Lompoc, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAHARA PACKING COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 82-CE-96-OX(SM) 11 ALRB No. 24

DECISION AND ORDER

On August 31, 1982, Administrative Law Judge (ALJ) Michael H. Weiss issued the attached Decision. Thereafter, the General Counsel and the United Farm Workers of America, AFL-CIO (UFW) filed timely exceptions with supporting briefs to the ALJ's Decision. Sahara Packing Company (Sahara) filed a timely reply brief to the exceptions of the General Counsel and UFW.

The Board has considered the record and the ALJ's Decision in light of the exceptions, briefs and reply brief and has decided to affirm his findings, conclusions and rulings[1/] only to the extent consistent herewith and to issue the attached Order.

[1/] On June 28, 1983, following the close of the hearing, the General Counsel attempted to amend the complaint in this matter so as to name Lompoc Custom Farming (the Co-op) as an agent of Sahara. Sahara denied the existence of any agency relationship with the Co-op and moved to strike the amendment as untimely. Sahara's motion to strike the amendment was indirectly denied by the ALJ. (See p. 2, fn. 1 of the ALJ's Decision.) We here make explicit that implicit ruling of the ALJ by affirming his denial of the motion to strike.

The question before us is whether Respondent Sahara Packing Company is liable for the loss of employment suffered by three celery harvesters. The harvesters' membership in an agricultural cooperative was involuntarily terminated due to their complaints about the operation of the cooperative. The cooperative was created solely to harvest crops marketed and packed by Respondent.

The ALJ found that Sahara could not be considered the employer of the celery harvesters. He therefore concluded that Sahara was not liable for the actions of the president of the cooperative who, by terminating the harvesters' membership in the cooperative, effectively denied them further harvesting work. General Counsel and the UFW excepted to this conclusion. We find merit in the exceptions.

Sahara is engaged in the growing, harvesting, shipping and marketing of fresh produce in both the Imperial Valley and Lompoc areas. Sahara grows no crops in Lompoc; rather, since 1977, when it commenced operating there, Sahara has only harvested, packed and marketed the produce grown on various ranches, principally those owned by its president, John Elmore, and his son-in-law, Robert Witt.[2/] In 1979, rather than directly hiring harvesting and packing employees in order to fulfill its obligations to Elmore and Witt, Sahara contracted with Larry Martinez to provide the labor to harvest and pack its customers'

[2/] In John Elmore Farms (1982) 8 ALRB No. 20, this Board found Robert Witt to be the alter ego of another corporation of which John Elmore was principal owner.

celery. The relationship between Martinez and Sahara continued until 1982 when Sahara decided to replace Martinez with a harvesting cooperative. Since no cooperative existed, Sahara took steps to organize one. To this end, it hired Martinez' former field supervisor, Pat Fidel who, in turn, recruited Salvator Ortega, another former member of Martinez' crew. In late spring, as harvesters started to return to Lompoc from Imperial, Fidel began to receive numerous inquiries about celery harvest work from former members of the Martinez crew as well as from other, applicants. All who asked him for work were referred to Ortega.

In May, 1982 approximately 25 workers, having been funnelled through Fidel to Ortega, met with the latter in a park in Lompoc where they were told by Ortega that Sahara would give them work if they would form a harvesting cooperative.[3/] Ortega told the group that Sahara promised to pay the cooperative 25 percent of its profits from the sale of the crop. Apparently agreeable to the idea, the group selected Ortega as president and Fidel and Ortega met with Elmore and Witt to work out an agreement with Sahara which, as Ortega had represented, guaranteed the cooperative 25 percent of the net profits from the sale of the crop, as well as a $1.00 per carton minimum. The agreement also provided for a per carton fee to be paid by the cooperative

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[3/] As found by the ALJ, Sahara's reasons for wanting to establish a cooperative were partly economic, partly tax-related and partly labor-related; so far as they were labor-related, Respondent sought to avoid being an agricultural employer for purposes of this Act. We adopt the ALJ's findings on this issue.

for the use of Sahara's trucks and other equipment. The agreement, although reduced to writing, was never signed.

Robert Witt loaned the cooperative $2,000 for starting costs. Sahara's field manager, Fidel, purchased supplies for the cooperative and Sahara allowed the cooperative to charge supplies to Sahara's accounts. There is no evidence that the cooperative engaged in any production activities; it neither owned nor leased any land, buildings, trucks or equipment. The cooperative operated out of Ortega's garage and its bookkeeping was handled by Ortega's wife.

The celery harvest began on May 27. Due to poor market conditions, the cooperative received only the $1.00 per carton minimum. In an effort to maximize the cooperative's return, Sahara agreed to absorb the trucking costs for which, under the original agreement, the cooperative had been required to pay.

While the record establishes that the crew was experienced and required little direct supervision, it is also clear that Fidel and Ortega acted as the day-to-day supervisors. For example, Fidel decided which fields and what quantity to harvest, while Ortega functioned as foreman or crew leader,[4/] deciding, for example, who would perform which tasks.

After the harvest began, members of the cooperative complained to Ortega about various problems. One of the major concerns was the fact that the harvesters were not covered by

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[4/] Ortega testified that he also worked outside normal working hours for Lompoc, performing such tasks as picking up trash, moving equipment, and checking the fields. He was paid $4,500 by Sahara for this additional work.

workers' compensation insurance; other causes for complaint were the crew's mistrust of Ortega's accounting of their earnings and his general handling of the cooperative's affairs, including the faulty filing for incorporation which had come to the harvesters' attention. The notary Ortega had engaged to prepare the appropriate Articles of Incorporation neglected to designate the corporation as a cooperative and mistakenly used a "for-profit" incorporation form. The discriminatees, Renteria, Garcia and Vasquez, were the most vocal in their concern over the various problems of the cooperative.

