa weighed his baskets he double-checked them by weighing one basket at a time. He weighed seven or eight baskets. Some weighed more than was required; some weighed less. Contreras added mushrooms to bring the light baskets up to the proper weight and found that

there was a net surplus of about four pounds. Quintanar testified that he and Sosa weighed six of Contreras's baskets. After they finished, Contreras picked three more baskets and added their weights to the first six in order to get them up to the proper weight. Contreras then asked Quintanar to call Sosa back to the mushroom house to re-weigh his baskets. Quintanar stated that Contreras's baskets were visibly shallow. The thrust of Quintanar's testimony is that Contreras brought his baskets up to the proper weight only after Sosa had weighed them. Therefore, Quintanar refused to call Sosa. He told Contreras that it was strange that suddenly his baskets weighed more. I credit Respondent's witnesses on this issue. Contreras had a history of failing to fill his baskets sufficiently. This history antedated the Union campaign. The fact that Contreras did not challenge Sosa at the time his baskets were originally weighed supports Quintanar's testimony.

4. The Suspensions Of Abel Meza:

Meza, also known as Jose Luis Chavarria, began working for the Company in 1977. He worked both as a picker and as part of a four-person crew responsible for picking up mushrooms from the growing rooms and taking them by forklift to the cooler. Meza was named captain of the forklift operators during the Union campaign. In addition to the more typical Union activities engaged in by other workers, Meza acted as a messenger between workers on the two sides of the plant, because his duties required him to take mushrooms from the east side to the west side. During the Company's election campaign, when Perez was meeting with small groups of workers, Meza, who had completed his work on

the west side, wanted to go to the east side to inform Amalio Garcia that the meetings were taking place. Meza testified that Sosa gave him busy-work assignments on the west side and told him that he had orders not to let Meza go to the east side. Sosa did not testify about this incident.

(a) The Suspension Of October 2

Meza was alone in a growing room with Juana Alba, who was sweeping it out, and began to ask her whether it was true that she was having sexual relations in the parking lot with another employee. There is no doubt that Meza was harassing Alba and falsely claiming that there were rumors about her sexual activities going around in the plant. Alba testified credibly that she became angry and tearful and yelled at Meza that her private life was none of his business. Lopez and Pena came into the growing room during this argument. Perez also testified that Alba reported the incident to him that day and was crying at the time. Meza received a three-day suspension for interfering with the work of others.

(b) The Suspension Of December 2

The mushroom pick-up crew is comprised of two two-person teams, each responsible for the growing rooms on one side of the plant. Each team is made up of one person who drives the forklift and one who is responsible for keeping a number of production accounts and directing the forklift driver to pick up mushrooms in the growing rooms. Each employee in the crew drives the forklift one day and keeps accounts the next.

On December 2, Meza was keeping the accounts. A large quantity of mushrooms was left in a growing room for more

than eight hours. Meza was suspended for three days and lost his job on the crew. The forklift driver was not suspended or warned. Pena, who issued the suspension, could not remember if he had asked the driver if Meza had told him to pick up the mushrooms. Meza did not testify that he had told the driver to pick them up. Meza had received a warning in early August for the same offense. Another member of the crew was issued a similar warning in July. Meza testified that he had never heard of a warning or suspension for leaving mushrooms in a growing room. Similarly, Meza had received a warning in August for not reconciling production accounts.

(c) The Suspensions Of December 10 And 28

Meza was late to work on these two days and received suspensions of three and five days respectively. He had previously been warned about tardiness in September. Meza had testified on behalf of Jose Mendoza at an administrative hearing concerning Mendoza's eligibility for unemployment insurance benefits shortly before receiving the last suspension. He had also filed unfair labor practice charges with respect to his earlier suspensions.

5. The Suspensions Of Salvador Garcia:

Garcia began working for the Company as a picker in 1977. During the Union campaign, he attended meetings, wore buttons at work, accompanied other workers when unfair labor practice charges were served, and signed an authorization card.

(a) The Suspension Of October 6

On October 6, Morado asked Garcia to attend a "slow pickers" meeting that afternoon. Such meetings were held

periodically for those employees who picked less than 40 pounds of mushrooms per hour. According to Morado, Garcia refused to attend the meeting without offering any reasons. He then asked Amalio Garcia, Salvador's brother, to talk to him. Amalio said that he would. Amalio did not testify about this incident. Garcia testified that he told Morado that he could not attend the meeting because his sister was in the hospital. Sosa also told Garcia to go to the meeting. According to Sosa, Garcia refused, never mentioning his sister. Sosa testified that other members of the crew teased Garcia and told him that he was lazy. Garcia stated that he also informed Sosa that his sister was ill and that the teasing incident never took place. For refusing to attend the meeting, which lasted about 40 minutes, Garcia was suspended for five days. The following week Garcia spoke to Perez. Perez testified that Garcia told him that he had not mentioned his sister's illness to Morado and Sosa because he did not want to share his reason with them. Garcia's version of the conversation is quite different. He testified that he told Perez that he had mentioned his sister's hospitalization to the supervisors and that Perez said that the suspension must have been a mistake.

The credibility resolutions regarding this suspension are difficult to make because they involve, for the most part, flat contradictions between the only two parties to a conversation. What extrinsic evidence there is tends to support the Company's witnesses. First, the General Counsel never called Amalio to rebut Morado's testimony that Amalio had said he would talk to his brother about attending the meeting. If Garcia had mentioned his sister's illness to Morado, it is doubtful that he

would have turned to another member of the family in an effort to persuade him to go. Second, Garcia never explained why attending a 40-minute meeting, which took place early in the afternoon, would interfere with his wish to visit his sister. On cross-examination, Garcia said he told Morado and Sosa that he had other matters to attend to, implying that he did not mention his sister. Third, the only witness who rebutted Sosa's testimony that the crew had been teasing Garcia about being ordered to attend the meeting was Garcia himself. If Sosa's testimony were untrue, it would seem that other members of the crew could have been found to deny it. On the other hand, Perez's testimony was not very convincing either. If, according to Perez, Garcia told him that he did not want to tell Morado and Sosa about his sister's illness, it is difficult to understand why he was willing to tell Perez. It is possible that Garcia never suspected that he would be suspended for refusing to attend. On balance, I credit the testimony of the Company witnesses that Garcia did not tell them on October 6 that he needed to visit his sister in the hospital.

(b) The Suspension Of November 30

On November 30, after he had filed a charge concerning his earlier suspension, and after having participated in the November 23 work stoppage, Garcia received a three-day suspension for long stems. Garcia testified that he had never received any discipline for long stems. At times in the past, he had been told that the stems were too short or too long, but no suspensions or warnings had resulted. According to Garcia, Sosa asked him, shortly before he received the suspension, if he had been warned about long stems. Garcia replied that he had not been

warned. Sosa did not testify about this incident. Garcia's puncher, Lozano, testified that Garcia's stems were long and that he had warned Garcia orally about long stems about three days before he was suspended. Lozano did not fill out a warning slip and place it in Garcia's file because it was his practice to give two or three informal verbal warnings before doing so. It appears that Sosa was not aware of this informal warning.

6. The Demotion Of Ruben Alcantar:

Alcantar has worked at Steak Mate since 1971. In August, after he had been working as a temporary puncher, Alcantar was made a permanent puncher by Perez. Lopez gave Alcantar a copy of a Company document called the "Supervisor's Evaluation Form." This form contains the names of crew supervisors (punchers) and several categories of evaluation, including weight, quality, safety, attendance reporting, scales, and mushrooms on the floor. Lopez told Alcantar that this form contained the rules he was to follow as a puncher. The form in evidence, for the week of August 2, contains Alcantar's name and the word "yes" in each category, as well as the word "good" under proper bookkeeping. The form notes that "any NO rating will be subject to progressive disciplinary actions." Perez testified that the form was not actually used for disciplinary purposes.

During the organizing campaign, Alcantar attended Union meetings, as did most other punchers, talked to the other employees, and accompanied a group of employees serving unfair labor practice charges to the cafeteria area, but did not enter the cafeteria.

Alcantar testified that, at a meeting for punchers

held in early October, Perez told the punchers that they had the authority to issue warnings and other disciplinary action because they were foremen. Perez also told the punchers to be more strict and put more pressure on their crews. Perez's account of the meeting is essentially consistent with Alcantar's. Perez said that he told the punchers that the Company was very concerned with production quality because it was facing mounting economic pressure and that the job had to be done more efficiently. He stated that guidelines had been issued for the punchers to follow in guiding their crews. Perez could not remember any changes being made in the duties of punchers. While the record demonstrates that there was a substantial increase in warnings and suspensions relating to picking quality, there is no indication that the involvement of the punchers in the initiation and issuance of discipline changed during 1980.

Alcantar was called to Stout's office around October 15 and told that he was being returned to his picking job because of poor work and subtracting lugs from a worker's punch card in order to make his accounts come out even. Morado testified that he recommended Alcantar's demotion because of his bad work as a puncher. He specifically cited Alcantar's failure to keep track of the number of lugs picked, to tell his crew how to sort mushrooms, and because his crew's weights were lower than most. Alcantar was still in his probationary period as a puncher. Stout cited Alcantar's poor performance on the evaluation forms, but none was produced by the Company. Alcantar had received no warnings or suspensions while serving as a puncher.

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7. The Suspension Of Jesus Mariscal:

Mariscal works as a picker for the Company. During the Union organizing campaign he attended meetings, wore a UFW button along with others in his crew, and served charges on the Company as a member of a large group.

On October 23, Mariscal's puncher, Sofia Luna, ordered Mariscal to help a fellow worker pick a mushroom bed. It was Company practice for the first workers who finished picking their beds to help those who had not yet finished before moving on to the next house. Mariscal argued that another worker or two had finished first and should be required to help. He testified that two employees had already been permitted to leave by Luna. She denied that any employees had left. Her testimony was corroborated by Morado. Mariscal tried to leave the house, but Luna blocked his way. He called Luna a brown-noser and several other epithets. Morado came into the house and asked Mariscal and Luna to be quiet. Mariscal threw his picking hook and several baskets of mushrooms against the wall and told Morado he was sick. Morado let Mariscal go home.

The next day Lopez told Mariscal that because he had behaved badly toward Luna he was fired. Mariscal appealed the decision to Perez, who reduced the penalty to a 10-day suspension. Perez testified that Mariscal was a good worker who had had a very bad day. Roel Garcia, Amalio's brother, corroborated Mariscal's testimony that two workers had left the house, but admitted that he told Lopez and Perez at the time that he supported Luna in the dispute and that Mariscal was a nervous person who had just blown up. I do not credit Garcia's explanation that he spoke in Luna's

favor because he feared that she would suspend him if he did not.

8. The Suspensions Of Alfredo And Carlos Hernandez:

Carlos Hernandez and his son Alfredo began working for the Company in 1979. During the organizing campaign, they attended Union meetings. Carlos served several unfair labor practice charges on Company representatives as a member of a large group. Alfredo wore a Union button to work.

During the course of his work at Steak Mate, Carlos had become a close friend of Sosa's. Sosa phoned Carlos at his home two days before the election to urge him to vote against the Union, but Carlos was away at the time. Either the following day or the day of the election, Sosa made the request to both Carlos and Alfredo. Carlos told Sosa that he and his children had decided to vote for the Union. According to Sosa, the conversation took place on the day of the election, after Alfredo and Carlos had voted. Before the election, Sosa confided to Carlos that he was feeling a lot of pressure in his new job and that he was considering obtaining a rifle for protection from the workers. Sosa testified that he told Carlos he had gotten a rifle for shooting rabbits. I credit Carlos's testimony. He was a serious, thoughtful witness. I do not think it likely that he would have fabricated this conversation. Sosa, who was usually confident in his testimony, appeared embarrassed and uncomfortable when questioned about this incident.

After the election, Sosa asked Carlos and Alfredo to meet with him in an empty mushroom house. Sosa testified that he spoke to the men as friends. He explained that in his new job

he would have to mete out discipline for bad work regardless of friendships. Carlos testified that Sosa admonished them to do the best possible work because there were going to be more suspensions coming. Alfredo's version of the conversation was similar, except that Alfredo testified that Sosa said the additional penalties would be forthcoming because of the Union. Again, I credit the testimony of Carlos. It is undeniable that the number of suspensions for quality violations increased after October 1. There would have been no reason for Sosa to speak to the men if he did not know that disciplinary standards were to be tightened. But I do not credit Alfredo's testimony that Sosa mentioned the Union as the reason for the increase in suspensions. If Union activity rather than work quality were to be the controlling consideration in disciplinary decisions, it would have made no sense for Sosa to urge them to do their best work. Alfredo's credibility was impeached when he denied that Sosa had warned him about poor picking before he was given the suspension to be discussed below. A declaration signed by Alfredo in support of the underlying unfair labor practice charge mentions the warning. However, the declaration, while stating Alfredo's belief that he was suspended for Union activities, does not mention the conversation in which Sosa supposedly said that there was about to be an increase in suspensions because of such activity.

