Poplar, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MAYFAIR PACKING CO.,	}	
Respondent/Employer,	}	Case Nos. 83-RD-1-D
	}	83-CE-115-D
and	}	83-CE-134-D
	}	33-CE-138-D
MANUEL MARTINEZ AND MATIAS GUERRERO,	}	83-CE-156-D
	}	33-CE-167-D
	}	83-CE-191-D
Petitioners,	}	84-CE-140-D
	}	84-CE-145-D
and	}	
	}	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	}	13 ALRB No. 20
	}	
Certified Bargaining Representative.	}	

DECISION, ORDER AND CERTIFICATION OF RESULTS OF ELECTION

On April 24, 1985, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision in this proceeding. Thereafter, the General Counsel and the United Farm Workers of America, AFL-CIO (UFW or Union), the certified bargaining agent and Charging Party, each timely filed exceptions and a supporting brief. Respondent Mayfair Packing Company timely filed a brief in response to the exceptions of the Union and the General Counsel.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has

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

delegated its authority in this matter to a three-member panel.[2/]

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions,[3/] to certify the results of the election, and to adopt his proposed Order, as modified.[4/]

Background

A Petition for Decertification was filed by employees Matias Guerrero and Manual Martinez on June 10, 1983, and a representation election was conducted on August 4, 1983, among Respondent's agricultural employees. The official amended Tally of Ballots showed the following results:

United Farm Workers	10
No Union	15
Total	25

The UPW thereafter timely filed post election objections, several of which were set for hearing and consolidated with unfair

---

[2/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

[3/] Subsequent to the issuance of the ALJ's Decision, the California Supreme Court, on May 16, 1985, ordered that Armstrong Nurseries, Inc. v. Agricultural Labor Relations Board (1985) 164 Cal.App.3d 1041 (Armstrong) be depublished. Although the ALJ refers to Armstrong, ALJ Decision, p. 62, fn. 77, we find his analysis consistent with the record and prevailing legal precedent. Accordingly, we affirm his dismissal of the complaint insofar as it concerns the alleged discharge of Felipe Soto.

[4/] We have carefully considered the analysis of our dissenting colleague, and nonetheless affirm the ALJ's findings of fact and interpretation on legal precedents.

labor practice allegations involving related conduct which allegedly occurred before, during, and after the election. ALJ Decision and Board Rulings

The ALJ recommended that all of the objections to the decertification election be dismissed and that the results of the election be certified. We affirm that recommendation.

With regard to the unfair labor practice allegations, the ALJ found that Respondent, on one occasion approximately one year following the election, interfered with its employees' section 1152 rights in violation of section 1153(a) of the Agricultural Labor Relations Act (ALRA or Act) when it ejected off duty employee Matias Guerrero from its work site. Guerrero had sought to meet with two employees during their lunch time in connection with union-related protected concerted activities. Although the ALJ noted that the company rule prohibits "[unauthorized entry on company property for purposes other than work," he concluded that the rule was relaxed during the mid-day meal break and therefore could not serve in this instance to inhibit Guerrero's conduct.[5/] (See, e.g., AMC Air Conditioning Company (1977) 232 NLRB 283 [97 LRRM 1146].) He dismissed all other allegations of unlawful conduct. We affirm those conclusions as well.

CERTIFICATION OF ELECTION RESULTS

It is hereby certified that a majority of the valid ballots were cast for "no union" in the representation election

[5/]Because we find that the rule was applied in a discriminatory manner, we need not determine whether the rule itself interfered with employees' section 1152 rights to engage in "self-organization, to form, join, or assist labor organizations."

conducted on August 4, 1983, among the agricultural employees of Mayfair Packing Company in the State of California, and that the United Farm Workers of America, AFL-CIO, thereby lost its status as the exclusive representative of the said employees for the purpose of collective bargaining, *as* defined in section 1155.2(a).

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent Mayfair Packing Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminatorily enforcing company rules.

(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 Agricultural Labor Relations Act (ALRA or Act):

(a) 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.

(b) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from August 1, 1984, until August 1, 1985.

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

(d) Arrange for *a* representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost in this reading and during the question and answer period.

(e) 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: November 23, 1987

JOHN P. MCCARTHY, Member

IVONNE RAMOS RICHARDSON, Member

MEMBER HE.NNING, Dissenting:

A de novo review of the record compels me to dissent from the majority's adoption of the Administrative Law Judge's (ALJ) reconunended Decision in this case.

After a consolidated hearing on the United Farm Workers of America, AFL-CIO's (UFW or Union) election objections[1/] and

---

[1/] The objections litigated at hearing were:

1. Whether the petition for certification was timely filed pursuant to Labor Code section 1156.4;

2. whether the Employer has refused to bargain in good faith since March 1983 and has promised to negotiate with the decertification petitioners;

3. whether the Employer initiated, promoted or controlled the decertification of the certified bargaining representative; and

4. whether the Employer engaged in surveillance, threats, interrogations, harassment, bad-mouthing or acts of violence against union organizers and supporters and ranch committee members during the decertification election period and if so, whether such conduct affected the outcome of the election.

unfair labor practice allegations involving related conduct which occurred before, during and after the election,[2/] one of the decertification petitioners, Matias Guerrero, submitted a declaration charging Mayfair Packing Company (Respondent) with initiation and support of the decertification. The General Counsel issued another complaint, charging Respondent with initiation and support, and with additional discriminatory conduct against UFW supporters. The ALJ agreed to consolidate the reopened case with the new complaint, and the second hearing occurred in November and December 1984.

BAD FAITH BARGAINING

Although crediting the testimony of Matias Guerrero would establish a clear violation of Labor Code sections 1153(e), (c) and (a),[3/] and would invalidate the results of the election, I would find bad faith bargaining even without Guerrero's testimony. And because the bargaining violation bred--or at least

---

[2/]Unfair labor practices at issue in the first hearing included allegations that:

1. Respondent engaged in bad faith bargaining beginning in March 1983.

2. Respondent discriminatorily discharged ranch committee member Onesimo Esparza on June 29, 1983.

3. Respondent interfered with the protected activities of union supporter Antonio Acevedo by harassing him and giving him the impression of surveillance.

The General Counsel had originally dismissed the Union's charge that Respondent had initiated and supported the decertification effort.

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

exacerbated--the employee discontent which resulted ultimately in the decertification of the Union, I would set the election aside on the basis of the UFW's Objection #2.

Negotiations for a third contract between the UFW and Respondent commenced in August 1982, the month that the second contract expired. The Union submitted its proposal for a change in the subcontracting language, and Respondent finally countered on October 22. During the first couple of meetings in the fall of 1982, a Company decision was made to replace Controller Walters, who had negotiated the previous contract but whose wife was seriously ill, with Tom Dillon, a professional negotiator. Dillon had extensive experience in, and *an* ongoing commitment to, the ferrous steel industry, and had no experience in agriculture. Subcontracting had emerged as a major issue, with the Union accusing the Company of evading the vague restrictions on subcontracting and thereby reducing hours worked by unit members.

Dillon and Company officials Walters (Controller), James Melehan (Secretary-Treasurer), and Lamar Hart (Ranch Manager) met, in all, five times with UFW representative Ken Schroeder and members of the Union's negotiating committee. These meetings occurred on November 23, 1982, December 3, 1982, February 1, 1983, February 16, 1983, and June 7, 1983. The major sticking points were subcontracting and retroactive payments to the Robert F. Kennedy Medical Fund (RFK) to cover maintenance of the current level of benefits. On December 3, the Union requested information on the relative hours, dates, blocks, acres, and tonnage harvested in the 1981 and 1982 walnut harvest by unit members and

subcontractors in order to verify and analyze Mayfair's claim that reduction of work for unit members was due to weather and to acreage reduction.

Some of that information was supplied to the Union on February 1 and 16; some was never supplied.

Dillon cancelled two meetings scheduled for January, one for fog and one for unexplained reasons. On February 1, he provided limited acreage information, which was so incomplete as to be misleading. To explain the unit members' reduction in hours, he stated that 95 acres of walnuts had been taken out of production at the Mayfair Ranch. However, he failed to give any information about the Prune Tree ranch, which unit members had harvested in 1981, but not in 1982. Dillon agreed to seek additional information with respect to relative hours worked by unit members and subcontractors, tonnage, Prune Tree, and dates and blocks harvested. The meeting scheduled for February 3, was rescheduled at Dillon's request for February 16, to enable him to obtain the information--all of which had been originally requested on December 3.

On February 16, Dillon supplied some tonnage information which indicated less tonnage harvested in 1982 than 1981. However, the Company's claim that the reduction was due to weather factors, rather than subcontracting, was not verifiable because the dates and hours-worked information on subcontractor labor was not provided. For the first time, Dillon claimed to be unable to contact the subcontractors.

On February 16, Dillon also made his "final offer,"

which he threatened to withdraw if the Union did not accept. After Schroeder pointed out to him that the proposal was actually worse than the October 22 offer, Dillon, Walters, and Melehan caucused and increased the RFK medical plan payments, retroactive to January 1983. The Union was adamantly seeking retroactivity to September 1982, because increased rates had gone into effect at that time. Dillon and Walters testified that they saw no reason to pay additional retroactive RFK premiums because the workers had already enjoyed the benefits and stood to gain nothing from the increase.

By this meeting, Dillon was already heavily involved in preparation for the ferrous steel negotiations. Although the ferrous contracts were scheduled to expire on March 15, and the machinists' in April, necessitating intensive activity throughout March, April, and May, Dillon failed to notify Schroeder of this conflict at the February 16 meeting. He testified that he had expected to conclude the Mayfair/UFW negotiations within 10 days of the February 16 meeting. However, he gave no such deadline to the Union, and the parties were far apart on all key items. According to Dillon, the Company gave no consideration to replacing Dillon with another negotiator, such as Company attorney Ken Youmans or Controller Joe Walters, although both Youmans and Walters had negotiated previous contracts between the UFW and Mayfair, and Walters had attended each and every bargaining session with Dillon.

From February 16, 1983—the date of Dillon's presentation of the "final" offer--until March 24, Schroeder was

consulting with employees on how to respond to the Company's February 16 offer and cleaning up the Union office after a flood. Dillon was meanwhile engaged in ferrous steel negotiations for seven companies, as well as renegotiation of machinists' contracts. Schroeder testified that when he called Dillon on March 24, he was told for the first time that Dillon would be unavailable to meet until the end of April because of the other negotiations and a machinists' strike.

On April 20, Schroeder again called Dillon, as instructed, to arrange a meeting. Schroeder testified that by this time he had decided to concede RFK retroactivity. Dillon did not return his call. Dillon testified he did not return the call because he was "swamped" with other negotiations. On May 9, Schroeder called him back and left the message to call him. Dillon finally returned the call, claiming he would be unavailable to meet until late May, again because of the ferrous steel negotiations. They arranged to meet on May 23. But on May 22, the day before the scheduled bargaining date, Joe Walters called Schroeder to cancel, without explanation, and rescheduled for June 7.

On Tuesday, June 7, two days before the decertification petition was filed, the Union and Company held their long delayed —and last—negotiating session. The Union offered major concessions on wages and RFK retroactivity, and dropped entirely the proposed subcontracting restrictions which had been obstructing agreement. The Union's offer exceeded the Company's February 16 "final" proposal by 5¢ per hour, at a cost of

approximately $3,000, according to Melahan. Dillon caucused with the Company's managers and told Scnroeder they would need up to six days to submit the Union's proposal to President Perucci in San Jose. He agreed to respond by the 10th, or at the latest, by the 13th of June.

Company officials Melehan (Secretary-Treasurer) and Walters (Controller) testified that they decided to reject the Union's proposal on Wednesday, June 8, at a meeting with Company President Perucci. They claimed to have made their decision solely because of the escalation of the RFK contributions and the fact that they would have to be renegotiated within a few months, when the Fund's trustees changed the rates. They insisted that they had no idea about the decertification until Friday, June 10, when Hart called them after having been served with the petition. Once learning of the filing, they decided they had additional grounds to reject the Union's offer, and officially did so by Dillon's phone call on Monday, June 13. No explanation was offered for the rejection, and no counterproposal was made. In a letter dated July 1, 1983, Dillon wrote to the Union, formally rejecting their proposal of June 7, and resubmitting the Company's proposal of February 16. Again, no explanation was given for the rejection.

Given this record, I find that more than sufficient evidence exists to find that Respondent failed to display the requisite degree of diligence in bargaining and failed to treat its bargaining obligation as seriously as it did its other business. (NLRB v. Reed & Prince Mfg. Co. (1951) 96 NLRB 850

[28 LRRM 1608] enforced (1st Cir. 1953) 205 F.2d 131, [32 LRRM 2225].) This was manifested most clearly in Dillon's failure to make himself available for negotiations at reasonable times and places. (Montebello Rose Co., Inc., Mount Arbor Nurseries, Inc., and Thomas L. Flynn, Receiver for Mount Arbor Nurseries, Inc. (1979) 5 ALRB No. 64; Insulating Fabricators Inc. (1963) 144 NLRB 1325 [54 LRRM 1246].)

In my view, the ALJ's analysis of Dillon's lack of authority and unavailability suffers from a rigidly mechanistic approach: he split the totality of the circumstances into individual indicators of bad faith and considered and dismissed the individual indicators out of context of the total course of bargaining. While circumstances such as lack of sufficient delegation of authority, unavailability, or delays in producing information may not, in and of themselves, evidence a deliberate scheme to avoid agreement, their cumulative effect may indeed constitute a failure to meet the statutory obligation, and provide a basis from which the Agricultural Labor Relations Board (ALRB or Board) can infer that the Employer had no sincere desire to conclude a binding agreement. vSee, e.g., Insulating Fabricators, supra, 144 NLRB 1325; Borg Compressed Steel Corp. (1967) 165 NLRB 394 [65 LRRM 1474], and NLRB v. Fitzgerald Mills Corp. (2nd Cir. 1963) 313 F.2d 260 [52 LRRM 2174], enforced 133 NLRB 877 [48 LRRM 1745].)

