Exeter, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SEQUOIA ORANGE, CO.; EXETER ORANGE CO.; SEQUOIA ENTERPRISES; CARL A. PESCOSOLIDO, JR.; MARVIN L. WILSON; OLEAH H. WILSON; LINDA PESCOSOLIDO; WILLIAM PESCOSOLIDO; WILLIAM L. MARTIN II; RICHARD B. VIND; BADGER FARMING COMPANY; WILSON & WILSON; RICHARD J. PESCOSOLIDO; and DOES A-K, doing business as FOOTHILL FARMS, TROPICANA RANCH, VALLEY VIEW RANCH, SEQUOIA DEHYDRATOR/WEAVER,ENTERPRISE I, ENTERPRISE II, NORTH SLOPE RANCH, ROLLING HILLS RANCH, CAP RANCH, COUNTY LINE RANCH, HIATT RANCH, TEE DEE RANCH, JMW RANCH, KERN/CAMEO RANCH, PRICKETT RANCH, BURCH RANCH, MADERA 240 RANCH, MERRYMAN RANCH, OSO RANCH, and PANOCHE RANCH, a single agricultural employer, Respondent/Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner/Charging Party,	Case Nos. 83-RC-4-D 83-RC-4-1-D 83-CE-49-D 83-CE-50-D 83-CE-53-D 83-CE-56-D 11 ALRB No. 21

DECISION AND ORDER

On March 14, 1983,[1/] the United Farm Workers of America, AFL-CIO (UFW or Union) petitioned for an election among all the agricultural employees of two citrus packing houses, Sequoia Orange

[1/] Unless otherwise stated, all dates are 1983.

Company and Exeter Orange Company. The petition was amended to include all the agricultural employees of growers who pack into the above sheds as well as certain other related persons and entities.

On March 22, an election was conducted with the following result:

UFW.	198
No Union	74
Unresolved Challenged Ballots. . . .	279[2/]
Void Ballots.	8
Total.	559

On June 9, the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) set the following election objections for hearing:

> 1. Whether the petition improperly designated the employer or employing entities and, if so, whether such improper designation is grounds to set the election aside. In particular, the Board will hear evidence relating to:
>
> a) whether Jose Ontiveros and/or Alfred Padilla and/or Tony Padilla and/or Curtis Contracting Co., are labor contractors or custom harvesters (Objection No. 1);
>
> b) whether the petition improperly attempts to create a multi-employer bargaining unit (Objection No. 5).
>
> 2. Whether the scope of the bargaining unit was improperly designated and, if so, whether such improper designation is grounds to set the election aside. In particular, the Board will hear evidence relating to:
>
> a) whether an outcome determinative number of

[2/] This total includes the ballots of 165 packing shed employees.

individuals were employed by persons or entities not designated in the petition (Objection No. 6);

b) whether the votes of the packing shed employees should be counted (Objection No. 7);

c) whether the employees of Curtis Contracting Co., should have been permitted to vote (Objection No. 2);

d) whether the employees of Jose Ontiveros, Alfred Padilla and Tony Padilla were improperly permitted to vote (Objection No. 2).

3. Whether an outcome determinative number of eligible voters in two harvesting crews were disenfranchised and, if so, whether such disenfranchisement is proper grounds to set the election aside. In particular, the Board will hear evidence relating to:

a) whether the employees who worked on March 9, 1983 in Alfred Padilla's crew at Valley View Ranch and in Tony Padilla's crew at Tropicana Ranch were eligible to vote (Objection No. 8);

b) if the crew members were eligible to vote, whether an outcome determinative number of eligible voters were disenfranchised as the result of the Padilla's failure to include those employees' names on the eligibility list (Objection No. 8);

c) if the crew members were eligible to vote, whether the employees who worked on March 9, 1983, in the Padillas' crews at Valley View Ranch and at the Tropicana Ranch otherwise had notice of the election (Objection No. 8);

d) if the Padillas are labor contractors and their failure to include the names of eligible voters on the eligibility list is misconduct attributable to the Employer, whether the outcome determinative disenfranchisement of voters as the results of Employer misconduct is a proper basis for setting aside the election (Objection No. 8).

On May 10, a complaint issued against the above Respondents alleging certain unlawful conduct. This complaint was consolidated with the hearing on election objections. A hearing was held before Administrative Law Judge (ALJ) Matthew Goldberg on November 30, 1983 through December 6, 1983 and

April 23, 1984 through April 27, 1984. The ALJ issued his Decision on both the election objections and unfair labor practice complaint allegations on October 31, 1984. Timely exceptions to the ALJ's Decision with supporting briefs were filed by certain of the Respondents, the General Counsel and the UFW. Reply briefs were also timely filed by certain of the Respondents and the General Counsel.

Pursuant to section 1146 of the Agricultural Labor Relations Act (ALRA or Act), the Board[3/] has delegated its authority in this matter to a three member panel.

The Board has considered the Decision of the ALJ in light of the exceptions and supporting briefs and reply briefs and has decided to adopt the rulings, findings and conclusions of the ALJ with modifications and to adopt his recommended Order, with modifications.

ELECTION OBJECTIONS

Packing Shed Employees

The evidence adduced in this matter demonstrates that Sequoia Orange Company and Exeter Orange Company are two citrus packing houses managed by Marvin Wilson, Oleah Wilson, Richard Pescosolido, and Carl Pescosolido, Jr. Wilson & Wilson, a partnership, is the nominal employer of the packing shed workers (packers, graders, forklift drivers and loading dock employees) and provides payroll services to the packing shed. Badger Farming Company (Badger) manages the crops on the trees; that is, maintains

[3/] Chairperson James-Massengale did not participate in the consideration of this matter.

the orchards by handling irrigation, pruning, and pest and weed control. There exists employee interchange between the packing houses and Badger operations.

Further, the parties stipulated that:

> At the time of the filing of the election petition herein, Sequoia Orange Company, Exeter Orange Company, Sequoia Enterprises, Badger Farming Company, Wilson and Wilson, Foothill Farms, Tropicana Ranch, Valley View Ranch, Sequoia Dehydrator, DBA Weaver Ranch, Enterprises Ranch I, Enterprises Ranch II, North Slope Ranch, Rolling Hills Ranch, Canal Ranch, Cap Ranch, County Line Ranch, Hiatt Ranch, Tee Dee Ranch, JMW Ranches, Kern Ranch, also known as Cameo, Prickett and Prickett Ranch were affiliated business entities with common officers, common ownership, common directors, common management, and common supervisors; shared common premises and facilities; provided services for and made sales to each other; engaged in common advertising; interchanged personnel and equipment and held themselves out to the public as a single, integrated business enterprise and therefore, constitute a single, integrated employing entity.

The parties further stipulated that:

> During the year from November 1, 1982 to October 31, 1983, the only fruit packed by Sequoia Orange Company and Exeter Orange Company was grown on the ranches included in the single employer previously stipulated to, and was cultivated by Badger Farming Company with the exception of fruit from Gardikas-Merryman Ranch and Burch Ranch. The fruit from these ranches represented less than three percent of the total volume of fruit packed by Sequoia Orange Company and Exeter Orange Company during this time period. Prior to November 1, 1982, a percentage of fruit packed by Sequoia Orange Company and Exeter Orange Company for outside growers was such as to render the packing houses commercial and not subject to the jurisdiction of the ALRB.

The ALJ found that the evidence described above rendered the packing shed employees agricultural employees and hence eligible voters. He accordingly directed that the challenged ballots of the packing shed employees be opened and tallied.

We agree.

We have broadly defined "agricultural employee" to include all employees excluded as agricultural employees from the jurisdiction of the National Labor Relations Act (NLRA) (29 USC § 140 et seq.). (Napa Valley Vineyards (1977) 3 ALRB No. 22, p. 3; see § 1140.4(b) of the Act and 29 USC §152(3).) An agricultural employee is defined by the Act as a person engaged in agriculture. Agriculture is defined as including:

> ... farming in all of its branches, and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities..., the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market.
> (Section 1140.4(a) of the Act.) (Emphasis added.)

This definition is taken from section 3(f) of the Fair Labor Standards Act (FLSA) (29 USC 203(f)). The leading case on this section of the FLSA (and therefore ALRA and NLRA) is Farmers Reservoir and Irrigation Co. (FRIC) v. MeComb (1949) 337 U.S. 755 [69 S.Ct. 1274]. In FRIC, a group of farmers formed an independent co-op (Co-op) to handle their collective water needs. The Co-op delivered the water with its own employees to the gates of the member-farmers' fields and the individual farmers would release the water as directed. The question before the Supreme Court was whether the Co-op's employees were engaged in agriculture. The Court's analysis noted that the definition of "argiculture" had two components: those things done directly on

the farm by the farmer, so-called primary farming operations, and those things done incident to or in conjunction with the primary farming operations. The Court held that the Co-op's employees were not agricultural employees in either sense since the Co-op was not a farmer and since the delivery of water was not work done on the farm. In an aside, the Court stated that packing shed workers are engaged in agriculture only if packing primarily the produce of their own employer who is a farmer. (FRIC, supra, 337 U.S. at 766, fn. 15.)

We have consistently applied the FRIC test to determine when packing shed employees are agricultural. We have emphasized that the total circumstances of employment are relevant to determine whether the employer is engaged in agriculture and the packing operation is agricultural. Specifically, we have held that if the packing shed operation does not pack a significant percentage of produce for independent growers, the workers are engaged in agriculture. (Grow Art (1981) 7 ALRB No. 19; Transplant Nursery, Inc. (1979) 5 ALRB No. 49; Carl Joseph Maggio, Inc. (1976) 2 ALRB No. 9, p. 9.) The NLRB utilizes the same test. (The Garin Company (1964) 148 NLRB 1499 [57 LRRM 1175] [Packing 15% of the total volume for independent growers rendered the packing shed employees non-agricultural]; Employer Members of Grower-Shipper Vegetable Assn. (1977) 230 NLRB 1011, 1016 [96 LRRM 1054]. [Drivers hauling produce, 90% of which was grown by the employer, were agricultural employees.])

Neither Hodgson v. Idaho Trout Processing Company (9th Cir. 1974) 497 F.2d 58, nor North Whittier Heights Citrus

Ass'n v. NLRB (9th Cir. 1940) 109 F.2d 76, cited by the UFW, dictate a different result here. In Idaho Trout Processing Company, the court held that employees of the processing company were not agricultural despite the fact that the processing company was formed by three trout farms. The court emphasized the formal separation and division of function between the processing plant and the farms, finding the situation more analogous to that in the FRIC case. Here, there is some interchange of employees between the packinghouse workers and the farm-maintenance operations of Badger Farming Company. Further, .the shed, through its field superintendent, Tony Padilla, employs seven harvesting crews directly and 97% of the produce packed was grown by the single employing entity. North Whittier Heights Citrus Ass'n v. NLRB is an early (pre-FRIC) case where the NLRB asserted jurisdiction over a packing house handling citrus for some 200 citrus fruit growers. The court's analysis was directed to differentiating "agricultural" operations from "industrial" operations. The common denominator was found to be that "agricultural" operations, meaning small family farms, do not cause situations leading to strikes and other labor strife. To the extent this analysis is merely a rudimentary form of the presently accepted commercial/agricultural distinction, it is important to note that in Whittier Heights the packing house was engaged in "industry" because the farmer ceased his or her control upon delivery to the independent commercial operations. In the instant situation, however, the farmer never ceases control nor delivers the fruit to an independent, commercial operation.

We accordingly direct the Regional Director to open and tally the 165 challenged ballots cast by packing shed employees and issue a new amended tally of ballots.

Custom Harvester/Labor Contractor

The ALJ found Curtis Contracting, Inc., Alfred Padilla and Jose (Jesse) Ontiveros to be labor contractors as defined by the Act and Board precedent. He further found that the failure to notify the Curtis employees was not attributable to the employer and he recommended that if the failure of the 54 Curtis employees to vote could affect the outcome of the election, the election should be set aside.

We agree with the ALJ's analysis regarding the labor contractor status of the three harvesting entities[4/] and dismiss the election objections regarding those employees. However, we do not, at this time, decide the effect on the election of the failure to notify Curtis Contracting employees. Rather we direct that, following the issuance of a revised tally including the packing shed employees, the Regional Director will in the event that the remaining 114 challenged ballots are outcome determinative, promptly and expeditiously, issue a Challenged Ballot Report resolving the challenges to all outstanding challenged ballots. Upon the issuance of the Regional Director's report resolving challenges, parties may file exceptions pursuant

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[4/] The UFW objections to the inclusion of Curtis Contracting employees are more appropriately directed towards the scope of the bargaining unit here. Absent evidence of the inappropriateness of a bargaining unit including all agricultural employees of an employer, we will not disturb that bargaining unit designation. (See, e.g., Exeter Packing (1984) 9 ALRB No. 76.)

to 8 Cal. Admin. Code section 20363(b). Any such exceptions should address the question of the effect, if any, of inadequate notice to Curtis Contracting employees, packing shed employees and those employees of Anthony Padilla, Tony Padilla and Jesse Ontiveros, including truck drivers, upon the election. Specifically, the parties should address the effect of prior decisions holding that, due to the speed with which ALRB elections must be set following the filing of election petitions, the parties to ALRB elections must shoulder some of the responsibility of notifying the eligible (or arguably eligible) employees. (See, e.g., Lu-Ette Farms (1976) 2 ALRB No. 49; Sun World Packing Corp. (1978) 4 ALRB No. 23; Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99; J. Oberti , Inc. (1984.) 10 ALRB No. 50; Grow Art (1981) 7 ALRB No. 32. But see, Perry Farms, Inc. v. ALRB (1978) 86 Cal.App.3d 448, 473.) If the 114 remaining challenges are not outcome determinative, the parties may, within five days from the issuance of the revised tally of ballots, submit briefs to the Board addressing the specific issues enumerated above.

Unfair Labor Practices

Regarding the unfair labor practices found by the ALJ, we adopt the rulings, findings,[5/] and conclusions[6/] of the ALJ.

ORDER

By authority of section 1160.3 of the Agricultural Labor

[5/] Respondent has excepted to certain of the credibility findings of the ALJ. To the exent that an ALJ's credibility resolutions are based on the demeanor of the witnesses, we will not disturb them unless the clear preponderance of the relevant evidence

(Fns. 5 and 6 cont. on p. 11.)

Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Sequoia Orange, et al., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(Fn. 5 cont.)

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].) Our review of the record herein indicates that the ALJ's credibility resolutions are supported by the record as a whole.

6/ Certain of the stipulated single employer components attempted to withdraw from their earlier stipulation and to object to the representation of part of the single employer entity as representation of the whole.

The ALJ found that the stipulations of the parties entered into during the representational phase carried over into the unfair labor practice phase and presumptively establish the facts to which the stipulation applied. He noted that such stipulations would also constitute authorized and adoptive admissions. We agree, and further note Respondent has not shown that fundamental fairness or due process requires the stipulation to be set aside. In an analogous situation, the California Supreme Court recently concluded that an attorney could not be relieved of the effect of a stipulation as to certain facts, despite unforeseen collateral effects of those stipulations. (Smith v. State Bar (1985) 38 Cal.3d 525.) The Court, after noting the salutary purpose of stipulations, stated: "Petitioner has not demonstrated that he was denied a fair hearing simply because he voluntarily entered into a stipulation without knowledge of another complaint which had been filed against him." (Id. 38 Cal.3d at 532.) In the present matter, objecting respondents entered into the stipulation with knowledge of the other proceeding pending against them. (See, also, Sangamo Western, Inc. (1980) 251 NLRB 1597 [105 LRRM 1646],[A leadman was found to be the employer's agent because in an earlier proceeding the employer stipulated that the leadman was a supervisor, and the stipulation was found to be an admission against interest]. But, see, Servomation, Inc. (1978) 235 NLRB 975 [100 LRRM 1192] [Stipulation that included leadmen in the rank-and-file bargaining unit did not foreclose testimony regarding their supervisor status in later proceedings.]

In entering into the stipulations herein, all parties were represented by counsel, and were aware of the consequences of the stipulation. There is no showing that "fundamental concepts of fairness and due process require that the stipulation be set aside since it is based on a material excusable mistake of fact." (Smith v. State Bar, supra, 38 Cal.3d at 532.)

(a) Discharging, refusing to rehire, or otherwise discriminating against, any agricultural employee for engaging in union activity or other protected concerted activity.

(b) 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 the following individuals immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges:

(1) Tomas Sanchez and the members of his crew who were working on March 6, 1983;

(2) Ramon Cisneros;

(3) Josefina Cisneros;

(4) Rosa Cisneros;

(5) Francisco Cisneros;

(6) Florentine Cisneros;

(7) Roberto Cisneros;

(8) Hilario Robledo; and

(9) Genaro Flores and the members of his crew who worked during the 1982-83 navel orange harvest.

(b) Make whole the above-named individuals for all losses they have suffered as a result of Respondent's unlawful discharges, the makewhole amount 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) 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 amount of backpay due under the terms of this Order.

(d) 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed by Respondent at any time during the period from March 6, 1983 to March 6, 1984.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, 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.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate langauges 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 and 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 to compensate them for worktime lost at this reading and the question-and-answer period.

(h) 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: September 17, 1985

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

MEMBER KENNING, Concurring and Dissenting:

I concur in the majority opinion but would find that Respondent, through its labor contractor Alfred Padilla, discriminatorily refused to rehire foremen Cornelio Lopez, Gregorio Gonzalez and Miguel Sanchez. Through the simple ploy of promising these three foremen rehire and then failing to recall them, Respondent rid itself of three crews containing some of its most active union supporters.

Following a highly suspicious and apparently unique disruption in the normal level of Respondent's harvesting operation which resulted in the layoff of these three foremen, Padilla testified that he told all three foremen, consistent with his past practice following layoffs, that he would recall them and

their crews in November.[1/] He did not do so.

Further, the ALJ found that Foreman Genaro Flores was deserving of protection from Padilla's discrimination partially by reason of his seniority. Yet Lopez, Sanchez and Gonzalez were senior to foremen hired by Padilla to replace them. Finally, the record contains unrebutted testimony from Lopez (elicited by Respondent's attorney on cross-examination) that when Lopez subsequently sought non-supervisory work from Padilla, Padilla denied him work because of his union activity.

Accordingly, I would reverse the ALJ and order Respondent to reinstate and make whole foremen Cornelio Lopez, Gregario Gonzalez, and Miguel Sanchez and their crews.

Dated: September 17, 1985

PATRICK W. HENNING, Member

[1/] Padilla testified that he promised Lopez, "maybe we would call him back in November." Padilla was an otherwise untrustworthy witness in the ALJ's opinion. See p. 29, n. 43 of the ALJ's Decision where the ALJ states:

> Alfred Padilla's testimony was rife with such inconsistencies and shifts, indicating a decided lack of candor. Other examples will appear below. As such, I am constrained not to credit his testimony where it conflicts with that of other witnesses.

Here, however, the ALJ inexplicably credits Padilla's version of the promised recall over that of the three foremen.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint which alleged that we, Sequoia Orange Company, et al., had vioated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging and/or refusing to rehire Tomas Sanchez and his crew, Ramon Cisneros, Josefina Cisneros, Rosa Cisneros, Francisco Cisneros, Florentino Cisneros, Roberto Cisneros, Hilario Robledo, and Genaro Flores and the members of his crew because of their protected concerted activities and/or their support for the United Farm Workers of America, AFL-CIO (UFW). The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

WE WILL NOT discharge or refuse to rehire or otherwise discriminate against any employee because he or she has joined or supported the UFW or any other labor organization or has exercised any other rights described above.

WE WILL reinstate the people named above to their former or substantially equivalent jobs and we will reimburse them for all losses of pay and other economic losses they have sustained as a result of our discriminatory acts against them, plus interest.

Dated: SEQUOIA ORANGE CO., et al.

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) 725-5770.

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

11 ALRB No. 21 D0 NOT REMOVE OR MUTILATE.

CASE SUMMARY

SEQUOIA ORANGE, CO., et al . (UFW)
Case Nos. 83-RC-4-D, et al.
11 ALRB No. 21

ALJ DECISION

On March 14, 1983, the UFW petitioned for an election among all the agricultural employees of two citrus packing houses, Sequoia Orange Company and Exeter Orange Company. The petition was amended to include all the growers who pack into the two packing houses as well. An election was held on March 22 with the following result:

UFW	198
No Union	74
Challenged Ballots	279
Void_	8
Total	559

Certain election objections were filed and consolidated with certain unfair labor practices which were charged against the packing houses and others.

The parties stipulated that the packing houses, the ranches which packed into the packing houses, the company which maintained the citrus groves and the partnership which supplied the payroll services as well as a labor contractor, manifested nearly all the indicia of a single employer. The parties further stipulated that the packing houses, during the relevant times, packed citrus grown on ranches forming part of the single employer (except for less than three percent).

The ALJ found that the employees of the packing shed were agricultural employees and hence entitled to vote. He accordingly recommended that the 165 challenged ballots cast by those employees be tallied.

The ALJ found that three harvesting organizations employed by the packing sheds were labor contractors under the Act and that the employees of those harvesters were therefore eligible voters in the above election. He found that one harvester did not receive notice of the election because the Regional Director determined that she was a custom harvester. He ordered that should the 54 disenfranchised eligible voters prove outcome determinative, that this election be set aside. The ALJ further ruled that certain employees of the other harvesters who did not receive notice of the election, did not receive notice due to the failure of the employer to submit their names on an eligibility list. He accordingly recommended that the disenfranchisement of these voters not be considered in the resolution of this election.

Turning to the ULP charges, the ALJ found that a foreman for

the labor contractor employed by the sheds was discharged for requesting higher wages for his crew. The ALJ determined that the foreman was entitled to assert the protections of the Act, protections generally denied supervisors, because the crew members' tenure was expressly conditioned on the continued employment of the foreman. The ALJ found that the foreman had been fired as a method of retaliating against the crew for their protected activities. He rejected the defense that the foreman had actually been fired for cause.

The ALJ found that a group of employees of another crew had been unlawfully denied rehire following a one-day work stoppage to request higher wages. The ALJ found that the employees had not been replaced following their stoppage and had unconditionally requested reemployment.

The ALJ further found that three other foremen had been lawfully laid off following a reduction in harvesting operations. The ALJ ruled that the three foremen had failed to request their jobs back following the resumption of full operations. At the time employment was requested, the three had been replaced. He, however, did find that a fourth foreman, following an excused absence, was unlawfully refused rehire despite his timely request for reinstatement.

BOARD DECISION

The Board adopted the ALJ's rulings regarding the labor contractors and packing shed workers. The Board however reserved ruling on the disenfranchised voters pending further briefing. The Board directed that all outstanding challenged ballots that may be outcome determinative be resolved and in any further briefing, the parties address the obligation of the participants to ALRB elections to notify voters themselves.

Regarding the ULP findings of the ALJ, the Board adopted his rulings, findings and conclusions and issued his recommended order.

DISSENTING OPINION

Member Henning dissented regarding the three foremen who allegedly failed to request employment following layoff. He would find that the employer promised to recall the three foremen and by failing to do so, rid itself of the three most active union crews in its operations. Member Henning dissented to the failure to order that the three foremen and their crews be offered reinstatement and back pay.

* * *

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:	Case Nos. 83-RC-4-D
	83-RC-4-1-D
SEQUOIA ORANGE, CO., EXETER ORANGE CO., SEQUOIA ENTERPRISES, CARL A. PESCOSOLIDO, JR., MARVIN L. WILSON, OLEAH H. WILSON, LINDA PESCOSOLIDO, WILLIAM PESCOSOLIDO, WILLIAM L. MARTIN II, RICHARD B. VIND, BADGER FARMING COMPANY, WILSON & WILSON, RICHARD J. PESCOSOLIDO, and DOES A-K, doing business as FOOTHILL FARMS, TROPICANA RANCH, VALLEY VIEW RANCH, SEQUOIA DEHYDRATOR/WEAVER, ENTERPRISE I, ENTERPRISE II, NORTH SLOPE RANCH, ROLLING HILLS RANCH, CAP RANCH, COUNTY LINE RANCH, HIATT RANCH, TEE DEE RANCH, JMW RANCH, KERN/CAMEO RANCH, PRICKETT RANCH, BURCH RANCH, MADERA 240 RANCH, MERRYMAN RANCH, OSO RANCH, and PANOCHE RANCH, a single agricultural employer,	83-CE-49-D
	83-CE-50-D
	83-CE-53-D
	83-CE-56-D
Respondent/Employer,	
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Petitioner/Charging Party.	

Appearances :

Nancy Bramberg, Esq., for the General Counsel

Ned Dunphy,
for the United Farm Workers of America, AFL-CIO
Charging Party

Keith Hunsaker,
Seyfarth, Shaw, Fairweather & Geraldson
for Certain Respondents [1/]

Littler, Mendelson, Fastiff & Tichy [2/]
for Certain Respondents [3/]

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Footnotes contained on following page.

1. Mr. Hunsaker's firm represented, at one point, Sequoia Orange Company, Sequoia Enterprises, Marvin Wilson, Oleah Wilson, Wilson & Wilson, Sequoia Dehydrator/Weaver Ranch, Enterprises Ranch I, Rolling Hills Ranch, Gardikas-Merryman Ranch, Canal Ranch, JMW Ranch, Burch Ranch, Madera 240 Ranch, Merryman Ranch, Oso Ranch, and Panoche Ranch. Mr. Hunsaker and his firm withdrew from representing these particular entities at the unfair labor practice stage of the proceedings. The principals of certain of these ranches maintained that Mr. Hunsaker could not continue to represent them due to a "conflict of interest," but neglected to elaborate or explain exactly what conflict may or may not have existed above. The effect of the withdrawal of Mr. Hunsaker's firm is discussed below.

2. At various times, the following individuals associated with that law firm represented certain of the employer/respondents: Robert Carrol; Robert Drake; and Spencer Hipp.