The group's concerns led Ortega to retain the attorney who had incorporated another harvesting cooperative which provided Sahara with its model for creating Lompoc Custom Farms. The attorney discussed with the members matters relating to the legal, financial and bookkeeping aspects of the venture. He also prepared a Certificate of Amendment, changing the name of the cooperative to "LOMPOC CUSTOM FARMING COOPERATIVE, INC.," and the "not-for-profit" articles of incorporation. These documents were signed on August 19, 1982, and subsequently filed with the California Secretary of State.

On August 16, 1982, while the cooperative's legal status was being corrected, Ortega told its members that the cooperative was "finished" and "all over." After delivering this message to everyone, he selectively told some members that a "new" cooperative was being established and asked them to report to work as usual. The alleged discriminatees and Jesus Herrera, among others, were not told of the plan to amend the Articles

of Incorporation. On August 17, when Herrera went to the field to see Ortega, Ortega to I'd him, "if you want to work under our conditions, go pick up the truck." When the three discriminatees went to the field, however, Ortega told them there was no work. The three men then went to the office of the attorney Ortega retained, where they learned that the cooperative still existed, after which they went to see Fidel who told them he would attempt to arrange a meeting with Ortega. After Fidel met with Ortega, he reported to the men that nothing could be done for them because they were "too political." Fidel testified that he declined to intercede in order to avoid any implication that Sahara was the employer.

Ortega testified that the cooperative's board of directors had decided to discharge the three workers; to corroborate this testimony, he referred to what he claimed were minutes of a board meeting. The ALJ discredited Ortega and credited instead the cooperative's secretary who testified that he was not present at any board meeting where the discharges were discussed and that he simply transcribed minutes dictated by Ortega subsequent to the discharges. We affirm the ALJ's findings that only Ortega was involved in the decision to terminate the alleged discriminatees.

The complaints of Renteria, Garcia and Vasquez, which earned them their loss of employment, plainly took place in a group context and in furtherance of group interests; they are thus concerted. So far as they concerned questions of insurance coverage, and Ortega's accounting of their earnings, they would

also traditionally be considered protected if they were engaged in by the three "employees as employees." (Eastex Inc. v. N.L.R.B. (1978) 437 U.S. 556, 567-68 [98 S.Ct. 2505].) The question before us is whether the three harvesters, as members of an entity which could qualify as an agricultural employer in its own right under Labor Code section 1140.4(c),[5/] could be considered "agricultural employees" of Sahara and, if so, whether Sahara is liable for the conduct of Ortega in effectively terminating their employment.

For the reasons stated below, on the peculiar facts of the case, we hold Sahara liable for the termination of the three harvesters.

Labor Code section 1140.4(c) provides:

> 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.

However broadly the statute otherwise defines the term "employer," it specifically exempts persons "supplying workers to an agricultural employer" or "functioning in the capacity of a farm

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

labor contractor". Thus, even if a particular entity might otherwise qualify as an agricultural employer by virtue of its form, its function will be determinative; if it is a mere supplier of labor, it may not be considered an agricultural employer. While we intimate no opinion about the status of employee-cooperative associations generally, we cannot regard Lompoc Custom Farms as anything but a supplier of labor for Respondent Sahara Packing.[6/]

The impetus for formation of the cooperative arose from Sahara at least in part to insulate itself from any responsibility for labor relations,[7/] but also to assure itself of a labor supply

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[6/] Chairperson James-Massengale points out that the question of whether an entity is the employer of an individual performing services in its interest depends on the nature of the relationship between the entity and the individual, particularly the control which the entity exercises over the individual and the economic realities of the relationship (Deaton Truck Line, Inc. (1963) 143 NLRB 1372 [53 LRRM 1497], app. dism.(1964) 337 F.2d 697 [57 LRRM 2209]) and would conclude on these bases that the relationship between Sahara and the individuals here was one of employer-employee. (See also, Associated General Contractors of California, Inc. v. NLRB (9th Cir. 1977) 564 F.2d 271 [96 LRRM 3331]; News Syndicate Co., Inc. (1967) 164 NLRB 422 [65 LRRM 1104].)

[7/] It is interesting to note that, in choosing to use a harvesting cooperative to insulate itself from labor relations responsibility, Respondent was using the cooperative in the traditional way labor contractors have been used in agriculture since "the labor contractor system is essentially a means by which the employer of migratory farm workers avoids the responsibilities of obtaining and managing his labor." (Report of the President's Commission on Migratory Labor, Hearings Before Subcommittee on Migratory Labor, (1970) Part 8-C, p. 6154. See also, Lloyd H. Fisher, the Harvest Labor Market in California, (1953) p. 78: "One of the prime functions of the agricultural labor contractor is...to relieve the producer of all relations with the laborers who harvest his crops.") (Chairperson James-Massengale and Member McCarthy express no opinion as to

(Fn. 7 cont. on p. 9.)

during a weak market. Sahara initially recruited members of the cooperative through the former field supervisor of its harvesting crews; and it was Sahara's supervisor who selected Ortega as the organizer for the cooperative venture. Sahara was the only customer of the cooperative and it was one of Sahara's own customers who provided the initial capital for the cooperative. Under all the circumstances, we cannot view Lompoc Custom Farms as anything but an instrumentality created by Sahara to supply its labor.

We next consider whether Respondent may be deemed the agricultural employer for purposes of imputing to it liability for the termination of the three harvesters. In considering this question, we bear in mind the admonition of the Supreme Court in Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.3d 307 that the Act does not impose strict unfair labor practice liability on an agricultural employer merely because it has engaged a supplier of labor. Rather, liability must be established according to general principles of employer

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(Fn. 7 cont.)

the primary purpose labor contractors are used in agriculture.)