I am well aware that section 1153(e) contains no requirement that a negotiator be given plenary authority, and that a negotiator whose powers are limited to discussing proposals and

recommending action can nevertheless fulfill the statutory duty to bargain.[4/] The proposition is well-established, however, that while limiting a negotiator's authority to enter into a binding agreement is not—in the context of otherwise good faith bargaining a per se violation of the duty to bargain, the character of the negotiator and the degree of authority conveyed is "yet a factor which should be taken into consideration." (Great Southern Trucking Co. v. NLRB (4th Cir. 1942) 127 F.2d 180, 185 [10 LRRM 571], cert. den. 317 U.S. 652 [11 LRRM 838].)

I find a number of troubling aspects to Dillon's tenure as Mayfair's chief negotiator and, unlike the situation in Lloyd A. Fry Roofing Company v. NLRB, supra, 216 P.2d 273, the employer here did not otherwise affirmatively demonstrate good faith.

First and foremost, of course, is the fact that Dillon was unavailable to meet from March 24, 1983, when Schroeder called to request a meeting, until June 7. He failed even to return Schroeder's April 20th call until May 9th, almost 3 weeks later, after Schroeder had called again and left a second message for Dillon. His only excuse was that he was "swamped" with work. On May 9, he agreed to meet on May 23, a date later postponed without

---

[4/]In Lloyd A. Fry Roofina Company v. NLRB (9th Cir. 1954) 216 F.2d 273 [35 LRRM 2009], modified on other grounds (1955) 220 F.2d 432 [35 LRRM 2662], for example, the court reversed the Board and found no violation where a negotiator was limited in scope of authority just as was Dillon. However, the court was careful to note that the Trial Examiner had specifically found that the company "had not demonstrated a lack of good faith by taking an uncompromising position or failing to meet with the union at reasonable times and places." (216 F.2d 278.)

explanation to June 7.

The ALJ recognized that "the delay from the end of March until June 7, cannot be ignored in determining the question of Respondent's bad faith." However, he declined to draw an inference of bad faith from the day because Dillon's conflicting commitment to the ferrous steel negotiations appeared legitimate and not pretextual, and the Union displayed a "lack of urgency" in taking over a month to respond to Respondent's proposal of February 16.

Unavailability because of a busy schedule does not excuse a violation of the duty to meet and confer. Rather, it indicates a "failure to display the degree of diligence" required of parties to collective bargaining and a lack of the requisite genuine interest in the consummation of an agreement. (See Insulating Fabricators, supra, 144 NLRB 1325, 1328.) Dillon and the other Mayfair agents were well aware of Dillon's other commitments. Because the ferrous steel contracts were scheduled to expire on March 15, and Dillon was responsible for the new negotiations, it was quite predictable that he would become "swamped" by that time. However, Dillon cancelled two meetings in January, one for fog and one for unexplained reasons, and another one in February because of his claimed inability to get the tonnage and hours-worked data the Union had requested on December 3. Despite the evident impact which Dillon's impending unavailability would have on future negotiations, he made no mention to union representatives of his other commitments.

With respect to events after the meeting of June 7, the

ALJ's analysis focused solely on the Company's refusal to accept the Union's proposal. He stated:

> ... so long as the Respondent did not outright refuse to bargain with the Union upon the filing of the decertification petition, there is nothing unlawful in its hoping the election might facilitate agreement on its term. (ALJD, p. 84.)

Although the ALJ's choice of words could be viewed as implying that surface bargaining and deliberate delays are permissible once a decertification petition has been filed, such is clearly not the law. Regardless of the ultimate resolution of the election, an employer's bargaining obligation is not affected by the mere filing of a decertification petition. (See Nish Noroian Farms (1982) 8 ALRB No. 25, and RCA Del Caribe (1982) 262 NLRB 963 [110 LRRM 1369].) Dillon's request for a six-day response delay to meet with Perucci about the Union's proposal provides further indication of bad faith, in light of the fact that the meeting occurred the following night and the decertification petition was filed two days later.

By its delinquency in responding to requests for information, its ill-explained failure to notify the Union of its negotiator's impending unavailability, its carelessness in responding to union representatives' telephone calls, its unexplained cancellations of meetings, and its-general unavailability to meet between March 24 and June 7, 1984, Respondent, in my view, displayed a marked lack of diligence and a failure to treat its bargaining obligation as seriously as it did other business. (See NLRB v; Reed & Prince Mfg. Co., supra,

96 NLRB 858.) The aforementioned conduct, and what I consider the evasive and contradictory testimony of Dillon and other Company officials,[5/] provides substantial support for a finding that, by February 16, 1983, Respondent had ceased making any genuine efforts to reach an agreement with the UFW and had entered into a course of deliberate delay, in an attempt to undermine the Union by stalling negotiations.

Finally, testimony of decertification petitioner Manual Martinez--that employee dissatisfaction centered on the Union's inability to stem work reduction associated with subcontracting--indicates clearly that the delays bore a direct impact upon the decertification campaign. (See Borg Compressed Steel Corp., supra, 165 NLRB 394, and N.L.R.B. v. Alterman Transport Lines, Inc., (5th Cir. 1979) 587 F.2d 212, 228 [100 LRRM 2269].) Accordingly, and especially considering the small margin of the Union's defeat,[6/] I would find that Respondent's bargaining

---

[5/] Under direct questioning regarding his bargaining authority, Dillon first testified that Walters was "in control" of the Company and that he thought Walters had "authority" to enter a contract. Under redirect, several days later, Dillon characterized Walters, Nolan and Hart as a "team" which set the parameters for him. Company Secretary-Treasurer Melehan testified later the same day that, in the interim between Dillon's direct and redirect, he and Dillon had dined with Company attorney Youmans, where Dillon's earlier testimony on direct and Melehan's proposed testimony had been discussed. Moreover, although the record is clear that on June 1, 1983, the UFW served Charge No. 83-CE-115-D on Mayfair alleging Company assistance in a decertification signature drive. Dillon and all of the Company officials who testified insisted that they had no idea about the decertification until the petition was filed on June 9.

[6/] The Tally being 10 Union votes to 15 No Union votes, if only 3 of the No Union voters had voted for the Union, the Union would have won the election.

violation constitutes grounds to set aside the election.

DISCHARGE OF ONESIMP ESPARZA

Onesimo Esparza was a member of the Union's ranch committee and negotiating team who had worked for May-fair since 1978, and who, according to Superintendent Knutson, had been a good worker. He was "suspended pending discharge"[7/] on June 29, 1983, ostensibly for telling co-worker Consuelo Torres that she should "take it easy"[8/] so that the Company would give her more help or recall some of her laid-off co-workers. It is undisputed that the conversation was amicable and brief, and that Torres did not in fact slow down. The discharge was alleged both as an election objection[9/] and 0.3 an 1153 (c) violation. That Esparza did suggest that Torres "take it easy" was not denied, but the General Counsel and Union argued that Hart merely used the Torres incident as a pretext to justify Esparza[1]s termination

[7/] Article 7B of the expired contract between the UFW and Mayfair Packing provides that discharge cannot be finalized except in the presence of a union steward or representative. In the case where a union representative is not readily available, then the only action which the employer can take is a "suspension pending discharge." That the action was a de facto discharge is apparent from Esparza's termination letter (G.C. Ex. 17) as well as Knutson's testimony. (R.T. Vol. I, p. 22.)

[8/] Esparza admitted saying "lleva se la suave" (R.T. Vol. II, p. 104) to Torres when he saw her loading limbs by herself instead of her usual crew of three employees. This colloquial term is commonly used to mean "take it easy."

[9/] The discharge occurred approximately three weeks after the decertification petition was filed and five weeks before the election was actually held, during the period when the Company's appeal of Regional Director's dismissal of the decertification petition was pending before the Board. It was also approximately two weeks after the Company had flatly rejected the Union's June 7 contract offer.

while the true motive for his discharge was his active support for the UFW.

The ALJ recommended dismissing both the Union's election objection and the General Counsel's unfair labor practice allegation, and the majority today adopts that recommendation and the finding and conclusions on which it was based.

With respect to the allegation of coercion at the grievance meeting on Esparza's discharge, the ALJ discredited the testimony of union representative Juan Cervantes and union steward Cleo Gomez regarding threats of violence and intimidation by anti-union employees. He found that Gomez had been less than forthcoming about Cervantes' behavior at the meeting and that "it was [Cervantes'] entering the office in high dudgeon, essentially commanding 'everyone' to leave, which set loose the confusion that characterizes the meeting." The ALJ found that Consuelo Torres invited the decertification petitioners to the grievance meeting and that, although:

> ... it may have been an unfair labor practice for Respondent to have either invited the decertification petitioners to participate in or to have permitted them to participate in the grievance meeting ... these principles in no way render the mere presence of the anti-union faction in the waiting area outside Hart's office unlawful. (Footnote omitted.)

The ALJ found that although:

> Respondent did act severely in view of the nature of Esparza's offense and that certainly gives rise to a suspicion of unlawful motive ... such a suspicion does not constitute proof that Respondent violated the Act. (Footnote omitted.)

The ALJ also cited Midwest Precision Castings Company (1979) 244 NLRB 597 [102 LRRM 1074] (Midwest), in support of the

argument, not even raised by Respondent, that Respondent was justified in subjecting Esparza to harsher penalties for violation of the collective bargaining provision prohibiting "slowdowns" because of Esparza 's special status with the Union.

I reject the ALJ's conclusion that Midwest justifies imposing on Esparza a more severe, and apparently unprecedented, form of discipline -- namely, discharge without warning. Aside from the numerous bases for distinguishing the instant situation from that in Midwest, the case is inapplicable because Respondent did not even purport to rely on Esparza 's position with the Union to explain the severity of his punishment.

I also reject the ALJ's analysis of the events at the second-step grievance meeting. Contrary to the suggestion of the ALJ, the "mere presence" of th« decertification petitioners and the Torres brothers, and their right to "sit quietly" in the room outside Hart's office during the grievance meeting, is not at issue in this case. (See ALJD, p. 24; ALJD, p. 25, n. 31.) No one contends that anyone sat quietly in the outside room. Rather, all testimony is consistent with Cleo Gomez' description of the anti-union faction following Cervantes, Gomez and Esparza to the open door of Hart's office, and, in the case of Guerrero, even going so far as to enter the room. Whether or not the entire group actually entered the inner office is not determinative. The intimidating effect of having entry blocked by a crowd of hostile intervenors should be obvious, and Cervantes' vehement protest appears to me most natural and unblameworthy in the context of

this case.[10/]

Although the ALJ was persuaded that the expired contract provision permitting discharge of any worker who encourages a slowdown or interruption of work covers the situation, the Union points out that the provision was permissive, not mandatory. Moreover, several members of Respondent's management team testified that the employee handbook was in effect at the time of Esparza's discharge. Indeed, Ken Youmans, Respondent's counsel, at one time offered on the record to stipulate that Respondent was not relying on the contractual provision in firing Esparza.

[10/]I also note that, in a July 8 letter to Juan Cervantes, Hart summarized the incident as follows:

> This meeting was interrupted and worthwhile direction could not be accomplished. I adjourned this meeting at this time.

He made no mention of Cervantes' behavior in his summary or in his subsequent request to "reconsider your decision not to meet again." (Resp. Ex. 5.)

Moreover, evidence apparently not considered by the ALJ does provide limited support for the proposition that Martinez' presence may very well have been ordered by Respondent, through Consuelo Torres acting as its agent. Martinez testified that he was summoned to the meeting by Torres, who told him she did not know what the meeting was about. Moreover, Cervantes testified that Hart defended the presence of Gueirrero, Martinez and Torres at the meeting, saying "these people have a right to be here if they want to." Although Hart denied having made that remark, I note that the ALJ did credit Cervantes on that point.

When viewed in the context of the concurrent bargaining impasse and decertification campaign, and the role which Lamar Hart—and to a lesser extent Vasquez—are alleged to have played in both, the suspicion certainly arises that Hart and Vasquez may have set up a hostile encounter at the grievance meeting in order to intimidate union supporters and further undermine the Union. However, in my view, the General Counsel has not presented sufficient evidence to rebut Torrac' statement that the decertification petitioners were invited by her.

I find that the evidence of discrimination presents a prima facie case which Respondent was unable to rebut; moreover, the Company further buttressed that evidence with its witnesses' statements about the handbook. (See Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].) DISCHARGE OF FELIPE SOTO

As noted by the ALJ, "[t]here is no real dispute about what happened the day Soto was fired." Guerrero and his cousin Soto had been spearheading an effort to bring the UPW back to Mayfair and had been gathering signatures for an election in full view of supervisor Emilio Vasquez[1] wife, Helen. On July 28, for no apparent reason, Vasquez announced to them that they were not to leave the yard without permission, despite the fact that their jobs often required them to leave the yard. Guerrero testified that he considered Arlan Knutson, not Vasquez, to be his supervisor.[11/] At any rate, upon the urging of Guerrero, Soto ignored Vasquez[1] command in order to have a tire repaired. He was immediately fired. The firing was subsequently upheld by Vasquez' superior, Arlan Knutson.

The ALJ found that Respondent's explanation for the rule --that it was designed to relieve Soto and Guerrero of the burden of having to "get things"--"makes no sense." (ALJD, p. 62, n. 76.) However, he declined to find a violation because he felt

---

[11/]Knutson was the superintendent over Vasquez but testified that Vasquez was, in fact, Guerrero's immediate supervisor, and that employees had been notified by a note attached to their checks in the spring of 1983 that Vasquez was promoted to supervisor over the field and shop.

that the General Counsel had "not established any nexus between promulgation of the rule and any particular form of protected activity that it was designed to prevent or to punish." (ALJD, p. 62.) Rather, he explained the entire incident by reference to the "tremendous hostility" between Guerrero and Vasquez.[12/]

Given the uncontested testimony that Guerrero and Soto had been gathering signatures for a representation election in the presence of Emilio Vasquez' wife, and given Vasquez' apparent irritation with Guerrero's union activity, I would find that a prima facie case was established that the rule was specifically intended to interfere with their organizing activity. My finding is further supported by the marked contrast between the tight constraints imposed on Guerrerc and Soto when they were organizing for the Union and the conceded laxity with which Guerrero and Martinez were supervised the previous year while they were organizing for decertification.