3. The law firm specifically represented employer/respondents Carl A. Pescosolido, Jr., Linda A. Pescosolido, William L. Martin II, Richard B. Vind, Richard J. Pescosolido, Badger Farming Company, Foothill Farms, Tropicana Ranch, Valley View Ranches, Enterprise Ranch II, North Slope Ranch, Cap Ranch, County Line Ranch, Hiatt Ranch, Tee Dee Ranch, Kern Ranch, Cameo Ranch and Prickett Ranch.

I. STATEMENT OF THE CASE

On March 14, 1983,[4/] the United Farm Workers of America, AFL-CIO (hereafter referred to as "the Union"), filed a Petition for Certification in case number 83-RC-4-D in order that a representation election be held in a unit then defined as the "citrus agricultural employees" of Sequoia Orange/Exeter Orange and Sequoia Enterprises in the State of California. On March 16 this petition was amended so that the unit description read "all agricultural employees of Sequoia Orange Co./Exeter Orange Co./Sequoia Enterprises and all growers who pack in to Sequoia Orange Co., Exeter Orange Co., and Sequoia Enterprises, including Oleah Wilson, Marvin Wilson, Wilson & Wilson, Carl Pescosolido and Linda Pescosolido, Sequoia Ranch, and Richard Pescosolido in the State of California."

The Response to the Petition, filed on March 18 on behalf of the unit components listed in the aforementioned amended petition,[5/] contended, inter alia, that the unit description was defective, and that the employer(s) utilized four "custom harvesters" to pick the fruit which was packed and shipped at the Terra Bella and Exeter, California[6/] packing sheds.

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4. All dates refer to 1983 unless otherwise noted.

5. The Response also noted that "there is no entity known as Sequoia Ranch."

6. Sequoia Orange Company is the name of the entity comprised of the packing shed located in Exeter, California. Exeter Orange Company is the name of the packing shed located in Terra Bella, California.

A Notice and Direction of Election was issued, ordering that a representation election be held on March 22 among the workers in the unit described as follows: "All agricultural employees of Sequoia Orange Co./Exeter Orange Co./Sequoia Enterprises and all growers who pack into Sequoia Orange Co., Exeter Orange Co., and Sequoia Enterprises, including Oleah Wilson, Marvin Wilson, Wilson & Wilson, Carl Pescosolido and Linda Pescosolido, Sequoia Ranch, and Richard Pescosolido in the State of California." The Tally of Ballots issued after the election showed the following:

1. Votes cast for:

UFW	198
No Union	74
2. Number of unresolved challenged ballots	114
3. Total number of all ballots including unresolved challenged ballots	386
Number of void ballots:	8
Total number of voters:	394
Number of names on list:	596

In addition, a total of 135 (one hundred thirty-five) packing shed employees[7/] cast challenged ballots which were not included in the official Tally.

The "employer(s)"[8/] named on the amended petition duly

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7. A discrepancy, discussed infra, arose between this figure and that submitted by stipulation of the parties.

8. The description of the actual "employer" with which this proceeding is concerned is set forth below.

filed Objections to the Conduct of the Election. These objections eventually[9/] ripened into the following issues which the Executive Secretary, on September 19, set for the instant hearing:

1. Whether the petition improperly designated the employer or employing entities and, if so, whether such improper designation is grounds to set the election aside. In particular, the Board will hear evidence relating to:

a) whether Jose Ontiveros and/or Alfred Padilla and/or Tony Padilla and/or Curtis Contracting Co. are labor contractors or custom harvesters (Objection No. 1);

b) whether the petition improperly attempts to create a multi-employer bargaining unit (Objection No. 5).[10/]

2. Whether the scope of the bargaining unit was improperly designated and, if so, whether such improper designation is grounds to set the election aside. In particular, the Board will hear evidence relating to:

a) whether an outcome determinative number of individuals were employed by persons or entities not designated in the petition (Objection No. 6);

b) whether the votes of the packing shed employees should be counted (Objection No. 7);

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9. The objections ultimately set for hearing contained amendments to the initial Executive Secretary's Notice of Objections Set for Hearing issued June 9.

10. This objection was rendered moot by the parties' stipulation that the varying entities involved herein comprised a single, integrated employing unit. Hence, it will not be considered.

c) whether the employees of Curtis Contracting Co. should have been permitted to vote (Objection No. 2);

d) whether the employees of Jose Ontiveros, Aflred Padilla and Tony Padilla were improperly permitted to vote (Objection No. 2).

3. Whether an outcome determinative number of eligible voters in two harvesting crews were disenfranchised and, if so, Whether such disenfranchisement is proper grounds to set the election aside. In particular, the Board will hear evidence relating to:

a) whether the employees who worked on March 9, 1983 in Alfred Padilla's crew at Valley View Ranch and in Tony Padilla's crew at Tropicana Ranch were eligible to vote (Objection No. 8);

b) if the crew members were eligible to vote, whether an outcome determinative number of eligible voters were disenfranchised as the result of the Padillas[1] failure to include those employees' names on the eligibility list (Objection No. 8);

c) if the crew members were eligible to vote, whether the employees who worked on March 9, 1983 in the Padillas' crews at Valley View Ranch and at Tropicana Ranch otherwise had notice of the election (Objection No. 8);[11/]

d) if the Padillas are labor contractors and their failure to include the names of eligible voters on the eligibility list is misconduct attributable to the Employer, whether the outcome determinative disenfranchisement of voters as the result of Employer

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11. The parties stipulated (see infra) that these workers did not receive notice of the election.

misconduct is a proper basis for setting aside the election (Objection No. 8).

In the meantime, commencing March 25, the Union filed a series of unfair labor practices involving the employer.[12/] The dates that the charges were filed and when they were served on respondent are as follows:

Charge Number	Date Filed and Served
83-CE-49-D	March 25
83-CE-50-D	March 25
83-CE-53-D	March 29
83-CE-56-D	April 08

The charges alleged various violations of sections 1153(a) and (c) of the Act.

The General Counsel caused to be issued, on May 10, 1983, the initial complaint encompassing some of the matters noted on the aforementioned charges. The employer subsequently filed a timely answer to this complaint, essentially denying the commission of any unfair labor practices.

Following a series of amendments and notices of consolidation with the aforementioned election objections, a "Fourth Amended Consolidated Complaint" was issued on December 2.[13/] That complaint alleged that the employer/respondent committed the

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12. The charges variously named the "employer" as Sequoia Orange Co./Exeter Orange or Sequoia Orange Co./Exeter Orange/Sequoia Enterprises. As hereinafter referred to, the employer shall mean the "single, integrated business enterprise" comprised of the various components listed in Stipulation 1 of the parties, infra. This employer will also be referred to below, at various times, as "Sequoia," "respondent," the "company," the "shed," the "packing sheds," or the "packing houses."

13. All charges, pleadings and notices of hearing were duly served on respondent.

following unfair labor practices:

1. On or about March 6, 1983, Respondents, through labor contractors Tony Padilla, discharged the crew of Tomas Sanchez because the crew, through Tomas Sanchez, requested an increase in the piece-rate wage.[14/]

2. Since on or about March 23, 1983, and continuing thereafter, Respondents, through their agents, including but not limited to Tony and Alfred Padilla, have discriminated against the members of the crews of crew bosses Gregorio Gonzalez, Cornelio Lopez, Miguel Sanchez, and Genaro Flores by reducing the number of bins of citrus to be picked per day, even though more work was available. Said work reduction occurred because of the union support of these employees and in retaliation for the UFW's apparent election victory of March 22, 1983.

3. On or about April 7, 1983, Respondents, through their agents, including Tony and Alfred Padilla, discharged all agricultural employees in the crews of Gregorio Gonzales, Cornelio Lopez, and Miguel Sanchez because of their union activity and support, and in retaliation for the UFW's apparent election victory.

4. On or about August 29, 1983, and continuing thereafter, Respondents, through their agent Alfred Padilla, failed and refused to recall foremen Miguel Sanchez, Cornelio Lopez, Gregorio Gonzalez, and Genaro Flores and members of their crews, even though work was available. Prior to August 29, 1983, Respondents had recalled agricultural employees by means of recalling the foreman for whom

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14. The complaint was subsequently amended at the hearing to include Tomas Sanchez as a discriminatee.

the employees had worked. Respondent's failure and refusal to recall foremen Sanchez, Lopez, Gonzalez, and Flores was done with the intent, and had the effect, of avoiding the recall of agricultural employees because of their union activities and support.

5. On or about March 16, 1983, Respondents, through their agents, including Napoleon Vasquez, discharged members of Vasquez' crews, including all seven members of the Cisneros family (Francisco Cisneros, Ramon Cisneros, Josefina Cisneros, Florentine Cisneros, Rosa Cisneros, Eilario[15/] Robledo, Roberto Cisneros) because of their participation in a work stoppage in support of a raise in the piece-rate wage.

6. On or about March 19, 1983, Respondents, through agent Napoleon Vasquez, refused to rehire the Cisneros family even though they unconditionally offered to return to work and work was available.

Beginning November 30, a consolidated hearing was held before me in Visalia, California.[16/] All parties appeared, or were permitted to appear, through their respective representatives[17/] and

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15. This worker's name is actually Hilario Robledo.

16. *The* representation phase of the case was heard between November 30 and December 6. As detailed below, a tentative settlement agreement, reached as that phase of the case began, was ultimately rejected by the Board. The unfair labor practice phase of the case commenced on April 23, 1984, and proceeded up to and including the following Friday, or April 29, 1984.

17. As noted above, Mr. Hunsaker and his firm, counsel for certain respondents, withdrew from representing these respondents prior to the commencement of the unfair labor practice phase of the case. Mr. Hunsaker had been principally in charge of the presentation of the employer's proof in the representation phase of the case. The Littler, Mendelson firm oversaw the presentation of proof in the unfair labor practice phase.

were given full opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to submit oral arguments and briefs in support of their respective positions.

Based upon the entire record of the case, including my observations of the demeanor of each witness as he/she testified, and having read and considered the briefs submitted following the close of each phase of the hearing,[18] I make the following:

II. FINDINGS OF FACT

A. Jurisdiction

1. Respondent is and was, at all times material, an agricultural employer within the meaning of section 1140. 4(c) of the Act.[19]

2. The Union is and was, at all times material, a labor organization within the meaning of section 1140.4(f) of the Act.[20]

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18. The Seyfarth firm was responsible for briefing the major portion of the represenation issues, although the Littler, Mendelson firm did submit written argument on one aspect of the representation case. The latter firm also submitted a brief treating the unfair labor practice issues.

19. This finding is based on the totality of proof, including the stipulations of the parties hereinafter set forth, submitted during the course of both phases of the hearing.

20. Administrative notice is taken of the multitude of Board cases wherein the Union was found to be a labor organization.

B. The Representation Phase

1. Stipulations of the Parties [21/]

The stipulations are as follows:

1. At the time of the filing of the election petition herein, Sequoia Orange Company, Exeter Orange Company, Sequoia Enterprises, Badger Farming Company, Wilson & Wilson, Foothill Farms, Tropicana Ranch, Valley View Ranch, Sequoia Dehydrator d/b/a Weaver Ranch, Enterprises Ranch I, Enterprises Ranch II, North Slope Ranch, Rolling Hills Ranch, Canal Ranch, Cap Ranch, County Line Ranch, Hiatt Ranch, Tee Dee Ranch, JMW Ranches, Kern Ranch (also known as Cameo), Merryman Ranch, Oso Ranch, Madera 240 Ranch, Panoche Ranch, Prickett and Prickett Ranch (sic) were affiliated business entities with common officers, common ownership, common directors, common management, and common supervisors; provided services for and made sales to each other; engaged in common advertising; interchanged personnel and equipment; and held themselves out to the public as a single intergrated business enterprise and therefore, constituted a single intergrated employing entity. [22/]

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21. The parties entered the stipulations below following the announcement, on the first day of the consolidated hearing, that a tentative settlement had been reached in the unfair labor practice aspect of this case. The settlement agreement itself, through various processes and appeals, eventually was placed before the Board for approval. The agreement was rejected by the Board and the unfair labor practice matters reset for hearing. In the meantime, the representation aspect of this matter proceeded apace. Following the announcement of the tentative settlement agreement, counsel for the General Counsel voluntarily absented herself from the proceedings. Nevertheless, since the settlement agreement was still tentative, the lack of her presence did not serve to detract from or minimize the impact of any probative evidence, including stipulations, which were entered in her absence.

22. In the unfair labor practice complaint, General Counsel alleged as part of the matters to be proven that the foregoing business entities, ranches, etc., constituted a single employing entity. The stipulation entered during the representation phase of the case operates in the nature of *a* presumption which establishes a basic fact in General Counsel's case and affects the burden of proof and producing evidence thereon. (See Evid. Code section 604; Jefferson, Evidence Benchbook, 2d Ed., section 46.2, pp. 1686 and 1687 (1982).) The statements would also constitute authorized admissions under Evidence Code section 1222.

(Footnote continued------)

2. Sequoia Orange Company is a California corporation [whose] shareholders and managers are Carl A. Pescosolido, Jr., Oleah H. Wilson, and Marvin L. Wilson, and that it owns and operates the citrus packing house located at Exeter, California.

3. Exeter Orange Company is a California corporation, that its owners and managers are Carl A. Pescosolido, Jr., Oleah H. Wilson, and Marvin L. Wilson, and that it leases and operates a citrus packing house located in Terra Bella, California.[23/]

4. Badger Farming Company is a California corporation, that its shareholders are the owners of the ranches included within the single intergrated employing entity [noted above] that we've already stipulated to (sic), and that Badger provides farming services such as irrigation, pruning, pest control and weed control to these ranches.

5. Sequoia Enterprises is a California corporation. . . . [I]ts shareholders and managers are Carl A. Pescosolido, Jr., Oleah H. Wilson and Marvin L. Wilson, and that Sequoia Enterprises markets the fruit packed by Sequoia Orange Company and Exeter Orange Company.

(Footnote 22 continued------)

Further, pursuant to the procedure established for the hearing, and as noted infra, only one employer counsel at a particular time, generally, would be permitted to voice objections, submit motions, or engage in colloquy with either the representative for the United Farm Workers or the counsel for the General Counsel. An exception to this practice would be made in the event that counsel were able to demonstrate to the ALJ where their particular clients' interests diverged. In that event, objections, etc., from different counsel would be permitted. When Mr. Hunsaker verbalized this stipulation regarding the single employing entity, Mr. Carrol and Mr. Drake were present in the hearing room, and despite later representations during the unfair labor practice case that there was a conflict between the interests represented by Mr. Hunsaker and those represented by Mr. Carrol, neither Mr. Carrol nor Mr. Drake voiced any objections or attached any qualifications to the wording of the stipulation as presented by Mr. Hunsaker. Consequently, the stipulation would operate not only as an authorized admission on behalf of those parties represented by Mr. Carrol but also an adoptive admission under Evidence Code section 1221.

23. The property, is actually owned by an entity entitled "S.O.M. Company," a general partnership in which Oleah Wilson, Marvin Wilson, and Carl Pescosolido are partners.

6. Wilson Se Wilson is a general partnership between Oleah H. Wilson and Marvin L. Wilson and that it provides certain payroll services with respect to employees performing work on behalf of Sequoia Orange Company, Exeter Orange Company, Badger Farming Company and Sequoia Enterprises.

As and for clarification of this particular stipulation, Mr. Hunsaker further added that Wilson and Wilson provides payroll services, i.e., "keeps track of the earnings and hours of the employees and issues checks and takes care of the employer payroll taxes and insurance contributions and generally provides the kinds of services that would be provided by an outside payroll company."[24/] Additional clarification regarding Badger Farming was also provided by Mr. Hunsaker, who stated that "the shares of Badger Farming Company stock are held by the individuals who are the owners of those same ranches"[25/] which are contained within the single integrated employing entity.

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24. As will later be discussed, Wilson and Wilson is actually the nominal employer of the packing shed, farming company, and Sequoia Enterprises workers.

25. That Mr. Hunsaker voiced stipulations affecting those entities which theoretically he did not represent demonstrates that he was authorized to make such stipulations, which, in effect, constituted admissions. As previously noted, Mr. Hunsaker also was in charge of the presentation, on behalf of all the named employer/respondents, of the employer's proof in the representation phase. Mr. Carrol represented all the components of the single integrated employing entity in negotiations for a proposed settlement of the unfair labor practice aspect of the case.

Given the stipulation regarding single employer status, it was agreed that although Mr. Carrol might represent certain distinct entities within the single employing entity, the questions posed during the course of the representation phase of the hearing were to be voiced by Mr. Hunsaker. Hunsaker in fact conceded, albeit reluctantly, that he and Mr. Carrol would be regarded, for the purposes of examination of witnesses, as co-counsel.

7. The capital investment in the land, buildings, equipment, etc., of the single integrated employing entity is substantially greater than the aggregate capital investment of the various harvesting entities.[26/]

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26. This stipulation was entered at a later point during the course of the hearing, but is presented here for the sake of cohesion.

Additionally, the employer and the Union submitted the following stipulations concerning the composition of the bargaining unit:

1. During the payroll eligibility period, 29 employees in the crew of foreman Jesus Moran, working under Tony Padilla, picked oranges for one day at the employer's Tropicana Ranch. The names of these employees were left off the eligibility list supplied by Mr. Tony Padilla's attorney, Howard Sagaser, because Mr. Padilla overlooked the fact that the crew had worked at that location since the crew normally works for the Earlibest packing house. None of these workers were notified by the Board of the election and none of them voted.

2. One hundred sixteen (116) employees on the eligibility list were working under Jose Ontiveros.

3. One hundred fifty-eight (158) employees on the eligibility list were working under Alfred Padilla.

4. During the eligibility payroll period, approximately 200 employees packed fruit for Sequoia Orange Company and Exeter Orange Company. Prior to the election, the Regional Director decided that these employees were ineligible to vote because they were not agricultural employees. The Board did not notify these workers of the election. One hundred sixty-five (165)27/ of these workers voted challenged ballots. However, these challenges were not reflected on the official Tally of Ballots.

5. During the eligibility payroll period, fifty-four (54) employees working under June Curtis picked fruit on Madera 240 Ranch. These employees were not notified of the election and did not vote.28/

6. The employees in the crew of Teodoro Barajas working under Alfredo Padilla, whose names were not included on the eligibility list by Mr. Padilla as he testified, were not notified of the election by the Board and none of them voted.

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27. Despite the stipulation, the challenge list contains only the names of 135 shed workers.

28. Employer's Exhibit I, a letter from June Curtis, notes in addition that fifty employees worked on Madera 240 Ranch on March 10. The eligibility period was between March 3 and March 9.

7. From November 1, 1982, to October 31, 1983, the only fruit packed by Sequoia Orange Company and Exeter Orange Company was grown on the ranches included in the single employer previously stipulated to, and was cultivated by Badger Farming Company, with the exception of fruit from Gardikas-Merryman Ranch and Burch Ranch. The fruit from these ranches represented less than 3% of the total volume of fruit packed by Sequoia Orange Company and Exeter Orange Company during this time period. Prior to November 1, 1982, the percentage of fruit packed by Sequoia Orange Company and Exeter Orange Company for outside growers was such as to render the packing houses commercial and not subject to the jurisdiction of the ALRB.

8. The only crews or the only employees picking citrus that was packed at Sequoia Orange Company and Exeter Orange Company in the 1982-83 picking season were those crews of June Curtis, Alfredo Padilla, Jose Ontiveros, and Tony Padilla.

9. Tony Padilla is the field superintendent for Sequoia Orange Company and Exeter Orange Company and also supplies crews to the Sequoia and Exeter packing houses and two other packing houses, and that for the purposes of this proceeding there is no contention on the part of the single employer entity that he is anything other than a labor contractor in his capacity as supplier of these crews.

10. Each individual ranch named in the stipulation regarding the single employing entity has its own separate checking account that it is administered at 150 West Pine Street, Exeter, California. By way of example, Alfredo Padilla gets paid per ranch for the amount of picking and hauling that he does.

11. Regarding the inclusion or exclusion of employees working for Alfred or Tony Padilla, or Jose Ontiveros, the employer maintained that the legal representative of the packing sheds, Mr. Hunsaker, upon receipt of the relevant subpoenaes requesting information regarding the employees eligible to vote in the representation election, forwarded the subpoenaes and the request to Mr. Howard Sagaser, the legal representative of these three labor suppliers. Mr. Hunsaker stated in the forwarding telegram that Sequoia Orange Company itself did not possess the relevant information. Mr. Sagaser, on behalf of Alfredo and Tony Padilla and Jose Ontiveros, supplied the Board with the various eligibility lists. In his cover letter to the Board, Mr. Sagaser stated that the respective lists set forth "all the employees" employed by either Alfred or Tony Padilla or Jose Ontiveros, "to pick citrus which was. packed by Sequoia Orange and/or Exeter Orange." Mr. Hunsaker maintained that any exclusions from the list were not the

result of "employer misconduct," and that the actions of the purported employer were undertaken in good faith. The parties also stipulated that the lists furnished by Sagaser did not include the names of the truck drivers employed by Alfred Padilla or Jose Ontiveros who work in Sequoia-related operations.

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2. The Employer's Evidence

a. The Testimony of June Curtis

June Marie Curtis is the secretary/treasurer of Curtis Contracting Company, Incorporated, whose offices are in Herndon, California, which is on the north side of the Fresno county line. The contracting company provides picking and hauling services to a variety of agricultural entities, including two of the ranches included within the single employing enterprise herein. These two ranches are denominated as Panoche Ranch and Madera 240 Ranch. Madera 240 Ranch is located 16 miles north of the Fresno county line, approximately, whereas Panoche is about 25 miles east of Firebaugh. Additionally, the Madera Ranch is approximately 60 miles from the Exeter packing shed and about 90 miles from the Terra Bella packing shed. From the Panoche Ranch to either of the two packing sheds is d distance of approximately 140 miles.

Curtis Contracting has, at various times, done the harvesting and hauling of the citrus located on the aforementioned two properties for approximately 20 years through a succession of various owners, although it has had a harvesting arrangement with the Sequoia and Exeter Orange sheds for the last six or seven years. Ms. Curtis stated that her crews have been harvesting the citrus on Madera 240 Ranch for approximately 12 or 13 seasons,[29/] while Panoche Ranch has been harvested by these crews for about 3 or 4 years.

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29. The packing shed decided one of the years not to utilize Curtis Contracting to pick the Madera 240 ranch. However, Curtis Contracting was reinstated to perform this work the following year.

Ms. Curtis testified that a variety of factors go into her calculation of the base rate which she charges the employer for harvesting and hauling. Not the least of these, insofar as the hauling component is concerned, is the distance from the ranch to the particular shed where its output is hauled. The ultimate invoices submitted to the sheds, containing charges for picking and for hauling, are based on the number of orange bins picked.

The employees who work for Curtis Contracting who actually do the picking are paid on a piece rate based on the amount of bins that they themselves harvest. There is, in addition, a minimum wage guarantee.[30/] The wage rate itself that Curtis pays its particular workers is determined at the beginning of the season after consultations with the Pescosolidos or the Wilsons. If a problem arises during the course of the season regarding worker dissatisfaction with the amount of compensation, Curtis Contracting, according to Ms. Curtis, would absorb the difference. However, she also noted that the wage rate has never been changed during the middle of the year. Workers employed by Curtis, when working at the Madera 240 Ranch during the pertinent period, were getting paid $8.00 per bin, while on the Panoche Ranch they were being paid $9.00 per bin.

In regard to the benefits paid to Curtis employees, there are no formalized policy regarding vacations, pension plans, etc., except for foremen and key personnel, who may also participate in a

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30. This minimum wage guarantee becomes operative when fruit within a particular orchard is too sparse to enable harvesting crews to earn enough on an hourly basis to equalize their rate with the minimum wage.

health insurance program. The insurance coverage available to picking employees consists solely of workers' compensation. Ms. Curtis did not testify as to any interaction with shed managers regarding benefit levels extant among her workers.

The bills submitted for Curtis' services are made out in the name of the individual ranches themselves, but are sent to the employer's central location of 150 Pine in Exeter, California. Each of the ranches has its own banking and accounting system. Checks issued for payment for services on a particular ranch are drawn on the account of that particular ranch.

Curtis does not maintain a specific crew to pick the fruit. For example, on the Madera 240 Ranch, the crew utilized to perform this work is also a crew which is utilized in other facets of the Curtis operation, which include, as noted, providing picking and hauling services to other ranches with which this proceeding is not concerned. In 1983, for example, Curtis sent three different crews composed of various employees to work on the employer's property.

Ms. Curtis was unable to estimate with certainty exactly how much work would be available on an average in any given week from the single employing entity. The variance might be so wide-ranging as to prevent the making of any average.

The decision on when the fruit is to be picked and how much fruit is to be picked is made by Marvin L. Wilson, who consults with June Curtis and informs her that he needs a certain number of bins of the fruit and/or the packing house will be able to accommodate a particular quantity of the fruit. Wilson also specifies from whcih of the two ranches within the employing entity for which Curtis is

responsible he wants the fruit picked: Curtis does not make that determination. However, it is Ms. Curtis who actually schedules the crews so that the work can be performed. At times this work may be requested for a particular day, but not performed on the day requested due to Curtis Contracting's own commitments or scheduling conflicts.

Ms. Curtis testified that the type of equipment used in picking the employer's oranges includes four forklifts, bin trailers, trucks, bags, ladders, and field toilets. Ms. Curtis estimated the worth of the forklifts alone to be approximately $100,000.00. In the event that extra equipment is needed to harvest the fruit, i.e., trucks or extra tractors, Curtis Contracting is not reimbursed for the use of this extra equipment by the single employing entity.[31/] Curtis Contracting also provides workers with gloves, shoes and sacks. However, the workers themselves are responsible for these and in effect purchase them from her company.