Similarly, the $4.500 which Respondent paid Ortega appears little more than a fee for the labor contracting service he performed for Respondent. Under Labor Code section 1682(b) Ortega would qualify as a farm labor contractor:

> "Farm labor contractors" designates any person who, for a fee,...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:...disbursing wage payments to such persons.

responsibility under the ALRA.

> [When] an employer has not directed, authorized or ratified [actions taken]against its employees, under the ALRA an employer may be held responsible for unfair labor practice purposes (1) if the workers could reasonably believe that the coercing individual was acting on behalf of the employer or (2) if the employer has gained an illicit benefit from the misconduct and realistically has the ability either to prevent a repetition of such misconduct in the future or to alleviate the deleterious effect of such misconduct on the employees' statutory rights. (Emphasis added.) (Superior Farming Co. v. Agricultural Labor Relations Board (1984) 151 Cal.App.3d 100, 118.)

In this case, although there is no evidence that Sahara directed or authorized Ortega's treatment of the discriminatees, we think that Sahara's failure to disavow the treatment when it was brought to its attention constitutes a ratification just as much as Respondent Vista Verde Farms' failure to disavow the labor contractor's ejection of union organizers constituted a ratification in that case, see Vista Verde Farms (1977) 3 ALRB No. 19.[8/]

But even if Respondent might not be held to have ratified Ortega's acts under Labor Code section 1146, it will still be liable for them under the reasonable appearance of agency theory approved by the Supreme Court in Vista Verde. The cooperative's members were recruited through initial contact with Fidel, Respondent's field supervisor; at the meeting in Lompoc Park, Ortega promised them the same work they had previously enjoyed for Sahara if they would organize a cooperative to perform services

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[8/] In Vista Verde Farms v. Agricultural Labor Relations Board, supra, 29 Cal.3d 307, the Supreme Court left standing our finding of a ratification and upheld our imposition of unfair labor practice liability on the alternative grounds discussed below.

on terms set by Sahara; and, control over the day-to-day operation was jointly exercised by Respondent's field supervisor. That this chain of events would have led the cooperative members to believe Ortega was acting as Respondent's agent is further evidenced by the three discriminatees' seeking out Fidel after their termination in order to have him intervene.

We will therefore order Sahara to reinstate the discriminatees and make them whole for any losses they may have suffered due to Sahara's unlawful conduct herein.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Sahara Packing Company, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging the exercise of rights protected by the Agricultural Labor Relations Act (Act) by discharging any of its agricultural employees for participating in protected concerted activities.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them 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 Filemon Renteria, Anastacio Garcia and Gilberto Vascpaez immediate and full reinstatement to their former jobs without prejudice to their seniority or other rights

and privileges.

(b) Make whole Filemon Renteria, Anastacio Garcia and Gilberto Vasquez for any losses they suffered as a result of their discharge 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 the Board or 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 amounts due to the aforementioned employees under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for a 60-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days of the date of issuance of this Order to all employees employed by Respondent in its celery

harvest season in 1982.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

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

Dated: October 1, 1985

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Oxnard Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Sahara Packing Company, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we violated the law by being responsible for the discharge of employees Filemon Renteria, Anastacio Garcia and Gilberto Vasquez. The Board found that we were responsible for the actions of Salvador Ortega and Lompoc Custom Farms in those discharges. The Board has ordered 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 secret ballot elections 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 otherwise discriminate against any employee because he or she has exercised any of these rights.

WE WILL offer Filemon Renteria, Anastacio Garcia and Gilberto Vasquez their previous jobs back and will pay them any money they lost because of their unlawful discharge.

Dated: SAHARA PACKING COMPANY

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 528 S. "A" Street, Oxnard, California 93030. The telephone number is (805) 4.86-4475.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Sahara Packing Company
(UFW)

Case No. 82-CE-96-OX(SM)
11 ALRB No. 24

ALJ DECISION

Sahara Packing Company, harvests and markets celery, among other crops, in the Lompoc and Santa Maria areas. Through its harvest coordinator Patrick Fidel, Sahara assisted Salvador Ortega in establishing Lompoc Custom Farms, a production cooperative corporation (Co-op). The Co-op entered into a crop share agreement with Sahara and the farmers of the land to harvest the celery crop for 25% of the proceeds or $l/box, whichever was more. Three Co-op members were subsequently removed from the Co-op by Ortega and they filed charges against Sahara with the ALRB.

The ALJ found that the Co-op was the employer of the harvesters removed by Ortega and that any protected activities engaged in by the three harvesters was directed toward the Co-op and not Sahara. He therefore recommended dismissal of the complaint.

BOARD DECISION

The ALRB found the Co-op to be a "person supplying agricultural workers to an employer" and hence excluded from the expansive definition of agricultural employer in the Act. The Board found that the three harvesters had been terminated for engaging in activities protected by the Act and that Sahara was liable for the wrongful terminations.

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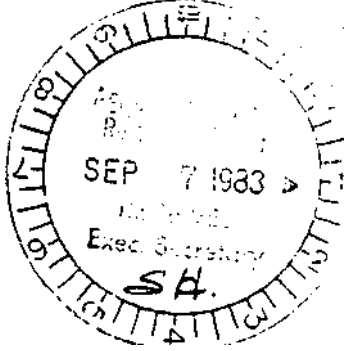

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In The Matter of SAHARA PACKING COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party.	Case No.82-CE-96-OX(SM) ADMINISTRATIVE LAW JUDGE'S DECISION

APPEARANCES:

Clifford Meneken, Esq.
Oxnard, California
For the General Counsel

Richard S. Quandt, Esq.
Guadalupe, California
For the Respondent

STATEMENT OF THE CASE

Michael H. Weiss, Administrative Law Judge: This case was heard before me on six hearing days between March 14 and May 5, 1983 in both Oxnard and Santa Maria, California. The initial complaint was

issued on December 3, 1982 based on a charge filed on September 22, 1 1982. [1] The complaint, as amended, alleges a violation of Section 1153 (a) of the Agricultural Labor Relations Act (hereinafter the Act) by SAHARA PACKING COMPANY (hereinafter Sahara or respondent).