On October 25, Alfred was suspended for five days for mixing the two grades of mushrooms and for leaving long stems on the mushrooms. Sosa testified, and Alfredo's declaration confirms, that he had warned Alfredo about his poor picking four days earlier. Alfredo had previously received a warning and a

three-day suspension in May and June, respectively, for low weights. Alfredo testified that Sosa, Lopez, Morado, and Perez spoke with him in the office before issuing him the suspension. He told them that it was impossible to do the work the way they wanted it and asked to be switched to hourly work. Sosa replied that he was capable of doing the work well. After some hesitation by the supervisors, Alfredo was given the suspension. According to Sosa, Alfredo's work has improved and he has not been subjected to any discipline since October.

Carlos had a clean disciplinary record until October 4, when he received an oral warning from Sosa for mixing the two grades of mushrooms and leaving long stems on them. On October 23 he received a written warning from Morado for the same offenses. Carlos did not testify about either of these warnings and there is no allegation that they were unwarranted. On November 14, Sosa suspended Carlos for three days for low weights. Carlos testified that no supervisor had spoken to him about his work during that week. Both Sosa and Jose Quintanar, the crew's puncher, testified that they weighed baskets of each member of the crew and that only those of Carlos and Ramon Contreras were low.[4/]

9. The Suspensions Of Juana Duran:

Duran, who has worked at Steak Mate both as a picker and packer since 1974, was easily the most outspoken and active Union supporter among the packing employees during the organizational campaign. She was the UFW organizing captain for

4/Carlos received another suspension for low weights on December 19. That suspension is the basis for a separate unfair labor practice charge not in issue in this hearing.

the more than 50 packing employees. In this capacity, she aggressively challenged Perez's claims about the Company's medical plan's superiority to the one offered by the Union, when Perez addressed a large group of packing employees. At the pre-election conference she spoke at length in opposition to the Company's position on the eligibility to vote of certain injured employees. She was an observer for the Union at the election.

On Saturday, September 13, Duran was absent from work. She testified that she telephoned the Company to report her absence, but that the phone was not answered. No operator is on duty on the weekends. On September 16, Pena and Frank Hinchberger, Duran's supervisor, handed her a warning notice for failing to call in and told Duran that they did not want to see her talking to the people. This testimony was not countered by Respondent.

On Saturday, November 1, Duran became ill at work. She received permission to go to the doctor's office, where she was given medication and told that she could return to work on November 3 or 4. On Sunday, November 2, Duran called the plant to report that she would be absent, but, once again, the phone was not answered until 11:30 a.m. She returned to work on Monday. Lopez gave her a three-day suspension for an unexcused absence. Duran explained the situation to Lopez. He said that he would remove the suspension and pay her for the day she had missed if she brought him an excuse from her doctor. Duran complied with the request, but Lopez told her that the suspension would stand because she had failed to call in early enough. Lopez did not testify concerning this incident. The record discloses that another

picker, Manuel Mier, received a verbal warning for failure to call in on Saturday, October 4. The warning notice states: "He claims he called in but nobody answered the phone which could be true. We the picking foremans [sic] were on the East side most of the morning." The notice is signed by Morado and Sosa. Duran's testimony that the phone was not answered is at least plausible. Her testimony that Lopez at first told her that an excuse from the doctor would result in the lifting of the suspension is very credible, particularly in the absence of any denial from Lopez.

On November 23, Duran hurt her back. According to her testimony, she noticed her back hurt when she awoke the next morning after sleeping on her couch. On November 25, she reported the injury to Pena and Sosa. They testified that she told them that she had twisted her back when she slipped and almost fell while picking. She thought it was nothing at the time. Pena filled out an accident report confirming the conversation. Pena and Sosa testified that they asked Duran's puncher if she had reported the accident when it occurred. He replied that she had not. The puncher, Jose Manuel Garcia, testified that he was unaware of any injury to Duran and that Pena did not ask him if she had reported it to him until three weeks later. Duran received a five-day suspension for failing to report the accident immediately. There is nothing in the record to suggest that Duran missed any work as a result of the injury. The record indicates that two punchers had previously been suspended for failing to report injuries to members of their crews, but there is no record of any discipline taken against an injured employee for failure

to report an accident.

Duran was late to work on Sunday, December 7. She received a five-day suspension for tardiness.

10. The Suspension Of Juventina Chambers:

Chambers began to work for the Company in the spring of 1980. She sought permission to transfer to a crew on the other side of the plant so that she would be able to have lunch with her sister. In August, Morado told her that the transfer had been approved, but the decision was overriden by Perez because Chambers's puncher, Mario Rodriguez, had been complaining about her work and attitude. On August 26, Rodriguez gave her a written warning for low weights. Chambers contended that Rodriguez was treating her unfairly. She had also been required to attend a "slow pickers" meeting.

During the organizational campaign, Chambers attended Union meetings, wore a UFW button at work, and spoke about the Union to her puncher, Priciliano Garcia. She also served charges on Respondent along with other workers.

On October 30, Chambers received a three-day suspension for long stems. The suspension notice contains a statement from Lopez that she had previously received a warning for the same offense. Chambers denies having been told that her work was bad. She claimed that both Lopez and Pena, who issued the suspension, had told her that her work was well done. Pena testified that he showed the mushrooms with long stems to Chambers and that she disagreed with him. He claimed that her puncher that day, Silvestre Delgado, agreed that the stems were long. Delgado, who was serving as a temporary puncher for a week, testified that there were

several employees in the crew with long stems on their mushrooms, but that only Chambers was suspended. He said that he signed the suspension notice because he had no choice. The record discloses that Delgado signed another three-day suspension notice for long stems on October 30. This suspension was given to Rogelio Gomez. There is no allegation that his suspension was discriminatory. His suspension notice also indicates that he had been warned previously about long stems.

11. The Picking Change And Work Stoppage Of November 23:

On November 23, without notice to the Union, the Company instituted a change in the order of picking mushrooms. Previously, workers had picked the bottom bed first and worked their way to the top bed. To reach the top bed workers had to climb on the lower beds. The change required them to start at the top. Before the change, workers had started picking mushrooms near the aisle of the house and worked toward the wall. The change reversed this order.

The pickers began to work as instructed, but soon began complaining to their Union leaders, Amalio Garcia and Rogelio Parada. With respect to the first change, the fundamental concern was safety. The employees felt that if they were required to climb to the top beds, over unpicked beds, which tend to be slippery, the risk of falling and serious injury would increase. The primary objection to the second change was economic: mushrooms tended to be less plentiful near the wall than the aisle and the change might cause the employees (who were paid on a piece rate basis) to earn less.

Parada and Garcia asked Morado during the morning break to allow them to discuss the changes with Company supervisors in order to get a clarification. Morado replied that none of the higher-ups was in the plant. He suggested that they wait until the following day (Monday). Parada testified that this response did not satisfy the employees.

At about 10:00, according to a pre-arranged signal, Parada flicked the lights in several houses off and on three times to advise the employees to leave their work to protest the new picking rules. Garcia also advised some employees to leave work, but he used his voice instead of turning the lights off and on. When four crews had left their houses, Morado returned and told the employees that they could continue to pick as they had before the change until Perez was able to meet with them on Monday. The protest lasted no more than 10 minutes. All the employees returned to work.

The following day Perez met with employees from several of the affected crews. He accepted their arguments about the safety problems inherent in picking from top to bottom and explained why picking from the wall to the aisle would not cause them to earn less. Perez felt that the employees had been convinced by his explanation. Garcia testified that they had not. On Tuesday, November 25, the crews were notified that they would be required to pick from the wall to the aisle beginning the next day. The requirement that the employees pick from the top to the bottom was abandoned.

On November 24, Parada was suspended for five days for turning the lights on and off. Perez testified that five days

was an arbitrary figure. The suspension indicates that Parada had interfered with the work of others by creating an unsafe condition. Despite the testimony of Perez and Morado that turning the lights on and off presents a safety hazard, there was credible testimony from a number of witnesses indicating that flicking the lights was used routinely by punchers as a signal to workers that it was time for their break. With the exception of the suspension imposed on Vicente Prado for playing with the lights (he was not following a pre-arranged signal) no employee had previously been suspended for this offense.

Garcia received a warning on November 24 for leaving his job without permission to take part in the work stoppage. Perez testified that Garcia was only warned because he had not flicked the lights.

On Wednesday, November 26, the day that the remaining change went into effect, Inocencio Nunez arrived at work without his picking knife. He testified that he went looking for a knife in several houses and decided to call Amalio Garcia on the intercom to find out if employees on the east side of the plant were in agreement with the change. According to Nunez, Garcia told him that the workers were not in agreement with the change. Garcia never testified about this incident. Nunez then notified several crews that there was no agreement about the change.

Nunez had been active in the organizing campaign. He was his crew's captain, had served charges on the Company, and had been in charge of the walkie-talkie on the west side of the plant that the employees used to communicate about Union matters.

Nunez testified that three supervisors, Lopez, Perez, and Stout, complained to him about his activities on the 26th. Lopez told Nunez that he had been using the intercom, giving orders to the employees, and organizing the people. Stout told him that the Company was aware of his Union activities and had not bothered him before. Perez said that he was being insubordinate and causing turmoil among the people. These statements were not denied by the supervisors.

Nunez was suspended for five days for leaving his job without permission and going through unassigned picking areas.

12. The Suspensions Of Miguel Rivera:

Rivera has worked for Respondent for about six years. During the organizational campaign, he attended meetings, wore a UFW button to work, served charges on Company representatives along with other employees, and signed an authorization card with other members of his crew in the presence of Sosa.

On November 28, Rivera was suspended for three days for refusing to repick a mushroom bed after being ordered to by his puncher, Guadalupe Chavez. Rivera testified that he explained to Lopez and Perez that the bed in question had actually been picked by Roel Garcia, Amalio's brother, who had the same picking number as Rivera. Perez said that he would investigate. Chavez testified that Rivera at first claimed that the bed had been well-picked. After he received the suspension, Rivera claimed that somebody else was responsible for the bed. Perez testified that he spoke to Garcia about the matter and that Garcia stated that he had nothing to do with it. On rebuttal, Garcia testified that

he and Rivera shared the same picking number, but he did not admit that he had been responsible for the unpicked bed. Garcia denied that Perez had talked to him about the matter near the time of the suspension, but he was unable to remember when he talked to Perez or anything about the content of the conversation. I credit Perez's testimony on this issue. Garcia admitted that Perez did talk to him about the incident. His inability to remember anything about the conversation suggests that he did not take responsibility for not picking the bed properly. I find that Perez had a good faith belief that Rivera had not picked the bed properly.

Two days before the suspension Rivera had received a warning from Perez for leaving his work place. Rivera testified that he had been told by Amalio Garcia to let Antonio Tovar know that there was no agreement on the newly implemented picking change. Neither Garcia nor Tovar corroborated Rivera's testimony. Rivera testified that Perez asked him whether he knew that Nunez and Parada had already been suspended for the same reason. Perez denied knowledge of what Rivera was doing when he left his crew. Given the fact that Nunez was suspended on the same day for attempting to get several crews to protest the picking change, I simply cannot believe that Perez was unaware of the purpose of Rivera's visit to another crew. Perez was asked what the difference was between the conduct of Nunez and Rivera which justified the difference in discipline. Perez replied that Lopez or Morado had reported to him that Rivera, unlike Nunez, had not actually attempted to have a crew stop working.

On December 19, Rivera was told by his temporary

puncher, Melecio Jimenez, to move from the bed he was picking to another. Rivera testified that he refused at first because he had not yet finished picking the bed and had never been told to leave a bed before finishing it. When Jimenez again ordered him to move, Rivera complied. Lopez came into the house and found mushrooms left on a bed. He determined from talking to Jimenez that Rivera was responsible. Rivera was told to re-pick the bed. Lopez and Perez suspended Rivera for 10 days. When Rivera received the suspension, he asked Perez to reconsider. Neither Lopez nor Jimenez testified concerning this incident. Perez was unable to recall the facts of this incident in any detail.

13. The Alleged Threat To Alex Cortez:

Cortez testified that on December 5 and 8 he and other employees of the Company went to the Board's Salinas Regional Office to demand that the UFW be certified as the winner of the representation election and that suspensions at the plant be stopped. Approximately 40 employees went to Salinas on December 5, while 15 attended the December 8 meeting. Duran and Amalio Garcia, among other employees, spoke at the December 5 meeting. On or about December 9, according to Cortez, Pena and Lopez asked him if he had attended the meeting. Cortez replied that he had. Lopez said that he might give Cortez a suspension. Lopez and Pena departed, "kind of laughing."