Regarding Curtis Contracting's liability for crop damage, the company maintains a million dollar "umbrella" insurance policy which, as Ms. Curtis described it, "covers products liability and performance so should that fruit be damaged or anything . . ., not be able to be delivered through any fault of our own, we are covered with insurance." Curtis Contracting is not responsible for problems arising from weather or acts of God, but once the fruit is removed from the orchard, it becomes Curtis Contracting's responsiblity to

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31. Curtis described a situation when the harvesting was done on very muddy ground, tow trucks were needed to pull the trailer bins out of the orchard, and her company was not reimbursed by the employer for this expense.

deliver it. Curtis maintains a cargo insurance policy for this purpose. When asked about liability for poor quality picking, Ms. Curtis maintained that that- has never been a problem.

An exhibit outlining Ms. Curtis' insurance coverage was requested from the witness and submitted following the hearing.[32/] The insurance which covers all *of* Curtis Contracting Company's operations includes a comprehensive general liability policy for bodily injury or property damage, a comprehensive automobile liability policy, a cargo coverage policy which, according to the summary applies to coverage of cargo while in transit, a workers' compensation policy, and an umbrella liability policy. No reference is made in the summary to coverage for work poorly or inadequately performed or for which there are problems regarding quality.

When asked whether representatives of either of the two sheds encompassed within the single-entity employer make daily visits to the ranches while harvesting operations are in progress, Ms. Curtis responded that she thought that Richard J. ("Wink") Pescosolido had been out "a time or two when the pickers have been out there." There is an individual by the name of "Henry" who lives on the Madera 240 Ranch property who may converse with Curtis Contracting employees but has no authority in connection with the citrus being harvesting there or how it is harvested[33/]

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32. The exhibit is hereby admitted into evidence as Employer's 18, there being no objections received.

33. Ms. Curtis' testimony in regard to Wink Pescololido was not based on her own personal observation. She had not met him until the morning of the hearing. No competence objection, however, was raised to this testimony.

Out of a total of about 2,500 different employees employed annually, 300-350 workers are employed in the citrus harvest.[34/] Generalized efforts are made to insure that workers have regular employment. If difficulty in work availability is experienced in the citrus harvesting aspect of the Curtis operation, the crews are occasionally sent to perform other jobs on other crops owned by other agricultural entities. Situations also arise where a few hours of work are performed on one of the employer's ranches, then the entire crew is transported to another location to perform work for another agricultural concern.

In regard to hiring, no one from the single employer entity determines who is to be hired to work for Curtis Contracting, including supervisory personnel. Most of the hiring for the Curtis Contracting crews is done by the worker visiting the office and filling out an application. None is done at the fields by foremen since prospective employees generally would not know where picking is taking place.

In regard to the discharge of harvest employees, Ms. Curtis could only answer from a hypothetical standpoint, since she could not recall this situation arising. Generally, she stated, if there were a problem with a particular worker on the ranches within the single employer entity, that worker would merely be moved to another location to work.

Concerning quality control, Ms. Curtis could not remember any specific problems which arose with crews or their foremen in

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34. The number of employees does not necessarily indicate the size of the workforce since there is considerable turnover.

regard to the quality of the fruit picked, but she stated that in the event that a complaint were to be received from the packing house, that complaint would be relayed to the foreman with instructions to watch the quality aspect of the harvesting operation more carefully.

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b. The Testimony of Alfred Padilla

Alfredo Padilla initially described himself as a "custom labor contractor in trucking."[35/] The name of the business which he heads is "Alfred Padilla Trucking." He has been in this business for about 20 years, providing a combination picking and hauling service. The hauling is generally performed in conjunction with the picking operation, i.e., his trucks haul those commodities which his crews are harvesting. Padilla has provided such services for the Sequoia and/or Exeter packing houses for about this same period. Padilla also provides these services to other packing houses in the area as well, such as Corsicoya, San Joaquin, Woodlake Pack, Earlibest, and Early California Olive Growers. In addition to citrus, the crops handled by Padilla include grapes, raisins, olives, plums and peaches.

The bills which Padilla submits weekly to the employer are comprised of three basic components: a per-bin picking charge at the rate he compensates his pickers; a commission or surcharge on the picking rate; and a hauling rate.[36/] Mr. Padilla derives his

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35. He repeated this reference to being a labor contractor during several points in his testimony in the representation phase. Invoices for his company's services bear the imprint "Alfredo P. Padilla - Farm Labor Contractor." Subsequently, in the unfair labor practice phase of the hearing, Padilla took great pains to describe himself as a custom harvester.

36. Invoices for his company's services to the employer herein are sent to the shed in Exeter but are made out in the name of the individual grower or grove on which work has been performed. In other words, if a crew works on several different groves during that particular day, several different and respective bills are made out for that work. In similar fashion, compensation is received by way of a check from each individual grower or ranch.

compensation from the picking commission, out of which he also pays his foremen. Padilla himself determines the foremen's rates, as well as the amount he pays his drivers.[37/]

Cost factors such as fuel and maintenance for his equipment are including within the hauling charges. Similar to the Curtis operation, the hauling charge varies according to the distance which the citrus is transported. Padilla testified that also like Ms. Curtis' business, in the event that extra equipment is required, for example to remove equipment that gets stuck during the course of an operation, this cost is absorbed by Mr. Padilla's company and not added as an extra component in the bill or reimbursed by the packing house.[38/]

For the last three or four years, between 35 to 40% of Padilla's business involved services provided to the employer. Between 175 and 200 individuals, in total, are employed by Padilla. Padilla stated that he attempts to keep these individuals employed through a variety of different crops and seasons.[39/] As a consequence, they may be used to work on crops other than those of the single employing entity herein.

In the field component of his operation, Padilla employs pickers, truck drivers and crew foremen. His son, Rafael, assists

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37. Salary advances, paid on occasion to drivers and foremen, are made by Padilla without any assistance from the sheds.

38. Padilla invoices, however, indicated that the shed is billed for the fork lifts utilized in his operation.

39. As will be discussed below, the Padilla operation does not have a sufficient amount of work to maintain maximum employment levels throughout the year.

in running the business, while a bookkeeper employed by Padilla makes out his payroll. Padilla does not keep any mechanics in his employ. Rather, when equipment needs to be worked on, he takes the equipment to a mechanic's shop.

To his knowledge, Padilla has never hired anyone that has worked for either the Sequoia or Exeter packing houses or for Badger Farming Company. Similarly, he is unaware of any of his pickers or drivers who have gone from his employ to that of those particular entities. Pickers are hired by the crew foremen, who are in turn hired by Mr. Padilla himself. Padilla also personally hires, fires, and disciplines his drivers. If required, the drivers are trained and directed by Padilla, and not by any one from the sheds, whereas the pickers are trained and directed by the foremen, who are also responsible, according to Padilla, for their disciplining. In the event there is a problem with the quality of the pick, Padilla is aware of which foreman and which crew worked in a particular grove on a given day. Consequently, he brings the problem to that foreman's attention and instructs him to talk to his pickers. Packing shed personnel, he stated, have no authority in regard to hiring, firing, disciplining, instructing or directing any of his workers.[40/]

When it is necessary to lay off employees, it is Alfredo Padilla who decides which employees are to be laid off. Padilla's

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40. This assertion was somewhat undercut by the testimony of his former foremen, and by the introduction into evidence of an "employee handbook" issued to his workers, discussed infra. Additionally, Padilla had told foreman Flores that shed managers had an impact on his being refused rehire. This is also discussed below.

company maintains its own payroll and any services in conjunction therewith. Padilla pays the employees directly, and withholds their income taxes and social security payments. Workers' and unemployment compensation, he asserted, were also his company's responsibility.[41/] Reports to the various government agencies involved in these matters are done in the name of the Padilla concern, as opposed to in the name of the packing houses.

In answer to the question how the picker compensation rate is determined, Padilla responded: "[W]e try to stay in line with the competition." As was developed at a later point in his testimony, the basic picking rate is actually determined by consultation with Carl Pescosolido, Marvin Wilson and Mr. Padilla at the beginning of the picking season.[42/]. Nearly at the conclusion of his testimony, Alfred altered these assertions by averring that the base picking rate is established prior to the beginning of the picking season in a conference involving himself, Jesse Ontiveros, Tony Padilla and Marvin Wilson. When asked if Carl Pescosolido had any input in these discussions, Padilla testified: "I guess it's strictly left to Marvin, because we never discussed hardly anything

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41. Apparently, however, as indicated by Padilla invoices submitted during the unfair labor practice phase, Padilla passes the cost of unemployment compensation insurance on to the sheds.

42. In testimony discussed below, discussions among Carl Pescosolido, Marvin Wilson, and Steven Highfill, a labor relations consultant, were held prior to the election centering on how pay and benefit levels should be adjusted as a counter to the Union's organizational efforts. Padilla himself did not participate. Following these discussions, certain modifications in pay and benefits were effectuated for workers in Padilla's Sequoia crews.

with Carl Pescosolido."[43/]

At times the compensation rate itself might vary from grove to grove, depending on how heavy the yield is in a particular grove. On occasion, the fruit available for harvest in a given grove might be so sparse that the picking rate needs to be raised in order that the harvesters earn at least the minimum wage. Alfred Padilla testified that together with his son, Rafael Padilla, he had modified the picking rate in this manner on approximately two occasions during the 1982-83 navel season,[44/] and that this was the sole rationale for a temporary rate increase, i.e., to insure that pickers working by piece rate would be able to earn at least the minimum wage. When such an increase is implimented, it is announced at the fields. The bills submitted to the shed reflect that increase. Padilla initially maintained that on occasion the rate he pays his pickers is somewhat higher than the packing house is willing to compensate him for. On cross-examination, however, he testified the shed "always" pays the increase he has implemented. Shed managers are not consulted when the question of a temporary wage increase arises.

Alfred Padilla tells his drivers where to report on a given work day, whereas the pickers in his crews are informed of the location of the next day's operations by the foremen, who in turn

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43. Alfred Padilla's testimony was rife with such inconsistencies and shifts, indicating a decided lack of candor. Other examples will appear below. As such, I am constrained not to credit his testimony where it conflicts with that of other witnesses.

44. Padilla's picking records indicate that the harvest rate was altered on many more occasions than he claimed.

learn this information from Padilla, according to his testimony.[45/] Padilla also tells the foremen how many bins he wants their crews to pick on a given day. Padilla determines which crew is going to pick in a particular location based on his knowledge of where the crew originates.[46/] However, on certain occasions where picking has been particularly bad in one location and particularly good in another, Padilla might switch crews to even out the work load. According to him, very seldom are the crews switched from working for one packing house to working for another in a given week, although these types of changes might occur during the course of the year in the transition period from season to season. There are some exceptions, however. Specifically, over the course of a year the crew of Lucilla de la Vega, Padilla stated, works between two and three different packing houses. Additionally, the crew of Teodoro Barajas also performs picking operations for several different packing houses.

Padilla's testimony regarding how it is determined where his crews perform a picking operation on a given day was fairly inconclusive. He stated that he is assigned a particular area encompassing about fifteen different ranches which he picks for the two sheds herein. Padilla testified that an individual from the packing house contacts him and tells him that a certain quantity of fruit is needed by a certain date. Generally, which grove is picked

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45. As will later be seen, evidence on this point was conflicting.

46. This is not to say that Padilla decides which particular grove is to be picked.

depends "upon the grower that's farther behind on the picking."[47/] Padilla also noted that at certain times a certain size of orange is specified by the packing house is needed to fill an order, and that "I know where to get them."[48/] He further maintained that he was aware of which groves would be sprayed or gibbed and hence not available for harvesting, but did not elaborate, initially, on the source of that knowledge. Picking on a given day might also be delayed due to the oranges being too wet to be harvested. Padilla claimed that it is he who determines when the oranges are sufficiently dry to pick.

Padilla later testified that he determines where he is going to locate his crews in the evening prior to the day he will send them to work at a given location. Taking into account the amount of citrus to be harvested and the fields which cannot be entered because there has been spraying, Alfred Padilla then contacts his foreman and tells them where to work the following day. Similarly, should a crew finish harvesting a grove before the workday is completed, Alfred also makes the decision where to take that crew for additional work that day.

The equipment that is needed in Padilla's operation consists of ladders, field toilets, forklifts, forklift trailers, trucks, and trailers which are used for hauling. Padilla's company owns approximately twelve diesel tractors, twelve to fourteen semi

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47. Notably, Padilla did not state who keeps track of which grower is "farther behind."

48. This assertion appears to conflict with certain testimony discussed below which he proffered on cross-examination regarding this issue.

trailers and eight pull trailers.[49/] It also owns twelve forklift trailers and thirteen forklifts, 250 ladders and ten ladder trailers, and ten field toilets. The aggregate worth of the equipment is about $400,000. When not being used, Padilla's equipment is stored in a parking place at Woodlake paid for by his company.

Regarding the cost of the aforesaid equipment, the last diesel tractor that Padilla bought cost $7,500, while another tractor he owns cost him about $8,500. The last semi trailer that Padilla bought cost about $2,500, which was also the price of the last pull trailer. The most recent forklift purchased by Padilla cost about $18,000, while the last forklift trailer he purchased cost around $1,300. Ladders are worth approximately $80 each. The trailers used to pull the toilets and the ladders cost about $1,400. Most of the amounts which are utilized to purchase Padilla's equipment are obtained by financing through various banks and lending institutions, and not borrowed or procured from the packing houses or any of Padilla's customers.

Padilla's concern maintains its own liability insurance policy. The damage that has to this date been caused by his workers in the employer's groves has been fairly inconsequential, such as damage to irrigation pipes or trees. More often than not, Padilla himself pays for this, as opposed to resorting to his insurance policy which contains a deductible. The packing house does not reimburse him for these costs. Similarly, if the fruit which is

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49. Pull trailers are attached to semi trailers which are in turn attached to the diesel tractors which pull them.

harvested does not reach the packing house for some reason or gets damaged in transit, Padilla must bear the burden of its loss. If equipment breaks down, it is Padilla's responsibility to pay for its being repaired.

As stated previously, Padilla has at least two foremen who work for more than one packing house. Foreman Teodoro Barajas generally works for Earlibest. Referring to payroll records, Padilla stated that Barajas came to work one day in a grove whose fruit was sent to the Sequoia packing house. That day was within the eligibility period for the employer's representation election at issue herein. Specifically, on Wednesday, March 9, according to Padilla, Barajas[1] crew was sent to Valley View 12, which is one of the ranches within the single employing entity from which Sequoia obtains its fruit. Padilla testified that he did not supply the names of this particular crew because when requested to do so by agents of the ALRB, Padilla was under the impression that the Barajas crew was working at Earlibest the entire week. Only after further investigation was it discovered that a total of 38 individuals performed work at the Valley View Ranch #2 on the day in question.

On cross-examination by the representative of the Union, Padilla stated that the navel orange season generally starts between the 5th and 10th of November every year and runs until April of the following year. The end of April or beginning of May is when the Valencia season begins. Another variety, mineolas, is harvested commencing the latter part, of December through the end of January. During the navel season, approximately four crews are employed to

harvest oranges destined for the employer's sheds. Two crews are devoted to that purpose in the Valencia season.

Padilla stated that during the navel season, certain crews are employed to work solely in the citrus. During the Valencia season, crews are employed to work in other crops, usually plums. In addition to the four crews that worked in the navel season for Sequoia-related operations, about four other crews worked for sheds that are not involved in this proceeding: three of these crews worked at Earlibest and one at Klink. The four foremen employed by Padilla to work for Sequoia-related operations were, in the 1982-83 navel season, Genaro Flores, Gregorio Gonzales, Cornelio Lopez, and Miguel Sanchez. When questioned by the Union representative as to whether any of these foremen had worked on crops that were sent to packing sheds other than Sequoia's, Padilla maintained that while, for example, Genero Flores had worked on such crops, he could not remember which packing shed he had worked for. He also did not remember or recall on what occasions Flores performed that function.[50/]

Although Padilla testified that his time was split evenly between the trucking and the harvesting service aspects of his business, Padilla stated, in seeming contradiction, that he actually

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50. Contrast this with Padilla's assertion above regarding how the navel season citrus crews are utilized. Noteworthy also are Padilla's remarks on the issue of crew location on a particular day. In contradiction to his testimony set forth above regarding the use of the Barajas crew to work at Valley View Ranch, he stated during cross-examination he would not be able to determine from examination of his payroll records where particular people worked on particular days. As he stated, "It wouldn't show on the records, on the payroll records, where they worked. It just shows the dates that they worked on that week."

spends all day in the fields supervising his various crews[51/] claiming to visit those fields where they are working on a daily basis.[52/] While in the fields, Padilla essentially maintained that he checks the performance of his workers and the quality of the picking job. Padilla noted that he hardly ever sees a representative from the shed, such as one of the Wilsons or Pescosolidos, when he is out in the fields checking his crews.

Alfred Padilla is the brother of Tony Padilla, who as noted, is employed by the Sequoia and Exeter packing sheds as a field man. In addition, Tony Padilla was stipulated to be a labor contractor who supplies harvesting crews which work in the employer's groves. Albert stated that he sees Tony Padilla out in these groves "once in a while" checking the sugar content of the oranges. Alfredo Padilla maintained it was his, not Tony's responsibility, to insure quality control. Tony Padilla, according to Alfred, has never reprimanded a worker in Alfred's crews for poor job performance.

Insofar as his actual contact with his brother, Tony, in Tony's capacity as a shed employee, Alfred stated that during the navel season he speaks with his brother by telephone on the average of once a. day. The general purpose of these phone calls is to determine which of the fields or groves had been sprayed or gibbed.

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51. Such inconsistencies, evident throughout his testimony, demonstrated the lack of credence which could be attached to it.

52. Padilla's erstwhile foreman Genaro Flores testified that Alfred was not often seen in the groves.

Occasionally, Alfred stated, Tony will tell him the amount of citrus to be harvested: "maybe I'll walk into the packing house and he's [Tony] there, and he already knows what the score is for tomorrow and so I don't have to bother to go and talk to Marvin." Alfred Padilla denied that he had regularly scheduled daily meetings with his brother Tony at the shed or that he learned of harvest locations for the following day in those meetings.

Alfred Padilla does have almost daily contact with Oleah or Marvin Wilson. According to him, one of these individuals relays the order to him to harvest a specific number of bins. He claimed that they do not specify which ranch or ranches to procure the oranges ordered from among those that are Padilla's responsibility to harvest. An exception to this general procedure occurs, however, when the shed requires a specific size of fruit to fill an order, and has a record of where that size might be obtained. A shed representative then tells Alfredo Padilla where he should harvest that fruit.

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c. The Testimony of Jose Ontiveros

Jose Ontiveros has, for the past 12 years, been in the business of hauling and harvesting fruit. He testified that his business is entitled "Ontiveros Custom Harvesting."[53/] Ontiveros provides picking and hauling services to a number of packing houses including those of the employer. However, sixty percent of Ontiveros" business involves the Sequoia and Exeter sheds. In addition to the citrus harvested for the employer, Ontiveros' crews also work in crops such as grapes, plums, olives and apples. At times the seasons for harvesting these commodities overlap. For example, the navel harvesting season overlaps with that for the Valencias, and the Valencias subsequently overlap with that for the grapes. The grape harvesting season coincides somewhat with that for apple harvesting, following which work is performed on the olive crop, which subsequently overlaps with the navel harvest. As a consequence of this overlapping, the labor supplier stated that there is work for a good portion of Ontiveros' crews for the entire year.

Ontiveros' bills submitted weekly during the season to the employer's packing shed do not differ significantly in format from those submitted by Alfred Padilla. Like them, the bills consist of three essential elements: charges based on the number of bins picked times the basic picking rate, a service charge based on a percentage of the picking charges, and a rate for the hauling. Crew

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53. The bills he submits to the employer's shed, however, bear the heading "Jose J. Ontiveros -- Farm Labor Contractor and Trucking." The self-serving nature of his testimonial assertion is thus apparent.

foremen are compensated out of the "service" charge and are paid in proportion to the amount harvested. The hauling rate is designed to compensate for the cost of the hauling, including gasoline and maintenance expenses, driver's salaries, and the use of mechanical equipment such as the forklift. It is determined on a per-bin basis according to the amount of the distance which the commodity is hauled.[54/]

In March, 1983, at or near the time of the election, Ontiveros employed a total of 105 people in the Sequoia-related aspect of his business, including pickers, drivers and crew foremen. His wife assisted him with the company's bookkeeping. Ontiveros also employed a service man on a salaried basis. The service man is generally responsible for minor maintenance, such as changing oil and small repairs. Major repairs are handled by an outside garage. Ontiveros' service man also moves the company forklifts from ranch to ranch.[55/]

Ontiveros had three foremen working for him under the arrangement with the employer in the 1982-83 navel season. These foremen were Ramon Arellano, Jose Silva, and Napoleon Vasquez. Napoleon Vasquez and Ramon Arellano also supervised crews which harvested for sheds other than those of the employer during the 1982-83 navel season, including Euclid. Ontiveros was unable to recall what periods of time these foremen worked for other concerns.

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54. For long hauls, drivers are sometimes paid a percentage of the gross of the hauling rate.

55. This facet of Ontiveros operation differs from that of Alfred Padilla, since Alfred Padilla loads his forklifts on a trailer pulled by a truck also used for hauling.

Ontiveros also employed additional crews to work for the Euclid and Nash-de-Camp packing houses at that time. Ontiveros stated that in total, he had six crews operating during this period.

Ontiveros has never hired anyone formerly employed by either Badger Farming Company or the Sequoia or Exeter packing houses. Similarly, he is unaware of any of his employees that have gone to work for any of these concerns. Ontiveros' pickers are hired by the foremen who are in turn hired by Ontiveros himself. Ontiveros also hires his drivers and service man without the assistance of anyone from the Sequoia or Exeter sheds. Training, discipline and firing of the various Ontiveros employees are handled by Ontiveros or by the foremen, also without the intervention of shed personnel.[56/] Pickers generally are overseen by the particular crew foremen, whereas the drivers are supervised more directly by Ontiveros himself. Like Alfred Padilla, Ontiveros claimed to spend most of his work day in the fields overseeing his crews and equipment.

In the event of a problem involving poor quality of pick, Ontiveros stated that he would expect to hear from the packing house about it. He would then report it to the foreman and also talk to the picker and try to correct the problem. Should the problem fail to be alleviated, the individual would be discharged, with Ontiveros himself making that ultimate decision.

In the event of a layoff, the packing sheds have no input

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56. Ontiveros issued an "employee handbook" to his pickers identical to that distributed by Alfred Padilla. As noted below, the handbook provides for consultation with the shed manager in matters concerning employee discipline, discharge and seniority.

as to which employees to lay off and which employees to retain: such matters are determined within the Ontiveros company.[57/]

Ontiveros informs his drivers where they are to report to work on a given morning. They then pick up empty bins and go out to the area that is to be picked. Ontiveros also informs his picking crews as to the location of the work on a given day. However, he does so by telling the foremen who in turn let the individual crew members know the location of the harvest.

Ontiveros testimony regarding how he decides where to send particular crews was somewhat vague. He stated that after the shed informs him of the quantity of fruit which he is to harvest, he tells his foremen where they are to harvest. In response to the question of how he determines where to send which foreman, Ontiveros stated, "I just rotate them . . . in order for them to know, to get acquainted with the ranches . . . ."

Ontiveros is assigned four specific ranches to pick for the employer. Among those four, Ontiveros initially claimed that it is he himself who decides which particular ranch to pick on a particular day. The largest ranch which Ontiveros is responsible for is the Kern Ranch, comprising about one thousand acres. In deciding where to pick on the Kern Ranch, Ontiveros stated: "I've got a map, and they just tell me, you pick out of a certain place, you know, like block 16, or wherever I see the quality that they want." It appears, therefore, that the harvest location decision

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57. However, as noted, Ontiveros" "employee handbook" provides for the shed manager's input on matters involving employee seniority.

for a given day is not entirely Ontiveros' own.

In response to further inquiry on this point from the Union representative, Ontiveros stated that it was correct that he is told by somebody from the shed that a given amount of citrus is wanted from a particular ranch. Ontiveros then almost immediately modified his testimony by stating that he was not told to harvest a particular block on a given ranch. However, the packing house, via Tony Padilla, informs Ontiveros whether a particular block or ranch has been gibbed. As a consequence, certain areas are unable to be harvested on a given day. Ontiveros maintained that he then chooses where to place his crews from the ranches or blocks that remain.

Generally, the shed has nothing to do with the payroll or the payroll records of the Ontiveros' concern. As with Alfred Padilla, social security, income tax deductions, and workers' compensation and unemployment insurance are all handled by Ontiveros' bookkeeper.

Regarding compensation paid to his pickers, Ontiveros testified that the picking rate was determined after consultation among himself, Marvin Wilson and Alfred Padilla. He and Padilla pay their pickers the identical base amount, which before the time of the election was nine dollars per bin.[58/] Ontiveros initially claimed that there had been no occasions when pickers were paid more than the usual rate. He then modified this assertion by recounting that on ranches where the picking had been particularly difficult,

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58. As later discussed, this rate was increased to $9.50 per bin after shed managers consulted with Steven Highfill immediately prior to the election.

he might augment the base rate slightly, such as fifty cents per bin. Ontiveros stated that it *is* his company that absorbs the additional cost of the wage augmentation.

On cross-examination, however, the Union representative adduced proof that pay increases to harvest a particular grove often are substantially higher than a mere 50¢ per bin. For example, the base rate agreed upon for harvesting of the Mineola variety was $14 per bin. Records demonstrate at least on one occasion, Ontiveros compensated his crew $15 per bin and on another occasion $20 per bin. After being confronted with these records, Ontiveros corrected his earlier testimony, and admitted that wage adjustments to the base rate were in fact passed on to the employed, and not borne solely by his company.[59/]

Ontiveros maintains the following equipment in his business: six diesel truck tractors, six semi pull trailers, six pull trailers, and four bobtail trucks with four pull trailers. The business has an interest in seven forklifts, including four which are leased, and in the forklift trailers used to transport them.[60/] Additionally, Ontiveros' business owns equipment incidental to the harvesting operation, including ladders, portable toilets and equipment to haul same, and gloves which Ontiveros supplies his harvest workers. Ontiveros estimated his total investment in

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59. As with Padilla's testimony, such shifting accounts and inconsistencies warrant adverse credibility findings, particularly where Ontiveros' testimony conflicts with that of other witnesses. (See Ev. Code §780.)

