Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

M. CARATAN, INC.,	)	Case Nos. 78-RD-2-D
	)	79-CE-57-D
Respondent	)	79-CE-61-D
	)	79-CE-62-D
and	)	79-CE-65-D
	)	79-CE-66-D
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	79-CE-69-D
	)	79-CE-88-D
Charging Party.	)	9 ALRB No. 33

DECISION AND ORDER

On July 14, 1980, Administrative Law Judge (ALJ)[1/] Michael H. Weiss issued the attached Decision and recommended Order in this matter. Thereafter, Respondent and the United Farm Workers of America, AFL-CIO (UFW) each timely filed exceptions to the ALJ's Decision and an accompanying brief. Respondent and the UFW each timely filed a brief in reply to the other's exceptions.

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

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided

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[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.)

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

to affirm the findings,[3/] rulings, and conclusions of the ALJ, as modified herein, and to adopt his proposed order, as modified.

On August 25, 1978, employee Jose Cadiz filed a petition for decertification of the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees pursuant to section 1156.7(c) of the Agricultural Labor Relations Act (ALRA or Act). After an investigation, the Regional Director determined that a sufficient showing of interest accompanied the petition and directed that an election be held on September 1, 1978. The ballots were impounded pending a determination as to whether the petition had been timely filed in light of the existence of a one-year collective bargaining agreement between Respondent and the UFW. That issue was resolved in Cadiz, et al. v. ALRB (1979) 92 Cal.App.3d 365 [155 Cal.Rptr. 213], and the ballots were opened and counted on August 16, 1979. The official tally of ballots showed:

No Union	122
UFW	66
Challenged Ballots	5
Total	193

The UFW filed objections to the conduct of the decertification election, the following of which were set for hearing:

[3/] Respondent has excepted to most of the ALJ's credibility resolutions. To the extent such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) We have reviewed the record and find the ALJ's resolutions of witness credibility to be supported by that record viewed as a whole.

Objection B.1., whether the printed contents of the petition, ALRB Form 145a, misrepresented the purpose of the petition, and if so, whether such misrepresentation affected the conduct of the election;

Objection C., whether the employer engaged in a systematic pattern of conduct designed to initiate, assist and/or dominate the decertification of the United Farm Workers of America, as the collective bargaining representative at M. Caratan from August 1978 and continuing thereafter, and if so, whether such conduct affected the outcome of the election;

Objection D., whether during the election campaign the employer unlawfully promised benefits to workers if they would vote "no-union," and if so, whether such conduct affected the outcome of the election;

Objection E., whether the employer and or its agents engaged in systematic interviewing of individual workers in the fields, and if so, whether such conduct affected the outcome of the election;

Objection F., whether the employer engaged in last minute campaigning including captive audience speeches to workers during the election September 1, 1978, and if so, whether such conduct affected the outcome of the election;

Objection G., whether the employer failed to provide a complete and accurate list of employee names and current street addresses during the pre-election period.

Consolidated for hearing on these objections was a complaint based on several unfair labor practice charges which were filed against Respondent and concerned, primarily, a later decertification election.[4/]

[4/] We reject Respondent's exception to this consolidation, as it served the purposes of administrative efficiency and economy. (NLRB v. La Salle Steel Co. (7th Cir. 1949) 178 F.2d 822 [25 LRRM 2152], cert. den. (1950) 339 U.S. 963 [70 S.Ct. 966].) The NLRB's long practice has been to consolidate representation and complaint cases when they involve interrelated issues to avoid time consuming and costly piecemeal litigation. (Triad-Utrad Div. of Litton Systems, Inc. (1975) 217 NLRB 842 [89 LRRM 1344].) General Counsel's participation in the investigation of election objections,

(fn. 4 cont. on p. 4)

We affirm the ALJ's conclusion that the Act denies supervisors the right to file decertification petitions. Section 1156.7(c) is limited by its express language to allow only agricultural employees the right to file decertification petitions. We have consistently followed National Labor Relations Act (NLRA) precedent and excluded supervisors from the definition of employee, utilizing the language of section 1140.4(j) of the ALRA which adopts section 2(11) of the NLRA.[5/] However, we agree with Respondent that Cadiz was not a supervisor at the time he filed the decertification petition.

Luis Caratan testified that Cadiz began working for Respondent in the early 1970's. During the period from April to August or early September 1979 (following the 1978 election), Respondent promoted Cadiz to the position of foreman, a position all parties admit fulfills the statutory definition of supervisor. Before that promotion, including the period during which he filed

(fn. 4 cont.)

not here at issue, did not deprive Respondent of any opportunity to defend against unfair labor practice charges. Further, Respondent was adequately represented by competent counsel, and it was given ample opportunity to produce evidence of its own and cross-examine adverse witnesses. (Barrus Construction Co. v. NLRB (4th Cir. 1973) 483 F.2d 191 [83 LRRM 3014].)

[5/] Section 1140.4(j) provides:

> The term 'supervisor' means 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.

the petition, Cadiz was a foreman-trainee. In his capacity as foreman-trainee for Respondent, Cadiz was periodically placed in charge of "break-off" crews of three to five workers, implementing orders from Mike Anderson, Respondent's harvest coordinator, for periods of one to two hours. Cadiz had been receiving similar assignments for three years prior to his filing of the decertification petition. Although Anderson testified that Cadiz had authority to direct the work of the small crews on those occasions, and that when working in the larger crews, he sometimes assigned minor tasks to other members of the crew at the completion of their assigned work when the crew leader was absent, there is insufficient evidence on the record to establish that Cadiz was a statutory supervisor. Cadiz' assignments have not been shown to involve more than routine functions nor required the use of independent judgment. (Perry's Plants, Inc. (1979) 5 ALRB No. 17; Superior Farming Co., Inc. (1981) 7 ALRB No. 39; Anton Caratan & Sons (1978) 4 ALRB No. 103; Dad's Foods, Inc. (1974) 212 NLRB 501 [86 LRRM 1569].)

However, we agree with the ALJ that Cadiz was perceived by Respondent's employees as closely aligned with Respondent through his familial and quasi-supervisorial status and was perceived as acting in the interest of Respondent in filing and circulating the decertification petition.

Unlike the NLRA, our statute does not permit an employer, which term includes "... any person acting directly or indirectly in the interest of an employer ..." (see § 1140.4(c)), to file any type of representation or decertification petition. Under the ALRA, only petitions filed in behalf of agricultural employees are valid.

Therefore, an employee who files any type of petition in the employer's behalf, or at the employer's instigation, rather than in behalf of employees, is acting as an agent of the employer. The employee-agent's filing of the petition becomes the act of the employer just as clearly as if the employer itself or any of its supervisors had filed it. It is the most fundamental precept in the law of agency that, "qui facit per alium facit per se," i.e., that the acts of the agent are the acts of the principal.

Thus, the same law and precedents which invalidate any petition filed by an employer or its supervisors (Modern Hard Chrome Service Company (1959) 124 NLRB 1235, 1236 [44 LRRM 1624]) also invalidate any ALRB petition filed by any agent of the employer. Were we to allow an employer to circumvent the Act by ordering or inducing a rank-and-file employee to file a petition, which the employer itself cannot do, we would be ignoring case precedent and our responsibility to conduct elections free of employer instigation or design. (Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307 [172 Cal.Rptr. 720]; Columbia Bldg. Materials, Inc. (1979) 239 NLRB 1342 [100 LRRM 1182], enforced (9th Cir. 1980) 620 F.2d 1357 [106 LRRM 3076]; Nish Noroian (1982) 8 ALRB No. 25; Abatti Farms (1981) 7 ALRB No., 36.)

The close affinity between Cadiz and his brother, Fermin Martinez (one of Respondent's foremen) was apprarent by the fact that many witnesses knew Cadiz only as "Fermin's brother." The low-level supervisorial status awarded Cadiz by Anderson, the lack of any evidence of an independent motivation on Cadiz' part for initiating the decertification drive, the mirroring of Respondent's

officers' anti-union attitude by Cadiz when coupled with his close association in the minds of employees with Martinez all lead to the conclusion that employees of Respondent would have, and did, justifiably perceive Cadiz as acting for Respondent when he circulated and filed the decertification petition. (Vista Verde (1977) 3 ALRB No. 91, enforced Vista Verde Farms v. ALRB, supra, 29 Cal.3d 309; American Door Co. (1970) 181 NLRB 37 [73 LRRM 1305]. See also NLRB v. Sky Wolf Sales (9th Cir. 1972) 470 F.2d 827, 839 [82 LRRM 2050].)

We therefore find that Cadiz was not eligible to file the decertification petition and hereby direct that this election be set aside.[6/]

The 1979 Decertification Election

While the tallying of the ballots cast in the 1978 election was blocked awaiting Board and court resolution of the issues,

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[6/] While our Decision here does not necessitate discussion of the ALJ's findings of impermissable campaigning by Respondent in this election, we agree with the ALJ that the widespread interrogation by Anderson and Martinez on behalf of Respondent had a substantial effect on the outcome of the election and would form an independent grounds to set this election aside. (Rod McLellan (1971) 3 ALRB No. 71; NLRB v. Louisiana Mfg. Co. (8th Cir. 1967) 374 F.2d 696 [64 LRRM 2704]; Nick J. Canata (1983) 9 ALRB No. 8.) We would also, were the resolution of this issue necessary, find in agreement with the ALJ, that Respondent's no-union campaign impermissibly promised benefits (an increase in medical and hospital coverage) and wage increases should the UFW be rejected as the collective bargaining representative. (Etna Equipment and Supply Co., Inc. (1979) 243 NLRB 596 [101 LRRM 1500]; NLRB v. Exchange Parts (1964) 375 U.S. 405, 409 [84 S.Ct. 457]; Hansen Farms (1976) 2 ALRB No. 61; Nick J. Canata, supra, 9 ALRB No. 8.

another petition for decertification was filed on June 8, 1979.[7/] After two crews had voted peaceably, and departed, Martinez arrived with a bus load of voters, who also voted. Upon the completion of the voting, a rowdy group of workers attacked the Board agents supervising the election, causing severe injury and disrupting the balloting process. The ballot box was wrested from the Board agents and the ballots were strewn about the voting site. After the destruction of the ballot box and the disruption of the election, Martinez ordered the crew back to the bus and raised his fist to the injured Board agents as he drove the workers away. Meanwhile, Ed Thomas, executive manager of the South Central Farmers Committee and media director for Respondent, arrived with a television crew from a local television station. Despite repeated requests from Board agents to cease filming, the filming continued. The television crew testified that caution must be observed in filming potentially violent events, lest the filming itself incite the

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[7/] The filing of the second petition was found by the ALJ to constitute a violation of section 1153(a) of the Act in that Respondent aided and supported the circulation of this petition. Despite the nature of Catarino Correa's (the decertification petitioner) duties when acting as a "juicer," it seems clear that Correa was entitled to file a petition at the relevant time herein. Without more evidence we are not prepared to deny an apparent agricultural employee the right to utilize the Act's processes. Further, we feel the evidence is insufficient to prove that Correa was acting, or authorized to act, as Respondent's agent during that period. (Pleasant Valley Vegetable Co-op. (1982) 8 ALRB No. 82; San Diego Nursery Co., Inc. (1979) 5 ALRB No. 43.) We therefore dismiss the allegation that Respondent violated section 1153(a) of the Act through the solicitation and filing of this second decertification petition.

violence. Thomas[8/] also refused the requests of Board agents to radio for assistance to curb the violence taking place.

This participation by supervisors and agents of the Respondent in the above violence is alleged, and was so found by the ALJ, to be violative of section 1153(a) of the Act. We concur. Martinez' participation in the above violence and Thomas' refusal to comply with Board agent requests in the presence of employees thwarts the purposes of the Act. (See Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54.

The next work day, the crew containing employees who had attacked the balloting area (Crew No. 1) was assigned to work in conjunction with the crew (Crew No. 2) most closely identified with the UFW, a rare occurrence. Not surprisingly, threats, harassment, and other coercive actions were directed toward members of Crew No. 2 by the workers in Crew No. 1. Martinez ignored requests by Martha Gonzalez for his intervention and directed threats himself at the intimidated crew. Some of the members of Crew No. 2, aware of their co-workers' violent attack of the earlier day, left work rather than face another potentially dangerous situation.

The ALJ concluded that this intermixing of crews, one of which had recently deprived all Respondent's workers of a free election by acts of violence, with threats and insults abetted by a supervisor, violated section 1153(a) of the Act. We affirm that conclusion. (NLRB v. Fred P. Weissman Co. (6th Cir. 1948)

[8/] Thomas, as executive manager of the South Central Farmers Committee, acted as Respondent's press agent and managed Respondent's (among other agricultural employer's) public relations campaign.

170 F.2d 952 [23 LRRM 2131]; NLRB v. Cast Optics Corp. (3rd Cir. 1972) 458 F.2d 398 [79 LRRM 3093].)

Further, when employees Wilson Santiago and Martha Gonzales left the field to avoid the brewing violence, they were terminated. Working conditions for these workers had become intolerable and Santiago and Gonzales were constructively discharged by this purposeful intermixing of crews. (Mini Ranch Farms (1981) 7 ALRB No. 48.)

The ALJ concluded that Respondent, by the actions of Caratan and Catarino Correa (the second decertification petitioner), violated the Act by refusing to cooperate with Board agents in the staging of the second election. Respondent argues that Caratan's "understandable irritation" at the Regional Director's decision to impound the ballots for the second time does not manifest a lack of cooperation. Respondent also excepts to the ALJ's finding that Correa's actions here were attributable to Respondent. We agree that, standing alone, Caratan's statements do not imply an intent to thwart employee rights and that his subsequent decision to end the harvest one day early and pay off his workers, also standing alone, does not imply improper motivation. However, when coupled with Caratan's and Correa's orchestrated outrage at a meeting between Caratan and the employees regarding the impoundment of ballots[9/] and the subsequent violence at the voting site condoned

[9/] Correa, present at the preelection conference, was informed of the decision not to tally the ballots from this second election and was present when Caratan expressed his outrage at this decision. At the subsequent meeting with employees, Correa questioned Caratan

(fn. 9 cont. on p. 11)

by Respondent's representatives Martinez and Thomas, a general scheme of interference with section 1152 rights is overwhelmingly presented. (NLRB v. Fred P. Weissman Co., supra, 23 LRRM at 2133.) We therefore affirm the ALJ's conclusion in this matter.

We find merit in Respondent's exceptions to the ALJ's finding that Caratan's promotion of Cadiz was to reward him for the circulation of the first decertification petition, as we find that the evidence does not persuade us that the promotion was other than an exercise of managerial prerogative. We also reject the ALJ's conclusion that Caratan's actions to secure release of those workers arrested for assaulting the Board agents who conducted the election was a violation of the Act and we hereby dismiss those allegations.

Respondent excepts to the ALJ's conclusion that its decision to terminate supervisor Pedro Guzman Garcia (following on the heels of his demotion) was a violation of the Act. Although supervisors are not generally protected by the NLRA,[10/] recently the National Labor Relations Board set forth the general guidelines for determining when the discharge of a supervisor constitutes a violation of the NLRA. (Parker-Robb Chevrolet, Inc. (1982) 262 NLRB No. 58 [110 LRRM 1289], slip opinion at pp. 3-5.) Specifically,

(fn. 9 cont.)

whether the ballots would be tallied and then threatened violence if no tally was made. Caratan did not disavow Correa's threats and led employees to believe that Correa spoke for Respondent in promising a violent reaction to the failure to count the ballots. We find Respondent acquiescence to constitute interference with employee section 1152 rights. (Vista Verde, supra, 3 ALRB No. 91, enforced Vista Verde v. ALRB, supra, 29 Cal.3d 307.)

[10/] This is also true under the ALRA. (See M. Caratan (1978) 4 ALRB No. 83; Sam Andrews' Sons (1979) 5 ALRB No. 68; and Ruline Nursery (1981) 7 ALRB No. 21.)

"an employer may not discharge a supervisor for refusing to commit unfair labor practices or because the supervisor fails to prevent unionization." (Id. at pp. 4-5, citing, inter alia, Belcher Towing Company (1978) 238 NLRB 446 [99 LRRM 1566], enforced in part (5th Cir. 1980) 614 F.2d 88 [103 LRRM 2939] and Talladega Cotton Factory, Inc. (1953) 106 NLRB 295 [32 LRRM 1479], enforced (5th Cir. 1954) 213 F.2d 309, 315-317 [34 LRRM 2196].) Here the ALJ found, based on his resolutions of the conflicting testimony of Anderson and Garcia, that Anderson ordered Garcia to prevent unionization by refusing to hire union activists. The ALJ concluded that Garcia was fired by Anderson for failing to follow those unlawful instructions. We affirm the ALJ's conclusion and will order that Garcia be reinstated in accordance with NLRA precedent.

The ALJ concluded that Garcia was specifically directed by Anderson not to rehire Jose Rodriguez in 1978 because Rodriguez was a union activist. After some delay, Rodriguez was hired to work in the pruning crew supervised by Teresa Heredia. Thereafter, Rodriguez left work on a sick leave furlough, which had been approved by Heredia and Anderson, according to credibility resolutions of the ALJ. Rodriguez did not receive a recall notice to the next harvest and, upon seeking work, was denied reemployment based upon his untimely application. The ALJ found, and we affirm, that the Respondent's failure to recall Rodriguez was based on his union activity and not, as Respondent argues, based upon an unauthorized leave of absence or voluntary termination. We conclude that by that conduct Respondent violated section 1153(c) and (a) of the Act.

We also affirm the ALJ's conclusion that Fermin Martinez

engaged in unlawful surveillance of a union meeting on June 14, 1979. As the conduct attributed to Martinez tended to interfere with, restrain or coerce employees in the exercise of their section 1152 rights, Respondent thereby violated section 1153(a) of the Act. (Kawano, Inc. (1981) 7 ALRB No. 16; Louis Caric & Sons (1978) 4 ALRB No. 108.)

Respondent's Refusal to Sign a Contract

In March of 1979, Respondent and other local agricultural employers entered in joint negotiations with the UFW to negotiate a contract to supersede the contract due to expire in approximately two months. Agreement was reached on all terms and conditions of the new contract. All the growers except Respondent signed the new contract. Respondent's sole reason for refusing to sign the contract was the pendency of the decertification petition. Neither the pendency of the decertification petition, nor the tally of ballots, which later issued, suspended Respondent's duty to bargain in good faith. Upon dismissal of the election petition by this Board, Respondent's refusal to sign the contract constituted a violation of section 1153(e) and (a) of the Act. We so find. (H. J. Heinz v. NLRB (1941) 311 U.S. 514 [61 S.Ct. 320]; NLRB v. Strong (1969) 393 U.S. 357 [89 S.Ct. 541].) Even assuming that the pendency of the decertification petition permitted Respondent to refuse to bargain at its peril that the UFW would again be certified, our decision to set aside the election would render Respondent's refusal to sign the collective bargaining agreement a violation of section 1153(e) and (a). (Dow Chemical Company v. NLRB (5th Cir. 1981) 660 F.2d 637 [108 LRRM 2924].)

Additionally, we affirm the ALJ's finding that Respondent's away-from-the-bargaining-table conduct, manifested in a course of conduct intended to thwart the valid exercise of section 1152 rights by Respondent's employees and to undermine employee support for the exclusive representative, demonstrates bad faith on Respondent's part in deciding not to sign the negotiated collective bargaining agreement with the UFW. (Tex-Cal Land Management Co. v. ALRB (1982) 135 Cal.App.3d 906 [185 Cal.Rptr. 588].)

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to hire or rehire, laying off, or otherwise discrminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment 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) Unlawfully engaging in surveillance or creating the impression of surveillance of its agricultural employees' union activities or other protected concerted activities.

(c) Failing or refusing to meet and bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW), the certified collective bargaining representative of Respondent's agricultural employees, by refusing, at the UFW's

request, to sign a labor agreement which had been reached by Respondent and the UFW.

(d) Discharging, demoting, or otherwise discriminating against, any supervisor in regard to hire or tenure of employment because he or she has refused to commit unfair labor practices or has refused to prevent unionization of Respondent's agricultural employees.

(e) 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 Pedro Guzman Garcia, Jose Rodriguez, Wilson Santiago, and Martha Gonzales immediate and full reinstatement to their former positions or to substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole the above named agricultural employees and supervisor 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.

(c) Sign the collective bargaining agreement it reached with the UFW in August 1979, giving retroactive effect to all terms and provisions of that agreement from August 1979, and make whole all bargaining unit employees for all losses of

pay and other losses they have suffered as a result of Respondent's failure and refusal heretofore to sign the aforesaid agreement.

(d) 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.

(e) 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.

(f) Provide a copy of the attached Notice in the appropriate language to each employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(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 June 15, 1979, to July 14, 1980, and thereafter until Respondent commences to bargain in good faith with the UFW.

(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: June 10, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

MEMBER McCARTHY, Dissenting:

I respectfully dissent from my colleagues' conclusion that the first of two decertification elections which are at issue in this consolidated proceeding must be set aside primarily on the grounds that employees would perceive the decertification petitioner as acting for the employer. I also dissent from certain of the findings which are based on incidents arising contemporaneously with or immediately subsequent to the second decertification election.

Procedure. As a threshold matter, I register my disagreement with the majority opinion to the extent that it suggests or infers, by its silence on the subject, that purely investigatory election proceedings may be litigated by the General Counsel.

Apparently my colleagues find nothing amiss in the General Counsel's unprecedented litigation of election objections; nor does the majority hesitate over the procedural issue of the

Regional Director's consolidation of the objections to the September 1978 election with an unfair labor practice complaint based wholly on independent and unrelated conduct.

California Administrative Code, title 8, section 20365(c)(2)[1/] provides that a party (to the election) who objects to the election on the grounds that misconduct occurred which affected the results of the election shall establish facts which could constitute sufficient grounds for the Board to refuse to certify the election. The only parties to elections conducted pursuant to Chapter 5 of the Act are the employer and the party, or parties, which seek to be designated as the exclusive bargaining representative of the unit employees. Under regulations in effect at the time of the election and hearing, a "party" to any Board proceeding shall be any person named or admitted as a party, or properly entitled as of right to be admitted as a party. California Administrative Code title 8, section 20370(b) pertains to investigative hearings in representation cases and states that the parties shall have the right to participate in such hearings in person, by counsel, or by other representative.

Under the scheme of our statute, the General Counsel is not a party to election proceedings. As stated in the Board's Election Manual at section 8, page 3, "Unlike a CE or CL case, where the Board takes the role of prosecutor for the charging party, each party represents itself in an RC [Representation

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[1/] All code references are to regulations which were in force at the time of the election and hearing.

Case] hearing." Yet, the Administrative Law Judge (ALJ) permitted the General Counsel to exercise those rights which our regulations grant only to parties to representation proceedings, to call and examine witnesses, and to present evidence on issues which arose solely in the context of the election absent any showing of relevance to allegations of unfair labor practices.

In post-election objection proceedings, the burden is on the objecting party to establish conduct which would warrant the setting aside of an election. (Visual Educom, Inc. (7th Cir. 1973) 486 F.2d 639 [84 LRRM 2319]; Patterson Farms (1982) 8 ALRB No. 57.) The burden on the objecting party is a heavy one. (Sauk Valley Manufacturing Co., Inc. (9th Cir. 1973) 486 F.2d 1127 [84 LRRM 2674]; California Lettuce (1979) 5 ALRB No. 24.) Moreover, the objecting party is required to produce "specific evidence" of conduct "so glaring as to impair employees' freedom of choice." (Rockwell Manufacturing Co. (7th Cir. 1963) 330 F.2d 795 [55 LRRM 2868], cert. den. (1964) 379 U.S. 890 [55 LRRM 2868].) All the considerations of legislative meaning and the Board's declared policy compel the conclusion that only the objecting party may bear the burden of proving its objections in proceedings before the Board. Ironically, however, my colleagues have just decided that a nonparty, i.e., the General Counsel in this matter, has carried the objecting party's, i.e., the Union's, burden of proving that conduct occurred which warrants setting aside the election. The inescapable inquiry therefore should be whether permitting the General Counsel to assist the Union by assuming its burden of proof with respect

to the objection allegations in this proceeding resulted in prejudice to, or abridgement of, the Employer's rights in the post-election investigative hearing under Chapter 5 of the Agricultural Labor Relations Act (Act).

California Administrative Code, title 8, section 20335 permits the Board to order a consolidation for hearing of concurrent post-election objections and a complaint based on unfair-labor-practice charges when the complaint alleges "the same or some of the same matter which forms the basis of [the post-election objections] petition." But there is no authority which would sanction such a consolidation of proceedings unless certain acts or conduct have been alleged both as post-election objections and unfair labor practices. That would be impossible in the instant matter because no unfair-labor-practice-charges were filed by any person based on any conduct even remotely related to the election. The earliest of the unfair-labor-practice charges were filed more than nine months following the election. Conduct which occurs after an election cannot, of course, constitute grounds for invalidating the election. Even if one or more of the aforementioned charges had alleged as unfair labor practices conduct which occurred before or during the election, they would have been time-barred by Labor Code section 1160.3.

California Administrative Code, title 8, section 20335(a) provides that the Board, or the Regional Director, <u>after consultation with the parties</u>, may order that any petition and any proceedings instituted in respect thereto be consolidated

with any other proceedings instituted in the same Region. The Employer objected to the consolidation at the time it was ordered and has again registered its continuing objection in exceptions to the ALJ's Decision in this matter. Even if the Employer had agreed to a proposed consolidation of election and unfair labor practice matters, for purposes of hearing, such consent would not have justified the General Counsel's unwarranted assumption of the Union's burden of proof as to the post-election objections. The majority's response, at footnote 4, to the Employer's exception to the consolidation of the unfair-labor-practice proceeding with the objections to the first decertification election is misplaced. While the majority properly observes that consolidation serves the purpose of administrative efficiency and economy, that purpose is served only when, as is not the case here, some of the issues in both proceedings are based on the same factual situations.

In my view, the General Counsel has engaged in a serious abuse of the Board's representation proceedings by interjecting himself, as an advocate, into the strictly investigative phases of a post-election hearing, into matters which are reserved exclusively to parties to the election. I submit that, under these circumstances, it is outside the Board's proper exercise of its adjudicatory responsibilities to decide, as the majority apparently believes it is required to do in this instance, whether the General Counsel has proved that conduct occurred which warrants setting aside the election. Simply stated, under a strict reading of our regulations, and in light of our historical

practice, the Union has failed to carry its statutory burden of establishing objectionable election conduct. Therefore, I would dismiss in its entirety the Union's petition which contends that the first decertification election should be set aside.

However, the General Counsel's serious procedural error is not the only basis on which I would find that this Board should certify the results of the election. I have reviewed the majority's opinion in light of the entire record and I find that if the same evidence had been properly and independently adduced by the Union itself, instead of by the General Counsel, in support of the Union's post-election objections, I would still conclude that there is insufficient record evidence to warrant setting aside the election.

Validity of First Decertification Petition. The majority finds that Jose Cadiz, although not a statutory supervisor within the meaning of the Act, would justifiably have been perceived by his fellow employees as acting for the Employer when he filed the first of the two decertification petitions which are at issue in this proceeding. Reasoning that Cadiz thereby became the Employer's agent for the purpose of filing the petition, the majority concludes that the election which was held on September 1, 1978, pursuant to that petition, is invalid and must be set aside. In my judgment, the majority's findings and conclusions are not sustainable.

I agree with the majority insofar as it holds that since the Act does not permit an employer to file a decertification petition, an employer may not circumvent the Act by filing

such a petition by means of a designated agent, whether it be a supervisor or a rank-and-file employee. As I understand my colleagues' further holding, however, under no circumstances may the Act be read to permit statutory supervisors to file decertification petitions because the provisions of Labor Code section 1156.7(c) are reserved solely for employees within the meaning of Labor Code section 1140.4(b). I believe that the majority has read applicable authorities too broadly. While the cases relied on by the majority may on first reading appear to support such a blanket prohibition, the National Labor Relations Board (NLRB), as discussed more fully below, has long recognized that supervisors who are members of the bargaining unit are entitled to circulate and file decertification petitions if it is clear that in so doing they are not acting as members of management.

It is important to point out that in unfair-labor-practice proceedings, which is not the case here, acts of supervisors are imputable to respondents for purposes of liability. For example, it is prima facie interference with employees' section 1152 rights for a supervisor to solicit employee support for a decertification petition. A respondent would be held liable for such conduct under the doctrine of respondeat superior. The same reasoning requires that a petition for decertification filed by a supervisor be deemed invalid. (Clyde J. Merris (1948) 77 NLRB 1375 [22 LRRM 1142].) Accordingly, the NLRB has long followed a policy of dismissing a decertification petition when it appears that the authorization

cards supporting that petition were obtained through the active participation of supervisory personnel. (Southeastern Newspapers, Inc. (1960) 129 NLRB 311 [46 LRRM 1541].)[2/] But, employees, who are not supervisors, as a general rule, are not presumed to be acting on behalf of their employer unless they are acting within the general scope of their employment or management has instigated such conduct or has ratified it after the fact. (National Paper Co. (5th Cir. 1954) 216 F.2d 859 [35 LRRM 2117].)

Having found that Cadiz was not a supervisor within the meaning of the Act, the majority nevertheless finds that he was charged with quasi-supervisory duties.[3/] Even if he were a statutory supervisor, the fact remains that he was a bargaining unit member at all times material herein. The ultimate question

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[2/] In Abatti Farms (1981) 7 ALRB No. 36, we adopted NLRB precedents in holding that it is an unfair labor practice for an employer to assist or support employees in a decertification effort. However, in that case, as here, the Union failed to file unfair labor practice charges alleging that Respondent either instigated or supported the decertification campaign.

[3/] Indeed, Cadiz clearly lacked authority to hire, discharge, discipline, or effectively recommend those or any other personnel actions. (Rod McLellan Co. (1978) 4 ALRB No. 22; Anton Caratan & Sons (1978) 4 ALRB No. 103.) His duties were routine in nature, requiring no exercise of independent judgment, and his occasional substitutions for a crew foreman were not sufficient to confer supervisory status. (Miranda Mushrooms Farms, Inc. (1980) 6 ALRB No. 22.) Thus, unable as a matter of law to impute to the employer Cadiz' role in the decertification effort on the basis of his alleged supervisory status, my colleagues find, in the alternative, that his duties were analogous to that of a "quasi-supervisor" or a "low-level" supervisor. We rejected a similar contention in Dairy Fresh Co. (1976) 2 ALRB No. 55, wherein we adopted the ruling of Doctor's Hospital of Modesto, Inc. v. NLRB (1973) 489 F.2d 772 85 LRRM 2228 that: "The leadman or straw boss may give minor orders or directives or supervise the work of others, but he is not necessarily a part of management and a 'supervisor' under the Act."

in such circumstances would be whether he had the apparent authority to act for the Employer when he solicited employees' support for the decertification petition and ultimately filed such petition. The critical issue in making such a determination is whether, under all the circumstances, the employees would reasonably believe that he was reflecting the policy of the Employer, that is, speaking and acting for the Employer in the course of his attempts to decertify the incumbent union.

But in this case, the majority's conclusion that Cadiz was an agent of the Employer,[4/] for the purpose of decertifying the Union, rests on a basic error of law in that the majority has failed to recognize that employees must perceive that the employer itself has engaged in antiunion conduct so that it may be said that it was the employer who "acted in such manner as to lead employees reasonably to believe that the supervisor was

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[4/] In addition to Cadiz' quasi-supervisory role, the majority finds that employees would perceive him to be an agent of the Company because of his familial relationship to a supervisor, namely, his brother, Fermin Martinez. In Rapid Manufacturing Co. v. NLRB (3d Cir. 1979) 612 F.2d 144 [103 LRRM 2162], a decertification proceeding, the NLRB had found that a nonsupervisory employee was an agent of the company because of her family ties to management. One of the brothers of the purported agent was a co-owner of the small manufacturing plant which employed 45 workers while another brother served in a supervisory capacity. Moreover, the purported agent had made statements to employees indicating that they would be better off if they voted to decertify the union. Although the court resolved the appeal of the NLRB's Decision on other grounds, it nonetheless stressed that its failure to deal with the agency issue "in no way suggests that an employee who is related to a Company official is, without more, an agent of that Company so that she may be precluded from expressing her views on unionization during the course of an election campaign."

acting for and on behalf of management." (Montgomery Ward & Co., Inc. (1956) 115 NLRB 645 [37 LRRM 1370].) In Montgomery Ward & Co., supra, the NLRB set forth these guidelines for determining employer responsibility for the antiunion acts of a supervisor who is included in the bargaining unit:

> Statements made by a supervisor violate section 8(a)(1) of the Act when they reasonably tend to restrain or coerce employees. When a supervisor is included in the unit by agreement of the Union and the Employer and is permitted to vote in the election, the employees obviously regard him as one of themselves. Statements made by such a supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible for the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.
> (Id. at 647.)