In my view, a violation is made out if an employee is fired for defying a rule directed specifically at union supporters when the rule's apparent purpose was to prevent organizing and retaliate against the organizers. (See, e.g., Republic Aviation Corp. v. N.L.R.B. (1945) 324 U.S. 793 [16 LRRM 620]; Florida Steel Corp. v. N.L.R.B. (5th Cir. 1976) 529 F.2d 1225, 1230-1231 [92 LRRM 2040]; Liberty House Nursing Homes (1979) 245 NLRB 1190 [102 LRRM 1517]; Anderson Plumbing and Heating (1973) 203 NLRB 18

[12/] The ALJ also cited to the Court of Appeal's decision in Armstrong Nursery v. ALRB (1985) 164 Cal.App.3d 104, which, as the majority notes, has since been \XXX\apublished by order of the Supreme Court.

[83 LRRM 1026].) Accordingly, I would find that Respondent's dismissal of Felipe Soto violated section 1153(c) and (a).

For the above-stated reasons, I dissent from the majority's adoption of the ALJ's recommended Decision. Dated: November 23, 1987

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office by United Farm Workers of America, AFL-CIO (UFW or Union), the certified, exclusive bargaining agent for our agricultural employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued *a* complaint which alleged that we, Mayfair Packing Co., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board dismissed all but one of the charges. The Board found that we interfered with certain employee rights guaranteed by the Agricultural Labor Relations Act (ALRA or Act) when we prevented an off-duty employee from entering the work site in order to communicate with other employees about union matters during their lunch period. 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 restrain or interfere with the rights of our employees to discuss matters relating to union and other concerted activities within the meaning or the Agricultural Labor Relations Act.

Dated: MAYFAIR PACKING CO.

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 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995.

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

Mayfair Packing, Co. (UPW)

Case No. 83-RD-l-D
13 ALRB No. 20

ALJ DECISION

In this consolidated election objections and unfair labor practice case, the Administrative Law Judge (ALJ) recommended upholding the decertification of the United Farm Workers of America, AFL-CIO (UFW or Union) and dismissing allegations of employer bad faith bargaining with the UFW, instigation and support of the decertification, and discrimninating dicharges and harassment. He recommended that the Board find one violation: the employer's interference with the concerted activity of an off-duty employee engaged in organizing for the UFW the year following the decertification election. In dismissing the other allegations, the ALJ discredited the testimony of one of the decertification petitioners that the employer had assisted the decertification and instigated it with promises of benefits to the petitioners. The ALJ was not persuaded that the bargaining delays and unavailability of Respondent's negotiator after filing of the decertification petition, constituted bad faith bargaining and further found that the Union was partially responsible for the slow pace of negotiations. He found that the discharge of a UFW negotiation team member was not motivated by discriminatory intent but properly followed his admission that he advised a coworker to "take it easy," in violation of a contract provision making participation in a "slowdown" a dischargeable offense. He found the firing of a UFW organizer, Soto, cousin to the discredited decertification petitioner, to be a legitimate response to Soto's insubordinate refusal to follow a supervisor's order which was not an illegal order.

BOARD DECISION

The Board affirmed the ALJ in all respects with the exception of his citation to the subsequently depublished case of Armstrong Nurseries, Inc. v. ALRB (1985) 164 Cal.App.3d 1041.

DISSENT

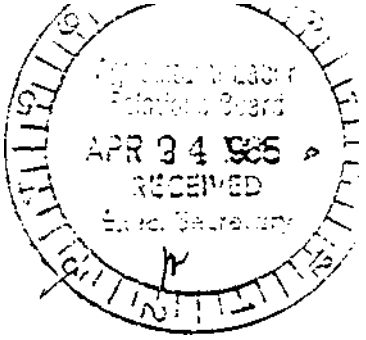
Member Henning dissented from the majority's decision to uphold the election decertifying the union and to dismiss the allegations of bad faith bargaining and discriminatory discharge of Esparza and Soto. Without reaching the issue of Matias Guerrero's credibility, he would set aside the election based on the Respondent's bargaining delays during the months leading up to the filing of the decertification petition. He noted that Respondent's negotiator failed to produce requested information for over two months, at which point he announced a "final

proposal" with virtually no movement and without notifying the union's representatives that he would be unavailable for the next several months due to conflicting obligations in ferrous steel negotiations. In Member Henning's view, testimony of decertification petitioner Manuel Martinez that employee dissatisfaction centered on Union inability to stem work reduction associated with subcontracting—the major stumbling block in negotiations—indicates clearly that the bargaining delays bore a direct impact upon the decertification campaign and constitute adequate grounds for setting aside the election. He would also reverse the ALJ's findings with respect to discharges of Onesimo Esparza, whose discharge violated the employee handbook which Respondent's witnesses admitted was in effect at the time, and Felipe Soto, whose insubordination he would find to be a legitimate refusal to accede to a discriminatory order.

* * *

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:	
MAYFAIR PACKING COMPANY, Respondent, and MANUEL WARTIMES AND MATIAS GUERRERO, Petitioners, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	Case Nos. 83-RD-1-D 83-CE-115-D 83-CE-134-D 83-CS-138-D 83-CE-156-D 83-CE-167-D 83-CE-191-D 84-CE-140-D 83-CE-145-D

Appearances:

Derek Ledda
ALRB Delano Regional Office
627 Main Street,
Delano, CA 93215
for General Counsel

Ken C- Youmans
Lani Poderick
Seyfarth, Shaw, Fairweather & Geraldson
2029 Century Park East, Suite 3300
Los Angeles, CA 90067
for Respondent

Ned Dunphy
United Farm Workers
P. 0. Box 30
Keene, CA 93531
for Certified Bargaining Representative

Before: Thomas M. Sobel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Thomas Sobel, Administrative Law Judge:

I

PROCEDURAL HISTORY

This proceeding, a consolidated hearing upon unfair labor practice allegations brought by the General Counsel against Respondent Mayfair, an admitted agricultural employer, and upon objections to a decertification election filed by ousted labor organization, the United Farmworkers of America, AFL-CIO, was heard in two distinct phases.[1/]

The first phase took place in late January and early February 1984. The unfair practices at issue in this phase included allegations that (1) Respondent engaged in bad faith bargaining, (2) discriminatorily discharged ranch committee member Onesimo Esparza, and (3) interfered with the protected activities of.another worker, Antonio Acevedo, by giving him the impression of surveillance. The representation issues tried at the same time concerned the timeliness and provenance of the decertification petition, and

1. Because I will frequently refer to transcripts in this decision, I will distinguish between the two phases of the hearing by using a "prime" superscript after the volumes arising from the second phase of the hearing. (e.g., I':32) References to exhibits from the initial phase of the hearing will be numbered sequentially (e.g., GC 1..., R 1..., UFW 1...) and references to exhibits from the later phase of the hearing will be lettered sequentially (e.g. G.C. A..., R A..., UFW A....)

misconduct said to have affected the outcome of the election.[2/] Although some of the objections set for hearing tracked the unfair labor practice allegations, the alleged election misconduct which is at the hub of the later procedural history of this case -- the accusation that Respondent initiated and supported the decertification effort — was not originally tried as an unfair labor practice, although the union had charged it as one.[3/] However, after investigation, General Counsel dismissed the charge for lack of evidence, a conclusion which prefigured my own when, after hearing such evidence as the union had to offer, I dismissed

---

2. The objections sat for hearing were:

> 1. Whether the petition for certification was timely filed pursuant to Labor Code section 1156.4;
>
> 2. Whether the Employer has refused to bargain in good faith since March 1983 and has promised to negotiate with the decertification petitioners;
>
> 3. Whether the Employer initiated, promoted or controlled the decertification of the certified bargaining representative;
>
> 4. Whether the Employer engaged in surveillance, threats, interrogations, harrassment, bad-mouthing or acts of violence against Union organizers and supporters and ranch committee members during the decertification election period and if so, Whether such conduct affected the outcome of the election.

The Executive Secretary also set for hearing the objection: "Whether employees at some or all of the following operations of Mayfair Packing Company were considered in determining whether to conduct a decertification election: (1) Prune Tree Ranch; (2) Sanborne Ranch; (3) Disavitch Ranch; (4) South Ranch; (5) walnut bleachers in Farmersville, (6) dehydrator for nuts in Cotton Center and (7) dehydrator for nuts and prunes in Farmersville ..." Order Setting Objections for Hearing. The Union waived this objection at the hearing. Tr. Prehearing Conf., o. 60; VII:76.

3. See Charge 383-C2-115-D.

the objection for failure of proof.[4/]

Hearing continued on the remaining matters and, after the close of the record, the Union filed a motion to re-open the record to take the testimony of one of the decertification petitioners, Matias Guerrero, who now averred that Respondent initiated and supported circulation of the decertification petition. On a parallel track, General Counsel moved to re-open the record to take additional evidence relating to the discharge of Onesimo. Esparsa on the basis of representations contained in another declaration given by Guerrero to the effect that Respondent had earlier expressed an intent "to get" Esparza.[5/] Meanwhile, the UFW filed new charges accusing Respondent's officials of harassing and threatening Guerrero in retaliation for his informing against them. The stage was set for a flurry of papers in support of, and in opposition to, the motions to re-open the record with those of Respondent naturally arrayed against those of General Counsel and the union. After a variety of procedural steps, I granted both motions.

Subsequent to my re-opening the hearing, General Counsel issued a new unfair labor practice complaint in which, as finally amended, Respondent was accused of (1) unlawful initation and

---

4. I also dismissed the unfair practice allegation, and so much of the union's election objection which went to the issue of unlawful surveillance. (See note 27, infra.)

5. Even though General Counsel sought to re-open the record to take evidence relating to the Esparza termination, he initially decided to defer decision on whether to re-instate the previously dismissed charge of initiation and support of the decertification effort. See Letter, dated September 6, 1984. Later, General Counsel re-instated the charge and issued a complaint containing an allegation of unlawful initiation and support of the decertification effort.

support of the decertification effort; (2) harassing Matias Guerrero in a variety of ways because of his union activities and his resort to Board processes, and (3) discrirainatorily discharging Guerrero' s cousin, Felipe Soto, on account of Soto's union activities. General Counsel next moved to consolidate hearing on the new complaint with hearing on the re-opened matters. I granted the motion to consolidate.

The second phase of the hearing, which took place November 27-30 and December 4-7, and 11-12, 1984, was devoted to taking the newly discovered evidence concerning (1) the company's initiation and support of the decertification campaign and (2) the company's intention "to get" Onesimo Esparza; and to taking evidence concerning the allegations of the newly issued complaint of (1) the harassment of, and threats against, Matias Guerrero and (2) the discriminatory discharge of his cousin, Felipe Soto.

II.

THE PEAK ISSUE

(An Election Objection)

On June 10, 1983, petitioners Matias Guerrero and Manuel Martinez filed a decertification petition with the Board's Delano office seeking an election in order to determine whether Respondent's employees wished to continue to be represented by the United Farm Workers. Upon receipt of the petition, Board personnel conducted an investigation to determine whether the petition was timely filed. On June 16, 1983, Regional Director Luis Lopez apprised petitioners that:

> [The] investigation disclosed the absence of sufficient evidence to conclude that a bona fide question of

> representation exists. The decertification petition has been filed at a time when the number of agricultural employees is less than 50 percent of the employer's peak agricultural employment.
>
> Letter Dismissing Petition, 83-RD-1-D, ALJ 1.

Petitioners timely requested review of the Regional Director's decision and on July 25, 1983, the Board ordered an election, reserving the peak question for post-election objection procedures.

Like most "peak" cases, this one turns upon which figures one chooses to compare in order to determine whether the number of employees employed during the payroll period immediately preceding the filing of the petition was at least 50 percent of Respondent's peak agricultural employment. Since there is no dispute about the number of employees employed during the pre-petition payroll period, and no dispute about the number of employees employed during the various periods which the parties contend ought to be considered Respondent's period of peak agricultural employment, my task is to determine whether, as the Union contends, the 1933 crop year was so anomalous (because its employment levels were so low) that the peak employment figures for other years ought to be used as a basis of comparison; or whether, as Respondent contends, 1983 peak figures ought to be used, in which case there is no disputing that the decertification petition was timely filed.[6/]

---

6. At the hearing, I ruled that I considered the question before me to be whether the petition was timely filed, not whether the Regional Director reasonably concluded that it was not. I will briefly summarize the grounds for my ruling. Although the Board has resorted to a "reasonableness" standard in reviewing a Regional Director's decision to go forward with an election, see e.g., Bonita Farms (1978) 4 ALRB No. 96; Wine World, Inc. d/b/a Beringer

(Footnote continued——)

A.

The Facts

Respondent generally has two periods of relatively high employment, one, during the pruning in January and February, and the other, during the harvest in October and November.[7/] As the petition in this case was filed June 10, 1983, only the pruning season had passed; harvest had. not yet occurred.[8/] During the payroll period preceding the filing of the petition, Respondent employed 26 employees. (Petition for Decertification, p. 1; Employer's Response to Petition for Decertification p. 3, ALJ 1). The highest number of employees employed during the 1983 pruning season was 40 (R 6). Accordingly, if pruning represented the peak for the 1983 calendar year, the petition would have been timely filed.

(Footnote 6 continued ———)

Vineyards (1979) 5 ALRB No. 41), it seemed to me inappropriate to use such a standard when the Regional Director has determined that an election ought not to be held for if subsequent investigation reveals that the petition was timely filed, it would make no sense to invalidate an election which the employees had a statutory right to have.

7. The Board's discussions of "peak" questions have produced a variety of techniques for "counting" employees? sometimes an average number of employees is used; sometimes a "weighted" average (determined by discounting certain days as non-representative); sometimes a "straight body count" (determined by counting the number of employees appearing on the payroll). The "body count method" has been used by all parties in this proceeding.

8. Since peak employment at harvest turned out to be 45, ,it is also clear that the petition would have been timely filed if, treating this as a "prospective peak" case, the 1983 harvest were to be our reference point (since 26 is more than 50 percent of 45.) However, the union does not argue that harvest ought to be considered peak.