60. Only two of the forklifts, Ontiveros stated, were used in conjunction with the Sequoia operation.

equipment to be about $350,000. None of the financing for the equipment has been done with the assistance of or through the employer. When the equipment is not in use, it is stored in a yard which Ontiveros owns.[61/]

Should damage be caused in the groves by Ontiveros' equipment or crews, Ontiveros is responsible for that damage and pays for it after being billed for same by the grower. If fruit is damaged or destroyed enroute from the grove to the packing shed, Ontiveros is likewise liable. Ontiveros maintains insurance for these eventualities, paying the premiums on the insurance himself without assistance or reimbursement from the employer.

In the event of inclement weather and the crew has arrived at a given location but is unable to work during that particular period, Ontiveros at times has reimbursed his workers for gas. He claimed that the packing shed does not compensate his company for these payments.[62/]

The farthest grove that Ontiveros harvests for the Sequoia concern is about 43 miles from the Exeter shed. The closest is around 37 miles away. The farthest ranch from the Terra Bella shed which is harvests is located about 18 miles distant. The closest is about 12 miles away from that shed.

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61. it is significant to note that not all of Ontiveros' equipment is devoted to Sequoia-related functions. If, by his own account, sixty percent of his business involves services provided to the employer, the remaining forty percent, and a proportional share of his equipment, are then devoted to other concerns.

62. By contrast, as demonstrated on an Alfred Padilla invoice, this labor cost was, at least on one occasion, passed on to the shed.

Regarding Ontiveros' contact with shed personnel, Ontiveros stated that occasionally, but rarely, he would see Tony Padilla out in the field. He would not see Richard Pescosolido in the course of his duties, but occasionally would run into Oleah Wilson on the road. When asked whether he himself has seen any field men from the shed doing quality inspection in the groves while he is working, Ontiveros responded in the negative.[63/]

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63. As will be detailed below, several of Alfred Padilla's former foremen stated that Tony Padilla had performed responsibilities in this connection.

d. Testimony of Marvin Wilson

Marvin L. Wilson described himself as a grower and packer, having been in the citrus business for about 20 years. As noted in the parties' stipulations he is a stockholder in the Sequoia Orange Company and Exeter Orange Company, as well as an officer of Sequoia Orange Company, Inc. Together with his father Oleah, he is a partner in the firm known as Wilson and Wilson, which is located at the same address as the offices of the two packing houses and that of the farming company. Marvin Wilson is also a shareholder of Badger Farming company as well as having an ownership interest in some of the ranches that send citrus to the Sequoia and Exeter sheds.

Workers at the Sequoia Orange and Exeter Orange packing houses and who work for Badger Farming Company are actually employees of Wilson and Wilson. It is Wilson and Wilson that reports their earnings to the government, provides for workers' compensation, social security, unemployment insurance, and work-related benefits. There is no real difference between the relationship Wilson and Wilson has with Sequoia and Exeter Orange and the relationship that it has with Badger Farming. There is a health insurance plan available to employees of the three concerns who become eligible to participate after they have worked for any of them for 60 hours in *a* given month. Wilson and Wilson has a holiday and vacation pay policy which it maintains for the salaried employees of both the packing sheds and Badger Farming. Wilson and Wilson likewise promulgates work rules for the three entities.

Salary and wage structures for the packing shed employees

are determined by consultation by and among Marvin Wilson and his father and Carl Pescosolido. With respect to the wage structure of Badger Farming Company, the manager of that concern, Richard Pescosolido, is principally responsible for establishing same. Generally, the structure is determined after consulation with the owners of the various ranches, who would include Oleah and Marvin Wilson, and Carl Pescosolido. Similarly, consultations among the Wilsons and the Pescosolidos occur when a new job or job function is established at Badger Farming Company. Marvin Wilson also stated that he has brought the unsatisfactory work performance of a particular employee within Badger Farming Company to the attention of Richard Pescosolido, who took action based on Marvin Wilson's recommendations.

Within the operations of the two packing sheds and Badger Farming Company themselves, Badger Farming Company employees do not receive any overtime pay, at least according to the payroll sheets that were submitted in evidence. By contrast, shed employees do receive overtime. The shed employees also, on occasion, received Christmas bonuses, as well as receiving days off for legal holidays. The shed operation ordinarily functions from the first of November until September of the following year.

The people that work for Badger Farming perform such tasks as irrigation, weed, pest and frost control under what might be termed a "general laborer" job classification. At the packing sheds, the following job classifications exist: packer, grader, general hourly worker and forklift driver. Packers are usually paid on a piece rate basis, whereas the remainder are hourly employees.

Supervisory employees at the sheds are on a salaried basis.

There is a minimal degree of interaction between the forklift drivers at the sheds and the drivers who haul the citrus from the groves where it is harvested. The truck drivers inform the forklift operators the block from which the citrus was obtained, and occasionally assist in unloading of the crop.

Some transfers occur between employees working in the packing houses and those working for Badger Farming Company. As a general rule, during the summer-months the work load increases in the farming operations while it diminishes at the packing sheds. Some of the packing shed employees are then utilized by Badger Farming Company during these packing shed slack periods and are subsequently transferred back to the packing houses when the farming operation tapers off.

Regarding the potential impact of operations interrupted by labor disputes at the sheds, Marvin Wilson testified that the storage capacity of the Terra Bella shed was approximately three days of picking, whereas the packing shed in Exeter can store up to five days' worth of the harvest. In the event that there was a work stoppage or labor dispute at the packing shed, this would have an inevitable effect on the harvesting operation, as there would be no facility for packing the harvested crops once the sheds had reached their capacity, and no further work was being done to remove the fruit from the packing houses.[64/]

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64. One might also infer, as a corallary to Wilson's testimony that in the event of a labor dispute involving harvest workers, packing shed personnel, being without harvested fruit to pack, would also be effected.

In the fall of 1982 the Wilsons and Carl Pescosolido acquired additional lands which would allow the packing sheds to be supplied with enough fruit from the ranches within the single integrated employing entity to fill them to capacity. It was at that point, Wilson testified, that the decision was made to terminate packing arrangements with all of its outside growers, i.e., those not contained within the single employing entity. He further stated that he had no plans as of the date of the hearing to go back to the previous arrangement and accommodate additional outside growers in the packing shed operations.

The land on which the Sequoia Orange Company shed is situated, that is, the shed that is located in Exeter, California, is owned by Sequoia Orange Company, Inc., itself. The Exeter Orange Company in Terra Bella is situated on land leased from a company which is a general partnership of whom the partners are Oleah and Marvin Wilson and Carl Pescosolido.

Concerning individuals supplying harvesting crews, Marvin Wilson has extensive contact with these concerns, communicating to them the type of fruit and quantity of fruit that may be needed for *a* given period of time. Oleah Wilson also participates in this function, as does Tony Padilla and Skip Pescosolido.

Regarding Tony Padilla's responsibilities as field superintendent, Marvin Wilson stated that Padilla oversees the overall crop, estimating the quantity and sizes of fruit that are available. Sixty to seventy percent of Tony Padilla's time is spent outside the shed in and around the orange groves. Wilson maintained that Tony Padilla does not have any specific function in regard to

quality control of the crop that is harvested. Generally, inspection of the fruit for these purposes is performed by people within the packing shed. Occasionally, Tony Padilla might inform the shed principals of problems arising in this regard.

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3. The Union's Evidence

a. Testimony of Genaro Flores

Genaro Flores was employed as a foreman by Alfredo Padilla in March of 1983. He had worked in such capacity for Padilla for about 13 or 14 years in both the navel and Valencia orange harvests. In all of those years, Flores' crews picked citrus that was sent to the Sequoia or Exeter Packing Sheds. As a foreman, Flores[1] duties included hiring, firing, disciplining and generally overseeing his crew, and informing them where they were going to work on a given harvest day.

Flores stated that he would be told where his crew was to be working by Rafael Padilla, Alfred's son, and by Tony Padilla, although Flores stated that Tony Padilla provided such instructions on a very occasional basis. However, Flores testified that he would see Tony Padilla out in the groves on an average of three to four times a week during the 1982-83 navel season. Flores further stated that while Tony was in the groves, he would inspect the picking job to make sure that it was being done properly and that no oranges were being left on the trees. According to Flores, Tony Padilla would check each box or bin picked by each individual worker. In the event the work was not being done correctly, Tony Padilla would bring it to the worker's attention by telling the foreman to instruct the picker. Tony Padilla also has told Flores at what time to commence the picking operation should the oranges in the grove be wet. If Tony is not present, Rafael Padilla gives this order. Should the crew finish work in a particular block early on a given day, it is Tony Padilla who tells the foreman where the crew is to

move to work next. In terms of general supervision over the foremen working for Alfred Padilla, Alfred, Rafael and Tony Padilla all give them instructions.

Flores stated that on occasion the workers in his crew would demand more money when the quantity of fruit in a given grove was sparse. Flores would relay their request to Tony or Rafael Padilla. On occasion, Tony Padilla would authorize the increase; on others he would not. Flores himself did not possess the authority to grant such an increase. Alfred Padilla has also approved an increase of this type.

On cross-examination, Flores stated that Alfred Padilla was very seldom in the groves during the 1982-83 navel orange picking season. As a consequence, he did not check the work of Flores' pickers very often. Flores stated that even though Alfredo was the boss, "Rafael and Tony were the ones in charge of it there."

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b. Testimony of Gregorio Gonzales

Gregorio Gonzales had worked for Alfredo Padilla as a harvesting foreman for the three years up to and including the 1982-83 season.[65/] The fruit which his crews harvested was sent to the Sequoia and Exeter Orange Packing Sheds. As with Mr. Flores, Gonzales' duties as foreman included the hiring and firing of workers, and insuring that their work was being done properly.

Gonzales corroborated Flores' assertion that he received orders as to where his crew was to work from Rafael and Tony Padilla and from Alfredo when Rafael was not there. Gonzales also stated that he would see Tony Padilla in the groves daily, checking the work of each individual picker, ascertaining whether there were too many steins left on the fruit or too much fruit left on the trees. Gonzales testified that he witnessed Tony Padilla instructing and/or reprimanding individual pickers who were not performing their jobs properly. Gonzales also reiterated the assertions of foreman Flores that Tony and/or Rafael Padilla, on occasions that the groves were wet, would tell the crew when it could commence picking.

Gonzales also described situations when workers would arrive at a field and have to wait several hours before beginning to pick. In these circumstances, the workers might demand "wet time" pay or money for gas for traveling to the harvest site and not working. Tony Padilla had the authority to approve the payment of such monies to the workers. The workers would request such payment

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65. As will be discussed at greater length in the unfair labor practice portion of this decision, neither Gonzalez nor Flores are still employed by Alfred Padilla.

of their foremen who would in turn relay the request to Tony Padilla.[66/]

Gonzales further testified that there were occasions when his crew demanded additional money to harvest a particular grove. Gonzales did not grant those increases since, as he stated, he did not have the authority to do so. He would relay the request, however, to Tony Padilla. Tony Padilla has not given his approval to a wage increase that Gonzales asked for on behalf of his crew.

Also similar to Flores' testimony, Gonzalez stated that when his crew finished work in a particular block at an early hour on a given work day, Tony or Rafael Padilla would tell the foreman where to move the crew next.

As Marvin Wilson testified, Gonzalez noted that Tony Padilla's duties also included checking the oranges for their sugar content. In the event the sugar content did not reach a certain level and Gonzales' crew was present in the grove, Tony Padilla would order the crew to another grove.

The parties stipulated that in the event that Miguel Sanchez and Cornelio Lopez were called to testify, they would offer testimony substantially the same as that of Gregorio Gonzales and Genaro Flores, and that Sanchez and Lopez occupied the same positions as Gonzales and Flores in the period being considered, i.e., they were foremen working under Alfred Padilla.

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66. Gonzales also stated that Tony told him "they were never going to get it."

4. Rebuttal Testimony of Marvin Wilson

In an effort to refute the above assertions by the foremen who worked for Alfred Padilla regarding the amount of contact that Tony Padilla had with their crews, the employer recalled Marvin Wilson. Wilson stated initially that during the winter navel season, crews picked oranges for a period of between four to six hours per day. Given the problems intendant upon picking wet fruit (which essentially causes a weak rind), crews ordinarily wait until between 10:00 and 12:00 noon before they commenced working to enable the fruit on the trees to dry.

Wilson testified that during the 1982-83 navel orange season Tony Padilla was responsible for the direct supervision of seven harvesting crews. These crews, according to Wilson, worked on those ranches in the single employing entity that were located within Kern County.[67/] The ranches themselves are located east of Highway 99 in the area between Delano and Famoso. Three of them are west of Highway 65 and one slightly to the east of Highway 65. An additional ranch is located more or less on the Kern county line.

Wilson was somewhat vague as to Tony Padilla's exact responsibilities in connection with these ranches. He answered in the affirmative to the following question posed by counsel: "During the 1982-83 navel orange season, did Tony Padilla, to your knowledge, have crews that were harvesting in Kern County on a regular basis?" The fact that Tony Padilla's crews may have been

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67. Wilson did not state specifically that Tony Padilla's responsibilities were exclusively involved in those ranches in Kern County. He noted, however, that 55-60% of the total acreage within the single employing entity was contained within that county.

harvesting in Kern County on a regular basis does not indicate that was the only location for his crews, nor does it indicate that any other crews may have been responsible for harvesting in these particular areas.

Marvin Wilson was also directed to demonstrate on a map of the area the locations of those ranches where the crews of Alfredo Padilla were "usually responsible for harvesting operations." The ranches so encompassed included an area from Plainview east of Tulare all the way north to the town of Navelencia, south of the County Road 180 which bisects Fresno. Included within this grouping were some 16 different ranches. From north to south the area encompassed roughly 40-45 miles. Plainview is located approximately 25 miles north of the Fresno County line.

In its brief, the employer argued at length that the testimony of the erstwhile foreman was inherently incredible because in order for Tony Padilla to make appearances where other crews were working and supervise his own crews, in addition to performing whatever functions were encompassed within his responsibilities as a shed employee, Mr. Padilla would have had to have covered too extensive an area during the time of the harvesting operation within a given day. In short, the employer argues that Tony Padilla would have had to have been everywhere at once.

However, the employer's arguments in this regard are unavailing. As noted earlier, the specific ranches on which Tony Padilla supervised his own crews were not mentioned when testified to by the employer's witness. The vague references by Marvin Wilson do not indicate whether Tony Padilla might have been responsible for

harvesting operations on any ranches other than those in Kern County, nor does it indicate that any other supervisors such as Jose Ontiveros or Alfred Padilla were responsible for harvesting in those particular locations. As it developed on cross-examination, Marvin Wilson admitted that he was not that familiar with exactly how Tony Padilla spent his time on a given work day, that he would not see him that much, sometimes once or twice a day. Most importantly, however, Tony Padilla himself was not called as a witness. Therefore, there was no direct refutation of any of the assertions made by the former foremen working under Alfred Padilla. Accordingly, their testimony must be credited.[68/]

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68. The employer argues in essence that an inference should be used to overturn direct testimonial evidence. However, that inference is based on the vague recitations of Marvin Wilson as to the area of Tony Padilla's responsibilities, and is by no means conclusive. Under Evidence Code section 412, "[I]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Further, under Evidence Code section 413: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the parties' failure to explain or to deny by his testimony such evidence or facts in the case against him. ..." It is clear, then, that the failure to call Tony Padilla during the representation phase to directly counter assertions made regarding his own particular responsibilities can only lead to the conclusion that the inference which the employer seeks to be drawn from the testimony of Marvin Wilson is insufficient to substantially refute the direct sworn testimony of two witnesses and the corroborative testimony which would have been preferred in the event that a stipulation regarding that testimony not been entered into. Additionall testimony received during the unfair labor practice phase concerning Tony Padilla's duties (see below) further buttresses the evidence preferred by the Union's witnesses.

5. Analysis of Representational Issues

Section 1156.2 of the Act mandates that for representational purposes "[t]he bargaining unit shall be all the agricultural employees of an employer." (Emphasis supplied.) The Employer's Objections to the Election may be succinctly characterized as centering on the question of the size and scope of the appropriate bargaining unit, i.e., whether the polled workers represented all the employer's agricultural employees. The Employer essentially contends that certain employees or groups of employees were improperly excluded or included in the unit. Hence, the election which was conducted was not truly reflective of employee choice.

As noted above, the Tally of Ballots revealed that 386 individuals voted in the election out of a total of approximately 550 deemed eligible to vote. One hundred fourteen voters were challenged on the basis that their names were not contained on the eligibility lists or that they did not present proper identification. An additional 135 workers voted challenged ballots which were not included on the official tally.[69/] Given the Union's margin of victory (121 votes), including the packing shed workers within the unit would, in and of itself, be potentially sufficient to affect the outcome of the election.

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69. The challenge sheets for these voters list these individuals. A stipulation entered into by the parties, and the employer's brief, state that a total of 165 packing shed employees attempted to vote. This figure is apparently erroneous. Testimony reflected that a total of approximately 200 individuals were employed at the packing sheds during the eligibility period.

a. Inclusion/Exclusion of the Packing Shed Employees (Objections 2(a) and 2(b)

This Board, by statute, is constrained to specifically follow[70/] the National Labor Relations Board interpretation of the term "agricultural employee," as set forth in ALRA section 1140.4(b):

> The term "agricultural employee" or "employee" shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act, . . . and Section 3(f) of the Fair Labor Standards Act ....

Simply stated, this Board's jurisdiction is limited to those employees excluded under the N.L.R.A. as agricultural workers.[71/]

Section 3(f) of the Fair Labor Standards Act defines "agriculture" as encompassing:

> farming in all its branches and among other things includes the cultivation and tillage of the soil , dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . ., and any practices (. . .) performed by a farmer or on a farm as are incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The above section of the F.L.S.A. was interpreted by the Supreme Court in Farmers' Reservoir and Irrigation Company v. McComb

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70. Compare Labor Code section 1148, which states that the ALRB follow "applicable" NLRA precedent, thus allowing for this Board's determination of the "applicability" of a given rule of Federal law.

71. In fact, the National Board has held that the federal Act preempts the A.L.R.A. on the issue of who is an agricultural employee under its standards, even where the state Board has previously exercised jurisdiction over the workers. (H.M. Flowers, Inc. (1977) 227 NLRB 1183.)

(1949) 337 U.S. 755, which set forth a construction of that statute which has continued in effect through the present. The Court stated that within the statutory language was a dichotomy which divided the definition of "agriculture" into "primary" and "secondary" classifications. Under the "primary" classification, functions directly involved in the cultivation and harvesting of crops, among other things, were included. Within the secondary classification were such functions that were not directly associated with the actual growing and harvesting of agricultural commodities, but were performed "by a farmer or on a farm, incidently to or in conjunction with . . . farming operations." (Id. at 762.)

The packing shed operations concerned in this case would seem to fall within the "secondary" classification under the FLSA as "preparation for market, delivery to storage or to market or to carriers for transportation to market." When the National Board has treated the issue of whether a packing shed is an "agricultural" operation (and hence exempt from N.L.R.A. coverage) or a "commercial" operation, the question has, in some instances, turned on the percentage of crops handled at the shed which are not grown by the employer of the shed's employees. Employees are thus not deemed agricultural workers if a "regular and substantial portion of their work effort is directed toward hauling and processing the crops of growers other than their own employer." (Grower-Shipper Vegetable Association (1977) 230 NLRB 101.) In that specific case, drivers hauling 90% of the produce grown by their employer were determined to be agricultural workers. By contrast, in N.L.R.B. v. C & D Foods, Inc. (C.A. 7, 1980) 626 F.2d 578, drivers who

transported twenty percent or more of the crops grown by employers other than their own were deemed non-exempt employees.

Here, the parties stipulated that with the exception of three percent of their total volume, the Sequoia and Exeter sheds packed only fruit grown and cultivated by Badger Farming Company on the twenty ranches contained within the single integrated employing entity. Thus, it would seem that the packing sheds, under this percentage-type of analysis, would be considered agricultural and not commercial and hence subject to ALRA jurisdiction.

However, this Board has cautioned against using a "mechanical application of any rule or percentage" in determining the agricultural vs. commercial nature of a particular packing shed operation. (Grow Art (1981) 7 ALRB No. 19.) Instead, it has suggested that there should be an examination of the "totality of the situation rather than isolated factors." (Bonita Packing (1977) 4 ALRB No. 96; Grow Art, supra.) In the instant situation, both the Sequoia Orange and Exeter Orange packing sheds are owned and managed by the same three individuals: Oleah Wilson, Marvin Wilson and Carl Pescosolido, Jr. As per the stipulation between the Union and the employer, these individuals also participate in the common ownership and management of the twenty distinct ranch properties which grow at least 97% of the citrus handled by the two sheds. Two of the shed owners, Oleah and his son Marvin, operate the entity Wilson and Wilson, which is the nominal employer of the shed employees and of the employees of Badger Farming Company who are already included within the unit. There is additionally a degree of interchange of personnel between the sheds and the farming company. Lastly, the

ranches, the farming company and the sheds share common office facilities at 150 West Pine in Exeter, California, which is also the location of the Sequoia Orange Company packing shed.

The Union basically argues that the packing sheds are separate corporate entities which in and of themselves do not own any agricultural land. Thus, they should be considered akin to the Farmers Reservoir and Irrigation Company, which the Supreme Court held was a commercial, not an agricultural, venture, since the workers were employed by a distinct, independent entity which itself did not own land or engage in any activities directly involved in the growth or harvesting of agricultural commodities. The water supplying function therein was separated from the farming function itself and became its own self-contained and hence commercial activity. The employees of the water company were therefore deemed employees of a farmers cooperative association. (Farmers' Reservoir & Irrigation Co., supra.) Under the federal regulations interpreting F.L.S.A. §3(f), such employees are considered to be engaged in work not "by farmers" but "for farmers." (29 C.F.R. 780.33(a); see also Bonita Packing Co., supra.) By analogy, the Union contends, the packing shed workers should also be considered employed by a separate commercial venture, not "by farmers."

Unfortunately for their position on this issue, the Union's argument ignores the stipulation of the parties that the sheds, the ranches, and the farming company, despite their nominal separateness, function and "[hold] themselves out to the public as a single, integrated business enterprise and therefore constitute a single integrated employing entity. " The "single, integrated

employing entity" should therefore, in this instance, be considered to be *a* "farmer" within the meaning of F.L.S.A. section 3(t). The various ranches and Badger Farming Company, as components within the integrated enterprise, comprise elements within the "primary" meaning of "agriculture," i.e. "cultivation and tillage of the soil . . ., production cultivation, growing ... of any agricultural . . . commodities." The packing sheds, as another component of the integrated employing entity, or "farmer," function in a capacity "as an incident to or in conjunction with such farming operations:" the "preparation for market, delivery to storage or to market or to carriers for transportation to market." The fact that each shed is organized as a distinct corporate entity does not, given the integrated nature of the entire enterprise and the common management and ownership of its various components, transform the agricultural nature of the enterprise into a commercial venture. (Cf. Pappas and Company (1984) 10 ALRB No. 27.)

Therefore, it is recommended that the ballots cast by the workers in the Sequoia Orange and Exeter Orange sheds should be opened and counted and a revised Tally of Ballots prepared.

b. The Labor Contractor/Custom Harvester Issue (Objections l(a), 2(c), (d). and 3(d))

(1) Summary of the Evidence

The three individual concerns under consideration[72/] which supply harvesting crews to the employer possess many similar features. Because of these similarities, the reasons for including

72. Tony Padilla, as the supplier of picking crews, was stipulated to be a labor contractor, and hence his harvesting employees would automatically be included in the bargaining unit.

or excluding the crews of each from the bargaining unit are equally applicable.[73/] Each hires its own drivers, foremen and harvest workers. Hiring for Curtis Contracting is done at their offices, Whereas crew members working for Alfredo Padilla and Jose Ontiveros are hired by their foremen. There is no interchange of workers between the sheds and/or Badger Farming Company and the three companies responsible for harvesting the crop.

Nonetheless, while packing shed supervisorial personnel are not involved in the hiring of harvest employees, they affect the work forces of each enterprise in the vital areas of wages, discipline, and direction and hence control of their work. By manifesting this control, the single integrated employer demonstrates that it has "the substantial long-term interest in the ongoing agricultural operation" which makes it "appropriate to fix employer responsibility on them," (Rivcom Corporation, infra), and leads to the conclusion that the employees of the three labor suppliers should be included within the single, integrated employer bargaining unit.

Of the three areas which the employer, via Marvin Wilson, Carl Pescosolido, and/or Tony Padilla exerts its influence, the most significant is in the area of wages. The integrated employer plays a central role in determining the wage rate for the harvest

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73. The Union's arguments in this regard will be treated below.

workers,[74/] and, indirectly, in setting foremen's salaries and determining labor supplier's profits, since the commission from which these items are derived is based on a percentage of the picker rate. The extent of remuneration for harvest workers, foremen and owners of the three concerns is determined only after consultation and presumable approval of representatives of the employer.[75/]

As a general proposition, the single employer controls the amount of work available to the harvesting employees of Curtis, Ontiveros and Alfred Padilla, as it assigns to each of these concerns specific ranches which each is responsible for harvesting.[76/] The employer also dictates the quantity of fruit to be harvested in a given period by a given concern, thus likewise exerting further direct control on the extent of work availability.