In Arcadia Foods, Inc. (1981) 254 NLRB 1012 [1073 LRRM 1073], the ALJ found that the employer interfered with employees' section 7 rights in violation of section 8(a)(1) of the National Labor Relations Act (NLRA) by the circulation of a decertification petition by an individual who was classified as a supervisor, and was held up to the employees, and perceived by them, as a supervisor. The ALJ had found particularly significant the fact that the supervisor who circulated and filed the decertification petition had utilized the services of an attorney whose name or fee he could not recall, as well as the supervisor's gratuitous suggestion that he had never spoken to a particular management official about the decertification petition, leading the ALJ

to suggest that the remark "raises a question as to whether Respondent's connection with the decertification petition was less remote than is revealed in the testimony." Relying on the principles set forth in Montgomery Ward & Co., Inc. (1956) 115 NLRB 645 [37 LRRM 1370], as quoted above, the NLRB reversed its ALJ, finding no evidence that Respondent encouraged, authorized, or ratified the supervisor's conduct or acted in a manner which would lead employees reasonably to believe that he was acting on behalf of management.

Conversely, an employer was held accountable for the circulation of a decertification petition by a supervisory member of the bargaining unit in Connecticut Distributors, Inc. (1981) 255 NRLB 1255 [107 LRRM 1229]. The ALJ ruled that although the employer would normally be liable for the acts of the supervisor with respect to the question of unfair labor practices, the question was whether the employer was responsible for his circulation of the decertification petition since, in addition to his supervisory duties, he was also a member of the union and included in the bargaining unit. The ALJ noted that the Board has adopted "a doctrine of reality" in cases such as this.

> Thus, the Board has attempted to determine whether the acts of a supervisor in such instances were acts on behalf of the employer or acts on behalf of the 'supervisor' as an employee and union member. The Board has always considered and determined that a supervisor within the meaning of the Act who is a union member and in the bargaining unit is an arm of management; for example, knowledge of employee union activity known to such supervisor is imputable to the employer even though respondent might not be held responsible for antiunion statements by said supervisor. (Id. at 1259.)

The ALJ, with NLRB approval, concluded that surrounding circumstances indicated that the supervisor made statements in the nature of admissions by the employer that he was acting as its agent.[5/] Thus, notwithstanding his bargaining unit status, the supervisor remained an arm of management and therefore the employer was held to be liable for his circulation of the decertification petition, an act of interference with employees' section 7 rights in violation of section 8(a)(1) of the NLRA.

Montgomery Ward, supra, 115 NLRB 645, and its progeny, make clear that neither an employer's knowledge of, nor its passive acquiesence in, a supervisor's antiunion activity is enough to hold the employer responsible for such conduct if the supervisor is a member of the bargaining unit. Thus, in Curtiss Way Corp. (1953) 105 NLRB 642 [32 LRRM 1338], the decertification petitioner circulated the petition during working hours with knowledge of the employer's supervisors. The NLRB denied the union's motion to dismiss the petition, finding no evidence that the employer inspired or fostered the petition. Similarly, in Southeast Ohio Egg Producers (1956) 116 NLRB 1076 [38 LRRM 1406], where the petition was circulated on the employer's premises during working hours, the NLRB found that the employer did not act improperly, even though:

[5/] The ALJ found that the supervisor told employees the employer would not negotiate with the Union, promised them specific benefits if they rejected the Union, and even gave some employees copies of contracts which purportedly represented what they could expect to receive in wages and benefits should they decertify the Union. In addition, the supervisor informed employees that his decertification efforts had the "blessing" of management. The employer later relied on the decertification petition obtained by the supervisor to assert loss of majority status by the incumbent union.

> [T]he petitioner requested and received information from the employer as to the procedure to be followed in obtaining and filing a petition for decertification; the employer furnished petitioner with certain information necessary to complete the petition; the petition and the showing of interest form in support thereof were typed in the employer's office after working hours by petitioner's wife, admittedly a supervisor; and employees signed the showing of interest form in employer's office during working hours in petitioner's presence.
> (Ibid.)

A different result was reached in EMR Photoelectric (1980) 251 NLRB 1597 [105 LRRM 1646], where the employer solicited a rank-and-file employee to carry out the employer's antiunion campaign, and then informed employees that it now considered him to be a supervisor. The employee followed the employer's instructions to discuss with employees matters contained in the Company handouts, explaining to them that he supported management's position with respect to unionization because he was now considered a supervisor. The ALJ held that where:

> Respondent chooses a worker, or supervisor, as its agent to communicate its antiunion position to the employees, and places him in a position identifying him with management so that employees would reasonably understand that he speaks for management, Respondent may not escape liability for his conduct in carrying out its antiunion campaign.
> (Emphasis added: Id. at 1601.))

In evaluating the right of a supervisor who is also a member of the bargaining unit to engage in antiunion activity, great deference must first be given to that individual's Labor Code section 1152 rights as a bargaining unit member to engage in antiunion or prounion activities. (Montgomery Ward & Co., Inc., supra, 115 NLRB 645.) Notwithstanding the principles set

forth in the cases discussed above, the majority has found the Employer herein liable for the antiunion conduct of a nonsupervisory bargaining unit member on a theory of agency which it extracts from Vista Verde Farms (1981) 29 Cal.3d 307 [172 Cal.Rptr. 720]. In that case, the California Supreme Court held that an employer who obtains workers through a farm labor contractor may be held responsible for actions of such contractor which tend to interfere with, restrain, or coerce employees in the exercise of their Labor Code section 1152 rights, where employees reasonably believe that the actions of the contractor were engaged in on the employer's behalf or were reflective of the employer's policy even though the employer did not authorize or direct the improper conduct. The issue in Vista Verde Farms, supra, unlike the case here, arose in the context of an unfair-labor-practice proceeding.

Contrary to my colleagues in the majority, I cannot find that the question of the Employer's responsibility for Cadiz' conduct in circulating and filing the decertification petition falls within the ambit of the doctrine of Vista Verde Farms, supra, 29 Cal.3d 307 [172 Cal.Rptr. 720]. Taken as a whole, Vista Verde merely equates with statutory supervisors, for purposes of employer liability for unfair labor practices, labor contractors hired by the employer to similarly supervise employees because no "meaningful distinction can be drawn between the two." (Id. at p. 328.) The Vista Verde court was not required, as we are here, to balance the rights of a bargaining unit member, whether or not a supervisor, to engage in a decertification effort

or other antiunion activity.

The Vista Verde court correctly identified the critical inquiry with respect to employers' responsibility for the improperly coercive actions of persons hired and placed by them in positions of authority over employees in this manner:

> Like a supervisor, the farm labor contractor is hired and compensated by the grower to supervise the activities of the agricultural employees of the employer ... In addition, because of the labor contractor's authority to hire and fire individual workers, the coercive impact of the contractor's actions are likely to be as great as that of the employer's most senior supervisory personnel. (Id. at p. 328.)6/

The employees' perception of an individual's role, as an agent of the employer, becomes relevant under a Vista Verde analysis only when the allegedly coercive conduct of the supervisor/labor contractor was not specifically authorized or ratified by the employer; that is, acts which are outside the scope of the supervisor's delegated duties "but which are impliedly authorized because they are within the apparent authority of the actor." (Citations; Id. at p. 320.) Consistent with Montgomery Ward & Co., supra, 115 NLRB 645, Vista Verde requires a showing that the employer acted in a manner which would lead employees reasonably to believe that the supervisor/-labor contractor was acting on its behalf when he coerced or restrained employees. The Employer herein clearly did not act in such a manner.

6/ Indeed, as the court observed, "The relationship between a labor contractor and the workers under its control bears many of the hallmarks of a traditional employer-employee relationship...." (Id. at p. 323.)

In International Association of Machinists (I.A. of M.) v. Labor Board (1940) 311 U.S. 72 [7 LRRM 282], the United States Supreme Court affirmed the NLRB's finding that employees who did not have the power to hire or fire, but who did in fact exercise general authority over other employees, actively promoted a union favored by the company. The court concluded that since the employees "were in a strategic position to translate to their subordinates the policies and desires of the management," their emulation of the example set by their employer would have given other employees "just cause to believe" that they were acting for and on behalf of management when they solicited support for a labor organization. On that basis, the court concluded that the Board could properly hold the employer responsible for their actions in a violation of the Act. Similarly, in H. J. Heinz Co. v. Labor Board (1941) 311 U.S. 72 [7 LRRM 291], likewise an unfair-labor-practice proceeding, the Supreme Court upheld the NLRB's finding that the employer could be held responsible for the coercive antiunion conduct of several foremen and the plant superintendent even though such conduct had not been expressly authorized or ratified by the employer. All of the supervising employees had authority to effectively recommend hiring and firing as well as wage increases. All of them spoke disparagingly of the union and interrogated employees regarding their union sympathies while two of them threatened employees with discharge if they supported the union.

Noting both these authorities, the Vista Verde court observed that the rule of law they articulate is, in turn, the

basis for holding that an employer may be held responsible for unfair labor practice purposes if (1) the employees could reasonably believe that the coercive acts were undertaken on behalf of the employer; or (2) the employer has gained an illicit benefit from the misconduct and "realistically has the ability either to prevent the repetition of such misconduct in the future or to alleviate the deleterious effect of such misconduct on the employees statutory rights." (Vista Verde, supra, 29 Cal.3d at p. 322.)

Clearly, the court's holdings in Viste Verde apply only to individuals (labor contractors/supervisors) who explicitly are excluded from the protection of the Act. In I.A. of M. v. Labor Board (1940) 311 U.S. 72 [7 LRRM 282], as well as in H. J. Heinz Co. v. Labor Board (1941) 311 U.S. 514 [7 LRRM 291], the individuals whose conduct was in issue possessed indicia of authority that clearly would have constituted them as supervisors within the definition currently contained in both the National Labor Relations Act (NLRA) and the ALRA. However, both of those cases were decided at a time when the term "supervisor" was not used in the original NLRA (Wagner Act), as it appears for the first time in the 1947 Taft-Hartley Amendments to the NLRA. - Today, therefore, both the "leadmen" of I.A. of M. as well as the "supervising workers" of Heinz clearly would be found to be supervisors within the meaning of the NLRA.

This interpretation of the extent of the Vista Verde holding finds support in the court's reference to an employer's ability to prevent a repetition of coercive conduct or to

alleviate the effect of coercive misconduct on employees. As the Vista Verde court said:

> ... an employer may be able to escape responsibility for misconduct of a labor contractor, just as it may occasionally escape responsibility for improper acts of a supervisor ... if an employer publicly repudiates improper conduct and takes action to reprimand the labor contractor and to ensure that the conduct does not coerce or intimidate employees. (Id. at 328.)

But repudiation is unavailing when the individual is an employee rather than a supervisor. In Rapid Manufacturing Co. v. NLRB (3d Cir. 1979) 612 F.2d 122 [103 LRRM 2162], the NLRB was critical of the employer's failure to publicly rebuke an employee's antiunion conduct. The court justifiably questioned whether the employer had the power to restrict, rebuke or discipline the acts or conduct of a person who was no more than an employee.

In my view, therefore, Vista Verde Farms v. ALRB, supra, 29 Cal.3d 307, is a limited holding which has meaning only where an employer is in a position to repudiate or reprimand unfair labor practices, or to prevent unfair labor practices, by its labor contractors or supervisors (not members of the bargaining unit), who are within its control. On the contrary, where, as here, the decertification petitioner is a rank-and-file member of the bargaining unit, neither his decertification efforts nor any other antiunion activity of his can constitute an unfair labor practice, and the employer may not lawfully interfere with such activity for to do so would be a clear violation of the employee's Labor Code section 1152 rights.

I also believe that my colleagues' alternative attempt

to hold the Employer responsible for Cadiz' decertification efforts on a theory of agency, purportedly based on their reading of Vista Verde Farms, is misplaced. Even if Cadiz were in fact a statutory supervisor at the time he circulated the decertification petition, agency is not an available doctrine absent a showing that the Employer itself acted in a manner which would lead employees reasonably to believe that Cadiz was acting on the Employer's behalf.[7/] But the present record is devoid of any evidence to suggest that the Employer, in any manner, engaged in efforts to promote or assist the decertification of

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[7/] This principle was acknowledged in Nish Noroian Farms (1982) 8 ALRB No. 25, wherein we observed that in Vista Verde Farms v. ALRB, supra, 29 Cal.3d 307, the question before the court was whether the labor contractor/agent engaged in conduct which paralleled that of Respondent so that employees reasonably could believe that the contractor was acting in the employer's behalf. As we said:

> Our finding of agency in that case (Vista Verde, supra) was upheld by the Supreme Court which noted the following facts: that Respondent itself had engaged in a series of hostile acts against the union, including ejecting organizers from its property; that Respondent's agents had assisted Bobby DeDios [the labor contractor] in destroying UFW leaflets in front of workers; that Respondent knew of Bobby DeDios' animus toward the union; and, finally, that Respondent's general manager permitted DeDios to assemble the workers so that he could talk to them immediately after DeDios caused the UFW organizers to be arrested for trying to talk to the workers. (Nish Noroian Farms, supra, 8 ALRB No. 25 at p. 8.)

Based on the test set forth in Vista Verde Farms, supra, my colleagues herein and I joined in concluding in Nish Noroian that since the only evidence purporting to establish agency was the antiunion attitude of the decertification petitioner, an employee, there were no facts which would reasonably lead other employees to deduce or believe that he was acting on behalf of the employer in circulating the petition. Not only are the facts in Vista Verde Farms distinguishable from those in the case before us, however, but those very distinctions clearly require an opposite result here.

the incumbent union prior to the time Cadiz circulated and then filed the petition.[8/]

If it had been established by the evidence that the employer ordered, influenced, or induced Cadiz to file the decertification petition, I would concur with my colleagues that he did so as an agent of the Employer and thereby invalidated the petition. But I find no basis for concluding that Cadiz acted as the Employer's agent because he is the brother of a supervisor or exhibited an antiunion attitude (not unusual for an employee leading a decertification campaign). The majority, finding no employer instigation of the decertification effort, finds that other workers would have perceived Cadiz as acting in behalf of Respondent, rather than in behalf of employees, and therefore that Cadiz filed the petition as an agent of Respondent. That finding is not even based on a permissible inference and cannot be upheld on the basis of the record before us.

I submit that if, on the record herein, Cadiz can be found to have acted as the Employer's agent, then no agricultural employee can ever file a valid decertification petition because the filing of such a petition can always be "perceived as," or found to be, in the employer's behalf or "... in the interest of

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[8/] Immediately after the petition had been filed, the incumbent union alleged fraud and employer assistance in the obtaining of signatures. The Regional Director thereafter conducted an extensive investigation, interviewing a ramdom sampling of signatories to the petition, in their homes after work. Since the Regional Director subsequently issued a Notice and Direction of election, it must be presumed that he found nothing irregular in the validity of employee support for the petition. Clearly, the Regional Director's decision to go forward with the election, in light of the UFW's allegations, would suggest no employer involvement in that effort, either direct or indirect.

an employer ..." within the meaning of section 1140.4(c) of the Act. I do not believe the Legislature granted employees the right to decertify an incumbent union just to have them deprived of that right because the filing of a decertification petition may be interpreted or perceived by other employees as serving the employer's interest or wishes. It should be obvious that the filing of a decertification (or certification) petition is always effected in the behalf and interest of employees, as an expression of their Labor Code section 1152 right to reject (or select) a collective-bargaining representative. The fact that an employer may be pleased or displeased by the filing, depending on the type of petition, does not alter the fact that both types were intended to, and do, serve employees' rights alone. We understand that, and I believe employees, unions, and employers also understand that. If the majority persists in holding employers responsible for the decertification efforts or other antiunion activities of bargaining unit employees, such as Cadiz, it will effectively nullify the decertification provisions of the Act, Labor Code section 1156.7(c), and seriously inhibit employees' Labor Code section 1152 rights.

Interrogation. In its opinion in this proceeding, at footnote 6, the majority, without comment, affirmed the ALJ's finding that supervisors Mike Anderson and Fermin Martinez engaged in widespread "interrogation" of Respondent's employees and concluded that that conduct had "a substantial effect on the outcome of the election and would form an independent ground to set the election aside."

A post-election objection which alleged merely that the

Employer engaged in systematic interviewing of individual employees was set for hearing, although no prima facie case of objectionable election conduct was asserted therein. Assuming arguendo, that the objection related to a separate objection which alleged that agents of the Employer made unlawful promises of benefits to employees and that, on that basis, the issue was properly framed, I note that the ALJ, during the course of the hearing, dismissed allegations that such promises were made by Anderson. The present state of the record, therefore, is relevant only as to evidence that Martinez alone made unlawful promises of benefits while "interrogating" employees. That evidence is this. Prior to the election, Martinez interviewed members of his crew individually, factually pointing out to them that it was the Employer, not the Union, which gave them their jobs. In addition, he solicited the opinion of at least one employee, namely, Augustino Arallano, regarding the forthcoming election and then expressed to Arallano his own view that it would be to the employees' advantage to vote against the Union.

In an unfair-labor-practice context, such conduct by a supervisor could arguably constitute a de minimis interference with employees' section 1152 rights. However, the issue is raised in the instant matter only as conduct tending to affect the results of the election.

In Associated Milk Producers, Inc. (1978) 237 NLRB 879 [99 LRRM 1212], the NLRB certified the results of the election although the plant manager spoke to nearly every eligible employee, individually, at his or her work station, on the morning of the

election. He told them that he did not believe that they needed a union and expressed his hope that they would decide to vote against the union.[9/]

There is no record evidence that Martinez attempted to influence the employees' choice by promising them benefits or threatening them with reprisal conditioned on how they voted in the election, or that his asking one employee's opinion and/or expressing his own was conduct which tended to interfere with the free choice of employees or involved a sufficient number of employees to have affected the outcome of the election. Absent such a showing, I cannot agree with the majority that Martinez' conduct was sufficient in itself to justify setting aside the election.

Promise of Benefits. The majority has, again without comment, affirmed a finding of the ALJ, in this instance, that the Employer unlawfully promised employees an increase in wages and other benefits (medical and hospital insurance coverage) conditioned on their rejection of the Union. Implicit in the majority's resolution of the issue is a finding of conduct sufficient in itself to warrant setting aside the election.

It is not absolutely clear to me whether the majority has reference only to alleged oral promises of benefits made by

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[9/] The precise question in that case was whether, by such conduct, the employer had violated the NLRB's strict proscription against captive-audience election speeches by any party within 24 hours preceding the election. (Peerless Plywood Co. (1953) 107 NLRB 427 [33 LRRM 1151].) The Board concluded that the Peerless rule did not attach because the comments to individual employees, "advocating nothing more than a vote against the union," did not constitute a speech.

supervisors Anderson and Martinez, discussed above, or to a printed leaflet Respondent prepared and circulated to employees concerning medical insurance coverage. Since there is virtually no record evidence of any allegations pertaining to an increase in wages, I presume that the majority's finding relates only to the insurance matters.

At all times relevant herein, the Employer was a member of the California Grape & Fruit League, an industry group which sponsors a group insurance program for employees of its grower members. Approximately 20 of the Employer's neighboring growers, who were members of the association at the time, had subscribed to and implemented such a plan for their own employees. After the decertification petition had been filed, the Employer distributed the leaflet which accurately compared the existing medical insurance program provided under the bargaining agreement with the industry program.

Supervisor Anderson distributed the leaflet to members of the "Town Crew." He said he had been cautioned beforehand by the Employer to avoid any statements which might be construed by employees to convey express or implied assurances of a wage/benefit schedule in the event the Union did not prevail in the upcoming election. According to the testimony of employee Maria Obad, some workers had asked Anderson, "If a new election occurred for no union, what would be the benefits that we would get from the company without a union." She testified further that Anderson told them he couldn't promise them anything, but gave them a copy of the comparison leaflet. She said Anderson,

> ... told us when he explained to us that the companies that did not have a union had these benefits, he told us that some of these companies didn't have these benefits, but what he wanted was for the people to think about it 10/

Record evidence indicates that employees did not depend solely on information provided them by their employer. Many of them independently sought out workers from nonunion companies in the area in order to ascertain what their nonunion wage/benefit package amounted to.

In my Dissenting Opinion in Jack or Marion Radovich (1983) 9 ALRB No 16, I discussed wage and benefit comparisons by employers in the context of decertification campaigns. For example, in Shows, Inc. (1977) 228 NLRB 1355 [9 LRRM 1015], the employer had compared benefits which a union of its employees had received under a past collective bargaining agreement with benefits which would become implemented in the same company's nonunion facilities. The ALJ observed that, "... an employer would seem to be entitled to point out to employees the facts concerning what benefits are extant in a union vis-a-vis a similar nonunion facility." (See, also, Galbreath & Co. (1983) 266 NLRB No. 18 [11 LRRM 1279].)

The evidence here does not warrant the ALJ's finding that the Employer promised employees an improved medical package if they voted no-union. The Employer advised them that it could make no promises and then, in response to their questions about

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10/ Maria also testified that Anderson made no reference at all to salary matters. The ALJ observed that although Obad was called to testify by the Employer, her testimony corroborated that of witnesses who were union supporters. (ALOD 44, n. 77.)

the nature of medical insurance coverage they might expect to receive should the Union not prevail, did no more than suggest that they examine the insurance programs which nonunion employees in similar operations in the immediate area were receiving.

In sum therefore, I would certify the results of the first decertification election, in which two-thirds of the employees voted to decertify the Union, and, accordingly, would conclude that Respondent did not violate any duty to bargain with the UFW or otherwise violate section 1153(e) and (a) of the Act. The majority herein, relying in the main on an unwarranted extension of the test set forth in Vista Verde Farms (1981) 29 Cal.3d 307 [172 Cal.Rptr. 720) has, in my view, rejected the most elementary principle and purpose of the Act: the protection of the rights of employees to organize and to select, or to reject, a collective--bargaining representative.

Second decertification election. I dissent from my colleagues' finding that Respondent's supervisor and/or its alleged agent were/was responsible for the disruption of the Board's election process. General Counsel has not established that either Ed Thomas, executive director of an industry group in which Respondent holds membership, or the mobile news crew from a local television station had a duty under the Act to summon help at the request of Board agents.[11/] Their alleged

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[11/] The whole of General Counsel's attempt to prove Respondent liable for the disruption of the election is marked by internal inconsistencies. For example, General Counsel argues, on the one hand, that Respondent is liable for Cadiz' petition and efforts to obtain a decertification election and then, on the

(fn. 11 cont. on p. 44.)

inaction, or refusal to interfere or to become involved, cannot possibly, as the ALJ found, constitute unlawful interference. It is true that interference includes many statements, acts, and forms of conduct, but it clearly does not include non-interference. Moreover, General Counsel has not established that supervisor Martinez, as he was driving away from polling area, raised his fist towards Board agents rather than to other persons or employees in the area. Even if he did so, such conduct would not be violative of the Act.[12/]

(fn. 11. cont.)

other, disrupted the election when it was in progress. My colleagues have ignored the undisputed fact that Respondent, immediately following the aborted election, sought to persuade the Regional Director to conduct a rerun election. However, there is ample record evidence of widespread employee resentment of the Board's decision to impound the ballots, for a second time, in a decertification election affecting the same unit. I believe that the record clearly supports an inference that the employees who disrupted the election acted, on their own, based on understandable frustration and anger, when they learned of the Board's directive that again there would be no tally of ballots at the conclusion of the election.

[12/]Contrary to all implications in the majority opinion, Martinez was nowhere near the election area when the fracas broke out. After busing his crew to the polls, he was instructed to leave the area because of his supervisory status. Board agent Jack Matalka testified that he had twice ordered employees who were congregated in the immediate polling area to "back off" and directed a Board agent to summon the sheriff before he instructed yet another Board agent to notify Martinez to return and collect his crew. Moreover, the combined testimony of all percipient witnesses attests to the fact that Martinez returned to the polling area after the fight broke out. With respect to the raised-fist gesture by Martinez, there is no basis in the record for finding that it was directed at the Board agents. Three witnesses for the General Counsel testified merely that Martinez was on the bus when he raised his fist but all of them had observed the incident from somewhere outside the bus. Martinez testified that he raised his arm but claimed that he did so as a means of directing employees who were standing up in the bus to sit down. Martinez's version was corroborated by Miguel Ramos and Enrique Orozco, employees who were on the bus at the time.

I dissent also from my colleagues' conclusion that Respondent violated the Act[13/] by "constructively discharging" Wilson Santiago and Martha Gonzales. It is clear from the record, and from the majority opinion as well, that the two employees were terminated because they "... left the field to avoid the brewing violence" and not because Respondent had assigned the Town and Puerto Rican Crews to work together. Such a work assignment can scarcely be considered the basic element of a constructive discharge: the imposition by an employer of arduous or intolerable working conditions to induce an employee to quit. (See George Arakelian Farms, Inc. (1979) 5 ALRB No. 10 and Superior Farming Company (1982) 8 ALRB No. 40.) Moreover, the other essential elements of a constructive discharge (namely, union or other protected activity by the employee, employer knowledge thereof, and a causative connection between that activity and the employer's imposition of the intolerable conditions)[14/]

[13/] The majority has not indicated whether it is finding a Labor Code section 1153(a) or 1153(c) discharge. As there is no evidence that the employees were terminated because of either protected concerted activity or union activity, there is no basis for finding either violation.

[14/] This definition of constructive discharge has been consistently used, and followed, by the NLRB (see, e.g., Keller Mfg. Co. (1978) 237 NLRB 712, 722-723), and by this Board in more than a dozen cases during the past six years (see e.g., Merzoian Bros., (1977) 3 ALRB No. 62; Tanaka Brothers (1978) 4 ALRB No. 95; Sierra Citrus Association (1979) 5 ALRB No. 12; Ukegawa Brothers (1982) 8 ALRB No. 90; Superior Farming Company (1982) 8 ALRB No. 40, and L. E. Cooke Co. (1982) 8 ALRB No. 56.) The last two of the cited Decisions were signed by my colleagues herein. In the instant matter, the General Counsel has not proved a prima facie case of constructive discharge because he did not establish that Respondent "... deliberately made [Santiago's and Gonzales'] working conditions intolerable ... because of [their] union [or other protected] activity." (Keller Mfg., Co., supra, 237 NLRB 712.)

have not been established in the record or found by my colleagues. As their discharges had no connection with their (or any other employee's) protected concerted activity or union activity, I would follow NLRA and ALRA precedents and dismiss the allegations that Respondent violated the Act by discharging Wilson Santiago and Martha Gonzales. (See my Dissenting Opinion in Mini Ranch Farms (1981) 7 ALRB No. 48.) A discriminatory constructive discharge is a well-defined, specific type of Labor Code section 1153(a), (c), or (d) violation. It should not be invoked in an attempt to provide a remedy for any lawful discharge we may consider arbitrary or unjust. The U. S. Supreme Court has said that an employer may discharge an employee for any reason at all, or for no reason, without violating the Act, just so it does not discharge the employee because of his or her union activity or other protected concerted activity.

Dated: June 10, 1983

JOHN P. McCARTHY

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, M. Caratan, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we violated the law by refusing to sign a collective bargaining agreement with the United Farm Workers of America, AFL-CIO (UFW), by discharging workers and a supervisor, by surveillance of a union meeting, by acting in complicity with employee interference with a Board conducted election, and by making working conditions intolerable for employees who are UFW supporters. 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 sign the collective bargaining agreement reached with the UFW and make our workers whole for any loss of benefits.

WE WILL offer to Pedro Guzman Garcia, Jose Rodriguez, Wilson Santiago, and Martha Gonzales reinstatement to their prior positions with backpay.

WE WILL NOT engage in surveillance, threats, instigation or condonation of interference with our employees in the exercise of their rights under the Act.

Dated: M. Caratan, 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 627 Main Street, Delano, California, 93215. The telephone number is (805) 625-5770.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

M. CARATAN, INC.
(UFW)

9 ALRB No. 33
Case Nos. 78-RD-2-D, et al.

ALJ DECISION

In 1978, Jose Cadiz filed a petition seeking an election to decertify the United Farm Workers of America, AFL-CIO (UFW) as the exclusive representative of the employees at M. Caratan's operations. The ALJ found Cadiz to be a supervisor, as defined in the Act, and accordingly ineligible to file election petitions. The ALJ, alternatively, found that even if Cadiz were not a supervisor, his status as Respondent's agent deprived him of the right to file decertification petitions. The ALJ further found that Respondent's no-union campaign in the following election impermissibly promised benefits to employees for voting against the UFW and that Respondent coerced a no-union vote from its workers through systematic interrogation by supervisors. The ALJ recommended setting the election aside.

In 1979, while certain threshold issues surrounding the 1978 election were being litigated, a second decertification petition was filed and election conducted. At a polling site a group of employees disrupted the balloting, destroyed some ballots and attacked the supervising Board agents. The ALJ found that Respondent violated the Act by refusing to cooperate in the conducting of the election, by instituting unilateral changes to influence the voting patterns, by acting in complicity in the disruptive conduct at the polling site, by failing to control the disruptive behavior, and by condoning and rewarding that conduct. The ALJ also found that Respondent unlawfully discharged two employees and a supervisor, threatened employees and engaged in surveillance of an employees' union meeting. The ALJ further found that Respondent failed to sign a collective bargaining agreement that had been fully negotiated with the UFW, an additional violation of the Act.

BOARD DECISION

The Board adopted the rulings, findings, and conclusions of the ALJ with modifications. While disagreeing with the ALJ's conclusion that Cadiz was a statutory supervisor, the Board concurred in his finding that he was an agent for Respondent and hence unable to file and circulate a decertification petition. Accordingly, the Board directed that the 1978 election be set aside. While noting that its conclusion did not require that the Board consider the other findings of the ALJ regarding the 1978 election, the Board expressed agreement with the ALJ's analysis.

The Board found, in regard to the 1979 events, that Respondent had committed numerous violations of the Act, including threatening employees, engaging in unlawful surveillance, refusing to cooperate in the election process, complicity in the ensuing violence and

the discharging of employees and one supervisor. The Board also agreed that Respondent violated the Act by its refusal to sign the fully executed collective bargaining agreement. However, the Board rejected the ALJ's conclusions regarding the unilateral changes and his finding that Respondent unlawfully rewarded employees for engaging in disruptive behavior or other conduct not permitted by the Act.

The Board ordered Respondent to cease and desist from its unlawful activities, to sign the collective bargaining agreement and to otherwise remedy the above violations.

DISSENT

Member McCarthy dissented from the majority's finding that employee Jose Cadiz, who circulated and filed the first of the decertification petitions, did so at the behest of his Employer or would have been perceived by other employees to be acting on behalf of management in that regard and therefore the resulting election should be invalidated. He expressed the opinion that the ease with which the majority has attributed to the Employer Cadiz' exercise of his section 1152 rights effectively serves to nullify those express provisions of the Act which accord employees the right to select, or reject, a bargaining representatives. With respect to the second decertification election, Member McCarthy found no evidence by which to hold Respondent liable for the disruption of the Board's elections process by employees who angrily reacted to the Board's announcement that it would impound the ballots (and thus foreclose a tally of votes) in yet another decertification election.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

M. CARATAN, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-57-D 79-CE-61-D 79-CE-62-D 79-CE-65-D 79-CE-66-D 79-CE-69-D 79-CE-88-D
In the Matter of: M. CARATAN, INC., Employer, and JOSE L. CADIZ, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	)	Case No. 78-RD-2-D DECISION OF ADMINISTRATIVE LAW OFFICER

Agricultural Labor Relations Board
JUL 1 8 1980
RECEIVED
Exec. Secretary

Appearances:

For the General Counsel: JOHN PATRICK MOORE
Fresno, California

For the Respondent (Employer): SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
BY: KENWOOD C. YOUMANS, ESQ. and
WILLIAM W. PHILLIPS, JR., ESQ.
Los Angeles, California

Representatives for the UFW: DEBORAH MILLER
Delano, California

FEDERICO G. CHAVEZ
Salinas, California

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
FINDINGS OF FACT	4
I. JURISDICTION	4
II. THE UNFAIR LABOR PRACTICE ALLEGATIONS	4
III. THE SEPTEMBER 1, 1978 DECERTIFICATION ELECTION OBJECTIONS	6
IV. BACKGROUND FACTS	7
A. Procedural History	7
B. M. Caratan's Operations	10
C. UFW Organizing and Representation History at M. Caratan, Inc.	15
D. Respondent's Procedural Motions	18
1. Respondent's Request for Bill of Particulars and Giumarra Discovery	18
2. Respondent's Motions for Continuances	20
3. The Consolidation Order and the Substantive Violation Periods	22
4. The Newspaper Reporter's "Shield Law" Issue	27
E. The First Decertification Election Period (August - September, 1978)	29
1. The First Decertification Petition	29
2. The First Decertification Petitioner	34
3. The Respondent's No-Union Campaign Before the First Decertification Election	36

///

///

Page

4. The First Decertification Election 45

a. Pre-Election Conference 45

b. September 1, 1978 Election 46

5. Respondent's Employment Practices Subsequent to the First Election 48

a. Introduction 48

b. Jose Quinones 49

c. Sofia Gomez 50

d. Jose Rodriquez 53

e. Wilson Santiago 55

f. The Termination of Pedro Guzman Garcia 56

F. Second Decertification Election Period (June, 1979) 60

1. Second Decertification Petition 60

2. The Pre-Election Conference - June 13, 1979 63

3. Events of Thursday, June 14 65

a. Caratan's Noontime Speech to the Town Crew 65

b. Caratan's Japanese Camp Meeting 66

c. UFW Election Observer Valentine Covarrubias 67

d. UFW Meeting at Wilson Santiago's House 69

e. Events at Caratan's Labor Camp that Evening 71

f. ALRB Contact with Caratan that Night 72

///

Page

4. June 15 - The Second Decertification Election 73

a. Initial Procedure and Voting 73

b. Puerto Rican Labor Camp Prior to Voting 74

c. The Puerto Rican Crew at the Election Site 75

d. Ed Thomas and the KERO TV News Reporters 78

e. The Melee 83

5. June 18 Mixing of the Crews 87

6. Santiago, Gonzales and Rodriquez' Efforts to Obtain Re-Employment During Respondent's 1979 Delano Harvest 91

7. Respondent's Assistance to Workers Charged with Assaults Against Board Agents 93

8. Maria Fernandez 93

ANALYSIS AND CONCLUSIONS OF LAW

V. THE "R" CASE: ELECTION OBJECTIONS GENERAL DISCUSSION OF THE LAW 94

A. Legal Status of First Decertification Petitioner 94

B. Agency Status Under the Act 97

1. Liability of an Agricultural Employer for Conduct of a Person Acting Directly or Indirectly in His Interest 98

2. Cases Under the NLRA Definition 100

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Page

C. Objection C: Whether the employer engaged in a systematic pattern of conduct designed to initiate, assist and/or dominate the decertification of the United Farm Workers of America, as the collective bargaining representative of M. Caratan from August, 1978, and continuing thereafter, and if so, whether such conduct affected the outcome of the election. 102

D. Objection D: Whether during the election campaign the employer unlawfully promised benefits to employees if they would vote "no union", and if so, whether such conduct affected the outcome of the election. 104

E. Objection E: Whether the employer and/or its agents engaged in systematic interviewing of individual workers in the fields, and if so, whether such conduct affected the outcome of the election. 107

F. Objection F: Whether the employer engaged in last minute campaigning including captive audience speeches to workers during the election September 1, 1978, and if so, whether such conduct affected the outcome of the election. 108

G. Objection G: Whether the employer failed to provide a complete and accurate list of employee names and current street addresses during the pre-election period. 110

H. Objection B.1.: Whether the printed contents of the petition, ALRB Form 145a, misrepresented the purpose of the petition, and if so, whether such misrepresentation affected the conduct of the election. 111

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Page

VI. THE "C" CASE: THE UNFAIR LABOR PRACTICE ALLEGATIONS 113

A. Whether Respondent, by its agents, interfered with and restrained the completion of a duly authorized ALRB decertification election [Paragraphs 8(a)-(j) of the First Amended Complaint]. 113

1. Introduction 113

2. On or about June 12, 1979, Respondent openly refused at a regular called pre-election conference, to cooperate with the planning and orderly regulation of a decertification election. 113

3. On or about June 14 and 15, 1979 Respondent unilaterally instituted substantial and unpredictable changes in the working conditions of the decertification electorate.