Even though the pre-petition employment level was over 50% of Respondent's employment level for its usual period of peak employment and more than 50 percent of Respondent's predicted peak period for 1983, the Board agent in charge of investigating the timeliness of the petition, concluded that it was inappropriate to use the 1983 season to measure Respondent's peak employment, because Respondent used fewer employees to prune in 1983 than it used in 3 of the 4 previous years.[9/] As one can see from the figures presented below, since 1981 Respondent's peak pruning needs have fluctuated widely: in 1981, it used 42 employees; in 1982, it used 64 employees; in 1983, it used 40 employees. The explanation for this pattern is that since 1981 Respondent has alternated a year of

---

9. After the hearing, the parties stipulated to the peak employment figures for each of Respondent's labor intensive operations for the years 1979-83 (except for the number of employees employed in the 1979 harvest for which no figures were given), ALJ 2:

Year	Greatest Number of Pruning Employees	Greatest Number of Harvest Employees
1979	70	-
1980	79	58
1981	42	55
1982	64	48*
1983	40	45

*This number is variously given as 47 (see ALJ 2, Schedule H) or 48 (see ALJ 2, Schedule I). The number 47 reflects "the total number of employees on employer's payroll [On October 14, 1982] of the 1982 harvest." The number 48 reflects "the total number of employees on employer's payroll during the payroll period [ending October 14, 1982]. Thus, there was at least some interchange of employees during the week ending October 14, 1982.

light pruning (or topping) with a year of more intensive pruning.[10/]

B.

Analysis

Labor Code section 1156.4 provides:

> Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.
>
> In this connection, the peak agricultural employment for the prior season shall not alone be *a* basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data.

Focusing on the language in the second paragraph quoted above, which permits (but does not require) the Board to rely on "peak agricultural employment for the prior season" in determining whether a petition has been timely filed, the Union argues that "Respondent's normal peak period (pruning) for 1983 was unusually low and non-representative of prior years, or what was anticipated for the forthcoming years", Post-Hearing Brief, p. 23, and, should therefore, be disregarded in determining the "real" size of

---

10. There is no evidence that the light pruning done in 1981 or 1983 was done for other than legitimate business reasons; indeed, although the union initially contended that the lower number of employees in the pruning in 1983 was "planned" in order to facilitate a decertification election, Memorandum of Points and Authorities to Accompany the Union's Objections to the Decertification Election, pp. 5-6, ALJ 1, no evidence was presented to support such a conclusion at the initial phase of the hearing and no evidence was presented to warrant re-opening the hearing on this point.

Respondent's work force.[11] To take the last point first -- that the "peak payroll" for 1983 was unrepresentative of the number of employees who would perform similar tasks in "forthcoming years" — there is simply no evidence in support of it. Not only does the argument ignore Lamar Hart's testimony that Respondent would do very little pruning in 1984, once again for economic reasons (VIII:94)[12]; but also the Union never presented any evidence (based upon generalized crop and acreage statistics) to indicate that Respondent's future pruning peaks would be higher than they were in 1983. The argument must fail for lack of proof. Since all that remains of the Union's claim is that 1983 was not "representative" of the highest peak of past years, I must next determine whether the statute requires the petition to be considered untimely merely because it was filed at a time when the work force was not at 50 percent of the previous year's peak employment.

On this point, Respondent argues that because the statute deems an election timely so long as the employer's payroll "reflects

---

11. The statute's peak requirement is designed to insure that "the electorate is representative of the bargaining unit which may be ultimately certified". Charles Malovich (1979) 5 ALRB Mo. 33, p. 5.

12. Sahagun testified that he asked Hart whether Respondent was going "to employ more workers for the pruning in '84 than he did in '82" and Hart responded that he was not going to employ more than 62 for that period. (VI:78-79.) When pressed by Respondent's Counsel, Sahagan said he understood Hart would hire "62 or less" Ibid., lines 4-6. Sahagun's other testimony indicates he understood Hart was not predicting 62 as the level of peak employment. Sahagun had been advised by other company officials that Respondent intended to remove 40 more acres of prune trees and that it was considering removing 50 additional acres of prune trees the next season. (VI:79.) In fact, by the end of 1983, 80 acres and 6,000 trees had been removed. (VIII:34.)

50 percent of the peak agricultural employment . . . for the current calendar year", a whole year cannot be considered unrepresentative. Read literally, the language of the statute supports Respondent's argument, as do various Board decisions which interpret it. For example, the Board recently described the task of the Regional Director in making peak determinations as one that required him to "determine if the employer is at least at 50% of its peak employment for that year." (Tepusquet Vineyards (1984) 10 ALRB Mo. 29, p. 7; see also Charles Malovich 5 ALRB No. 33, p. 2.) And in Wine World Inc, dba Beringer Vineyards, 5 ALRB No. 41, where the Union made the same argument it presently makes the Board rejected it:

> The UFW urges us to reject this peak figure, arguing that changes in the Employer's operation caused the 1975 employment figures to be "unique" and "unrepresentative" of the Employer's usual employment figures. We reject this argument. Although we may review data for years other than the current calendar year, Labor Code Section 1156.4 states that an election petition is timely filed only if "the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition." (5 ALRB No. 41, p. 8.) (Emphasis in the original.) 13/

I recommend this objection be, and hereby is, dismissed.

---

13. The union concedes that its "unrepresentative" year theory is novel, but nevertheless argues that it is only a "logical extension" of the Board's "unrepresentative" day theory originally propounded in Ranch No. 1 (1976) 2 ALRB No. 37. However, "logical" an extension it may be, the Board has determined the statute stops short of permitting it.

III.

THE TREATMENT OF ONES IMP ESPAP.ZA

(An election objection and an unfair labor practice)

A.

From the Discharge to the Grievance Meeting

Onesimo Esparza, a prominent member of the union's ranch committee, was discharged on June 29, 1983. There is no real dispute concerning the incident preceding his discharge. Esparza and another employee, Consuelo Torres, were working in adjacent fields. Esparza was driving a tractor; Torres was picking up broken branches, a job which had been done in the past by Torres and two other workers, Maria Balderas and Cleo Gomez. (I:18-19.) This year, because there were very few branches to be cleared (I:31-33, 41, 43), Torres was working by herself. Esparza was approximately 30-40 feet from Torres (I:33, II:87-39) when, observing Torres looking "agitated" or "tired" (II:100), he approached her and essentially advise her "to go slow" (II:89-90) or to "take it easy so that the company would send her some helpers." (II:100, 102. [Testimony of Esparza]) When her forelady, Elena Vasquez, brought her water, Torres told her what Esparza said (II:37) because she felt "bad" having been "told what to do" by another worker. (II:37.) Torres also told Emilio Vasquez, another supervisor (and the husband of Elena Vasquez) what Esparza said. She did not slow down. (II:38.)[14/]

---

14. According to Esparza, when he told Torres to go slow, she replied,-"You know how the bosses are." 1:90. He also

(Footnote continued---)

Emilio Vasquez told Lamar Hart, Respondent's General Manager, what Esparza said. (I:79-80.)[15/] Hart told Arland Knutson to investigate whether Esparza said what Vasquez reported he said-(I:81.) According to Knutson, whom I credit,[16/] Hart also told him to suspend Esparza pending discharge. (I:122-123, 130.) Knutson went out, asked Esparza if he said what was reported, and when Esparza confirmed that he had, Knutson suspended him pending discharge. (I:124.) Hart testified he went out to the field later that day to ask Consuelo if she needed help or if she was working too hard. She said no. (I:106.)

Juan Cervantes, the union's contract administrator, was notified of Esparza's suspension that afternoon by Cleo Gomez. (II:136.) When he called Hart to set up a grievance meeting, Hart

---

(Footnote 14 continued——)

testified that after he spoke to Torres, Elena Vasquez immediately rushed over to talk to her. (I:91.) These additional details reflect the thrust of General Counsel's case that Respondent was out to get Esparza since what he said was unobjectionable to (because accepted sympathetically by) Torres. Obviously, Esparza's sense of the conversation does not correspond to that of Torres who testified that it was she who told Vasquez about Esparza's comment because she was offended by it. At first blush, it seems highly unlikely to me that Respondent was so committed to getting a worker that its supervisors shadowed in and, whenever he talked to another worker, rushed to find out what he said. Although General Counsel and the union were at great pains to prove that exactly such a pattern of harassment was evidenced in this case, my review of the record as a whole does not support the claim and I discount that part of Esparza's testimony which supports it.

15. Hart testified Vasquez told him Esparza told "Consuelo Torres to slow down and the Company would have to hira more workers." (I:80.)

16. Knutson was simply one of those witnesses who impresses a trier of fact as credible; indeed, of the entire cast in this case, Knutson was far and away the most credible witness.

told him he was willing to meet immediately, taut Cervantes couldn't meet until the following day. (V:43, 100.) Cervantes and Hart discussed who would be present at the grievance. Cervantes testified he only asked to have the supervisors there. He also testified that when Hart asked him if he wanted Torres present, he said no. Hart, however, testified he asked Cervantes who he (Cervantes) wanted, and when Cervantes began to name people, Hart said, "Do you mean everybody involved" and Cervantes said, "Yes." (VIII:74.) Upon agreeing to meet the next day, Hart asked Emilio Vasquez to notify "the people involved." (VIII:74.)

After work the next day, Cervantes met Gomez and Esparza across the street from the building which housed Hart's office-From this vantage point they observed Emilio and Elena Vasquez, Consuelo Torres and her husband and two sons (Armando and Luis,) and Manuel Martinez and Matias Guerrero, the decertification petitioners, gathering outside the office.[17/](V:102. See also, V:46-47.) Cervantes asked Gomez if she wanbed to go in and Gomez said she did, although she testified she was frightened because Vasquez was staring at her challengingly and she knew the Torres brothers to be violent (V:49.)[18/] Cervantes told Gomez and Esparza that he would do all the talking and, if he walked out, to follow him. [V:103, VIII:74; see- also V:70 (Gomez).]

---

17. I make nothing of this gathering since, as will be discussed, it is clear Respondent was not responsible for the presence of Guerraro, Martinez and the other members of the Torres family and, so far as appears from the record, people going to the same place were simply assembling after work.

18. According to Gomez, Luis Torres threatened to beat her and her husband (V:48-49), and Armando Torres once drove her off the road. (V:49.)

B.

The Grievance Hearing

1.

Introduction

Sorting out what happened at the grievance hearing is difficult because the accounts of the various witnesses are at odds about who said what and in what order. It is quite clear, however, that the encounter was brief, heated and unproductive. It is agreed by all that Cervantes, Gomez and Esparza came to the meeting late VIII:74 (Hart); V:70 (Gomez),] so that by the time they entered the larger office which surrounded Hart's inner office,[19/] the "anti-union faction" (the Torres family and Martinez and Guerrero) were already there. V:50. Although union accounts of what happened after Cervantes reached Hart's office differ greatly as to specific detail, the thrust of the story told by Cervantes and Gomez is that Hart, by planning [20/] the disruption of the grievance hearing, was responsible for an atmosphere of hostility against the union which would have carried over into the voting booth and made a free and fair election impossible. To this end, Cervantes and Gomez essentially testified that when they entered the large office which led to Hart's inner office they had to run a gauntlet of anti-union employees in order to reach the inner office where, once inside,

---

19. Hart's office is one of several situated inside a larger office; to get to it one has to walk past a counter through a common area. See VIII:32-33.

20. Gomez and Cervantes admit they suspected Hart of planning to "sabotage" the meeting from the moment they saw the decertification faction gathering outside the company offices. (V:63; 7:103.)

they were trapped by the hostile faction behind them, insulted and attacked when they protested their presence, and again threatened and attacked as they made their way out of the office upon being ordered to leave by Hart.

General Counsel uses this episode for a different purpose. He argues that so far as the episode shows that Hart was willing to "flout" the contract's grievance procedure, it also shows that he could not have been genuinely concerned that Esparza violated the contract when he urged Torres to slow down; and, the argument continues, it must follow that Hart merely used the Torres incident as a pretext to justify Esparza's termination. Although General Counsel never clearly articulates in what sense Hart "flouted" the grievance procedure, as I shall discuss, there are some general principles under which to consider the propriety of Hart's "conduct" of the grievance meeting.

2.

Facts

On direct examination, Gomez testified that when the union trio entered Hart's office they were immediately followed inside by Guerraro and Emilio Vasquez. The first thing Cervantes said was that he did not want to have the meeting with "all the people" present; he only wanted the supervisors who were involved. When Hart replied, "They're your people," Cervantes told him he didn't have time for a circus, the dispute was between Onesimo and the supervisors. V:50, Hart then replied, "If you don't want to have the meeting, just get the hell out of my office." V:51. In Gomez[1] telling, after this initial exchange, events tumbled one after

another: Smilio Vasquez started to talk; Elena Vasquez pushed Consuelo Torres forward to speak; Matias Guerrero, claiming he had a right to be there, shoved Cervantes; Cervantes served a grievance on Hart and, as the union people started to leave, Gomez was pushed and Armando Torres grabbed at his belt, only to be restrained by his brother who shouted, "No, No."[21/] V:52. As they left the room they were jeered for "only caring about their own people" and told they needed an "ass-kicking." V:53-55.

Cervantes' story on direct examination added many details not related by Gomez, but emphasized roughly the same points. The anti-union faction, already present in the waiting area outside Hart's office, followed him, Gomez and Esparza into Hart's office, effectively bottling them up.. V:104. When Cervantes asked what the other people were doing there, Hart replied they were there for the grievance. When Cervantes objected that the grievance only involved the company and Esparza, Hart told him he was "tired of seeing the same old people and it was about time the workers saw what was going on." At this point, Guerrero interjected that he had a right to be there because it was his own time and pushed Cervantes, who told him, "Back off, clown." V:104-105. Emilio Vasquez beckoned toward Cervantes, as though challenging him to fight, saying: "You wanted me; here I am." Cervantes called Vasquez a "flunky", said he was in enough trouble because of the way he treated the workers and told him the union would deal with him later. Cervantes then told Hart

---

21. The significance of this testimony will become clear in connection with Cervantes' testimony that Arnando Torres was reaching for a knife.

he didn't have time for a circus. Elena Vasquez, pushing Consuelo Torres into the office, told Cervantes: "You only listen to your own people." Cervantes told Torres that if she had problems with another worker, she was to come to him, not go to the company-V:105-107.

Finally, Hart told Cervantes that if he didn't want to discuss the grievance, he should "get the hell out of his office." When Cervantes replied he would not discuss the grievance with "these people" here, Hart said "They had a right to be there," and repeated, "If you don't want to talk . . . then get out." V:107. Before leaving, Cervantes accused Hart of setting the whole thing up. As the union people went out through the waiting area, Cervantes saw Luis Torres and Emilio Vasquez, who by then was outside Hart's office, restraining Armando Torres from brandishing the buck knife he held closed in his hand. V:107. Luis Torres told the retreating group they needed a good ass-kicking. V:109.