According to the testimony of Genaro Flores and Gregorio Gonzalez, Tony Padilla, the packing shed field man, inspected the work of individual pickers in Alfred Padilla's crews and reprimanded them when it was not up to standard. Alfred Padilla might also bring these problems involving picking quality to the attention of

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74. The ultimate authority of the shed on wage matters and the minimal authority of the labor suppliers in this regard can be seen directly in the evidence preferred by labor consultant Highfill, recounted below, who recommended that picker rates be increased prior to the election. Shed managers decided to implement his recommendation without discussing it with the labor suppliers.

75. Additionally, Tony Padilla has the authority to grant ad hoc wage increases and compensation for "wet time."

76. As may be recalled, Alfred Padilla's crews were assigned to harvest fifteen separate ranches, Ontiveros' were assigned to four, while those of Curtis were assigned to two. Curtis demonstrated the shed's control over the total work load in her testimony regarding the reassignment, several years previous, of. the harvesting of one of those two ranches to another concern.

the foremen of the picker who was responsible. The foremen would then speak to the individual worker, who might order the discharge of that worker as a result.

Jose Ontiveros also noted that shed personnel would bring pick quality problems to his attention. Ontiveros would either speak directly to the picker about it, or discuss the problem with that picker's foreman. Ontiveros might utilize these difficulties as the basis for *a* discharge; however, it would be he, not the foremen, who would make the decision whether to take that action.

June Curtis likewise alluded to the possibility of shed personnel bringing pick quality problems to her attention which she would, in turn, relay to the foreman of the crew in which the problem arose.[77/]

Shed personnel are additionally directly involved in ordering when and where harvesting might take place. The Curtis company is told specifically by Marvin Wilson the quantity of fruit that the shed requires, and from which of the two ranches which are Curtis' responsibility the fruit should be obtained. Similarly, Jose Ontiveros is given an order by shed personnel to harvest a certain quantity of citrus. He might also be told where to obtain

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77. Additional evidence was adduced during the unfair labor practice aspect of the case which further demonstrated the possible impact of the packing shed on harvesting employee policies in such areas as discipline and discharge and seniority. Alfred and Tony Padilla, and Jose Ontiveros jointly prepared an "employee handbook" which, the record reveals, was distributed at least to the Alfred Padilla crews. In separate sections the handbook states that the "packing house manager," or Marvin Wilson, may intercede and take action on matters involving potential discharges or seniority. While Padilla maintained that such intercessions had never taken place, the fact remains that he saw fit to include such language in the booklet distributed to all his employees.

the fruit from among the four ranches to which he is assigned: a specific block number might be designated by the shed as the area from which his crews are to obtain the quantity of citrus ordered for that day.

Concerning Alfredo Padilla's operation, Mr. Padilla maintained that he has broad discretion among the fifteen ranches to which he is assigned as to where to send his crews to obtain the quantity of fruit ordered by the shed. However, the shed might make this decision if it requires a particular size of fruit known to be procurable on a particular ranch. It also can affect where Padilla's crews are not to work by gibbing certain groves, and then informing Padilla where this procedure has taken place.[78/]

Other similarities among the three concerns include the type of equipment each utilizes in its harvesting and hauling business. Each maintains trucks, trailers, fork lifts, ladders, and field toilets. Ontiveros and Curtis noted that they provide picker sacks and gloves.[79/] This equipment might be deemed costly to a degree.[80/]

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78. Curtis' and Ontiveros' crews operate under similar restrictions.

79. Alfred Padilla did not mention this facet of his operations. However, as discussed infra, after the shed retained labor consultant Highfill prior to the election, it was determined by the shed that this equipment be provided presumably to all pickers.

80. The value of Padilla's equipment was about $400,000, that of Ontiveros $350,000, while that of Curtis totalled $100,000, As noted previously, not all of this equipment is devoted to Sequoia-related operations.

Risk of loss of the crop attaches to all three concerns from the time it is harvested until it is delivered to the packing sheds. However, the single employer bears this risk for losses stemming from any and all other factors and time periods, including cultivation and marketing of the crop. The three labor suppliers are also liable for damage in the groves caused by their crews. All of the suppliers of labor maintain liability insurance for each of the foregoing possibilities.

(2) The Union's Contentions re; Curtis Contracting

The Union argues that the employees of Curtis Contracting should be considered a custom harvester and as a consequence its employees should not be included in the unit. However, as discussed above, the Curtis operation has more similarities than differences to the businesses of Alfred Padilla and Jose Ontiveros. Like them, it provides hauling services and the equipment needed for same.[81/] While the Union contends that "Curtis provides its employees with steady year-round employment in one crop or another," such assertions have little support in the record. Ms. Curtis stated that her crews work in a variety of crops and seasons, like those of Padilla and Ontiveros, and employment can be had on a continuing basis "if there's spaces available." The high rate of turnover, attested to by Ms. Curtis, more accurately evinces the lack of continuity, or the more sporadic nature, of work opportunities. As with a good deal of Curtis' testimony, she did not rely on personal

81. The Curtis investment in equipment is substantially less ($100,000 as opposed to three or four hundred thousand) than that of Ontiveros or Padilla.

knowledge or experience to respond to counsel's queries on this issue. Rather, her recitation was based more on conjecture and speculation:

> Q: (By Mr. Dunphy): Now, if you have, let's say three or four, five crews employed in citrus, and let's say the season ends -- the Valencia season ends and the grape season is starting, do you transfer those employees if it's at all possible -- if there's spaces available, right in to the grapes?
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> A: (By Ms. Curtis): Right. I believe we have a fair amount of people seeking to work with our company because we do different types of harvesting and they're assured of a longer season.
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> Q: So, they're assured of fairly year-round employment?
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> A: Right. Those that want to stay year-round -- it's a free world. They come and they go.

The "comings" and "goings" of the Curtis work force cannot be underemphasized. Steady "year-round" employment would appear to be the exception, rather than the rule, despite its possible availability.

Curtis noted that there was a lack of contact in the groves between shed personnel and her crews. This lack of contact is viewed as more a function of the distance from the sheds to the groves in which her crews work, and of the wide fluctuations in the quantity of work to be accomplished on the two ranches, than it is a manifestation of the degree of independence or discretion which Curtis exercises in conjunction with Sequoia-related operations. Shed personnel are integrally involved, as they are with Padilla and Ontiveros, in determining time, place, quantity and quality of harvest, and in setting wage rates. In light of these factors, the absence of contact in the groves between Sequoia representatives is

not considered significant.[82/]

The Union further contends that as Curtis testified, her company must absorb the difference between the "fixed" bin rate negotiated with the employer at the beginning of the season and a raise in that rate necessitated by a sparse yield. As may be recalled, Ontiveros and Padilla have a similar wage policy in that their rate could be raised so that pickers earn at least the minimum wage. However, Ontiveros and Padilla pass the cost of the raise on to the shed and thus by inference, gain their approval for it. Nonetheless, Curtis was basing her testimony on this issue on speculation. She stated that "[t]o this date, we've never changed any [wage rates] in the middle of the year."

Lastly, the Union argues that the Curtis crews are more typically used on a sporadic basis when employed on Sequoia's ranches. Because of the variance of the employer-related work load, they are often transferred by Curtis mid-week or mid-day to other, non-Sequoia ranches in an attempt to maintain a certain continuity of employment for these employees. Given the policy considerations inherent in determining the appropriate "employer," i.e., which entity offers the most stable environment for collective bargaining as a result of a continued relationship with employees, the Union contends that Curtis' workers, should they work under a Union contract on a limited or partial-day basis, would present

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82. Ms. Curtis did testify that she did have contact with "Henry" who lives at the Madera 240 ranch. Henry converses with her personnel while they are on the property and may be asked by Curtis to report, informally, on weather and field conditions. However, he does not exercise any managerial or decision-making authority in these regards.

"administrative nightmares" for the Union and the employer.

Nevertheless, as has been repeatedly emphasized, this employer exercises a great deal of control in determining the wages, hours, and terms and conditions of employment of all of the employees of the three labor suppliers. In the absence of attaching primary employer responsibility to Sequoia, Union representation in a unit defined as employees of the labor supplier would be an exercise in futility. Any issues negotiated on behalf of these employees would, in effect, have to be renegotiated with Sequoia. Such circumstances could hardly lead to "stability" in collective bargaining for the Curtis employees working on Sequoia properties.

(3) Legal Discussion and Analysis

Section 1140.4(c) of the Act defines an agricultural employer as:

> The term "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 of 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 by 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.

A farm labor contractor is defined as:

> (b) "Farm labor contractor" designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for such workers;

> supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons.
>
> (e) "Fee" shall mean (1) the difference between the amount received by a labor contractor and the amount paid out by him to persons employed to render personal services to, for or under the direction of a third person; (2) any valuable consideration received or to be received by a farm labor contractor for or in connection with any of the services described above, and shall include the difference between any amount received or to be received by him, and the amount paid out by him, for or in connection with the rendering of such services.

As labor contractors are excluded from the definition of "agricultural employer" in the Act, persons engaged by them in a non-supervisorial capacity are deemed the employees of the employer who engages the labor contractor him or herself and are included, for the purposes of union representation, in that employer's collective bargaining unit. (See, e.g., Jordan Brothers' Ranch, supra; S & J Ranch, Inc. (1984) 10 ALRB No. 26.)

On the other hand, if a supplier of labor is determined to be a "custom harvester," then the employees are included within a bargaining unit defined as the employees of the custom harvester, rather than the entity which retains the custom harvester. (See, e.g., Gourmet Harvesting and Packing (1978) 4 ALRB No. 14); Limoneira Company (1981) 7 ALRB No. 23.)

The definition of the term "custom harvester" has arisen from decisional law, as contrasted with the statutory definition of the term labor contractor. Basically, a "custom harvester" provides "something more" than the mere furnishing of agricultural labor for a fee. (Kotchevar Brothers (1976) 2 ALRB No. 45; Gourmet Harvesting and Packing, supra.) One or both of two factors have previously been "considered essential" in earlier cases to the application of

custom harvester status: "the providing of specialized equipment and the exercise of managerial judgment in the cultivation or harvesting of crops." (Sutti Farms (1980) 6 ALRB No. 11.) An examination of the totality of the activities engaged in by the supplier of labor is necessary in making a custom harvester determination (Joe Maggio (1979) 5 ALRB No. 26), with a view towards "fastening the bargaining obligation upon the entity with the more permanent interest in the ongoing agricultural operation." (Gourmet Harvesting and Packing, supra, p. 5; Tony Lomanto (1982) 8 ALRB No. 44; Jordan Brothers Ranch (1983) 9 ALRB No. 41.)

A seemingly definitive discussion of factors applicable to custom harvester status appeared in Tony Lomanto, supra. There, the Board recognized that in prior decisions it had been "difficult to consistently distinguish between labor contractors and custom harvesters," given the variety of agricultural practices in varying regions with varying crops, and that "no conclusive factor has emerged to control all 'custom harvester' cases." (Id. at 4 and 5.) Accordingly, it determined that there should be a full inquiry into all facets of a labor supplier's operation and all factors which bore "upon the ultimate goal of attaching the collective bargaining obligation to the entity which will promote the most stable and effective labor relations." The Board then proceeded to list thirteen separate criteria for assessing the issue, which any such inquiry should "include, but not be limited to . ..." A discussion of the application of these criteria will appear below.

Not long thereafter, however, the California Supreme Court decided Rivcom Corp v. A.L.R.B. (1983) 34 Cal.3d 743. In that case

it stated:

> No decision holds, however, that a custom harvester is the sole employer of any workers it furnishes. Any such result would undermine the statutory goal of fixing labor relation responsibility directly on farm operators. Thus any assumption the Triple M [the supplier of harvest labor as well as hauling services and equipment] acted as a custom harvester at Rivcom Ranch, and was therefore an employer of the workers there, does not preclude a finding that Rivcom and Riverbend, the ranch's operators, were also employers of those workers for purposes of the Act. (34 Cal.3d 769.)

Accordingly, the Court determined that regardless of a labor supplier's custom harvester attributes, where warranted it would, in effect, establish "joint employer" status between that entity and the one who engaged it by affixing employer responsibility on the entity which had "the substantial long-term interest in the on-going agricultural operation." (Id. at 768.)

Finally, the Board, incorporating these principles, determined that While an inquiry based on the Lomanto factors might be instructive, it would ultimately need to "balanc[e] . . . policy considerations" in assigning employer status to the entity with the "long-term interest ... in the . . . operation." (S & J Ranch (1984) 10 ALRB No. 26.)

With all of the foregoing principles in mind, it is found that the single, integrated employer is the employer, within the meaning of the Act, of the employees employed by Jose Ontiveros, June Curtis, and Alfredo Padilla, who perform services on its properties. This determination is made not only because Sequoia et al. might be considered a "joint" employer of these employees, but also because the three entities supplying labor are considered "labor contractors," under the "Lomanto" standard, within the meaning of the Act.

It is unquestionable that the employer has the most significant "substantial long-term interest in the on-going agricultural operation." Through its various sub-entities, it owns the land, cultivates the *crop,* determines the timing and extent of the harvest, assigns its harvest work forces, maintains quality control, and packs and markets the crop. In the control it exerts over the wages paid by the labor suppliers, and the quantity, quality and location—of their work, Sequoia fundamentally controls the "wages, hours and terms and conditions of employment" of these workers.[84/] Accordingly, it is appropriate to affix the collective bargaining obligation on the employer, as it exhibits those characteristics which will enable it to "promote the most stable and effective labor relations" within this context.

Even if a Lomanto-type analysis were undertaken, as it was by both the Union and Employer in their briefs, the same conclusion would be reached. It is determined that the three suppliers of labor are more akin to labor contractors than custom harvesters, and their workers are to be considered employees of the employer for the purposes delineated in the Act.

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83. That the labor suppliers might decide, on a day-to-day basis, where to locate their crews is not considered as significant as the ability of the employer to assign or apportion, overall, which ranches the three will be responsible for harvesting.

84. As stated previously and discussed infra in the unfair labor practices section, notable also was the shed's retention of a labor consultant and its direct participation in decisions with the consultant concerning methods for modifying wages and fringe benefits prior to the election. The labor suppliers' input was not sought in the meeting held for this purpose. Rather, the decision to increase wages and augment benefits was made by the shed principals alone.

Incorporating by reference the testimony and factual summary thereof, appearing supra, the Lomanto factors are considered with, in some instances, abbreviated applications to the circumstances of this case.

1. Who exercises managerial control over the various operations? Who has day-to-day responsibilities?

The employer daily orders a quantity of fruit from a given labor supplier in most instances.[85/] The labor suppliers may decide where to harvest within the area of their assignments and provide daily on-the-job supervision of their crews. Shed personnel such as Tony Padilla may also have a role in directing and controlling the work in the groves, e.g., by ordering the crews when to begin picking.

2. Who decides what to plant, when to irrigate or harvest, which fields to work on?

The employer, although, as per above, harvest work locations might be selected by Ontiveros or Alfred Padilla.

3. Who is responsible for performing the farming operations?

The employer.

4. Who provides the labor? Does the provider also supervise the crews?

In the instance of the harvest workers, the labor is provided by Ontiveros, Curtis and A. Padilla, who also provide

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85. Curtis testified that she might receive the shed's orders on a weekly basis.

supervision of their crews.[86/]

5. Does someone provide equipment of a costly or specialized nature?

All three labor suppliers provide "equipment." Trucks, trailers, and forklifts, however, are not considered sufficiently "specialized," as their use is not limited to a particular crop or even to agriculture itself.[87/] (See Jordan Brothers Ranch, supra.) Equipment such as ladders, sacks and gloves, might be considered "specialized"; however, when compared with their investment in trucks, etc., the value of this equipment is insignificant. In terms of whether the total value of this equipment can be deemed costly, it undoubtedly is when considered within the context of the particular entity which owns it.[88/] However, when compared with the costliness of the employer's investment, calculated in the millions, it is substantially less so.

6. Who is responsible for hauling the crop to be processed or marketed?

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86. Such attributes fall squarely within the definition of "labor contractor" in Labor Code section 1682.

87. Cf. Tony Lomanto, where tomato harvesting machines, as they were limited to a particular crop, were considered "specialized."

88. See S & J Ranch, supra, where the labor supplier also provided hauling and harvesting equipment valued between $110,000 and $312,000, not dissimilar to the value of the equipment considered here. There the board was "not prepared to classify [the] inventory as nonspecialized and noncostly." (10 ALRB No. 26 at p. 7.)

The labor suppliers.[89]

7. Who owns or leases the land?

The employer.

8. On what basis are any contractors compensated and who bears the risk of crop loss?

For harvesting, the labor suppliers are paid a percentage override on the aggregate piece rate wages paid to their pickers. Hauling charges are assessed on varying bases by the three, but are generally grounded on quantity of citrus hauled and the distance it is transported. Although the labor suppliers bear the risk of loss of the crop from the time of harvest until it is delivered to the shed, "risk of loss" in terms of crop failure, unsuccessful cultivation practices, or adverse market conditions, lies squarely with the employer.[90]

9. Do the parties have any financial or business relationships with each other outside of the relationship at issue in the case? What form of business organization is each party to

89. In Jordan Brothers, supra, the fact that a labor contractor also provided hauling services was not determinative in concluding that he was to be considered a labor contractor.

90. Compare Tony Lomanto, supra, where the entity involved was paid on a per-ton basis, rather than a commission based on employee wages. Such method of compensation indicated that the labor supplying entity had an interest in the quantity and quality of the harvest, and hence bore some risk of its loss. In S & J Ranch, supra, the employer, as here, was responsible for irrigating, pruning and maintaining of the groves and was responsible for negotiating the "price and quality control" of the harvest with the canneries. Similar to the instant case, "any entrepreneurial discretion exercised [by the labor supplier] was of a limited nature." See also Sutti Farms, supra, where the labor supplier's "risk of loss" due to rejected produce picked by his crews was deemed of minor importance.

the case?

No. The Ontiveros and Padilla concerns are sole proprietorships. Curtis Contracting is a corporation. The employer is an interlocking and interdependent series of corporations, partnerships and proprietorships.

10. How do the parties view themselves, i.e., does the grower/landowner consider the contractor a custom harvester? If other growers enter similar arrangmenets, what are their views?

Despite self-serving testimony from Curtis, Ontiveros, and Alfred Padilla, these entities saw themselves, as evidenced by their invoices, as farm labor contractors. Evidence as to how the employer views them was similarly self-serving and hence inconclusive. No testimony was received by other growers regarding this issue.

11. How long has each party been entering into arrangements of the kind at issue in the case? What is each party's investment in that line of business and how easily could that investment be liquidated?

Curtis has been harvesting Madera 240 Ranch for twelve or thirteen years, and Panoche Ranch for three or four. Under and including previous owners, Curtis has provided labor to these properties for about twenty years.

Ontiveros has been in the hauling and harvesting business for twelve years, although how long he has provided services to the employer was not established.

Alfred Padilla has supplied services to the employer and/or its packing sheds for about twenty years.

It appears that the investment of the labor suppliers might be more easily liquidated, or utilized in other capacities, than that of the employer. Their investment is almost exclusively personalty, not necessarily tied to a given crop in a given area.[91/]

12. What continuity of employment exists between any of the parties and the agricultural employees invovled in the case, e.g., did harvest employees also work before or after the harvest for one of the parties?

There is no interchange between the harvest crews and the agricultural employees working with the various entities contained in the single integrated employer. The labor suppliers attempt to maintain a certain continuity of employment for their employees through a variety of seasons and crops. However, as the employer accounts for sixty percent of Ontiveros' work load, and thirty-five to forty percent of Padilla's, one can infer that once the employer's season is finished, neither of these concerns has full alternate employment available for the Sequoia harvesting crews.[92/]

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91. As the Union points out in its brief, the liquidation of the labor supplier's inventory would eventuate in the direct characterization of these entities as "labor contractors." The hauling component of their businesses is the major element in determining whether they might be accorded custom harvester status. Removing that element would therefore leave their employees without a statutory employer, and hence create a potentially unstable collective bargaining situation.

92. It may be recalled that four of Padilla's crews are assigned to Sequoia-related operations, while four additional are assigned to duties in connnection with other packing houses. Out of a total of six harvesting crews working for Ontiveros, three worked on lands owned by the employer while three worked for commodities received by other packing houses.

No specific evidence was received regarding particular crews which, having finished working for the employer, were relocated to other agricultural concerns.

Curtis' crews, to a greater degree, are shifted from one grower to another, and hence may exhibit a greater continuity of employment within the Curtis organization.

13. Ultimately, who is the "employer" for collective bargaining purposes, and what is the correct legal status of each of the parties?

For reasons outlined above, the "employer" herein is the single integrated entity, Sequoia, et al. Curtis, Ontiveros and Alfred Padilla, for definitional purposes, are viewed "labor contractors plus" (see S & J Ranch, supra). For purposes of the statute, these entities are deemed labor contractors. Their employees are thus considered employees of Sequoia when they are engaged in agricultural tasks on its properties.

c. Employer Responsibility for Failure to Inform Certain Crews of the Election (Objection 3(a)-(d))

Groups of employees working for the three labor suppliers and for Tony Padilla were not included on the eligibility list and not informed of the representation election, despite the fact that they were employed during the eligibility period on Sequoia properties. These groups included twenty-nine harvest workers in the crew of Jesus Moran, working under Tony Padilla at the Tropicana Ranch; fifty-four Curtis Contracting harvest workers employed at the Madera 240 Ranch during the eligibility week; twenty-eight members

of the Teodoro Barajas crews working under Alfreda Padilla;[93/] plus the truck drivers who worked for the harvesting companies.

Regarding the truck drivers, despite the representation in the employer's brief that this group included fourteen employees, no support for this assertion can be found in the record. Furthermore, no proof was adduced as to whether the drivers spent all their time hauling produce to the employer's shed, or only portions of their day so occupied, with the remainder being spent on hauling runs to other sheds. The employer cannot now assert the failure to include the drivers on the eligibility list as a ground for setting aside the election,[94/] (see, e.g., J.A. Wood Company, 4 ALRB No. 10; Ruline Nursery (1980) 6 ALRB No. 33) as it has not met its burden of proof in this regard.

The employees of the three labor suppliers have been deemed employers of the primary employer. Accordingly, these truck drivers, in appropriate circumstances, might be included in the overall bargaining unit. (See Grower-Shipper Vegetable Assn., supra; Romar Carrot (1978) 4 ALRB No. 56; Dairy Fresh Products (1976) 2 ALRB No. 55.) Therefore, it is recommended that upon presentation of adequate proof to the Regional Director of the number of hours spent by these drivers hauling produce to the

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93. While Padilla's testimony about this crew was inconsistent, documentary evidence did prove that the crew was employed at Valley View #2 ranch during the eligibility record. Rather than affecting the ultimate finding concerning this crew, Padilla's testimony is viewed more as a reflection on his overall credibility, which was found wanting.

94. Parenthetically, it should be noted that the employer raised no specific objection to election in connection with the inclusion or exclusion of the drivers.

employer's shed, they be permitted to vote in subsequent elections. In the alternative, it is recommended that the drivers be included on the eligibility list and cast their ballots subject to challenge.

It is clear that as determined above, the Curtis employees, and the members of the Barajas and Moran crews who worked on the employer's properties during the eligibility period, are employees of the primary employer who should have been considered eligible to vote. (ALRA Regs. §20352(a)(1).) The Regional Director, at least implicitly, decided that the Curtis employees were employees of a custom harvester, and hence not eligible to vote under any circumstances. The employer bore no responsibility for this exclusion. The failure to include these fifty-four employees on the eligibility list, and their resulting disenfranchisement, might or might not have affected the ultimate outcome of the election. This issue cannot be determined until the 135 ballots from the packing shed are opened and counted. Consequently, should the Union's margin of victory be less than fifty-four votes after a revised Tally is prepared shich includes the packing shed votes, the election must be set aside. (ALRA §§1156.2, 1156.3(c) and 1157; see, e.g., Hemet Wholesale (1976) 2 ALRB No. 24.)

However, the employees of Tony and Alfred Padilla were, ab initio, considered eligible to vote. As framed in the employer's objections, was the failure to include them on the election eligibility list "misconduct attributable to the employer," and hence an improper ground to rely upon, under ALRA Regs, section 20365(c)(5), to overturn the election?

The employer stipulated that Tony Padilla was a labor

contractor. Hence his harvest workers are deemed employees of the primary employer. Likewise, the harvest workers under Alfred Padilla have been determined to be employees of Sequoia. Despite representations by employer counsel Hunsaker that he transmitted the Board subpoena and eligibility list information request to the attorney for the Padillas, and that attorney submitted lists which were ultimately proven to be deficient, it is the primary employer's responsibility to maintain accurate and current lists of its employees, including those workers employed through a labor contractor. (ALRA §§1157.3 and 1174(c); ALRA Regs §20310(a)(2); Cardinal Distributing Co. (1977) 3 ALRB no. 23; Filice Estate Vineyards (1978) 4 ALRB No. 71; Yoder Brothers (1976) 2 ALRB No. 4.) Assertions of "good faith" notwithstanding, the employer cannot rely upon its failure to comply with statutory list requirements and the consequent failure of adequate notice to its employees of a representation election, as a ground for setting aside that election. (ALRA Regs §§20365(c)(5); Pacific Farms (1977) 3 ALRB No. 75.) Thus Objection 3 should be dismissed.

d. Summary of Representation Case Findings of Fact and Conclusions of Law

1. Harvest workers employed by Alfredo Padilla, Tony Padilla, Jose Ontiveros and Curtis Contracting are deemed employees of the employer when working on lands within the single integrated employing entity.

2. Truck drivers working for the above entities may, in the event they spend a substantial amount of their work day hauling produce to the employer's sheds, also be deemed employees of the employer.

3. Alfredo Padilla, Jose Ontiveros, and June Curtis are determined to be labor contractors within the meaning of the Act.