On or about June 14, 1979 Respondent informed the decertification electorate the election would cause disruption in the work and loss of pay. 115

4. On or about June 14, 1979, Respondent incited and encouraged workers to oppose Agricultural Labor Relations Board agents as they attempted to conduct a decertification election by openly soliciting resistance to a duly established election rule.

Respondent failed to inform or otherwise warn Agricultural Labor Relations Board agents of known immediate threats by workers to resort to the use of force and violence at the election polls. 116

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Page

5. Respondent failed to exercise reasonable control over workers openly and continuously expressing an intent to violently disrupt the decertification election.

Respondent openly condoned and displayed encouragement to the persons directly responsible for disruption of a decertification election, attack upon the persons of Agricultural Labor Relations Board agents, and theft of election ballots. 118

6. On or about June 15, 1979, Respondent directed and otherwise authorized, a local TV reporting crew to the election site while an election was still in progress.

Respondent authorized the photographing and publicizing of a decertification election while in progress and during the disruption thereof. 120

7. On or about June 18, 1979, Respondent prevented completion of the decertification election by terminating the employment of 50% of the electorate and thereby making a rerun election impossible.

B. Whether Respondent during the period from July, 1978 through August, 1979 supported, sponsored, assisted and participated in the decertification of the UFW [Paragraphs 9(a) - (m) of the First Amended Complaint]. 122

1. Introduction 122

2. Respondent's Employment Practices Generally 123

3. Discharge of Pedro Guzman Garcia 124

4. Jose Cadiz' Promotion 125

5. The Refusal to Rehire Wilson Santiago, Martha Gonzales and Jose Rodriquez 126

STATEMENT OF THE CASE

MICHAEL H. WEISS, Administrative Law Officer: These consolidated cases were heard by me on 20 hearing days from August 28, 1979[1/] through October 4, 1979 in Delano, California. The original Complaint [General Counsel's Exhibit 1-F] was issued on June 25, 1979 and was based upon 5 charges[2/] which were timely filed and served by the United Farm Workers, AFL-CIO, the charging party [hereinafter UFW]. Three additional charges were timely filed and served by the charging party on June 22, 29 and August 15, 1979, respectively.[3/] Thereafter, on September 4 and 15, during the course of the hearing, the General Counsel amended Paragraph 9 of the original Complaint to incorporate these charges as well as to set forth additional specific contentions of the alleged unlawful conduct set forth in the original Complaint. Finally, on October 9, subsequent to the close of the hearing,

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1/ The pre-hearing conference was originally set for July 27, with the hearing to commence on August 15. Both were continued two weeks by the Executive Secretary in an effort to accomodate the Employer counsel's schedule. Just prior to the hearing commencing on August 28, Employer's counsel sought and obtained from the Executive Secretary [on August 29] an additional week's continuance to September 4 when a family emergency required the Employer's principal counsel in this case to be in Los Angeles for several days. Although some preliminary procedural matters, including the request for continuance, were taken up on August 28 and 29, actual testimony did not commence until September 4.

2/ Charge 79-CE-57-D was filed and served on June 8, 1979. Charges 79-CD-61, 62, 65 and 66-D were filed and served on June 18, 1979.

3/ Charges 79-CE-69-D and 73-D were filed by the UFW. Charge 79-CE-88-D was filed and served by the alleged discriminatee, Jose Rodriquez, on August 15.

the General Counsel submitted a First Amended Consolidated Complaint which deleted four of the allegations contained in Paragraph 9[4/] of the initial Complaint, as amended. This Complaint and Respondent's Answer [General Counsel's Exhibit 1-G] which admitted the jurisdictional allegations and denied the substantive ones represent the moving papers in the unfair labor practices portion of this consolidated proceeding.

On August 24, 1979[5/] the UFW moved to consolidate Case No. 78-RD-2-D involving election objections to the September 1, 1978 decertification election with the unfair labor practices proceeding. This request was granted on August 29 [as well as the Respondent's motion to continue the hearing one additional week to September 4]. On September 7 the Deputy Executive Secretary issued the formal notice and order consolidating the hearings.

All parties were given a full opportunity to and did, in fact, participate in the hearing and after the close of the hearing, each of the parties filed a post-hearing brief.

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4/ Paragraphs 9b [regarding Jose and Maria Quinones]; 9c [regarding alleged promises made by Mike Anderson]; 9e [regarding alleged assistance to first decertification Petitioner Cadiz]; and Paragraph 9k [Charge 79-CE-73-D regarding Ali Nagi and Dorothy Shaek] were dismissed by the General Counsel. See XI Tr. pp. 64-65.

5/ See Procedural History, infra, regarding the basis for the timing of this motion.

Upon the entire record,[6/] including my visit to view one of Respondent's grape fields during harvesting, my observation of the demeanor of the witnesses, and the consideration of the arguments and briefs of the parties,[7/] I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent admits in its Answer that it is an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act [Act] and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act; and on the basis of the pleadings and undisputed evidence I so find.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The First Amended Consolidated Complaint, which serves as the final form of the allegations, alleges that Respondent violated Sections 1153(a), (c) and (e) of the Act.

The Complaint is structured as follows: Paragraph 8 [in 10 Subsections (a) - (j)] alleges that Respondent, through its agents, unlawfully interfered with and prevented the completion of a duly authorized Agricultural Labor Relations Board [hereinafter ALRB or Board] decertification election. The allegations focus on the events immediately prior to, during and subsequent

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6/ Attached hereto as Appendix I is the list of the 63 witnesses called by the parties, as well as the transcript volume in which their testimony can be found; in Appendix II is the list of the Exhibits identified and/or admitted into evidence at the hearing.

7/ The parties jointly requested and were granted an extension of time until January 11, 1980 to file their briefs.

to the June 15, 1979 decertification election. Paragraph 9 [also in 10 Subsections (a) - (n), omitting (b), (c), (e) and (k)] alleges that Respondent, through its agents, over the course of an approximately 13 month period [July 1978 - August 1979] unlawfully sponsored, supported, assisted and/or participated in the decertification of the UFW by means of discriminatory hiring, promotion and firing practices coupled with unlawful threats of termination. Paragraph 10 alleges that Respondent, through its agents, threatened workers with loss of employment for not supporting the June, 1979 decertification petition; Paragraph 11 alleges that Respondent, through its agent Fermin Martinez, created the impression of conducting a surveillance of a workers' meeting prior to the June, 1979 decertification election; and Paragraph 12 alleges that Respondent on June 18, through its agent Fermin Martinez, threatened and harassed workers opposed to the decertification of UFW.

Respondent denies that it initiated, sponsored, promoted or assisted the decertification of the UFW or was in any way responsible for the events culminating in the melee that occurred on June 15, which disrupted and terminated the decertification election. Moreover, Respondent asserts that the General Counsel's theory of the case is inherently and logically inconsistent by contending that the Respondent initiated or sponsored the decertification process, and then proceeded to sabotage the very process it sought and sponsored.

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III. THE SEPTEMBER 1, 1978 DECERTIFICATION ELECTION OBJECTIONS

On September 7, 1979 the Board, through its Executive Secretary, issued a "Notice of Allegations to be Set for Hearing and Order of Partial Dismissal of Objections Petition and Order Consolidating Hearings". Four objections were dismissed and the following six objections set to be heard at the consolidated hearing:

"Objection B.1., whether the printed contents of the petition, ALRB Form 145a, misrepresented the purpose of the petition, and if so, whether such misrepresentation affected the conduct of the election;

"Objection C., whether the employer engaged in a systematic pattern of conduct designed to initiate, assist and/or dominate the decertification of the United Farm Workers of America, as the collective bargaining representative at M. Caratan from August 1978 and continuing thereafter, and if so, whether such conduct affected the outcome of the election;

"Objection D., whether during the election campaign the employer unlawfully promised benefits to workers if they would vote "no-union", and if so, whether such conduct affected the outcome of the election;

"Objection E., whether the employer and/or its agents engaged in systematic interviewing of individual workers in the fields, and if so, whether such conduct affected the outcome of the election;

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"Objection F., whether the employer engaged in last minute campaigning including captive audience speeches to workers during the election September 1, 1978, and if so, whether such conduct affected the outcome of the election;

"Objection G., whether the employer failed to provide a complete and accurate list of employee names and current street addresses during the pre-election period."

IV. BACKGROUND FACTS

A. Procedural History

A representation election was held at M. Caratan, Inc. on September 6, 1975 in which the UFW received a substantial majority of the votes cast [UFW 121 votes, no-union 41 votes and 11 challenged votes]. Following resolution of objections to the election the UFW was certified on March 22, 1977 as the exclusive bargaining representative of Respondent's agricultural employees. After more than a year of bargaining, the UFW and Respondent signed a contract on May 11, 1978 for a one year term until May 10, 1979.

Approximately three and one-half months later, on August 25, 1978 a petition to decertify the UFW as bargaining representative was filed by Jose L. Cadiz, a member of the bargaining unit.

The UFW filed a motion to dismiss the petition or to stay the election pending resolution of the legal question of whether the one-year contract constituted a bar to the election. The UFW also filed declarations with the Fresno Regional Office

resulting in an investigation as to whether the showing of interest in the petition was tainted. Although the ALRB Agent in charge of the investigation recommended that the election not be held because of sufficient evidence of taint in the obtaining of signatures which affected the showing of interest on the petition, the then Regional Director overruled the recommendation and set an election for September 1, 1978.[8/] On September 1, the Board ruled on the UFW's motion refusing to stay the election, but ordered the ballots impounded to maintain the status quo pending a decision on the contract bar issue. The parties were advised of this new development by phone that afternoon at the ALRB office in Delano.[9/]

On September 29, 1978 the Board issued its decision [M. Caratan, Inc., 4 ALRB No. 68 (1978)] upholding by a 3-2 vote the contract bar, ruling that the decertification was untimely and declaring the election null and void. This decision was appealed by the filing of a joint mandamus petition by both the employer and decertification petitioner Cadiz.

On April 25, 1979 the Court of Appeals for the Fifth District, in a 2-1 decision,[10/] reversed the Board directing it to set aside its orders in 4 ALRB No. 68 and further ordered the

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8/ Testimony of Fresno Regional Director Ed Perez, Vol. XII:P. 164.

9/ Testimony of Fresno Regional Director Ed Perez, Vol. XVI:P. 17.

10/ Cadiz, et al. v. Agricultural Labor Relations Board, 92 Cal. App. 3d 365 (1979).

Board to count the impounded ballots. The Board and the UFW filed Petitions for Hearing with the California Supreme Court requesting it to review, and thereby staying the effect of, the Court of Appeals decision.

On May 10, 1979 the one-year contract between M. Caratan, Inc. and the UFW expired, the employer choosing not to extend its term. Four weeks later on June 8, Catarino Correa, a member of the bargaining unit, filed a second decertification petition with the ALRB in Delano. A second decertification election was scheduled and commenced a week later on June 15. As the last persons were just finishing voting, a group of workers surged towards the ballot box and began pushing, then fighting and injuring several of the Board Agents. The ballot box was seized, opened and the ballots taken. These events led to the filing, on June 25, of the Complaint in this proceeding which was initially set for hearing on August 15.

On July 26 the California Supreme Court denied the Petitions for Hearing[11/] filed by the UFW and ALRB, thereby terminating the stay of the mandamus issued by the Court of Appeal.

Three weeks later, on August 16 a tally of the ballots of the first decertification election of September, 1978 was conducted at the ALRB's Delano field office. The result was no-union 122 votes, UFW 66 votes with 5 challenged ballots.

11/ See 24 Cal. 3d p. 2 - Minutes. Chief Justice Bird did not participate while Justices Tobriner and Newman voted to grant the petitions.

On August 24 the UFW filed and served on the parties its petition to set aside the decertification election results and requested their election objections be consolidated with the then pending hearing of unfair labor practice charges. The consolidation was granted on August 29 and was actually implemented on September 7 when the Executive Secretary issued the notice and order.

B. M. Caratan's Operations

Respondent M. Caratan, Inc. engages in the production, cultivation, growing and harvesting of agricultural commodities in Kern and Tulare Counties. Utilizing approximately 2,000 acres, it grows grapes, almonds, oranges, alfalfa and olives. The majority of its production [approximately 60% of its acreage] involves, however, table grapes.

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The daily conduct of business is determined by the two principals, brothers Luis and Milan Caratan, President and Vice-President respectively. Mike Anderson, the crew superintendent during the three-year period of 1976 - May 1, 1979, reported daily for directions from the Caratans. Each of the five foremen[12/] reported, in turn, to Mike Anderson.[13/]

In addition to its operations in Delano, Luis and Milan Caratan are in partnership with Dan Surber involving two other grape cultivation operations, one near Arvin [approximately 70 miles south of Delano] in Kern County and one near

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12/ Travis Pruit and Junior Ruiz are foremen of the "steadies", tractor drivers and irrigators; Fermin Martinez is foreman of the "Puerto Rican" crew [actually, an approximately equal mix of Puerto Rican and Mexican men]; Ahmed Alomari is foreman of the "Arab" crew; Pedro Guzman Garcia was foreman from 1977 until his involuntary termination on April 22, 1979 of the "town's" crew; he was succeeded by Jose L. Cadiz until Cadiz' demotion to second foreman in Mid-September 1979.

13/ Respondent admits in its Answer that Luis Caratan and Mike Anderson are supervisors within the meaning of the Act. Milan Caratan's status was raised in Paragraph 4 of the Complaint but his conduct was not, in fact, at issue at the hearing. However, to the extent his conduct is alluded to, it is clearly attributable to Respondent. The foremen's supervisory status at M. Caratan has previously been found by the ALOs' and affirmed by the Board [See 4 ALRB No. 83 (1978) and 5 ALRB No. 16 (1979)]. There is ample evidence in the record that the foremen whose conduct is at issue in this hearing [Ruiz, Martinez, Pedro Guzman Garcia and Jose L. Cadiz] exercised considerable independent judgment and I reaffirm the findings that each is a supervisor within the meaning of the Act. Cadiz' role and status prior to being promoted to foreman of the town's crew in April 1979 is discussed separately, infra p. 34.

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Hermosillo, Mexico which apparently has been in operation for three years. Each June Respondent would send several individuals from its Delano operation down to Mexico to be harvest crew foremen there for a month.[14/]

The cultivation of table grapes at M. Caratan consists of four basic operations: the pruning and tieing of the vines, which usually starts around the first of December and lasts until mid or late February; crown and ground suckering, which normally starts towards the end of March or beginning of April; thinning and deleafing, which normally occurs in May and June; and finally harvesting, which normally starts in Arvin in Mid-July and in Delano in early August through October and sometimes into November [the Arvin "enterprises" worked by the Delano crews (usually pruning, tieing and harvesting) occur immediately prior to the Delano ones]. In between these "enterprises" lay-offs of a few days to a month would occur.

Except during the harvest, Respondent employs approximately 100-120 persons in three crews, as well as the "steadies", the irrigators and tractor drivers. During the harvest, the number of employees would typically exceed 220 persons.[15/]

14/ In 1977 Jose Cadiz and Pedro Guzman Garcia were sent; in 1978 Jose Cadiz, Pedro Guzman Garcia and a third individual were sent; in 1979 Jose Cadiz and several other individuals were sent.

15/ The number of persons eligible to vote in the September 1, 1978 decertification election was 227.

Following the first harvest through the grape fields for its table grape market, Respondent, like other Delano-area growers, contracts out to independent contractors or "juicers" to go through the fields a second time. Those grapes are then sold independently by the "juicers", if they can, to third party buyers. If the grapes are not of sufficient quality they are sold instead to wineries for wine. In the 1978 and 1979 Delano harvests, Respondent had this arrangement with Catarino Correa, the second decertification petitioner.[16/] Respondent, however, utilized another "juicer" for its Arvin grape harvests.[17/]

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16/ Correa had a similar arrangement with at least one other Delano-area grower, Jim Hronis, in 1979.

17/ The economics are apparently significantly beneficial to both sides. Respondent pegs the price he sets to what he would get from the wineries, which in 1978 and 1979 was about $150.00 a ton. Caratan, accordingly, charged Catarino Correa $1.75 a box for the grapes Correa picked in 1978 and 1979 [a box (lug) contains approximately 23 pounds of grapes and approximately 86 or 87 boxes make up a ton]. Caratan thus obtains a market price without the cost of picking or transporting the grapes. For the 1978 harvest, Correa paid Caratan $8,000.00 in cash and for the 1979 harvest to date [up to September 6, but not including the additional transactions that were being completed during the course of the hearing] the sum of $12,662.00 cash. Correa testified he usually received $2.25 or $2.50 [sometimes $2.00] a box. For the approximately 11,794 boxes he paid for, Correa would have received a net profit, without any overhead [The buyer provides the pickers, boxes and trucks. Correa would charge an additional $.50 a box to transport the boxes to Los Angeles.] ranging from $5,897.00 to $8,845.00 cash for approximately 8-10 weeks during the 1978 harvest and 4-5 weeks during the 1979 harvest. See Correa testimony, Vol. IX:P. 103-143; General Counsel's Exhibits No. 7 (1-19) and 8.

Commencing sometime in May or June, 1977[18/] Respondent instituted a new practice requiring both new hires and those employees who either had not worked for the company through the previous enterprise or who had not timely answered the recall to fill out dated written applications. This practice continued until sometime prior to August, 1979 when Respondent, for inexplicable reasons, no longer required the applications to be dated.[19/]

Respondent also instituted a new layoff procedure, effective March, 1979. In order to centralize the recall procedure and to establish a recall list after each layoff, a slip was attached to the last paycheck. This "lay-off slip" indicates to the worker that he or she is eligible for recall and gives the approximate date of the recall with a request for the worker to contact the office on that approximate date. The slip also contains the worker's last known phone number which the office and/or crew forman would call to verify the date work is to commence. In addition, a copy of this "lay-off slip" was retained in the office. The recall list would then be prepared from these slips.

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18/ Judicial or Administrative notice has been taken of this date as found in the ALO decision, pp. 19 and 38 attached to M. Caratan, Inc., 5 ALRB No. 16 (1979); see footnote 20, infra.

19/ This is based upon the testimony of Respondent's office manager, Ron Holgate, Vol. XX: Pp. 14, 16-18.

C. UFW Organizing and Representation History at M. Caratan, Inc.

The long history between the UFW and Respondent has been marked by intermittent conflict and much litigation. As summarized by the ALO decision attached to M. Caratan, 4 ALRB No. 83 (1978), the history involved an organizational strike in 1965 and a boycott of grapes marketed by M. Caratan in 1968 which only terminated in 1970 when all of the Delano area grape growers, including Respondent, entered into contracts with the UFW. The conflict renewed again in 1973 when Respondent refused to sign a contract with the UFW and instead entered into a contract with the Teamsters. This was the contract in effect when the representation election won by the UFW was held in September, 1975. Respondent conducted a no-union campaign against the UFW prior to the September, 1975 representation election. Respondent's conduct during and subsequent to that representation election resulted in the Board sustaining two unfair labor practice charges against it; M. Caratan, Inc., 4 ALRB No. 83 (1978).[20/]

1. Respondent violated Section 1153(a) and (c) when it caused two union members, one of whom was the union's

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20/ Both the ALRB and NLRB as well as the California Evidence Code uniformly provide applicable precedents to taking judicial or administrative notice here. See e.g., Sunnyside Nurseries, 4 ALRB No. 88, p. 3, footnote 4; NLRB v. Mueller Brass Co., 509 F. 2d 704, 705, 88 LRRM 3236, 3239 (5th Cir., 1975) (Proper to take judicial notice of findings of prior proceeding in order to supply corroboration of background of anti-union animus); California Evidence Code Section 452(c).

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observer at the election, to perform painful work that was not their usual assignment resulting in their hands becoming bloodied and inflamed. Although it was the middle of the harvest, these two packers were assigned by Fermin Martinez for two days to pull weeds to prepare a field which the employer knew he would not be using. The Board further found that the assignment was the result of the employees' union activities and resulted in constructive discharges in violation of the Act.

2. Respondent violated Section 1153(a) of the Act when it caused an unfair labor practice charge against it to be posted at its labor camp. Thereafter, one of its supervisors, Ahmed Alomari, made a speech to some members of his crew that the four signers of the charge were trying to wreck his job. The Board ruled that the posting and speech was reasonably calculated to discourage use of and resort to the Board's processes by employees and therefore constituted unlawful interference.

Additional unfair labor practice charges were brought against Respondent after the UFW was certified as the bargaining representative in March, 1977, and sustained by the Board in M. Caratan, Inc., 5 ALRB No. 16 (1979):

Respondent violated Section 1153(a) of the Act when:

1) On April 4, 1977, after the UFW posted a leaflet in the labor camp, Supervisor Alomari threatened employees with loss of employment if they joined or supported the UFW.

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2) on July 14, 1977, Supervisor Fermin Martinez engaged in surveillance of employees at a meeting with UFW agents which had been convened for the purpose of selecting delegates for the forthcoming UFW convention.

3) on September 28, 1977, Supervisor Alomari unlawfully interrogated workers in his crew in an effort to obtain testimony contrary to that of a worker who had testified at an ALRB hearing so that he could remove from the labor camp those who had complained to the UFW and had testified at the hearing.

4) in May, 1977, Supervisor Alomari solicited an employee to spy on his fellow workers to ascertain who was with the union and to secure information which could be used against the union.

Finally, since approximately August 15, 1978 [that is, about the time of the first decertification petition] until September, 1979, Respondent, through its president Luis Caratan and its media representative, Ed Thomas, in both public and private, expressed statements reflecting an extremely strong animus against the UFW [and the ALRB as well].[21/]

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21/ See, e.g. IV Tr. p. 15-16 [Caratan]; XIV Tr. p. 65-66 [Thomas]: "I believe that the ALRB in connection with the decertification election has been engaging in delaying and stalling tactics which are a dishonest manipulation of the law...whose principal beneficiary is the UFW."

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D. Respondent's Procedural Motions

Respondent, during the course of the hearing as well as in its post-hearing brief, raised a number of procedural motions that it claims, individually or taken together, affected its due process rights at the hearing. Each was considered then and overruled. Each ruling is discussed and affirmed seriatim.

1. Respondent's Request for Bill of Particulars and Giumarra Discovery.

Prior to and at the inception of the hearing, Respondent sought an additional Bill of Particulars [General Counsel's Exhibit 1-J] concerning the allegations set forth in Paragraphs 8 - 12 of the Amended Complaint. The essence of its demand is that the General Counsel failed to provide sufficient specificity in the Complaint's allegations thereby affecting Respondent's ability to prepare its defense.

I have reviewed the original Complaint as supplemented by General Counsel's Bill of Particulars filed on July 23, 1979 [General Counsel's Exhibit 1-I] and its Response to Respondent's Request for Additional Bill of Particulars filed on August 15, 1979 [General Counsel's Exhibit 1-K] and find the Respondent's motion lacks merit. Each of the charging paragraphs [Paragraphs 8 - 12] of the Complaint provided Respondent with sufficient notice to prepare its defense and clearly comports with the standards of "notice pleading" utilized and upheld before the NLRB [arguably a closer question as to Paragraph 9 exists, but see *infra*].

On September 4, the first hearing day of testimony, General Counsel filed an amendment to Paragraph 9 incorporating the three charges that had been duly filed and served on Respondent subsequent to the issuance of the original Complaint as well as setting forth nine examples [three of which were later withdrawn] of the alleged unlawful conduct at issue in Paragraph 9.

Amendments are, of course, freely granted in labor cases, especially since no substantial pre-hearing discovery is permitted. Thus, amendments are frequently necessary which would seem tardy in a civil court case. It has frequently been held by the NLRB to be error not to permit amendments to conform to proof. Community Convalescent Hospital, et al., 206 NLRB No. 124, 84 LRRM 1421 (1973); Sunrise Manor Nursing Home, 199 NLRB No. 154, 82 LRRM 1186 (1972); Lion Knitting Mills, 160 NLRB 801, 63 LRRM 1041 (1966). Courts have even permitted amendments in some cases after submission of the entire case. Preiser Scientific Inc., 387 F. 2d 143, 67 LRRM 2077 (4th Cir., 1967).

Of course, where some undue advantage was taken of respondent, amendment will not be permitted. Great Scott Supermarkets, Inc., 206 NLRB No. 111, 84 LRRM 1563 (1973) [General Counsel was aware of facts upon which he premised his requested amendments well before close of hearing, but did not file motion until after hearing was closed].

But this is not such a case. The amendments occurred on the first day of testimony. The addition of the

specific allegations involving Pedro Guzman Garcia occurred at that time because they were only discovered then in the course of the on-going investigation and interviews recently conducted by the General Counsel's office.[22/] Respondent's case did not commence until more than three weeks later. In addition, Respondent was granted a full day and a half in order to prepare its cross-examination of Pedro Guzman Garcia, the key witness called by the General Counsel to support the allegations in the amendments to Paragraph 9. The Board has held where, as here, "the charges are related, in nature and in time, to the subject matter of the initial charge, [then] Respondent [is] not prejudiced by the inclusion in the complaint of allegations based on amended charges." See John Elmore, Inc., 4 ALRB No. 98, p. 3 (1978).

2. Respondent's Motions for Continuances.

In addition to the two continuances, for a total of three weeks, sought and obtained from the Executive Secretary during August, 1979, Respondent also sought from the ALO on the first day of testimony, September 4, two additional continuances. One was sought to prepare cross-examination of witnesses called by the General Counsel who were testifying concerning the allegations set forth in the amendments to Paragraph 9. The second continuance request was for an additional

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22/ See testimony of ALRB Field Examiner Alexander Correa, VII Tr. p. 80.

two weeks to prepare its case. Respondent's complaints concerning its continuance requests entirely lack substance.

The principal witness called by the General Counsel in support of the allegations set forth in amended Paragraph 9 of the Complaint was Respondent's former foreman of the "town" crew, Pedro Guzman Garcia. His direct-examination testimony lasted several hours. In view of its content, effect[23/] and importance, Respondent was permitted a full day and a half to prepare its cross-examination of Garcia. Then, after each succeeding witness finished his or her direct examination, Respondent's counsel was permitted a recess in which to review in a separate, private room his notes and witness declarations, as well as to consult with his co-counsel and Luis Caratan in preparing cross-examination.

At the conclusion of the General Counsel and UFW's cases in chief, the hearing was recessed for five days to permit Respondent further opportunity to prepare its case. This was in addition to the six days that the hearing was in recess over the prior two weeks [the hearing was in recess for the preceeding two-three-day weekends]. In sum, Respondent,

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23/ Garcia was a strong, solid and very credible witness whose testimony was devastating to Respondent's defense.

contrary to its assertions, had eleven days preparation time in September [in addition to the three weeks in August] for its case.[24/]

3. The Consolidation Order and the Substantive Violation Periods.

Respondent's objection to the consolidation of the objections case with the unfair labor practice case is based on its view that the substantive allegation periods are "wholly separate". This is so, Respondent contends, because only conduct that occurred prior to the first decertification election on September 1, 1978 could have affected its outcome. By contrast, only substantive unfair labor practice allegations involving the second decertification election based on charges filed in June 1979 [and the prior six-month period] were alleged in the Complaint.

Respondent's objection to the consolidation was directed to, considered and denied by the Board.

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24/ Likewise, Respondent's claim [on page 5 of its post-hearing brief] that it had to "defend its actions prior to the first decertification election with virtually no advance notice" is without merit. On or about August 24, 1979 Respondent was served with a copy of the UFW's election objections which included virtually all of the declarations of witnesses called by the General Counsel and UFW who testified regarding that period.

Respondent also seeks to limit both the evidentiary and substantive consideration given to what it calls the "distinctive in time" and "substantively unrelated" allegations of the "R" case and of the "C" case.

Prior to presenting its case at the hearing, Respondent successfully sought to limit consideration of any conduct prior to December 8, 1978 as substantive allegations pursuant to Labor Code Section 1160.2.[25/] Its motion to prevent evidentiary consideration in both portions of the consolidated cases of this highly relevant and probative conduct, however, was denied.[26/]

General Counsel's theory of its case at the consolidated hearing was that Respondent, through a course of unlawful conduct that extended over a 13-month period from August, 1978 to September, 1979, promoted and assisted in the decertification of the UFW. The UFW on the other hand contends in the Objections Petition filed that Respondent engaged in unlawful conduct, both prior to the September 1, 1978 decertification election and continuing thereafter, which was designed to promote, assist and/or dominate the decertification of the UFW and such conduct affected the outcome of that election.

25/ The six-month period was based on the UFW filing and serving its first unfair labor practice charge against Respondent on June 8, 1979.

26/ XIV, Tr. 4.

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It is too obvious to require any further comment that each case covers testimony and evidence that would overlap, provide background and be relevant to the other case. Indeed, this fact presumably provided the basis for the Board's granting the consolidation order pursuant to 8 Cal. Admin. Code Secs. 20335(a)(1) and (c).

Respondent's reliance on Local Lodge No. 1424 v. N.L.R.B. (Bryan Mfg. Co.) 362 U.S. 422, 80 S.Ct. 822 (1960) in support of its contention is misplaced. In Bryan Mfg., an unfair labor practice charge (ULP) was filed against the company 10 months after the company and union, which had only minority status at the time, had executed a collective bargaining agreement. The U. S. Supreme Court ruled that the ULP charge was now time-barred because the union minority status was not a continuing violation and the sole and exclusive basis for the current ULP was the now time-barred minority status.

By contrast, the conduct charged and the evidence presented clearly set forth a continuing pattern of unlawful conduct by Respondent. Moreover, while Respondent's counsel made an able and vigorous presentation of Respondent's defense, the evidence is overwhelming that Respondent has committed the unlawful conduct it is charged with throughout the thirteen month period at issue.[27/]

27/ NLRB v. MacMillan Ring-Free Oil Co., 394 F. 2d 26 (9th Cir., 1968) also relied upon by Respondent is equally inapplicable. There, the court was unwilling to allow evidence of lack of good faith in bargaining from three and one-half years earlier to be used or considered in a current ULP charge of refusal to bargain in good faith. As indicated above, the evidence amply shows here a continuing course of unlawful conduct over a thirteen month period by Respondent.

Two other matters related to this issue require comment here. First, Respondent correctly observed that under both the ALRB and NLRB the showing of interest in election petitions is to be considered solely an administrative matter which can not be litigated at a representation hearing;[28/] however, it does not follow that evidence of unlawful threats, promises or promotion and assistance, which provide an independent basis for setting the election aside, cannot be litigated at the representation and/or unfair labor practice hearing.[29/] Thus, relevant evidence was admitted and considered in the "C" case which pre-dated the December 8, 1978 substantive allegation period and which post-dated the issuance of the complaint. Similarly, relevant post-election conduct (subsequent to September 1, 1978) was admitted and considered in the "R" case solely and exclusively in aid of the determination whether Respondent, through its agents, provided unlawful assistance, promotion, promises or benefits, or threats of such a nature as to constitute a basis for setting aside the election. The NLRB provides ample precedent for admitting or considering such evidence, not as a substantive unfair labor practice or as conduct which affected the outcome of the election, but as relevant background to "shed light" on

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28/ See, e.g., 8 Calif. Admin. Code §§ 20300(j)(4) and (5), 20390 (b) and (c); John v. Borchard, 2 ALRB No. 16 (1976); Nishikawa Farms, Inc. v. Mahony, 66 CA 3d 781; 136 Cal. Rptr. 233 (1977); and cases cited at pp. 18-23 of Respondent's brief.