Lopez denied ever talking to Cortez about anything, let alone about the meeting at the ALRB office. Lopez at first denied having heard that employees had ever gone to the ALRB office. When pressed, he testified that he had probably heard rumors "through the grapevine" about such meetings, and that the

fact that such meetings had occurred "was pretty well known throughout the plant." Despite making this concession, Lopez maintained that all he knew about employees going to the ALRB office was that charges were filed there. He consistently denied knowledge of any large group of workers having gone to the ALRB office.

Neither Cortez nor Lopez was a very credible or reliable witness. And Lopez's testimony was particularly suspect in the area of knowledge of Union activity at the plant. However, given the state of the record, I am unable to credit Cortez on this issue. His testimony was the only reference in the hearing to the December 5 and 8 meetings. No other employee witness corroborated his testimony, even though he testified that Duran and Amalio Garcia spoke at the December 5 meeting. No Company supervisor other than Lopez was asked if he had knowledge of the meeting. Moreover, Lopez did not deny an equally damaging conversation with Mejia, to be discussed later.

14. The Suspension Of Basilio Banuelos:

Banuelos has worked for the Company as a picker for about three years. During the organizational campaign, he attended Union meetings, served charges on supervisors as a member of a large group of employees, and was a crew captain for a short period. At one of the meetings held by Perez to present the Company's position in favor of a "no union" vote, Banuelos challenged his statements concerning the relative merits of the Company and Union medical insurance plans. On September 16, Banuelos was with the group of employees waiting in the east side parking lot to talk to John Brown. Perez arrived and told

Banuelos and the others that if they did not return to work he could sue them or even have them sent to jail. Perez admitted that he threatened the employees with possible disciplinary action if they did not go back to work. After Parada and Duran were suspended in late November, Banuelos took up a collection for them at work.

On December 19, Banuelos was picking mushrooms. He had a large plastic bag, called a "stump bag" on the mushroom bed he was picking. The bag is used to collect mushroom stumps and other waste. It is undisputed that the Company prohibits placing stump bags on beds in mushroom houses other than those which are undergoing their final picking prior to being cleaned and readied for a new batch of young mushrooms. The problem with having a stump bag on a bed is that it can damage growing mushrooms. Banuelos claimed that on December 19, a Friday, the house in question was in its "fourth break" or final picking, and that the rule against having stump bags on beds does not apply in such cases, because there can be no damage to the growth of mushrooms. Salvador Garcia, a member of Banuelos's crew, testified that the house in question would have its final picking on Friday. However, he did not testify about December 19 in particular. Because a house is generally picked for four weeks before it is cleaned out, the fact that it would have its final picking on Friday does not mean that it would not have its first picking on Friday as well.

Sosa testified that he entered the house in which Banuelos was picking and saw a stump bag on his mushroom bed. Sosa stated that the house was in its "first break," which means

that it was being picked for the first time. Sosa said that he had never seen another stump bag on a bed in his tenure as a picking supervisor. Jose Lozano, the crew's puncher, also testified that it was a first break house. Morado stated that the rule prohibited placing stump bags on beds in any house.

Banuelos received a three-day suspension for his offense. The suspension form notes that the house was in its first break. There is no contention that the suspension form was not filled out on December 19. Pena handed the suspension to Banuelos. When Banuelos complained, Pena referred him to Lopez. Lopez told him that he was lucky that he had not been fired. The record discloses that three other employees had received warnings in 1980 for having stump bags on their beds, one of which was signed by Sosa. None was suspended.

15. <u>The Suspension Of Ezequiel Hernandez</u>:

Hernandez, who is the son of Carlos and brother of Alfredo, began working as a picker before his relatives were hired. He was an active Union supporter, a crew captain, and had had a conversation with Perez relating to the election shortly after it took place.

Hernandez received a verbal warning from Sosa on October 15, for long stems, and a written warning 10 days later for long stems and mixing the two grades of mushrooms. On January 5, Morado suspended Hernandez for three days after weighing his mushroom baskets and finding them light. Hernandez testified that he was only suspended for two days. Hernandez did not deny that his baskets were low, but he claimed that other members of his crew also had long stems and low weights but were

not punished. Hernandez named two crew members who fell into this category, but admitted that they had also signed authorization cards and supported the Union. Morado testified that Hernandez was the only member of the crew whose baskets were low on January 5.

16. The Suspension Of Antonio Tovar:

Tovar has worked for Respondent as a picker since 1974. During the organizing campaign, he attended meetings, was a member of a group of employees which served charges on Company representatives, and participated in the work stoppage on November 23.

On October 25, Sosa orally warned Tovar that he was leaving long stems and mixing the two grades of mushrooms. On January 21, Sosa told him that his stems were too long. Two days later he was given a three-day suspension for long stems. Tovar did not deny that his stems were long, but stated that he had not been told that there was any problem with his work.

17. The Alleged Threat To Luis Mejia On March 3, 1981:

Mejia was subpoenaed by the General Counsel to testify at the hearing in this matter. On March 3, 1981, he notified his supervisor, Ruben Arias, that he would be absent from work the following day to testify. Late that afternoon Lopez told Mejia that:

> Ruben had told him that I had to go to court, and that it was all right, but that on Thursday morning I had to present some kind of a paper signed by the judge [sic] stating that I had been here the whole day, or otherwise I would be in great problem [sic].

Lopez was, at first, evasive when testifying about this issue, but finally admitted that he had told Mejia he would be required to bring some sort of a paper signed by me.

On cross-examination, Mejia, who had testified that he had told other employees about the signed paper requirement, was asked if he now understood that he would not have to bring a signed paper when he returned to work. Mejia replied: "Yes, that is what you're telling me now, but I would like to know what my supervisor is going to tell me about it."

ANALYSIS AND CONCLUSIONS

A. Section 1153(a) Issues.

The Complaint alleges 12 violations of §1153(a)'s prohibitions against employer interference, restraint, or coercion of agricultural employees in the exercise of rights set forth in §1152 of the Act. The allegations fall into three categories: interference with the right of employees to communicate freely, through the imposition of barriers to speech and movement within the plant; denial of access to representatives of the Board and the Union; and threats.

1. Allegations Concerning The Ability Of Employees To Communicate Among Themselves.

The General Counsel argues that Perez's July instruction to the picking crews not to speak about politics, religion, or sports during their working time constitutes a violation of the Act because it was aimed at Union organizing. It is undisputed that Perez did not speak about Unions when he talked to the employees and that employees freely discussed unionization within the plant after he spoke to them. Perez characterized his talk as

a reminder of the Company's long-standing rule against solicitation. However, his explanation of the impetus for the reminder, namely that an Avon lady and an employee in the office selling jewelry had caused an uproar in the plant, is so incredible as to require a search for some other motive for Perez's visit to the pickers, who were not involved in the incidents which Perez cited and to which Perez made no reference in his short speech to the employees.

The General Counsel contends that the motivating factor behind Perez's reminder was the garlic strike in Gilroy. Clearly, the Company was aware of the strike and had already shown its sensitivity to the possibility of unionization in its admonition to Parada not to speak about the Union at work. Perez's examples of employees arguing about boxing matches, the Presidential election, and the religious beliefs of Hindu employees as additional reasons for the reminder are unconvincing, since there is no indication that they led to any problems within the plant except, perhaps, at breaks or during lunch, when the rule did not apply. Morado also testified that the rule was meant to include talking about the Union. I agree with the General Counsel that the visits by Perez to the picking crews are evidence that the Company had knowledge of incipient organizational activity among its employees or, at the very least, suspected that the garlic strike would give rise to such activity.

I do not agree, however, that the mere invocation of a rule prohibiting talk about politics, sports, or religion constitutes a violation of the Act. There must be evidence that the rule would reasonably tend to restrain employees in the exercise

of their organizational rights. The Company's Employee Relations Manual does contain two versions of a non-solicitation rule. One bars all solicitation by any person, at any time, for any purpose. This rule, while clearly invalid on its face, does not appear to have been enforced in a manner violative of the Act. The other no-solicitation rule, listed under plant rules of conduct, bars solicitation during working hours. While a no-solicitation rule referring to "working hours" as opposed to "working time" is presumptively invalid, Essex International, Inc., 211 NLRB 749 (1974), there is abundant record evidence that employees were permitted to engage in organizational activities before and after work, as well as during breaks and lunch. I therefore conclude that, in telling employees not to discuss politics, religion, or sports while working, Respondent did not violate §1153(a) of the Act. Paragraph 7(b) of the Complaint shall be dismissed.[5/]

In its brief, the General Counsel concedes that the rule against sports, religion, and politics "did not work." Employing dramatic and colorful phrases such as "state of siege" and "all-out war," the General Counsel contends that a number of measures taken by Respondent unlawfully restricted the ability of employees to communicate with each other at the plant about the Union. Beginning in August, the Company took steps to tighten security in the plant and to monitor movement from one side to the other. First, the Company hired full-time guards. Prior to this

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5/Whether Respondent applied its no-solicitation rules in a discriminatory manner is a separate issue, which will be discussed in connection with specific allegations of violations of §1153(c) of the Act.

time, guards had not been present during the day. Second, employees were required to wear I.D. badges at all times. These two measures enabled Respondent to enforce effectively its rules prohibiting entry to the plant to off-duty employees. Respondent's instructions to the guards demonstrate that the Company contemplated that they might serve as an early warning system in the event of labor unrest and is further evidence that it had begun to plan for that contingency at a time when it denied knowledge of organizational activity among its employees. But, no allegation has been made that the required use of I.D. badges or the employment of the guards are violations of the Act.

The Complaint does allege that changes in rules concerning entry to, and access within, the plant interfered with organizational activities and constitute violations of the Act. It is undisputed that Respondent's rules prohibited employees from being on Company property when they were off duty and that employees who left their work area without permission were subject to discipline. There is no substantial evidence that Respondent changed its rules concerning access and employee movement within the plant during the pre-election period; the issue is whether the Company enforced these rules in a discriminatory manner. That issue will be addressed in connection with allegations of violations of §1153(c) of the Act. Such discriminatory acts would also constitute derivative violations of §1153(a). Because I do not find that Respondent changed its rules concerning employee access to the plant and movement within it, I conclude that Paragraph 7(f) of the Complaint must be dismissed.

Similarly, the Complaint alleges that the enclosure

of the east side parking lot by a fence constitutes a violation of the Act. Respondent conceded that it constructed the fence, in part, as a defensive measure in the event of a strike. I am unable to find that the mere construction of a fence would cause a reasonable employee to feel menaced or threatened and thus interfere, coerce, or restrain him or her in the exercise of protected rights. Whether Respondent in fact used the fence in an unlawful manner is a separate issue. I conclude that Paragraph 7(n) of the Complaint must be dismissed.

The Complaint also alleges that Respondent denied employees use of the intercom system in order to interfere with their organizational efforts. On September 10, Parada used the intercom to announce an organizational meeting. He was not disciplined for using the intercom. There is no evidence that either employees or management had previously used the intercom for purposes relating to solicitation or speeches. Employees had been permitted to use the intercom to talk to the office, supervisors, and other employees. A day or so after Parada's announcement the intercom was out of service for several days. Respondent claims that the system broke down frequently. Unlike the General Counsel, I do not find this defense totally unbelievable. I find it to be no more unbelievable than the possibility that three typewriters in the Board's Salinas office would refuse to work on the same day that a brief was due to be filed, as happened in this case. It is a matter of almost universal knowledge in a technological society that telephones and other machinery sometimes cease to function.

There was testimony that when the intercom returned

to service the numbers had been changed. Because no General Counsel witness claimed to have tried to use the system again, I find this testimony unpersuasive and accept the Company's denial. The employees apparently decided to use other methods of communication, such as walkie-talkies. They might well have decided that it was unwise to broadcast their plans to management. I conclude that the General Counsel has failed to establish that Respondent denied use of the intercom to employees or, that if it did, that the intercom system had previously been available to employees to make announcements or for other purposes unrelated to work. Paragraph 7(k) of the Complaint must be dismissed.

2. Allegations Of Denial Of Access To The Board And The Union And Impersonation Of A Board Agent.

On September 8, the Union filed a Notice of Intent to Take Access. It designated Jose Mendoza, who had already been discharged, as an organizer. Despite some testimony by John Brown that the Company had denied access to Mendoza, there is no allegation of such denial by the General Counsel. Evidently, the Union did not attempt to take access until September 15. An agreement was reached between the Company and the Union limiting access to the parking lots and cafeterias on both sides of the plant. John Brown took access at lunch time on September 15, in the cafeterias. Perez expressed concern that he had attempted to go into areas other than the cafeterias. On September 16, Brown took access and spoke to employees in the west side cafeteria. He testified that he had heard that organizing captains from the east side had been prevented from going to the west side cafeteria. Assuming that this is true, I do not find that the denial constitutes a violation

of the Act. There is no evidence that workers from one side of the plant were ever permitted to eat lunch on the other side. In fact, Juventina Chambers had requested a transfer several months earlier to enable her to eat lunch with her sister who worked on the other side of the plant.