Although Cervantes' and Gomez' versions differ as to details, the sense of both of them is the same: business could not be done with "the others" present and the union people were chased from the office. Gomez' version, however, is much more abbreviated than that of Cervantes as she pretty much loses track of the order of events after the initial exchange between Cervantes and Hart. She also failed to relate the most telling anti-union comment made by Hart in Cervantes' version (that Hart was "sick and tired of seeing the same old people, etc.") and, of equal interest in terms of what she left out, she related only what was said or done to the union faction, ignoring any provocative statements by Cervantes.

Her testimony also changed to some degree on cross-examination: she now conceded, as Respondent's witnesses would later testify, that the first thing Cervantes said upon entering Hart's office was that he didn't have time for a circus. Unlike Respondent's witnesses, however, she insisted he said this in a normal tone of voice. V:73.[22/] she still gave a highly compressed version of events and had to be reminded that Cervantes called Vasquez a "stooge" or a "flunky." V:77-78. Except as to minor details, Cervantes' version remained fairly consistent on cross-examination.

Vasquez[1] and Hart's versions are even briefer than that of Gomez and, as I have noted, very different in tone. Both testified that Cervantes' statement that he had no time for a circus was the first thing he said (VIII:22; VIII:74, 99), and that he said it loudly (VIII:74, VIII:29). Vasquez testified he then asked Cervantes "What about me, don't you want to talk to me" and Cervantes called him a "flunky" [VIII:22, see also VIII:103 (Hart)] after which Vasquez left the room. Hart testified he asked Cervantes to sit down and continue the grievance and Cervantes told him he wouldn't meet with everyone present, VIII:75-76, after which the entire meeting was disrupted by people talking and shouting, Cervantes above all. Before Hart told Cervantes there was no point in continuing, Hart admitted that Guerrero entered the office, but he did not see him push Cervantes; nor did he observe Vasquez trying to pick a fight with him, V:76. He testified he did not ask the

---

22. Gomez had earlier testified that Cervantes' voice was elevated during the encounter, but only to the degree necessary to rnaka himself heard over others or in the manner of people discussing serious matters. IV:63.

anti-union people "to leave" because it seemed to him Cervantes was not in a frame of mind conducive to a productive meeting since he was yelling from the moment he entered; besides, he thought the others had a right to be there, VIII:96-98,[23/] Hart didn't recall people clapping and cherring as the union people left. VIII:96. None of the company witnesses saw Armando Torres wield a knife (V:16, VIII:36), and Consuelo Torres even testified that her son never carries one, VIII:3. Martinez and Vasquez also testified that, although Guerrero entered Hart's office, the other anti-union people were some distance away from the door in the common area.

It is undisputed that Cervantes subsequently refused to meet with Hart to discuss the grievance even though Hart and Cervantes agreed the following day to meet at a "neutral" place (V:109) because, as Cervantes later wrote to Hart,

> We the Union and the Ranch Committee went to meet in good faith with your Company.
>
> After the violent attack, something that I hope nobody else will ever have to experience, we believe that nothing can be accomplished by meeting with you, as long as you permit or condone this type of activity at our meetings.
>
> We feel that the grievance procedure at Mayfair Packing Co. is futile and that nothing can be accomplished by this.
>
> (ss. Juan Cervantes, UFW 1.)

---

23. Manuel Martinez testified he and Guerrero were present because Consuelo Torres asked him to go with her (V:15). There is no evidence that it was Respondent who invited the other Torreses or the decertification petitioners and it was quite obvious throughout the hearing that the problems between the pro-union and the anti-union employees had become highly personalized with families the nucleus of the factions. In such an atmosphere, it is understandable that the problems of one would be treated as the problems of all.

3.

The Grievance Episode Considered as an Election Objection

In considering what happened at the meeting, certain aspects of Goraez' testimony immediately draw attention. I find her omission of details about Cervantes' provocative behavior to reflect a lack of candor, as does her nice insistence that, if Cervantes raised his voice, it was only to match the gravity of the situation when it was obvious at the hearing that Cervantes got carried away merely testifying about what happened in the office. Because these considerations point to a desire "to soften" Cervantes' approach, I take as true her admission that Cervantes' first statement upon entering the office was to tell Hart that he didn't have time for a circus. It follows that I credit Hart's and Vasquez' testimony to the same effect.

I also credit their testimony that Cervantes was loud and aggressive when he said it. Their account not only fits what I saw of Cervantes, but also the circumstances: since Cervantes and Torres both thought the meeting was a "set-up", in telling his people not to say anything and to follow his lead if he left, Cervantes appeared to be looking towards a confrontation. His denouncing the meeting as a "circus," therefore, seems more likely than not to have been said with a degree of fervor. It also seems reasonable to conclude that Cervantes coupled his circus comment with some kind of inclusive demand for "these people" to leave because every version has various people making statements that only make sense as responses to just such a comment.

Thus, in one version or another, Hart says the people have

a right to be there;[24/] Guerrero says he has a right to be there;[25/] Consuelo Torres' right to be there is defended (and, in turn/ challenged by Cervantes); and depending upon which version is credited, Vasquez either inquired whether Cervantes meant to challenge his presence, or himself challenged Cervantes to a fight.

In Vasquez' telling, he said, "What about me, don't you want to talk to me"; in Cervantes' telling, Vasquez said, "You wanted me, here I am." So far as the actual language is concerned, either version makes sense in response to Cervantes' telling people to leave; but Cervantes also testified Vasquez made his remarks in a threatening manner. *I* do not credit Cervantes. It is undisputed that Cervantes replied to Vasquez by calling him names and telling him he was in hot water and would be dealt with later. Since General Counsel's and the Union's case at several points has depended upon Vasquez' being threatening (indeed, dangerous), it seems out of keeping with the very character they have sought to portray for Vasquez to initiate a fight with Cervantes, and then to retire from the office after being insulted and threatened by him.[26/]

---

24. Although Hart denied saying this, as discussed below, I find that he did say it and I shall later consider the implications of this statement.

25. I also find, as Hart, Cervantes and Gomez testified, that Guerrero entered Hart's office; however, contrary to the thrust of Cervantes' testimony I find that he entered in response to Cervantes' statement.

26. Since even Gomez put Vasquez outside Hart's office (where he supposedly restrained Arrnando Torres), Vasquez' own testimony that he left the office is corroborated --and I conclude that he did.

I also do not credit Cervantes' testimony that Hart said he was "sick and tired of seeing the same old people" and "it was about time [the people] got a chance to see what was going on". For one thing, Gomez failed to corroborate that Hart made such a comment-It seems more likely to me that, as Gomez testified, Hart said something like "they have a right to be here" or "there're your people", since, as he later testified, he believed the anti-union faction did have a right to be there.

Whatever Cervantes may have meant when he challenged the right of "those people" to be present, his remarks to Vasquez, who was one of the supervisors involved, and to Consuelo Torres, who was the only percipient witness to the event, leads me to conclude that he made no distinction between the presence of the anti-union "people" at the grievance itself and their presence in the outer office and it was his entering the office in high dudgeon, essentially commanding "everyone" to leave, which set loose the confusion that characterizes the meeting.

It remains to address the credibility of Gomez' and Cervantes' account that Guerrero pushed Cervantes and Armando Torres pulled a knife. In order to properly evaluate this testimony, however, I must place it in a slightly larger perspective. The theme of violence against union sympathizers has been a mainstay of this hearing: it has already appeared in connection with the events in Hart's office; it will re-appear in connection with the allegations of retaliation against Matias Guerrero; and it was present in an alleged unfair labor practice which *I* dismissed at the

initial phase of the hearing for being both inherently incredible[27/] and plausibly denied.

Obviously, I have already found much of the union testimony about the events in Hart's office exaggerated and misleading/ calculated to put responsibility on Hart for what I regard as a performance by Cervantes. My sense that Cervantes' sought to create a confrontation, coupled with my general awareness of violence as a sought-for theme in the union's assault on the validity of the decertification election, causes me to discount the Cervantes and Gomez versions of the shoving and knife incident. Accordingly, so far as the Union's election objection turns on Respondent's creating "an atmosphere of violence" which made a free and fair election impossible, I recommend that the objection be, arid hereby is, dismissed.

4.

The Grievance Incident as Evidence of an Unfair Labor Practice

When Onesimo Esparza filed his grievance, he had a statutory right to have a union representative present to assist him

---

27. The unfair labor practice concerned the allegation that Emilio Vasquez "stopped, threatened and assaulted" Antonio Acevedo because of his union activities. The evidence revealed that Emilio Vasquez followed a car which he thought behaved suspiciously when it passed the site of his house which had just been gutted by arson. Although the car turned out to be that of employee Antonio Acevedo, Vasquez credibly testified he would have followed anybody under the circumstances. Acevedo testified that after Vasquez demanded an explanation from him as to why he was in the neighborhood, Vasquez "accused" him of signing a petition requesting Respondent to sign a contract with the union. The petition Acevedo signed and Vasquez purportedly referred to had absolutely nothing to do with Vasquez and to link it with such a personal attack as arson on one's home seemed about as likely to me as a partner in a quarrel over purely domestic matters suddenly attacking the other's politics.

and it would have been a violation of the Act not to permit him to have one. See Thiokol Coroporation (1981) 257 NLRB 830.[28/] And since the union was certified as the exclusive representative of Respondent's employees at the time of the grievance, it follows that it might have been an unfair labor practice for Respondent to have either invited the decertification petitioners to participate in[29/] or to have permitted them to participate in the grievance meeting. But these principles in no way render the mere presence of the anti-union faction in the waiting area outside Hart's office unlawful.[30/] The union had no "right" to compel Consuelo Torres to come alone to the meeting: nothing in its status as exclusive representative infringes on her associational rights except to the extent that it forbids Respondent from recognizing or treating with

---

28. Labor Code section 1156 specifically provides:

> Representatives designed or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. Any individual agricultural employee or a group of agricultural employees shall have the right at any time to present grievances to their agricultural employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect, if the bargaining representative has been given opportunity to be present at such adjustment.

29. Inasmuch as I have found that it was Torres who askad her family and the decertification petitioners to come with her, no further inquiry will be made on this score.

30. Although Cervantes originally took the position that Torres had no right to be at the grievance meeting, he was forced to concede the company had a right to have her present as a witness.

any group of employees other than through their Board certified representative.[31/] certainly, Hart's failure to take command of the situation does him no credit, but if he is guilty of nothing more than playing a subordinate role to Cervantes, he is not guilty of anything for which the ALRA would hold Mayfair responsible. Since the evidence shows that the anti-union faction was not in Hart's office, but in the waiting area outside it, and that Guerrero only entered Hart's office after Cervantes (unfairly) challenged his right even to be in the waiting room, I cannot conclude that Hart "flouted" the grievance procedure.

C.

The Tractor Incident

1.

The initial hearing

It remains to consider whether Esparza's discharge was in itself an unfair labor practice. In this connection I shall discuss Guerrero's allegations in the re-opened hearing that Respondent had previously sought "to get" Esparza as evidenced (1) by his earlier suspension for damaging a tractor and (2) by the company's inflating the amount of damage in order to justify his suspension when it was

---

31. That Hart could have used his right to control access to the company's offices to prevent anyone but Consuelo Torres from entering, and that he chose not to do so, cannot be considered evidence of unlawful motive in view of the fact that no plausible argument could be made against the presence of the anti-union employees if the facts simply showed that MartInez, Guerrero and the Torres family sat quietly in the waiting area while the ranch committee met with Hart. Because of this I engage in no "reasonable-perception of agency" inquiry in this case: if the anti-union people could lawfully have been in the company's office, no finding of any kind can be basad upon their mere presence.

at issue in the initial phase of the hearing. These contentions were not original to the re-opened hearing; in the initial phase, General Counsel and the union sought to prove that both were true; but, lacking Guerrero's testimony, they failed to offer any persuasive evidence for either.

At the initial phase of the hearing, it was established that sometime in April 1983, Onesimo Esparza hit a tree while turning his tractor in a walnut orchard. Lamar Hart testified he heard about the incident from George Crowder, who also told him he thought Esparza had been driving too fast and had lost control of his tractor. I:68. Hart went to the field, observed the damage and suspended Esparza. I:70. At no time was Esparza threatened with discharge as a result of the incident. Subsequent to the suspension, there was a grievance hearing at which Esparza contended, as he did at the hearing, that his foot merely slipped from the clutch. I:63. In view of the dispute over whether Esparza was negligent, the company, which felt strongly about not excusing Esparza because of the amount of damage it claimed he did, kept the suspension in force, but counted his time off against his vacation so that Esparza lost time but not pay. I:72. The Union made no issue of the amount of damages at the grievance hearing and Cervantes even wrote to Hart to express his appreciation at the resolution of the matter. (Resp. 9.)

At the initial phase of the hearing, Hart testified the amount of damage done to the tractor was about $1,500. I:72, VIII:80. Arland Knutson testified the whole front end of the tractor had been pushed in, obviously damaging the radiator and the

fuel tank. VIII:39-40. Esparza himself never testified about the extent of the damage even though General Counsel and Charging Party contended that he had been discriminatorily disciplined for it.

2.

The re-opened hearing

At the re-opened hearing, Guerrero testified that when he was informed by George Crowder that Esparza had wrecked a tractor, he took a new tractor out to the field where he met Hart, who asked him how much it would cost to fix the tractor. When Guerrero said he didn't know, Hart asked whether it would be about $1500. When Guerrero said, "Maybe," Hart replied, "Good maybe we can fire that son-of-a bitch." Guerrero further testified that it only cost about $400 to repair the tractor and that a week before the initial phase of the hearing, Hart asked him to help prepare a summary of parts used in the repair of the tractor which was far more extensive than those which Guerrero, who did the repair work, actually used-According to Guerrero, of all the parts listed on R I (which is the summary), only a fan, a hood extension, a belt, a right side grill, and a fuel tank were used to repair the tractor; and of these the grill and the fuel tank were used pieces he had around the shop-I':87-88. Indeed, Guerrero testified that some of the parts listed on the summary would not even fit the particular kind of tractor Esparza damaged. Although some of the parts listed in R I were in fact ordered on invoices keyed to repair of the damaged tractor, they were ordered as general inventory and never intended to be used to repair Esparza's tractor. According to Guerrero, they are still in the shop. I': 87 .

a.