29/ See, e.g., John v. Borchard, 2 ALRB No. 16, p. 7, fn. 2.

subsequent or previous acts. See, e.g., NLRB v. Anchor Rome Mills, 228 F. 2d 775 (5th Cir., 1956); H. K. Porter Co., 153 NLRB 1370, 59 LRRM 1462 (1965), aff'd. sub. nom. United Steel Workers v. NLRB, 363 F. 2d 272 (D.C. Cir., 1966), cert. den. 385 U.S. 851 (1966); NLRB v. MacMillan Ring-Free Oil Co., 394 F. 2d 26 (9th Cir., 1968), enforcing in part 106 NLRB 877, 63 LRRM 1073 (1966); Eden Forest & Garden of Eden Nursing Homes, 213 NLRB No. 107, 87 LRRM 1415 (1974) (Board considered fact that employee who had passed around decertification petition had assumed supervisory status one month later in determining whether employee was a supervisor within the meaning of the Act when he passed decertification petition around.); and GAF Corp. 214 NLRB No. 67, 87 LRRM 1455 (1974) (Board considered post-election conduct of alleged supervisor to aid in its determination whether was in fact a supervisor and therefore ineligible to vote in election.).

Second, Respondent asserts that the General Counsel's involvement in the consolidated hearing unfairly provided the UFW with "the support of the weight of the state and access to its enormous resources and manpower pool". It's unclear what "enormous resources or weight" of the state's manpower pool Respondent is referring to,[30/] but it is clear that the General Counsel was entitled to fully participate as a party

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30/ There may have been occasional references (more off the record than on) during the course of the hearing to John Moore's circumference, but presumably that's not what the reference is to. Mr. Moore was the only counsel utilized by the General Counsel at the hearing.

in any such consolidated proceedings pursuant to 8 Cal. Admin. Code § 20335(c). Moreover, the examination of the witnesses by counsel for General Counsel was relevant to and probative of the theory of its "C" case. The fact that the same testimony was relevant to and probative of the UFW's "R" case, thereby obviating the need for the UFW's representative asking the same questions again at this or a separate hearing, only reinforces and supports the basis for the Board's consolidation order.

4. The Newspaper Reporter's "Shield Law" Issue

General Counsel's first rebuttal witness at the hearing was Tina Niswonger, a newspaper reporter for the Bakersfield Californian. She was called to testify on the second-to-last day of the hearing in rebuttal to testimony given the previous week on behalf of Respondent by Ed Thomas, the Executive Manager of the South Central Valley Farms Committee. Ms. Niswonger was asked by General Counsel whether three of the quotes of Ed Thomas set forth in an article she wrote for her paper on June 27, 1979 were accurate.[31/] She testified that the

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31/ The newspaper article is in evidence as General Counsel's Exhibit 21. The three quotes of Ed Thomas in question are:

> "We [referring to Thomas and the KERO TV film crew] were told the voting was over. We asked the Agents where we could take shots. No one stopped us or objected to the film crew or truck."

> "I think they [referring to the ALRB] know there is a growing resentment among the farm workers against the union and under no circumstances are they going to allow a decertification election."

> "They now have to put the blame somewhere else in order to extricate themselves."

quotes were accurate to the best of her recollection.[32/] These quotes, if accurate, significantly impeached, as prior inconsistent statements, Thomas' testimony at the hearing. After eliciting from Ms. Niswonger that she had taken notes at the time she interviewed Thomas and had consulted those notes prior to testifying, Respondent's counsel sought the notes to review in order to further examine her. Ms. Niswonger refused to produce the notes pursuant to California Evidence Section 1070 [the news-reporter "Shield Law"]. The matter was taken under submission to be determined, if necessary, in this decision.[33/]

While I'm not unmindful of the Board's policy of requiring ALO's to make determinations of new or unprecedented issues raised at a hearing[34/] there are significant reasons why I decline to do so in this one instance. Primarily, as will be discussed in more detail hereinafter, it is unnecessary to confront the issue and rely upon this particular impeachment since Thomas' testimony was significantly and frequently contradicted by other credible testimony and evidence. Second, this matter requires the resolution of competing policy considerations which are wholly independent of the Act and unnecessary to resolve in order to decide the issues in this case. Compare,

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32/ XIX, Tr. p. 12, lines 8-9.

33/ The ALO's inclination at the time was to strike the testimony of the witness for failure to produce the notes. XIX, Tr. p. 19, lines 13-15. See California Evidence Code § 771.

34/ See, e.g., Sun Harvest, Inc., 6 ALRB No. 4 (1980).

e.g., CBS v. Superior Court, 85 CA 3d 241 (1978) and Hammarly v. Superior Court, 89 CA 3d 388 (1979), two recent cases in which the media was compelled to disclose the information sought in criminal or grand jury proceedings notwithstanding the Shield Law, with Baker v. F&F Investment, 470 F. 2d 778 (2d Cir., 1972); Cervantes v. Time, Inc. 464 F. 2d 986 (8th Cir., 1972) and Democratic National Committee v. McCord, 356 F. Supp. 1394 (D. D.C. 1973), three recent civil cases where the media was not compelled to reveal its sources or information sought. The policy considerations discussed and applied in those cases would need to be further resolved and reconciled with California Evidence Code § 771 which requires that a writing that has been used to refresh a witness' testimony must be produced or the testimony stricken.

Accordingly, no consideration has been given to Ms. Niswonger's testimony concerning the accuracy of her published quotes of Ed Thomas nor has a determination been made whether the notes should be produced.

E. The First Decertification Election Period (August - September, 1978)

1. The First Decertification Petition

On August 25, 1978 Jose Luis Cadiz, a member of the bargaining unit at M. Caratan, Inc., filed with the ALRB's Delano office a Petition to Decertify the UFW as the bargaining representative for Respondent's agricultural employees. Cadiz had personally passed this petition around to

members of Fermin Martinez' crew approximately two weeks before the election. Francisco Pulido, a member of Fermin's crew at the time,[35/] credibly testified that the foreman's brother[36/] passed the petition at the ranch's Puerto Rican labor camp.[37/] Cadiz told those members gathered that the paper he was circulating should be signed "so that they would not deduct the two percent for the union".[38/]

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35/ Pulido credibly testified that he left Respondent's employment two days before the decertification election after he no longer could bear the pressure that he felt Fermin Martinez imposed on him at work. The pressure occurred, according to Pulido, after he had complained to the UFW several weeks earlier about the quality and quantity of food served at the labor camp. See XIX Tr. 187-193. Pulido's testimony was received and considered as relevant background and as highly credible and probative of whether Respondent sponsored or assisted in the decertification. It was not considered in determining anti-union animus, tainted showing of interest or as a basis for substantive allegations against Respondent.

36/ Jose Cadiz is foreman Fermin Martinez' younger half-brother. XVII Tr. p. 146. Cadiz, who worked in Fermin's crew, is also known by the nickname "Chuy" ("Chu-ee").

37/ Respondent maintains three labor camps. The "Puerto Rican" and "Arab" labor camps are located on opposite sides of a dirt and oil covered road on M. Caratan property near the machine sheds, a short distance outside of Delano city limits. Approximately 3/4 of a mile further east on Cecil Avenue is the so-called "Japanese" camp where some of the "steadies" live in small bungalows and which was also the location for the second decertification election.

38/ See XIX Tr. p. 187.

In addition to Cadiz, Pedro Velasquez, a member of Fermin's crew, also passed the decertification petition among Fermin's crew.[39/] While the petition was passed among Fermin's crew after work hours at their labor camp, it was circulated amongst Pedro Guzman Garcia's "Town" crew[40/] during working hours in the field.[41/] Cadiz came out to the field just before or at lunch time one day and handed the decertification petition to Margarita Dorado, a member of the Town's crew and wife of Catarino Correa. During the lunch break and thereafter during working time Dorado passed the petition amongst the women while Rigoberto Ochoa passed it amongst the men. Garcia observed this occurring but at the time was not sure what the paper was. However, after Cadiz left the field with the petition, Garcia was approached by two members of his crew, husband and wife Jose and Marie Quinones who were upset. They asked to see the paper they had signed because they wanted to remove their names. Garcia directed them to the office.

Quinones credibly testified that 45 minutes after signing the paper he saw Margarita Dorado talking to Mike

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39/ See testimony of Miguel Ramos, XVII Tr. p. 40. Velasquez' role as one of the key participants in the brawl that occurred at the second decertification election on June 15, 1979 is discussed hereinafter.

40/ The "Town" crew was so-named because all or most of the members, half or more of whom were women, lived in Delano, rather than in Respondent's labor camps.

41/ This is based on credited testimony of Martha Gonzales, Pedro Guzman Garcia and Jose Quinones.

Anderson, who had just pulled into the field avenue in his pickup. Seeing Dorado holding a paper he believed was the one he had signed, Quinones heard Anderson tell her in English to give the paper to Garcia to sign or for Garcia to have someone else sign. Although Quinones does not apparently speak English, he heard and understood the words "paper" and "sign". He did see Dorado pass the paper to Garcia who was standing nearby.[42/]

After lunch, but before he went to Garcia, Quinones asked Rigoberto what had happened to the signed paper because he wanted his name removed. Catarino Correa and Margarita Dorado were standing next to them when he asked. Correa told Quinones he could have his name taken off, but he did not know where the paper was at present. Although he had no recollection at the hearing, Quinones believed when he signed a declaration the year previous, that the paper was taken to the company office.[43/]

Later, when Garcia saw Cadiz again, he asked Cadiz what the paper was for. Cadiz told Garcia that he could not tell him because Luis Caratan told Cadiz not to tell anyone what the paper was for.[44/]

42/ XI Tr. pp. 65-78.

43/ Ibid., pp. 77-78.

44/ See III Tr. pp. 54-58. Respondent did not call Cadiz, who was currently working for it as a supervisor, to testify concerning this and other significant statements attributed to Cadiz. An inference adverse to Respondent based on California Evidence Code §§ 1241, 1250 and 1251 and pursuant to California Evidence Code § 413 was drawn.

Subsequent to the filing of the petition on August 25, the ALRB conducted an investigation, based in part on the declarations filed by Pulido and Quinones [and others], concerning whether the obtaining of signatures on the petition was tainted. According to Ed Perez, who was in charge of the investigation, home visits were made on a random basis to various members of the four crews[45/] utilizing the employee list provided the ALRB and UFW by Respondent.[46/]

Luis Caratan learned of the investigation and was disturbed by what he believed to be biased questions asked of his workers by the ALRB agents conducting the investigation. He had prepared, after consultation with his attorney, a paper which he distributed to his crew members urging them to call him at home if ALRB agents contacted them and they did not want to talk to the agents.[47/]

Although Perez recommended, on the basis of his investigation, that the election not be held because of a tainted showing of interest, his recommendation was overruled by

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45/ The other two crews were the "Arab" crew and the harvesting crew of labor contractor Frank Sierra. No testimony was presented regarding the circulation of the petition in these two crews other than Abdul Baabbad's. Baabbad, a part-time worker in the Arab crew, testified he did not know anything about the petition circulating in the Arab crew.

46/ See XVI Tr. p. 46.

47/ See Respondent's Exhibit No. E and testimony of Luis Caratan, IV Tr. pp. 48-50; XIX Tr. pp. 86-88. Caratan's perception of the investigation reflects the degree of his mistrust as well as the seriousness of the investigation. Compare Perez' testimony, XII Tr. pp. 166-167.

the then Regional Director. The election was set for September 1, with a pre-election conference originally scheduled for 3:00 p.m., Wednesday afternoon, August 30. However, in order to conclude the then pending investigation, it was necessary for Perez to continue the pre-election conference until the next day, Thursday at 5:00 p.m. Perez was successful in contacting the other parties by phone to notify them of the change, but was unable to reach the petitioner, Cadiz. So, on Wednesday at 3:00 p.m. Cadiz arrived at the ALRB office as originally scheduled. Perez advised him of the change and of Perez' inability to reach and notify him by phone. Perez asked Cadiz again[48/] if he had an attorney or representative that Perez could contact if other changes were to occur. Cadiz advised Perez that his attorney was Ken Youmans [Respondent's attorney as well] but declined to sign a declaration form authorizing Perez to contact Youmans on behalf of Cadiz. The following day at the pre-election conference, Cadiz repudiated his statement that Youmans was his attorney.[49/]

2. The First Decertification Petitioner

At the time Jose Luis Cadiz circulated and filed the first decertification petition in mid-August, 1978 he worked for Respondent in capacities other than as a crew member. As indicated previously, each June, commencing in 1977

48/ In a previous encounter regarding the filing of the petition, Cadiz told Perez he had an attorney but declined to say who it was, XII Tr. 160-168.

49/ Ibid.

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he [as well as one or two others] would work for a month as a crew foreman in Respondent's grape harvesting operations in Mexico. In addition, Cadiz was periodically and apparently exclusively[50/] utilized by Mike Anderson as a second foreman in charge of a break-off crew during Anderson's three year tenure as crew superintendent. Cadiz would be put in charge of crews varying in size from two to five men and would be given responsibility for clean up work, hothouse work or specialized jobs. While in charge Cadiz was allowed to direct these men and make job assignments regarding minor tasks. During this period Cadiz was being evaluated and considered by Anderson and Luis Caratan for the position of foreman on the basis of these and the Mexico assignments. At the first opening, which occurred in April, 1979 when Garcia was demoted and then terminated, Cadiz was promoted to foreman of the Town's crew.[51/]

As noted previously, Cadiz was also the younger half-brother of and worked in the crew of foreman Fermin Martinez, who is staunchly anti-UFW.

Finally, it was stipulated by the parties that Respondent's law firm undertook to represent Cadiz as well Respondent shortly after a determination was made to appeal the Board's decision in 4 ALRB No. 68.[52/] The representation covered

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50/ Theresa Heredia was selected by Anderson to be a second in charge of a break-off crew from the town crew to tie vines in January, 1979. It was not clarified but it was my understanding that Cadiz was in charge of break-off crews from Fermin's crew.

51/ Anderson testimony, XVI Tr. pp. 159-162; Caratan testimony XI Tr. 106, line 27.

52/ The Board's decision was issued on September 29, 1978.

the period from late September or early October, 1978 through the Court of Appeals argument and decision and the opposition to the Petition for Hearing filed with the California Supreme Court, in the Spring of 1979. During this period Respondent was billed and paid for eight hours of legal work performed by the law firm that was attributable to time incurred on Cadiz's behalf.[53/]

3. Respondent's No-Union Campaign Before the First Decertification Election

Sometime during the week prior to the election, Respondent decided, after consulting with and receiving approval from its attorneys, to conduct a no-union campaign.[54/] The theme of the campaign was to be "what has the union done for you". The campaign was to be conducted by Anderson, who was to be responsible for the Town crew, Dan Surber, who was assigned to Fermin's crew and Caratan himself, who took responsibility for the "Arab"

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53/ Respondent's counsel further testified that no portion of the research and writing time billed for the Court of Appeals briefs was allocated to Cadiz. This was attributed to the fact that the bulk of the research had already been done when it was agreed to represent Cadiz and no additional or separate research or writing was deemed necessary in support of Cadiz' position. XVIII Tr. p. 110-111.

54/ Mike Anderson's specific recollection was this approval was not forthcoming and the campaign did not start until after lunch on Wednesday, August 30. XVI Tr. p. 170-172. The record does not corroborate his recollection. Francisco Pulido credibly testified that he and other members of Fermin's crew received a copy of Respondent's medical benefits comparison pamphlet (General Counsel's Exhibit 2) early, i.e., 7 a.m., that Wednesday morning. According to Caratan, it was necessary for him to obtain the insurance information from the California Tree Fruit and Grape League's office, have it translated to both Spanish and Arabic, approved by his counsel, and then duplicated before it could be distributed. Respondent's campaign apparently started at least several days earlier than Wednesday afternoon.

and Frank Sierra crews.[55/] Caratan gave instructions to the others that no promises or threats could be made, but left it to their discretion how best to conduct the campaign. Three methods were utilized: talks to an assembled crew, talks with individual workers one-to-one and distribution and discussion of a pamphlet prepared by Respondent comparing insurance benefits of those nearby ranches with no union with the union's insurance benefits. According to Anderson and Caratan, the preparation and use of the insurance pamphlet was in response to an inquiry from several women in the Town's crew wondering what were the insurance benefits offered at ranches without a union.[56/] During his campaigning, Anderson used Pedro Garcia as his interpreter; generally, Luis Caratan did not use an interpreter since he apparently speaks and understands Spanish quite well. However, Caratan did use Fermin as his interpreter when he talked to Fermin's assembled crew about the pamphlet.[57/]

55/ Although Caratan testified that he did not utilize his foremen to assist in the campaign, Francisco Pulido and Augustine Arrellano both testified credibly that shortly after the petition had been filed Fermin was out in the field going from row to row asking each worker his views of the union and how he planned to vote in the upcoming election. XIX Tr. p. 200, 243. Pedro Garcia also testified credibly that the same day that the petition was circulated amongst his crew he was translating for Anderson who was urging individual workers to vote no-union. See III Tr. p. 63.

56/ This explanation was discredited by two witnesses, Maria Obad and Maria Munoz, called by Respondent, discussed infra. Compare also Anderson's testimony on direct, XVI Tr. p. 173 with his testimony on cross "some workers also wanted to know what insurance company would offer if they got rid of the union". XVI Tr. p. 217.

57/ See Pulido testimony, XII Tr. p. 203, lines 11-19. No testimony was presented regarding Dan Surber's conduct or campaigning.

Anderson and Caratan testified they did not deviate from the campaign theme, specifically did not make any promises of increased salary or insurance benefits when they talked to the crew members, and told the assembled crews they could not make any promises. However, the witnesses called to testify concerning Respondent's no-union campaign neither supported nor corroborated but, in fact, discredited Caratan and Anderson's testimony.

Two witnesses, Francisco Pulido and Augustine Arrellano, convincingly testified regarding the campaigning conducted by Luis Caratan before the Puerto Rican crew early Wednesday morning, August 30. Pulido, Arrellano and the rest of Fermin's crew had just arrived in the field to start work when Fermin called them together and Luis Caratan spoke to them, partly in English and partly in Spanish. Fermin translated the English portion to the workers. Caratan started off by asking what benefits did the workers have with the union. At first no one said anything, then several of the Puerto Rican workers answered "nothing".[58/] Caratan then alluded to the two percent they had deducted from their pay for dues and the $8 - 10,000.00 a month paid by him for which, he claimed, neither he nor the workers received any benefits.

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58/ Although called the Puerto Rican crew it was actually a mixed crew of Puerto Rican and Mexican men. According to Ben Maddock and Deborah Miller's testimony it was well known that a majority of the crew, particularly the Puerto Rican workers, were not UFW supporters.

Mid-way through his talk Caratan passed out the insurance benefit pamphlet to each crew member. Caratan indicated that the left column was the union's medical plan and the right column was the plan the company had or would give the workers.[59/] Both Pulido and Arrellano's testimony was clear and convincing regarding Caratan's discussion and their understanding of the substantially increased medical benefits available to the workers if they voted no-union.[60/] Pulido further testified that Caratan promised the workers a higher salary, although he did not recall whether a specific amount was mentioned. Arrellano also recalled that Caratan talked about better services or

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59/ General Counsel's Exhibit 2 shows that the difference in the benefits of the two plans was substantial. John Helmer, an insurance agent called by Respondent, testified that Respondent implemented this plan sometime in August, 1979 [apparently after the election results were announced].

60/ See XIX Tr. p. 204-206 [Pulido]; p. 245 [Arrellano]. The testimony remained convincing even after vigorous cross-examination.

benefits for the workers if they voted no-union[61/] but could not recall what Caratan specifically referred to. Both also testified that one of the Puerto Rican workers, a barber named "Pelon", asked Caratan "Are you pushing us to vote no union". Caratan said "Sure, I'm pushing you for no union".[62/]

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61/ See XIX Tr. p. 204-206; p. 244-245, 256.

Respondent seeks to discount and discredit Pulido's testimony because it views Pulido's declaration, which was given to the UFW on August 30, 1978 [General Counsel's Exhibit 22], as significantly impeaching his hearing testimony. Respondent contends that because Pulido's testimony omits any reference to Caratan's campaign promises of better wages and insurance benefits it amounts to a prior inconsistent statement by omission. I do not concur for three reasons.

First, Pulido's testimony was independently corroborated by a very credible witness, Augustine Arrellano. Second, a trier of fact may discredit or discount the testimony of a witness who has been impeached by a prior inconsistent statement [Evidence Code § 1202] or even consider the prior inconsistent statement for the truth [Evidence Code §§ 770 and 1235]; but a prior inconsistent statement is but one factor to take into account in evaluating the trustworthiness and weight to give the testimony [California Evidence Code § 780]. Here, I found Pulido a sincere and honest witness who does not have financial or other gainful interest in the outcome of the case. I further found credible his explanation that his declaration contained only those things that he recalled at the time in order to alert the UFW that something was going on at Caratan's.

Finally, while there may be circumstances where impeachment by omission in a prior statement is applicable [See, e.g., 3 Wigmore § 1042] I am not persuaded that this is one. There is no evidence that Pulido understood or should have, the full import or legal significance of Caratan's statements at the time. I am not convinced that this "omission" is, in fact, clearly an inconsistent prior statement [See Witkin, California Evidence, § 1254, p. 1156; Brooks v. Willig Truck Transportation Co., 40 C. 2d 669, 675 (1953)]. I considered and rejected Respondent's similar argument regarding the testimony and declaration [Resp. Exh. #A for Identification only] of Umberto Gomez.

62/ Ibid., p. 206, lines 21-23; p. 254, lines 16-17.

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Moreover, by the time Arrellano and Pulido testified on the second to last day of the hearing, Caratan had already testified on these matters several times. His testimony in these key areas significantly changed. When first called by the General Counsel as an adverse witness Caratan testified that he had the insurance comparison pamphlet distributed to all of his workers 1 or 2 days before the election.[63/] However, Caratan testified during Respondent's case that he had a recollection of having the pamphlet distributed to members of the Town's crew only.[64/] This distribution occurred to the Town's crew, according to Caratan, because a majority of the crew were women with families and they were the primary ones to voice an interest in the insurance benefits. Caratan's changed testimony[65/] was significantly discredited by Arrellano and Pulido's testimony.

A number of witnesses were called to testify regarding the campaign speeches to the Town's crew. Martha Gonzales, Wilson Santiago and Jose Rodriquez were called by the General Counsel and UFW. Martha Gonzales, who signed the first decertification petition, credibly testified that Mike Anderson and Pedro Garcia, while talking to the workers one-to-one, came by to discuss the upcoming election with her individually. With

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63/ See IV Tr. p. 34, lines 22-27; XII Tr. pp. 18-20.

64/ See XIX Tr. p. 82, 104.

65/ Significantly, the change occurred after the General Counsel had presented testimony that the Arab translation [General Counsel's Exhibit 12] of the insurance benefits pamphlets was an unlawful campaign promise on its face. Caratan was present at his counsel's table throughout the entire hearing pursuant to California Evidence Code § 777(c).

Garcia translating, Anderson told her that the company had more insurance than the union. Anderson asked her what her thinking was about the company and the union. Gonzales told Anderson that she wanted insurance to cover an operation she was going to need. Anderson replied that the union covered her for $10,000.00 while the company covered her for $25,000.00. Gonzales testified she thought to herself, "Well, that is a difference". Anderson told her if she voted out the union she would get this insurance. He also told her she would be able to work the entire year.[66/] Caratan also spoke to her crew. Although she could not recall exactly what he said, Caratan did say he wanted the crew to vote for the company and he also said he would raise their salary.[67/]

Wilson Santiago testified credibly that Anderson also spoke to him individually before the election. With Garcia translating, Anderson told Santiago that the company would provide better insurance and would give a pay raise if the union was voted out. Santiago was asked his opinion about the company and the union. Anderson then said he could have better insurance and higher pay if there was no union.[68/] Luis Caratan spoke to the crew the day before the election. According to Santiago, Caratan explained the benefits he gave and the union gave. Caratan then told them that the company would give more

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66/ See VII Tr. p. 23-25, lines 16-28.

67/ Ibid., p. 26.

68/ VII Tr. p. 98-100.

Jose Rodriquez also credibly testified about Respondent's campaign speeches. Rodriquez, Santiago's "brother",[70] also was talked to individually by Anderson with Garcia translating. Anderson told him that if he voted no union the company would have better insurance and higher wages.[71] When Caratan talked to the assembled crew he told them if there was no union they would have higher salaries and better insurance benefits. Caratan then passed around a paper to everyone showing benefits of the company and benefits of the union. It was Rodriquez' understanding from the pamphlet and from what Caratan said that the pamphlet was comparing actual benefits that the union and company offered.[72]

Two witnesses, Maria Obad and Maria Munoz, who were called by Respondent, also provided instructive testimony regarding their understanding of the insurance comparison pamphlet. Obad and Munoz were two of the women who asked Anderson about the company's insurance benefits "because we knew that the elections were going to take place" and were "concerned to see what [the company's] insurance was going to cover".[73] Both women testified that Anderson did not make promises to them about higher wages or better insurance benefits. Yet Mrs. Obad, an acknowledged no-union

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70/ Santiago and Rodriquez were raised together in Puerto Rico; though they consider themselves "brothers", they are not actually related.

71/ VII Tr. p. 35.

72/ VII Tr. p. 36.

73/ XIV Tr. p. 165.

supporter and sister of Rigoberto Ochoa,[74] confirmed that it was her understanding from Anderson's speech and Respondent's insurance pamphlet that if she voted no-union she would get better insurance benefits.[75] Moreover, although testifying that Anderson made no promises of higher wages in his speech to the crew, nevertheless it was also her understanding that if the union was voted out the crew would "probably have higher wages after the election".[76] Similarly, Mrs. Munoz also learned of "the company's insurance" from the sheet Anderson passed out, although also testifying that no promises were made.[77]

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74/ XIV Tr. pp. 135, 154.

75/ XIV Tr. p. 149.

76/ XIV Tr. p. 150.

77/ XIV Tr. p. 168 - Mrs. Munoz' testimony became very evasive when pressed on cross-examination. XIV Tr. pp. 177-182. The significance of the women's testimony, however, is the extent that these two witnesses called by Respondent and not union supporters, corroborated the testimony of those witnesses who were union supporters Similarly, Javier Navarez, who had been a union supporter, testified that after seeing the insurance benefit pamphlet distributed by Anderson he changed his mind and decided to vote for the company. See XV Tr. pp. 63-64. I do not credit the testimony of Rigoberto Ochoa, who helped circulate the petition, that no promises were made by Anderson or Caratan in their speeches to the crew. Moreover, it was also Ochoa's understanding from Respondent's speeches that the crew would receive better benefits if they voted no-union. XV Tr. p. 36.

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4. The First Decertification Election

a. Pre-Election Conference

The pre-election conference, originally scheduled for Wednesday, August 30, was held on Thursday, August 31 at 5:00 p.m. The meeting was conducted at the ALRB's Delano office by Ed Perez, who was assigned as agent in charge of the election. The purpose was to discuss and reach agreement on the actual conduct of the election. The subjects covered were the election sites, electioneering, quarantine area, observers, tally of the ballots and employer eligibility list. Present were Luis Caratan and his counsel, Jose Cadiz and an ALRB agent assigned as an interpreter for him, several UFW representatives and Perez. Perez, called by the ALO, testified that the parties reached an agreement, after discussion and rulings by him as follows: The voting would be accomplished by a mobile ballot box moving from each crew location rather than balloting at a fixed location. Six locations were designated, one for each of the crews,[78/] one for the "steadies" and one at the ALRB office from 4-7 p.m. for those who would not be working that day. No electioneering was to be conducted on the election day. All agents of the parties would be kept out of the fields until after the crew had voted except foremen who could continue to supervise work. Perez asked all parties to avoid doing anything that could be construed as last-

78/ According to Perez, the Agents were not able to timely notify some Frank Sierra crew members of the voting location. The ALRB office location was set up with that also in mind.

minute electioneering thereby providing a possible basis for the other party filing election objections. A quarantine area was to be established that required all persons other than the voters and observers, when notified by the ALRB Agents that the voting was shortly to commence, to be out of sight and sound of the voters. Perez accepted and used the employer's eligibility list, but over the UFW's objections that the list contained a high number of P. O. Box Number addresses for Frank Sierra crew members. Finally, the tally of ballots was to commence at 7 p.m. at the ALRB office after the voting was closed.[79/]

b. September 1, 1978 Election

The first crew to vote was the Arab crew. On the other side of the same field was Fermin's crew who were to vote next. The remaining sites were more scattered and were to follow. Tanis Ybarra, a volunteer organizer for the UFW in August, 1978, was responsible to represent the UFW at two of the voting sites. Prior to the polling starting at Fermin's crew Ybarra, who knows Jose Cadiz, the petitioner, was talking to him out in the field avenue away from the crew while waiting for the ballot box to be set up. Cadiz told Ybarra that his observer was going to be Miguel Ramos. Shortly thereafter Ybarra heard Cadiz talking to the Respondent's counsel, Ken Youmans, Fermin and "Chuco", Fermin's second. Youmans asked Cadiz who his observer

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79/ This was, of course, changed by the Board order the following day. Perez' testimony contains a more complete description of the areas covered and the parties' positions. See XVI Tr. pp. 1-47.

was going to be. Cadiz replied Ramos. Youmans told Cadiz that Ramos was the company's observer. He told Cadiz to go talk this over with Fermin. Fermin, Cadiz' brother, in turn told Cadiz to talk to Chuco. Chuco then went and called into the field for "Pelon" and then went into the row and came out with a worker. Fermin told the worker "Pelon" that he would now be Cadiz' observer.

A short time later, approximately 15 minutes before balloting, Ybarra saw Luis Caratan out in the fields leaving one row and going to another row talking to workers. One of the Board's agents, Alexandro Correa, assigned to monitor the voting, was called over and told about Caratan's presence in the rows talking to workers. Correa went over to where Caratan was and told him he was not to be in the field talking to the workers just prior to their voting. Caratan told Correa he had a right to be in his field to conduct and supervise his business. A heated exchange occurred with much yelling. Caratan left the row angrily, jumped into his pickup and drove off. Shortly thereafter Youmans came into the field and a heated exchange ensued, also with much yelling between the attorney and the Board agent, over Caratan's right to be in the field. Shortly, Youmans left as well.[80/]

The greater number of problems regarding the election centered around the Frank Sierra crew. Andy

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80/ Ybarra's testimony is at XII Tr. p. 14-38; Board Agent Correa's is at XII Tr. p. 39-60.

Hardcastle, one of the Board Agents, told Ed Perez that part of the crew had been split up and were not where the employer said they would be. Charges by the UFW of Caratan's improper last minute electioneering were also raised. Umberto Gomez, a UFW contract administrator who had been assigned to help organize Respondent's "steadies" a few days prior to the election, credibly testified that he had gone out to locate that portion of Frank Sierra's crew that was turning raisins. Caratan arrived after Gomez. Caratan spoke to the 15 or so crew members both individually and as a group telling them they should vote no-union, that they would get more benefits, including their dues, without the union.[81/] Caratan acknowledged talking to members of the Frank Sierra crew but only within the limits of his campaign theme that the workers were not receiving any benefits for their dues.[82/] At the time Gomez saw him Caratan claimed he was merely telling the workers where they were to vote. Board Agent Correa was compelled to ask Caratan to leave the Sierra crew as well.[83/]

5. Respondent's Employment Practices Subsequent to the First Election

a. Introduction

The principal witness called by General Counsel and the UFW to testify regarding these matters was Pedro

81/ V Tr. p. 157-158; VI tr. p. 29-30.

82/ XVII Tr. p. 157. Caratan also testified to discussing the insurance and health benefits to the Arab crew in the course of the campaign. XIX Tr. p. 84, lines 7-10, p. 105, line 10.

83/ XII Tr. p. 58-60.

Guzman Garcia. Garcia, a Puerto Rican originally hired by Fermin Martinez in 1970, had been the foreman of the Town crew from 1977 until his demotion, and then termination on April 22, 1979. His testimony, from an insider's viewpoint, about Respondent's employment practices was not only convincing, but significantly undermined much of Respondent's defense.[84/]

The principal witness called by Respondent to rebut and discredit Garcia was their former crew supervisor, Mike Anderson. Essentially, Anderson denied any knowledge or conduct attributed to him by Garcia for which an unlawful or discriminatory intention could be found or imputed. Anderson's lack of credibility as a witness is discussed hereinafter in more detail under Subsection g, page 57.

b. Jose Quinones[85/]

Subsequent to Jose Quinones seeking to have his name removed from the First Decertification Petition, Garcia had a discussion with Anderson in which Garcia was told by Anderson not to give Quinones any work if he asked.[86/]

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84/ Garcia was not clear in several instances regarding dates or the sequence of events. Respondent advocates in its brief that these errors or lack of clarity discredit his entire testimony. However, this lack of clarity did not detract from Garcia's credibility or the substance of this testimony.