When Brown arrived at the east side of the plant, he was confronted by Perez. A large group of employees had gathered in the parking lot. The gates were closed. They were readily opened for Brown. Perez demanded that Brown be escorted to the cafeteria in a car. Brown refused. He testified that he preferred to speak to the employees in the parking lot. He then left the parking lot. The gates were opened for him. He returned to the parking area atop a car and addressed the workers. The Union took access several more times before the election. There were no further incidents.

Much confusion surrounds the events of September 16. While some of the details remain unclear, there does emerge a resistance on the part of the Respondent to Union access which manifested itself in very restrictive interpretations of the Board's access regulation. It also is apparent that John Brown saw an opportunity for confrontation with the Company and seized upon it for tactical purposes. Despite the hostility which Perez displayed, Brown did have the option of staying in the parking lot to talk to the workers, which is what he testified that he wished to do. Or, he could have talked to the employees in the cafeteria. While I can understand Brown's unwillingness to be seen in a car with Company supervisors, I do not find that Perez's insistence to be in violation of the access regulations.

However, Perez and other supervisors did interfere with the Union's right to take access by delaying Brown's entry into the parking lot and by threatening employees who remained to listen to Brown with suspension or arrest. Perez claimed that the situation was confusing to him, because the lunch break had ended for some of the employees, but not for others. Regardless of Perez's motives, his threats transformed a rather trivial incident into one which reasonably tended to interfere with the employees' organizational rights. I conclude that the Respondent violated §1153(a) by interfering with the rights of its employees to have access to Union organizers on September 16.

It is undisputed that Respondent denied access to Viniegra and other Board agents who wanted to conduct worker education within the plant. Again, the tone of the Respondent in discussions with Board agents could be characterized as hostile or "stonewalling." Clearly, Respondent did not intend to permit greater access to the Board than it was legally obliged to. But, the General Counsel's argument that Respondent's refusal to permit access to the Board for the purpose of conducting worker education is evidence of anti-Union animus is completely without merit. The Company was within its legal rights to deny such access to the Board in the absence of a Board regulation authorizing it. San Diego Nursery Company, Inc. v. Agricultural Labor Relations Board, 100 Cal.App.3d 128 (1979). Indeed, while Viniegra relied upon San Diego Nursery as authority for taking access, it is now Respondent which cites the case in its brief, while the General Counsel has chosen to ignore it.

Later on September 16, Viniegra delivered an

address over the intercom system. I do not credit the testimony which indicates that the Company cut off Viniegra's speech. If the Company were cynical enough to have offered Viniegra an opportunity to talk to himself alone, surely it would have been clever enough not to have waited until several minutes into his speech before cutting him off. Again, while Respondent may have timed Viniegra's address to ensure that few employees would hear him, I cannot find that this is a violation of the Act.

On September 17, Board agents arrived late to speak to employees about the election process. But, after a short discussion, the agents were permitted to speak to the employees at their work place.

The Complaint also alleges that the Company locked employees in the parking lot in order to deny them access to Viniegra. Viniegra's testimony establishes that he had no intention of speaking to workers when they were in the parking lot because of a Board policy not to do so when Union organizers are present. The reason for the policy, of course, is to avoid linking the Union and the Board in the minds of the employees.

In sum, I conclude that the Respondent did not impede the Board in the carrying out of its lawful election functions. Paragraph 7(p) of the Complaint shall be dismissed.

It is further alleged that the anti-Union speech given by Ed Hunter is violative of §1153(a) in that Hunter impersonated a Board agent. The facts of the matter are not in dispute. I conclude that Respondent did not intend to pass off Hunter's speech as emanating from the Board. It was intended to

be a speech giving the Company's arguments against the Union. Regardless of motive, the speech could still be a violation of the Act if it reasonably tended to interfere with, restrain, or coerce employees in the exercise of protected rights. Several supervisors did tell employees that they were about to hear a Board agent. However, the overwhelming weight of the testimony demonstrates that there was in fact no confusion on the part of the employees. Hunter has a distinctive South American accent well known to the employees. Most listened for a minute or two, recognized Hunter's voice and returned to work. Those who did not immediately recognize his voice were no doubt informed of his identity by other employees. I conclude that no reasonable employee would have been misled into believing that Hunter's speech was being given by a Board agent. I shall therefore dismiss Paragraph 7(q) of the Complaint.

3. Allegations Of Threats Made By Respondent.

On or about September 12, Respondent mailed copies of the Morgan Hill Times article concerning the closure of Alpine Mushrooms to all employees. According to Jud Brown, he sent the article "to show employees what might happen if the union made excessive demands."

Section 1155 of the Act, which is almost identical to Section 8(e) of the National Labor Relations Act, insulates employer speech from the provisions of §1153(a) unless it contains a threat of reprisal or force, or promise of benefit. In N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court addressed the distinction between employer speech which merely advises employees of a point of view, and that speech

which contains an implied or veiled threat:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union. . . . He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion. . . . [395 U.S. at 618-19.]

Here, Respondent mailed the article to its employees without any explanation. The headline notes the plant closing and the article makes it clear that the closure took place immediately after the Union won the representation election. There is no indication that the closing was related to positions taken by the Union on economic issues. The clear implication of the article is that an employer is free to close its plant after the Union wins an election. The Company's conduct here falls far short of the requirements laid down by the Supreme Court in Gissel. I conclude that in sending the Alpine article to its employees Respondent has violated Section 1153(a) of the Act.

Similarly, the statements made by Arias to Mejia and other employees implying that a strike was inevitable and that the Company would never agree to a contract, but would replace the strikers, is not a prediction based on objective fact.

Nor is it merely the privileged opinion of a supervisor. Taken together with the Alpine article, Arias's statements convey a threat to employees that a Union victory would likely result in the closing of the plant or a strike. In either event, they would lose their jobs. I conclude that Arias's statements contain threats of reprisal and violate §1153(a) of the Act.

Although Perez told Ezequiel Hernandez shortly after the election that things were going to be a little harder from now on, I do not find that this rather ambiguous statement is violative of the Act. It was an isolated conversation, which both participants characterized as friendly. There is no evidence that any other employee was aware of the conversation or that Hernandez considered it to be of any significance at the time. I conclude that Paragraph 7(s) of the Complaint must be dismissed.

As I have found that the evidence is insufficient to conclude that Lopez or Pena threatened Cortez with a suspension because of his attendance at a meeting at the Board's Salinas office, I conclude that Paragraph 7(ss) of the Complaint must also be dismissed.

It is alleged that Lopez's statement to Mejia that he needed an excuse signed by the Administrative Law Officer or he would be in big trouble is a violation of §§1153(a) and (d) of the Act. In concluding that Lopez's statement does violate the Act, I rely heavily on the context in which it occurred. Despite the Board's decision in Giumarra Vineyards, 3 ALRB No. 21 (1977), that the General Counsel is not required to disclose the names of employee witnesses to Respondent in advance of their testimony, in

order to minimize threats or fears of reprisal, I had asked that General Counsel voluntarily make the names of the following day's witnesses available to Respondent. I made this request because of Respondent's expressed need to know who would be absent from work in order to make necessary arrangements for replacements. I had made similar requests in other cases to minimize disruptions to the employer's operations. In this case, the General Counsel was reluctant to comply because of employee fears of reprisal, and the Respondent was particularly eager to have the names each day. In light of this background, even though Lopez's statements were quickly disowned by the Company, I find that it is extremely important for both the employees and Respondent to understand that interference with Board processes or attempts to restrain employees from testifying will not be tolerated. I conclude that Lopez's statements are violative of §1153(a) of the Act.

B. Section 1153(c) Issues.[6/]

1. Legal Principles.

Cases involving allegations that employees were discharged or subjected to lesser discipline by their employers because of their participation in union activities have comprised a majority of the unfair labor practice caseloads of both the National Labor Relations Board and our Board since their inception. The number and variety of legal tests to determine a

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6/The General Counsel alleged that a number of suspensions violated §1153(d) of the Act. The evidence does not support a finding that Respondent discriminated against those employees who filed unfair labor practice charges against it. Only five of the many employees who filed charges were subsequently disciplined. I conclude that Respondent has not violated §1153(d).

violation of Section 8(a)(3) of the National Labor Relations Act (§1153(c) of the Act) have proliferated in recent years, resulting in "intolerable confusion," according to the NLRB. In Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980), the NLRB made an attempt to clarify the situation by setting out a test for violations of Section 8(a)(3) which, although it uses new phraseology, is consistent with previous standards. After reviewing the history of the development of various tests, which I will omit here, the NLRB adopted the reasoning of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), in arriving at its new formulation:

> . . . [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [105 LRRM at 1174-5.]

I find that Wright Line is an applicable precedent under the NLRA, which the Board is required to follow, pursuant to §1148 of the Act.

In order to make out a prima facie case of a violation of §1153(c), the General Counsel must ordinarily[7/] establish that the affected employee engaged in union or other protected activities, that the employer had knowledge of those activities,

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7/For an exception to this rule, see discussion in Section B.3(a), infra.

and that there is some causal link between the protected activities and the discipline. Evidence to support a finding that such a causal link exists will typically be circumstantial and the reason proffered by the employer for the discipline may be so insubstantial as to provide further evidence of a discriminatory motive. Although the NLRB discussed the distinction between pretext and dual motive cases in Wright Line, I agree with the NLRB that it is unnecessary to draw a line between them. Whenever the General Counsel has met its burden of establishing a prima facie case and the respondent has submitted nondiscriminatory business justifications for its conduct, the Board must balance the protected conduct against the business justification. A pretextual business justification differs from another business justification insufficient to outweigh the employee's right to engage in protected activities only in weight or degree, not in kind. It may be said that a pretextual explanation has no weight at all, but in all cases the same analytical process must be undertaken in order to arrive at a decision.

2. The Discharges.

(a) Refugio Franco:

Franco's Union activities at the plant took place before there was any organized campaign among Respondent's employees. Franco spoke to a relatively small number of employees about the desirability of having a union more than a month before he contacted John Brown of the UFW. The only evidence that Franco's activities consisted of anything more than talk came from his puncher, Jose Lozano, who testified that Franco urged him to sign an authorization card.

Respondent denies that it had any knowledge of Union activity at the plant in June or July and specifically denies that it knew Franco had been talking about the Union when it discharged him. Lozano testified that he never told any other supervisor about Franco's activities. His denial is credible, particularly since Lozano did later sign an authorization card. There is, however, other evidence that the Company was aware that employees were talking about the Union at the time of Franco's discharge. First, Perez called Parada to his office around June 20, discussed statements that he thought Parada had been making about Company wages in relation to those of a mushroom grower with a Union contract (apparently Mendoza had made the statements), and advised Parada not to talk about the Union at work. Clearly, Respondent had some intelligence source providing information to Perez about a conversation between Parada and Mendoza. It could just as easily have learned the names of the others who were also discussing unionization. Second, Perez spoke to all the picking crews about the Company's no-solicitation rule in early July. The rather lame reasons for these speeches proffered by Perez leads to the inference that concern about Union activity was the real motivation for them. These considerations lend support to the finding that Perez told Priciliano Garcia that Franco had been fired for cause, rather than his Union activities, shortly after Franco's discharge, and not several months later, as Perez claimed. Respondent's denial of knowledge of Franco's protected activities, when in fact it had such knowledge, coupled with the Company's admitted failure to adhere to its usual progressive disciplinary system in Franco's case, supports an inference that

Franco's protected activities were a motivating factor in the decision to discharge him. I therefore find that the General Counsel has made out a prima facie case of a violation of §1153 (c).

Respondent argues that Franco would have been fired even if he had not engaged in protected activities. Franco was simply absent and tardy too much. Perez determined that he was incorrigible and there would be no point in going through with a five and 10-day suspension. In fact, prior to June 28, when Franco asked for the day off because his pregnant wife might need medical attention, Franco's disciplinary record was not a particularly bad one. He had been suspended for three days in April for an unexcused absence. This was his first suspension. He had never been warned or suspended for tardiness, despite Perez's anecdotal testimony that Franco had difficulty getting to work on time, had been seen drunk in a car, and sometimes did not tell his wife where he was. The unsubstantiated nature of this testimony, offered in an effort to demonstrate that Franco was indeed incorrigible, actually undermines Respondent's contention that Franco's was an appropriate case to deviate, apparently for the first time, from its standard progression of warning, three, five, and 10-day suspensions, prior to discharge.