All parties were given full opportunity to participate in the [2] hearing and after the close of the hearing the General Counsel and Respondent each filed a brief in support of its respective position .

Upon the entire record, [3] including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

1. The complaint was amended three times to incorporate added agents names, but not to otherwise alter the substantive charge.

2. Charging Party filed a Motion to Intervene and periodically appeared and participated at the hearing.

3. A list of the witnesses who testified as well as a list of the exhibits identified and/or admitted into evidence may be found in the ALJ file. In addition, two documents referred to and considered by the ALJ, "California's Low-Income Producer Cooperatives: Great Potential, Limited Success--New Directions for the 1980s by Rochin, Huffstutlar and Nuckton, University of California Davis Department of Agricultural Economics, Feb.8, 1982; and "The Legal Side of Multi - Owner Farm Business: Doing Business as a Production Cooperative Corporation," Special Publication 3222, University of California, Davis, Division of Agricultural Sciences, August, 1977 may be found in the ALJ file as well.

FINDINGS OF FACT

I. Jurisdiction

Respondent admits that it is engaged in agriculture in the State of California and that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act. Respondent does not dispute that the three alleged discriminatees are agricultural employees althought it strongly disputes the allegation that the three are its employees. [4]

II. The Unfair Labor Practice Allegation

The Complaint, as amended, alleges that on or about August 16, 1982 respondent, through its agent Salvador Ortega of Lompoc Custom Farms, discriminatorily discharged Filemon Renteria, Anastacio Garcia and Gilberto Vasquez for protected concerted activities. Respondent denies that it violated the Act and specifically asserts that the three alleged discriminatees were not its employees but rather were members of Lompoc Custom Farms, a separate and independent production cooperative, which removed the three from membership for valid reasons.

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4. The harvesting coop, Lompoc Custom Farms as well as its president, Salvatore Ortega, were alleged to be agents of Sahara. Lompoc Custom Farms was not made a party to the proceedings but did make a formal appearance through its attorney, Stephen Belasco at the hearing.

III. Company Operations

In order to place the unlawful termination allegation into its proper context, an overview of respondent's overall operations including its harvesting procedures, is necessary. This will be followed by an overview of the inception and operation of Lompoc Custom Farms.

Sahara Packing Co. - Respondent is a California corporation engaged in the planting, producing, harvesting, shipping and marketing of fresh produce. It has been in the agricultural business approximately fifteen years, initially in the Imperial Valley. It began operating in the Lompoc area approximately six years ago in 1977. In the Lompoc area Saharaships and markets celery, lettuce and cauliflower, which are cooled at Sahara's commercial cooling faci1ity there. [5]

John Elmore is respondent's president and chief executive officer. He and his brother Stephen Elmore each own 40% of the corporation's shares. Louis Hausmann, who is the chief financial officer, owns the remaining 20% of the shares. Relevant aspects of

5. Statewide, Sahara Packing has annual gross sales in excess of ten million dollars. It ships in excess of two million cartons of produce annually. It has capital assets in excess of one million dollars. See Gen. Counsel Exhibit 3

Elmore's Lompoc and Santa Maria area agricultural operation were the subject of a recent Board decision in John Elmore Farms, Kudu, Inc. and Robert Witt Ranch (1982) 8 ALRB No. 20. To avoid any duplicative testimony, Administrative Notice was taken of the relevant portions of this Board and ALJ decision. [6]

Sahara Packing neither owned nor leased any agricultural land itself. Rather, it entered into crop agreements with various ranches, principally John Elmore's and his son-in-law Robert Witt's in the Santa Maria area, to harvest, pack, ship and market the crops.

The celery crop and crop agreement at issue in this case was between Robert Witt Ranch and Sahara Packing Co. However, as noted by the Board in the 8 ALRB 20 decision, the financial and family relationship between Witt and Elmore was such that the Board found Kudu, Inc.(John Elmore's alter ego) and Robert Witt Ranch to be alter egos.

In 1982, as in prior years, Sahara Packing contracted with Kudo. Inc. as well as with Robert Witt Ranch to harvest, pack, cool, ship

6. See e.g., Sunnyside Nurseries (1978) 4 ALRB No. 88. footnote 4; and NLRB v Mueller Brass Co., 509 F.2d 704, 705; 88 LRRM 3236, 3239 (5th Cir. 1975). In addition, other aspects of Elmore's and respondent's labor relations policy have been the subject of ALRB decisions. See, e.g., John Elmore_Farms (1977) 3 ALRB No. 16 and Sahara Packing Co. (1978) 4 ALRB Nos. 40 and 98.

and market their lettuce and celery crops. Commencing in 1979, Sahara Packing, in turn contracted with Larry Martinez to custom pack Elmore's and Witt's celery crops. [7] In addition, commencing in 1979 Sahara Packing contracted with La Cooperativa Tizoc (hereinafter Tizoc) to perform its lettuce wrap harvesting in the Lompoc and Santa Maria area. Sahara Packing apparently offered startup assistance (money, supplies and equipment) as well as a contract to Tizoc when Tizoc was first organized in 1979 in order to assure its viability as the harvesting crew. [8] Tizoc has continued as respondent's Santa Maria area lettuce wrap harvester the past four years.

Martinez continued as the harvester of Sahara Packing's Imperial Valley and Santa Maria area celery crops until Spring, 1982. [9] In April, 1982, respondent informed Martinez that they did not intend to continue to use his services in the celery harvesting. Rather, respondent was going to try utilizing a cooperative harvesting crew

7. There is a dispute between the parties as to whether Martinez was a custom harvester or labor contractor. However, resolution of this difference is unnecessary to otherwise decide the principal issue of the status of the cooperative and its relationship to Sahara Packing. Martinez harvested celery for Sahara Packing in the Imperia1 Valley as wel1.

