

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

TNH FARMS , INC . ,	)	
	)	
Employer,	)	Case No. 82-RD-2-OX
	)	
and	)	
	)	
HERIBERTO GARCIA,	)	
	)	
Petitioner,	)	
and	)	
	)	
UNITED FARM WORKERS	)	10 ALRB No. 37
OF AMERICA, AFL-CIO,	)	
	)	
Certified Bargaining	)	
Representative.	)	
	)	

---

DECISION AND DECERTIFICATION OF  
BARGAINING REPRESENTATIVE

On December 21, 1982, employee Heriberto Garcia filed a Petition for Decertification to decertify the United Farm Workers of America, AFL-CIO ( UFW or Union), the exclusive collective bargaining representative of the agricultural employees of TNH Farms, Inc. (TNH or Employer). Pursuant to that petition, an election was held on December 29, 1982. The Tally of Ballots, issued on August 15, 1983, showed the following result:

UFW	22
No Union	29
Challenged Ballots	<u>3</u>
Total	54

On January 5, 1983, the Union filed Objections and Petition to Set Aside the Decertification Election. On August 25, 1983, the Deputy Executive Secretary issued his Order Dismissing

Objections and Notice of Objections Set for Hearing. The objections set for hearing were as follows:

1. Whether the Employer engaged in a course of conduct designed to disaffect the unit workers from the union and assisted and/or instigated the decertification effort;

2. Whether the Employer, through labor contractor Larry Martinez, hired workers from neighboring ranches to sign the petition and vote in the election;

3. Whether the Employer hired workers for the purpose of voting no-union;

4. Whether the Employer hired a crew of 25 workers without notifying the UFW in an effort to oust the UFW.

An investigative hearing was conducted on September 27 and 28, 1983, before Investigative Hearing Examiner (IHE) Matthew Goldberg. The IHE found that the UFW failed to prove that the Employer had hired workers for the purpose of voting in the election or that the Employer had instigated the decertification efforts of the petitioning employee. He therefore recommended that the UFW's objections be dismissed and the election results be certified.

Pursuant to Labor Code section 1146, 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 objections, the record, and the IHE's Decision and recommendation in light of the exceptions and brief filed by the UFW and the Employer's responsive

//////////

//////////

brief<sup>1/</sup> and has decided to affirm the IHE's rulings, findings, and conclusions,<sup>2/</sup> and to accept his recommendation.

DECERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for no union and that, pursuant to Labor Code section 1156, the United Farm Workers of America, AFL-CIO is decertified as the exclusive representative of all agricultural employees of TNH Farms, Inc. for purposes of collective bargaining as defined

---

<sup>1/</sup>The Employer argues that the UFW's exceptions should be rejected in their entirety for failure to conform to the Board's regulations which require specific citations to the record in support of any exception. (8 Cal.Admin. Code section 20370(g)(1).) We agree with the Employer that the Union's exceptions are inadequate. The reference to testimony is not sufficient; excepting parties must indicate with specificity the transcript pages and/or documents that support an exception. Since the record in the instant proceeding is relatively small, we do not find sufficient prejudice to reject the UFW's exceptions herein. However, in cases with voluminous records, we will not consider exceptions that fail to cite to the record, since the burden on the responding party and the Board to search the record would be unduly great.

<sup>2/</sup>We agree with the ALJ's conclusion that the UFW failed to establish that the celery harvest crew provided for a few days by labor contractor Larry Martinez was hired for the purpose of voting against the Union. Although Martinez<sup>1</sup> office manager, Jess Espinoza, was unable to convincingly explain why the celery harvest crew, who voted heavily for no-union, was paid for the time spent in returning to the Employer's premises to vote, there was also no evidence that other TNH workers were not paid for their time spent voting. Absent some discrimination in favor of anti-union workers, the payment by Martinez is not, by itself, grounds to set aside the election. Member Henning is not convinced that even if the labor contractor paid only a vocal anti-union crew to show up to vote, to the exclusion of a vocally pro-union crew who were not paid, such action would qualify as sufficient proof that the anti-union employees were originally hired for the primary purpose of voting in a decertification election. Absent employer knowledge at the time of hire of the celery harvest crew that a decertification election was likely (and no such employer knowledge is demonstrated on this record), there is insufficient proof of an intent to hire employees for the primary purpose of voting in an election. (See, e.g., Arakelian Farms (1983) 9 ALRB No. 25.)

in section 1155.1(a) concerning employees' wages, hours and working conditions.