85/ The allegations regarding Quinones' had been dismissed at their request by the General Counsel. Garcia's testimony is being considered here solely as relevant background.

86/ III Tr. pp. 57-58. Quinones had left work shortly after the incident during the harvest with permission for a week or more. He was denied reemployment when he sought to return thereafter.

c. Sofia Gomez

Sofia Gomez and her family[87/] had worked for Respondent the past two or three years in Garcia's Town crew during harvesting. Gomez, a small, attractive and fragile-appearing young woman, was a good worker according to Garcia. Gomez, who had been rehired in May by Garcia was a union supporter and the principal person who would talk to the workers in her crew about the union and assist them if problems arose. Apparently there was no officially designated UFW crew representative and she performed some of those functions on an unofficial basis.[88/] Anderson knew of Sofia's union activities, according to Garcia, who was present when Margarita Dorado told Anderson who, including Gomez, in his crew were "from the union" or supported it.[89/] Both prior to and during the 1978 Arvin and Delano harvests Sofia asked Garcia, Anderson and Caratan for work for her family on numerous occasions. Each time she was told to wait a little bit longer. One day Anderson finally told her that he would give work for her brothers but not her mother and father because the grape inspector had made several complaints the previous year about their

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87/ The family consisted of her mother, father and several brothers.

88/ Gomez was asked to be the UFW's observer for her crew, but declined because she was not going to be at work that day. She was instrumental, however, in obtaining Juan Espinoza as the observer. XIX Tr. pp. 118-119.

89/ III Tr. pp. 81-85; V Tr. p. 21, lines 13-24. The testimony was received as a basis for Respondent's belief as to the union supporters in its workforce rather than for the truth of the matter asserted.

grapes not being good. Sofia told Anderson that was not true; a complaint was made but once about her parents. Anderson told her to wait longer.[90/] Caratan on a separate occasion at the end of August told her he wasn't going to hire her parents because last harvest's computer printout showed they were too slow.[91/] Garcia, on the other hand, had told her he would hire her whole family but the decision was not his.[92/] Indeed, Anderson told Garcia to fire Sofia because she was only trouble and was from the union.[93/]

A day or two after the September 1st election, Sofia asked Garcia to be excused from work to see her doctor. Permission was granted upon condition she bring a note from the doctor. Upon returning the following day Garcia asked Gomez for the doctor's note. Gomez told him she didn't have one. Garcia told her she'd have to go home that day. Gomez lost her temper and swore at and insulted Garcia who sent her home.[94/]

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90/ It was not clarified but my understanding was that none of the Gomez family was in fact hired.

91/ XIX Tr. pp. 113-117. Caratan utilized a computer printout to monitor the daily production of the trios. He could not recall ever terminating anyone on the basis of the computer production comparison. XIX Tr. p. 63.

92/ XIX Tr. p. 177.

93/ III Tr. p. 85. According to Anderson he had a recollection of Sofia asking him for work for her family once [and not at all by her family] during the 1978 harvest. XVI Tr. pp. 85-86.

94/ XIX Tr. p. 140. It was not entirely clear whether this was a suspension or termination.

Garcia, believing he was following company policy in the matter, told Anderson of the incident who in turn told Caratan. Caratan ascertained that the practice of obtaining written documentation for excuses was not uniformly maintained so he sent a telegram to Gomez advising her she was entitled to return towork. Gomez, in the meantime, had gone to the ALRB to file a charge.[95/]

Gomez returned to work within a day or two of the incident but remained only a week. She testified that she left because of the pressure she felt was placed on her and because Respondent would not hire her family who had just obtained employment elsewhere. The pressure, she testified, consisted of Caratan and Anderson refusing to be friendly or talking to her anymore and of Garcia refusing to have anyone assist her when she needed it. Garcia testified that after the election he was told by Anderson to push his crew more, that they were not working fast enough and not to assist or have anyone assist the workers. It had been Garcia's practice over the past year and a half to assist or have some of the workers assist those who might fall behind. No complaints had been made prior to the election about the speed his crew worked or assistance provided to his workers.[96/]

95/ It was also unclear what the timing of the telegram and charge was or if they occurred independent of each other. In any event, the incident reflected a very short outburst of anger between Gomez and Garcia and was of no great moment. The two were friends and otherwise had a good working relationship. Indeed, Gomez, when testifying about it was obviously embarrassed and felt wrong for her language and anger toward Garcia.

96/ V Tr. pp. 102-103, 122-123.

d. Jose Rodriquez

Rodriquez was first hired by Garcia to work in his crew in November, 1977. In 1978 he also assisted Sofia Gomez concerning her activities in support of the UFW. He was also an active UFW supporter which Anderson knew.[97/] In the 1978 harvest Anderson told Garcia not to hire Rodriquez unless Anderson told him to because Rodriquez was a UFW supporter.[98/] Nevertheless, Garcia rehired Rodriquez for the harvest because he was friendly with Rodriquez and knew him to be an experienced and capable worker. After the harvest ended Rodriquez spent a month with his family and then returned after Thanksgiving and called Garcia for work. After telling Rodriquez they had not started pruning in Delano yet, Garcia informed Anderson that Rodriquez was asking for work pruning. Anderson told Garcia to put him off. Rodriquez continued to ask Garcia for work on a nearly daily basis. Garcia went to Anderson several more times and each time was told to put Rodriquez off. Finally, Garcia put Rodriquez to work pruning after putting him off for several weeks and then told Anderson. Anderson, angry with Garcia, warned him about hiring UFW supporters without his permission.[99/]

97/ V Tr. p. 21, lines 13-24.

98/ III Tr. p. 86

99/ Garcia testified he had hired in December Fidel Ruiz, also a UFW supporter, while Anderson was away. It was unclear whether this occurred before or after Rodriquez' hiring.

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Anderson then moved Rodriquez from pruning to tieing in the Theresa Heredia breakoff crew with ten or so other women.[100/]

In January, 1979, Rodriquez continued working in Theresa's group tieing vines as well as doing other types of work for another foreman, Travis. Heredia testified credibly that one Friday morning in February she noticed that Rodriquez was working noticably slower than his usual pace and asked if everything was allright. Rodriquez responded that he felt considerable pain in his side and thought it would be best if he stopped working and go have a doctor look at him. Theresa gave Rodriquez permission to leave work to see a doctor.[101/] That afternoon when she saw Anderson she told him that she had given Rodriquez permission to leave work because of a pain in his side. That following Monday Wilson Santiago told Theresa in the field that Rodriquez was ill from a hernia that was to be operated on. Anderson was standing with them when Santiago told this to Theresa and she then told Anderson in English what Santiago told her in Spanish. On the following Friday Theresa saw Jose in the store. He told her he had been operated on for a hernia and would be out for at least three months recuperating. Theresa told Anderson that day or the next that she had seen Rodriquez and he had informed her he would be out at least three months recuperating.[102/]

100/ V Tr. pp. 10-20.

101/ It was within Heredia's delegated authority as a second in charge of a crew to give workers permission to leave work. IX Tr. pp. 9-10.

102/ Anderson denies any knowledge of this. He testified that he (continued on Page 55)

e. Wilson Santiago

Santiago was also hired by Garcia in November, 1977 to work in the Town's crew. Santiago worked until the June, 1978 lay-off. Although Anderson told Garcia not to rehire Santiago for the 1978 harvest because Santiago was a UFW supporter,[103/] Garcia nevertheless did hire him.[104/] Santiago worked through the 1978 harvest and then left for two months to visit his family in Puerto Rico. He returned to the area on or about January 26, 1979 and sought work from Garcia at that time. Garcia informed Anderson that Santiago was looking for work. Anderson told Garcia to put him off. After several days of Santiago requesting work Garcia permitted him to work with Rodriquez tieing vines, but did not put him on the company payroll. Since tieing vines is piece rate, Rodriquez shared his salary with Santiago.[105/] At the end of two weeks Garcia put Santiago on

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102/ (cont.) learned about 3 weeks after Rodriquez left that Rodriquez had quit because, as he understood it, Rodriquez didn't like tieing vines. XVI Tr. pp. 63, 145.

Rodriquez' efforts to obtain re-employment at M. Caratan for the 1979 harvest will be separately discussed hereinafter.

103/ III Tr. 81-85, V Tr. p. 21. Santiago would occasionally help out Rodriquez and Gomez in their union efforts. VII Tr. p. 101.

104/ III Tr. p. 89.

105/ The record is not entirely clear as to how many days Santiago tied vines with Rodriquez or who knew about it. Santiago said it went on over a two week period during which he would also ask Anderson daily for work. VII Tr. p. 103. Anderson denies any knowledge that Santiago sought work from him during this period. XVI Tr. p. 153. Garcia said he had permitted the arrangement all along, V Tr. p. 17. Theresa Heredia said she was aware of it occurring on at least one day, IX Tr. p. 10. She also corroborated that Santiago asked Anderson for work in her presence, ibid. p. 7, and did not recall anyone being hired in her crew during that period, ibid. p. 11. Apparently

(continued on Page 56)

the payroll. Anderson, according to Garcia, became very angry when Garcia told him. Several days later Rodriquez left because of the surgery and Santiago took over as the UFW crew representative in the Town crew. In March Santiago became a member of the workers negotiating committee and attended negotiating sessions [with M. Caratan, Inc.]. He continued to work until the June 18 crew lay-off except for the crew lay-off in May.[106/]

f. The Termination of Pedro Guzman Garcia

As previously noted, Garcia had been employed as the foreman of the Town's crew for approximately two years at the time of his demotion and then termination on April 22, 1979. Prior to that he had been employed by Respondent since 1970, first in Fermin's crew, then as a swamper, irrigator and tractor driver under Travis. According to Anderson and Caratan, Garcia was terminated because he was not progressing and meeting company standards as a crew foreman. Essentially, they testified that throughout this two year period[107/] Garcia would perform reasonably well some of the time but Caratan and Anderson would have to talk

105/ (cont.) Rodriquez worked a portion of this period doing non-piece rate work with Travis. In any event, it is clear that for a significant portion of this two week period Santiago, while requesting work from Anderson, worked with Rodriquez, but not on the payroll, tieing vines for which Rodriquez paid him from his salary.

106/ Santiago's efforts to obtain re-employment at M. Caratan for the 1979 Delano harvest is discussed separately hereinafter.

107/ By contrast it took Respondent only 4-1/2 months to evaluate Cadiz' performance to determine if he should be demoted as crew foreman. See IV Tr. pp. 102-103; XI tr. pp. 103, 110.

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to Garcia periodically regarding the following areas: Garcia was spending too much time in the avenues and not enough in the rows; he did not "push" his workers enough; his crew's production output was such that Caratan made periodic oral "reprimands"; and finally, although he lacked the authority, Garcia would hire persons occasionally on his own without first sending them to the office. Sending applicants to the office first was the company policy prior to the UFW contract and continued under the contract as well.[108/] Caratan and Anderson's disappointments with Garcia's performance over the prior 18-20 months resulted in Caratan giving Garcia a written warning approximately a week before Christmas, 1978. In his office with Anderson present Caratan handed Garcia the letter and told him that unless his performance in the enumerated areas improved he would be removed as foreman. Finally, after seeing no improvement in his performance over the next four months, Anderson and Caratan testified they conferred, and Caratan then informed Garcia he was being demoted to his old job with Travis.[109/]

108/ The contract also provided the employer's foremen with the right to preferential hiring of relatives. XIX Tr. p. 62, lines 19-22. In fact, it was not uncommon for foremen to directly hire relatives without their first filing applications or referring them to the office. See e.g., ALO D. pp. 20, 39, M. Caratan, Inc., 5 ALRB No. 16 (1979).

109/ Anderson was subjected to a particularly effective and probing cross-examination by the General Counsel regarding Garcia's two year crew foreman performance and termination. See e.g., XVI Tr. pp. 101-128. Initially, Anderson testified that Garcia was progressing to acceptable standards in 1977 [ibid., p. 105]; he then modified his testimony and said Garcia wasn't [ibid., pp. 107, 114]. The effectiveness of the probing regarding Garcia caused Anderson, a witness of otherwise facial continence, to inadvertently smile several times at the disingenuousness of his testimony. Anderson also retained considerable interest in the outcome of the decertification election even after he left Caratan's employment. He drove 40 miles in the mid-afternoon from his current job in order to be present when the tally was conducted and results announced on August 16.

Garcia on the other hand credibly testified that he experienced no problems or criticism regarding the running of his crew or their production prior to the September, 1978 election. According to Garcia the company hiring policy was that if the worker had worked for Garcia in prior enterprises he could rehire the worker without first sending him to the office.[110/] In the 1978 harvest Anderson instructed Garcia before hiring anyone to determine whether the worker was a union supporter. If they were, Garcia was instructed to say "There's no work" and not to hire them; if he was sure they were not with the union he could hire them and if he wasn't sure to send them to the office.[111/] Nevertheless during the 1978 Delano harvest Garcia followed his usual practice and hired Santiago and Rodriquez who had been working for him nearly a year.

After the election Anderson started criticizing Garcia's work performance. During the remaining two months of the harvest he was told to "push" his crews more and to not be so "nice" to them by helping those who fell behind. Garcia was also criticized for the handling of the Sofia Gomez incident and the hiring of two others without sending them to the office

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110/ V Tr. p. 106. E.g., Garcia hired Wilson Santiago in the morning and following what he understood as the company's instructions, sent him to the office later that day. V Tr. pp. 22-23.

111/ III Tr. pp. 52-53.

first.[112/] He was warned about the hiring of Rodriquez in December especially when he had been instructed "to put him off". The Christmas warning letter that followed was the first and only written warning Garcia received.[113/]

According to Garcia nothing of consequence regarding his performance occurred between the warning letter and his termination in April other than the hiring of Santiago without prior office clearance, which angered Anderson considerably.

On or about April 20 Garcia was removed by Caratan as crew foreman and told to report to Travis the next day to work in his former job. When Garcia then reported to Travis for work he was told he couldn't be hired but would have to check with Caratan first. When Garcia finally located and talked to Caratan he was told by Caratan that he was fired. Garcia asked why. Caratan said that two or three crew members had told him that Garcia had told the crew they were all fired.[114/] Garcia

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112/ One of the persons Garcia hired without obtaining permission first was his nephew Carlos. He was also one of the persons who Garcia was helping because of slowness. Another person hired first before being sent to the office was apparently Fidel Ruiz. See III Tr. pp. 101-103.

113/ Respondent could not locate a copy of the letter.

114/ The initial and principal person to tell Caratan this was Catarino Correa.

Apparently the Town crew had just returned from a lay-off at the time and a number of workers called Garcia to find out about work. Garcia told them he had been demoted, was no longer their foreman and told them to call the office. V Tr. pp. 51-54. Garcia was obviously a very popular foreman with his crew. Apparently, after learning of his demotion, many of the crew signed a petition asking Caratan to reconsider his demotion.

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told Caratan that this was not true and attempted to explain what happened. Caratan, according to Garcia, would not believe him and he was terminated immediately.

F. Second Decertification Election Period (June, 1979)

1. Second Decertification Petition

The second petition was filed on or about Friday, June 8, 1979. According to Theresa Heredia it was circulated among the Town crew by Catarino Correa. Correa approached Theresa, her sister Lupe Martinez, her mother, Maria Fernandez, and three other female friends who were together in a group. He asked them to sign the petition. The women said "No", to which Correa responded, "Why not, all of the Arab and Puerto Rican crew signed it". The women then replied, "If you treat us this way with a union, what would it be like without a union".[115/]

Manuela Diaz, a current Caratan worker, also testified convincingly about Correa circulating the petition. Correa, who was working near her said, "Luis gave me this sheet [the petition] to be signed". Diaz replied, "I'm not going to sign; if Luis wants me to sign let him come and ask me".[116/] The day before the petition was circulated Diaz had been working in the field and looking for Luis Caratan to tell him about her problem with Cadiz and what she felt was his unjust treatment.

115/ IX Tr. pp. 22-23.

116/ X Tr. p. 50.

When she bent down she saw Caratan talking with Correa two rows away. Although she could not hear what they said she estimated they talked for approximately 15-20 minutes. During this time she could see that Correa was talking and not working.[117/]

Maria Haro, also a current Caratan worker, testified credibly that at lunch time Catarino Correa approached her and a female friend while they were eating. Correa said, "OK girls, you know what this is about. This is for no union. The union is not worth anything except to take your dues. A majority of the workers have already signed, as you can see. If you want to, you can sign; there is no pressure to". According to Haro, the other woman asked Correa, "What are the signatures for?". Correa responded they are "for no union". Haro told Correa to go around to the others in her crew; "We'll do what the majority does". Correa responded, "Luis will find out; this

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117/ Ibid., p. 52. Lupe Martinez and Lorena Banuelos, also current Caratan workers, corroborated this testimony; IX Tr. p. 46; XII Tr. pp. 3-4. Caratan and Correa denied they were in the field talking for 20 or more minutes the day before the petition was circulated. Respondent has sought to impeach this as well as other testimony [e.g., Pulido's observing Martinez going from row to row talking to his crew individually the day the first petition had been circulated] on the basis that the witnesses could not observe through or above the vines what allegedly occurred in the vineyard rows.

As part of my fact-finding responsibility I visited one of Respondent's grape fields in mid-September during harvesting. Although height and thickness of the vines may well vary depending on the grape variety and time of year, generally, it would be difficult to observe other rows over or through the vines. However, I also bent down at several locations to see the extent one could observe from beneath the vines. It was my observation that it would be possible for a person to see 2-3 rows in each direction in most places and at least 6-7 rows in each direction in many places. My observation corroborated the witnesses' testimony that one could observe most of a person's body 2 or more rows away when viewed from beneath the vines.

copy I will show Luis". Then Correa said, "Luis will find out on his own who did and did not sign it".[118/] Neither signed the petition as Correa never returned again to ask them to.[119/]

Correa also asked Jose Tellez, another worker in the Town's crew, to sign the petition. According to Tellez, Correa said the petition dealt with helping Luis. Tellez asked if the petition was for voting. Correa said, "It is not for voting. The signatures are to help Luis". After Correa showed Tellez the petition and how many had signed, he signed also. Correa told Tellez that "Later, Luis will see the list and know who signed".[120/]

Amelia Carrillo credibly testified that on the same day and less than a half hour after Correa was circulating the petition among the Town's crew, she observed Luis Caratan with Correa. While the rest of the crew was working she could see them talking, but could not hear them, as they walked together past her row and then out of her view.[121/]

The day after the petition was circulated Margarita Dorado, the second petitioner's wife, came up to and spoke to Lupe Martinez. Dorado told her, "How dumb of you not to sign the petition. Luis will fire you just as he tried to fire Sofia Gomez". Dorado then told Lupe not to tell anyone,

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118/ X Tr. pp. 70-72.

119/ Ibid., p. 78.

120/ XI Tr. pp. 81-82.

121/ X Tr. pp. 64-65.

"but Luis will get a copy [of the petition] and will know who didn't sign".[122/] Later when Lupe saw Catarino she asked him if he still had a copy of the petition to sign. Correa told her, "It was too late, I had already turned it in and Luis had a copy". Correa then told her, "How dumb it was of your sister [Theresa Heredia] not to sign the petition. She no longer would be given the job as foreman [when Cadiz left for Mexico]."[123/]

2. The Pre-Election Conference - June 13, 1979

The second pre-election conference was held on Wednesday afternoon, June 13, in the ALRB's Fresno office. Present were Luis and Milan Caratan and their counsel, Catarino Correa, the second petitioner with Board Agent David Caraventes assigned as his interpreter, Arturo Rodriquez and Ben Maddock on behalf of the UFW and ALRB Staff Counsel Judy Weissberg. Board Agent Jack Matalka, who was assigned as agent-in-charge of the election, conducted the hearing. Wilson Santiago, Martha Gonzales and several Caratan workers not identified also attended.

According to Weissberg the following issues were raised by Matalka and discussed: the company's eligibility list; the date, time and location of voting [Caratan informed everyone that all the crews would be working on June 15, unless something unusual happened. After discussion Matalka ruled the

122/ IX Tr. pp. 43-44.

123/ Ibid., pp. 47-48. Approximately a month before the election Fermin asked Theresa to assist him as a second in charge of the Town crew when Cadiz was going to be in Mexico. It was never mentioned to her again. IX Tr. p. 25.

voting would take place at the "Japanese" camp between 5:30 - 7:30 a.m. before work commenced]; the quarantine area [Caratan objected to the quarantine area of 1/4 mile in each direction since it prevented his foremen and "steadies" from using the most convenient public roads to go from one work area to another. Caratan said he would not be staying off these public roads]; electioneering [the parties agreed to no electioneering on election day]; observers [it was agreed that two observers for each party would be named the following afternoon];[124/] and the tally of ballots issue. This was the primary purpose for Weissberg's presence. She advised everyone that the decision had been made [by Regional Director Ed Perez] to seal the ballot box and place it in a bank vault pending the outcome of the Petition for Hearing before the California Supreme Court on the status of the first decertification election and election bar. Either Luis Caratan or his counsel said, "It is not an election if you don't count the ballots now"; Correa concurred. Weissberg responded that the Board disagreed. "The decision to hold the election and impound the ballots would ensure the workers of their right to vote while the legal issue was finally determined."

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124/ According to Caraventes, Correa agreed to whatever the Respondent wanted. XII Tr. p. 23.

Luis Caratan then said that, "Our cooperation [in the election] has been placed in doubt. Everything is contingent on the ballots being counted then and there". Caratan left the meeting angrily. The meeting ended shortly thereafter.[125/]

3. Events of Thursday, June 14

a. Caratan's Noontime Speech to the Town Crew

About noon Luis Caratan came to the Town crew and made a speech to them about the upcoming election.[126/] At the end of the speech he told them all that because of the election and the time required to vote, "The crews will not work tomorrow". He also told them they would not be working that afternoon or Saturday. Catarino Correa then asked Caratan, "Were they going to open the ballot box and count the ballots or would it be like last year". Caratan said, "I think it will be the same as last year".[127/] Correa then said, "If they don't count the ballots then, we would kick open the ballot box and count the ballots". Caratan replied, "That's none of my business, that's

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125/ VI Tr. pp. 126-136. Matalka fully corroborated this testimony. IX Tr. pp. 81-82. Caratan, in fact, cooperated in some aspects, e.g., permitting ALRB agents to address the crews regarding the upcoming election and posting signs; and didn't in others, e.g., at least two Caratan foremen violated the quarantine area several times

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126/ There was considerably less testimony concerning campaigning before the second election. Apparently less campaigning was conducted.

127/ Correa and Caratan, of course, already knew this as they had attended the election conference the previous day.

your problem" and shrugged his shoulders and threw up his hands.[128/]

Theresa Heredia and her friend approached Caratan afterward and asked him how long they would have to work. Caratan replied, "Maybe until Tuesday or Wednesday and then a lay-off until July".[129/]

b. Caratan's Japanese Camp Meeting

Later that afternoon [approximately 5 p.m] while driving down Cecil Avenue past the area called the Japanese camp, Juan Cervantes, then a UFW contractor administrator, credibly testified that he observed[130/] Luis Caratan there in a meeting with Fermin Martinez, Junior Ruiz and Pedro Velasquez. Cervantes drove his car off the road onto the shoulder, parked under the water tower and watched the group for 5-10 minutes while they talked in front of one of the small cottages that make up the Japanese camp.[131/] Umberto Gomez also credibly testified and

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128/ Caratan, Correa and Dorado all denied Correa made any statement to Caratan. Theresa Heredia, Lupe Martinez, Marie Fernandez, Manuela Diaz, Jose Tellez and Luis Gonzalez all persuasively testified to the contrary.

Catarino Correa and his wife Margarito Dorado along with Fermin Martinez are three of the least credible witnesses I've observed. Their demeanor, the inherent incredibility of much of their respective testimony, their strong identification with Respondent, coupled with their staunch anti-union animus all contributed to discrediting their testimony.

129/ IX Tr. p. 13.

130/ The Japanese camp is approximately 125' away, and is observable from the road.

131/ X Tr. p. 19. I personally observed the area and would estimate the distance from the water tower to be 60-75'. Caratan and Martinez denied being there at all.

independently corroborated that he also observed the same four men meeting together in the same area when he drove down Cecil Avenue late in the afternoon past the Japanese camp.[132/]

c. UFW Election Observer Valentine Covarrubias

Covarrubias was a particularly effective and convincing witness. Employed by Caratan for four seasons, Covarrubias, a quiet spoken, older-appearing man, had been employed as a tractor driver the past year and a half after working as an irrigator for several years. Two days before the election he was asked by Juan Cervantes if he would be one of the UFW observers at the election. Covarrubias considered and agreed to the request. The following day the parties' observers were announced. Later that afternoon Covarrubias' foreman Junior Ruiz discussed this with him at work. Ruiz said, "Tomorrow the election is to take place and I don't want you to be of the union because you are from my crew. I never told you to be or not to be of the union, but you think about it". Covarrubias then decided it would be better for him if he was not a UFW observer because Ruiz didn't want him to and he thought it would affect his job or work if he did.

That evening he told Cervantes that he would prefer not to be a UFW observer. Cervantes asked him not to let them down because they needed his assistance. He reconsidered and agreed again to be one of the UFW observers.

132/ V Tr. p. 146; VI Tr. p. 72.

Two weeks later he was on a tractor spraying almonds when Luis Caratan arrived. He told Covarrubias to stop, pointed out one sprayer that was plugged and told him he would have to do a better job. Covarrubias replied, "I just started". Caratan than suggested they go behind the other tractors where there was less noise. The following conversation took place:

Luis Caratan:	"Chato, I want to speak to you. I don't know where your head is, why are you working with the union.
"Chato" Covarrubias:	I am not working with the union. They invited me to be an observer and I agreed.
Luis:	I don't know where your brain is at. If you don't use your brain you'll have an empty pocket.
Chato:	I didn't know these problems would happen. There was no union for a while and then there was and I signed papers to join the union.
Luis:	I might be able to give you only 4 or 5 hours work per day, 20-25 hours per week.
Chato:	That's very little work. You are the boss of your company and its your money. If you do that I guess I'll have to go to Mexico.133/
Luis:	Why don't you go to the union when you come back. If they have a ranch you can go to work there.
Luis:	I'm the one who gives you a home. I'm not pressuring you. I'm also interested in your work.
Luis:	I don't want the union if its possible. The union doesn't help you; it doesn't give you a place to stay when you're here from Mexico."134/

133/ Covarrubias spent a few months each year in Mexico seeing his family.

134/ VII Tr. pp. 69-76.

d. UFW Meeting at Wilson Santiago's Home

The UFW scheduled a 7 p.m. election eve meeting for the Town's crew at Wilson Santiago's house [618 Dover Place, west of Highway 99, in Delano]. The workers started to arrive by car a few minutes after 7. They parked on the street and assembled along the side of Santiago's house where his driveway ended. Approximately 24 or 25 [all but 6 or 7] of the crew attended. At approximately 7:30 - 7:40 p.m. as the meeting was starting, Pablo Fink, a UFW organizer, went out to the front to see if anyone else was still coming. When he looked to his left he saw Fermin Martinez kneeling in a squatting position next to a white, recent model pick-up truck. The pick-up was parked in the driveway of the house immediately to the left of Santiago's. Martinez saw Fink, got back into his pick-up, started the engine, backed out of the driveway and slowly drove past Fink standing in front of Santiago's house.[135/] Fink went to tell Ben Maddock, the director of the UFW's Delano office, who was also at the meeting. Maddock had also just seen Fermin driving by when he was returning from his car for some cigarettes. Maddock, wanting to see if Fermin was going to come by again, decided to see where Fermin went. Maddock went around the corner while Fink returned to the meeting. However, while at the meeting, Fink saw Fermin again from the back of Santiago's house driving on the street

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135/ VII Tr. pp. 5-9.

at the side of Dan's Market.[136/] Fink left to get Maddock who was wanted at the meeting. He went out on to Dover Place, went to the corner and turned right. As he was going towards Dan's Market Fink saw the pick-up again coming out of the market's parking lot from the direction of the alley that also borders on Santiago's house. Fink pointed and yelled to Maddock. Maddock turned and also saw the pick-up with Fermin driving. Fermin then drove to the corner, turned again at the next corner and drove out of sight.[137/]

Fermin, on the other hand, testified that at approximately 6:30 - 7:00 that evening he went to the post office to pick up the mail for his crew. He drove to their labor camp arriving at approximately seven and remained there after distributing the mail for several hours playing dominoes.[138/] Respondent also offered testimony of Miguel Ramos and Enrique Orosco Garcia, two members of Fermin's crew, to corroborate Fermin's alibi that he arrived at their camp at approximately seven p.m. and remained several hours playing dominoes. Their entire testimony, including the alibi, was particularly unconvincing.[139/]

136/ The alley behind Santiago's house runs behind Dan's Market and also can be reached from the Market's parking area as well. Because of the open spaces one can see from the back and side of Santiago's house to this street and area.

137/ VII Tr. pp. 11-13. This testimony was fully and persuasively corroborated by Maddock. XII Tr. pp. 95-97.

138/ XVII Tr. pp. 67-70. Fermin acknowledged he owned a late model white pick-up truck. The post office box referred to is accessible at all hours; Ibid. p. 160. The post office is about 5 blocks and 3 minutes away from Santiago's house.

139/ XV tr. pp. 104-107; XVII Tr. pp. 28-30. A discussion of their testimony regarding the election day melee is covered in that subsection, infra.

e. Events at Caratan's Labor Camp that Evening

In an effort to maintain a "presence" and contact with the workers prior to the election, the UFW had at least 2 organizers at the Puerto Rican and Arab labor camps observing throughout the night. At approximately 6 p.m. that evening Umberto Gomez of the UFW, while attempting to talk to some of the Mexican members of the crew, briefly talked to Miguel Figueroa. Figueroa was amongst a group of Puerto Ricans who were making considerable noise clanking their beer cans and shouting threats. Figueroa told Gomez to get out of there and then said, "You'll see what we're going to do; we're going to count the ballots one way or another tomorrow".[140/]

Later that evening Pablo Fink and several other UFW organizers were assigned to be at the labor camps from 2 a.m. on. At approximately 2:20 a.m. an old pick-up truck arrived at the camp and two persons got out. They walked to the Puerto Rican camp kicking at the doors of the rooms. The men started yelling "It's time, it's election time". After a few minutes Fink heard rifle shots. Moving closer but remaining hidden, Fink saw a person coming from the labor camp area with a rifle firing more shots, then return. The two men then resumed banging on doors of the rooms again. The second door opened and a tall man with short pants came out. The men talked and laughed and then the tall one went back inside. The organizers called the police

140/ V. Tr. p. 132.

who came out to investigate. They drove around, parked their car and shined their lights in the camp. Finally the police knocked on the second door of the Puerto Rican camp rooms. The officer told Fink that the man who answered said he had been sleeping and had not heard any shots.[141/]

f. ALRB Contact with Caratan that Night

Jack Matalka testified that at approximately 5 p.m. his secretary called relaying a message from Ben Maddock that one or more of the crews were apparently not going to be working on Friday. Matalka called the Respondent's office and spoke to Milan Caratan. Matalka asked him whether the crews were going to be working the following day. Milan said, "I don't know. What difference does it make?". Matalka answered it could make a difference in voter turnout and asked him to have Luis Caratan call him. Luis Caratan called Matalka at his home at approximately 9 p.m. confirming that no workers but the steadies would work the next day. Caratan agreed, however, to permit the crews to be transported by the company bus as previously agreed. Matalka advised Craatan that Board Agents had been instructed to contact the Town crew workers that the voting was still going to take place as scheduled. He also advised Caratan that he would determine at 7:30 whether to extend the voting hours to 9:30 a.m.

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141/ VIII Tr. pp. 15-19. The police officer's statement was not received for the truth of the matter asserted, but to show the state of mind of the individuals involved.

should low voter participation warrant it.[142/] They also discussed in this context the timing for paying the workers. Typically, Caratan paid his workers after work on each Saturday, or if they didn't work on Saturday, then after work on Friday. Caratan suggested he would pay the crew that Friday morning after voting. Matalka said that he was not going to tell him when he should pay his workers but conveyed to Caratan that it would not be appropriate to pay his crew during the same period they were voting.[143/]

4. June 15 - The Second Decertification Election

a. Initial Procedure and Voting

All the parties met at the Japanese camp with the ALRB agents at approximately 5:15 a.m. in order to establish the voting procedure and set up the equipment. The Japanese camp, located at the northeast corner of Cecil and Zachary Roads, consists of a large storage structure, a water tower and two rows of small bungalows facing each other 75' further east where some of the "steadies" lived. The voting location was established in an open area at an approximately midway point against the north side of the storage building where the table, ballot box and portable voting booths were placed. This location shielded the voting from view on Cecil but not on Zachary Road. Persons turning onto Zachary from Cecil would be able to view the voting area almost immediately. Two state vehicles were parked, one at

142/ This did not in fact occur as voter participation was high. XI Tr. p. 21.