8. See e.g., discussion in "California's Low-Income Producer Cooperatives", pp. 10-11, footnote 2, supra.

9. The Santa Maria-Lompoc area celery harvesting season is approximately June 1-December 25 while the Imperial Valley harvesting season is approximately January 1-April 1. The cauliflower harvesting, performed by a different contractor, was not at issue in this hearing.

that they were going to assist in forming. To this end respondent hired Martinez's field supervisor, Pat Fidel, as their field supervisor and quality control person. [10] Respondent acknowledges that one of Fidel's first responsibi1ites was to assist in coordinating the setting up of the celery crew cooperative. Fidel was apparently instrumental in recruiting Salvatore Ortega to help organize and direct the newly forming harvesting crew. As was customary, Martinez's crew members, upon returning to the Lompoc area after the Imperial harvest, contacted Fidel about the upcoming season. Fidel informed these workers and others as well, to contact Ortega about celery harvesting work in the upcoming harvest.

Respondent, through Louis Hausmann's testimony, indicated there were a number of business reasons which made the establishment of the cooperative harvesting crew appealing. First, production cooperatives already had a history in the Santa Maria area, unlike the Imperial Valley area. Second, respondent had by that point, a nearly four year successful relationship with Tizoc regarding their lettuce harvesting. Third, there were significant cost savings to both the cooperative and Sahara Packing. Under California law, the non-profit cooperative form of organization does not have to pay payroll taxes, unemployment insurance or workers compensation insurance. Sahara Packing therefore would save these costs as well

10. Fidel was replacing respondent's recently retired quality control person, Jay Blessing.

as reduced supervision costs. Fourth, Sahara is relieved of the obligation to meet state OSHA, labor, social security, worker's compensation and ALRA regulations and liability because the members of the Coop are considered "self-employed". Finally, Sahara Packing could provide steady work to the crew while providing a steady supply of celery to its buyers because the crew would be paid on a percentage-of-proceeds received basis. Thus the crew members partially absorbs a poor market while also partially sharing in the earnings of a high market. By this arrangement, with no fixed breakeven point, respondent can economically continue harvesting when other companies must suspend harvesting or sell for processing.

Lompoc Custom Farming Cooperative - In early May, 1982, approximately 25 workers gathered at a city park in Lompoc. The group had been organized through the combined efforts of Fidel and Ortega. At the meeting Ortega told them that Sahara Packing was interested in making an agreement with them if the group was willing to form itself as a harvesting cooperative. Ortega also informed the group that as part of the agreement Sahara Packing would provide 25% of its profits from the sale of its harvested celery. Ortega agreed to be the group's president. Thereafter, at about the time the celery harvest was to begin, Ortega and some of the other workers met with John Elmore, Robert Witt and Pat Fidel at Witt's office and reached agreement on the terms and conditions for the season's celery harvest. The pertinent terms included that:

1. Sahara agreed to pay the coop 25% of the net profit from the sale of the celery;
2. This net profit payment would not be calculated until the end of the celery harvest;
3. In lieu of a salary, the workers would be given an advance against their final net profit share calculated at $1.00 per celery carton;
4. The coop would receive a floor or minimum of $1. per carton of harvested celery regardless of the ultimate market price;
5. The coop would be assessed a ten cents per carton [11] fee for the use of Sahara's trucks and stitcher in transporting the celery from the field to the cooling shed.

Although a written contract was drawn up by Sahara in English, it was never executed by the parties. Louis Hausmann testified that Sahara had a comparable written contract with Tizoc regarding the lettuce harvest. Nevertheless, Hausmann testified that Sahara considered the oral agreement with Lompoc Custom Farming to be a binding one.

On or about May 17, 1982 members of the coop went to a notary, who had papers filed that day naming the coop, Lompoc Custom Farming, Inc. (See Gen Coun Ex. 13a). In June the coop established a set of by-laws (See Gen Coun Ex. 14) as well as adopted a set of work rules that was signed by all of the members. (See Resp. Exh. C)

11. The trucks were actually owned by Louis Hausmann, one of the owners and officers of Sahara. A similar assessment arrangement was made between Hausmann and Martinez for Martinez's use of the trucks in the previous celery harvest. This ten cents a carton assessment caused some difficulty for the coop and the agreement was later modified to provide that Sahara would bear the cost of transporting the celery to the cooler.

Robert Witt loaned the coop $2000. to help it get started. In addition, Pat Fidel purchased supplies and helped the coop establish credit by essentially having Sahara guarantee that the bill would be paid.

Throughout the 1982 Lompoc celery harvest season, the coop neither owned nor had an interest in any land, buildings, trucks or equipment. It's business address was Salvatore Ortega's home in Lompoc and it was operated out of his garage. While the workers provided their own gloves, knives and staple guns. Sahara provided the staples and cartons. In addition to the trucks and stitcher. Sahara provided the small trailers or celery humps ("burras") used in the fields.

On May 27 celery harvest began. Ortega was the foreman or crew leader while Pat Fidel was the company liason and field quality controller. It was Fidel who chose which fields and quantity to pick each day (the latter was based on instructions from Sahara's buyers office in Brawley). There was a dispute in the testimony concerning the extent that Fidel directly supervised the workers in their day to day activities. The three dischargees testified that Fidel directly supervised them in the same manner and to the same extent as when he was their supervisor in these same fields the previous year with Martinez. Fidel and Ortega testified, on the other hand, that the coop workers essentially supervised themselves. The evidence and testimony as a whole however seems to

fall somewhere in between. As indicated above, the most critical decisions, which fields and quantity to harvest, were made by Fidel. But other seemingly management determinations evolved from the nature of the celery harvest. Thus, since celery harvesting like lettuce harvesting is considered a skilled agricultural job, usually the manner and division of work was left to the workers to determine. However, since nearly all the crew were experienced celery cutters and had previously worked these same fields as Martinez crewmembers, little direct supervision or discipline of the workers was required. Moreover, lunch or other breaks were normally determined by when the lunch truck arrived. When the workers arrived or left work was dictated by the harvesting needs, which was determined by the buying office. In sum, no clear demarcation appears indicating that Sahara or the coop members primarily controlled the day to day harvesting decisions in the field.