Respondent points out that the General Counsel has not alleged that Franco's suspension for unexcused absence on June 28 was discriminatory. The only allegation concerning Franco relates to his discharge. In Franco's case, I find that the circumstances surrounding the incidents of June 28, July 4, and July 6 were fully litigated and reasonably encompassed within the

allegation of discriminatory discharge. With respect to the suspension for unexcused absence on June 28, there was no testimony contradicting Franco's statement that he was never asked for a note from his wife's doctor after he returned to work. Perez suspended him without asking for the note or for an explanation of why there was no note. Perez must have been aware that Mrs. Franco, a Company employee, was pregnant, and that doctors or hospitals provide treatment to pregnant women even if the doctor's office is closed. Perez might well have disbelieved Franco's story, but the failure of any Company supervisor to ask Franco for his account leads me to conclude that the suspension was discriminatory and would not have been issued if Franco had not been engaging in Union activities.

Franco was late to work on July 4. According to Perez, a decision was made in very early July to permit all tardy employees to come to work, with discipline to be decided upon later. Because the exact date of this policy change was never established, the evidence is insufficient for me to conclude that the refusal to allow Franco to work on July 4, a holiday with extra pay, was discriminatory.

Perez hedged about when the decision to terminate Franco was made. At one point, he testified that the decision may have been made before Franco missed work on July 6. In any event, I have found that Franco was told by Morado not to work on July 6, in order that his five-day suspension actually include five working days.

A review of the disciplinary records of other employees discharged by Respondent for attendance problems indicates

that employees were rarely fired after they had been absent or tardy only the bare minimum number of times in a six-month period.[8/] In fact, Ricardo Ortiz, also known as Sergio Aguiniga, who was discharged on July 5, when the decision concerning Franco may also have been made, had been absent or tardy 13 times in the preceding six months. Perez testified that consistency in discipline was a factor that he considered when making decisions about the severity of discipline. These two actions demonstrate no consistency at all. And Franco was not even told by any supervisor in the week preceding his termination that he was in trouble. If, as Franco testified without significant contradiction, he did not receive the five-day suspension notice until July 5, the last day he worked, he had no reason to suspect that his employment was in jeopardy until that day.

I conclude that, while Franco's attendance record may have been a factor in Respondent's decision to discharge him, he would not have been discharged if he had not engaged in protected activities at the plant. His discharge therefore was in violation of §§1153(a) and (c).

(b) Jose Mendoza:

Mendoza engaged in a number of Union activities at the plant. Parada was called to Perez's office in June to discuss statements made by Mendoza to Parada. Whether or not Mendoza's name was mentioned by Perez, it seems likely that Perez would have known the name of the other party to the conversation. On September 5, Mendoza was distributing authorization cards to

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8/A number of employees who missed work three days in a row were terminated as voluntary quits.

crew captains in various locations on both sides of the plant. Although Lopez ejected Mendoza from the plant and was involved in the decision to suspend Mendoza for 10 days, he denied knowing that Mendoza was distributing authorization cards. Lopez never even asked Mendoza what he was doing all over the plant. Such a lack of curiosity can only be explained if Lopez already knew the answer to the question he never asked. Lopez's testimony on the issue of knowledge was evasive, inconsistent, and utterly unbelievable. The fact that Mendoza was suspended while engaging in concerted activity supports an inference that those activities were a motivating factor in the decision to expel him from the plant, suspend him for 10 days, and then discharge him. The General Counsel has met its burden of making out a prima facie case as to these allegations. Even though the 10-day suspension was not alleged as a violation of the Act, it was fully litigated, and is reasonably encompassed within the allegation of discriminatory discharge.

The Complaint also alleges that the three-day suspension Mendoza received for being late to work on August 31 was discriminatory. I find that the General Counsel has not met its burden of establishing a prima facie case as to this violation. Mendoza was admittedly late on August 31. The General Counsel argues that the fact that Mendoza was permitted to work that day means that the Company had accepted his excuse and that the fact that he did not receive a suspension notice until September 2 or 3 demonstrates that the Company must have deliberated and decided to suspend Mendoza for discriminatory reasons. These contentions are without merit. By this time, Respondent seems to have adopted

the practice of permitting all tardy employees to work, rather than be sent home, even though Mendoza had been sent home four weeks earlier. A delay in two days from the time of the infraction until receipt of a suspension is not at all uncommon at Steak Mate. Furthermore, there is nothing to suggest that the level of Mendoza's Union activities as of August 31 differed significantly from that of other employees. Union activities did not become fully open and visible until September 5.

The facts with respect to Mendoza's 10-day suspension present a true "dual motive" case. It is clear that Mendoza was engaging in Union activities at the plant on September 5 and that the Company was aware of what he was doing, but it is equally clear that Mendoza was in violation of long-standing Company rules by his very presence at the plant. The question is whether Mendoza would have been expelled from the plant and/or suspended if he had not been engaging in Union activities.

Respondent presented convincing testimony that sanitation and contamination are important concerns for mushroom growers. The Company attempted to demonstrate that Mendoza went into off-limits areas on September 5 and that his movements presented serious contamination dangers. Although Respondent established that Mendoza was on or near the wharf, a "dirty" area of the plant just before he finally left, it did not prove that he was in the case preparation area, where the air is filtered and sanitation is critical. The fact that Mendoza's suspension notice does not mention contamination as a reason for the discipline and that no supervisor told Mendoza that contamination was involved in his suspension, leads me to conclude that the

contamination issue was an afterthought, submitted by Respondent in an effort to bolster its business justification defense.

Mendoza was in violation of Plant Rule of Conduct No. 10, which prohibits employees from being on Company property except during working hours. The fact that Mendoza claimed that he asked Lopez for permission to be in the plant suggests that he was aware of this rule. A review of Respondent's disciplinary records failed to disclose a single warning or suspension to an employee for unauthorized presence on Company property from January 1, 1979, to the date of Mendoza's suspension. It is possible that no employee had previously violated the rule, but the testimony of several employees that they routinely came to the plant on their day off, coupled with Perez's memo to all supervisors on August 11 to remind employees that they were not allowed on Company property on their day off, belies such a conclusion. On September 23, less than three weeks after Mendoza's suspension, Rodolfo Chavaria received only a warning from Morado "for forcing his way in to the company premises on his day off Saturday 9/20/80. And was under the influence of alcohol. (Breaking company rule No. 10)." Chavaria's infraction appears to be at least as serious as was Mendoza's. Again, the inconsistency in discipline meted out for roughly comparable offenses supports an inference that Mendoza would not have received a 10-day suspension had he not been engaged in Union activities.

I conclude that in expelling Mendoza from the plant, Lopez was simply enforcing a Company rule and would have done the same thing even if Mendoza had not been engaged in Union activities. However, I find that Mendoza's 10-day suspension was

in violation of §§1153(a) and (c) of the Act, taking into consideration Respondent's unbelievable denial of knowledge of Mendoza's Union activities, the lack of previous discipline of employees for being on Company property on their day off, the pretextual nature of the contamination defense, and the inconsistency in discipline between the very rare 10-day suspension given to Mendoza and the warning to Chavaria for comparable offenses.

Mendoza's discharge grew out of his reaction to his discriminatory suspension, which he reasonably viewed as unfair. While Mendoza was argumentative with Lopez, I do not find that the argument went so far as to deny him protection under the Act. Lopez said that Mendoza was "almost yelling." There was no obscenity used. At most Mendoza hurled the epithet "liars" at Lopez and Pena. If he did, it was apparently in reference to a false statement by Lopez that plant rules had just been changed the day before. None of this conduct rises to the level of insubordination.[9/] Even though Mendoza had previously been warned not to argue with Lopez, this warning cannot provide a business justification to an employer which has discriminatorily suspended an employee. Mendoza had the right to complain, within limits, and he did not exceed those limits. I find that Mendoza would not have been discharged if he had not been engaging in Union activities and that his discharge was in violation of §§1153(a) and (c).

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9/Lopez may have attempted to provoke an insubordinate response from Mendoza as a pretext for firing him. In such cases, insubordination is not a valid ground for discharge. See Highland Ranch and San Clemente Ranch, 5 ALRB No. 54 (1979), ALO Decision, p. 24, and cases cited therein.

(c) Armando Lemus:

Lemus spoke about the Union at the plant while working as a picker and after his transfer to the line cleaning job. He had several conversations with Hunter concerning the Union in which he and Hunter took opposite sides. At the time of the election, Hunter was not a supervisor, but he did act as an agent of the Company when he delivered the anti-Union speech. Hunter attended meetings of supervisors in his capacity as picking department secretary and was involved to some extent in the Company's anti-Union campaign. The conversations between Lemus and Hunter provide some evidence of Company knowledge of Lemus's Union activities, but the activities themselves did not rise above the general background level of activities engaged in by the majority of pickers. Hunter was discharged for tardiness after having been suspended for three, five, and 10 days for tardiness or unexcused absences. He had also been warned about poor work and been advised that the next violation would result in his discharge. I find that the General Counsel has not made out a prima facie case that Lemus's Union activities were a motivating factor in his discharge. I will order that Paragraph 7(t) of the Complaint be dismissed.

Even if the General Counsel had succeeded in establishing a prima facie case, I would find that Respondent has met its burden of proving that Lemus would have been discharged despite his Union activities. There is no doubt that Lemus was late to work on the day that he was discharged. His account of the instructions he received from Naranjo was riddled with inconsistencies. There is nothing to indicate that Lemus was

deliberately misinformed about the time he was to report to work. Perez's testimony about following Lemus to work in his car is so unusual that it would have been hard to invent. It is the kind of event which would have caused Perez to check Lemus's time card the following day. Finally, Lemus's record was so bad that Respondent did not need to go out of its way to find a reason to discharge him. And, considering that his activities in support of the Union were indistinguishable from those of most of the other pickers, there is no reason to assume that the Company seized upon Lemus's tardiness as a pretext to fire him.

3. The Suspensions And Warnings.

(a) Introduction:

The General Counsel argues that after the Union's election victory the Company embarked on a campaign of discriminatory issuance of suspensions aimed at Union supporters. The record confirms that there was an upsurge in warnings immediately after the election. There were 21 suspensions not related to attendance in the 20 months from January, 1979, through August, 1980. In the five months after the election, there were 26 such suspensions issued to 22 individual employees. The statistics relating to discipline for failing to adhere to the Company's picking rules are an even more dramatic indication of a change in disciplinary policy after the election. During the 20-month period just referred to, the Company issued two warnings in 1979 to employees for not properly cutting the stems on their mushrooms. There were no suspensions for this offense. In June, 1980, one employee received a suspension for low weights and long stems. There was one warning and no suspensions during this

period for mixing different grades of mushrooms. During the months of October and November alone, the Company issued 25 warnings and four suspensions for these offenses. Almost all of the employees were cited for both violations at the same time.

But the record does not support the General Counsel's contention that Union supporters were disciplined disproportionately to their percentage of the work force. Of the 22 employees suspended for reasons not related to attendance during the post-election period, 15 are named as alleged discriminatees, while the other seven are not. Since the Union received two-thirds of the votes in the election, there is no evidence of disparate impact as to its supporters. Nor were the suspended employees noticeably more active in their support of the Union, for the most part, than were those Union supporters who were not suspended. In short, except in a relatively small number of cases, which will be discussed individually later, the record does not indicate that the Company singled out specific Union supporters for retaliation.

What the sudden increase of discipline after the election does demonstrate is that the Respondent decided to change its disciplinary standards in some areas, such as picking quality, and generally to enforce its existing work rules more harshly, in order to demonstrate to all its picking employees, regardless of their Union support, that it was still in control of the plant and could make life very difficult for them. Given the statistics I have just recited, I find it incredible that, absent some change in the Company's standards for suspensions, its employees were violating the work rules five times more often after the election

than they did before. But, not only did the Respondent fail to provide a business justification for a change in its disciplinary standards, it denied that any such change had taken place. In its brief, Respondent blandly asserts that if there were an increase in discipline after the election, it was caused by an increase in violations of its work rules. Respondent has made no effort to explain why nearly a quarter of its picking employees suddenly began to cut mushroom stems improperly after the election. The statistical evidence, taken together with testimony of several employees who were warned by supervisors that more suspensions would be forthcoming, the threats of reprisals during the election campaign, and the absence of any reasonable explanation by Respondent, establish that the increased discipline was motivated by Respondent's desire to punish its work force for its support of the Union.

In The Larimer Press, 222 NLRB 220 (1976), enforced M.S.P. Industries v. N.L.R.B., 568 F.2d 166 (10th Cir. 1977), the NLRB held that an employer which changed its long-established no-layoff policy immediately after a union victory in a representation election, violated Sections 8(a)(1) and (3) of the NLRA when it laid off employees, regardless of whether they had engaged in union activities or whether the employer had knowledge of any such activities. The NLRB found that the employer:

> . . . was not so much concerned with the individual activities of the employees involved as with the fact that a majority of the employees had voted in favor of the Union, and that it was determined to punish the employees for exercising their right of self-determination. Its change of policy, therefore, affected both pro-union employees and those whose union

> sympathies were unknown, and thus discouraged union activities of all employees, union or non-union. [222 NLRB at 240.]