143/ IX Tr. pp. 83-86. Caratan paid the Puerto Rican crew prior to their voting and paid the Town's crew immediately afterwards. XII Tr. p. 24.

the northwest corner of the intersection and the other against the west wall of the structure, with signs inside their windows indicating "Voting area, Do not enter". After viewing the establishment of the voting area all the parties, except the observers, departed.[144/]

The first to vote were the Town and Arab crews. They assembled at the Thrifty Shopping Center parking lot on Cecil Avenue at the edge of town, donned UFW buttons, organized into a car caravan and drove the two-three miles to the Japanese camp.[145/] They arrived at approximately 5:45 a.m. and voted without incident.

b. Puerto Rican Labor Camp Prior to Voting

The Puerto Rican crew was to be transported by a company bus to vote after the Arab and Town's crews. Umberto Gomez was assigned to the Puerto Rican labor camp and arrived there at about 5:30 a.m. He parked his car and was standing near the camp entrance with another UFW organizer when the Puerto Rican crew started to board the bus. The crew bus was parked in the area in front of their camp with their foreman, Fermin Martinez, in the driver's seat. Also parked in the area 4-5' away from the bus was a green Ford driven by a man called "Tattoo" or "Huero",

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144/ The employer's observers were Miguel Figueroa and a man named "Bobbi". The UFW's were Wilson Santiago and Valentine Covarrubias. The petitioner Correa's were not identified.

145/ According to Deborah Miller the Arab workers, most of whom supported the union, went to vote in their working clothes as they were only told by their foreman Alomari at 5:30 a.m. that, "There's no work today". VI Tr. pp. 163-165, 176.

wearing a red bandana around his long blond hair. Also standing nearby in a group some 15-20' away during the crew's boarding were Catarino Correa, Margarita Dorado, Luis Caratan and 1 or 2 others. Gomez credibly testified that he saw Luis Caraballo walking from the Puerto Rican camp waving a gun in his hand. Walking towards the green Ford, Caraballo stopped at the window of the camp's grocery store [which is the first building on the left as one enters the camp] showed the gun to the store clerk, and displayed the gun to the Correa group as he continued. As he entered the greed Ford displaying the gun, the crew members were boarding the bus. ALRB Agent David Caravantes had boarded the bus to ride over with the crew and then the bus, followed by the green Ford, left. Gomez saw the UFW's Deborah Miller and told her about Caraballo and the gun and the two of them then told ALRB Agent Jack Matalka.[146/] Caravantes testified that going over on the bus to the voting area members of the Puerto Rican crew exhibited and voiced extreme hostility towards him and the ALRB.[147/]

c. The Puerto Rican Crew at the Election Site[148/]

Arriving at the voting site, Fermin pulled the bus up to a point directly in front of the ballot box

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146/ V Tr. pp. 137-144 [direct examination]; VI Tr. pp. 33-55 [cross examination]. Caratan and Correa denied seeing Caraballo displaying a gun.

147/ XII Tr. p. 25.

148/ The testimony regarding the Puerto Rican crew voting and the melee is a composite of the six Board Agents, Matalka, Caravantes, Ornelas, Mejia, Colmenero and Chavez, who testified.

table where the crew got off. The green Ford also arrived and parked near the bus. Three men got out: Torrez or "Tattoo", the driver with the red bandana and blond hair; Caraballo, also known as "Toothless", wearing a green jacket with the gun in his waistband and a short stocky man. Matalka, who had also just arrived, went up to Caraballo and told him he could not remain there with a gun. Caraballo and his companions got back into the green Ford and drove off.[149/]

According to Board Agent [Legal Assistant] Ricardo Ornelas, Fermin's bus arrived at approximately 6:30 a.m. All of the Town and Arab crews had completed their voting, although a few might still have been in their cars when the bus arrived. Ornelas credibly testified that he instructed the approximately 30-40 workers who got off the bus about the voting procedures. He told them to get in line, identify themselves, have some identification, vote and after voting leave the election area. The majority followed his instructions. Fermin was told he could not remain in the election area and he left on the bus. Ornelas then returned to the election table area where 5-7 men were standing around. Matalka came up to him and told Ornelas that someone had come earlier with a pistol and pointed Caraballo out. Ornelas went up to Caraballo and the others in the group and asked them if they had the right to vote. Several said yes. He instructed them to get in the line to vote as well.

149/ Apparently shortly after the melee Torrez painted the green Ford blue. Some witnesses referred to it as the blue Ford.

A discussion ensued with Torrez ["Tattoo"] about whether the Board was going to count the ballots. The talk grew louder as the group demanded that the ballots be counted and moved towards the line of men waiting to vote. Finally the group got into the line, this discussion having lasted 5-10 minutes.

As voting continued a group of 3-5 men remained standing or squatting near the election table. Ornelas asked them if they had voted and, if they had, to leave the voting area; several refused to do so. Ornelas and Board Agent David Caravantes asked them to leave several more times; they were told to "get screwed". The group finally gave Ornelas an ultimatum that it would be in his best interests if he left instead. Ornelas went over and talked with Matalka, indicating there was a group that was very hostile. Matalka suggested that the sheriff be called. Ornelas suggested instead to get Fermin and the bus to transport the workers from the polling area. He told Matalka he did not want to inflame the situation by calling the sheriff unless it was necessary. Ornelas would in the meantime, go call Ed Perez and decide what action, including whether to call the sheriff, should be taken.

All the voting had been completed except for two persons. The observers had voted last. One of the company observers was remaining in the booth a long time. It appeared to the Board Agents that he was intentionally delaying in leaving the booth. A second worker, wearing a green jacket [Caraballo] was acting, as described by the Agents, in a foolish

and clowning manner, feigning or acting as if he did not know how to vote or what to do.

Fermin, meanwhile, had pulled up in the bus and parked it in the area in front of and about 15' from the table with the ballot box. A few workers got on the bus but the majority remained to its front or side, except for a group of 7-10 workers. They remained crowding and shoving in the area in front of the table. When Caravantes asked Fermin to collect his workers and move the bus, Fermin remained in the driver's seat, not saying or doing anything.

At this point a white van with TV Station KERO in large letters on it pulled into the area off of Zachary Road parked at the other end of the building and three persons got out.

d. Ed Thomas and the KERO TV News Reporter

Ron Kilgore, KERO TV news director, credibly testified that he first learned of the Caratan decertification election on early Thursday morning, June 14 off of the AP wire service copy. He had also learned early that morning that the ballots of the election were to be impounded. He assigned two recently hired reporters, David Halyaman and Gay Yee, to cover the election. Kilgore made contact with Ed Thomas[150/] and indicated he was assigning two reporters with a mobile camera and portable sound pack to cover the story. Kilgore knew his reporters

150/ It was unclear who phoned first. Thomas said he did. Kilgore thought he might have.

would have to ask permission in order to go on to Caratan's private property to film the voting and expected that Halyaman would obtain that permission from Caratan, the following morning. He was not aware prior to that election, however, that there was a prohibition against filming ALRB elections, nor was he advised by Thomas that there was any such prohibition or that he would have to seek permission from the Board Agents to film. When Kilgore made the story assignment he was not aware of any restrictions on covering it.[151/]

David Halyaman, one of the KERO TV news reporters, also credibly testified [except regarding two matters occurring at the election site discussed hereinafter] that he called Ed Thomas after receiving the assignment and made arrangements to meet Thomas at his office in Delano the following morning before 7 a.m. Early Friday morning Halyaman picked up the KERO van with the camera equipment, drove to Delano with Gay Yee and met Thomas at his office before 7 a.m. After a quick cup of coffee, Halyaman followed Thomas to the Caratan shed and labor camp area arriving shortly after 7. Halyaman and Yee were introduced to Caratan and told him they would like to do a background interview with him. Caratan agreed. Halyaman also indicated they wanted to cover the election while it was still in progress and take some shots of the polling area and people balloting.[152/]

151/ XIV Tr. pp. 74-88.

152/ Halyaman had also looked at the AP wire press story that indicated the hours of the election were 5:30 - 7:30 a.m.

Either Caratan or Thomas indicated they should go over to the election site now as the voting was winding down.[153/] Halyaman did not bother to take out the camera equipment telling Caratan that he would come back to interview him afterwards. Halyaman got back in the KERO van with Yee in the passenger seat and Thomas in the back with the camera equipment and turned onto Cecil Avenue towards the election site, Thomas directing. At no time did either Caratan, Thomas or any other company representative indicate to Halyaman or Yee that they did not have permission to be on Caratan property or could not film the election in progress. Thomas directed Halyaman to make a left onto Zachary Road and pull into the area alongside the long storage shed. As Halyaman pulled in and stopped he could observe a large group of workers milling around in front of a table, yelling, shoving, and shaking their fists. All three exited the van at about the same time with Thomas leaving by the side cargo door where the camera equipment was. According to Halyaman he waited approximately 5 minutes before actually starting to film. He delayed because he did not want his camera and filming to further inflame the situation, a not uncommon occurrence that TV film crews experience. During this five minute period ALRB Agent Jack Matalka approached him and Thomas and asked if they could please call or get the police. Neither complied with the request.[154/] Also during this

153/ An ALRB agent had already come and asked Fermin to pick up his crew in the labor camp bus. WHen Halyaman first arrived the bus was no longer there.

154/ The van had no phone; to comply would require them to leave. Matalka had also asked them to leave.

period Halyaman apparently did a "white-out" or "white-balancing" with the camera.[155/] After waiting the approximately five minutes and determining "the riot was in full progress", Halyaman put on the camera and filmed the fight from beside the van.

While Halyaman's testimony was essentially credible, I do not credit his testimony that he was the only person to handle or use the camera, that he waited five minutes before filming or that the fighting was in full progress when he arrived at the election site.[156/]

Ed Thomas testified that he called KERO on Thursday, June 14 and talked to news director Ron Kilgore about the upcoming Caratan election. Thomas, the executive manager of the South Central Farmers Committee [SCFC] for the previous five years, was the media and public relations representative on behalf of the Committee's members, one of whom is M. Caratan, Inc. His job was to present newsworthy events from the growers viewpoint.[157/]

155/ "White-out" is the technical term for adjusting the camera for color white. Once adjusted to white the camera picks up all other colors clearly.

156/ See XIV Tr. pp. 98-125. The credited version is discussed in the following section under "Melee". It should be noted that according to Kilgore it is an automatic termination for a trained KERO news reporter to allow anyone else to handle or use the expensive camera equipment.

157/ SCFC's Articles of Incorporation specifically authorize Thomas to deal with the public and press on behalf of its members [including M. Caratan, Inc.]. According to Thomas he needed no specific authority to contact KERO about filming the election; that's his job. XIV Tr. pp. 20, 48-49, 68. Caratan concurred, IV Tr. p. 10, line 16. Moreover, Caratan was a board member and the immediate past president of SCFC. Thomas had talked to Caratan on June 14th and informed him that a KERO TV crew was coming out to film the election.

According to Thomas, he had informed both Kilgore and Halyaman that it would be necessary for them to obtain permission from the ALRB agents before they could film the election site or balloting. Thomas knew this to be necessary because of his recent experience in the Richardson decertification election where he learned that no one was permitted within the quarantine or polling area. Thomas claimed that Halyaman and Yee asked Caratan at the Caratan shop and labor camp area if they could conduct a background interview. Receiving his consent they proceeded to take out and set up the camera equipment. Halyaman had just completed the "white-out" process when someone in the distance yelled that the bus had left to pick up the last crew who had finished voting. Thomas informed Halyaman if he wanted to get some shots of the voting area before the booths were taken down that he should go over now. Thomas testified he got into the passenger side of the KERO van and accompanied the reporters to the polling site. He did not see any signs identifying the polling site and did not realize it was the polling area until they were turning to pull in. As they stopped the van he could observe a scuffle or fight going on. After the van stopped they all alighted, remaining along side the van for several minutes. During that time the booths went down [they had been up still on their arrival]; Matalka approached them two or three times asking them to go call the police;[158/] and Gay Yee unloaded the

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158/ Since they had no phone in the van they took no action.

camera equipment, put it on and started to shoot the film in front of him.[159/]

e. The Melee

According to the testimony of all the Board Agents the confrontation by the 7-10 workers was at a stand-off until the KERO TV van arrived. Up to that point the workers were milling around, yelling [demanding to count the ballots], shoving and shaking their fists, but not making any move towards the ballot box. Because of the delay in voting by the last two voters the ballot box had not been sealed. Four or five Board Agents stood between the ballot box and the workers. However, the situation changed from a stand-off to a surge and to an open violent confrontation shortly after the KERO van pulled in and three persons got out and promptly unloaded the camera equipment.

As the van stopped and Thomas, Halyaman and Yee got out Board Agent Matalka saw them and approached waving his arms and telling them they would have to leave. Matalka, who was a particularly credible witness, observed that the "older man" [Thomas] was taking the camera equipment out and placing it on his shoulder.[160/] Matalka heard a commotion behind

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159/ Thomas testified this occurred after Matalka approached them the first time. The General Counsel's cross-examination was particularly effective in bringing out the glaring inconsistencies of Thomas' testimony. XIV Tr. pp. 15-55. His testimony was thoroughly discredited.

160/ XI Tr. pp. 32-35. Matalka's first approach to the van is not on the video tape. Board Agent Robert Mejia corroborated that Thomas had the camera on his shoulder apparently filming at one point. XIX Tr. p. 146.

his shoulder and turned around to see the group of workers rushing the ballot box.

Board Agent Caravantes credibly testified that Pedro Velasquez [Garcia] started the fighting. He approached Board Agent Augie Colmenero, who was near the ballot box, and threw three or four punches in quick succession. Agent Andy Hardcastle grabbed the ballot box and attempted to secure it on the table. Velasquez smashed Hardcastle in the throat. Caravantes came to the aid of Colmenero by shoving Velasquez to the side. Velasquez and he exchanged blows and then Velasquez moved away laughing. The voting booths went down during their scuffle. As Caravantes turned back he saw Colmenero's head smashed open [it took twenty stitches to close] while a young worker with bushy hair [identified as Edwin Lopez] stepped back with a chair in his hand. Caravantes pushed Colmenero back against the wall and ascertained he was badly hurt.

Board Agent Augie Chavez had grabbed the ballot box and was on the ground attempting to protect it with his body. Several men were standing over him and striking him and Robert Mejia who had come to Chavez' aid, with a chair.[161/] The men broke the chair over Mejia. Velasquez, a tall muscular Puerto Rican, had removed his shirt and had returned holding a large shock absorber as a weapon. He approached the group

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161/ Chavez suffered blows all over his body including 2 big knots on his head and a deep cut on his hand. His body became numb from the blows.

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menacingly with the shock absorber. Caravantes grabbed a chair and confronted Velasquez using the chair as a shield. Velasquez then attacked Caravantes with the shock absorber. Luis Caraballo, meanwhile, was striking Chavez on the ground with a 4' long metal pipe.

With the ballot box freed, Miguel Figueroa, one of the company observers, grabbed the ballots and passed them to several workers nearby.[162/]

At about this point Fermin Martinez stepped down in the bus stairwell and yelled to his crew, "Boy's, now that you've done it we can go. I'm leaving. Those who stay will stay". The remaining crew boarded the bus amidst much shouting, yelling and jubilation. As the bus pulled out Fermin could be seen waving his right arm with a clenched fist in a victorious manner.[163/] Four workers including Figueroa got into Torrez' car and drove off. Some of the ballots were taken on the bus, the remaining in Torrez' car.

The Board Agents uniformly testified that the film[164/] accurately reflects all or substantially all of

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162/ XII Tr. pp. 28-31.

163/ Miguel Ramos and Enrique Orosco Garcia testified for Respondent that they could only recall normal conversation between the workers on the bus. Fermin's gesture was explained as an effort to get the workers to sit down. Their entire testimony lacked credibility. The film's sound track from a distance of some 75' picks up the workers' jubilation and shouting. Six or more witnesses all credibly testified to Fermin's conduct and as indicated earlier, Fermin's entire testimony was particularly unworthy of belief.

164/ General Counsel's Exhibit #10.

the fighting that took place. The entire film, from just before the voting booths go down until the bus leaves, lasts 4 minutes and 39 seconds.

Fermin's bus with the crew and Torrez' green Ford returned immediately to their labor camp. The ballots were never seen again. That afternoon felony warrants were issued and the police arrested at the labor camp Edwin Lopez, Torrez and Pedro Velasquez. They were each bailed out over the weekend in time to return to work the following Monday morning.

In the afternoon Respondent's counsel sent telegrams to the ALRB and talked on the phone with Fresno Regional Director Ed Perez urging that a rerun be held the following Monday or Tuesday. Respondent's counsel contended that it would significantly undermine the integrity of the Board processes to permit the disruption by a handful of workers to interfere with the rights of the majority of workers to vote. Perez concurred. Respondent's counsel, knowing that Respondent intended to lay off the crews on Monday, however, neglected to inform Perez.[165/]

Over the weekend Ben Maddock learned from several of Caratan's Arab workers that ten or more of them had been laid off and were in the process of leaving the area Sunday to look for work elsewhere.

Monday morning Maddock further learned of the lay-off of the Town's crew and the intimidation of the members of that crew when Caratan and Fermin intermixed them with

165/ XVIII Tr. pp. 88-89.

the Puerto Rican crew. This information was also relayed to Perez before noon. On the basis of all of this new information Perez reconsidered his previous inclination to hold a rerun election on Tuesday. He determined that the combined effect of the violence of Friday, the lay-off of portions of the Arab crew over the weekend and the intimidation and then lay-off of the Town crew Monday morning would result in the great likelihood that a significant portion of the workers [most of whom were known to be union supporters] would be disenfranchised. He advised all the parties that afternoon that he had decided against a rerun election at that time and why.

5. June 18 Mixing of the Crews

On Monday, June 18 work started at approximately 8 a.m. Cadiz had left to be in charge of a crew in Caratan's Mexican operation about June 12. Fermin was placed in charge of both his and the Town crew with Chuco, his second, helping to supervise Fermin's crew. According to Caratan two opposite sides of one field and two other fields elsewhere remained to be tipped and deleafed. The two crews apparently started in the same part of one field at opposite ends of the same row. For reasons that were not satisfactorily explained, Caratan personally directed at about 10 a.m. that the Puerto Rican and Town's crews would work intermixed, i.e., side by side.[166/] A serious and grave

166/ It was not uncommon for two crews to work at opposite ends of a row or field towards each other and then split off again. However this was the first time that two crews had been intermixed and worked side by side. Fermin was in charge of the Town crew for at least 2 or 3 days prior to the election. Although working in the same field then the crews were not intermixed.

confrontation quickly developed. The insults and threats started after Lorena Banuelos complained to Fermin that she couldn't work in the row he had assigned her because it was so wet. She told Fermin, "Get me a boat so I can work my row". Fermin responded, with several Puerto Ricans nearby, that "She could go with Chavez, let him get you a boat". Torrez ["Tattoo"] started insulting and threatening Theresa Heredia, Edwin Lopez her mother, and others threatened Wilson Santiago.[167/] Although Heredia testified she was more angry than scared, others were considerably more intimidated. After approximately 15 minutes of the threats and insults Santiago felt that the men were getting louder, more agitated and excited and he and Martha Gonzales left the field. Lupe Martinez, Theresa's sister, became increasingly afraid and left her row to look for help. Standing out in the avenue 2 rows away within hearing distance was Fermin and Luis Caratan talking. They had been there the entire time. According to Caratan he heard some insults being traded back and forth between a few workers for a couple of minutes but didn't consider it too serious. Lupe Martinez told Caratan that she wanted him to stop the men from making the threats and insults. Caratan immediately told the Puerto Ricans to quiet down,

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167/ All three Town crew members were active union supporters, Santiago by then the most prominent as negotiating committee member, crew representative and UFW election observer. Torrez, Lopez and Velasquez were just released on bail from jail after their violence against the Board Agents. In addition to the general threats Heredia and her mother were called "bitch" and "whore". Heredia was told that "they were going to get her from the rear" and similar threats. Comparable insults and threats were made to Santiago ["We're going to get you chauvistas."].

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that they would have to behave and then separated them and moved the Puerto Rican crew to another portion of the field. The Town crew worked another hour or so and then were laid off before noon. The Puerto Rican crew were moved to another field and worked a full day before being laid off.

Santiago and Gonzales went to her home and called the UFW. The UFW representative told them to return to work in the field. They followed the advice and returned to the field early that afternoon. Santiago saw Fermin in the field and asked him about working. Fermin told him the Town's crew was laid off until harvesting. They both left. That Thursday, June 21 Gonzales and Santiago returned to the office to pick up their checks.[168/] The secretary told them their checks were not ready, and they would have to return on Friday.[169/] On Friday the two returned again to the office. The secretary informed them they would have to speak to Luis Caratan. Caratan was called on the radio and came to the office. The following conversation occurred:

Luis:	"I thought you had quit.
Wilson:	No, I hadn't. I left because of the problems out in the field.
Luis:	What problems? I hadn't seen or heard anything. The rest of the crew remained and worked."

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168/ Santiago had overheard Fermin tell his crew they could pick up their checks at the office on Thursday.

169/ Santiago had observed that all the other checks were prepared and the Puerto Rican crew had received theirs.

Caratan then brought their checks out. He took off the lay-off notice slip from Santiago's and Gonzales' checks. He also had a third check for Gloria Espinoza. He did not take off her lay-off notice slip.

Wilson:	"Why did you take off the lay-off notice slips?
Luis:	Possibly, by your conduct you have quit. If that's what I determine then there will be no more work for you. Call me tomorrow and I'll tell you whether I will give you any more work.
Luis:	Because you went out of the field I'm not paying you for the two hours of work for June 18th.
Wilson:	It doesn't matter if you don't pay us for that, just give us our check for the other days that we worked."170/

The following day, Friday, Santiago called Caratan at the office and left his name. He also called Caratan at his home. He was not called back by the company.

On that same Friday, June 22 Respondent sent a letter to the UFW [General Counsel's Exhibit #5] stating that Santiago and Gonzales would be eligible for recall. The letter was filed away by the UFW. No copy of the letter or phone call explaining it was communicated to Santiago or Gonzales by either.

Late in June or early in July, approximately two weeks after the election Lupe Martinez credibly testified regarding a conversation she had with Catarino Correa at his home. Catarino told her that "Luis said he is going to fire the

170/ VII Tr. pp. 88, 108-123.

women in the Town crew because he is having too many difficulties or trouble with them [Luis does not have problems with the Puerto Rican men].[171/]

6. Santiago, Gonzales and Rodriquez's Efforts to Obtain Re-Employment During Respondent's 1979 Delano Harvest

Jose Rodriquez returned to Delano in early July during Respondent's lay-off. When he contacted Garcia he learned of his termination and current employment at Kavacovich Ranch in Arvin. With Garcia's assistance Rodriquez, Santiago and Gonzales obtained work there as well. Kavacovich's Arvin harvest starts about a week before Caratan's. As a result, Amelia Carrillo and a few other Caratan workers were employed there as well. After approximately a week of work Amelia told them she had been called back from lay-off to start work in a day or so for Caratan's Arvin harvest [Town's crew started work on July 27]. Th three workers continued work at Kavacovich while awaiting their recall notice. For another week to week and a half they still had not been contacted. In early August they went to Caratan's office and inquired about when they were going to be recalled for work. The secretary in the office told them there was no job openings and had each of them fill out application forms.[172/] The three returned approximately ten days later on August 15 or 16 [Respondent's Arvin harvest had been completed on August 9 and its

171/ IX Tr. p. 51. This constituted the basis for Paragraph 9(h) of the complaint.

172/ General Counsel's Exhibit #23[1-3].

Delano harvest had started on August 13] and were told in the office that there were no openings available. Rodriquez asked to speak to Caratan. Caratan was reached by radio and Rodriquez and Gonzales met him in the field. Caratan told Rodriquez the reason he couldn't hire him is that he quit and therefore had no recall rights. He told Gonzales she and Santiago could not be employed because they had failed to timely respond to the recall.[173]

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173/ Respondent's records in evidence and General Counsel's effective cross-examination of Respondent's office manager, Ron Holgate, are particularly illuminating on the recall issue. XX Tr.pp. 23-38. First, Holgate could not recall precisely when the three workers had come in and filled out the applications ["I recall it was August 6 or 7."] because the applications as of August were no longer dated. [It was noteworthy here that a significant basis for the Board's finding of ULP's against Respondent in March, 1979 (M. Caratan, Inc., 5 ALRB No. 16) was premised on dated work applications.] Second, it was transparently obvious from the cross-examination and the applications that Respondent was attempting to insert purported reasons for its actions against the three in the face of further litigation of its recall procedures [Rodriquez had filed and served his charge against Respondent for failing to recall him on August 15]. Third, Respondent's Exhibit F and secretary Rochelle Rickles' testimony made clear that Respondent had the incorrect number for Gonzales [725-8186 rather than 725-0192] and no number for Santiago on the June recall list and an incorrect one on the May list.

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7. Respondent's Assistance to Workers Charged with Assaults Against Board Agents

On or about August 1 additional felony warrants were issued for the arrests of Miguel Figueroa, Luis Caraballo and one other Caratan worker arising out of the election day melee and assaults on the Board Agents. Acting as their interpreter, Luis Caratan assisted and helped arrange for the public defender to represent the three men initially. At their bail hearing Caratan appeared and spoke as their employer on behalf of the workers. He advised the court the workers had been and continue to be employed by him. The workers were released thereafter without the requirement of posting bail.[174/]

8. Maria Fernandez

During harvesting in Delano in August, 1979, Maria Fernandez credibly testified that her foreman, Jose Cadiz, started to put pressure on her and her co-workers to work faster. On at least three occasions Cadiz would bring a paper to them and tell them they had to pack more boxes. Cadiz did not indicate how many more boxes he wanted them to pack. If they did not produce more Cadiz warned, he would lay them off.[175/]

174/ The ultimate outcome and disposition of the felony charges against the six is not entirely clear. Incomplete indications were that a mistrial was declared against three after a jury failed to reach verdict on some of the charges and acquitted on others; one pled nolo contendre and received probation; charges were dismissed on one for insufficient evidence; and one, Caraballo, failed to appear for trial and a bench warrant was issued and is still outstanding.

175/ IX Tr. pp. 69-71. I understood "lay-off" to mean termination. This constituted the testimony in support of Paragraph 9(l) of the amended complaint.

ANALYSIS AND
CONCLUSIONS OF LAW

V. THE "R" CASE: ELECTION OBJECTIONS

GENERAL DISCUSSION OF THE LAW

A. Legal Status of First Decertification Petitioner

A threshold determination to be made is whether Jose Luis Cadiz' status with Respondent compels, as a matter of law, that the decertification election results be set aside.

Under the sister NLRA,[176/] an employer violates § 8(a)(1) [the equivalent to § 1153(a)] when its supervisors or agents assist in a decertification petition or cause it to be circulated. NLRB v. Skywolf Sales (Pacific Industries), 470 F. 2d 827, 82 LRRM 2050 (9th Cir., 1972); enfor'g 77 LRRM 1411 (1971). In Skywolf Sales, salesmen, although not supervisors within the meaning of Section 2(11) of the NLRA, were sufficiently identified and allied with the employer to compel barring their participation in circulating a decertification petition.

The courts and the NLRB first view the allegations of unlawful employer assistance in the context of the employer's general pattern and course of conduct. Then, they determine whether the employer's assistance is (1) merely ministerial or material assistance and (2) whether it had the reasonable effect of coercing the employees and depriving them of a free choice guaranteed by the Act. Cf. NLRB v. Movie Star, Inc., 361 F. 2d 346,

176/ Pursuant to § 1148 of the Act applicable NLRA precedents shall be followed.

enfor'g in part 54 LRRM 1387; with NLRB v. River Togs, Inc., 382 F. 2d 198, 65 LRRM 2987 (2d Cir., 1967) enfor'g in part 62 LRRM 1511.

The general rule regarding supervisory status under the NLRA is that persons holding "temporary" or seasonal supervisory positions are nevertheless considered "employees" and are eligible to vote.[177/] U.S. Steel Corp., 188 NLRB 39, 76 LRRM 1266 (1977); Great Western Sugar Co., 137 NLRB 73, 50 LRRM 1186 (1962). This is to be distinguished from persons who regularly spend a part of their working time [even as little as 10%] in a supervisory capacity. They would be considered ineligible to vote or to be decertification petitioners. See, e.g., U.S. Gypsum, 127 NLRB 134, 45 LRRM 1529 (1960); Archer Mills, Inc., 115 NLRB 674, 37 LRRM 1373 (1956); Modern Hardchrome Service Co., 124 NLRB 1235, 44 LRRM 1624 (1959); Carrizo Mfg. Co., Inc., 214 NLRB No. 21, 88 LRRM 1314 (1974); Cavern Supply Co., Inc., 203 NLRB 583, 83 LRRM 1633 (1973); Sunshine Homes, Inc., 205 NLRB 644, 84 LRRM 1146 (1973).[178/]

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177/ § 1156.7(c) of the Act and 8 Admin. Code § 20390 require that a decertification petition by filed by an "employee". § 1140.4(b) of the Act defines employee as synonomous with "agricultural employee". By implication, if not expressly, the Act excludes persons defined as supervisors from acting as decertification petitioners.

178/ This Board has decreed that "occasional, isolated instances of actions are generally insufficient to predicate a finding of supervisory status". Anton Caratan, 4 ALRB No. 103 (1978), citing Commercial Fleet Wash, Inc., 190 NLRB 326, 77 LRRM 1156 (1971).

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Cadiz, as both a seasonal[179/] and part-time supervisor or second in charge of a crew with some supervisory attributes, had such an identification and alliance with Respondent as to compel the finding that his participation as the decertification petitioner should be barred.[180/] See NLRB v. Skywolf Sales, supra. Several factors when taken together, inevitably lead to this conclusion. First, in addition to his seasonal supervisory status and attributes of a supervisor when in charge of a break off crew, Cadiz was the brother of Fermin Martinez, a staunch and outspoken anti-UFW foreman. Moreover, while Cadiz' promotion seven months later could not obviously have reasonably affected the employees in September,[181/] it accurately reflects the seriousness and esteem that Respondent gave to Cadiz. This reasonably could affect and coerce the employees when Cadiz was circulating the petition. Moreover, even should the totality of Cadiz' work attributes not amount to supervisory status, the facts of this case would still compel that Respondent be held to account for Cadiz' activities as an agent.

179/ Although Respondent in its brief contends to the contrary, it was well known amongst the crews when Cadiz and Garcia would leave each June to be Respondent's foremen in Mexico.

180/ A principal policy reason for this is to avoid conflicting and irreconcilable loyalties in persons in Cadiz' position. This is particularly true where, as here, the person is being considered for a full-time supervisory position and continues to perform as a part-time supervisor or second in charge of a break off crew after the election.

181/ Many of the Town's crew believed that Cadiz was promoted to Garcia's position as a reward for his decertification efforts.

B. Agency Status Under the Act[182/]

Section 1140.4 of the ALRA defines "agricultural employer" as follows:

> The terms 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association or persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined in Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.
> (emphasis added)

This language is patterned after the original Wagner Act of 1935, rather than the current NLRA language adopted in 1947. Moreover, by adding the words "shall be liberally construed", the California law apparently defines "employer" as broadly as did the Wagner Act. Nevertheless, the 1935 Wagner Act language, the ALRA language, and even the 1947 NLRA language all impose liability on employers for the conduct, not only of management and supervisorial personnel, but in some cases also other types of employees and non-employees. See, e.g., Gorman, Basic Text on Labor Law (1976), pp. 134-137;

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182/ The legal analysis of agency under the Act is applicable to the status of Ed Thomas, Catarino Correa and Margarito Dorado in the "C" case as well.

NLRB v. Arkansas-Louisiana Gas Co., 333 F. 2d 790 (CA 8, 1964). By adding provisions for labor contractors to the definition, the ALRA deals separately with employer responsibility for that class of non-employees unique to agriculture.

1. Liability of an Agricultural Employer for Conduct of a Person Acting Directly or Indirectly in His Interest

The changes in § 1140.4(c) indicate an intention on the part of the Legislature to go beyond the NLRA's current definition of "employer". Recognizing the infinite character of agricultural employment, the Legislature apparently determined not to limit the reach of the Act merely to employers and their traditional agents. Instead, the ALRA mandates that any person acting directly or indirectly in the interest of an employer shall be liberally construed to be an employer and shall be liable [in addition to the actual employer] thereby for any unlawful conduct under the Act. Although some nexus must exist between an employer and the actor before the employer assumes responsibility for the actor's conduct, the broad language of $ 1140.4(c) indicates a legislative policy to hold the employer liable for conduct committed by persons beyond both the narrow scope of common law agency and even the liberal agency principles written into the NLRA in 1947. The few such NLRA cases decided under the similar Wagner Act language reflect the principle of broad responsibility. Thus, the breadth of the NLRA language has included persons such as supervisors, H. J. Heinz Co. v. NLRB,

311 U.S. 514, 61 S. Ct. 320 (1941); non-supervisory "leadmen", IAM v. NLRB, 311 U.S. 72, 61 S. Ct 83 (1940); the wife of a leading foreman, NLRB v. Taylor-Colquitt Co., 140 F. 2d 92 (CA 4, 1943); the manager of a building in which an employer has its offices, Northwestern Mutual Fire Association, 46 NLRB 825, 11 LRRM 242 (1943), enf. at 14 LRRM 769 (CA 9), cert. den. 15 LRRM 973; non-employee third persons, such as businessmen, Consumers Lumber and Veneer Co., 63 NLRB 17, 16 LRRM 292 (1945). The U.S. Supreme Court made clear the purpose behind expanded employer responsibility for the conduct of others:

> We are dealing here not with private rights (citation omitted) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible.
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> IAM v. NLRB, 311 U.S. 72, 80 (1940) (emphasis added)

In one other early case, the Supreme Court articulated it another way:

> The question is not one of legal liability of the employer in damages or for penalties on principles of agency or respondent superior, but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from

> them any advantage in the bargaining process of a kind which the Act proscribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if he had directed them.
>
> H. J. Heinz Co. v. NLRB
> 311 U.S. at 521

Thus, for example, in a case where the wife of a foreman engaged in unlawful conduct, such as breaking up union meetings, the Court upheld the Board's ruling that the employer was responsible for her actions [There was no claim the company instigated or suggested the conduct.]. NLRB v. Taylor-Colquitt, supra.