Dated: August 7, 1984

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

TNH Farms, Inc. (UFW)

10 ALRB No. 37  
Case No. 82-RD-2-OX

IHE DECISION

The IHE recommended that the union's decertification election objections be dismissed, finding that the union failed to establish that the employer hired workers for the purpose of voting no-union or that the employer instigated or encouraged the decertification effort.

BOARD DECISION

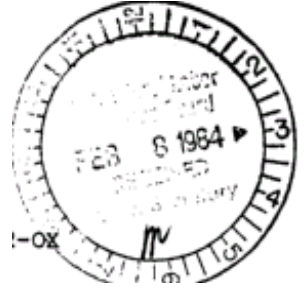
The Board adopted the IHE's findings, conclusions, and recommendation and ordered the UFW decertified as the bargaining representative of the employer's agricultural employees.

\* \* \*

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



In the Matter of: )  
T.N.H. FARMS, INC., )  
Employer, )  
and )  
HERIBERTO GARCIA, )  
Petitioner, )  
and )  
UNITED FARM WORKERS )  
OF AMERICA, AFL-CIO, )  
Certified Bargaining )  
Representative. )

---

Case No. 82-RD-2-0X

Appearances:

Robert P. Roy, Esq.,  
for the Employer

Clare M. McGinnis,  
for the United Farm Workers  
of America, AFL-CIO

Before: Matthew Goldberg  
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

I. STATEMENT OF THE CASE

On December 21, 1982, employee Heriberto Garcia filed a Petition for Decertification to decertify the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union"), the exclusive collective bargaining representative of the agricultural employees of TNH Farms, Inc. (hereafter referred to as "TNH," the "employer" or the "company.") Pursuant to that petition, an election was held on December 29, 1982. The Tally of Ballots, issued on August 15, 1983, showed the following result:

United Farm Workers of America, AFL-CIO:	22
No Union:	29
Unresolved Challenged Ballots:	<u>3</u>
Total	54

On January 5, 1983, the Union filed Objections and Petition to Set Aside the Decertification Election. On August 25, 1983, the Deputy Executive Secretary issued his Order Dismissing Objections and Notice of Objections Set for Hearing.<sup>1/</sup> Those objections are:

1. Whether the Employer engaged in a course of conduct designed to disaffect the unit workers from the union and assisted and/or instigated the decertification effort;
2. Whether the Employer, through labor contractor Larry

---

1. In the interim, the Union had filed charge numbers 82-CE-138-OX and 83-CE-3-OX, alleging that the employer hired workers for the purposes of undermining the Union and voting in the decertification election. On June 22, 1983, the Oxnard regional office informed the Union that these charges were being dismissed. The dismissals were reviewed by the General Counsel's office, and were affirmed on August 5, 1983. As will be seen, the issues raised by the objections here are similar to those delineated in the charges.

Martinez, hired workers from neighboring ranches to sign the petition and vote in the election;

3. Whether the Employer hired workers for the purpose of voting no-union;

4. Whether the Employer hired a crew of 25 workers without notifying the UFW in an effort to oust the UFW.

Commencing September 27, 1983, a hearing was held before me in Oxnard, California. All parties<sup>2/</sup> were afforded the opportunity to enter appearances, to present testimonial and documentary evidence, and to submit oral argument and written briefs.

Based upon the entire record in the case, including my observations of the respective demeanors of each of the witnesses who testified, and, having read and considered the briefs submitted to me since the close of the hearing, I make the following:

II. FINDINGS OF FACT

A. Jurisdiction

1. The employer is and at all times material was an agricultural employer within the meaning of section 1140.4(c) of the Act.

2. The Union, at times material, is and has been a labor organization within the meaning of section 1140.4(f) of the Act.<sup>3/</sup>

/

/

/

---

2. The petitioner, although present during the course of the hearing, did not enter a formal appearance.

3. Jurisdictional facts (1) and (2) were established by stipulation.



3. Petitioner is an agricultural employee within the meaning of section 1140.4(b) of the Act.<sup>4/</sup>

B. Introduction and General Background

As reflected below in the stipulations of the parties, the employer is the successor to Bee and Bee Produce, Inc. In 3 ALRB No. 84, the Union was certified as the exclusive bargaining representative of the employees of Bee and Bee. On May 14, 1982, the employer and the Union executed a collective bargaining agreement retroactive to March 11, 1982.