The NLRB held that, in this type of case, it is unnecessary for the General Counsel to establish that the employer had knowledge of the union activities of each person laid off in order to establish unlawful discrimination. The Board has adopted the Larimer standard in Kawano, Inc., 4 ALRB No. 104 (1978), enf'd Kawano, Inc. v. A.L.R.B., 106 Cal.App.3d 937 (1980); and Highland Ranch and San Clemente Ranch, 5 ALRB No. 54 (1979).

In the present case, the General Counsel failed to allege that many of the warnings issued for long stem violations were unlawful. Some of these warnings served as the basis for suspensions for other work rule violations, in that a first offense ordinarily results in a warning, rather than a suspension. In the absence of the warning, there would have been no suspension for the subsequent offense. Because the General Counsel failed to allege that these actions were discriminatory, the facts surrounding their issuance were not fully litigated, and I am precluded from finding them to be unfair labor practices. Similarly, the General Counsel has not alleged that the suspensions for long stems issued to several employees, who I assume were not Union supporters, violated the Act. Although they could constitute unfair labor practices, under the Larimer approach, they have not been fully litigated and cannot be found to have violated the Act.

In sum, if the record establishes that the Company changed its disciplinary policy after the election with respect to a particular type of work rule, the General Counsel will not have to establish that the discipline instituted as a result of such a

change in policy was motivated by the Union activities of the individual employees subjected to the discipline. The burden will shift to Respondent, pursuant to Wright Line, supra, to prove that its change in policy was motivated by substantial business reasons, or that the discipline would have issued, regardless of the employee's Union activities, even under its pre-election disciplinary policy. In addition, because the total number of suspensions increased so dramatically after the election, Respondent will have the burden of establishing that the same kind of discipline would have been imposed before the election.

(b) Suspensions Relating To Picking Quality:

Twelve of the allegedly discriminatory suspensions were issued by Respondent for claimed violations of its production standards for picking mushrooms. These standards include filling baskets with sufficient mushrooms to meet the Company's minimum weight requirements, separating No. 1 mushrooms (those with closed veils and good color) from No. 2 mushrooms (those with open veils or bad color), and cutting the stems of the mushrooms to the proper length. In addition, employees are required to pick all ripe mushrooms from a bed before moving to the next bed and must avoid getting an excessive amount of dirt into the baskets along with the mushrooms. In this regard, employees are required to keep the plastic stump bags they use to dispose of waste off the mushroom beds to avoid damage to growing mushrooms.

(1) Suspension For Low Weights

In most of the individual cases of suspensions for quality violations, the General Counsel does not argue that there was no violation, but it does contend that the Company's

standards can be easily manipulated to find a violation whenever the Company wishes to discriminate against a Union activitist. In the case of proper weights, while the standard is an objective one, suspensions have been issued for failing to meet the 13-pound standard by as little as a half pound. However, there is no clear indication in the record of disparate treatment of Union members or of an upsurge of suspensions for this offense after the election. Three employees were suspended for low weights from the time scales were installed in the early months of 1980 until June 20. Two of them are named as discriminatees. There were no further suspensions for low weights until September 30, shortly after the election. Four employees received such suspensions after the election. Three are named as discriminatees.

a. Ramon Contreras: The General Counsel has established that Contreras was active in the Union's organizational effort and served as the organizing captain for his crew. He also was part of a group of employees which served unfair labor practice charges on Respondent. I find that Contreras's Union activities were sufficiently greater than those of the average Union supporter at Steak Mate to support the inference that Respondent had knowledge of those activities. Given the timing of his first suspension, shortly after the election, when there had been no other suspensions for any picking quality violations for more than three months, I conclude that the General Counsel has established a prima facie case that Contreras's suspensions were motivated in part by his Union activities.

Respondent's business justification is a simple one: Contreras's work was bad. He had received several

warnings about his work in the days immediately preceding his suspension, one from Sosa and the other from Lozano. Contreras did not deny that his work was bad on September 30. And, while Contreras disputed the fairness of his May suspension for low weights, there is no contention that it was issued in retaliation for nonexistent Union activities. Nor is there strong evidence that Respondent was singling out crew captains for discriminatory treatment. Only two other captains, Banuelos and Ezequiel Hernandez were suspended for picking quality violations during the post-election period and these suspensions occurred months later. I conclude that Respondent suspended Contreras on September 30 and November 13 for violations of its production standards and not as retaliation for his Union activities. I shall order that Paragraphs 7(u) and (hh) of the Complaint be dismissed.

b. Carlos Hernandez: Hernandez supported the Union during the election campaign. Sosa's conversation with Hernandez and his son establishes that the Company had knowledge of this support. The fact that Hernandez had a spotless disciplinary record prior to the election supports an inference that his Union support was a motivating factor in his suspension. I conclude that Respondent has made out a prima facie case of a violation of the Act.

In support of its business justification defense, Respondent points to the testimony of Sosa and Quintanar who stated that they weighed the baskets of all of the members of the crew and found only those of Sosa and Contreras to be light. Hernandez had received two warnings after the election for long

stems and mixing the two grades of mushrooms. There is no contention that these were discriminatory.[10/] Of course, those two violations do not support an inference that an employee is also likely not to fill his baskets to the proper weight, although it is possible to assert that one form of sloppy work leads to another. I also believe that Sosa's warning to Hernandez that there were going to be more suspensions actually negates a finding of discrimination in this case. Sosa would have had no reason to warn Hernandez that he was about to be suspended for his Union activities. Rather, it appears that Sosa was giving Hernandez advance notice that Respondent was about to begin giving suspensions for violations that had been overlooked in the past. I conclude that Hernandez would have been suspended even in the absence of his Union activities. Paragraph 7(ii) of the Complaint shall be dismissed.[11/]

c. Ezequiel Hernandez: Hernandez was his crew's captain during the organizational campaign. His conversation with Perez after the election establishes Company knowledge of his Union activities. Although his suspension occurred more than three months after the election, I find that this strong evidence of knowledge is sufficient to establish a *prima facie* case that Hernandez's Union activities were a motivating factor in his suspension.

10/If the issues relating to these warnings had been fully litigated, it is likely that they would have been found to be discriminatory. In that case, I would have ordered that this suspension be reduced to a warning.

11/Sosa's statements to Hernandez lend strong support to the notion that Respondent intentionally tightened up its disciplinary standards after the election.

Again, Respondent asserts that Hernandez was suspended for cause. Like his father, Hernandez received two warnings in October for long stems and mixing mushrooms, neither of which is alleged to have violated the Act,[12/] before receiving a suspension for low weights. Hernandez did not deny that his baskets were light. He did maintain that other employees in his crew with light baskets were not suspended, but he admitted that they also supported the Union. The evidence simply does not support an inference that Hernandez was singled out for suspension because of his Union activities. The only other employee to be suspended for low weights in January or February, 1981, was not alleged to have been the victim of discrimination. I shall order that Paragraph 7(xx) of the Complaint be dismissed.

(2) Suspensions For Long Stems

The difficulty with which Respondent's supervisors struggled in an effort to define the proper length of a mushroom stem was reminiscent of Justice Potter Stewart's efforts to define hardcore pornography in Jacobellis v. Ohio, 378 U.S. 184 (1964). Stewart conceded that he could not define the term, "[b]ut I know it when I see it. . ." Here, several punchers said they could not define a long stem, because it depended on the size of the mushroom, but they knew a long stem when they saw one. Pena, the Company's expert on quality control, came up with a more objective standard: the stem should be cut to equal the diameter of the mushroom's cap. Unfortunately, Morado's standard,

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12/If the issues relating to these warnings had been fully litigated, it is likely that they would have been found to be discriminatory. In that case, I would have ordered that this suspension be reduced to a warning.

while equally objective, was quite different. He testified that the stem should equal the circumference of the cap. (The circumference of a circle is 3.14 times longer than its diameter.) There is no evidence that the Company actually spent time measuring stems, diameters, and circumferences with a ruler. The purpose of cutting the stem to a certain length, according to Pena, was to assure customer acceptance, because some housewives refused to buy mushrooms with long stems. Stems must, of course, be cut at some point in order to remove the roots and dirt.

The General Counsel's argument that Respondent's quality standards were subject to manipulation for discriminatory purposes is particularly strong here. First, there was no agreement on what the standard should be. Second, the statistical evidence already cited indicates that long stems became a ground for discipline for the first time immediately after the election.[13/] The Company offered no explanation at all for this occurrence, unless some very vague testimony about quality problems constitutes an attempt to provide a business justification. Most of the discipline for long stems included citations for mixing the two grades of mushrooms. Prior to mid-1980, employees had to sort mushrooms into three sizes as well as two grades. Yet, there were only a few isolated warnings and no suspensions for violations of these standards prior to the election. Again, Respondent offered no explanation for this dramatic change.

I conclude that the General Counsel has established a prima facie case that discipline for mixed mushrooms

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13/After October, the number of warnings and suspensions dropped sharply.

and long stems was motivated by Respondent's desire to punish the picking work force for its support of the Union.

a. Alfredo Hernandez: Hernandez supported the Union. His conversation with Sosa establishes Company knowledge of this support. For the reasons noted above, I find that the General Counsel has made out a prima facie case as to Hernandez's suspension for long stems.

Respondent's defense rests on Hernandez's admittedly nondiscriminatory suspension in June for low weights and a warning from Sosa just prior to his suspension for long stems and mixed mushrooms. While the General Counsel has not alleged that this warning violated the Act, I find that it is reasonably encompassed within the allegation of a suspension for the same offense and that it has been fully litigated. Because Respondent has not come forward with any business justification for the sudden institution of discipline for long stem and mixed mushroom violations, I conclude that Hernandez was warned and suspended in retaliation for the Union's victory in the election, in violation of §§1153(a) and (c).

b. Juventina Chambers: Chambers was a Union supporter who spoke to her puncher, Priciliano Garcia, about the Union. Her brother, Alex Cortez, was also an active Union supporter. While the causal connection between Chambers's Union activities and her suspension is not strong, the unexplained institution of suspensions for long stems is sufficient to make out a prima facie case.

Respondent asserts that Chambers's stems were too long. Chambers did not agree. She had previously been warned

about her work by Mario Rodriguez, who, as a Union supporter, was clearly not motivated by anti-Union sentiments, but the warning was unrelated to long stems. There is no evidence that the Company singled Chambers out for retaliation, but I conclude that she would not have been suspended had Respondent not changed its policies concerning discipline for long stems in order to retaliate against all the pickers for the Union's election victory. In suspending Chambers, Respondent violated §§1153(a) and (c).

c. Salvador Garcia: Garcia's Union activities were rather typical of those engaged in by Steak Mate employees. Knowledge of these activities by the Company is established through the testimony of Perez, who remembered Garcia as an employee who served unfair labor practice charges on him and by the fact that his father, Priciliano Garcia, was a puncher, and his brother, Amalio, was a Union leader. For purposes of discussion, I will assume that the General Counsel has met its burden of establishing a prima facie case as to Garcia's first suspension. I find that, given the unexplained institution of suspensions for long stems, a prima facie case as to the second suspension has been made.

The first suspension relates to picking quality in that Garcia was required to attend a meeting for slow pickers. He refused. Because I have credited the testimony of Respondent's witnesses on the issue of what reasons Garcia gave for his refusal to attend, I conclude that he was suspended for business reasons and would have been suspended regardless of his Union activities. The fact that Garcia is the only person to have been suspended for refusing to attend such a meeting is of

little significance, because there is no evidence that any other employee had ever refused to attend. I will order that Paragraph 7(aa) of the Complaint be dismissed.

The suspension for long stems came after Garcia had filed an unfair labor practice charge in connection with the first suspension and after he had participated in the work stoppage of November 23. Lozano, while confirming that Garcia's stems were long, strongly implied that he did not believe that Garcia should have been suspended. Lozano had informally warned Garcia about long stems, but it was his policy not to issue a written warning unless there was no improvement after several informal warnings. Sosa, who issued the suspension, did not testify on this issue. Whether or not Sosa was aware of the informal warning, I conclude that Garcia would not have been suspended if the Company had not changed its policy concerning discipline for long stems after, and because of, the Union election victory. The suspension violated §§1153(a) and (c).

d. Antonio Tovar: Tovar's Union activities were not remarkable. He participated in the serving of charges and the November work stoppage. I find that these activities are sufficient to establish Company knowledge and that, because he was suspended for long stems, the General Counsel has made out a *prima facie* case.

Tovar received two oral warnings after the election and before his suspension for the same offense. The warnings are not alleged to have been discriminatory. In the absence of a reasonable business justification for its change in policy concerning discipline for long stems, I conclude that

Tovar, who had worked for the Company for six years without receiving any discipline, would not have been suspended had the Company not changed its policy in order to punish the pickers for the election victory. I conclude that Tovar's suspension violated §§1153(a) and (c).