Moreover, where an outside party engaged in wrongful conduct, even without employer instigation, the employer was liable when it failed to disavow the activity, especially if company supervisors were, in any way, involved in the activity. Northwestern Mutual Fire Ass'n, supra.

2. Cases Under the NLRA Definition

NLRA agency law has developed its own standards in recognition of the unique needs of affixing responsibility in the labor relations context. The cases note that even after the two 1947 amendments [NLRA § 2(2) and § 2(13)], a liberal concept of agency was appropriate. NLRB v. General Metal Products Co., 410 F. 2d 473, 475 (6th Cir., 1973); Amalgamated Clothing Workers v. NLRB (Hamburg Shirt Co.), 371 F. 2d 740, 744 (D.C. Cir., 1966)

["In this setting responsibility under the Act is not controlled by refinements of the law of agency."]

In a variety of cases the standards set forth by the NLRB and the Courts reappear. See, e.g., Henry I. Siegal Co., Inc., 172 NLRB 825 (1968); Dean Industries, Inc., 162 NLRB No. 106, 64 LRRM 1193. In Dean, despite the absence of direct evidence that the company requested the assistance of the towns-people in an effort to get workers to withdraw their union support, the employer's knowledge of the actions, without a specific disavowal, were sufficient. Sprouse-Reitz Co., 199 NLRB 943, 81 LRRM 1373 (1972) [Employer held responsible for general manager's wife's conduct]; Cast Optics Corp., 79 LRRM 3093 (3rd Cir., 1972) [Employer responsible for assaults on its striking employees.]; NLRB v. Champa Linen Service, 324 F. 2d 563, 54 LRRM 2418 (10th Cir., 1963), enfor'g 52 LRRM 1208; NLRB v. Calson Corp., 347 F. 2d 128, 57 LRRM 1078 (8th Cir., 1965) [Local businessman deemed employer's agent.].

NLRB cases also find a third party to be an agent of the company when the workers reasonably would perceive that person to be speaking or acting on behalf of the employer. Amalgamated Clothing Workers (Hamburg Shirt Co.) v. NLRB, supra, Hyster Corp. v. NLRB, 480 F. 2d 1081 (5th Cir., 1973).

In this case the nexus of Cadiz, Correa, Dorado and Thomas to Respondent has been considerable, extensive and on-going. There could be only one reasonable conclusion the employees could perceive: that each was speaking with the

Respondent's cloak or mantle of authority. See Paul W. Bertuccio, 5 ALRB No. 5 (1979); Anderson Farms Co., 3 ALRB No. 67.

I conclude that Cadiz' seasonal and part-time supervisory or agency status with Respondent prohibited Cadiz' role as the decertification petitioner. Accordingly, the election should be set aside.

C. Objection C: Whether the employer engaged in a systematic pattern of conduct designed to initiate, assist and/or dominate the decertification of the United Farm Workers of America, as the collective bargaining representative of M. Caratan from August, 1978, and continuing thereafter, and if so, whether such conduct affected the outcome of the election.

Section 1153(b) of the Act makes it unlawful for an agricultural employer to dominate or interfere with the administration of a labor organization. Moreover, the Act guarantees to agricultural employees the right to select [and maintain] a bargaining representative of their own choosing, free from employer interference, restraint or coercion.

The substantial evidence in this case persuades me that Respondent breached its responsibility to refrain from acts that were intended to interfere with its employees' organizational rights by assisting in the decertificaton of the UFW. Inevitably, such conduct affected the outcome of the election.

The most obvious practice Respondent engaged in that was designed to and would affect the outcome of the election was its hiring practices.[183/] For example, Respondent's crew

183/ Contrary to his testimony, Luis Caratan was clearly aware of the first decertification petition before its filing. The evidence is more equivocal how far in advance he knew and if he initiated it. (continued on Page 103)

supervisor Mike Anderson instructed Town crew foreman Pedro Garcia during the 1978 harvest not to hire UFW supporters. Pursuant to that practice Sofia Gomez' family, relatives to a known UFW supporter, applied and were denied work. In addition, at least two UFW supporters, Jose Rodriquez and Wilson Santiago, were hired by Garcia contrary to Respondent's instructions. Other union supporters, e.g., Francisco Pulido, terminated their employment as a result of the work pressure and harassment. Moreover, apart from the conclusion that Respondent should be held to account for Cadiz' role as first decertification petitioner, it is clear that Respondent also assisted in circulating the petition. The credited testimony reveals that the petition was circulated on company time by two workers [Dorado and Ochoa] who were presumably being paid by the company while under the watchful eye and guidance of Mike Anderson.[184/]

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183/ (Cont.) Each of the unlawful practices engaged in reinforces the inference that he was aware of and assisted in the petition at its inception.

184/ I have not considered or discussed the significant misrepresentations stated by Cadiz during the petition circulation; it would require a difficult determination between unlawful assistance and the "showing of interest" issue and is unnecessary given the other unlawful conduct. Compare Objection B.1. discussed on pages 111-112.

D. Objection D: Whether during the election campaign the employer unlawfully promised benefits to employees if they would vote "no union", and if so, whether such conduct affected the outcome of the election.

It is clear under the NLRB that a grant or promises of medical benefits or a hospitalization plan, for the purpose of discouraging employee organization, is a violation of Section 8(a)(1). Cedartown Yarn Mills, Inc., 84 NLRB 1 (1949); Popeill Bros, Inc., 101 NLRB 1083 (1952); Waters Distrubuting Co., 182 NLRB No. 141 (1970); Regal Aluminum, Inc., 436 F. 2d 525 (CA 8, 1971); Airlines Parking, Inc., 196 NLRB 1018 (1972). This is especially the case where the timing of the plan is such as to interfere in the union selection process. Cedartown Yarn Mills, Inc., supra; Popeill Bros, Inc., supra; Englewood Lumber Co., 130 NLRB 394 (1961); Gainsville Publishing Co., 150 NLRB No. 60 (1964).

NLRB precedents unambiguously establish that a wage increase or a promised increase in benefits is a violation of the law if its effect is to interfere with the organizational rights of workers, whether or not coupled with any threats or conditioned upon nonparticipation of employees in union activity. NLRB v. Exchange Parts, 375 U.S. 405, 55 LRRM 2098 (1964); Rupp Industries, NLRB, 88 LRRM 1603 (1975); International Shoe, NLRB, 43 LRRM 1520 (1959). Violations have also been found whether the the increased benefits occurred prior to the representation election, during the union organizational drive, or after an election. See NLRB v. Gary Aircraft Corp., 468 F. 2d 562, 81 LRRM 2613 (5th Cir., 1972); NLRB v. WKRG-TV, Inc., 470 F. 2d 1302, 82 LRRM 2146 (5th

Cir., 1973); NLRB v. Furnas Electric Co., 463 F. 2d 665, 80 LRRM 2836 (7th Cir., 1972).

The ALRB has also addressed the issue of the effect of promised increase in benefits on organizational rights prior to elections in a number of cases. See, e.g., Hansen Farms, 2 ALRB No. 61 (1976); Prohoroff Poultry Farms, 3 ALRB No. 87 (1977); Oshita, Inc., 3 ALRB No. 10 (1977); Anderson Farms Co., 3 ALRB No. 67 (1977); McAnally Enterprises, Inc., 3 ALRB No. 82 (1977); Royal Packing Co., 5 ALRB No. 31 (1979).

The Hansen case, the Board's watershed decision in this area, presents facts similar to the ones in this case. There the employer, after consulting with his attorney as to the proper boundaries of his "no-union" campaign, made speeches and issued campaign literature enumerating the disadvantages of a union. The employer claimed to follow the required guidelines of making no promises or threats. After resolving the disputed testimony regarding the employer's conduct and statements, the decision adopted the "economic realities" test of NLRB v. Gissel Packing Co., 395 U.S. 575, 618, 71 LRRM 2481, 2497 (1969). Thus, the employer's statement "I can't promise you anything" is viewed in light of the message actually conveyed. In applying the "economic realities" test the Board makes no distinction between promised or conferred benefits, nor implied as opposed to express promises.[185/]

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185/ 2 ALRB No. 61, p. 12, fn. 18.

The Board then established the following test:

> Our evaluation of the employer's pre-election conduct must ask first whether the conduct was an unfair use of his economic position. If the conduct is found to be objectionable the inquiry must proceed to a determination of the effect such conduct might have had on the election. Conduct which tends to interfere with the free choice of a significant number of voters will be sufficient to set aside an election.
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> 2 ALRB No. 61 at p. 15

The record and evidence here is overwhelming[186/] that there was no basis for Respondent's campaign promises other than to influence the outcome of the election. Every witness who testified, including Respondent's, had no difficulty in perceiving and understanding the message that Respondent was actually conveying.[187/]

I conclude that Respondent interfered with its employees' rights by promising substantially improved medical benefits and increased wages of an unspecified amount to employees during its campaign prior to the decertification election.

By linking the promised benefits to the employees' no-union vote, and by announcing substantially better benefits at a critical time just prior to the decertification election, Respondent engaged in objectionable conduct which materially

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186/ See, e.g., pp 36-45, supra.

187/ Direct evidence of the unlawful promises before the Town's crew and Puerto Rican crews was presented by the workers. By his own admission Caratan also made similar campaign speeches to the Arab and Sierra crews. By implication it seems reasonable to infer they were also unlawful. Moreover, I find that the insurance pamphlet and translation given to the Arab crew [Gen'l Coun. Ex. #12] was a per se unlawful promise of benefits on its face. See, e.g., Anderson Farms Co., 3 ALRB No. 67 (1977).

interfered with the employees' free choice. Accordingly, I recomment this as an additional ground for setting aside the election. Oshita, Inc., 3 ALRB No. 10 (1977); Royal Packing Co., 5 ALRB No. 31 (1979); NLRB v. Spotlight, 80 LRRM 2533 (8th Cir., 1972).

E. Objection E: Whether the employer and/or its agents engaged in systematic interviewing of individual workers in the fields, and if so, whether such conduct affected the outcome of the election.

Under the Act, questioning an employee as to his or her views, sympathies or activities with the union tends to restrain or interfere with the collective rights guaranteed by the Act. Rod McLellan Co., 3 ALRB No. 71 (1977). See also NLRB v. Louisiana Mfg. Co., 374 F. 2d 696, 700 (8th Cir., 1967) ["When a supervisor with expressed anti-union sentiments asks an employee about his union affiliation and the union sympathies of his fellow workers, there is going to be a most natural coercive effect on the questioned employee."]. Respondent cites to Mid-States Horticulture Co., 4 ALRB No. 101 (1978) and two NLRB cases, Associated Milk Producers, 237 NLRB No. 120, 99 LRRM 2212 (1978) and Electro-Wire Products, 242 NLRB No. 144, 101 LRRM 1271 (1979) in support of its position that the employer is entitled to speak to its employees on a one-to-one basis at work prior to the election. Each of the cited cases involved an employer or supervisor asking individual employees on election day to vote no union [or "Teamster" in the Mid-States Horticulture Co. case].

By contrast, the credited testimony here is that at least two staunchly anti-UFW supervisors, Mike Anderson and

Fermin Martinez, proceeded through their crews on a one-to-one basis inquiring what the workers' views of the union were and how they intended to vote.[188/] This conduct occurred during the same period that a no-union campaign containing unlawful promises was also being conducted. The conduct was highly coercive with a likely chilling impact on the workers.

I conclude that Respondent interfered with its employees' rights by systematically interviewing individual employees in the field about their union views and intended vote in the upcoming election. I find that Respondent engaged in further objectionable conduct which tended to interfere with the employees' free choice.

Accordingly, I recommend this as further grounds for setting aside the election. Rod McClellan, 3 ALRB No. 71 (1977).

F. Objection F: Whether the employer engaged in last minute campaigning including captive audience speeches to workers during the election September 1, 1978, and if so, whether such conduct affected the outcome of the election.

Under ALRB decisions last minute campaigning, whether within the quarantine area or not, does not violate the Act and does not warrant setting aside an election "absent a showing that the conversations affected the outcome of the election", Superior Farming Co., 3 ALRB No. 35 (1977); Sakata Ranches, 5 ALRB No. 56 (1979).[189/] Under the Act therefore, the gravaman of the harm is

188/ See pp. 30-33, 38-43, supra.

189/ The "captive audience" rule of Peerless Plywood, 107 NLRB 427, 33 LRRM 1151 (1953), and the Milchem, Inc., 170 NLRB 362, 67 LRRM 1395 (1968) prohibition against sustained conversations with
(continued on Page 109)

not the fact that "last minute" or "captive audience" campaigning occurred, but whether such conduct could reasonably have affected the outcome of the election ["Was the employer's campaigning and the substance of his statements an unfair use of his economic position; did the conduct tend to interfere with the free choice of a significant number of voters." Hansen Farms, supra.] 190/ However, taking into consideration Respondent's conduct prior to the first decertification election as a whole, see Harden Farms, 2 ALRB No. 30 (1976), the credited testimony regarding the "last minute" campaigning supports the conclusion that it affected the outcome of the election. Gomez' testimony regarding Respondent's unlawful promises made to the raisin-turning portion of the Sierra crew just prior to their balloting is consistent with the overwhelming evidence of unlawful promises made to the Town and Puerto Rican crews during the two previous days. This should be compared with Caratan's own [discredited] testimony that he made similar speeches

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189/ (Cont.) prospective voters awaiting to vote have not apparently been adopted by the ALRB. See Yamada Bros., 1 ALRB No. 13 (1975); California Coastal Farms, 2 ALRB No. 26 (1976); and Superior Farming Co., 3 ALRB No. 35 (1977), respectively.

190/ The employer's conduct clearly violated the quarantine and no electioneering procedures established by the ALRB for the election. See Findings of Fact on pages 45-48, supra.

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to each of the crews "within the bounds of his campaign theme". Based on the credited testimony and record herein[191/], I conclude that Respondent engaged in objectional conduct which "tended to interfere with the free choice of a significant number of voters". Accordingly, I recommend this as an additional ground, coupled with Objection D, for setting aside the election. Hansen Farms, 2 ALRB No. 61 (1976).

G. Objection G: Whether the employer failed to provide a complete and accurate list of employee names and current street addresses during the pre-election period.

The evidence was not in dispute. Respondent's employee list contained a substantial number of post office box addresses for members of the Frank Sierra crew. However, this same list was utilized by the ALRB during its investigation to determine whether the showing of interest on the petition was tainted. Moreover, the UFW as the certified bargaining representative for Respondent's argicultural employees, including those in the Sierra harvesting crew, had maintained its own address list pursuant to its representation role. No actual prejudice was shown.

Accordingly, I recommend that this objection to the election be dismissed. See, e.g., Bud Antle, Inc., 3 ALRB No. 7 (1977)

191/ Under the NLRB the "no electioneering" rule in or near the polling place was meant to be prophylatic in nature. Accordingly, all conversation within its ambit are considered prejudicial in nature. See Modern Hardchrome Service, 75 LRRM 1498 (1970). While application of this rule might be appropriate in the circumstances of Caratan's last minute electioneering to Fermin's crew, observed but not heard by Ybarra, I have not considered it in view of the substantial evidence in the record regarding the Sierra crew.

H. Objection B.1.: Whether the printed contents of the petition, ALRB Form 145a, misrepresented the purpose of the petition, and if so, whether such misrepresentation affected the conduct of the election.

The petition actually filed August 25, 1978 was not offered into evidence in this case. It was my preference not to have in the record a list of employees who supported the decertification, from which it would be fairly easy to establish who did not. In order to rule on this objection I reviewed and considered a blank decertification petition set forth as Exhibit E to the UFW's Petition to Review and Set Aside Election filed on August 24, 1979.

This form [ALRB Form No. 145a], in both English and Spanish, states at the top "Petition for Decertification Signature Sheet" in caps. Immediately below this it states in small print "We, the undersigned employees hereby request the Agricultural Labor Relations Board to conduct a representation election among the agricultural employees of _____."

There is no explanation what this document means or what effect the signatures on it or the election would have. It is obviously a very ambiguous document on its face. This ambiguity takes on further significance when considered in the context that many farm workers do not read or write well [or at all] coupled with the haste in which the signatures were sought and obtained at Respondent's work site and/or labor camps. The conclusion one is left with is that it is quite likely for a signator to misunderstand this document and its purpose even

without misrepresentation. There was, of course, significant testimony regarding the misrepresentation of the petition's purpose by both Cadiz and Rigoberto Ochoa.[192/] However, it is difficult for me to separate this misrepresentation of the petition's purpose with tainted showing of interest in order to rule on the objection.

While I find that this document is ambiguous on its face and that when the petition was circulated it's purpose to some workers was misrepresented, nevertheless I feel constrained to and decline to find that this affected the outcome of the election. At least two persons, the Quinones, wanted their signatures off, and presumably never accomplished their aim. Yet, by the time of the election some eight to ten days later, at least the purpose of the petition and election was known. Without further evidence that would require delving into the issue of tainted showing of interest, I feel constrained, but nevertheless recommend that this objection be dismissed.[193/]

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192/ See pages 30-33, supra.

193/ I would strongly recommend that the decertification petition form be materially modified to make its purpose and effect considerably clearer on its face.

VI. THE "C" CASE: THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. Whether Respondent, by its agents, interfered with and restrained the completion of a duly authorized ALRB decertification election [Paragraph 8(a)-(j) of the First Amended Complaint].

1. Introduction

Paragraph 8 of the First Amended Complaint sets forth 10 allegations of Respondent's conduct which, individually and taken together, assert and reveal an intent and effort to unlawfully initiate and assist the decertification of the UFW, and then to interfere with the decertification election process itself.[194/]

As set forth in the findings earlier [pp. 53-85], the evidence is overwhelming that Respondent unlawfully initiated, promoted and assisted first the decertification of the UFW, and then assisted in the interference with the decertification procedure and election. The specific allegations and evidence are summarized seriatim.

2. On or about June 13, 1979, Respondent openly refused at a regularly called pre-election conference, to cooperate with the planning and orderly regulation of a decertification election.

The evidence was clear and essentially uncontroverted that Luis Caratan, learning the ballots would be sealed rather than immediately counted, informed everyone at the pre-election conference that his cooperation could no longer be counted

194/ Respondent, in its defense and brief, asserts that this theory of General Counsel's case is inherently and logically inconsistent. However, I concur with General Counsel that it is unnecessary for it to fathom Respondent's motives as part of its case.
(Continued on Page 114)

on. He then left angrily. His conduct occurred while Wilson Santiago, Martha Gonzales and several other unidentified Caratan workers were present. Caratan lived up to his word. During voting, two of his foremen violated the quarantine area on several occasions; a TV film crew was given permission by Caratan and directed to the polling site by his agent, Ed Thomas to film the voting process; Respondent's agents [Fermin and Ed Thomas] stood by and refused to seek help or provide assistance as Caratan workers disrupted the voting and violently seized the ballots.

I conclude, based upon the uncontroverted evidence in the record, that Respondent, by and through Luis Caratan, violated Section 1153(a) of the Act by Caratan's statement, as alleged in Paragraph 8(a) of the Amended Complaint, coupled with its other unlawful conduct.

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194/ (Cont.) The evidence was clear, substantial and convincing that Respondent was involved in both initiation and interference. Should the Board deem that motive is an element of the proof of the case, there is evidence to glean such motive. Justifiable inferences can be drawn concerning Respondent's motives and purposes for acting in a [purportedly] inconsistent manner. One can look to the immediate move of Respondent through counsel to contact Cadiz to represent him in support of its standing needs [XVIII Tr. pp. 34, 47-48]. Also, the initiation of a second decertification petition would further promote the mootness of the Board's decision, then pending before the California Supreme Court. Caratan's conduct subsequent to the ballot sealing announcement seems accurately to reflect his own testimony of "frustration".

3. On or about June 14 and 15, 1979 Respondent unilaterally instituted substantial and unpredictable changes in the working conditions of the decertification electorate.

On or about June 14, 1979 Respondent informed the decertification electorate the election would cause disruption in the work and loss of pay.

The uncontroverted evidence presented showed that Respondent, through Luis Caratan, instituted a number of changes after the pre-election conference [and the announcement the ballots were to be sealed] calculated to adversely affect its workers. Although the election procedure was premised on and adjusted to the crews working on Friday starting at 7:30 a.m. [based on Caratan's representation at the pre-election conference], Caratan, unilaterally, unexpectedly and without prior announcement, cancelled work for all the workers but the steadies for Friday. The first obvious effect was to make clear to the workers who were soon to vote, who controlled the work and pay. The second was the potential adverse affect on voter participation.[195/] On election day, Caratan paid Fermin's crew before they voted and the Town's crew and presumably the Arab crew immediately after, contrary to the admonition from Board Agent Matalka as to its impropriety. Respondent's conduct indicates further examples of its uncooperative intent and intent to adversely affect its workers' statutory rights.

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195/ Caratan's action compelled Matalka to send agents out Thursday evening to announce to the workers that the election would take place as scheduled. As indicated earlier, the election turnout was high.

I conclude that Respondent, based upon the essentially uncontroverted evidence in the record, violated Section 1153(a) of the Act as alleged in Paragraphs 8(b) and 8(c) of th Amended Complaint.

4. On or about June 14, 1979, Respondent incited and encouraged workers to oppose Agricultural Labor Relations Board agents as they attempted to conduct a decertification election by openly soliciting resistance to a duly established election rule.

Respondent failed to inform or otherwise warn Agricultural Labor Relations Board agents of known immediate threats by workers to resort to the use of force and violence at the election polls.

The credited evidence in support of this allegation is substantial, clear and convincing. Catarino Correa, the second decertification petitioner, business associate and agent of Respondent, told Luis Caratan at noon on June 14 that he [and other workers] would "kick open the ballot box and seize and count the ballots" if the ALRB didn't count them.[196/] Caratan's response and conduct ["That's your business and none of my affair."] graphically illustrates Respondent's complicity in the election disruption conduct on the basis of his knowledge and inaction.[197/]

196/ Correa was denied the opportunity when ALRB agents declined to permit him to remain in the polling area.

197/ Caratan's promotion and assistance in the decertification process and violence is separately considered infra. I have not ruled whether Caratan "knew" of the rifle shots late Thursday evening [either from his own knowledge or the police's] or Caraballo's gun on Friday morning. Caratan denies such knowledge and such findings would only corroborate other evidence already clearly established in the record. Moreover, the presence of Caraballo's gun, fortunately, was brought to the ALRB agents' attention during the same period Caratan allegedly learned about it.

I conclude based upon the credited and substantial evidence in the record that Respondent, by and through Luis Caratan, violated Section 1153(a) of the Act as alleged in Paragraphs 8(d) and (e) of the Amended Complaint.[198/]

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198/ There was conflicting evidence in the record whether Caratan urged his Arab crew on June 14 to picket the ALRB offices regarding the decision to seal the ballots. It was uncontroverted that he urged some of the Arab crew to do so on September 1, 1978 in connection with the initial decision to seal the ballots. In either event I have not considered this evidence in support of these allegations since it is equivocal, at best, whether the conduct standing alone is unlawful.

5. Respondent failed to exercise reasonable control over workers openly and continuously expressing an intent to violently disrupt the decertification election.

Respondent openly condoned and displayed encouragement to the persons directly responsible for disruption of a decertification election, attack upon the persons of Agricultural Labor Relations Board agents, and theft of election ballots.

From its earliest beginnings, the federal courts have imposed an affirmative duty on employers to protect its employees from violence of co-workers. NLRB v. Hudson Motor Car Co., 128 F. 2d 528 (6th Cir., 1942). Employers have been also held responsible to protect its union-supporting employees from hostile anti-union employees; the failure to intercede and prevent the unlawful conduct is viewed as acquiescence or tacit approval of the illegal anti-union conduct; NLRB v. Weissman Co., 170 F. 2d 952 (6th Cir., 1948); NLRB v. Cast Optic Corp., 79 LRRM 3093 (1972); and the failure to reprimand the wrongdoers is treated as ratification of the conduct; American Thread Co., 94 NLRB 1699, 28 LRRM 1249 (1951). See also Brewton Fashion, Inc. v. NLRB, 361 F. 2d 8 (5th Cir., 1966) and Newton Brothers Lumber Co., 214 F. 2d 472 (5th Cir., 1954)

The primary conduct considered under this subsection was Fermin Martinez' [as well as one aspect of Ed Thomas' at the polling site].[199/] Whether their conduct is viewed and considered under the expanded concepts of agency found under

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199/ See Pages 74-86, supra.

the NLRA or ALRA[200/] or under the traditional, more narrow concepts of respondeat superior of common law, there is little doubt that their conduct is attributable to Respondent.

Even when the evidence is considered for the severely limited purposes that Respondent claims Martinez and Thomas' conduct must be viewed, their conduct is unlawful and attributable to Respondent.[201/]

In addition to Martinez' calculated inaction prior to and during the melee, his open support by comment and gesture while promptly bringing his crew under control and onto the bus after the ballots were seized, is further support for Respondent complicity in the violence.[202/] Finally, Martinez' declination to reprimand or discipline his workers for their violence and disruption of the election[203/] is further evidence of Respondent's condonation of the election violence.

200/ See Pages 94-102, supra.

201/ According to Respondent, Martinez' role was solely to transport and pick up the voters at the election site. Yet even within that limited agency authority, Fermin refused to comply with the agents requests, before the violence got out of hand to pick up his workers. Ed Thomas purpose, according to Respondent, was solely to assist the KERO TV reporters to the election site. Yet even within that limited agency authority Thomas refused to comply with requests to leave or to seek help.

202/ The usual remedy for an atmosphere or intrusion of violence or threats, whether by the employer, union or third parties, is to set aside the election results because of the likelihood of impairment of the employees' free choice. See, e.g., Browning Industries, 142 NLRB 1397, 53 LRRM 1266 (1963); Lipman Bros., 147 NLRB 1342, 56 LRRM 1420 (1964). Here, of course, the election result was unknown, except presumably to the workers who seized the ballots.

203/ XVII Tr. pp. 123-124.

Accordingly, I find that Respondent, through its agents Fermin Martinez and Ed Thomas, flagrantly abused and interfered with the statutory rights of its employees as alleged in Paragraphs 8(f) and (i) of the Amended Complaint in violation of Section 1153(a) of the Act.

6. On or about June 15, 1979, Respondent directed, and otherwise authorized, a local TV reporting crew to the election site while an election was still in progress.

Respondent authorized the photographing and publicizing of a decertification election while in progress and during the disruption thereof.

The credited testimony and evidence establishes the following, and I so find:[204/]

(1) Ed Thomas, Respondent's public, press and media respresentative, while acting as Respondent's authorized agent,[205/] arranged and assisted in KERO TV's unlawful presence and filming at an ALRB election.

(2) Thomas knew it was unlawful to be present within a quarantine area and to film the voting during a duly scheduled ALRB election.

(3) Thomas, although asked to leave and to obtain help for the ALRB agents, refused to do so.

(4) Thomas' and the KERO TV newsreporters' presence interfered with the completion of the election procedures.

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204/ See Pages 78-86, supra.

205/ Thomas' agency status was considered supra, pp. 97-102.

(5) Thomas' presence, along with the KERO TV camera and reporters, triggered the violence that erupted shortly after their arrival.

Interference with an ALRB election is a violation of Section 1153(a) of the Act. Highland Ranch and San Clemente Ranch, Ltd., 5 ALRB No. 54 (1979). Election interference knowingly and intentionally done resulting in violence [whether intended or not] is a most flagrant and aggravated violation of Section 1153(a) of the Act.

Accordingly, I conclude that Respondent, through its agent Ed Thomas, flagrantly interfered with the statutory rights of its employees as alleged in Paragraphs 8(g) and (h) of the Amended Complaint in violation of Section 1153(a) of the Act.

7. On or about June 18, 1979, Respondent prevented completion of the decertification election by terminating the employment of 50% of the electorate and thereby making a rerun election impossible.

The facts are not in dispute. Subsequent to the election disruption on Friday Respondent, through its counsel, sought an election re-run for the following Monday or Tuesday. At the same time Respondent was laying off portions of the Arab crew over that week-end and the Town crew on Monday morning [all previous indications were that the work would continued until Tuesday or Wednesday]. Respondent and its counsel neglected to mention this fact to Ed Perez. Perez, the area Regional Director had intended, prior to learning of the lay-offs, to hold a re-run

election. Finally, the Arab and Town crews were known strong union supporters [the crews drove to the election in a car caravan under union auspices wearing UFW buttons and insignia].

Taken out of context the evidence here would be considerably more equivocal. However, in the context of Respondent's conduct throughout the second decertification period, I'm persuaded by the preponderance of the evidence that Respondent's conduct, as alleged in Paragraph 8(j) of the Amended Complaint, was intended to interfere with the completion of the decertification election re-run.[206/]

B. Whether Respondent during the period from July, 1978 through August, 1979 supported, sponsored, assisted and participated in the decertification of the UFW [Paragraphs 9(a)-(m) of the First Amended Complaint].

1. Introduction

Paragraph 9 of the First Amended Complaint sets forth 10 allegations of Respondent's discriminatory conduct, which considered individually or taken together, reveal an intent to support, sponsor and assist in the decertification of the UFW.[207/] I find merit in each of the paragraph's allegations [with the exception of Paragraph 9(l)] which are summarized and discussed seriatim.

206/ Respondent's argument [p. 87 of its Brief] that it had nothing to lose if the re-run election was held and the UFW prevailed because they would be in the same position it was prior to the electio is unpersuasive. Its desires [or efforts] to assist in the decertification of the UFW over the past 9 months would have been materially affected. Contrary to Respondent's counsel's claims [XVIII Tr. p. 101, lines 20-23] the contract bar issue was a considerably closer interpretation of law than asserted.

207/ The allegations that the same provision violated Section 1153(e) of the Act are treated separately, infra.

The credited testimony and evidence[208/] is clear, convincing and substantial that Respondent in furtherance of a decertification effort started in August, 1978 instituted employment practices calculated to undermine the UFW support while aiding the decertification.

2. Respondent's Employment Practices Generally

Respondent instituted employment practices and policies, starting with its 1978 harvests, to prevent known union supporters from obtaining employment. The principal enforcer of the discriminatory hiring policy was Mike Anderson. However, one of the critical "linch pins" was foreman Pedro Garcia. Respondent was successful in carrying out its unlawful policy with Sofia Gomez' family in August. It was not successful, however, with Jose Rodriquez and Wilson Santiago, because of foreman Pedro Garcia's failure to abide by its unlawful practice.

The employment practices also operated to hinder the re-employment of known union supporters after the election. Successfully denied re-employment was Jose Quinones. Efforts to prevent the re-employment of Rodriquez and Santiago were also attempted, but unsuccessful at first, because Garcia again thwarted the efforts. Garcia himself, however, then fell to Respondent's unlawful employment practices. Garcia's testimony was particularly convincing, and as an insider, devastating to Respondent's defense.

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208/ See pp. 48-59, supra.

I conclude based upon the credited and overwhelming evidence in the record that Respondent, by and through Mike Anderson, violated Sections 1153(a) and (c) of the Act as alleged in Paragraph 9(a) of the Amended Complaint.

3. Discharge of Pedro Guzman Garcia

Supervisors are not generally provided the protection afforded agricultural workers under the Act. One notable exception applicable here is where the supervisor was discharged for refusing to carry out the employer's unfair labor practices. See, e.g., Dave Walsh Co., 4 ALRB No. 84 (1978); Kaplan Fruit and Produce Co., 5 ALRB No. 40 (1979); Krebs & King Toyota, Inc., 197 NLRB No. 462, 80 LRRM 1570 (1972); Morris, The Developing Labor Law, p. 774.

Garcia, after two years of foreman status and seven more as field worker, irrigator and tractor driver, was demoted and then terminated for "not progressing to company standards". However, the General Counsel's cross-examination of Anderson effectively revealed Respondent's defense of incompetence as pretexual. Garcia's credited testimony in combination with that of various Town's crew members, was particularly convincing in establishing Respondent's true reason for discharging Garcia: his unwillingness to carry our Respondent's discriminatory practices in furtherance of the decertification effort.

Accordingly, I conclude that Respondent, through Luis Caratan and Mike Anderson, unlawfully violated Sections 1153(a) and (c) of the Act as alleged in Paragraph 9(d) of the Amended Complaint

4. Jose Cadiz' Promotion

When Respondent's conduct is considered over the entire year period [August, 1978 - August, 1979] and Cadiz' promotion considered in its context,[209/] then the conclusion is unavoidable that Cadiz' promotion[210/] was intended as a reward for his assistance on Respondent's behalf in the decertification effort.[211/] This inference and conclusion is fortified when the timing and unlawful basis for Garcia's termination is taken into account.