The agreement, however, was not applied to employees of labor contractor H. Larry Martinez, who were utilized in various capacities by TNH.<sup>5/</sup> These workers were principally involved in harvesting celery, although they also worked on other crops, such as mixed lettuce, cauliflower, bell peppers and beans. Whether these employees should have been included in the unit became the subject of a unit clarification petition. In addition, the Union and the employer negotiated the issue following the execution of the collective bargaining agreement itself.

The stipulations regarding these matters, in their entirety, are as follows:

---

4. Heriberto Garcia, the petitioner, is listed as an employee on the employer's crew sheets for foreman Jose Escamilla. His name also appears on the computer payroll print-out for the periods surrounding the decertification election, as well as on the celery crew seniority list submitted as an exhibit by the Union, in its election objections, the Union did not contest the petitioner's agricultural employee status.

5. The company initially maintained that Martinez was a custom harvester, as the stipulation following records.

The UFW and T.N.H. FARMS, INC. agree to the following stipulations:

1. T.N.H. Farms, Inc. is the successor-employer to Bee & Bee Produce;
2. T.N.H. started its agricultural operations in the same location, with the same employees and same crops as Bee & Bee on or about July 1, 1981;
3. Negotiations between the UFW and T.N.H. commenced in January 1982 after T.N.H.'s recognition of the UFW;
4. T.N.H. utilized a "steady" workforce of approximately 14 employees and supplemented its harvest work with a labor contractor, H. Larry Martinez, who performed celery, mixed lettuce, K-Y bean & bell pepper harvesting and on occasion, napa and celery transplanting;
5. T.N.H. has traditionally directly hired its own "steady" employees and has left the hire of Martinez' employees to Martinez;
6. During the 1982 negotiations between the parties, only the Martinez "celery" crew was specifically excluded from the collective bargaining agreement. However, in actual practice, all Martinez employees were excluded by the parties from the contract;
7. On or about September 27, 1983, the UFW filed a Petition for Unit Clarification with the ALRB in order to resolve the issue as to the status of Martinez' crews;
8. On October 19, 1982, the Employer voluntarily agreed to resolve the issue as to Martinez' status as a labor contractor by recognizing the UFW and agreeing to negotiate wages, hours and working conditions for the celery crew.
9. Negotiations concerning the mixed lettuce crew and celery crew of Martinez commenced on October 21, 1982 via a UFW request for information. . . .
10. On October 27, 1982, the Union and Employer mutually agreed to meet on November 5, 1982;
11. On November 1, 1982, the Employer submitted its response to the UFW's request for information;
12. On November 1, 1982, the Employer sent a letter to the Oxnard Regional Director, Wayne Smith, requesting that the UFW's Petition for Unit Clarification be dismissed on the legal basis that it was moot since the Company agreed to recognize the UFW for the Martinez crew;

13. At the November 5, 1982, negotiation session, the parties arrived at partial agreement on wages for the mixed lettuce crew with other issues to be resolved at a later meeting;

14. On November 8, 1982, the Union sent a wage proposal to the Employer and a proposal concerning the RFK Medical Trust;  
. . .

15. On November 8, 1982, the Oxnard Regional Director dismissed the UFW's Petition for Unit Clarification;

16. On November 10, 1982, the parties met for the second time to negotiate concerning the mixed lettuce and celery crews;

17. On November 10, 1982, the Employer sent seniority lists to the UFW for the mixed lettuce and celery crews;

18. On December 9, 1982, the Employer's attorney, Rob Roy, had a telephone conversation with Gerardo Puente, the UFW representative, wherein the UFW indicated that it agreed to the Employer's November 10, 1982, wage proposal and the UFW confirmed this conversation in a letter dated December 10, 1982; ...

19. On December 14, 1982, the Employer's attorney sent a letter to the UFW in response to the UFW's letter dated November 10, 1982, rejecting the Union's position on wage retroactivity; . . .