(3) Other Suspensions Relating To Work Quality

a. Miguel Rivera: Rivera engaged in Union activities typical of those of other employees at Steak Mate. On November 26, he was warned for leaving his work area when he went to discuss the recently implemented picking change with Tovar. As a result of this incident, I conclude that Perez associated Rivera with those who were continuing to protest the picking change. This association is sufficient to establish a prima facie case that his concerted activities were a motivating factor in his subsequent suspensions.

The evidence concerning Rivera's November 28 suspension is murky. While I believe that Rivera testified honestly that he was not responsible for the badly picked bed, I am in no position to resolve the facts involved in the controversy among Rivera, Guadalupe Chavez, and Roel Garcia. Garcia, who testified in General Counsel's rebuttal case, was a weak witness. He certainly did not take responsibility for having left a bed unpicked. His failure to recall anything concerning his conversation with Perez about this incident, other than that it occurred after Rivera's suspension, makes it impossible for me to give much weight to his testimony. Under the circumstances, I conclude that, regardless of which employee failed to pick the

bed properly, Perez had a good faith belief that Rivera was at fault. As Respondent notes in its brief, the natural inclination of someone in Perez's position, faced with a factual dispute, would be to side with the puncher. I conclude that Rivera would have been suspended regardless of his Union activities.[14/] Paragraph 7(oo) of the Complaint will be dismissed.

The facts of the December 19 suspension are, if anything, even more confused. The two men responsible for the suspension, Lopez and temporary puncher Melecio Jimenez, did not testify. Rivera's testimony and the inconsistent reasoning on the suspension notice indicate that Rivera was placed in a Catch-22 situation by Jimenez. Rivera was first ordered to transfer from the bed he was picking to another bed. According to Rivera, he had not yet finished picking the bed. If he refused to obey the order, as he did at first, he would be guilty of insubordination. If, on the other hand, he complied with the instruction, as he eventually did, he would be cited for leaving good mushrooms unpicked. According to the essentially uncontradicted testimony of Rivera, this is exactly what happened. There is simply no rational explanation for a picker refusing to move from one bed to another once the mushrooms have been picked. Pickers work on a piece rate basis, so they earn nothing by standing around. While Perez testified that he investigated the incident after Rivera complained, it was clear that he was unable to remember any of the facts. Reading the words on the suspension notice did not

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14/Although suspensions for refusing to re-pick a bed are rare, they are not unprecedented. I cannot find that the decision to suspend, rather than warn, Rivera is evidence of discrimination.

assist him in his effort to reconstruct the situation. Perez testified that one of the reasons that he gave Rivera a 10-day suspension was that the facts relating to the prior suspension were still fresh in his mind. Undoubtedly, the facts of the November 26 warning also played a part. Because the Respondent's business justification defense is so weak in this case, I conclude that Rivera would not have been suspended if he had not engaged in protected Union activities, and that the suspension violated §§1153(a) and (c) of the Act.

b. Basilio Banuelos: Banuelos was a Union crew captain at the beginning of the organizing campaign. He was a rather vocal Union supporter and I find that his support was known to Perez and the Company. Because no picker had previously been suspended for leaving a stump bag on a mushroom bed, I conclude that the General Counsel has made out a *prima facie* case that the Union's election victory or Banuelos's Union activities were a motivating factor in the decision to suspend him.

Although I have found that Banuelos violated Company rules when he placed a stump bag on his mushroom bed, Sosa was not a credible witness on this issue. He testified that he had never before heard of a worker committing this particular offense, when the record establishes that he had signed a warning notice for the same violation in early 1980. No other employee had been suspended for this offense, although several had received warnings. Those warning notices indicate that it was a second warning. Here, Banuelos received a suspension for a first offense and was threatened by Lopez with discharge. I conclude that Banuelos would not have received the penalty of suspension

for this offense had the Company not changed its disciplinary policy after the election to punish employees for the Union victory. The suspension violated §§1153(a) and (c).

(c) Suspensions And Warnings Issued To Employees For Engaging In Arguably Concerted Activity:

(1) Alfredo Bustos

When Bustos signed an authorization card during working time, he was in violation of Respondent's presumptively valid no-solicitation rule. However, I find that he was warned because he was engaging in Union activity and would not have been warned had he been engaging in other solicitation with such a minimal impact on production. Signing the cards took only a few minutes. Perez testified about solicitation in the Company offices several months earlier which, according to the record, resulted in no discipline to any involved employee, although it was the source of a directive from Brown to Perez to remind workers of the no-solicitation rule. Perez singled out Bustos, the crew captain, and Rodriguez, the puncher, for punishment, while leaving the rest of the crew alone. Clearly, a message was conveyed that Union activities were dangerous. The record discloses several incidents in the past several years in which an entire crew refused to obey instructions from a puncher. In each case, the entire crew was disciplined. Here, there was no explanation for the disparate treatment of Bustos and Rodriguez. I conclude that in issuing the warning to Bustos, Respondent violated §§1153 (a) and (c) of the Act.

(2) The Warning Of September 8 To Luis Mejia

The warning to Mejia does not, on its face,

appear to violate the Act. However, Vantassal's statement to Mejia that he would not be permitted to leave his work area even during lunch and breaks demonstrates that the warning was intended to interfere with Mejia's concerted activities on behalf of the Union even during nonworking time, in violation of §1153 (a) of the Act.

(3) Discipline Relating To The November 23 Work Stoppage

Parada and Amalio Garcia organized a peaceful work stoppage to protest changes in working conditions which a number of employees believed were unsafe or would result in less income. Such peaceful protests are protected under the Act. N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962). Parada received a suspension, ostensibly because he flicked the lights on and off in a growing room. The record indicates that punchers often turned the lights on and off to signal employees to take a break. No employee had ever been disciplined for engaging in such a practice. Here, Parada flicked the lights as part of a prearranged signal. Respondent's argument that Parada's action constituted a safety hazard is specious. He did not leave the lights off, which could have endangered the employees. It is particularly ironic that Respondent relies on a safety justification for Parada's suspension when it conceded the validity of the employees' contention that the picking change it had instituted without notice to the Union itself created serious safety problems. I conclude that the Company seized on the light incident as a pretext to punish Parada for engaging in protected concerted activities and that, in so doing, it violated §1153(a) of the Act.

I further find that Parada and Garcia were singled out for discipline because of their well-known leadership positions in the Union. Perhaps 40 employees participated in the protest, but only Parada and Garcia were disciplined. They were used as examples to other employees not to engage in similar actions. As such, the warning to Garcia and the suspension to Parada constitute violations of §1153(c) as well as §1153(a).

The facts relating to the suspension of Inocencio Nunez are largely undisputed. Nunez was suspended for leaving his crew to urge employees in at least two other crews to continue to resist the picking change that was implemented on November 26. Perez had decided on a five-day suspension even before Nunez was called to the office to speak to Perez, Stout, and Lopez, who made it clear to him that Union organizing would not be tolerated.

Respondent argues that Nunez's activities were such as to be unprotected under the Act. Nunez, according to Respondent, simply refused to abide by an agreement between the Union representatives and itself to compromise, by agreeing to one of the two original picking changes. While this argument would have great force had Respondent not violated its duty to notify the Union prior to the implementation of changes in working conditions (see Section "C," <u>infra</u>), Respondent chose to bypass the Union. The meeting between Perez and two crews on November 24 did not constitute a formal meeting between the Union and the Company. Apparently, not all the affected employees were even informed of the meeting, and not all the employees were in agreement with the Company's decision. Under these circumstances,

I do not find that Nunez's conduct constituted an effort to have employees engage in intermittent work stoppages of the type that have been held to be unprotected under the NLRA. I conclude that Nunez was suspended for engaging in protected, concerted activities in violation of §1153(a) of the Act.

(d) Suspensions Issued For Other Reasons:

(1) Vicente Prado

Prado supported the Union during the election campaign. There is no evidence that his support was known by the Company at the time of his September 5 suspension. However, the timing of Prado's suspension, which occurred on the same day that Mendoza was distributing authorization cards to be signed throughout the plant, suggests that Perez may have sent Sosa to check on Prado's movements in the mistaken belief that he was engaging in Union activities. An employer disciplinary action, made on the basis of such a mistaken belief, may constitute a violation of §1153(c) of the Act. Miranda Mushroom Farm, Inc., 6 ALRB No. 22 (1980). I therefore conclude that the General Counsel has established a prima facie case with respect to Prado's suspensions.

I have found that Prado's explanation of his activities on the east side of the plant is not credible. It appears that he was simply taking an unscheduled break to talk to his friends. Even if Perez's mistaken belief that Prado might have been engaging in Union activities was a factor in his decision to suspend Prado, I conclude that an employee taking such an unscheduled break would have been disciplined regardless of such a mistaken belief. Because Prado had received a warning for a similar offense less than a year before, I do not find that the

fact that he was suspended, rather than warned, to be evidence of a discriminatory motive. Paragraph 7(bbb) of the Complaint shall be dismissed.

Prado's suspension for turning the lights off in a growing room on September 29 is in no way analogous to Parada's suspension for flicking lights on and off. Unless I were to believe that Morado was guilty of entrapment in inducing Prado to turn off the lights, it is clear that Prado's conduct posed a potential safety hazard to other workers. I conclude that Prado was suspended for business reasons and would have been suspended even if he had engaged in no Union activities. Paragraph 7(z) of the Complaint will be dismissed.

(2) Abel Meza

Meza was one of the Union's most active supporters in the plant. It is also clear that his activities were quite visible to the Company. His access to both sides of the plant made him a perfect messenger for the Union. There is no real dispute about whether Meza engaged in the conduct for which he received the four suspensions. The issue is whether he would have been suspended had he not engaged in Union activities. I conclude that none of the suspensions violated the Act. For purposes of a brief discussion of the Company's business justification, I will assume that the General Counsel has made out a *prima facie* case as to each allegation.

Meza did not deny harassing Juana Alba about her sexual relationships. She testified credibly that Meza's obnoxious conduct reduced her to tears. There is no doubt that Meza did, in fact, interfere with Alba's work. I frankly find the

General Counsel's attempt to characterize this incident as an ordinary "private conversation" between employees to be distasteful. I conclude that Meza would have been suspended for his sexual harassment regardless of any Union activities he had engaged in. Paragraph 7(w) of the Complaint shall be dismissed.

Two months later Meza was suspended for leaving mushrooms in a growing room for eight hours. He had previously received a warning for the same offense. Meza did not deny that the mushrooms had been left, but attempted to shift responsibility to another employee. The fact that Meza was the only member of the four-man pick-up crew to be suspended for this offense does not give rise to an inference of discriminatory treatment, given the small size of the crew and the fact that another member had received a warning for leaving mushrooms in a growing room. I conclude that Meza would have received this suspension even if he had engaged in no Union activities. Paragraph 7(x) of the Complaint shall be dismissed.

Meza's last two suspensions were for his admitted tardiness. They came after a previous warning for tardiness and were in conformity with the Company's consistent practice of progressive discipline for attendance-related offenses. The General Counsel has made no argument that there was any general pattern of discrimination by the Company in such cases. The General Counsel's argument seems to rest on the fact that Meza was late to work soon after he testified in Mendoza's behalf at an Unemployment Insurance hearing. I conclude that Meza would have received the two suspensions for tardiness regardless of this testimony and even if he had engaged in no Union

activities. I shall order that Paragraphs 7(qq) and (ww) be dismissed.

(3) Jesus Mariscal

Mariscal's Union activities were quite typical of those of a substantial number of the pickers. Evidence of Company knowledge of these activities is slight. The only causal connection between these activities and Mariscal's suspension is that the severity of the penalty may be evidence of a discriminatory motive. I will assume, for purposes of discussing this issue, that the General Counsel has made out a prima facie case.

Regardless of the merits of Mariscal's contention that he was being mistreated by his puncher, there is no evidence that such mistreatment was connected with Mariscal's Union activities. Rather, Mariscal seemed to be saying that the puncher was treating her relative more favorably than other members of the crew. Even if Mariscal had been wronged, it did not excuse his subsequent conduct, which was clearly insubordinate and which cost the Company the loss of the mushrooms which Mariscal threw against the wall. While discharge or a 10-day suspension for such conduct is uncommon at Steak Mate, I have no basis on which to compare this incident with others of a similar nature. And there is nothing to suggest that Mariscal's Union activities played a part in the decision of what penalty to impose. I conclude that Mariscal would have received the same penalty even if he had not engaged in Union activities. Paragraph 7(dd) of the Complaint shall be dismissed.

(4) Juana Duran

Duran was an extremely vocal, open supporter of

the Union. She made sure that the Company was aware of her position. The level of her commitment, which manifested itself in frequent challenges to positions put forth by Perez, clearly irritated Perez. I conclude that the General Counsel has established a strong prima facie case that Duran's Union activities were a motivating factor in the decisions to suspend her.