4. In the alternative, the single integrated employing entity herein has "the substantial long-term interest in the ongoing agricultural operation" in question so as to affix on it employer responsibility for its harvest workers for the purposes of collective bargaining.

5. The employer may not rely, as a ground for overturning the election, on the disenfranchisement arising from its failure to include certain groups of harvest workers and/or truck drivers on the eligibility lists submitted to the Board for the representation election herein.

6. The employer's packing sheds are agricultural enterprises, and the packing shed workers are agricultural employees.

7. The ballots of the packing shed workers should be opened and counted and their votes recorded and included on a Revised Talley of Ballots.

8. The fifty-four workers employed by Curtis Contracting who worked on the employer's lands during the eligibility period should have been deemed eligible to vote in the election, and the consequent failure to notify them of the election may constitute grounds for setting the election aside.

9. In the event that the union's margin of victory is equal to or less than fifty-four votes after the Revised Tally has been prepared, the election must be set aside.

10. In the event that the Union's margin of victory in the Revised Tally is greater that fifty-four votes, the Union should be certified as the exclusive bargaining representative of the employer's agricultural employees for a bargaining unit which shall include:

a. Harvest workers employed by Tony Padilla, Alfredo Padilla, Jose Ontiveros and June Curtis;

b. Truck drivers for the foregoing labor suppliers, in the event they spend a substantial portion of their work day hauling produce to the employer's sheds,

c. Packing shed workers employed at the Sequoia Orange Company and Exeter Orange Company packing sheds;

d. Agricultural workers employed by Badger Farming Company.

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C. The Unfair Labor Practices Alleged [95/]

1. The Discharge of Tomas Sanchez and his Crew

General Counsel alleged that on or about March 6, 1983, resondent discharged Tomas Sanchez[96/] and his crew because they requested a wage increase.

a. General Counsel's Evidence

Tomas Sanchez had initially been hired to work as a foreman for Tony Padilla in January of 1983. Like all harvesting foremen, his overall responsibilities included hiring his crew, informing them where work would be located on a given day, and generally overseeing the crew work output to insure that the work was being properly performed.

On March 6, 1983, Sanchez' crew was working in a mineola grove on the Cameo Ranch. Picking there was very sparse, according to Sanchez: while it ordinarily took the oranges from two and one-half trees to fill a bin, on this occasion the fruit from sixteen to eighteen trees, he estimated, was needed. Several days earlier, the workers in Sanchez' crew complained about the quantity of fruit to be harvested (hence lessening their potential piece-rate earnings), and asked him if he would talk to Tony Padilla about a

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95. As it has been determined that the employees of the labor suppliers are considered employees of the primary employer, it is that employer which is ultimately responsible for the unfair labor practices under consideration. (See, generally, Rivcom Corp. v. A.L.R.B., supra.)

96. As the unfair labor practice phase of the case began, General Counsel amended the complaint to include Tomas Sanchez, a foreman, as a discriminatee.

wage increase.[97/] At the particular time when the wage issue initially arose, Padilla was not present, although a request to raise wages was related to a man named "Lorenzo" who visited the work site that day.[98/]

On the following day the crew returned to the same block. Again the workers complained about the quantity to be picked, and again they asked Sanchez to speak to Tony Padilla about obtaining a rate increase. That afternoon, Sanchez telephoned Padilla, who told him that he would visit the grove the following day "to see what it was that he would do."[99/]

Tony Padilla did in fact come out to the harvest site that next day. He arrived, Sanchez testified, about three hours after the crew had assembled that morning.[100/] Sanchez told Padilla "that the people were asking me for a raise and that the fruit was very bad." Sanchez also asked Padilla to go and inspect the grove and verify the conditions. Padilla, Sanchez stated, then told the foreman ". . .no. There is no more raise. There is no more work for you [in the plural, thus meaning the crew.]" Sanchez continued to insist that Padilla inspect the grove. Padilla accused Sanchez

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97. Sanchez did not have the authority to grant such an increase. He would pass on to Padilla requests for same by his workers, who could grant them.

98. It was not established that "Lorenzo" was a supervisor or agent for the employer. Evidence regarding his identity was inconclusive.

99. Padilla denied receiving such a call.

100. The crew, however, had not begun to work because they awaited Padilla, who, according to Sanchez, had always given the order to start.

of being drunk, after Sanchez, by his own account, "began to start talking somewhat strong to him." Sanchez essentially denied that he had had anything to drink.[101/] The foreman then gave the message to the crew that there would be no raise, and that they were all dismissed.

The foreman telephoned Padilla again that afternoon to find out for certain whether the crew would be getting any more work. Padilla merely reiterated that they had all been fired.

Andres Fernandez, a picker in Sanchez' crew, corroborated Sanchez' assertions regarding the inadequate quantity of citrus available to be picked, the workers' complaints about the situation, and the subsequent discharge by Tony Padilla. He additionally testified that he rode to work with Sanchez, and had never seen him drinking on the job.

b. Respondent's Evidence; The Testimony of Tony Padilla

Tony Padilla was stipulated to be a labor contractor retained by the respondent. Part of his function in this regard was to obtain foremen and harvest crews for citrus packed in to the respondent's sheds.[102/]

Padilla recalled that around March 6, the picking on the Cameo Ranch was somewhat sparse. However, the workers were being paid $14 per bin, and he had not personally received any complaints

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101. Sanchez also stated that Padilla never said anything before to him about being drunk on the job, and denied that he ever drank anything alcoholic at work.

102. Tony Padilla had additional duties in his capacity as shed fieldman working for Wilson and Wilson. These duties are discussed elsewhere.

from them about the picking rate.[103] Accompanied by his assistant, Rogelio Ortiz, he visited the ranch at about 8:30 a.m. on March 6 to tell the crew to start.[104] He also wanted to talk to Sanchez about his bin counts, which Padilla maintained had repeatedly not been accurate.[105] As Sanchez began explaining the alleged mistake, Padilla testified, the supervisor "noticed that he had been drinking" by "the way he was talking. . . . and the smell of alcohol. He was slurring and repeating his words." Padilla also mentioned to Sanchez at that time that he noticed other occasions when the foreman had been drinking, but did not mention them to him "because I haven't wanted to embarass you."

Padilla then stated that he told Sanchez "... this is the last time I want to put up with it because I am again, going through another discussion on the payroll -- on your totals that keeps [sic] coming out wrong . . . and I can't put up with this any more. I'm going to have to let you go." Sanchez protested, but the contractor would not reconsider. The foreman asked him for a "paper" to take to the unemployment office. It was at that point, Padilla

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103. Union Exhibit 2, admitted during the representation phase of the case, consists of Jose Ontiveros' invoices for picking in early March. One such invoice, dated 3/11/83, notes that on Cameo Ranch there was "very light picking" of mineolas, and his workers were paid $20 per bin.

104. Padilla, as Sanchez noted, usually gave the order to begin. Padilla' estimate of the time when he arrived obviously conflicts with that of Sanchez.

105. In the two months that Sanchez was employed, Padilla claimed there had been at least four separate occasions when these errors were made. No documentation was produced to substantiate these claims. Ordinarily, should there be an error in the bin count, the foreman is backcharged for the discrepancy.

testified, that the foreman first brought up the problem with the picking rate. Padilla then told the foreman that he tried to be fair in locating his crews so that each could pick a fair amount. "And you haven't complained to me or they haven't complained to me before and now you bring this up. That's not the issue here." Padilla thereupon wrote on the "paper" "the reasons I was letting him go, as far as his conditions of drinking and the payroll records -- that we were having every week."[106/]

Padilla testified that he left the area because it had been too wet for the crew[107/] to start working, and visited some other ranches. When he returned at 11:30 that morning everyone from the crew had departed.

Padilla claimed to have received telephone calls requesting re-employment from two former Sanchez crew members, only one of whom he could identify as being Maria Araaya. Padilla allegedly told the workers that they would be put to work if a place in another crew could be found. Padilla's testimony in this regard was uncorroborated hearsay which was properly and in timely fashion objected to. Since the workers were not called as witnesses, Padilla's testimony cannot be utilized as the basis for a finding that Sanchez crew members called him seeking re-employment.

Respondent profferred evidence that recall notices were sent to certain crew members in June of 1983. Additionally,

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106. Padilla claimed not to have kept a copy of this "paper." It was not produced in evidence.

107. Actually, only about half the crew, or twelve workers, were present.

pursuant to a stipulation- submitted after the hearing was adjourned, the parties acknowledged that of the twenty-nine individuals employed by Padilla in Sanchez' crew as of the work week beginning March 3, 1983, seven workers were employed after March 6, 1983 to work in other Tony Padilla crews harvesting citrus for the employer.[108/]

c. Analysis and Conclusions

Clearly, ultimate findings regarding this allegation turn on the question of credibility. For respondent to prevail on this issue, their version of the Sanchez discharge must be accepted, to wit, that Sanchez was terminated for repeatedly reporting mistaken bin counts and for being drunk on the job. For General Counsel to prevail, it must be found that Sanchez and the members of his crew were discharged for protesting the wage rate that they were receiving.

Before analyzing the two versions of the facts, it is necessary to determine whether or not Sanchez, as a foreman and supervisor, might avail himself of the protections of the Act. As an initial observation, the wage protest, assuming that it did in fact occur, is the type of protected, concerted activity which the Act is designed to insulate from employer discrimination. (See, e.g., Pioneer Nursery (1984) 10 ALRB No. 30); Mike Yurosek & Sons (1983) 9 ALRB No. 69; Royal Packing Co. (1982) 8 ALRB No. 16; Lawrence Scarrone (1981) 7 ALRB No. 13; Tenneco West (1978) 6 ALRB No. 53.) A discharge which would not have been effectuated "but

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108. Interestingly, Maria Amaya was not one of the individuals so re-employed.

for" employee participation in such protected concerted activities is one which is violative of the Act. (Martori Brothers v. A.L.R.B. (1981) 29 Cal.3d 721, Wright Line (1980) 251 NLRB No. 150.

As a general proposition, however, such protections are customarily not accorded to supervisory personnel who are by definition, not "employees," and are specifically excluded from the Act's coverage. These individuals, as part of management, are expected to exhibit "loyalty" to their employer's interests, and not to subordinate such interests to the concerns of the rank-and-file employees whom they supervise. (Florida Power & Light v. IBEW (1974) 417 U.S. 790; Beasley v. Food Fair of North Carolina, Inc. (1974) 416 U.S. 653.)

Exceptions to this general rule have arisen in circumstances where the discharge of a supervisor would run counter to the Act's underlying philosophy of guaranteeing to agricultural workers "full freedom of association," and freedom "from interference, restraint or coercion of employers in ... concerted activities for the purpose of ... mutual aid or protection." (ALRA preamble and section 1152.) The lead case arising under the ALRA recognizing this principle and promulgating rules pertinent to its application is Ruline Nursery (1981) 7 ALRB No. 21. There the board enunciated three general factual situations where a supervisor's discharge will have the effect of restraining, coercing, or interferring with the exercise of employee section 1152 rights, and hence result in a violation of section 1153(a). Two of these categories are not pertinent to this discussion: where a supervisor was discharged for having refused to engage in activities

proscribed by the Act (Id. at p. 9), or where a supervisor is discharged for having engaged in conduct designed to protect employee rights, such as "giving testimony adverse to the employer in a [Board] proceeding". (Id. at p. 10.)

The third exception to permitting a discharge of a supervisor at will without violating the Act arises where the discharge is "the means by which the employer unlawfully discriminates against its employees." "A prima facie case is made out in this category when employees' tenure is expressly conditioned on the continued employment of their supervisor, employees have engaged in protected concerted activities, and their supervisor has been discharged as a means of terminating the employees because of their concerted activity." (Id. at p. 11; Kaplan Ranch (1979) 5 ALRB No. 40; Pioneer Drilling Co. (1967) 162 NLRB 918, enf'd in pert, part, Pioneer Drilling Co. v. N.L.R.B. (C.A. 10 1968) 391 F.2d 961.)

In the instant situation, testimony from a variety of witnesses established that the hiring of harvest crews, regardless of the labor supplier by whom they were paid, was effectuated through the hiring of a particular foreman, who in turn contacted and actually engaged the members of his crew.[109/] That the retention of individual crew members was dependent on the continued retention of their individual foreman is evidenced by the circumstances surrounding the discharge of Tomas Sanchez. After Sanchez had been told of his termination, no one from his crew

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109. Curtis Contracting provides an exception to this general practice.

remained at the work site to await further orders. Either because Sanchez had informed them directly (as per his testimony), or because they had reacted to' Sanchez' dismissal by assuming that they too were terminated, all of the pickers who had reported to work that morning had left by the time Padilla returned. Andres Fernandez testified that he asked Sanchez to contact Padilla after the terminations to see if the workers could regain their jobs. He did not personally attempt to contact Padilla.

Padilla himself testified "I went to check my other places that I needed to check on and then I said[110/] 'I' 11 come back and <u>if the workers are there,</u> I'll talk to them.'" (Emphasis supplied.) Thus even Padilla assumed that once the foreman had been discharged, the crew would not remain. Further, Padilla did not speak with the crew and tell them to remain despite what had happened to the foreman. I specifically find, therefore, that the continued employment of the harvest crew was directly contingent upon the continued employment of their foreman.

Respondent argues in its brief that the rule of law announced in <u>Pioneer Drilling</u> is inapplicable to the instant situation since there the discharge of the foreman <u>automatically</u> resulted in the discharge of his crew, whereas here, a crew might continue to work despite the foreman's termination. As evidence of this contention, respondent points to the replacement of Genaro Flores by Joaquin Navarro in August 1983, and the continued employment of Flores' crew members, and the evidence that seven

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110. To whom Padilla "said" this is not altogether clear.

members of Sanchez' former crew were employed after Sanchez' termination. These arguments are unavailing. Flores was not terminated but left voluntarily, as he had in past seasons, to work in the grape harvest.[111/] It may therefore be inferred that Navarro was merely "filling in" for Flores as an accommodation to him. More importantly, Flores' departure was not occassioned by any protected concerted activities of his crew. Insofar as the rehire of the seven erstwhile Sanchez crew members, no evidence was presented as to how soon after Sanchez' discharge they were retained, or whether, when the rehiring took place, the one who hired them had any knowledge that they were in fact former Sanchez crew employees.

Respondent additionally argues that Padilla did not intend to fire the members of Sanchez' crew. Nowhere was this purported intention actually conveyed to the workers. It should also be emphasized that neither an employer's motive or the actual success of a potentially coercive action is an element of a violation of section 1153(a) of the Act. The test for such a violation is whether the employer engages in conduct which may be reasonably be said to interfere with the exercise of employee rights as enumerated in the Act. (Harry Carian v. A.L.R.B. (1984) 36 Cal.3d 654; Merrill Farms v. A.L.R.B., 111 Cal.App.3d 176 at 183-84.)

Furthermore, as per Superior Farming v. A.L.R.B. (1984) 151 Cal.App.3d 100, even if Sanchez mistakenly informed his crew that they were discharged, the conveying of this mistaken information, which resulted in their dismissal, still had a coercive effect on

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111. This will be discussed infra in greater detail.

the employees, thus giving rise to a violation of ALRA section 1153(a). Similar to the instant case, a crew leader in Superior Farming relayed to a representative of management his crew's request for a wage increase. Although the crew leader there was neither directly told that he or the crew had been dismissed, when he reported to the crew that such had been the case, the crew could reasonably believe that he was speaking on management's behalf. Here, the evidence amply demonstrated the basis for such a "reasonable belief." Sanchez was the conduit through which the respondent hired its harvest workers, relayed its problems with quality control, and by which the workers conveyed their desires for a wage increase. At no time did any worker directly approach Padilla on any of these matters.[112/]

> Superior asserts the discharge was caused by the independent mistake of [crew leader] Zacarias and was not directly linked to the protected activity. The fact is that the mistake or misinterpretation of Zacarias was part of a chain of events set in motion by the crew's concerted wage protest and cannot be deemed an innocuous, independent cause of discharge. (151 Cal.App.3d 116.)

Similarly, the workers in Sanchez' crew could reasonably believe that their discharges were effectuated as a result of "a chain of events set in motion by the crew's concerted wage protest."

Turning to the factual conflict arising from testimony concerning the Tomas Sanchez discharge, I find that it is Sanchez' version, not that of Tony Padilla, which must be credited. In

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112. Padilla's testimony that workers telephoned him seeking employment does not detract from this conclusion. Notwithstanding its lack of evidentiary value, Padilla did not state that workers were or could be in fact hired as a result of their contacting him.

short, I resolve this conflict in General Counsel's favor. Such findings are principally based upon the total lack of corroboration presented to substantiate Padilla's assertions.

Both General Counsel and respondent cite the by-now well-recognized principle that once the General Counsel has presented prima facie evidence that protected activity was a motivating factor in an employer's decision to discharge an employee or employees, the burden of persuasion shifts to the employer to demonstrate that its action would have taken place even in the absence of such activity. (Martori Brothers v. A.L.R.B., supra; Wright Line, supra; N.L.R.B. v. Transportation Management Corp. (1983) 459 U.S 1014, 76 L.Ed.2d 667.) The prima facie elements of General Counsel's case were established by Tomas Sanchez's testimony to the effect that once he informed Padilla of his crew's dissatisfaction with the wage rate they were receiving, Padilla informed him that "there is no more work" for him and his crew.

Respondent failed to meet its burden of establishing, by a preponderance of the evidence, that the Sanchez discharge, and that of his crew, would have taken place in the absence of protected activity. Whereas Andres Fernandez substantiated Sanchez[1] account of the foreman's sober demeanor and of worker complaints on the rate of pay, and Sanchez relaying to them that they had been discharged, no corroboration was elicited for any of the factual assertions made by Tony Padilla. Padilla stated that when he spoke to Sanchez on March 6, Rogelio Ortiz was present throughout their conversation. Ortiz was not called as a witness. Although Padilla asserted that Sanchez had, on several occasions, miscalculated the bin count, no

documentary evidence was preferred, such as crew sheets or invoices, to substantiate these claims.[113/] Further, no specific reference to dates and/or locations was made in connection with the alleged miscalculations.[114/]

Other elements of respondent's purported defense merit comment. Padilla stated that he gave Sanchez "a paper" containing the reasons for his discharge. While Padilla claimed not to have kept a copy, no attempt was made to subpoena it from the foreman and thus provide a prior "consistent statement" as per Evidence Code Section 1236. Nor was any evidence preferred regarding the status of or the position taken by Padilla in Sanchez' purported unemployment claim, during such a process, if any there were Though assertions made by Padilla in an unemployment compensation dispute might be deemed hearsay, the fact that they were made would aid in countering the inference that the reasons for the discharge were pretextual.

Additionally, while Padilla maintained that Sanchez had prior problems with drinking on the job and with the bin counts, the fact that no evidence was offered that he had been previously warned

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113. Padilla testified that when the bin count comes out wrong, "I deduct them off of the foreman."

114. Interestingly, during respondent's cross-examination of Sanchez, no specific questions were asked to him regarding the conversation between Padilla and the foreman immediately prior to the discharge. If, as respondent asserted, there had been problems with bin counts, it would have been a simple matter to inquire into these matters during the cross-examination. Should Sanchez have admitted to the problem, this would lend some credence to Padilla's version. In the event that Sanchez denied the problem, records could have been introduced to refute his testimony and thus reflect adversely on his credibility.

that such actions might result in his discharge also lends support to General Counsel's version of the facts. In light of this absence of proof, even assuming arguendo that Padilla's account was accurate, the precipitous nature of the termination, i.e., that Sanchez' behavior of the sort alleged had, to an extent, been tolerated in the past, and that he and his crew were discharged in the context of a wage protest, appears to buttress the conclusion that the reasons advanced by respondent were pretextual. (See, e.g., Pioneer Nursery, supra.)[115/]

Finally, even if one were to accept in toto respondent's rationale for the Sanchez termination, no explanation was given for the crew's discharge. Padilla admitted his awareness of the crew's dissatisfaction with the wage rate. No effort was made by Padilla, or anyone from the employer, for that matter, to contact crew members to disabuse them of the notion that they had been terminated.[116/] In short, no attempt was made to vitiate the

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115. These circumstances create a situation which might also be viewed as a "dual motive" type of case. (See, e.g., Abatti Farms, Inc. v. A.L.R.B. (1980) 107 Cal.App.3d 317; Mike Yurosek and Sons, supra.) It is clear, however, that the wage protest played a part in the decision to terminate.

116. The assertion by Padilla that two crew members telephoned him asking for work, or that the seven Sanchez crew members were rehired after March 6, does not run counter to this finding. The burden was placed on the crew members to seek reemployment. In the instance of the phone calls, rehiring in Padilla's words was contingent upon vacancies existing in other crews. Their former positions, therefore, were eliminated. Evidence of the sending of recall letters to crew members some time in June of that year also does not militate against a finding of unlawful discharge. As pointed out by General Counsel during the hearing, such matters would only affect the extent of mitigation of employer liability, rather than refute the existence of liability itself. (See Kitayama Brothers (1983) 9 ALRB No. 23.)

coercive effect of Padilla's actions on March 6. Once General Counsel had made out a prima facie case of unlawful discrimination/ the burden of proof shifted" to the employer to establish a non-discriminatory motive for the change in employee tenure. This burden was simply not met, facile explanations of unexpressed intentions not to discharge and belated recall notices notwithstanding.

It is therefore concluded that the employer violated section 1153(a) of the Act by discharging Tomas Sanchez and the members of his crew.

2. The Cisneros Discharges

a. The Facts Presented

General Counsel alleged that "on or about March 16, 1933, Respondent . . . discharged . . . seven members of the Cisneros family because of their participation in a work stoppage in support of a raise in the piece-rate wage."

Ramon Cisneros provided the following testimony in support of this allegation. In March of 1983, he and six other members of his family had been working for Jose Ontiveros in the crew of Napoleon Vasquez. They had been so employed for from two to three weeks. The other members of his family included his wife, Josefina, his sister Rosa, his father Francisco, his brother Florentine, his cousin Roberto, and his brother-in-law, Hilario Robledo-Customarily, all of the Cisneros family rode to work together in Ramon's car.

On March 16 the Vasquez crew gathered to work at the Cameo

Ranch[117/] to pick navel oranges. Cisneros estimated that while it would usually take the fruit from three or four trees to fill a bin, on those days at Cameo the fruit from twenty trees would be needed. As the crew assembled, complaints were voiced about the quantity of fruit available for picking, and the notion to request a wage increase if Vasquez was expressed. Some of the workers had previously mentioned that they had approached Vasquez with such a request, asking him to pass it on to the contractor. They had met with a negative response.[118/]

Soon thereafter, Ramon Cisneros himself approached foreman Vasquez and asked that he "call the contractor so that he would appear there and he would talk to him so that he would raise our pay." Vasquez denied Cisneros' request, adding that "he [Ontiveros, presumably] was not going to give the raise." In Cisneros words, the foreman also stated that "those who want to go in and start, go ahead. And those who didn't, to get their ladders and put them on the trailer and that there would no longer be anymore work . . . ."

Some twelve or thirteen pickers went in to work that morning, while the remainder of the crew, about nineteen workers including the seven members of the Cisneros family, "stayed outside." The nineteen remained at the work site for about two or three hours, hoping to speak to the contractor about the situation. Someone did arrive at the field that morning but the protesting

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117. As will be discussed below, the crew actually worked on the Hiatt ranch that day.

118. Such statements coming by way of Cisneros' testimony were not offered for the truth of the matter but rather that such statements were made during the course of the workers' discussion.

workers, not knowing him, did not speak to him. After this person left, Vasquez approached the group and told them that they should have spoken to the visitor about a raise. The workers replied, according to Cisneros, that they wanted to speak with Ontiveros himself.

Cisneros subsequently contacted the foreman the following Saturday, the 19th, to inquire when he was going to work.[119/] He maintained that he was making the inquiry on behalf of all the members of his family. Although Vasquez told him on that occasion he was not going to work "because it was very wet," Cisneros later found out that Vasquez did, in fact, work that day.[120/]

Cisneros again sought reemployment around the time of the Union election: "I asked him [Vasquez] was he going to give me some work, and he said, 'no.' He said that ever since the day when we had refused to go in to work there where it was bad, since then, there was no longer any work for us."

Payroll records established that in the week beginning March 19, six new names appeared Vasquez' crew sheets, and in the

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119. Cisneros had not called him on the 17th or 18th because, he maintained, it had been raining. The transcript contained a statement that in this telephone conversation Cisneros had originally told Vasquez "he wasn't going to work." However, General Counsel moved to correct the transcript after the tape recording of Cisneros[1] statement had been reheard by Dr. Kemiji, the director of Language Services. The motion was granted, since the correction conformed to a statement Cisneros made after being asked to repeat what was said, and the correction appeared logical in the total context of Cisneros' testimony.

120. Vasquez' crew sheets support this finding as well.

following week, six additional hires were shown.[121/]

Respondent did not call Napoleon Vasquez as a witness. Given this absence of a refutation of Cisneros' testimony regarding his exchanges with the foreman, Cisneros' testimony in those particulars must be credited. (See Martori Brothers Dist. v. A.L.R.B. (1981) 29 Cal.3d 721, pp. 727, 728.)

Respondent did call Jose Ontiveros as a witness in an attempt to counter some aspects of the workers' testimony. Ontiveros provided the following:

Q: (By Mr. Drake): Do you know a Ramon Cisneros?

A: (By Jose Ontiveros): I do not know him personally, but I did talk with him on the day they were working at the Hiatt Ranch, which was the day when they were standing there refusing to go and begin work. He told me they wanted more money. And I told them that we could not give them any more money, that it was only one day which we were going to work there, that no one was laying him off, that if he wanted to continue working, he could. That's all I spoke to him and then I left.

Q: Do you remember approximately what date that was?

A: It was more or less, it was 16th, but I don't recall what month it was.

Q: Do you recall what year it was?

A: '83.