20. On Thursday, December 16 and Friday, December 17, 1982, the Employer utilized the services of a celery transplanting crew from H. Larry Martinez without first notifying the UFW. This crew was also utilized during the following week on December 22 and 23, 1982. The "steady" employees of T.N.H. Farms who customarily perform this work were concurrently employed by T.N.H. harvesting spinach;

21. On Thursday, December 14 and Wednesday, December 15, 1982, the Employer without notice to the UFW, hired, through H. Larry Martinez, eight (8) celery harvest workers who were regularly employed with Martinez at Pleasant Valley Vegetable Co-Op, but who were not employed harvesting celery at P.V.V.C. on said dates since there was no work in celery. This period coincided with the decertification eligibility period;

22. On Monday, December 20, 1982, the UFW's representative, Mr. Puente, and Mr. Roy, had a telephone conversation concerning the status of negotiations for the mixed lettuce and celery crews;

23. The Union position in negotiations for the contract with respect to the celery harvest crew, was that the work should be covered by the collective bargaining agreement;

24. The Company's position, during negotiations for the first contract, was that this operation was custom harvested and should not be in the unit under contract but should be decided by the ALRB;

25. The Union and T.N.H. signed a collective bargaining agreement in May of 1982, effective March 11, 1982;

26. The parties signed a letter of understanding, re: subcontracting, attached to the collective bargaining agreement, . . . herein, in May, 1982;

27. In September, 1982, the Union filed a petition to clarify the bargaining unit with the executive secretary of the ALRB. The Union's position was that the celery harvest operation should be covered under the contract.

As shown in the above and further stipulations, the employer hired additional workers for celery harvesting and transplanting and to work in the "steadies" crew at or near the time of the circulation of the decertification petition. Most of these employees were engaged for only one or two days. However, given the fact that they were employed in the payroll period immediately preceding the filing of the petition, they were eligible to vote in the election (see Labor Code section 1157). The thrust of the Union's objections was that the workers so hired were specifically retained to vote out the Union. As evidence in support of this contention, it cites the fact that, among other things, it was not notified of the need for the additional employees, nor of the fact that workers were actually hired.<sup>6/</sup>

---

6. The collective bargaining agreement between the parties contains a provision regarding hiring (Article 3). The seniority provision (Article 4) also refers to employee hiring. As the

(Footnote continued----)

It is recommended that the objections be dismissed for what may be termed a broad failure of proof. As will be more fully discussed below, there is no evidence to support the contention that the company was even aware that a decertification effort was afoot, much less actively seeking to employ workers who they assumed would vote against the Union.<sup>7/</sup> Further, the company was able to provide

---

(Footnote 6 continued—)

hearing opened, I informed the parties that, strictly speaking, I would not be interpreting the language of the contract, or deciding whether or not certain contractual provisions were observed when the workers in question were retained.

However, the parties subsequently stipulated that the employer did not use formal applications (for hiring) in 1982 as per the contract; that the company "did not use the contractual procedures in re-calling and re-hiring the 1982 celery harvest employees"; that on December 10, 12 and 14, 1982, three, one and one new hires, respectively, were made for the "steadies" crew, all without following the contract hiring provisions.

It should further be noted for the record that the hiring article contains language that "crew foremen and labor contractors shall not have authority to hire"; "all prospective employees shall fill out and sign an application"; that the company is to notify the Union if it "anticipates the need for new or additional workers," but only "at the beginning of any operating season" (the pertinent season was already well underway); that the "Company shall notify the Union in writing within forty-eight hours of the date of hire of the names, social security numbers, etc." of the new employees (the parties stipulated that the Union was not notified of the hiring of workers in question); and lastly, that disputes arising under the hiring provisions were "expressly understood and agreed" to be "subject to the Grievance and Arbitration Procedure of this Agreement."

The Seniority provision of the contract states that "the filling of vacancies [and] new jobs . . . shall be on the basis of seniority."

7. In her opening statement, the Union representative characterized the situation as one where the employer "created an artificial . . . work force, consciously hand picking the employees who worked at TNH in November and December of 1982 to decertify the Union."

ample justification for hiring the workers when it did, based upon the exigencies of its business.

C. Factual Discussion and Analysis

1. The Union's Witnesses

The sum total of the Union's testimonial evidence was significant not so much for what it contained, but for what it did not contain. Despite the principal assertion by the Union that workers were hired to vote the Union out, no testimony was presented from any worker that they were asked their feelings about the Union prior to being put to work for the employer, or that such employment was somehow conditioned on the expression of an anti-Union attitude. Nor was there any evidence linking the employer to the decertification drive itself, or that the employer carried on any sort of campaign whatsoever prior to the election.