Events leading to the discharge - After the harvest commenced significant problems about the coop emerged causing discord amongst the crewmembers. Rather than being incorporated as a nonprofit organization, the notary had instead improperly filed 'for profit' papers, jeopardizing the coop's tax status and existence. A dispute arose amongst the workers on the nature and extent of insurance coverage. Insurance representatives visited the workers at Sahara on at least two or three occasions to explain the plans. Yet, a lack of agreement continued through August and remained a concern to the members. The coop books, rather than being handled by the

treasurer or coop-member, was instead managed by Ortega's wife, causing some distrust. This distrust was compounded by the belief that Ortega was receiving payments on the side from Sahara. [12] The three dischargees, Renteria, Garcia and Vasquez were the most prominent and vocal in expressing concern and objection to the manner that the co-op's business was being run, which was communicated often to Ortega.

In July, the coop contacted and retained Santa Maria attorney Steve Belasco, who had counseled and assisted Tizoc when it became a cooperative. Belasco had several meetings with the workers out in the field in order to discuss and help in the co-op s legal and financial problems and record keeping. On August 19. three days after the discharges, Belasco filed the proper papers to incorporate the workers as a nonprofit cooperative.

However, on Monday, August 16, 1982, Ortega called the workers together after work and told them the coop had been disbanded. Thereafter, individual workers were contacted at their homes and told that a new coop was being started the next day and to report to work as usual. However, a few members, including the three dischargees, were expressly not told of this decision. On the

12. Ortega apparently received some payments individually from Sahara or Fidel during the harvest season and a $4500. payment at the end of the season for "extra" work. The "extra" work testified to was of a minor nature.

following day, the three dischargees went to the field and asked Ortega whether the coop was continuing or not and whether there was work for them. Ortega told the three that there was no work for them. A fourth worker, Jesse Herrera, who also had not been told of the new work but had also come to the field, was allowed to work. After Ortega told the three of the coop's dissolution they left the field and drove to Santa Maria to attorney Belasco's office to find out whether the coop still existed. When Belasco's partner informed them that the coop still existed they left to seek out Pat Fidel. The workers informed Fidel of what happened [13] and he told them he would go talk to Ortega and also arrange a meeting of the coop members. After talking to Ortega Fidel eventually returned and told the workers there was nothing he could do since the matter was an internal affair of the coop and "too political."' At the hearing Fidel testified that a prime reason he declined to intercede was to avoid any implication that Sahara was the employer. He testified that, "We were very aware that I could not do anything as far as meddling or instructing them on their operations for fear that it might end up in a hearing." (II R.T.56)

Ortega testified that the determination to discharge the three workers was made by the coop's board of directors prior to the discharges and referred to Respondent's Exhibit D, the minutes of

13. The evidence was undisputed that this was the first that anyone from Sahara learned of the terminations.

the meeting, in support of his contention. However, Ortega's testimony is not to be credited. Rather, Oscar Garcia, a board member and secretary at the time of the discharges, very credibly testified that it was he who drafted the minutes and they were dictated to him by Ortega subsequent to the discharges. As far as Garcia was aware, there was no board meeting to consider and determine the discharges. Rather, the decision was made by Ortega as the cumulative result of the three workers vocal objection to the manner in which the coop was being run. [14]

Two other matters regarding the record should be referred to here. First, there is no record evidence that anyone but Ortega played any direct (or indirect) role in the determination or actual termination of the three workers. The record is also undisputed that Sahara first learned of the discharges only after they occurred when the three workers contacted Fidel for assistance. Second, there is no record evidence that union activities, sentiment or support played any role in the determination or decision to terminate the three workers.

14. The discharges clearly do not comport with Section 7341 of the California Corporation Code which establishes the due process notice and hearing procedures required for expulsion from mutual benefit nonprofit corporations. However, that matter is not at issue in this complaint.

ANALYSIS AND CONCLUSION

Introduction

This case raises, apparently for the first time under the Act, the interrelationship between an employer-instigated harvesting cooperative and the employer as to who if anyone, should bear responsibility and liability for the discharges of three coop members. It is General Counsel's contention that the celery harvesting crew members are the employees of Sahara, rather than members of an independent coop called Lompoc Custom Farms. This is based on their analysis of the "economic realities" test adapted from common law principles of employer-employee determinations as discussed in such cases as U.S. v. Silk(1947) 332 U.S. 704; Real v. Driscoll, 603 F.2d 748 (9th Cir 1979); Empire Star Mines Co.. Ltd, v. California Employment Commission. 28 Cal.2d 33(1946); see also, California Labor Code Section 2750.5.

General Counsel further contends that even if the coop is considered a coop and not a mere paper organization instigated by the employer, nevertheless, it did not function as a true coop and and accordingly should not be so considered.

Finally, General Counsel contends that under the broad agency principles established in the Act, see e.g., Labor Code Sections 1140.4(c) and 1165.4 and in applicable decisions, see e.g.. Vista

Verde Farms v. ALRB (1981) 29 C.3d 307 and Silas Koopal (1983) 9 ALRB 2, the discharges by the coop should be imputed to Sahara.