When further asked if he had later spoken with Cisneros, Ontiveros replied that he had, that he told him "he could return to work," but that Cisneros informed him that he had another job.

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121. That these names did not appear on the Vasquez crew records for previous weeks would seem to indicate that they were new hires. For the week beginning 3/31/83, the actual word "new" appears alongside the names of six workers. Ontiveros, authenticating the payroll records, established that this notation signified that the worker was in fact a new hire.

However, Ontiveros stated that the date of this conversation was in the "autumn" of 1983. Ontiveros also sent recall letters to Cisneros and members of his family at the beginning of the navel season, or mid-November to December, 1983.[122/]

Strictly speaking, Ontiveros' testimony does not contradict the principle thrust of the worker's recitation. Admittedly, a conflict appears to exist between Cisneros' assertion that after some of the crew members refused to go in to work, an unidentified man arrived with whom he did not speak, and Ontiveros' claim that he did speak with Cisneros.[123/] However, on cross-examination, Ontiveros was unable to definitively establish how he knew it was Ramon Cisneros with whom he was speaking on that day:

> Q: (By Ms. Bramberg): What were the names of these other people [that were with Cisneros when you spoke to him]?
>
> A: (By J. Ontiveros): I don't know because, like I say, I don't know them personally.
>
> Q: Had you ever spoken to Ramon Cisneros before that day?
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> A: No, I hadn't spoken to him. Perhaps as I go in to talk to the people to check the picking, . . ., it could be that I had spoken to him and I didn't recognize him.

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122. The notices were actually sent by certified mail on December 29, 1983. The letters were returned undelivered.

123. By Ontiveros' estimate, about ten to twelve people did not go into work that day. The crew sheet for that week lists the names of thirty-two crew members, nineteen of whom did not work on March 16. While some of these individuals may have simply been absent from work, and not participants in the stoppage, it is nevertheless clear that a number *of* workers apart from Ramon Cisneros and his family took part in the wage protest.

Q: How did you know then that Ramon Cisneros was among the people you were talking to?

A: Because he himself, came over to me. When I arrived there, he came over to me and then he began to tell me regarding that which was . . . happening.

Ontiveros did not assert that Cisneros identified himself. If Ontiveros, by his own account, did not recognize Cisneros, it would not seem possible for the contractor to know or to be able to establish with certainty to whom he was speaking. What does appear logical, and somewhat consistent with the testimony of both witnesses, is that Ontiveros may have had a conversation with a worker that morning about the stoppage, but that worker may not have been Ramon Cisneros, and that neither Cisneros nor Ontiveros recognized one another. I therefore find that Ontiveros' testimony did not establish that he did, in fact, speak with Cisneros that morning.

Even assuming for the sake of argument that the conversation did take place, Ontiveros' averment that Cisneros could "work if he wanted" does not negate the establishment of the fact that the workers were refusing to work unless the wage rate were adjusted, and thus were engaging in protected, concerted activity. Regarding the contractor's claim that he told Cisneros that "no one was laying him off," Vasquez' subsequent refusals to rehire and the members of his family vitiated any potential impact that this purported "disavowal" might have on these workers. (Cf. J.R. Norton Company (1984) 10 ALRB No. 7.) It was Vasquez, not Cisneros, to whom the workers looked for employment.

b. Legal Analysis and Conclusions

The prima facie elements of the Cisneros discharges were established by the testimony of Ramon Cisneros, as were the elements of an unlawful refusal to rehire him and the members of his family[124/] when work was available.[125/] Cisneros and his family refused to work in an effort to obtain a wage augmentation. They were told at the grove and subsequently by way of telephone conversations between Cisneros and Vasquez, that because they had refused to work for them, "there would no longer be any work."

Respondent presented no evidence that it would have taken this action against the Cisneros regardless of their participation in protected concerted activities, as is common in defense of such such cases. (See cases cited in Sanchez' discussion, supra.) Instead respondent took a different tack.

Curiously, in its brief respondent ignores Ontiveros' testimony, not referring to it in either its factual discussion or legal argument. Any contention utilizing said testimony, e.g., that Cisneros voluntarily quit employment rather than being terminated, might be thereby considered waived. (See, e.g., Butte View Farms v. A.L.R.B. (1979) 95 Cal.App.3d 961, 971; Rivcom Corp. v. A.L.R.B.,

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124. To establish a prima facie case of a discriminatory refusal to rehire, General Counsel must show by a preponderance of the evidence that *a* person or persons engaged in protected activity, that their employer had knowledge of such activity, and there was a causal relationship between the protected activity and the refusal to rehire when job vacancies existed. (Ukegawa Brothers (1983) 9 ALRB No. 26; see also cases cited in Sanchez crew discharge discussion, ante.)

125. The fact that work was available was, as previously noted, established by Ontiveros' crew records.

supra, at p. 756.) Respondent instead bases its defense to this allegation on the contention that Cisneros never made an "unconditional" offer to return to work. As a general rule, an employer does not commit an unfair labor practice when it refuses to rehire strike participants who seek to return to work on a conditional basis which the employer need not accept. (See, e.g., Rivcom Corp., supra; Lu-Ette Farms (1982) 8 ALRB No. 55; Frudden Produce, Inc. (1982) 8 ALRB No. 42, aff'd in pert, part slip opinion No. A018374, 1st Dist., Div. 4 (unpub. opinion); Colace Brothers, Inc. (1982) 8 ALRB No. 1.)

In support of this contention respondent initially relies on the uncorrected transcription of Cisneros' testimony reported as a portion of his telephone conversation on March 19 ("And I told him I wasn't going to work.") As this testimony has been corrected via General Counsel's motion (see footnote 119, ante), no factual basis exists upon which this argument can be grounded.

Next relying on the proposed correction ("[w]hen's he going to work"), respondent argues that this comment does not constitute "a clear, specific, unconditional offer to return to work . . . ." Respondent ignores the logical impact of the statement, supported by the testimony of several witnesses, that workers often contacted, or were contacted by, their respective foremen to ascertain the work location for a succeeding day. Cisneros' remark, therefore, can be interpreted as a request for information which he and the members of his family needed in order to present themselves at a given grove in order to report for work. Vasquez' response on that occasion foreclosed any further discussion. As a general proposition, an

unreplaced economic striker's[126/] right to reinstatement does not depend upon the manner or form of his offer to return to work. (Frudden Produce Co., Inc., supra.)

Respondent also ignores in its argument Cisneros' subsequent contacts with the foreman. Vasquez clearly and unequivocally stated that there was "no longer any work" for those who had "refused to work where it was bad." "Deficient applications are no legal justification for a refusal to hire if proper, timely offers to work would have been rebuffed." (Rivcom Corp. v. A.L.R.B., supra, at p. 756; Kawano, Inc. v. A.L.R.B. (1980) 106 Cal.App.3d 937, 952; see also Ukegawa Brothers (1982) 8 ALRB No. 90; Golden Valley Farming (1980) 6 ALRB No. 8.) Vasquez' remarks established that any subsequent offers by the Cisneros to return to work would be a futile gesture.

Accordingly, it is established that respondent violated section 1153(a) of the Act by discharging, and subsequently refusing to rehire, Ramon Cisneros and the members of his family.

3. The Section 1153(c) Violations

a. Union Activities Among the Sequoia Crews Three allegations in General Counsel's consolidated complaint concern discrimination on the basis of Union activities among the crews of Genaro Flores, Gregoria Gonzalez, Cornelio Lopez, and Miguel Sanchez. What follows is a summation of the nature and extent of these activities, all occurring around the time of the

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126. As Cisneros withheld his services to protest the wage rate, his actions are akin to those of an ecnomic striker. (See, generally, Seabreeze Berry Farms (1981) 7 ALRB No. 40.)

Union election which took place, as noted, on March 22, 1983.

Foreman Genaro Flores testified that the majority of his crew wore Union buttons and spoke with organizers during the March 1983 representational campaign.[127/] Supervisor Rafael Padilla was present when organizers visited Flores' crew.[128/]

Pedro Aquilar, a worker in Flores' crew, was a member of the Union organizing committee for the crew. He stated that he spoke about the Union with his fellow employees and distributed authorization cards. Aquilar testified that his fellow crew members wore Union buttons in the presence of Rafael and Tony Padilla, and shouted pro-Union slogans when Rafael was nearly. Rafael was also present on an occasion when Aquilar handed out authorization cards to the members of foreman Gregoria Gonzalez' crew.

Foreman Miguel Sanchez testified that about twenty-five of his crew's thirty-two members wore Union buttons around the time of the election, and did so in the presence of Rafael and/or Tony Padilla. Worker Carlos Sanchez, who was in Miguel Sanchez' crew, stated that Rafael Padilla commented to him while he was wearing the button, "I didn't think you would go in the Union," to which Sanchez replied, "we are going to help one another because you [in the plural] don't help us." Carlos Sanchez further noted that Rafael

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127. Flores initially stated that he saw people wearing Union buttons in August, and at no other time during that year. This testimony was modified in succeeding questions by General Counsel, who linked the wearing of the buttons to the Union election. I do not attribute these inconsistencies to the foreman's lack of candor, but rather ascribe them to confusion.

128. This aspect of Flores' testimony, viewed in isolation, would be insufficient to establish employer knowledge of Union activity.

Padilla was present when Union organizers came to speak with his crew.

According to foreman Gregorio Gonzalez, for more than a week prior to the date of the Union election, his entire crew wore Union buttons daily and did so in the presence of Rafael and/or Tony Padilla. Worker Juvencio Remmos, a member of Gonzalez' crew, corroborated these assertions. Ramos additionally stated that he encountered Rafael Padilla at the pre-election conference, which a majority of the Gonzalez crew attended, and told him "excuse me, Rafael, there's nothing -- we're not doing anything bad."

Cornelio Lopez had begun working late in the 1981-82 season as a foreman under Alfred Padilla supervising the picking of Sequoia-packed citrus. He described a ,meeting held among Sequoia's foremen and supervisors prior to the Union election in 1983. At the meeting Tony Padilla told the foremen to "explain to the people things that can happen if the Union comes in." Among these "things" were that "they could pay better prices also. That they could pay the same as the Union." As he was leaving the building where the meeting was held, Padilla mentioned to Lopez that the people should "think properly prior to thinking about the Union, because if it comes in we would probably come out prejudiced." In addition, Padilla stated, according to Lopez, "if the Union came in we were probably going to be replaced by someone else, by other people. He said because the company was not going to accept us .... He asked if we weren't messed up yet. I told him we were already messed up, or we were already hurt. And he told me if I was in favor of the Union or against the company . . . and I told him I was

for neither side."[129/]

Lopez noted that on three or four occasions in March he saw people talking with Union organizers. Tony and Rafael Padilla were present at such times. When the workers in the crew were signing authorization cards, Rafael Padilla asked the foreman what the pickers were doing. The foreman responded that "they were signing."[130/] By the foreman's estimate, about one-half of his crew wore Union buttons.

In a similar vein, picker Hector Lopez, a member of Cornelio Lopez' crew, stated that prior to the election, his crew spoke with Union organizers. All of the crew signed authorization cards and obtained Union buttons, which were worn by about half their number. Rafael Padilla was present on the occasion of the organizer's visit, but Lopez' testimony was inconclusive as to whether Padilla was near enough to the crew to observe the card signings. Lopez noted that his crew shouted pro-Union slogans in the presence of Tony and/or Ralph Padilla. Lopez further testified that Alfred Padilla, who lives next to the worker, asked him on one occasion how he was going to vote, and commented to him that the "Union was no good . . ., it was good for the legals, and it was not good for the illegals."

Respondent did not counter any of the foregoing assertions,

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129. This testimony not only indicates respondent's attitude toward unionization, but also shows that Padilla had an inkling of the Union activities occurring in Lopez' crew.

130. As noted, Rafael Padilla was not called as a witness. Tony Padilla did not address any issues raised by Lopez' testimony. Lopez' unrebutted testimony in the foregoing particulars must therefore be credited.

save for the somewhat inconclusive statement by Alfred Padilla that he did not "remember" seeing any pickers with Union buttons. It must therefore be concluded that respondent had knowledge, via supervisors Tony and/or Rafael Padilla[131/] (see, e.g., Mario Saikhon (1978) 4 ALRB No. 107; Foster Poultry Farms (1980) 6 ALRB No. 15) of Union activities occurring in those crews which are alleged to be the targets of unlawful discrimination,

b. Respondent's Union Animus

Proof of respondent's opposition to Union organizational efforts was exhibited in the record in a variety of ways. Such proof contributes to *a* finding that participation in concerted activities may have been a "motivating factor" in the decisions to affect employee tenure in the ways alleged by the

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131. Respondent placed the supervisorial status of these individuals in issue by denying same in its answer. However, no party specifically discussed this issue in its brief. Tony Padilla, in his capacity as a labor contractor who controls the hiring, firing, disciplining and direction of his harvest workers, would be considered a supervisor within the meaning of the Act. Insofar as his relationship to employees of other labor suppliers is concerned, the evidence (via the testimony of Genaro Flores and Gregoria Gonzalez in the representation phase and the testimony of Pedro Aquilar in the unfair labor practice phase) demonstrated that Tony Padilla at times directed the work of these employees, telling their foremen where they were to report, when to start working, or pointing out problems with the quality of the pick. Tony Padilla has also authorized wage increases. Rafael Padilla, Alfred's assistant, had similar duties, particularly in the area of direction of work. Thus, both Rafael and Tony would be considered supervisors within the meaning of the Act, since they have demonstrated the exercise of the authority to, at minimum, direct workers in the interest of the employer in matters requiring "the use of independent judgment." Additionally, they would also be considered agents of the primary employer. (Venus Ranches (1977) 3 ALRB No. 55; Frudden Produce (1978) 4 ALRB No. 17. See, generally, Dan River Mills (1960 C.A.5) 274 F.2d 381.)

General Counsel. As noted by the Appellate Court in Harry Carian Sales v. A.L.R.B. (1984) 151 Cal.App.3d 197, 210, Union animus is "among the factors to be weighed in the determining the general counsel's prima facie case."

(1) The Testimony of Steven Highfill

Steven Highfill has been a labor relations consultant for about eight and one-half years. He counsels management, principally in agriculture, how to counteract Union organizational campaigns. On the Friday preceding the Union election at Sequoia, Highfill conducted a "conflict management class," as part of a counter-Union effort, among the foremen who worked for respondent under Jose Ontiveros, Tony Padilla, and Alfredo Padilla. Between twenty-five and thirty individuals were present to learn what "they could do, and could not do" as part of counter-Union campaign.

Following the meeting, Highfill met with the "principals" of Sequoia, Marvin and Oleah Wilson, and Carl "Skip" Pescosolido. At the meeting, Highfill informed these individuals that wages and benefits for the respondent's harvesting crews were lagging behind those provided by their competitors. He advised that a wage increase and health insurance plan should soon be implemented.[132/]

The next day, Saturday, Highfill went to visit the various harvesting crews working for the respondent. After these visits Highfill reported to the shed principals the varying degrees of

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132. In the earlier "class" with the foremen, Highfill learned from them that the lack of a health plan, wages lower than other paid by packing houses, and workers having to pay for their equipment were among the things which "might have led to the conflict with the Union."

Union support he found among these pickers. At a meeting held late that day attended by Skip Pescosolido, Marvin and Oleah Wilson, and Keith Hunsaker,[133/] it was decided to increase wages by fifty cents per bin. It was also determined during the course of the meeting to provide the pickers with a form of health insurance, and also for the employer to pay the cost of worker equipment[134/] such as bags and clippers.[135/]

The next day Highfill and David Aquino, another labor relations consultant called in to assist in the counter-Union campaign, resumed their visits to the picking crews. That evening Highfill conducted another class among shed personnel and the company's election observers.

Finally, Highfill, at some point during the campaign, suggested that a company-sponsored barbecue be held the night before

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133. Despite Highfill's testimony, pursuant to stipulation of the parties it is determined that Hunsaker was not in fact present at the meetings.

134. Notably, Tony Padilla, Alfred Padilla and Joe Ontiveros, though in the building at the time, were specifically asked to wait outside the room where the meeting was taking place. It is thus clear that the shed principals, rather than the labor suppliers, made ultimate determinations in setting wage and benefit levels. This fact is highly significant in its application to representational issues, discussed infra.

135. Increasing wages and augmenting benefits during the course of a Union organizational campaign consitutes a violation of section 1153(a) of the Act. (Merrill Farms (1982) 8 ALRB No. 4; Mission Packing Company (1982) 8 ALRB No. 14; Harry Carian Sales (1978) 6 ALRB No.55.) These were matters not alleged as violations of the Act, nor where they discussed, analyzed or argued about in the briefs. Hence they cannot be considered "fully litigated." (See e.g. Harry Carian Sales v. A.L.R.B. (1984), supra; Grands Brothers Harvesting, et al. (1983) 9 ALRB No. 60; D'Arrigo Brothers (1983) 8 ALRB No.45.)However, these acts may properly be considered as "background evidence" of the employer's attitude towards the Union. (See Holtville Farms (1981) 7 ALRB No. 15).

the election. Alfred Padilla participated in its planning, thus it would appear that his employees attended. Highfill, since he was not present, was unable to state whether the employees of Tony Padilla and/or Jesse Ontiveros attended the function.[136/]

(2) The "Disorganizers"

Additional evidence of the employer's anti-Union attitude came by way of testimony regarding the individuals, purportedly working on behalf of Highfill and the employer, who went to speak with harvesting crews immediately prior to the election. These persons were denominated as the "disorganizers."[137/]

Foreman Miguel Sanchez noted that three people came to talk to the crew about voting against the Union. These were known to him as the "disorganizers." Tony Padilla introduced them to the foreman. They stated to Sanchez that they were there on behalf of the packing shed, and that they wanted him to help them talk to the people, "that the Union was no good, and for me to tell them (the crew) to leave that . . . alone. When Sanchez stated that he "was for neither side," "they asked me didn't I know that if I didn't help them I could lose my job." Sanchez subsequently testified that the "disorganizers" told him that on behalf of the packing shed, they were going to give the people more benefits, a higher wage, and equipment to work with.

Carlos Sanchez, a picker in the Miguel Sanchez crew, also

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136. Highfill's testimony was not refuted by respondent in pertinent part.

137. The translator adopted this term as the English equivalent to that used by the Spanish-speaking witnesses, "desorganizador."

provided the following thorough description of his crew's encounter with the "disorganizers":

> They called us and asked us to get together so that they could talk to us. There were three and they told us they were disorganizers of the Union .... They -- introduced themselves, and gave us some cards.
>
> They said that the cards were from the insurance . Then I told them by now that the Union has arrived you give us this, the thing you never gave us, that. And at that time they told us . . . we're going to increase 50 cents a bin for you. So that we would listen to them.
>
> Then all of us got the cards and tore them up .... Then we said, now that we're in the Union -- we're already in the Union, now we're going to go see if they help us, because you won't, because you have never paid us what is due per bin.138/

c. Reduction in Workload

(1) The Evidence Presented

General Counsel established, both through testimonial and documentary evidence, that the amount of bins to be harvested by the crews working under Alfred Padilla totaled no more than about fifty per day for the period between March 20 and April 6, 1983. It was alleged that this reduction in the workload was motivated by discriminatory reasons based on the Union activities of the crews involved.

Foremen Miguel Sanchez Gregorio Gonzalez and Cornelio Lopez both testified that they were assigned this number of bins to harvest during this period. Gonzalez averred that given the quantity of the fruit available, his crew would have been able to pick at least the usual number they were assigned, or ninety-six

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138. Such remarks may also be utilized as a basis for finding employer knowledge of Union activities.

bins. Sanchez also noted this figure as the typical quota, although Sanchez felt that the crew might have been able to pick as many as 150 or 200 bins.[139/] Additionally, Lopez stated that while there were occasions when his crew harvested a total of fifty bins on a given day, it was unusual to pick that number for ten consecutive days, and that during his tenure his crew had never done so.[140/]

Harvest worker Pedro Aquilar stated that he complained to Rafael Padilla about the limited number of boxes the crew was harvesting around the time of the election.[141/] Alfred Padilla's crew sheets for payroll periods in March and April exhibit the following:

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139. These quotas, though not unheard of, were atypical and appeared, when compared against production records, to be a slight exaggeration.

140. Forty-eight bins represent the capacity of one truck-load.

141. Aquilar was told by Padilla that the bin count was "none of his business". Aquilar responded that "whatever they did regardless, they were going to lose the election."

Bins Harvested Per Crew [142]

Date	G. Gonzalez	C . Lopez	G. Flores	Sanchez
2/24	91	83	99	43
2/25	46	95	82 %	35 3/4
2/28	38	56	42	96
3/2	49	21 3/4	28	31
3/3 [143]	96	103	101	150
3/4	96	96	87	65
3/5	(Illegible)	(Illegible)	(Illegible)	(Illegible)
3/6	100	104	73	43
3/7	70	[144]	59	
3/8	100	96	100	102
3/9	96		112	94
3/10	96	100	96	100
3/11	75	97	75	100
3/12	50	50	111	88
3/14			90	
3/15	107½	96		96
3/16	96	101½	101	99
3/18		29		
3/19	73	96 3/4	90	128
3/20	48	50	52	49
3/22			9	13
3/23 [145]	51	48	50	48
3/26	50	50	50	50
3/27	50	50	50	50
3/28	50	50	50	50
3/29	48	50	48	33
3/30	46	50	50	50
3/31	50		50	50
4/1		50		
4/2	48	48	48	48
4/4	48	48	49	47
4/5	48	48	47	49
4/6	50	50	50	50

142. Teodoro Barajas' crew worked one day during the week of March 26-29 harvesting the employer's citrus. Foreman Antonio Ramirez was also in charge of a crew that picked such citrus for two days during that week.

143. Padilla's crew sheets for this week were inadvertently omitted by General Counsel when she introduced an exhibit which was supposed to be comprised of all of the crew sheets for 1983. (G.C. Ex. 10.) General Counsel moved to correct this omission. The motion is hereby granted.

144. Where no figure appears, the crew presumably did not work.

145. None of these crews worked on March 17, 20, 24 or 25.

Following the layoffs of three of these crews, the total harvest per day per foreman's crew is listed below:

Pate	Flores	de la Vega
4/7	100	100
4/8	100	100
4/11		
4/12	100	98
4/13	144	144
4/14	68	77
4/15	100	100
4/16	27	56½
4/19	100	96
4/20	101	96

Notably, with half the number of crews, the work load for those crews remaining doubled.

Marvin Wilson supplied testimony in defense of this allegation. It is he who communicates with the labor suppliers in ordering the quantity of fruit to be harvested. Prior to doing so, he discusses harvesting needs with Oleah Wilson and Carl Pescosolido.

Wilson denied that the bin orders had anything to do with the crews' Union activities, or that he had discussed the harvest quotas with Alfred Padilla in this light. He stated, in general terms, the factors that go in to the decision to order the harvest of a certain quantity of fruit. Significantly, however, he did not link any of these factors directly to the uniform orders given during the period between March 20 and April 6.

The amount of fruit already in the sheds would limit harvest orders. The sheds obviously have limited storage capacity, and Sequoia generally attempts not to harvest the fruit until it is actually sold. Wilson tries to anticipate customer demand so that there is not an overabundance of picked fruit being stored. Should

the sheds be near capacity with unmarketed fruit, harvest orders would naturally be curtailed until customer orders took up the slack.

The quality of the fruit available is also a factor in the decision as to how much fruit to harvest. Certain customers, Wilson noted, demand a certain quality of product.[146/] Sequoia attempts to spread the availability of higher quality fruit over the entire season in order to meet that demand throughout the season.[147/]

Weather conditions also affect harvest orders. Several witnesses testified that inclement weather limits the ability of crews to enter the groves to harvest the fruit. Fruit that is wet cannot be harvested, and, typically, crews must wait until it is sufficiently dry before the harvest day begins.

The employer is restricted by Federal Marketing Orders as to the quantity of navel oranges it may market, domestically, during a given week in any season. These allotments, also known as a "prorate," are issued by the Navel Orange Administrative Committee, and are based on the percentage of the total market volume shipped by the employer's sheds.

Pertinent also to a discussion of this allegation was Wilson's testimony that all of the fruit within a given grove is harvested over the course of the season, save for that which falls

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146. Generally, the higher quality fruit is more suitable for the employer's export markets.

147. Wilson also stated that an increase in export orders in one part of a season may necessitate extensive picking from a block which has that quality available. Harvesting would naturally be curtailed at subsequent times to equalize this effect.

from the trees before actually being picked, or "shiners," random, minimal quantities of fruit which would be uneconomical to harvest. Wilson, as part of his job, maintains what he terms "pick journals," which set forth, by ranch, the amount of fruit which is harvested per ranch per day. Given the fact that all the fruit from a ranch is picked, eventually, one may determine the quantity of fruit left in a grove from a given day forward. Wilson's pick journals for the navel harvest demonstrated the following amounts of available navels on the ranches which Alfred Padilla's crews harvested:

Ranch	Number of Bins Picked After April 6
Canal	773.25
Enterprise II	619
Foothill	27
Gardikas	1,133
Merryman	56.5
Tee Dee	170
Tropicane	225
Valley View II	249.75

Respondent argued in its brief that during the period, the average number of bins picked by all the crews working for the employer was approximately fifty. Respondent made these calculations utilizing fifteen as the total number of crews employed during that period. General Counsel, in a motion to strike certain portions of respondent's brief, stated that the number asserted as the total number of crews (fifteen) has no evidentiary support in the record. General Counsel is correct in her assessment. While additional crews such as those under foremen Teodoro Barajas, Jesus Moran, or Curtis Contracting may have been employed during this period on a sporadic basis,[148/] the record evidence shows that at

148. See discussion of representation issues, infra.

that time a total of eleven crews were employed regularly by the various labor suppliers to harvest the citrus packed by the employer's sheds.[149/] These crews included four under Alfred Padilla, three under Jesse Ontiveros, and four under Tony Padilla.[150/] Calculating the average bin count based on eleven crews one arrives at the following:

Date	Number of Bins Picked	Average Per Crew (11 Crews)
3/20	953	86
3/22	34	--
3/23	764	69
3/25	18	--
3/26	909	83
3/27	764	69
3/38	944	86
3/29	864	79
3/30	828	75
3/31	647	59
4/2	793	72
4/4	1,043	95
4/5	721	66
4/6	574	82

149. Marvin Wilson noted that the shed does not dictate to the labor supplier how many crews are to be employed. It merely orders that a certain quantity of citrus be harvested, leaving it up to the labor supplier to determine how many crews will be needed to get the job accomplished.