The two groups<sup>8/</sup> which the Union maintains were inserted "artificially" in the employer's work force consisted of a celery transplanting crew comprised of twenty-two workers, and a celery harvesting "burra" or "hump", comprised of eight workers.<sup>9/</sup> The ballots for the election were tallied separately for each of the company's various employee groups. At the time of the election, these groups consisted of the "steady" or "permanent" workers; the mixed lettuce crew; the transplant crew; and the celery harvesting

---

8. As indicated above, individual workers were hired for the "steadies" crew a week or two prior to the time of the decertification drive. The details of their retention are recounted infra.

9. Three cutters, three packers, one loader and one closer are contained in a "hump."

crew which contained the additional "burra." Significantly, the separate ballot tally showed that the transplant crew, allegedly retained to vote the Union put, voted in favor of the Union by a twelve to one margin.<sup>10/</sup>

The testimony from the Union's witnesses itself can best be characterized as inconclusive. Worker Victor Becerra testified that he attempted to find work with the employer in the celery harvest on three separate occasions, and was not hired. He placed the dates of his visits to the company offices on the 19th and 21st of November, and the 15th of December, 1982. Each time, he stated, he was in a group of about fifteen others seeking work. At the office, "office manager"<sup>11/</sup> Chiye Takeuchi referred them to a foreman and/or contractor in the field.<sup>12/</sup> Although Becerra stated that he was on strike at West Foods when he sought work with the employer, there was no indication in any aspect of his testimony that he or any of the others accompanying him somehow demonstrated a connection with, or a preference for, the Union.

---

10. The tally per crew was as follows:

	<u>UFW</u>	<u>No Union</u>
Celery Crew:	3	14
	(Challenged 3, Void 1)	
Permanents (Steadies):	5	8
Lettuce Crew:	2	6
Transplant Crew:	12	1

11. Ms. Takeuchi's position with the company is discussed below at greater length.

12. Becerra stated this happened on the last two occasions when he visited the office. On the first occasion, Ms. Takeuchi was on her way out and no hiring referral was made.

Chiye Takeuchi, whose "official title" with the employer is "office manager," could more accurately be described as general manager for the company. She is the wife of one of the owners (the "T" in TNH); she is responsible for collective bargaining, and authorized to negotiate and make agreements with the Union on the company's behalf? she is involved in, and directs, to a certain extent, the day-to-day operations of the company; and she possesses and exercises the authority to hire field employees. Ms. Takeuchi controverted Becerra's testimony in several particulars. Although Becerra claimed to be "absolutely sure" of the dates when he sought employment, and that he spoke with Chiye Takeuchi on such occasions, the manager herself denied remembering seeing Victor Becerra at any time. Further, she stated that she does not work on Sundays. Becerra, on the other hand, maintained that he spoke with her on November 21, which was a Sunday. Although she recalled that some time in November a group of men sought work after she attended a meeting with the Union, she did not remember Becerra as being among them.

The Union did, in fact, file a grievance regarding the company's failure to hire certain individuals. Union representative Gerardo Puente sent the company a list of these individuals together with the "approximate dates" when they asked to be hired. Although Becerra's name appears on this list, the "approximate" dates recorded for him were November 7 and 15. More importantly, while the list contains the names of twelve individuals, the dates indicate that at no time did they appear at the company offices en masse. The highest number of workers listed for any one date was



five.

Given the testimony of Ms. Takeuchi and the grievance letter from the Union, it appears that Becerra was not being entirely candid in his recitation. Nevertheless, viewing Becerra's testimony in its most favorable light, it appears that Becerra was called as a witness to show that foremen and/or the contractor had authority to hire, the collective bargaining agreement notwithstanding. There was no direct showing that work was available at the times when Becerra applied.<sup>13/</sup>

Gerardo Pasillas, who worked at TNH in the celery under Larry Martinez in the spring of 1982, stated that he was not recalled to work in November. His name appears on the celery crew list compiled from payroll records extant at the end of the spring 1982. However, by November of that year Pasillas was working under Union contract at Santa Clara Produce, which, he admitted, paid more money than the work for the employer. Pasillas was presumably called to show that he had not been selected for work as per the seniority provisions in the collective bargaining agreement. As with Becerra, no evidence was presented that Pasillas at anytime during his tenure with the company manifested a preference for or an affiliation with the Union.<sup>14/</sup>

---

13. On the contrary, Ms. Takeuchi stated that the celery crews had been filled by December 15, the last time Becerra claimed to have visited the TNH office.