The Credibility of Guerrero's Testimony

Because Guerrero's testimony at the re-opened hearing provides strong evidence from which to infer a discriminatory motive back of Esparza's discharge, the first step in determining the validity of General Counsel's 1153(c) allegation must be to examine the credibility of that testimony.

The first thing that strikes me about the testimony is that such a strong statement of animus was followed by such a weak form of discipline: despite Hart's purported statement, Esparza was not fired because of the tractor incident. Judging from the lack of congruence between Hart's intentions, as reflected in Guerrero's report of them, and his actions, as reflected in Esparza's discipline, the purported statement is either an exaggeration of those intentions or it doesn't represent them at all.[32/] The first possibility weakens the force of the evidence because it tends to show that, however strong Hart's hostility toward Esparza may have been, he didn't act in accordance with it (which is what the 'but for' test ultimately aims to determine); the second possibility points to the possible falsity of Guerrero's account.

The second thing that strikes me as curious is that, even taking Guerrero's account about Respondent's inflating damages as

---

32. One other possibility, that Hart meant to fire Esparza when he spoke, but later cooled down, is practically indistinguishable from the first one — since under this possibility Hart's anger distorted his intentions. Although Cervantes testified that Hart once spoke of never being able to forget the tractor incident, I discount this testimony as totally at odds with the record as a. whole, including the obviously amicable settlement.

true for the moment, the tractor still sustained $400 of damages (exclusive of the value of repair time). As an abstract matter, I cannot say this is an expense, an employer must overlook and, on this record, I certainly can't conclude that, in order to treat Esparza. equally, Respondent had to overlook it. In sum, neither Guerrero's testimony about Hart's statement, nor his testimony about inflating damages tends to show that the company's reaction to the tractor incident was discriminatory.

The third thing that strikes rae as curious follows from the preceding two observations. Since the evidence fails to show the company's reaction to the accident to be any different from a normal disciplinary action, the evidence appears probative only on the issue of the later firing. Of course, it is possible that Hart's animus skipped over the occasion of its first expression, but when such dramatic revelations are so unconvincing with respect to the incident with which they are supposedly associated, and yet *so* perfectly explain a later incident, the more likely explanation for this curious circumstance is that they were designed to explain the later incident.

This conclusion is reinforced from another direction. I have already noted that the Union appeared perfectly satisfied with the disposition of the tractor grievance when it was on notice of the company's claim that the tractor had suffered $1,500 damages. (GC 3.) The union's contemporaneous failure to protest the amount of damage would appear to indicate that it had no reason to believe the claimed amount was incorrect, and when the issue was raised at the initial phase of the hearing, no reasonable grounds for

believing the damages were inflated appeared in my mind either; and yet this apparently unsuspected and, when suspected, unproven, means of foul play turned out to be true. In view of the fact that no evidence was ever adduced to provide any reasonable grounds to suspect the existence of a discriminatory scheme, and that such evidence as Guerrero finally provided only indicates that the company had no need to resort to it, I can only conclude that Guerrero's testimony is false. [33/]

D.

Esparza's Discharge as an Unfair Labor Practice

Since I have discounted the evidence relating to the company's prior discipline of Esparza and the conduct of the grievance meeting, little but the circumstances of the firing itself is left from which to draw a conclusion about Respondent's

---

33. This is not necessarily to say that I believe that every part of Guerrero's testimony is false: thus, I believe he was asked to put together a list of parts and I don't doubt that he put one together for $2,500 and I don't doubt that Hart said this is too much and I don't doubt that he trimmed it down and I don't doubt that his list included some parts that don't belong to the tractor model under repair, but none of this alters my overall conclusion that the thrust of his story -- that Hart asked him to come up with an inflated claim right after the accident -- is false.

Before leaving this issue, I should also point out those points where Guerrero's testimony is contradicted by more credible evidence. One of these has been implicitly identified already, namely the company's account of its motives in disciplining Esparza, but others are worth detailing as well. Guerrero was not alone in testifying to the amount of damages? Arland Knutson, who, as I have noted, was the most credible witness at the hearing, testified that the tractor was more extensively damaged than Guerrero testified, as did Manuel Martinez. Secondly, Guerrero testified that he alone worked on the tractor, apparently to give him a monopoly on possession of any facts concerning its repair; yet the time cards support Martinez' testimony that he did most of the repair work on it. Compare Resp. G and H.

motive[34/] in this connection, General Counsel and the union argue that the swiftness and severity of Esparza's discharge compel the conclusion that Respondent was looking for an excuse to fire him. It is true, as Knutson testified and I so find, that Hart made the decision to suspend Esparza pending discharge before he had confirmed Vasquez' account of what Esparza supposedly said; by the same token, however, it is also true that Esparza was only suspended pending discharge and only after Knutson had, in fact, determined that Espaza said what he was reported to have said. Hart's alacrity to discharge, then, does not appear to be of major significance.

More persuasive on the question of motive is the fact that (1) Esparza was not given the luxury of a warning, but immediately disciplined even though the company handbook provides an employee be warned before being discharged for "[restricting] production of output and services" (See GCX 2, Part VB2.); (2) that Torres was the only employee urged to slow-down; (3) that she, in fact, did not; and, (4) that Respondent has not demonstrated it had any reason to believe slow-downs were a problem. As against these considerations, Respondent defends itself as acting reasonably because the

---

34. I should also note that the Union also argues that it was Respondent's twin desires "to hamper negotiations and to set the stage for decertification" (Post Hearing Brief, p. 20) which prompted Esparza's discharge. These points may be quickly disposed of by noting (1) there is no evidence from which to conclude that Esparza's discharge would, in fact, hamper negotiations (see e.g., Bruce Church (1981) *1* ALRB No. 20, p. 19); indeed, prior to Espaza's discharge the union had already filed bad faith bargaining charges against Respondent, and (2) on the date of Esparza's discharge, Respondent could not even be sure there would be a decertification election since the Regional Director had dismissed the decertification petition as untimely. These reasons appear entirely speculative.

collective bargaining agreement permits it to discipline (such discipline to include discharging) any worker who encourages a slow down or interruption of work. (R. 10(A) Art. 8, No Strikes-No Lockouts)

In Midwest Precision Castings Company (1979) 244 NLRB 597 the Board found no violation of the Act in an employer's disciplining a union steward for telling a single employee to slow down. Although a number of factors in that case do not appear in this one, such as the employer's suspicion that slowdowns were hampering production and, the employee's testimony that she, in fact, slowed down, the Board held, as a general principle, that it was not unlawful for an employer to treat a union steward's urging a slowdown as a more serious matter than it would treat similar comments made by a rank and file employee.

> Since it is clear that Picker [the union steward] urged support of and sought to induce employee participation in an unauthorized, illegal work slowdown in direct violation of a contractual no-strike, no-slowdown clause, Respondent did not violate Section S(a)(3) of the Act by disciplining Picker for such conduct or violate Section 8(a)(l) by singling out Picker for disparate treatment by holding her to a higher standard of conduct than other employees.
>
> 244 NLRB at 599, see also, Cone. opn. of Chairman Fanning, at p. 599. [35/]

Did Respondent fire Esparza for advocating the slowdown, which as Midwest Precision Castings Company instructs, it had a right to do, or did it fire him because of his union other

---

35. This decision is explicitly not affected by the Supreme Court's decision in Metropolitan Edison Co. v.N.L.R.B. (1983) _____U.S. ___; 112 LRPM 3265, 3267, which held that an employer may not impose greater discipline on union officials merely because they are union officials and not personally responsible for some unprotected activity.

activities? To my mind, Respondent did act severely in view of the nature of Esparza's offense and that certainly gives rise to a suspicion of unlawful motive, but such a suspicion does not constitute proof that Respondent violated the Act.[36/] I am simply not compelled by the preponderance of the evidence that the slowdown incident was a pretext.

I recommend that the allegation be, and hereby is, dismissed.

IV.

INITIATION AND SUPPORT OF THE DECERTIFICATION PETITION

(An Election Objection and Unfair Labor Practice)

A.

Introduction

According to Guerrero, Respondent bought itself a decertification election for he contends that had he not been bribed he would never have thought to decertify the union, and Manuel Hartinez was specifically brought to Mayfair to promote the decertification election. If this is true, an unfair labor practice is unquestionably made out since it is against the law for an employer to implant the idea of a decertification election in the minds of its employees. Moreover, if his further allegations, that Hart and Vasquez guided and assisted the decertification campaign in

36. "Speculation, conjecture and surmise ara not a substitute for [prima facie] evidence; there must be some basis in the record from which inference may be drawn .... Circumstances, demeanor, and inherent probabilities may play a role in any such determination, taut speculation or conjecture standing alone may not be used to satisfy the General Counsel's burden to establish a prima facie case." McCormick & Co. (1981) 254 NLRS 922, 923.

almost every critical way, be true, an unfair labor practice is also made out since an employer may not support a decertification campaign even if it does not initiate it. Indeed, Guerrero's allegations of wrongdoing are so extensive that, if even a part of them be true, the decertification election would have to be invalidated and Respondent would also have to be found to have bargained in bad faith.

B.

General Discussion of Credibility

General Counsel and the union argue that Guerrero is generally a credible witness because his story is internally consistent, consistent with the evidence provided by other witnesses and, finally, so consistent with the course of events portrayed in the initial phase of the hearing as to clarify the outstanding questions which remain from it. I will grant it has some of these hallmarks, but *I* would expect it to have them even if it is entirely false since the record of the previous proceeding provided a solid foundation upon which to build such a consistent account. The critical inquiry in this case cannot be whether Guerrero's testimony is consistent in the ways its proponents contend it is, but whether it makes sense to doubt it.[37/] Upon consideration of the entire record, I conclude that it does: in the first place, there are so many puzzling elements to the story that it is impossible to tell which parts, if any, are true; but more important, there is an

37. By this, I mean nothing less than whether it is at least as reasonable to doubt G-uerrero as to believe him for, in the former case, General Counsel and the union have not met their burden of persuasion.

overall fantastic quality to enough parts of Guerrero's testimony that, in the end, the whole of it is overwhelmed by them. To hear Guerrero tell it, to work for Mayfair was to enter an almost phantasmagoric world, not just of arbitrary firings but, worse, of employees being "set up" for arbitrary firings, of supervisors taking whole days off on private business who are themselves stealing from the company or condoning stealing by their subordinates, and of employees involved in the decertification effort extorting special treatment from the company in return for their silence.

These were some of the themes repeatedly expounded in his strident testimony which finally lost its power to persuade and succeeded only in indicting the imagination from which it proceeded, and which reached a peak of implausibility in his "revelation" that Armando Torres possessed a secret tape recording of Hart, Vasquez and Martinez discussing their roles in the decertification effort-I found the story of Armando Torres trying to play the secretly recorded confession full blast on his car stereo while Guerrero fled from hearing it (managing, however, to hear enough to know the tape was genuine) to be absolutely unbelievable, combining, as it did, so many motifs from his previous testimony as to appear little more than an assemblage of by-now familiar elements, such as the dramatic last minute confession (this time by Hart) which characterizes Guerrero's own testimony; the secretly made tape-recording; the "shouted-in-the-yard" confession similar to that which Martinez' supposedly uttered while shooting off a shotgun and, finally, the unwillingness to be involved which he displayed when Hart and

Vasquez initially talked to him of decertifying the union.

But if his testimony ended on its most unbelievable note/ from the beginning it often sank into incoherence as though he were groping for details to decorate it.[38/] There were times, too, when faced with apparent contradictions in his story, he came up with a new detail to conform his story to his original account.[39/] There were occasions when he completely denied having testified to something he had just said when, pressed by Respondent's counsel to justify his most recent testimony in light of previous testimony, it was clear his denial resulted from his having been forced to rethink the plausibility of his most recent account.[40/] There were occasions, too, when subsequent testimony {sometimes his own) provided more innocent and plausible explanations for what appeared

---

38. See, for example, his testimony about whether Hart promised him $50,000 in which after testifying no one gave him any definite promises, he plainly appears to imply that Hart himself promised him $50,000; then defends what he quickly admits was only an impression that he would receive $50,000 by arguing no one ever told him he wouldn't get it. I[1]: 26.

39. See, for example, his testimony about whether Jack Adams was "set up" for firing by the company or whether he quit, in which after asserting that Adams was fired he provides a quotation from Adams himself which reasonably indicates the latter might have quit, and then quickly relates a later conversation with Adams in which Adams says he was fired. III':25-27.

40. See, for example, his assertion that Martinez told him in April that he could get $10,000 from the company if he helped in "the decert." II':118. When Counsel for Respondent asked why he never asked anyone from, the company if he would get any money, Guerrero said, He was in "too deep at that point to get out. II':119. When Counsel pointed out that, according to his earlier testimony he had not committed himself to the decertification campaign until April, so that he couldn't have been in too deep when he first heard Martinez' boast, Guerrero quickly denied that he had ever said Martinez boasted of the $10,000 in April. II':119.

in his initial telling as damning evidence against the company.[41/]

By contrast, Manual Martinez testified in an open, straightforward manner: his answers simply made sense. Even with respect to his house building which I will discuss shortly, I never had the sense with Martinez, as I had with Guerrero, that his testimony revealed an act of imagination. Still, General Counsel and the union strenuously argue that Martinez[1] testimony about building his house is inherently incredible, and points to the conclusion that he must have received money from Respondent.[42/]

The evidence revealed that Manuel Martinez bought a piece of land in Strathmore, California in February of 1983 for $3,000. He put down $4,500 in cash and gave a note for $3,500 at 12% to be

---

41. See, for example, his testimony that he was paid for a full day's work on one of his trips to Delano, which, while true, was accounted for by the fact that he took compensatory time off owed to him for previous overtime work. II':57. See also his testimony about the Torres' receiving thousands of pounds of nuts in consideration for their help in the decertification when it turned out the nuts were hardly the windfall he makes them out to be; that, in fact, they were dirty or on branches that would ordinarly have been discarded.