I conclude, based on the credited testimony, that the evidence preponderates in favor of the finding that Respondent promoted decertification petitioner Cadiz to foreman for Cadiz' efforts on its behalf in the decertification efforts as alleged in Paragraphs 9(f) and (m) of the Amended Complaint. Such conduct was in violation of Sections 1153(a) and (c) of the Act.

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209/ For example, when the tally was announced at the ALRB office on August 16, 1979 members of Caratan's family were hugging and congratulating Cadiz while Milan Caratan was heard to say, "We've finally beat the union".

210/ Cadiz, however, had considerable difficulty satisfactorily supervising his crew, requiring Caratan to countermand his orders on numerous occasions. His tenure as foreman lasted but four and a half months. As noted earlier, Respondent chose not to call him as a witness in its defense.

211/ In August, 1978 Cadiz indicated that he was represented by Respondent's counsel in connection with the decertification. Even though the statement was later repudiated, it reinforces the impression and inference of Caratan's sponsorship and Cadiz' later promotion reward.

5. The Refusal to Rehire Wilson Santiago, Martha Gonzales and Jose Rodriquez

Rodriquez, Santiago and later Gonzales, as known and active UFW supporters, were targeted subjects of Respondent's unlawful employment practices. However, Respondent's year-long efforts to prevent their continued employment was unsuccessful until their foreman Pedro Garcia, who had been the "linch pin" in the unsuccessful effort, was first terminated. The credited evidence in the record[212/] is simply overwhelming that Respondent's discredited testimony [of Anderson] and doctored documents[213/] offered as a defense were a pretext for refusing to rehire the three. I conclude, based on the credited evidence, that Respondent, through Luis Caratan, flagrantly violated Sections 1153(a) and (c) of the Act as alleged in Paragraphs 9(g) and (i) of the Amended Complaint.

6. Respondent's Threat to Terminate the Women in the Town's Crew

The credited testimony in support of this allegation is set forth at Pages 90-91, supra. The thrust of Respondent's defense is that Correa's statement cannot be attributed to Caratan on agency principles merely on the basis of their limited and distinct business relationship. I do not concur,

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212/ See pp. 53-59, 87-93, supra.

213/ The documents were "doctored" when, in contemplation of litigation on this issue, Respondent had its office manager insert purported [but untrue] reasons for the refusal to rehire on its "business records" [Gen'l Coun. Ex. #23].

however, in Respondent's characterization that it is only the business relationship between the two that supports and compels the agency relationship. Respondent's conduct toward Correa during the second decertification petition and election period coupled with Correa's statement and staunch anti-UFW animus [as well as his wife's] leaves no doubt that Correa was "acting in the interests" of his employer throughout this period. I conclude, based upon the credited testimony and Correa's agency status, that Respondent violated Sections 1153(a) and (c) of the Act as alleged in Paragraph 9(h) of the Amended Complaint.

7. Respondent's Assistance to Workers Charged with Assaults Against Board Agents

The evidence in support of this allegation, like the previous two allegations, appears equivocal, until placed into the context of Respondent's entire conduct for the period. The evidence is undisputed [See Page 93 supra]; the motive, inference and effect are. However, when considered in the context of (1) Respondent's instigation and assistance in the second decertification petition; (2) Caratan's self-avowed over-riding feeling of "frustration" regarding the decision to seal the ballots; (3) Caratan's placing three of the charged Puerto Ricans back into their crew immediately after assaulting the Board Agents; and (4) his intermixing them with the most active UFW supporters, leads to but one conclusion: that Respondent would reward and assist workers that supported its decertification desires and efforts and punish those who opposed it. I conclude, based on the

credited evidence in the record, that Respondent, through Luis Caratan, violated Sections 1153(a) and (c) of the Act as alleged in Paragraph 9(j) of the Amended Complaint.

8. The Threat to Maria Fernandez

Respondent was well aware of Maria Fernandez' open and acitve UFW support [she refused to sign the petition; voted with her co-workers in the Town crew wearing UFW buttons and insignia; and was one of the targets of the threats and insults on June 18].

Nevertheless, I recommend that this allegation be dismissed because I do not find that the preponderance of the evidence supports the conclusion that Cadiz' conduct was intended as a discriminatory warning to her. Even when placed in the context of Respondent's on-going and flagrant unlawful and discriminatory conduct, I am not persuaded that this incident, individually or in combination with the other conduct was in furtherance of Respondent's unlawful goals. Accordingly, I recommend that the allegation set forth in Paragraph 9(l) of the Amended Complaint be dismissed.

B. On or about June 7, 1979, Respondent, through Luis Caratan, caused Petitioner Catarino Correa to circulate a petition to decertify the UFW [Paragraph 9(n) of the Amended Complaint].

On or about June 6, 7 & 8, Respondent, through agents Catarino Correa and Fermin Martinez, threatened workers with loss of employment for not supporting a decertification petition [Paragraph 10 of the Amended Complaint].

The same clear, convincing and substantial evidence

[see Pages 60-65 supra] supports both findings of unlawful conduct alleged above.[214/] The primary focus of Respondent's defense is that Correa's statements should not be attributable to Caratan. However, in addition to the agency concepts under labor law discussed earlier [Pages 97-102 supra] provisions of the California Evidence Code are contrary to Respondent's contention. Wholly aside from agency principles, Sections 1240-41 of the Evidence Code permit testimony to be admitted and considered for the truth in order to "explain, qualify or make understandable conduct of the declarant". When Correa's conduct, statements and relationship to Caratan are all considered together, the conclusion is inescapable: Respondent, through its agents Luis Caratan and Catarino Correa, unlawfully initiated the second decertification petition and threatened its workers with termination for failing to support it as alleged in Paragraphs 9(n) and 10 of the Amended Complaint in violation of Sections 1153(a) and (c) of the Act.

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214/ Correa, on the basis of his testimony, demeanor and expressed lack of business acumen, appeared to lack the sophistication or knowledge to consider filing a second petition on his own. Seemingly, it would have taken someone with considerably more sophistication, knowledge and self-interest to consel Correa about the possible benefits to circulating and filing a second petition at that time.

D. On or about June 14, 1979, Respondent, through Fermin Martinez, created the impression of conducting a surveillance of workers meeting to oppose decertification of the UFW [Paragraph 11 of the Amended Complaint].

Surveillance of employees or giving the impression of surveillance is violative of Section 1153(a) in that it interferes with, restrain and/or coerces employees in the exercise of their protected rights. Following union organizers who are engaging in protected activity from place to place and observing their conversations with employees is coercive per se. E-Z Mills, Inc., 101 NLRB 164, 31 LRRM 1149 (1952). Observing union activity has been held to be unlawful surveillance from a distance of 150 feet. Northwest Propane Co., 197 NLRB 87, 80 LRRM 1430 (1972). Even if respondents were unable to overhear the specific conversations, the mere creation of the impression of surveillance is also violative. Brennan's, Inc., 368 F. 2d 1004, 63 LRRM 2019 (5th Cir., 1966); Mitsubishi Aircraft International, Inc., 212 NLRB No. 124, 87 LRRM 1656 (1974); Taylor-Rose Mfg. Co., 205 NLRB 41, 84 LRRM 1017 (1973); Sayers Printing Co., 185 NLRB No. 20, 75 LRRM 127 (1970). Actual surveillance of union activities has been held to violate the NLRA in a number of contexts. See, e.g., Allied Drum Service, Inc., Astro Container Co. Div., 180 NLRB No. 123, 73 LRRM 116 (1970); Standard Forge & Axle Co., Inc., 427 F 2d 344, 72 LRRM 2617 (5th Cir., 1970); cert. den., 400 U.S. 903 (1970). The fact that surveillance is not surreptitious does not make it any less unlawful. NRLB v. Collins and Aikman Corporation, 146 F. 2d 454 (4th Cir., 1944).

At the very least Martinez created the impression of surveillance by his conduct on the evening of June 14 [see Pages 69-71 supra] thereby making it appear that his practice of determining workers' union activities and support continued.

Accordingly, I conclude that Respondent, through Fermin Martinez, violated Section 1153(a) of the Act as alleged in Paragraph 11 of the Amended Complaint.

E. On or about June 18, 1979 Respondent, through Fermin Martinez, threatened and harassed workers opposing decertification of the UFW by exposing such persons to verbal abuse and insults during work [Paragraph 12 of the Amended Complaint].

The testimony is clear, convincing and substantial here as well [see Pages 87-91 supra] that Respondent unlawfully sponsored the grave and intimidating acts by the violence-prone perpetrators at the election brawl. By Monday, June 18 Respondent knew of the active union support and assistance that many members of the Town crew provided the UFW. Respondent's calculated act to place violence-prone anti-union workers along side active union supporters and then stand by as escalating verbal abuse, insults and threats occurred, apparently reflected, as Luis Caratan's words alone didn't, the extent of the "frustration" and degree others would be permitted to act out the frustration.

I conclude, based upon the substantial evidence in the record that Respondent, through Fermin Martinez and Luis Caratan, violated Sections 1153(a) and (c) of the Act as alleged in Paragraph 12 of the Amended Complaint.

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F. Whether Respondent engaged in acts of conduct [described in Paragraphs 8-10 of the Complaint] to undermine the strength of the UFW in collective bargaining negotiations [Paragraph 15 of the Amended Complaint].

Section 1153(e) of the Act requires employers "to bargain collectively in good faith with labor organizations certified as representatives of their employees".[215/] Three recent Board decisions set forth the basic principles to be applied in refusal-to-bargain cases. See O. P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979); Montebello Rose, Inc./Mt. Arbor Nurseries, Inc., 5 ALRB No. 64 (1979); and McFarland Rose Production, 6 ALRB No. 18 (1980). Essentially, as stated by the Board, the question to be answered is whether Respondent undertook negotiations with "a bona fide intent to reach an agreement if agreement [was] possible". In making this determination, the Board examines the totality of Respondent's conduct, both at and away from the bargaining table. The prevelent issues in the usual refusal-to-bargain case focus on parties conduct at the bargaining table [e.g., absence, delay, surface bargaining, etc.] supplemented and interpreted by the conduct away from the bargaining table.

Here, Respondent's conduct at the bargaining table, as such, is not challenged. Starting in March, 1979, approximately two months prior to the contract terminating, Respondent with five other Delano area grape growers, entered into joint negotiations with the UFW for a new contract. By August, 1979 the parties reached agreement on all the terms. Four of the other growers

215/ Section 1155.2(a) defines what bargaining in good faith means and entails.

in fact signed the contract. Respondent refused to pending a determination of the decertification election results. But for the decertification election result, which it promoted and assisted, Respondent would have also signed the contract.[216/]

However, prior to and during the same period that Respondent is negotiating a contract it has also pursued unlawful employment practices with the effect, if not intent, of undermining the UFW strength amongst its workers and assisting decertification of the UFW.

In effect, Respondent's conduct away from the bargaining table was undermining, ultimately successfully, the support and basis for the union as the bargaining agent at the bargaining table. However, Respondent's willingness to sign a contract, if and only if, the union was able to overcome Respondent's unlawful efforts to decertify it, provides the basis for imposing an appropriate remedy in the case which is discussed in the next section.

Accordingly, I conclude, based on the entire record in the case, that Respondent has violated Sections 1153(a) and (e) of the Act as alleged in Paragraphs 8, 9, 10 and 15 of the Amended Complaint.

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216/ See IV Tr. p. 40.

THE REMEDY

A. Unfair Labor Practices. Having found that Respondent has engaged in certain unfair labor practices in violation 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. Such recommended affirmative action follows:

1. As to Jose Rodriquez, Wilson Santiago and Martha Gonzales, there being a violation of Sections 1153(a) and (c) as to each, I will recommend that the Respondent be ordered to offer each of them full reinstatement to their former or substantially equivalent jobs, effective immediately. I shall further recommend that the Respondent be ordered to make whole each of them for any losses they may have incurred as a result of Respondent's discriminatory refusal to rehire, by payment to them of a sum of money equal to the wages they would have earned from the date of their discharges to the date they are reinstated or offered reinstatement, less their net earnings, together with interest thereon at a rate of seven percent per annum, and that the loss of pay and interest be computed in accordance with the formula adopted by the Board in Kawario, Inc., 4 ALRB No. 104 (1978) [In the case of Jose Rodriquez it would involve additional entitlements for the period from December 8, 1978 until he was re-employed later in December].

2. As to Pedro Guzman Garcia, his discharge having affected the protected rights of Respondent's workers

contrary to Section 1153(a), I will recommend that Respondent be ordered to offer him full reinstatement to his former job as crew foreman, effective immediately. See, e.g., Anderson Farms, supra. I shall further recommend that the Respondent be ordered to make whole for Garcia any losses he may have incurred as a result of Respondent's discriminatory discharge, by payment to him of a sum of money equal to the wages he would have earned from the date of his discharge to the date he is reinstated or offered reinstatement, less his net earnings, together with interest thereon at a rate of seven percent per annum, and that the loss of pay and interest by computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc., 3 ALRB No. 42.

3. Respondent's pervasive unlawful conduct during the past year or more, including the discriminatory discharges, interrogation, surveillance, intimidation, and initiation and assistance of the decertification effort strikes at the heart of the rights guaranteed to employees by Section 1152 of the Act. The inference is warranted that Respondent maintains a pervasive attitude of opposition to the purposes of the Act with respect to justice, fair play, and the protection of employee rights. After consideration of Hickmott Foods, Inc., 242 NLRB No. 177, 101 LRRM 1342 (1979) and M. Caratan, Inc., 6 ALRB 14 (1980), I find this case an appropriate one to issue a broad cease and desist order. Therefore, I recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

B. The Election. As discussed earlier, I have determined that Respondent unlawfully provided assistance and promotion to the decertification efforts, combined with conduct which unlawfully interfered with its employees' statutory rights thereby effecting the outcome of the election. Accordingly, I recommend that the election and its results be set aside.

C. Extension of Certification. The UFW urges and I concur that Respondent's egregious conduct would otherwise be rewarded unless an extension of the UFW's certification is granted. Such extension should be for a period sufficiently long to enable the union to exercise its responsibilities without further unlawful employer underminings. Accordingly, I will recommend that the UFW's certification be extended for a period not less than one year.

D. Execution of the Collective Bargaining Agreement Agreed To. Circumstances such as in this case provide one of the limited exceptions where the NLRB has ordered an employer to execute and honor a contract agreed to. See, e.g. NLRB v. Strong 393 U.S. 357, 89 S. Ct. 541 (1969). I concur with the UFW that this would be an appropriate case for the Board to follow the NLRB precedent and order the Respondent to execute and honor the contract previously agreed to. Accordingly, I recommend that the parties execute and honor, with retroactive effect given to the collective bargaining contract heretofore agreed to in August, 1979 [General Counsel's Exhibit No. 4].

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E. Make Whole. In addition to the execution of the agreement, I recommend that Respondent be ordered to make whole the loss of benefits [if any] incurred by its employees as a result of Respondent's unlawful conduct and its further refusal to sign and honor a collective contract it had agreed to, together with interest thereon at seven percent per annum.

F. Attorneys' Fees and Costs. The UFW urges that this is an appropriate case to order that Respondent pay for the costs of litigation of both the General Counsel and itself.

I have considered the Board's decision and rationale in Western Conference of Teamsters (V.B. Zaninovich & Sons), 3 ALRB No. 57 (1977) [particularly pages 8 and 9] and conclude that it would effectuate the policies of the Act in the circumstances of this case to make such an order. Respondent's egregious conduct not only seriously interfered with its employees' collective rights guaranteed under the Act, but were equally calculated to interfere with and disrupt the lawful and duly authorized processes of this Board and the ALRA. Remedies under the Act appropriately are required to be remedial rather than punitive. Respondent mounted a vigorous defense by able and competent counsel. Nevertheless, the evidence was overwhelming that Respondent calculatedly sponsored and promoted pervasive unfair labor practices and decertificaton efforts, as well as, condoning and permitting violence and intimidating threats to be directed to its workers and Board Agents. Payment of litigation costs and attorneys' fees by Respondent in this case would provide here a compelling remedial sanction.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that Respondent, M. Caratan, Inc., its officers, agents, successors and assigns, shall:

A. Cease and desist from:

1. Discouraging membership of its employees in the UFW or any other labor organization by unlawfully discharging, refusing to rehire or laying off employees, or in any other manner discriminating against employees in regard to their hire, tenure of employment or any term or condition of employment, except as authorized by Labor Code Section 1153(c).

2. Threatening employees with loss of employment for supporting the UFW.

3. Threatening employees with loss of employment for failing to support decertification efforts.

4. Interrogating employees about their support of the UFW.

5. Promising benefits for abandoning support of the UFW.

6. Surveilling or giving the impression of surveilling its employees' protected activities.

7. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 1152 of the Agricultural Labor Relations Act.

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

1. Offer Jose Rodriquez, Wilson Santiago and Martha Gonzales during the next period when these employees would normally work, reinstatement to their former jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of the refusal to rehire them.

2. Offer Pedro Guzman Garcia immediate reinstatement to his former job as foreman without prejudice to his seniority or other rights and privileges, and make him whole for any losses he may have suffered as a result of his termination.

3. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reinstatement under the terms of this Order.

4. Execute the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reporduce sufficient copies in each language for the purposes set forth hereafter.

5. Post copies of the attached Notice at times and places to be determined by the Regional Director. The Notices shall remain for a period of 12 months. The Respondent shall execute due care to replace any Notices which have been altered, defaced, covered or removed.

6. Mail copies of the attached Notice in all appropriate languages, within 20 days from receipt of this Order, to all employees employed during the payroll periods which include the following dates: August 25, 1978 and September 7, 1979.

7. Arrange for a representative of the Respondent or a Board agent to distribute copies of, and read, the attached Notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall be at such time(s) and place(s) 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 workers are to be compensated at their hourly rate for time lost at this reading and the question-and-answer period. The Regional Director is also to determine any additional amounts due workers under Respondent's incentive system as well as rate of compensation for any nonhourly employees.

8. Hand a copy of the attached Notice to each employee hired during the next 12 months.

9. Notify the Regional Director in writing, within 20 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

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C. Take the following further affirmative actions which are necessary to effectuate the policies of the Act:

Execute and honor the collective bargaining agreement agreed to but not signed in August, 1979. Retroactive effect is to be given to the provisions of the contract. Respondent's employees shall be made whole for the loss of any benefits resulting from the retroactive effect to be given to the contract, plus interest at seven percent per annum.

IT IS FURTHER ORDERED that the September 1 1978 decertification election results be set aside.

IT IS FURTHER ORDERED that the certification of the UFW as exclusive Bargaining Agent shall be extended for a period of one year from the date this Order is signed and to take effect.

IT IS FURTHER ORDERED that Respondent pay the litigation costs and attorneys' fees incurred herein by the UFW and General Counsel arising out of the hearing and subsequent legal proceedings. An application with supporting documents shall be presented by the General Counsel and UFW to the Regional Director. Respondent should be afforded a reasonable period to reply. Attorneys' fees should be calculated and determined by the Regional Director and reviewed by the Board. An appropriate guideline for determining recoverable costs is set forth in Appendix A to the Local Rules of the U. S. District Court, Northern District of California.

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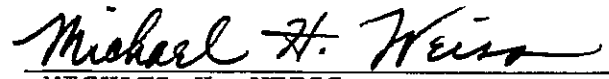
AND, IT IS FURTHER ORDERED that all allegations contained in the Complaint and not found herein to be violations of the Act are dismissed.

DATED: July 14, 1980

AGRICULTURAL LABOR RELATIONS BOARD



MICHAEL H. WEISS
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing where each side had opportunity to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act and that we interfered with the right of our workers to freely decide if they want the UFW to represent them. The Board has told us to send out, post this Notice on our property and publicly read this Notice.

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

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

1. To organize themselves;
2. To form, join or help unions;
3. To bargain as a group and choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect one another; and
5. To decide not to do any of these things.

Because this is true we promise that:

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

Especially:

WE WILL NOT fire employees because of their support for the UFW or any other union.

WE WILL NOT refuse to rehire employees because of their support for the UFW or any other union.

WE WILL NOT threaten employees in any manner for failing to support the decertification of the UFW.

WE WILL NOT ask employees whether they support or not the UFW or any other union.

WE WILL NOT make promises of benefits to you to abandon supporting the UFW or any other union.

WE WILL NOT surveill or give the impression we are of our employees involved in their union activities.

WE WILL offer the following employees their old jobs back, if they want them, and will give them back pay for the time they were out of work:

Jose Rodriquez
Wilson Santiago
Martha Gonzales
Pedro Guzman Garcia

APPENDIX "A"

WE WILL sign and honor a contract with the UFW as the exclusive bargaining representative of our employees.

Dated:

M. CARATAN, INC.

By _____

Representative Title

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

DO NOT REMOVE OR MUTILATE

APPENDIX I - WITNESSES

A. WITNESSES CALLED BY GENERAL COUNSEL (CASE IN CHIEF)

	NAME	IDENTIFICATION	DATES TESTIFIED	VOL. & PAGE
1.	Pedro Guzman Garcia	Former M. Caratan Foreman	9/ 4/79 9/ 6/79	III:51-113 V:6-125
2.	Catarino Correa	Caratan Worker Filed 6/79 Decert. Pet. Business Agreement with M. Caratan	9/ 5/79 9/ 6/79 9/13/79	IV:71-90 V:2-4 IX:103-143
3.	Luis Caratan	President, M. Caratan	9/ 5/79 9/13/79 9/18/79 9/19/79	IV:3-70 IX:146-150 XI:97-119 XII:15-20
4.	Umberto Gomez	UFW Contract Adm'r & Organizer	9/ 6/79 9/ 7/79	V:127-160 VI:22-109
5.	Paul Chavez	UFW Negotiator re M. Caratan Contract	9/ 7/79	VI:115-123
6.	Judy Weissberg	ALRB Attorney re 6/14/79 Pre-election conference	9/ 7/79	VI:126-157
7.	Deborah Miller	UFW Representative	9/ 7/79	VI:161-184
8.	Martha Gonzalez	Former M. Caratan Worker	9/11/79	VII:17-96
9.	Wilson Santiago	Former M. Caratan Worker	9/11/79	VII:98-160
10.	Pablo Fink	UFW Representative	9/12/79	VIII:5-30
11.	Jose Rodriquez	Former M. Caratan Worker	9/12/79	VIII:32-65
12.	Valentine Covarrubias	Current M. Caratan tractor driver; UFW Observer at 6/15/79 Decert. election	9/12/79	VIII:69-77
13.	Alexandero Correa	ALRB Field Examiner Investigated 6/15/79 events	9/12/79	VIII:78-100
14.	Theresa Heredia	Current M. Caratan Worker Formerly 2d Foreman in "Town" crew	9/13/79	IX:2-40
15.	Lupe Martinez	Current M. Caratan Worker Sister of Theresa Heredia	9/13/79	IX:41-66
16.	Maria Fernandez	Current M. Caratan Worker Mother of Theresa Heredia	9/13/79	IX:66-74

17.	Jack Matalka	ALRB Field Examiner; Also testified re Gen. Coun. Ex. ## 12 & 25	9/13/79 9/18/79 9/20/79	IX:80-103 XI:5-63 XIII:6-12
18.	Juan Cervantes	UFW Representative and Contract Administrator	9/14/79	X:10-46
19.	Manuela Diaz	Current M. Caratan Worker with "Town's" crew	9/14/79	X:48-62 79-87
20.	Amelia Carrillo	Current M. Caratan Worker with "Town's" crew	9/14/79	X:63-69
21.	Maria Haro	Current M. Caratan Worker with "Town's" crew	9/14/79	X:70-78
22.	Jose Quinones	Former M. Caratan Worker re 9/78 Decert. election	9/18/79	XI:65-78
23.	Jose Tellez	Current M. Caratan Worker re 6/79 Decert. election	9/18/79	XI:80-83 97-94
24.	Luis Gonzales	Current M. Caratan Worker re 6/79 Decert. election	9/18/79	XI:84-87
25.	Lorena Banuelos	Current M. Caratan Worker re conversation between Luis Caratan & C. Correa	9/19/79	XII:3-12
26.	David Caravantes	ALRB Field Examiner re 6/79 election site fight	9/19/79	XII:21-60
27.	Ben Maddock	Director, UFW Office in Delano	9/19/79	XII:85-159
28.	Ed Perez	ALRB Regional Director, Fresno	9/19/79 9/28/79 (called by ALO)	XII:63-83 160-168 XVI:1-47
29.	Ricardo Ornelos	ALRB Attorney, Fresno	9/19/79	XII:169-176
30.	Gilberto Urestes	ALRB Certified Interpreter re Gen. Coun. Ex. # 2	9/20/79	XIII:1-2

B. ADDITIONAL WITNESSES CALLED BY UFW

1.	Tanis Ybarra	UFW Organizer	9/20/79	XIII:14-38
2.	Alexandro Correa	ALRB Field Examiner re 9/78 Decert. election	9/20/79	XIII:39-60

C. WITNESSES CALLED BY RESPONDENT, M. CARATAN

1.	Ed Thomas	Executive Manager, South Central Valley Farmers Committee	9/26/79	XIV:10-69

2.	Ron Kilgore	TV Station KERO News Director	9/26/79	XIV:70-92
3.	Dave Halyman	TV Reporter, Station KERO	9/26/79	XIV:93-128
4.	Maria Obad	Current M. Caratan Worker "Town" crew, sister to Rigoberto Ochoa	9/26/79	XIV:131-155
5.	Maria Munoz	Current M. Caratan Worker "Town" crew	9/26/79	XIV:156-180
6.	Margarita Dorado	Current M. Caratan Worker "Town" crew, wife of Catarino Correa	9/26/79 9/27/79	XIV:182-214 XV:4-25
7.	Rigoberto Ochoa	Current M. Caratan Worker "Town" crew	9/27/79	XV:27-42
8.	Javier Navarez	Current M. Caratan Worker	9/27/79	XV:44-64
9.	Abdul Baabbad	Current Part-time M. Caratan Worker, "Arab" crew	9/27/79	XV:67-95
10.	Jose DeJesus	Foreman, Kovakovich Farms	9/27/79	XV:96-103
11.	Enrique Orosco Garcia	Current M. Caratan Worker Fermin's crew	9/27/79 10/ 1/79	XV:104-124 XVII:2-27
12.	Mike Anderson	Former Crew Superintendent 1976 - May 1979	9/28/79	XVI:48-219
13.	Miguel Ramos	Current M. Caratan Worker Fermin's crew	10/ 1/79	XVII:28-65
14.	Fermin Martinez	Foreman	10/ 1/79	XVII:65-161
15.	John Helmer	Insurance Agent	10/ 2/79	XVIII:1-9
16.	George Preonas	Respondent's Attorney	10/ 2/79	XVIII:10-115
17.	Luis Caratan	President, M. Caratan	10/ 2/79 10/ 3/79	XVIII:122-18 XIX:24-35 53-108
18.	Ronald Holgate	Office Manager, M Caratan	10/ 4/79	XX:3-66
19.	Rochelle Rickles	Secretary, M. Caratan	10/ 4/79	XX:67-83

D. GENERAL COUNSEL AND UFW REBUTTAL WITNESSES

1.	Tina Niswonger	Reporter, Bakersfield Californian	10/ 3/79	XIX:2-23 35-45
2.	Owen Kearns, Jr.	Managing Editor, Bakersfield Californian	10/ 3/79	XIX:45-49

3.	Ernestine Gonzales	Current M. Caratan Worker "Town" crew	10/ 3/79	XIX:109-111
4.	Sophia Gomez Velasquez	Former M. Caratan Worker "Town" crew	10/ 3/79	XIX:112-141
5.	Ben Maddock	Director, UFW Office - Delano	10/ 3/79	XIX:141-143
6.	Robert Mejia	ALRB Agent	10/ 3/79	XIX:143-165
7.	Augustin Colmenero	ALRB Agent	10/ 3/79	XIX:165-172
8.	Augustin Chavez	ALRB Agent	10/ 3/79	XIX:172-178
9.	Pedro Guzman Garcia	Former M. Caratan Foreman	10/ 3/79	XIX:179-181
10.	David Caravantes	ALRB Agent	10/ 3/79	XIX:182-185
11.	Francisco Pulido	Former M. Caratan Worker Fermin's crew	10/ 3/79	XIX:186-241
12.	Augustine Arrellano	Former M. Caratan Worker Fermin's crew	10/ 3/79	XIX:242-261

APPENDIX II
EXHIBIT WORKSHEET

CASE NAME: M. CARATAN, INC. CASE NO: 79-CE-57-D, et al.
78-RD-2-D

G.C.	RESP.	C.P.	OTHER	IDENT.	ADMIT or REJECT.	DESCRIPTION
#1 1A-1K				9/4/79	Admitted 9/4/79	Gen'l Counsel's Formal Papers
1L				9/4/79	Admitted 9/4/79	Amendment to G.C. Ex. 1F, Para. 9 of the Complaint
2				9/5/79	Admitted 9/5/79	Letter from M. Caratan to Spanish crew members re Med. Bene
3				9/6/79	Admitted 9/7/79	Diagram of M. Caratan's Labor Camp by Umberto Gomez
	A			9/7/79	Not Rec'd 9/7/79	Gomez' Decl. of 8/17/79 re 6/14/79 Japanese Camp events
4				9/7/79	Admitted 9/7/79	Proposed Collective Bargaining Ag. for 1979 Bet. UFW & M. Caratan
5				9/11/79	Admitted 9/11/79	Letter from M. Caratan, addressed to UFW re Martha Gonzales
	B			9/12/79	Admitted 9/12/79	Dec. 1978 Application of Jose Rodriquez
6				9/12/79	Admitted 9/12/79	Paper drawing showing Wilson Santiago's house & Fermin's P/U truck
	C			9/12/79	Admitted 9/12/79	Declaration of Jose Rodriquez dated 8/15/79
7 (1-19)				9/13/79	Admitted 9/13/79	Catarino Correa's records of receipt of grapes from M. Caratan
8				9/13/79	Admitted 9/13/79	M. Caratan's record of 1978 Bus. transactions w/ C. Correa
9				9/13/79	Admitted 9/13/79	Gen'l Counsel's Subpoena for M. Caratan records
10				9/18/79	Admitted 9/18/79	Video tape of polling area and fight on 6/15/79 [CSR to ALRB]
11				9/18/79	Admitted 9/18/79	M. Caratan's business records 9/6/79 of transactions w/ C. Correa
12				9/19/79	Admitted 9/20/79	M. Caratan's letter to Arab crew before 9/78 election [Interp. by ALRB Agent]
13				9/19/79	Admitted 9/20/79	Mailgram from Preonas, Atty for M. Caratan on 6/15/79 [Ed Perez]

APPENDIX II

EXHIBIT WORKSHEET

CASE NAME: M. CARATAN, INC. CASE NO: 79-CE-57-D, et al.
78-RD-2-D

G.C.	RESP.	C.P.	OTHER	IDENT.	ADMIT or REJECT.	DESCRIPTION
14				9/19/79	Admitted 9/20/79	Telegram message typed, dated 6/19/79 [Ed Perez]
15				9/19/79	Admitted 9/20/79	Translation of Gen'l Counsel's #2 by Interpreter Ureste
16				9/27/79	Admitted 9/27/79	8/28/78 Declaration of Javier Navarez
17				10/1/79	Admitted 10/1/79	Diagram of voting area and bus by Fermin Martinez
18				10/1/79	Admitted 10/1/79	Payroll record, Town's crew (#8) for 6/18/79
19				10/1/79	Admitted 10/1/79	Daily time sheets - Fermin Martinez' crew - 6/18/79
20				10/1/79	Admitted 10/1/79	Daily time sheets - Fermin Martinez' crew - 7/5-21/79
	D			10/2/79	Admitted 10/2/79	May 1978 Collective Bargaining Ag. Bet. UFW & M. Caratan
	E			10/2/79	Admitted 10/2/79	Letter from M. Caratan to workers sent before 9/1/78 election
21				10/3/79	Admitted 10/3/79	Newspaper article, 6/27/79, Bakersfield Californian re Ed Thomas
22				10/3/79	Admitted 10/3/79	Decl. of Frank C. Pulido dated 8/30/78 & English translation by Ureste
	F			10/4/79	Admitted 10/4/79	6/18/79 M. Caratan lay-off list
	G			10/4/79	Admitted 10/4/79	5/10/79 M. Caratan lay-off list
23 (1-3)				10/4/79	Admitted 10/4/79	Employment apps. (undated) for Jose Rodriquez, Martha Gonzales & Wilson Santiago
	H			10/4/79	Admitted 10/4/79	Payroll records - Town crew & Theresa's crew 1/17-2/17/79
	I			10/4/79	Admitted 10/4/79	Payroll record - Town crew 7/27-8/29/79
	H Appendix			10/4/79	Admitted 10/4/79	Dates when new computer list given to foreman [by R. Holgate]

APPENDIX II

EXHIBIT WORKSHEET

CASE NAME: M. CARATAN, INC.

CASE NO: 79-CE-57-D, et al.
78-RD-2-D

C.	RESP.	C.P.	OTHER	IDENT.	ADMIT or REJECT.	DESCRIPTION
	J			10/4/79	Admitted 10/4/79	Daily time sheets - Town crew 5/23-29/79