14. As reflected in the stipulations of the parties, members of the Martinez celery crews were not considered part of the bargaining unit until October 1982. Thus, Union membership, as per the Union security clause, was not required for Pasillas when he worked for the employer in the spring of 1982. Similarly, the contract provisions requiring the recall of seniority workers arguably would not be applicable to the Martinez celery crews.

Gerardo's cousin Tomasco Pasillas testified that he had worked in the last month of the celery season at TNH in the spring of 1982.<sup>15/</sup> When the celery harvest resumed, he was recalled by Martinez, and returned to work. Tomasco stated that Heriberto Garcia passed around the petition "so that the Union would not come in" during work. Tomasco did not hear the foreman, "Quico," who was standing nearby, ever tell Garcia to stop talking to the workers and get back to work. Tomasco further recalled that the company brought a group of seven to ten working to assist in the celery harvest during the second week of December. They worked for two or three days, then came back to the employer's premises to vote in the election.<sup>16/</sup> Pasillas further noted that there was "more production" when the extra workers were brought in.

Gilberto Vasquez was a member of the extra "hump" that was employed at TNH during December, 1982. Although he usually worked for Martinez at Pleasant Valley Vegetable Co-op, that company was on layoff at the time. He further stated that while he was working at TNH, the petition to take out the Union was circulated during a break. Soon thereafter he was recalled to work at Pleasant Valley. While working there, he was taken over to TNH to vote in the election, and was paid for two hours by Martinez.

---

15. The parties stipulated that Tomasco Pasillas<sup>1</sup> name first appeared on the Martinez payroll for TNH workers on April 30, 1982, in the celery harvest crew.

16. These employees were transported from jobs at Pleasant Valley Vegetable Co-op to the employer's premises on the day of the election. Martinez himself (as opposed to the employer) actually paid them for their time. The workers did not perform any actual work for TNH that day.

Yrineo Castaneda was apparently hired as a "seniority" employee. He had been employed by TNH previously in the spinach and parsley. In December, 1982, he asked a foreman, Manuel, for work, and was referred to the office, where he filled out an application. He obtained employment in the "steadies" crew and worked during the spinach season. Castaneda stated that the decertification petition was presented to the members of his crew during a break.<sup>17/</sup>

## 2. The Employer's Evidence

As its first witness, the employer called Larry Martinez' office manager, Jess Espinosa. Espinosa stated that in December, 1982 he received a call from Dennis Nacaba, a salesman for TNH. Nacaba said that the company's celery order for the next day had been increased, and that another hump should be added to the Martinez crew already working at TNH. Espinosa then contacted Florence Delatori (sic), a foreman nicknamed "Chato" who worked for Pleasant Valley Vegetable Co-op. Since Pleasant valley was not working that week, the hump could be made available. Chato was

---

17. Why Castaneda was called as a witness is not altogether clear. His recitation did little, if anything, to support any of the Union's election objections. However, his testimony is summarized in an effort to present a total picture of the content of the record. Notably, the parties stipulation regarding employment applications seems to counter Castaneda's assertion in this regard.

The testimony of Atanacio Martinez is viewed in a similar light. Martinez was hired by foreman "Hector" to work in the celery transplanting crew for three or four days in December 1982. He was recalled in order to be present for (and presumably vote in) the decertification election. Since he was employed elsewhere by that time, he asked his foreman if he might send a cousin in his stead. Martinez testified that he was told by his cousin that he voted. On cross-examination, Martinez stated that he was not told that he should vote a certain way in order to be hired by respondent.

given the responsibility for contacting the individual members of the hump and sending them to work at TNH.

Espinosa denied directly telling Chato that workers were needed specifically to vote in a decertification election, or that the company had informed him of such. Espinosa further denied even being aware that there was a decertification effort in progress when the additional workers were requested.