42. Before .rehearing commenced General Counsel and the union issued a wide-ranging subpoena seeking to obtain detailed financial information from Manuel Martinez relating to "his ability to finance the building of a house. The information adduced in support of the discovery was the allegation that Martinez bought the land through Hart Reality which is owned by Geneva Hart, Lamar Hart's wife, and that Martinez was receiving lumber from Mayfair. In view of the constitutional right to privacy which protects against compelled disclosure of financial records, I quashed the subpoena until General Counsel and the Union made a preliminary showing that there was reasonable cause to believe Martinez' otherwise private financial affairs were legitimately at issue in this case. After hearing Martinez testify about how he built his house, I advised General Counsel and the union that I would permit some discovery into his financial affairs, V':21,22, but neither sought any, apparently content to rest on the inferences to be drawn from such evidence as they had already adduced.

paid off in monthly installments of at least $100/month (IV':7-S, 20), and during the walnut and the plum season (when Martinez made more money) in larger installments of as much as $200/month.[43/] Geneva Hart handled the transaction for him, making the offer and doing the paperwork. Martinez was to make his final payment in December, 1984, so that it took 23 months to pay off the balance of $3,500 plus interest.;[44/]

He began to build his house in the spring of 1983. After clearing the land, he poured the concrete for the foundation which cost him about $1500. IV':14. He started framing the house in January of 1984 with lumber he bought at auction for about $300. IV: 17-18. He later bought framing for the ceiling for $300, IV: 36, installed insulation for about $150 and received wire from a friendly electrician, for whom he had done a favor, V':38. All told he estimated he spent between $5,000-6,000[45/] in cash, to build the house. IV: 39.

General Counsel and the Union vigorously contend that

---

43. The walnut season begins in September and usually lasts 2 or 3 months, V:27. It is not clear whether the plum harvest is a separate period. At the least, then Martinez had 4-6 months of $200 payments.

44. Although it is impossible to tell exactly how much interest Martinez paid because his payments varied, if his loan were simply at 12% over two years, he would have had to pay approximately $160.00 per month in order to pay it off. Since he had several months whan he paid $200 a month, his other monthly payments (assuming them to be equal) were obviously less than $160 per month.

45. The union argues that one cannot build a home for $6000. I advised the Union representative at the hearing that if he wanted to prove that claim, he should call an expert to testify to the cost of constructing a comparable house. No expert was ever called.

Martinez' account is unbelievable and, therefore, that he must have received money from Respondent in consideration for his role in the decertification campaign. They point out that when one adds the cost of building the house to the other household expenses about which he testified, Martinez had expenses in the neighborhood of $17,000 ovsr two years. Since Martinez testified he only had $8,000 in savings which he used during this period, General Counsel and the Union argue that he could not have spent $9,000 over a two year period unless "he had [other] money available to him," presumably from Respondent.

The record also shows that Martinez earned between $11,000-12,000 in 1982 and 1933 and Martinez testified all of it was. "available" to him. IV':28[46/] Although Martinez was not questioned about his 1984 income, assuming it was within the same range of his 1982 and 1983 income, he had between $22,000-$23,000 in earnings during the period in which he incurred the $9,000 in expenses it is claimed he couldn't meet. Deducting the $9,000 from his income means he had between $13,000-514,000 available to meet all his other living expenses. General Counsel's and the Union's argument, then, reduces to the proposition that a family of five cannot live on $6,500-$7,000 per year exclusive of the cost of housing, and it follows that Martinez must have received money from Mayfair. While I don't doubt that it would be hard going for a family of five to live on approximately $6,500-$7,000/year, in the absence of further

---

46. I take it this means Martinez paid no federal or state income taxes which, for a married man with three children, seems correct. See 1984 Instruction Form 1040; 1984 Long Form 540 A.)

evidence, I cannot conclude -that it would toe impossible to live on such an income.

In the first place, California Welfare and Institutions Code 11452 provides that a family of five needs at least $713/month or *$8,556* annually to meet what is considered the minimum basic standard of adequate care.[47/] since this figure includes the cost housing, the cost of which to Martinez is already included in the $17,000 figure, I must make some kind of reasonable adjustment to derive a figure for all other necessaries besides housing. For this purpose, I will treat his house payment as exemplary of the cost of housing (since it is close to what he was paying in rent, IV: 12) and I will deduct $160/month or $1,920/year from the minimum basic standard of adequate care to derive an annualized amount necessary to meet his other necessary expenses, which comes to $6,636/year. Since Martinez' available income ($6,500-7,000) was so close to "official standards" I am not compelled to conclude that he must have received extra money -- let alone illegally received money --in order to live.

An equally powerful consideration in discounting the argument that Martinez was paid for his role in the decertification campaign is the fact that Guerrero, who played no lesser role in the decertification campaign than Martinez did, could not point to receiving any money for his participation. I am at' a loss to understand why the one should have been compensated when the other

47. This figure is adjusted annually for the cost of living, Welfare and Institutions Code section 11453. It may be somewhat higher now,, but we only used it as a rough guide.

was not. Accordingly, on such slim circumstantial evidence as the parties have presented of Martinez' financial affairs, I cannot conclude that he received money from Mayfair.

C.

A step by Step Analysis of Guerrero's Testimony

Because I find Guerrero to be generally unbelievable and Martinez generally credible, it follows that when there is a direct contradiction between their testimony, I must discount Guerrero's version. Since Martinez essentially denied Guerrero's accusations of unlawful activity, discussion of the accusations of employer initiation and support could end here; but in view of the nature of the issues in the case, I will undertake a step by step analysis of most of the main features of Guerrero's testimony in order to convey some of the doubts engendered by it.

1.

The Matter of Motive

According to Guerrero, the decertification campaign started this way: Guerrero had been having some problems with Juan Cervantes in November and December 1982 about which he told Hart during Hart's periodic visits to the shop. (I':4-5.) After listening to him for about a month, Hart told him: "Matt if you want to solve yo'ur problem and get a little raise, decertify that union." (I':5-6.) Guerrero said nothing.

In early February, about a week after he initially broached the subject with Guerrero, Hart told him, "Matt, you're one of our best workers. If you want to make a little bit more money, the only

way I can pay that money is if you guys[48/] decertify the union." From February on, Hart would bring up the subject about twice a week. I': 7. As Hart was applying the pressure, so was Ernilio Vasquez, who began to spend more time around the shop urging Guerrero to decertify the union. (I':7, 10.) To these voices was added that of Manual Martinez who, not even working for Mayfair, nevertheless urged Guerrero to decertify the union when Guerrero went to service the equipment at DiGreco where Martinez worked.[49/] Guerrero initially testified that, Martinez suggested "[he] go ahead and try to decertify [the union] and he might get paid . ..." He also said he had been paid $2,000 by Jim Melahan, Respondent's Vice-President, for trying to defeat the union at Mayfair. I':9. Although he initially placed this conversation in March, Guerrero was later to testify that Martinez first began to speak to him about the decertification in January of 1983, about the time Hart did.50/

---

48. It is not clear who "you guys" could be since Martinez did not yet work for Respondent and Guerrero was initially to testify that Martinez only began to talk to him about decertifying the union in March. On cross-examination, he corrected the date.

49. Hart testified the DiGreco company is owned by his family and that in early 1983 he did use some DiGreco equipment on Mayfair property, but he never sent Guerrero to DiGreco to repair DiGreco equipment. VIII':59.

50. See also I:24, whera he speaks of his "later" conversations with Martinez taking place in February, March, April. In recounting the January conversation, Guerrero explained that he could place the date because it took place on a cold and foggy day and Martinez invited him into the office whera he could warm himself. General Counsel and the union sieze upon this detail in thier respective briefs as a sign of Guerrero's credibility because it explains in a natural way how he might have come to talk to Martinez in the first place. How could such a vivid detail as *a* warm haven on a cold day would have been forgotten when Guerrero first testified about the date he began to talk to Martinez?

II':40. When Guerrero first testified *as* to Martinez' claim, he clearly stated that Martinez told him he had been paid for trying to decertify the union. I':8.[51/] Because AL.RB records reveal no previous decertification effort at Mayfair, and no other witness testified about even an abortive decertification effort, if Martinez said what Guerrero claims he said, it is not clear what he could have meant. Some of the confusion on this score is eased by his testimony, a few moments later, that Martinez actually told him he was paid to campaign against the union during the original representation election which took place when he worked at Mayfair.[52/]' V':26.

Throughout February, March and April, the pressure from Martinez, whenever he went to Farmersville, and from Hart and Vasquez, when they visted him at the shop once or twice a week, increased considerably. I':24-25. Although he was not initially disposed to assist in the decertification effort, Guerrero began to "take the idea seriously" in April when Hart told him he would be

---

51. The transcript reads: "He [Martinez] said, Matt, why -- why don't you go ahead and try to decertify it, and you might get paid too -- before, and I got paid." My own notes read Guerrero said: "Why don't you go ahead and try to decertify the union. I tried before and *I* got paid . . . ." I believe the transcript is inaccurate and has dropped the clause "I tried it before." It is hereby corrected to read that way.

52. The transcript reads: "He said, before there was an election, He didn't say when. But, he said, before there was an election and he tried to maka people sign for the company, not for the union. ... he got $2,000 [just for trying]. I':9. See also II':41. In view of Martinez' testimony that he voted in the original representation election, I take no account of Respondent's argument that Guerrero's testimony is completely incoherent because, the Farmersville operation not even being in the unit, Martinez couldn't have taken part in a previous decertification effort there.

compensated and reimbursed for all his expenses if "he helped him. I':25 Despite the fact that the mention of "compensation" caused him to cast his lot with the company, Guerrero had no idea how much he would be "compensated", although he thought it could be as high as $50,000[53/] because Hart said the union was costing the company a lot of money. I':26 Later, he was to testify that the subject of "compensation" and reimbursement might have come up in March,(II':53; see also II':73,) and that the $50,000 (which he was never promised) was not just for him, but for "all three."[54/] II' :54

---

53. Guerrero's actual testimony:

> Q: What did you think they might pay you?
>
> A: Well — he was really concerned about the union, that they had a lot of expenses — pay you $50,000, you know for — the beginning that was Lamar.
>
> Q: When did he say that?
>
> A: No. I — I'm — he never said he would not pay $50,OOP. That came to my mind.
>
> (I[1]:26.) (Emphasis added)

Compare this with his testimony that it was a promise of money which changed his mind:

> Okay at the beginning, I though about [decertifying the union] a little bit because I had some problems with Juan. But those problems they were not strong enough to decertify the union. But when the company offered the money and all those promises, that's when I was interested.
>
> (II[1]:11-12) (Emphasis added)

54. It is not clear who "the three" might be, since Guerrero also testified that when Hart and Vasquez had a fight over Vasquez[1] accusation that Hart was taking all the glory for the decertification effort, Hart told Vasquez the rewards were to be split four ways. I':56-57. General Counsel argues that, even if Guerrero displayed a wild imagination in hoping he would receive

(Footnote 54 continued——-)

Although Guerrero essentially admitted he only imagined he might get $50,000 (or a share of $50,000), he testified that Hart actually promised him a raise, a new service truck, freedom to do side jobs at the shop and jobs for members of his family. I':26.

* * *

It is quite clear that Guerrero has pictured himself as a kind of neutral vessel who, although admittedly having certain problems with the union, nevertheless, did not have sufficient ill will towards it to seek to have it removed. Thus, he testified that his problems were not with the union as an institution, but with union representative, Juan Cervantes, or with the most active members of the ranch committee, Cleo Gomez and Onesimo Esparza. II[1] :12.

On cross-examination, however, he admitted filing a charge shortly before the decertification petition was filed accusing the union through Esparza, of threatening him and of failing to represent him in obtaining medical benefits. Resp. B, Charge dated 6/6/83; II':14. Within the compass of a few pages of transcript, Guerrero explained (first) that he only accused the union of failing to adequately represent him in obtaining medical benefits as a

---

(Footnote 54 continued——)

$50,000, I should just regard his fantasy as a sign of how powerful ftis motivation was to decertify the union. It is far easier to take it as a sign of how active an imagination Guerrero has; but, even going a step further and taking the promise of money as his motive (as General Counsel would have me do and as Guerrero testified) it is curious that Guerrero could not point to *a* definite promise of money. And, to the extent his later conduct reveals his original expectations, it is clear that Guerrero never asked Hart for any of the "money" he thought he was promised.

campaign tactic, II':14; (next) that, although there were real problems in obtaining reimbursement, he had merely been impatient in expecting it to be speedy, II':16; and (finally) that he had wrongly accused the union of responsibility for the delay in being reimbursed since it was he who had failed to send in his receipts. II':16. The charged threat was also explained away as meaningless. II':16.[55/] In other words, Guerrero essentially admitted his accusation against the union was false.

Even if I were to take as true his present account that the charge was false, I am still left with a general impression of a man given to making accusations to suit whatever his present purposes happen to be. Moreover, in explaining away the charge as thoroughly as he did, he has so trivialized the incidents about which he had formerly seen fit to complain as to raise questions about whether his complaints are ever in proportion to their cause.

Other details of his testimony also give me pause. 3y the date of the re-opened hearing, Guerrero had over a year to put the events in this case in perspective and yet he still wasn't sure of when he first talked to Martinez, what Martinez actually said to him,[56/] whether the company promised him money or even how much

---

55. According to Guerrero, the threat consisted of Esparza saying to him "We're going to try to put you as a foreman. We're going to get rid of you."

56. General Counsel agrues that the confusion over whether Martinez said he was paid to promote a previous decertification or to campaign against the union in the original representation election is irrelevant to determining Guerrero's credibility because it is not unreasonable to conclude that Martinez "may have concocted the story to more effectively entice Matias into participating in

(Footnote continued—)

But if these considerations make me cautious about relying on Guerrero's testimony there is another, stronger consideration which causes me to disbelieve it.

Guerrero is obviously a passionate man: even after listening to him testify for over three days in the re-opened hearing one of my strongest impressions of him still comes from the initial phase of the hearing when he started to cross-examine one of General Counsel's witnesses. It would understate the strength of the impression he left in those few moments to say that he was hostile. Moreover, the intensity he displayed during this encounter was consistent with his being the only one of the anti-union faction to enter Hart's office during the grievance meeting, and with the decision of the union representatives not to interview him during the initial phase of the objections case because they were sure he would lie; and such passion as he showed (to me and to everyone elsa) points to a far greater animus against the union than the few things he could actually point to as having been promised (a new service truck, jobs for his family, and the freedom to do side jobs on company premises) would seem capable of bringing forth.