150. Padilla testified that he held a meeting with his foremen and those of Jesse Ontiveros in February 1983. Asked to state the names of his foremen, Padilla testified:

> Q: (By Mr. Carrol): ... in terms of your foremen, can you remember any specific names apart from Mr. [Tomas] Sanchez?
>
> A: (By T. Padilla): Yes, I can remember all of them. Q: Okay.
>
> Would you tell the judge who else was there?
>
> A: Rogelio Ortiz, Juan Soto, Mario Chavez. I think that was it as far as mine.

Thus, the number of crews subjected to the alleged discriminatory reduction in work load picked, on the average, significantly fewer numbers of bins.

(2) Analysis and Conclusions

It is recommended that this allegation be dismissed due to the failure of General Counsel to establish by a preponderance of the evidence the necessary elements of a violation under these circumstances. While the unprecedented uniform picking orders surrounding the time of the election, the known Union activities of the crews involved, and respondent's we11-documented anti-Union attitude render highly suspect its actions during this period, a suspicion, in and of itself, is insufficient to establish a violation of the Act. (See, generally, Rod McClellan (1977) 3 ALRB No. 71; Rigi Agricultural Services, Inc. (1983) 9 ALRB No. 31; McCarthy Farming Co. (1983) 9 ALRB No. 34.)

For the sheds to intentionally limit the amount of fruit harvested would, in effect, be "cutting its nose off in spite of its face." All the fruit must be harvested at some point. While harvesting might be delayed due to market or weather conditions, by the end of the season, all marketable fruit is removed from the groves. No proof was adduced that this was not the case in the 1983 season. The quantity of harvest cannot be artificially curtailed without having an adverse impact on the employer.[151/]

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151. For purposes of discussion, I am assuming that drastic market conditions, which would render uneconomical the harvesting of' any fruit, did not prevail.

General Counsel's proof did not indicate that the fruit theoretically not harvested by the pro-Union crews during this period was at some point harvested by other crews under Padilla. To the contrary, when these three crews were laid off,[152/] the amounts harvested by the two crews which worked in the groves assigned to Padilla remained roughly at the same levels which General Counsel contended were artificially, and discriminatorily, determined. Thus, the two crews, with one day's exception, harvested approximately one hundred bins per day, which is double the amount of the fifty bins per day which General Counsel maintains was purposefully limited.

Nor was any proof adduced that any crews other than those working for Padilla were brought in to harvest the fruit theoretically "left" by the alleged artificial harvest limitations in the groves to which Alfred Padilla's crews were assigned. In the absence of such proof, and in light of the fact that all of the citrus from these groves is eventually picked, the conclusion that the work load was diminished for discriminatory reasons cannot by supported. The availability of additional harvests amounts, which was essential to a finding in General Counsel's favor, was not demonstrated. In short, the four Padilla crews did all the work which they could have done during this period.

In one of the few instances wherein Alfred Padilla's testimony might be given some credence, the labor supplier stated that he attempts to assign his crews to given areas so that the work

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152. The circumstances of the layoffs are treated below.

load among them might be equalized. The uniform quantities harvested by each crew during the period from March 20 to April 6 may therefore be viewed as an outgrowth of this policy, particularly when it is realized that for the entire month between March 20 and April 20 there was roughly, with few exceptions, only a total of 200 bins per day available to be harvested. This quantity might be handled by four crews picking fifty bins apiece, as was the case before April 6, or by two crews picking one hundred bins each, as was the case afterwards.

Therefore, it is recommended that this allegation be dismissed.

d. The Crew Layoffs

(1) The Evidence Presented

General Counsel alleged that on April 6, the crews of Cornelio Lopez, Gregorio Gonzalez, and Miguel Sanchez were laid off, in violation of §1153(c) of the Act, as a result of the Union activities of these crews. The date and fact of the lay-offs was uncontrovertibly established. Similarly, the record reflects that following the lay-offs, Alfred Padilla transferred forewoman Lucila de la Vega to supervise a crew to harvest oranges on the respondent's property.

Alfred Padilla stated that he told Lopez, Gonzalez and Sanchez that they and their crews were going to be laid off because "there was no more work for them." He added that "maybe we would call [them] back in November when we start navels again."

As the labor supplier testified during the representation

phase of the case,[153/] the navel orange season runs generally from early November to April of the following year. The Valencia harvest begins in late April or early May. Generally, four crews are utilized by Padilla to work during the navel season,[154/] but only two crews are employed to harvest the Valencias.[155/] Whereas the navel harvest crews customarily work solely in the citrus operation, crews working during the Valencia season are at times transferred to work in other crops for other packing sheds.[156/]

In April, May, and June the previous year, 1982, the crews of Genaro Flores, Gregorio Gonzalez , and Cornelio Lopez were employed harvesting citrus on the employer's behalf. However, crew records demonstrate that the amount of work available varied greatly from week to week, with nearly regular employment available only in the month of May. Thus, the records seem to support Padilla's assertion regarding the diminution of the workload.[157/]

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153. See discussion, infra.

154. The navel season also encompasses a period of about one month during which mineolas are harvested.

155. While this may have been the case in 1983, records from 1982 reflect, as shown infra, that three crews worked during the Valencia season.

156. This factual assertion was not evident from the 1983 Valencia season crew records.

157. Payroll records between the periods of 3/24/82 and 4/21/82 were not admitted in evidence. Padilla represented that the payroll records for that year, admitted in evidence as General Counsel's Exhibit 9, were all the records for the crews employed to work at the employer's operations during that year. Although there was no affirmative assertion of this fact, one may infer from the lack of records that there was an approximate one-month lay-off between 3/24/82 and 4/21/82. Further support for this inference may

(Footnote continued--------)

Payroll Ending Date	Days Worked Per Week Per Crew [158]		
	G. Flores	C. Lopez	G. Gonzalez
April 21, 1982	1 [159]		1
April 28, 1982	2	2	3
May 5, 1982	4	3	4
May 12, 1982	6 [160]	7	6
May 19, 1982	6	6	6
May 26, 1982	4	4	3
June 2, 1982	5	4	4
June 9, 1982	5	6	7
June 16, 1982	3 [161]	1 [162]	3
June 23, 1982	3		3

Comparisons between the 1982 and 1983 cannot, however, be made with consistency. Marvin Wilson testified that in the fall of 1982, the single, integrated employing entity acquired additional lands. As previously noted, the acquisition was large enough to enable the packing sheds to be supplied with sufficient citrus to reduce to three percent of the total the amount of citrus packed and shipped by these sheds for growers outside the single entity.

(Footnote 157 continued-------)

be drawn from the records for the period ending 3/17/82, when crews worked for only one day, generally, that week. (Eight and one-quarter bins were harvested by Lopez crew members on a second day in the period.) The records for the following week also show that limited work was available.

158. "Days worked" includes days when at least one-half the crew complement was utilized.

159. Five pickers were employed for an additional one day during this period.

160. One picker only worked on May 11, 1982 for Flores. The full crew was employed for six days that week.

161. Forty-eight different individuals worked for Flores that week. On Wednesday, June 16, sixteen people were employed.

162. Five pickers worked on June 10, 1982.

In one sense, more work was available from the employer for the Padilla crews in 1983 than was available in 1982, as the crew sheets indicate that Padilla's crews worked on the employer's properties through the payroll period ending September 21, 1983, i.e., they worked for a greater number of days. However, the amount of work available, especially during the summer months, was exceedingly sporadic, sometimes being only for one or two days per week. Alfred Padilla also noted that the size of the navels harvested in 1982-83 was larger than that for the prior season. As it would take fewer, larger, oranges to fill a bin, it would theoretically also require fewer pickers to do so.

As pointed out by General Counsel in her brief, during the period from April 21 to June 23 in 1982, a total of 8113 bins were picked by the three crews under Padilla; in 1983 6754 bins were harvested by the two Padilla crews that worked during this period.[163/] The argument is thus advanced that the reduction of 16.7% in the workload[164/] would seem not to merit a decrease of one-third, approximately, in the work force.[165/] However, it is the labor suppliers who determine the number of harvesters needed to pick the available crop. Should they determine that fewer people are necessary to do the job, each of those individuals would make

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163. A crew or crews under Tony Padilla, in three separate payroll periods, harvested 825 bins on Merryman Ranch, a property which is considered within Padilla's area of responsibility.

164. If the 825 bins harvested by the Tony Padilla crews are included in the calculations, a 6.5% reduction of workload results.

165. Padilla was made aware of worker dissatisfaction with the diminished work load.

more money, proportionally, than they would if crew size were larger. Stated in another fashion, there would be more slices of the same pie.[166/]

Finally, the transfer of the de la Vega crew to the Sequoia-related operations and the "bumping" of a Sequoia crew is another circumstance which General counsel points to as evidence of an unlawfully motivated layoff. In response, Alfred Padilla maintained that de la Vega has the most "seniority" among the foremen he employs, and that due to this fact, he attempts to provide her with year-round employment.

Padilla stated that de la Vega has worked year-round for him since 1980,[167/] and that she has been employed as a forewoman for him in the Sequoia harvest "off and on for ten years at least." The other foremen Padilla employs who harvest crops for other sheds include, as noted elsewhere, Teodoro Barajas, Jesus Luna, Tony Ramirez and Jose Martinez. Each of these individuals, Padilla

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166. Crew size varied from week to week. In comparable periods for the two years (between week ending April 21 and the week ending June 22), the crews averaged thirty-five (Flores), twenty-nine (Lopez) and thirty (Gonzalez), respectively, for 19S2. In 1983 the Flores crew averaged thirty-four members, while that of de la Vega averaged twenty-one employees. Thus, the total average number of employees was decreased by thirty-nine workers in the two years.

167. General Counsel introduced records to show that de la Vega was on leave of absence from May 31, 1982 to July 16, 1982. Although Padilla was uncertain as to the exact reason why de la Vega took the leave, her absenting herself from work does not negate Padilla's basic assertion that de la Vega is "never laid off." The blanket statement by Padilla that the forewoman has worked year-round for him since 1980 once again reflects adversely on his credibility, but does not totally vitiate the probative value of his testimony in this regard.

asserted, had more seniority than the foremen laid off from work at Sequoia,[168/] at least two or three years more, by his estimate.

Gregorio Gonzales had worked as a foreman for Padilla since 1980. Miguel Sanchez, on the other hand, only began working in that capacity since January 1983.[169/] Cornelio Lopez only began working as a Padilla foreman in March of 1982.

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168. Genaro Flores, whose crew remained after the layoffs, perhaps had the greatest seniority among Sequoia foremen under Padilla. He has supervised crews under Padilla for Sequoia harvests for at least thirteen or fourteen years.

169. General Counsel states in her brief that Sanchez "worked as a foreman since 1979." This claim finds no support in the record. To the contrary, Sanchez noted the January 1983 beginning date at the commencement of his testimony.

Sanchez' testimony regarding his foreman's experience can be termed ambiguous at best:

> Q: (By Ms. Bramberg) . . . have you ever been employed as a foreman working under Alfred Padilla?
>
> A: (By M. Sanchez) Yes.
>
> Q: And when did you start working for Alfred?
>
> A: 1979 I started working for Alfred Padilla.
>
> Q: And when did you first start having a crew that was picking for Sequoia?
>
> A: January 15th of '83.

At another point in his testimony, Sanchez stated that he had people in his crew that had worked with him the season before. These statements were similarly inconclusive. Later in his recitation, the following exchange occurred:

> Q: (By Mr. Drake) . . . You said that you got people to work for you for more than one year.
>
> A: All the way up to four years, since *I* began.

While this might seem to indicate the length of Sanchez' tenure as a foreman, Padilla's Sequoia-related records show that Sanchez was not employed in this capacity for 1981-82. Significantly, the question "how long have you been working as a foreman for Alfred Padilla?" was never directly put to Sanchez.

General Counsel contends that Padilla's vague assertion as to the work histories of his foremen, couched in such terms as "probably," "I don't remember," and a certain period of years, "maybe more," indicate the lack of probative value which can be attached to this testimony. She asserts that the employer should have introduced records supporting Padilla's claims. Having failed to do so, it is argued, the employer has not sustained its "burden of proof" on this issue.

(2) Analysis and Conclusions

The evidence presented in support of this allegation is not susceptible of easy synthesis. The best that can be said of it is that it is inconclusive. Since General Counsel has the burden of proving by a preponderance of the evidence that the layoffs would not have taken place "but for" the Union activities of the crews involved, this burden has not been sustained, and the allegation must be dismissed.

Testimony and documentary evidence established that there is, in fact, a decrease each year in the amount of work available for citrus harvesting crews at or near the time of the layoffs under scrutiny. The slow-down in work opportunities also seems to coincide with the transition from the navel to the Valencia harvest seasons, with the latter requiring, according to Padilla, fewer workers. In 1982, records from the payroll period ending March 10 indicate a total of five crews worked six days that week. The following week, work was available for only one day for four crews (one of which contained only eight pickers) and one of these crews picked a mere eight and one-quarter bins on an additional day. The

week after (ending 3/24/82), there was only work for three or four days for three crews. Then a one-month layoff ensued. Thus, it appears that the 1983 layoffs were not atypical, and seemed to roughly coincide with the work pattern evident from the previous year.[170/]

General Counsel's contention that the transfer of the de la Vega crew to the Sequoia operation was "unprecedented" is somewhat of an overstatement of the case. Padilla did maintain that over a ten-year period de la Vega was transferred to work on the employer's properties "from time to time." General Counsel's asserts that by not introducing documentary evidence regarding foreman seniority, the employer failed to meet its burden of proving that the foremen given preference for available work were in fact the most senior. In so doing, General Counsel misplaces that burden. Once Padilla testified that his most senior foremen were retained while the least senior foremen were laid off, this testimony was adequate to establish his seniority "policy," (see Evidence Code section 411) and to create the basis for a finding on this issue.[171/] it would have then been incumbent upon General Counsel, concommitant with the proper allocation of the burden of proof, to rebut, by reference to documentary or testimonial evidence, that Padilla's statements

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170. The fifty bin per day harvest quotas experienced by the crews in the two weeks or so prior to the layoffs in 1983 also tends to support the conclusion that work opportunities were diminishing at that time of year.

171. Parenthetically, it was also sufficient to establish a so-called "business justification" for the layoffs which would counter the contention that the crews would not have been laid off "but-for" their participation in protected, concerted activities.

concerning foremen seniority preference were inaccurate or inconsistent. This she failed to do. Hence, Padilla's assertions in this regard must be credited.[172/]

Significant also was the failure of General Counsel to demonstrate affirmatively that another foreman, with another crew, was retained to perform non-Sequoia work for Padilla to fill the vacancy theoretically left by de la Vega when she was transferred to the Sequoia harvest. Evidence of the retention of a new crew would have countered Padilla's claims that the most senior foremen were retained to perform his work, as well as the assertion that de la Vega was transferred to Sequoia because there was no other work available within the entire scope of the Padilla operation.

Accordingly, since General Counsel has failed to meet the burden of proof on this allegation, it is recommended that it be dismissed.

(e) The Failure to Recall the Gonzalez, Lopez, Sanchez and Flores Crews

As previously noted, in order for General Counsel to establish a discriminatory refusal to re-hire, it must be proven:

> . . . that the alleged discriminatee made a proper application for work at a time when work was available, but was refused or denied rehire because of his or her union activity or other protected concerted activity .... To prove that an employer discriminatorily failed to recall a laid-off employee, the General Counsel must establish that the employer did in fact have a policy or practice of recalling former employees as suitable openings arose, but did not do so with respect to alleged discriminatees because of their union activity or other protected, concerted activity.

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172. Notably, the continued retention of Genaro Flores, who was one of the most, if not the most, senior foreman, tends to corroborate Padilla's testimony on this issue.

(Ukegawa Brothers (1982) 8 ALRB No. 90 at pp. 33-38; George A. Lucas & Sons (1984) 10 ALRB No. 33; see also Sam Andrews' Sons (1980) 6 ALRB No. 44; Guimarra Vineyards (1979) 7 ALRB No. 17.) While an exception exists to the "work availability" requirement where an employer "has a practice or policy of recalling, or giving priority in hiring employees," that employee generally, at some point, must still make a proper application for work. (George A. Lucas & Sons, op. cit.; George Lucas (1979) 5 ARLB No. 62).[173/]

General Counsel's proof in this facet of the case, with one exception, falls far short of that necessary to establish a violation.

The Union activities of the crews in question, as well *as* the respondent's Union animus, were clearly established in the record (see discussion, ante). Prima facie evidence indicated the possibility of unlawful motivation for the employer's action in failing to recall the four crews in question, and their foremen. Nevertheless, while Padilla himself asserted that he told Lopez, Gonzalez and Sanchez on April 6 when he laid off them and their crews "maybe we would call him back in November when we start navels again," not one of these former foreman testified that they attempted to contact, or did contact, Padilla around the time of the commencement of the navel season. Thus, the requisite "but for"

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173. I am cognizant of the rule announced in Kawano, Inc. (1978) 4 ALRB No. 104) that when an employer has implimented *a* discriminatory scheme that prevents employees from in the record applying for work, proof of making a proper application for work at a time when work was available may be ovbiated. Here, however, there was no showing that anyone was prevented, because of a change in hiring practices, from applying for work.

aspect of the case is negated: "a proper application" not being established, it is not possible to definitively state that the foremen were not rehired because of their crews' Union activities.[174/]

General Counsel also neglected to establish in the record that it was Padilla's practice or policy to contact foremen, rather than having the foremen contact him to apply for work.[175/] In the absence of such proof, I am unable to conclude that the mere showing that the foremen under discussion here "never heard from Padilla" is sufficient to establish the necessary element of a "proper application" in a refusal to rehire case.[176/]

General Counsel argues that Joaquin Navarro, hired to replace Genaro Flores,[177/] added many "new hires" to his crew in September, only one of whom was a worker who had been laid off the

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174. Cornelio Lopez did assert that he asked Padilla for work in September of 1983. Padilla told him at that time that there was no work available for him. General Counsel's non-specific proof did not suffice to establish that Lopez applied at a time when work was available. (See George A. Lucas & Sons (1984) 10 ALRB No. 21.)

175. Specifically, there was no testimony on this issue, i.e., exactly how the foremen, generally, did obtain their jobs.

176. For purposes of this discussion, I am assuming that given adequate proof, these three foremen could, under Ruline Nursery, supra, avail themselves of the protections of the Act. The evidence indicated that the foremen were responsible for contacting and hiring their crews, and under. Pioneer Drilling, supra, their failure to be rehired might be utilized by the employer as a means by which to avoid rehiring their demonstrably pro-Union crews.

177. The failure to recall Flores will be discussed infra.

previous April 6.[178/] A new foreman was retained, Gabriel Perez, in the week ending August 31. Another foreman was also retained that week, Rosario Vega, but appeared not to have worked on respondent's properties.[179/] The following week Navarro's crew also appeared to work three days on ranches other than the employer's. Similarly, in the week after, de la Vega and Navarro spent two days with crews at "Fowler"[180/] ranch.

Employment patterns at that time of year differed greatly from those during the navel, or even the Valencia season. Turnover was high; crews worked for entities other than the employer during the same week. There was no indication that any of the laid-off navel harvest workers made "proper application," or indicated that they were available for work in September, or that Padilla was obligated under some sort of seniority system or past practice to recall them. To the contrary, as noted, one of the fundamental aspects of this case is that the foremen are charged with the responsibility of hiring their crews.

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178. Navarro's crew also contained eight workers from the crew of twenty-four who had formerly been under Flores. Turnover in the crew at that time, however, was extensive. Only eight of the same workers were employed in each of the three weeks between the period ending August 31 and that ending September 30. The week of September 14 had twenty-seven new hires in a total of thirty-five different workers then employed. Thirteen new hired appeared the week following.

179. The crew sheet, though saying "Exeter" above the column of worker's names, has the name of a ranch (Rocky Hill) written above the bin count columns which is not part of the single-integrated employing entity.

180. Also spelled "Flowler" and "Folwer."

The one exception to the foregoing analysis is provided by foreman Genaro Flores and the members of his crew. Flores testified as follows regarding his departure from Padilla's employ, and his failure to regain employment.

Genaro Flores worked as a foreman for Alfredo Padilla for at least fourteen or fifteen years, by his estimate. On or about August 29 of 1983, Flores relinquished his responsibilities in Sequoia-related operations, as was his custom, to work in the grapes.[181/] Prior to leaving, he asked Alfred for permission to leave, which was granted. Following the end of his work in the grapes, Flores again spoke to Padilla about resuming work in the respondent's orange groves. Padilla told him that "Skip" had "gotten angry" because he had "left the job," but that "Oleah was on vacation, and upon Oleah's return everything would be taken care of [a]nd they would give me my job for November at the beginning of the navels."

Flores, however, was not rehired when the navel season recommenced. On the day before the navel harvest began, Flores asked his son-in-law, Joaquin Navarro, who had become a foreman working under Padilla,[182/] to find out whether Flores was going to get his job back. Navarro returned with Padilla's answer, "that he couldn't hire me because if he gave me my job, they would stop him."

By Flores' estimate, about fifteen members of his crew from

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181. In previous grape harvests, Flores had worked under Alfred Padilla. In 1983, however, Flores was employed by another contractor.

182. As noted, Navarro assumed Flores' position in August.

the previous year worked in the 1982-83 season, and approximately that number returned each year to work with him in the citrus harvest.

Thus, the requisite elements were established for a violation arising from failing to rehire Genaro Flores through him, the members of his crew.

Alfred Padilla did not rebut any of Flores[1] assertions regarding the labor supplier's giving the foreman "permission" to work in the grapes and the statements to him as to why Flores had not been rehired. Flores, a foreman with thirteen or fourteen years of tenure under Padilla, should have been retained as a "senior" foreman.[183/] Flores was given permission from Padilla to leave work at the employer's to work elsewhere in the grape harvest. The fact that Padilla told Flores that "Skip" had "gotten angry" with the foreman for leaving the citrus harvest prematurely smacks of a pretext: it was the first time in either phase of the case that any mention was made of the possibility that shed personnel had an input in hiring the foremen of the labor suppliers.[184/] The claim that Flores had "abandoned the job"[185/] was belied by uncontroverted

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183. Such was the preferred rationale for Lucila de la Vega beign transferred to work for Sequoia.

184. Shifting reasons for a discharge or failure to rehire give rise to an inference of improper motivation. See, generally, Associated Produce Distributors (1980) 6 ALRB No. 54; Rivcom Corp. v. A.L.R.B., supra.

185. Padilla had told one of Flores[1] workers, Pedro Aquilar, that the worker would not be rehired because Flores had "abandoned the job" to work in the grapes.

testimony that the foreman had gotten permission to leave. The subsequent claim that "Skip" intervened in Flores' being rehired was inconsistent with the evidence regarding the retention of any of the labor suppliers' foremen, who claimed that this function was solely their responsibility. Thus, it is concluded that the refusal to rehire Flores and his crew was, in reality, unlawfully motiviated.[186/]

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Sequoia Orange, et al., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, refusing to rehire, or otherwise discriminating against, any agricultural employee for engaging in union activity or other protected concerted activity.

(b) 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 the following individuals immediate and full reinstatement to their former or substantially equivalent position, without prejudice to their seniority or other employment

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186. To reiterate, the action regarding Flores, as a foreman responsible for hiring his crew, is rendered a violation of section 1153(a) of the Act under Ruline Nursery, supra, and Pioneer Drilling, supra.

ights or privileges:

(1) Tomas Sanchez and the members of his crew who were working on March 6, 1983;

(2) Ramon Cisneros;

(3) Josefina Cisneros;

(4) Rosa Cisneros;

(5) Francisco Cisneros;

(6) Florentine Cisneros;

(7) Roberto Cisneros;

(8) Hilario Robledo; and

(9) Genaro Flores and the members of his crew who worked during the 1982-83 navel orange harvest.

(b) Make whole the above-named individuals for all losses of pay and other economic losses they have suffered as a result of respondent's unlawful discharges, the makewhole amount 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) 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 amount of backpay due under the terms of this Order.

(d) 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed by Respondent at any time during the period from March 6, 1983 to August 29, 1983.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, 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.

(g) 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 and 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 to compensate them for worktime lost at this reading and the question-and-answer period.

(h) 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: October 31, 1984

METHEW GOLDGURG
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint which alleged that we, Sequoia Orange company, et al., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law be discharging and/or refusing to rehire Tomas Sanchez and his crew, Ramon Cisneros, Josefina Cisneros, Rosa Cisneros, Francisco Cisneros, Florentine Cisneros, Roberto Cisneros, Hilario Robledo, and Genaro Floras and the members of his crew because of their protected concerted activities and/or their support for the United Farm Workers of America, AFL-CIO (UFW). The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

WE WILL NOT discharge or refuse to rehire or otherwise discriminate against any employee because he or she has joined or supported the UFW or any other labor organization or has exercised any other rights described above.

WE WILL reinstate the people named above to their former or substantially equivalent jobs and we will reimburse them for all losses of pay and other economic losses they have sustained as a result of our discriminatory acts against them, plus interest.

Dated: SEQUOIA ORANGE CO., et al.

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) 725-5770.

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

DO NOT REMOVE OR MUTILATE.