To counter the Union's assertion that the company had failed to recall seniority workers, Espinosa testified regarding his knowledge of the individual circumstances of several of them (i.e., working elsewhere, injuries, etc.) which would prevent them from returning to work for TNH. However, as he admitted on cross-examination, that knowledge was acquired by reports from company foremen or by reference to company records. While recognizing, as a purely evidentiary matter, that Espinosa's testimony was hearsay and, without corroboration, could not be used to support an ultimate finding (see, e.g., Abatti Farms (1977) 3 ALRB No. 83), the fact remains that, as he testified, seniority lists were supplied to the foremen prior to the start of the season, foremen were instructed to contact those people whose names were on the list, and that the foremen had reported back to him regarding those individuals who would not be returning to work.

Moises Mora, one such foreman, was subsequently called as a witness. He corroborated the fact that he received a seniority list from Espinosa for his (mixed lettuce) crew, and that he contacted or attempted to contact the people named on the list to inform them about the beginning of the harvest. Mora further supplied details

regarding the reasons he received about specific individuals who would not be returning to work for the employer. This evidence sufficiently counters the "course of conduct" objection arising from the Union's inference that seniority workers were not recalled and non-seniority workers hired in an effort to supplant employees who were arguably pro-Union.

Cal-Cel Marketing, Inc., is the sales agent for the celery harvested by TNH. It assembles orders from its purchaser-customers, then fills those orders with the produce from organizations, such as TNH, with which it has a marketing arrangement. Cal-Cel employees contact those organizations on a daily basis to request the quantity ordered by its customers. Richard Tanita, assistant sales manager for Cal-Cel, recalled contacting Dennis Nacaba of TNH in mid-December, 1982 regarding the increase in the number of cartons of celery ordered. He added that it was TNH's decision whether to augment their crews to fill the orders.

Invoices from Cal-Cel introduced into evidence revealed that the following numbers of cartons<sup>18/</sup> were received from TNH on the dates appearing opposite:<sup>19/</sup>

---

18. The cartons themselves differ in size according to the number of celery bunches per carton.

19. The employer later introduced a summary of the Martinez payroll records for these weeks, which also contained a reference to the number of cartons harvested at that time. Interestingly, there appears a discrepancy between the number of cartons invoiced by Cal-Cel and the number of cartons harvested as recorded by Martinez and reflected in the summary. Counsel for the Union did not seek a clarification, nor did she find inaccuracies in the summary although having the opportunity to inspect the underlying documents from which it was prepared. The pertinent portion of the Martinez summary is as follows:

(Footnote continued----)

<u>Date</u>	<u>Number of Cartons</u>
12/12/82	384
12/13/82	500
12/14/82	1,885
12/15/82	2,379
12/16/82	1,999
12/17/82	769
12/18/82	6
12/21/82	389
12/22/82	625
12/27/82	858
12/28/82	685
12/29/82	860
12/30/82	967
12/31/82	977

Obviously, the amount of celery harvested by the employer increased significantly during the week when the decertification petition was being circulated. If one were to accept the Union's premise that workers were hired for the primary purpose of participating in the decertification effort, one would also have to infer that the company and Cal-Cel purposefully increased the amount of celery harvested and sold to customers to further this design. Neither the evidence, nor plain logic, could reasonably support this conclusion.

Chiye Takeuchi was called as the company's final witness. Ms. Takeuchi explained that when the collective bargaining agreement with the Union was executed in May 1982, she understood that the status of the Martinez crews would be "set aside" pending a unit

---

(Footnote 19 continued—)

<u>Date</u>	<u>Celery Crew</u>	<u>Cartons</u>	<u>Payroll Period</u>
12/13/82	15	1,075	
12/14/82	24	2,170	
12/15/82	24	2,356	
12/16/82	18	1,771	12/15/82

clarification hearing. The issue was still unresolved when the company hired Martinez crews in late August and September 1982 to work in its KY bean harvest. The Union filed a grievance on the matter which was resolved in early November, with the company agreeing to pay the contract rate for those workers, plus fringe benefits.

By way of recapitulation, a unit clarification petition was filed by the Union on September 27, 1982. The company voluntarily agreed to include the Martinez workers in the unit on October 19, 1982, and, through its attorney, proposed to meet with the Union regarding bargaining with it over these workers' wages, hours and working conditions.<sup>20/</sup> Negotiations over these matters commenced soon thereafter, with the hiring of employees for the celery and mixed lettuce crews an issue under active consideration. The issue remained open until it was ostensibly resolved<sup>21/</sup> in late December 1982, as indicated both in Takeuchi's testimony and in the exchange of correspondence between Union and company representatives.