Respondent, on the other hand, contends there is no evidence that it in any way participated in or influenced the cooperative in any of its internal operations or membership matters. Likewise it asserts there is no evidence to reasonably support the claim that the coop was acting in the interests of Sahara or that Sahara benefited from the discharges. Finally, respondent argues that the effect of the General Counsel's theory and any Board decision in support of its theory would be to effectively deny to agricultural employees the right to self-organization as a cooperative which presumably is recognized in Section 1152 of the Act.

After a careful review of the record herein, including counsel s arguments and post hearing briefs, I have concluded that the General Counsel has failed to sustain its burden of proof that respondent should be considered the employer of the three dischargees; or that even under liberal agency principles respondent should be held responsible for the discharges. In addition, the General Counsel has failed to sustain its burden of proof that the activities that the three dischargees were involved in within the coop could be construed as concerted activities, vis-a-vis- the respondent.

The Employer-Employee Relationship.

The starting point and most compelling argument for General Counsel's contentions and theory of its case flows from respondent's extensive involvement in the initiation, formation, and sustenance of Lompoc Custom Farms (hereinafter LCF). [15] Indeed, in reviewing the business relationship between respondent and the coop, it is evident that Sahara has a substantial amount of control over the working conditions and work performed by the workers. Sahara provided the land (owned by Witt and/or Elmore), did the cultivation. irrigation including pesticides and fertilizer and planted the crop. Sahara paid for the trucks used by LCF, maintained the cooler and insured the crop and crop crew during the harvesting. Sahara, through its quality controller, Pat Fidel, determined which fields and quantity of celery should be harvested. Even those attributes of self control which the workers arguably retained, such as the hours of work, was directly related to matters (quantity required) that Sahara determined. Sahara, in essence maintained necessary authority over the harvesting operation, which was an integral part of its overall agriculatural operation. Because the coop was in its infancy, the crew members were essentially dependent on Sahara for its existence and viability. Since LCF's only contract was with Sahara, who retained the remedy to terminate the contract, the coop's economic power and leverage with Sahara was negligible. Yet, a separate entity with at least a modicum of leverage did exist.

15. The payment of additional monies to Ortega rather than to LCF is a further questionable aspect of Sahara's involvement with LCF s affairs.

Although the coop was improperly incorporated at first, this was corrected. It ultimately, in September 1982, obtained insurance for its members. It retained an attorney to assist in the very matters that were causing the internal strain amongst its members. It retained and exercised the right to hire and fire its members. Ironically, this matter would never have gone to charge, complaint, hearing and decision had respondent not declined to intercede or interfere in the coop's president's decision to expel the three dischargees. Moreover, the coop's attorney believed and so counseled his client, that once properly incorporated as a nonprofit coop (on August 19, 1982) the coop and its members were considered self-employed pursuant to applicable IRS regulations. (See IV R.T. 16). While not controlling it nevertheless conveys the intention and purpose of the coop members in forming the coop.

While the issue is a close one, I nevertheless conclude that notwithstanding Sahara's extensive involvement in the formation, maintenance and financial sustenance of LCF the coop retained sufficient indicia to be considered a separate entity. Accordingly, the General Counsel has failed to establish by a preponderance of the evidence that the crew members were or should be considered the employees of Sahara.

Lompoc Custom Farms As A Separate Entity

A related but separate argument by General Counsel is that

whatever aspirations LCF may have had, those aspirations do not qualify an entity, as such, as a coop. Thus General Counsel argues that Sahara's collusion in the formation and financing of the coop, coupled with the coop's inchoate status and lack of assets and member services when considered together portray the entity as nothing more than an arm of respondent. General Counsel cites to Olympia Shingle Co. (1940) 26 NLRB 1398, 7 LRRM 52, Bickford Shoes. Inc. (1954) 109 NLRB 1346 and Fleming v. Palmer 123 F.2d 749, 759-762 (1st Cir 1941) in support of its argument. Olympia Shingle has long stood for the proposition that a stockholder-employee may retain employee status under the Federal Act even where a majority of employees, by virtue of their stock ownership, may have ultimate management control of their corporate employer. All three cases, however, can be cited for a separate but ultimately controlling proposition here. Each cited case involved an employer seeking to utilize the formation of a cooperative entity to avoid the consequences, in two instances, of prior union contracts and presence, and in Fleming, of prior employer-employee status. Thus in Olympia Shingle, the NLRB found that the new cooperative, consisting entirely of shareholder-members, was formed from Capital Shingle, a company composed of both shareholder and non-shareholders who belonged to a union. The NLRB ruled that the refusal to offer stock to the non-shareholders in the new entity (which consisted of the old company's assets) was directly related to their union membership and activities. See 26 NLRB at 1413-14. Likewise in Bickford Shoes, the NLRB found a violation of the Federal Act when a

shoe workers cooperative, which also owned the building in Milford to be used for the manufacturing, entered into a contract with Bickford Shoes causing discharge of the union employees at Bickford's old plant and obtaining preferential hiring of the cooperative's members at the new plan. Finally, in Fleming the Court found that Palmer, the company owner, had instructed and assisted his workers in forming a cooperative in order to avoid the application of the recently passed minimum wage law. Palmer then leased his building and equipment to the cooperative on terms Palmer established and then became the cooperative's manager. As manager, Palmer could establish which workers would get work and could also influence who would qualify as a board member of the coop. The Court determined, after reviewing the entire record, that Palmer retained "extraordinary control" over the cooperative, and for wage and Hour Regulation purposes be considered the employer.