Duran was suspended for three days for failing to call the plant early enough on November 2. Her testimony that Lopez had promised to revoke the suspension if she brought in a statement from her doctor is uncontradicted. When she complied with that request, Lopez retreated to defending the suspension on the grounds that she had not called in. These shifting grounds for the suspension are an indication of discriminatory motive. Duran's testimony that the phone was not answered on November 2 is corroborated by the warning notice issued to Manuel Mier. I conclude that Respondent has not established that Duran would have been suspended had it not been for her Union activities and that her suspension violated §§1153(a) and (c) of the Act.

The suspension for failing to report an injury immediately is even more suspect. Respondent would never even have learned of the injury had Duran not voluntarily reported it. It is clear that Duran was not even aware that she had hurt herself at the time she slipped. There is not the slightest evidence that the Company was in any way prejudiced by a delay of 48 hours in reporting the incident. Respondent used Duran's extremely technical violation of its rules as a pretext to punish her for her Union activities. I conclude that this suspension violated §§1153(a) and (c) of the Act.

With respect to Duran's five-day suspension for tardiness on December 7, it is undisputed that she arrived late. There is no evidence that Respondent enforced its disciplinary procedures in cases of tardiness in a discriminatory manner. I conclude that Duran would have been suspended for this offense regardless of her Union activities. Paragraph 7(rr) of the Complaint shall be dismissed.[15/]

4. Discipline To Punchers.

(a) The Supervisory Status Of The Punchers:

Section 1140.4(j) of the Act defines a supervisor as:

> . . . any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Here, the parties agree that the punchers possess none of the listed authorities, with the possible exception of the authority to assign work or the responsibility to direct employees in their work. But, Respondent contends that the punchers have the power to make effective recommendations concerning discipline. Because the definition of supervisor lists the various factors in the disjunctive, possession of any one element is

15/Because I have found that Duran's three-day suspension for unexcused absence on November 2 violated the Act, I will order that this suspension be reduced from five to three days, in accordance with Respondent's progressive disciplinary policy.

sufficient to bring an employee within its terms. Perry's Plants, Inc., 5 ALRB No. 17 (1979).

While punchers do assign employees to pick particular beds, no independent judgment is required to carry out this routine task. The Board has held that such a duty does not bring an employee within the definition of a supervisor. Anton Caratan and Sons, 4 ALRB No. 103 (1978).

It is clear, however, that punchers are held accountable for the quality of work done by the crew members. They are evaluated, in part, on the basis of picking quality. In connection with this responsibility, punchers have the authority to order an employee to repick a mushroom bed. A substantial number of employees have been disciplined for failure to comply with such orders. While the punchers have no authority to discipline employees, they do report bad work to their supervisors, who then act upon the reports. For example, Mario Rodriguez complained to his superiors about Juventina Chambers's work. The record contains many warning notices issued by punchers before the advent of Union activity at the plant. Many of these refer to the puncher as the "foreperson."

Some punchers appeared to exercise their authority to a greater extent than others. Priciliano Garcia, Jose Quintanar, Ramon Sosa (prior to his promotion), and Guadalupe Chavez appear to be among those who considered themselves to be supervisory personnel, more closely allied with management than with the pickers. Other punchers appeared to consider themselves to be more like rank-and-file employees than supervisors.

Although the General Counsel generally argues that

the punchers are not supervisors, it considers Jose Lozano to be a supervisor for purposes of imputing knowledge of Franco's Union activities to Respondent. Similarly, Respondent forgets that it considers punchers to be supervisors when it comes to minimizing the significance of their knowledge of pickers' Union activities. The positions of both parties seem to be dictated by tactical considerations as much as by the evidence supporting them.

I conclude that, because they effectively recommend discipline and responsibly direct the work of pickers, tasks which require the use of independent judgment, the punchers are supervisors within the meaning of the Act. I am also persuaded by Respondent's argument that it would be difficult to manage the Company's operations with only three or four supervisors for 120 pickers.

(b) The Suspension Of Mario Rodriguez:

Rodriguez was suspended for one day for permitting his crew to engage in Union solicitation during working time. If Rodriguez were not a supervisor, I would find that his suspension violated §1153(c) of the Act, because it resulted from Respondent's discriminatory application of its no-solicitation rule. But, unless the General Counsel can establish that the suspension was part of a pattern of conduct by Respondent to interfere with, restrain, or coerce employees in the exercise of their §1152 rights, Respondent has not violated §1153(a) by its suspension of Rodriguez. Because there is no evidence that any employees knew of Rodriguez's one-day suspension, and because the employees were able to conduct a vigorous and successful organizing campaign in the plant, I conclude that the suspension did not violate the Act

and that Paragraph 7(i) of the Complaint must be dismissed.

(c) The Demotion Of Ruben Alcantar:

Alcantar was a supporter of the Union, but there is no evidence his support was especially noticeable to the Company. He did not even go into the cafeteria with other employees who were serving unfair labor practice charges on the Company. There is little to distinguish Alcantar's Union activities from those of other punchers who favored the Union. But the weakness of the justifications offered for Alcantar's demotion are some evidence of a discriminatory motive. Still, because Alcantar was in his probationary period, I am unable to find that the General Counsel has established a prima facie case. Of course, since I have concluded that Alcantar was a supervisor, his demotion was not, in any event, violative of §1153(c) of the Act.

As there is no evidence to indicate that Alcantar's demotion was part of a plan by Respondent to chill the exercise by nonsupervisory employees of their §1152 rights, I conclude that it was not violative of §1153(a). I shall order that Paragraph 7(cc) of the Complaint be dismissed.

C. Section 1153(e) Issues.

The Complaint alleges that the Respondent unilaterally changed the duties of the punchers and the pickers without notice to the Union, in violation of §1153(e) of the Act. Respondent denies that it made any changes in the punchers' duties around October 1, but admits that it did not notify the Union about the November 23 picking changes.

Because I have concluded that the punchers are supervisors, Respondent was under no obligation to notify the Union about

changes in their duties. In addition, I conclude that no such changes were made. The record simply does not support Alcantar's testimony that punchers were authorized to issue discipline on their own. In every case of discipline in issue in this proceeding, the testimony and the notices indicate that a supervisor above the level of puncher took the action. As was the case before October, the puncher often signed the disciplinary notice and sometimes brought the violation to the attention of his superior. I conclude that Paragraph 7(v) of the Complaint must be dismissed.

With respect to the picking changes, the Board has held in Highland Ranch and San Clemente Ranch, supra, that an employer is required to notify and give the union an opportunity to bargain about unilateral changes in working conditions in cases where the union has won the representation election but has not yet been certified as the exclusive bargaining representative because of pending objections. In the event that the union is subsequently certified, the employer may be found to be in violation of §1153 (e) of the Act for its failure to bargain.

Respondent concedes that it would be required to bargain about a substantial change in working conditions, but argues that the changes in picking procedures which it instituted on November 23 were so minor that they were not bargainable matters. I do not agree. One of the two changes posed serious safety problems for the pickers, while the other arguably could have detrimentally affected their earnings. If the changes were as minor as the Respondent suggests, the employees would not have staged a work stoppage to protest them. The changes involved here were

much more substantial than those made by the employer in Little Rock Downtowner, Inc., 148 NLRB No. 78 (1964), the principal case cited by Respondent. I conclude that the Respondent violated §§1153(a) and (e) of the Act by unilaterally changing its picking procedures on November 23 and 26 without providing notice and an opportunity to bargain about them to the Union.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153(a), (c), and (e) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to offer immediate reinstatement to their former or equivalent jobs to Refugio Franco and Jose Mendoza and to make them whole by paying to each of them a sum of money equal to the wages they would have earned but for Respondent's unlawful discharge of them, less their respective net earnings, together with interest at the rate of 7% per annum.

I shall further recommend that Respondent make whole the following employees for any losses in pay they suffered as a result of their unlawful suspensions: Basilio Banuelos, Juventina Chambers, Juana Duran, Salvador Garcia, Alfredo Hernandez, Inocencio Nunez, Rogelio Parada, Miguel Rivera, and Antonio Tovar. The disciplinary records relating to these unlawful suspensions shall be expunged from Respondent's personnel files and shall be disregarded in considering any future disciplinary action. The warnings issued to Luis Mejia, Amalio Garcia, and Alfredo Bustos shall also be

expunged and not used for any purpose by Respondent.

Finally, I shall order that a Notice to Employees be read, posted, and mailed in accordance with Board policy.

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

ORDER

Respondent, Steak Mate, Inc., its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, suspending, issuing warning notices, or otherwise discriminating against any agricultural employee for engaging in Union or other protected concerted activity.

(b) Interfering with, restraining, or coercing agricultural employees desiring to communicate with Union organizers on its property pursuant to 8 Cal. Admin. Code §20900, et seq.

(c) Changing its mushroom picking practices or any other term or condition of employment without first notifying and affording the UFW a reasonable opportunity to bargain with respect to such changes.

(d) Threatening its agricultural employees with reprisals for supporting the UFW.

(e) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code §1152.

2. Take the following affirmative actions which are

deemed necessary to effectuate the policies of the Act:

(a) Immediately offer to Refugio Franco and Jose Mendoza full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

(b) Reimburse the following employees for all wage and other economic losses they have suffered as a result of Respondent's discrimination against them. Such losses shall be computed according to the formula stated in J & L Farms, 6 ALRB No. 43 (1980). Interest, computed at the rate of 7% per annum, shall be added to the net back pay to be paid to each of the following persons:

Basilio Banuelos	Jose Mendoza
Juventina Chambers	Inocencio Nunez
Juana Duran	Rogelio Parada
Refugio Franco	Miguel Rivera
Salvador Garcia	Antonio Tovar
Alfredo Hernandez	

(c) Expunge from its records all notations concerning the disciplinary actions taken against the above-named employees and Alfredo Bustos, Amalio Garcia, and Luis Mejia, which have been found discriminatory in the preceding Decision. No such disciplinary actions shall be taken into account in making any determination with respect to any future discipline to the above-named employees.

(d) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the

back pay period and the amount of back pay due under the terms of this Order.

(e) Upon request, meet and bargain with the UFW concerning the unilateral change in picking mushrooms made in November, 1980.

(f) Sign the Notice to Employees attached hereto. After its translation by a Board agent into Spanish and any other appropriate language(s), Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(g) Post copies of the attached Notice for 60 days at conspicuous places on its premises, the periods and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(h) Mail copies of the attached Notice in Spanish and any other appropriate language(s) within 30 days after the date of issuance of this Order, to all employees employed at any time from July 1, 1980, up to the date of this mailing.

(i) Arrange for a representative of Respondent or a Board agent to read the attached Notice in Spanish and any other appropriate language(s) to the assembled employees of Respondent on Company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable

rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

IT IS FURTHER ORDERED that allegations contained in the Complaint not specifically found herein as violations of the Act shall be, and hereby are, dismissed.

Dated: August 17, 1981

AGRICULTURAL LABOR RELATIONS BOARD

By _____
Joel Gomberg
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing in which each side had an opportunity to present evidence, the Agricultural Labor Relations Board has found that we violated the law by discharging, suspending, and warning a number of our employees because they engaged in activity protected under the Agricultural Labor Relations Act. The Board also found that we violated the law by interfering with your rights to communicate with UFW organizers who were on our property to take lawful access; by threatening employees with reprisals if the UFW won the election; and by refusing to notify and consult with the UFW about the changes in mushroom picking we made in November, 1980. The Board has ordered us to post this Notice and to mail it to those who worked for the Company between July 1, 1980, and the present.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law of the State of California which gives farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To choose, by secret-ballot election, a union to represent them in bargaining with their employer.

4. To act together with other workers to try to get a contract or to help and protect one another.

5. To decide not to do any of these things.

Especially:

WE WILL NOT discharge, suspend, warn, or otherwise discriminate against any employee because he or she exercised these rights.

WE WILL NOT interfere with your right to communicate with any Union organizer on our property in compliance with the Board's access rules.

WE WILL NOT make threats of reprisal against you because you support a union.

WE WILL NOT make any changes in your working conditions without first notifying the UFW and offering to bargain with it as your representative.

The Board has found that we discriminated against Refugio Franco and Jose Mendoza by discharging them because they engaged in activity protected under the law. The Board has also found that we warned Alfredo Bustos, Amalio Garcia, and Luis Mejia,

and suspended the following employees for the same reason:

Basilio Banuelos	Inocencio Nunez
Juventina Chambers	Rogelio Parada
Juana Duran	Miguel Rivera
Salvador Garcia	Antonio Tovar
Alfredo Hernandez	

WE WILL reinstate Refugio Franco and Jose Mendoza to their former jobs, or substantially equivalent ones, and reimburse them and the above-named employees who we discriminatorily suspended, for any loss of pay and other money losses they suffered as a result of the discrimination, plus 7% interest per annum.

Dated:

STEAK MATE, INC.

By _____

THIS IS AN OFFICIAL DOCUMENT OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA.

DO NOT REMOVE OR MUTILATE