The Union's arguments regarding the applicability of the contract to the celery harvest and transplant workers, and the lack of company notification to the Union about work availability, reputedly in an effort to "oust the UFW" and assist the decertification effort, must be viewed in light of the foregoing events. These issues, at or near the time of the decertification

---

20. The unit clarification petition was accordingly dismissed.

21. An actual copy of an executed document memorializing the accord was not actually produced.

petition's circulation, were being actively negotiated. The Company did not, during this period, concede that it had an obligation to hire these workers or notify the Union concerning job openings as per the terms of the contract. Its utilizing Martinez to supply workers was consistent with its prior practice and its position in collective bargaining. Thus, the inference that it engaged in these acts to rid itself of the Union cannot easily be drawn, if at all.<sup>22/</sup>

In regard to the hiring of the "steady" employees, which the company conceded was not in accordance with the contract, Ms. Takeuchi explained that the five employees that were hired at this time were known to her, either because they had worked for her previously at TNH or Bee and Bee, or that the members of her family had done so. She denied hiring them for their pro or anti-Union sympathies. The employees were hired before Ms. Takeuchi claimed that she was aware of the decertification drive; no evidence whatsoever was presented that they participated in it. Furthermore, as the "steadies" crew vote was five for the Union and eight against, no conclusion as to the new workers' preferences can be reached. Similar to the hiring of the celery and transplant workers, no inferences concerning the retention of "steadies" can be drawn which would support the Union's objections.

Takeuchi testified further that the company did not engage

---

22. As noted above, the most damaging evidence to the Union's position regarding the transplant workers comes from the fact that although it was not notified about the need for them, those workers who were hired voted in favor of the Union twelve to one.



in any anti-Union or pro-Company campaign, nor did it authorize Martinez to engage in these activities. Indeed, she stated that in her relationship with the Union prior to decertification, she "had no problems at all."<sup>23/</sup> The Union's assertions that the company assisted or "instigated" the decertification drive have no support in the record. Merely permitting the circulation of the petition on company time or allowing employees to discuss, during working hours, getting rid of the Union has been held insufficient to support a finding of active employer instigation of or participation and assistance in a decertification campaign. (See, generally, Jack or Marion Radovich (1983) 9 ALRB No. 45; Interstate Mechanical Laboratories, Inc. (1943) 48 NLRB 551; Curtiss Way Corporation (1953) 145 NLRB 642.)

Given that crew's ballot tally, one of the weakest assertions made by the Union regarding objectionable election conduct concerned the hiring of the celery transplant crew. Ms. Takeuchi, nevertheless, was asked why this crew was hired in the manner in which it was. She explained that at the time in question, a number of celery plants were made available to the company. TNH had previously had problems obtaining these plants. The plants were being delivered at a time when the field were very wet due to heavy rains. The mechanical planter could not therefore be utilized.

Normally, the "steadies" crew performs the transplanting task. However, this crew was unavailable since it was already

---

23. The execution of the collective bargaining agreement and the apparently amicable resolution of grievance matters tends to support this assessment.

engaged in harvesting spinach and parsley that week. Because the celery had to be planted by hand, Takeuchi called Martinez to obtain approximately twenty-five workers for the job on December 16 and 17. Takeuchi denied any knowledge of the decertification effort at the time she obtained the celery transplant crew.

The transplant crew ballot tally and the above testimony notwithstanding, the retention of a crew of twenty-five without notifying the Union, in a week when eight other workers were hired on a short-term basis, and when a decertification petition was being circulated, might appear to be suspicious were it an isolated circumstance. However, documentary evidence revealed that Martinez transplant crews were commonly furnished to TNH throughout this period:

<u>Date Supplied</u>	<u>Number in Crew</u>	<u>Crop</u>
11/11/82	23	Celery
11/12/82	26	Celery
12/16/82	22	Celery
12/17/82	10	Napa
12/22/82	28	Celery
12/23/82	30	Napa
12/29/82	15	Celery
12/30/82	24	Celery

Therefore, no reliance can be placed on this circumstance to support the Union's objection that the celery transplant crew was retained "in an effort to oust the UFW."

/

/

/

/

/

/

IV. CONCLUSION

For all of the foregoing reasons, it is recommended that the Union's objections be dismissed, and the results of the election be certified.

DATED: February 3, 1984

  
\_\_\_\_\_  
MATHEW GOLDBERG  
Investigative Hearing Examiner