By contrast, the record here is considerably less clear that Sahara controlled the internal operations of the coop or important aspects of the cooperative's harvesting responsibilities, such as hiring and firing. Moreover, the coop retained sufficient independent negotiating leverage to negotiate during the harvesting season a significant modification of their contract to require Sanara to bear the cost of transporting the produce from the field to the cooler. Because the coop was in its very infancy, considerable assistance was given to it by Sahara to ensure ITS viability for the long harvesting season. Without a second or third

harvesting season to review and compare' the coop's structure and relationship to Sahara, there is insufficient record evidence to conclude that LCF's dependence on Sahara compels a finding that the coop did not have sufficient independent existence and legal status and should be treated as an alter ego of Sahara. [16] Nor, in reaching this conclusion were Sahara's reasons for initiating and assisting the nonprofit incorporation, e.g., to save money and avoid state and federal regulations, discounted. However, neither Sahara's ulterior motives nor its extensive involvement in the coop's formation and existence persuade me that the coop's "corporate veil" should be pierced under the circumstances of this case to impute the three dishcarges to the respondent.

Lompoc Custom Farms & Ortega as Respondent's Agents

General Counsel initially advances the argument that under the ALRB's two most recent decisions construing the Custom Harvester/labor contractor dichotomy, Tony Lomanto (1982) 8 ALRB No. 44 and Sutti Farms (1982) 8 ALRB No. 63, LCF would not qualify as a custom harvester (or as an employer). To the extent that this analysis requires an evaluation of whether LCF was acting as something more than a mere labor copntractor (See e.g., Kotchevar Brothers (1976) FT 2 ALRB No. 45), then I so conclude that it was.[17] This conclusion is

16. There is ample NLRB precedence for "piercing the corporate veil" in appropriate circumstances, see e.g., NLRB v. Stowe Spinning Co. (1949) 336 U.S. 226; NLRB v. Somerset Classics, 1 93 F.2d 613, 615 Cir 1952)

17. Footnote 17 on page 22.

derived largely from the fact that LCF had a risk interest in the celery harvest by tying its wages to the ultimate price received by Sahara. This conclusion is further buttressed by the ultimately bona fide formation of a separate cooperative entity, which under the employer definition found in Section 1140.4(c) of the Act, could qualify it as an employer. [18]

The thrust of General Counsel's agency argument is that the workers would have perceived Ortega to be respondent's agent regarding the discharges, citing to Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307 and to the precedents cited therein. General Counsel's argument regarding Ortega's actual or perceived agency

17 In Lomanto, the Board listed at least 13 factors to be considered in determining whether an entity should be considered an agricultural employer. They include, who exercises daily control including which fields and quantity to farm; who provides, does and supervises the labor; who provides the equipment; who does the hauling of the crops; who owns or leases the land; who bears the risk of crop loss; how do the parties view the relationship, etc Under this analysis, most of the factors would indicate that LCF does not meet custom harvester or employer status. However, an overriding concern in this analysis is the determination which entity is best suited to enhance the statutory goal of furthering collective bargaining. However, this is not as overriding a consideration here where the cooperative is attempting to attain the status of self-employed workers.

18. The relevant portion of Section 1140.4(c) states, "...The term 'agricultural employer' shall be liberally construed to include, harvesting association, [&]...any association of cooperatives engaged in agriculture."

role would appear to be applicable regarding the initial formation of LCF; and it is at least arguably applicable to Ortega's role as harvesting crew leader in the fields. However, I am unpersuaded that the broad application of agency rules in the agricultural labor relations arena is appropriate or should be applied regarding the internal operations and workings of the coop.

The evidence and testimony during the hearing was undisputed that the only reason for the discharges was the objections voiced by the three dischargees regarding the internal operation of the coop and the ensuing personality clashes between the three and Ortega. [19]

Moreover, as indicated earlier, there is no record evidence to indicate that anyone other than Ortega played any role in the decision to and actual termination of the three. Nor is there any record evidence to indicate that Sahara had gained any benefit from the discharges. In fact, the inferences from the evidence are just the opposite. Three experienced and needed workers were discharged which caused considerable disharmony within the membership ranks. Under the circumstances it cannot be claimed realistically that either the coop or Sahara obtained any benefit from the termination decision. Moreover, Pat Fidel, who had a very good working

19. Respondent also suggests that in at least the case of Garcia, there was an indepedent basis for his discharge in that he had been found drinking in the fields during lunch breaks contrary to work rules. However, the evidence and testimony also made it clear that nearly all the workers, including Ortega, ignored the no drinking rule. To the extent it is relied on by respondent I conclude it was pretextua1.

relationship with all of the members of the coop including the three dischargees, had to forego on Sahara's behalf, any intervention in the decision. It is straining credulity to consider such forbearance as being in the company's interest, or converting such forbearance into a ratification of Ortega's decision.

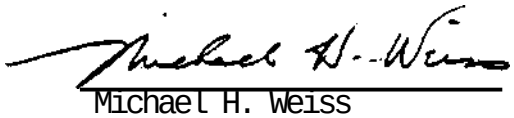
Finally, General Counsel has not met its burden of proof that the activities for which the three were discharged were concerted activities, vis-à-vis, Sahara Packing. While General Counsel is correct in its assertion that similar activity or protests have been found to be concerted activity by the ALRB, see e.g., Royal Packing Co. (1982) 8 ALRB No. 74, nevertheless, I am unpersuaded that the activities were concerted ones in the context of this case. Rather, the undisputed evidence is that this group of workers were involved in a new cooperative entity still in its infancy and were experiencing considerable internal dispute regarding the coop's benefits and structure. That the three dischargees were improperly expelled by the coop's president cannot seriously be gainsaid. However, there is insufficient evidence that Ortega was acting in any other capacity than an individual one, nor that his action should be or could be imputed to Sahara on expanded agency principles. Accordingly, I conclude that respondent did not violate Section 1153(a) of the Act as alleged in the complaint.

Conclusion

Based upon the foregoing findings of facts, analysis and conclusions of law I recommend that the complaint be dismissed in its entirety.

Dated : August 31, 1983

Respectfully submitted,



Michael H. Weiss
Administrative Law Judge