Thus, I do not credit his account of the initiation of the decertification campaign.

(Footnote 56 continued——)

the decertification campaign." To the extent General Counsel means that the fact of payment would have stuck in Guerrero's mind more than the precise consideration for which it was supposedly given, I agree. But General Counsel's argument obviously goes further to suggest that if the entire account is false, it is so because Martinez made it up. Since the statement *at* the hearing was Guerrero's-, if the factual predicate on which it is based is false, it is far more plausible to take it as reflecting on Guerrero's credibility than on that of Martinez.

2.

The Recruiting of Manual Martinez

Guerrero testified that, even though Hart's promises hooked him at the beginning of April, because Hart was not convinced Guerrero would be his man, he decided to bring in Manual Martinez from DiGreco to lead the decertification effort. I':26-27. when Hart, Vasquez and Guerrero began to look for a way to hire Martinez, *I':26-27,* they decided to hire him to assist Guerrero's assistant in the shop. I':27

Martinez tells a different story:

He testified that at least since 1982, he has worked from September to March at Digreco, and when he is laid off, as he was in March 1933, he works for Mayfair from March-September at the Farmersville or Plainview dehydrators which are not in the unit. V:26-27. In late winter or spring 1983, Hart mentioned to him there were job openings at Mayfair "whenever"[57/] he wanted to apply for work. In fact, as Guerrero admitted, there not only was an opening in the shop, but he had been pressing Hart to hire someone to help him since his regular assistant, Felipe Soto, was unable to return to work after an automobile accident. Martinez applied after he was laid off at DiGreco.[58/] Martinez worked at Mayfair from April

57. The transcript reads "whether"; my notes read "whenever". Since my notes are consistent with the sense of Martinez' testimony, the transcript is hereby corrected to read "whenever". V:21.

58. General Counsel and the union argue that because Respondent did not produce any other employment applications, I musl conclude Martinez was not hired in the customary way. Assuming a

(Footnote continued-—)

1983 until September When, he returned to DiGreco. V:21.

* * *

Although apparently straightforward, Guerrero's testimony that Respondent hired Martinez to conduct the decertification campaign still has a few puzzling aspects. For example, Guerrero plainly speaks of the decision to hire Martinez as necessitated in Hart's mind by his own reluctance to commit himself to the scheme. If the decision to bring in Martinez was made when, and for the reason stated by Guerrero, Guerrero's own participation in the scheming to hire Martinez would have made Martinez' hiring unnecessary since Guerrero's participation would be the very signal Hart lacked about Guerrero's own committment. Also, if the decision to hire Martinez was made so late, why would Hart have chosen Martinez to induce Guerrero to conduct the decerification campaign? If Hart were capable, as he obviously was in Guerrero's account, of directly approaching Guerrero about decertifying the union, why would he choose a relative stranger to try to persuade him? Certainly, there is nothing in Martinez' account of having received money to campaign against the union that could not be as readily, indeed more persuasively, accomplished by Hart's directly promising Guerrero money.

The strongest case for Martinez' being hired to participate

(Footnote 58 continued——)

best evidence objection would have been appropriate when Knutson testified to receiving a number of applications, neither General Counsel nor the union made one. VIII':28. Indeed, the union representative himself elicited Knutson's testimony that he received additional applications, VIII':52-53.

45, ALJD p. 56-57[60/]. In fact, the evidence does show a deeply divided work force with Guerrero's difficulties with Juan Cervantes antedating Martinez' appearance. It was into such an atmosphere that Martinez arrived and was put to work not only with an employee who obviously likes to complain, but in the raids of a unit in which Martinez testified without contradiction, a number of other workers were also complaining that the union didn't represent them. V:10. The complaints ripened into a decision to appoint him, Guerrero and Luis Torres to go to the ALRB office to see what could be done. V:10-11, 33-34.

The three men did exactly this, speaking to Regional Director Luis Lopez about a week before they filed the petition, at

---

60. In Radovich, the ALJ dismissed General Counsel's theory of employer initiation by observing, among other things:

> Contrary to General Counsel's view, the picture that emerges from my consideration of this case is of a work force in active revolt against its bargaining representative. As stated earlier, prior to the circulation of the decertification petition, two employees, Adela Dalere and Nancy Sanchez, circulated petitions asking for higher wages. Afterwards, a single employee, Americo Ramos, separately angered by the union for personal reasons, began to circulate another petition which, inspired another anti-union employee to ask still another anti-union acquaintance to help him circulate what became the decertification petition. Even after the election was over, yet another petition was begun to halt dues deductions, which in turn led to a spontaneous confrontation with Board agents. According to employee witnesses, whom I credit, approximately 40 people crowded into the Board's regional office with many more people outside, wanting to know why dues were still being deducted after the election results had indicated a no-union victory. While General Counsel makes use of these petitions to argue that Respondent refused to bargain with the union, it seems to me, these events betoken obvious, genuine and considerable worker unrest, out of keeping with the theory that Respondent's crews wera subtly manipulated by Respondent.

which time Lopez advised them to talk to their union representatives before doing anything further. VII:13; V:34.[61/] It was only after their request for a meeting was denied that the dissatisfied workers went back to Lopez, who then advised them decertification procedures. V:35.

Neither the preliminary trip to the Board's Regional Office, nor the requested meeting with the union representatives, appears in Guerrero' s testimony. These details, which picture the anti-union faction inching toward a confrontation with the union, contradict Guerrero's account of an impatient Martinez who had to be restrained from rushing to decertify the union. Because this account is neither more nor less plausible than the inference I an asked to draw about Martinez[1] being chosen to sow dissension in the work force, I cannot conclude that he was.[62/]

3.

From the Planning Stage to Preparation of the Petition

With Martinez in place, Guerrero and Vasquez were assigned roles in the decertification campaign. Vasquez was supposed "to

---

61. In her testimony at the initial hearing, Cleo Gomez confirmed that Martinez and Guerrero did ask to meet with the ranch committee before the petition was filed and that their request was denied. Lopez was never called to contradict Mart.inez[1] account.

62. One final point: General Counsel argues that "because" Martinez was an unlikely person to lead the decertification campaign, it must be concluded that he was recruited to do it. General Counsel relies on the ALJ decision in Abatti Farms (1981) 7 ALRB No. 36, ALJD, p. 10 for language suggesting that we may infer employer support from a decertification petitioner's past indifference to the union. In the first place, the Board overruled the ALJ's conclusion about employer instigation specifically finding enough anti-union "history" in the employees to negate the ALJ's conclusions; secondly, Martinez himself testified to anti-union feelings. V:31-33.

persuade" the people to vote for the company; a role which depended, according to Guerrero, on people being afraid of him. I':28.[63/] Hart, Vasquez, Martinez and Guerrero had at least one, sometimes two meetings a week to talk about the decertification effort. II':89. Finally, on Saturday, May 28, the group (including Dennis Papagni now) made their final plans during a five hour drinking session, three hours of which were devoted to planning the decertification, II':89, and in particular, to discussions of "how many people were on the company side and on the union side" and "how it was supposed to be done." II':90.[64/] The net result of all these hours of planning was to decide that Guerrero and Martinez would go to the Delano Regional office to ask about decertification procedures. II': 93; I':30.[65/]

According to Guerrero, because the next workday after the meeting was Tuesday (May 31st) it was not until then that he, Martinez and Luis Torres went to the Board's Delano Office.

---

63. Despite Vasquez' being assigned this role, no testimony was ever adduced at the initial hearing that he threatened or intimidated any worker into signing the decertification petition. If he wasn't going to "play" the role he was assigned, one wonders why he was assigned to it? In light of the record as a whole, the "role" seems a figment of Guerrero[1]s imagination, more consistent with his obvious animus towards Vasquez than with the actual course of events.

64. Martinez and Hart admit there was a time when all these people were present in the shop, but they testified Hart was with Papagni and Vasquez and Martinez and Guerrero were drinking by themselves.

65. Guerrero also testified Martinez and Hart knew quite a bit about the procedures. I':30, II':90-91. Since all there is to know is expressed in a few lines of the statute, their knowledge, if they had any, hardly bespeaks the kind of learning that only experience could produce.

I[1]:30-31. The men left around lunch time and, after waiting for Lopez, spoke to him for approximately 30-45 minutes (I':31) before returning to Mayfair at about 3:00-3:30[66/] when they Immediately met with Hart. II':31. They reported to him that Lopez said they had to to prepare a petition. II': 94, I'-.32. Hart and Vasquez said, "Let's do it."

The first step was to type the petition. According to Guerrero, it had originally been planned to have Hart's secretary, Yolanda Medlin, type the petition; however, when Hart raised the possibility that her typing could be traced to the office, Guerrero volunteered his cousin Joanna Chapa to type it. I':34. Despite the fact that Chapa lives around the corner from him, II':94, Guerrero took the handwritten petition to Delano the next day where 'Chapa, who was enrolled in a secretarial school, could type it. Although Guerrero left for Delano at 9:30, because Chapa couldn't work on the petition until her lunch hour and, even after she started typing, she had trouble typing in Spanish, she did not finish until the afternoon. By the time Guerrero bought her lunch, he didn't return to Mayfair until 3:00 at the earliest. I':36. Thus, according to him, he had another day off for which he was paid.

Guerrero met Vasquez and Hart at the shop and it was decided to make two copies to permit circulation of more than one petition at a time. Vasquez went to Porterville to get the petition

---

66. When Guerrero first testified, he said he was paid for his time in Delano, which he was. I':33. See G.C. Exhibit A. Martinez and Torres, however, took time off to go to Delano, so that only Guerrero received a full day's pay. As he later admitted, however, he used compensatory time off owed to him from previous overtime work to give himself a full work day. II' :57 .

copied -- once again because Hart was concerned that, if the petition were duplicated on the company machine, it could be traced, II':95. Vasquez returned with the copies in the late afternoon and Guerrero and Martinez began to solicit signatures that same afternoon. I':37; II': 96.[67/]

* * *

I have already noted the telling absence of any mention in Guerrero's account of the preliminary visit to the Regional office and the attempt to meet with the union. Curious also is why it was necessary to have one or maybe two meetings a week "to plan" a venture which consisted of passing around two pieces of paper, and the planning for which, if Guerrero is otherwise to be credited, was so deficient as to require a last minute decision about who ought to type the papers. The account of the typing is also a bit discordant. I have no doubt that Chapa typed the petition or that she typed it in Delano; but why should Guerrero have taken an extra trip to Delano to have her type it when, by his own account, the decision to have her type it was made in the evening and she lives just around the corner from him and he could have just given her the petition? Finally, as to those specific details as to which there is a clash of testimony between Guerrero and Martinez, the matter comes down to whether I believe Martinez or Guerrero and in such a

---

67. Although none of the signatures bears a date earlier than June 6, 1983, Guerrero explained that he and Martinez put down June 6 as the date in order to "be on the payroll preceding the election." I':33; see also II':96. I am unable to determine from examination of the petitions (GC J or UFW H), whether the "6/6" dates are in the same hand. At least one feature of the writing, the curvature of the entries, appears similar; but the digits look different.

contest, as I have previously stated, Martinez prevails.[68/]

4.

The Decertification Campaign

According to Guerrero, the company assisted the decertification campaign by permitting him and Martinez to solicit signatures on company time[69/] and in company vehicles (I':44) by helping them locate potential signatories, and by giving them specific instructions about how to persuade balky ones.[70/] Exemplary of Respondent's support of this kind was Vasquez' advice about how to persuade the Garcia family to sign. One Saturday, Martinez sought to obtain the signatures of Victor, Lupe, and Paul Garcia, but he found them reluctant to sign, I':40. When he reported their reluctance to Hart and Vasquez, Vasquez told Guerrero, I':41, to concentrate on convincing Victor Garcia because he "thought" for his whole family. Before Guerrero went out,

---

68. Both General Counsel and the union argue that Respondent's failure to call Vasquez to deny some of the statement or actions attributed to him means I must accept Guerrero's account. If I believed any of it, that would be true; since I don't, Respondent was under no burden to refute it by these witnesses.

69. According to Guerrero he and Martinez spent 2-3 hours a day soliciting signatures. I':43. Martinez testified he did collect signatures on work time, but he denied spending much time obtaining them. According to him, some signatures were gotten when people brought equipment to the shop; others, when the two went to the fields to service equipment in order to pick up and deliver equipment. VII[1]: 17-19. I credit Martinez. Although there is nothing per se wrong with obtaining signatures on work time, see Radovich 9 ALRB No. 45 ALJD pp. 52-53, if the two spent as much time as Guerrero testified they spent, an inference of employer support could be made.

70. For example, Guerrero testified he made certain promises to employees to persuade them to sign; for example, he told Emilia Mitchell that she would get her equipment repaired if she signed the petititon. I':39.

Vasquez called Dennis Pagagni to find out where Victor was working. MartInez went out and, instructed by Vasquez, told Victor that if his family signed the petition, his little brother would get a job if "we decertified the union." I':42-43 According to Guerrero, Victor signed the petition and later talked to his family about it. I':43; V':103. Victor Garcia, however, didn't recall any promises being made to him. V':104 Garcia was clearly evasive about whether he had previously told a Board agent that Matias told him he would put in a good word about getting his younger brother hired if he signed" V':107,[71/] and, in fact, young Garcia was hired, but only for one day a week in February, 1984. VI':54

Hart also kept a close watch on the number of signatures being gathered, I':44; so close a watch, according to Guerrero, that he cut short their campaign when he knew they had enough to qualify in order to mesh with Respondent's bargaining strategy. The two men were still hoping to get more signatures when, on June 9, 1983, Hart told them they had to file it right away because the company had to give a response to the union's last contract proposal. I':46[72/] The two men took the petition to Delano that afternoon. I':47 Martinez testified they filed the petition when they got all the signatures

---

71. The witness did recall telling the union representative that "maybe Matias had said that". V':107

72. Guerrero testified they still wanted to get the signatures of Antonio Acsvedo, Onesino Esparza, and Ernie Salcedo. I':47.

they were going to get. VII':22.[73/]

In the middle of June, Hart told Martinez and Guerrero that there would be no election. I':48 Later, Board agents also informed them there was no peak. According to Guerrero, Hart then said "There must be something left to do. Let me talk to someone." I':48. He went to the office to talk to someone and when he came back to the shop he said we had to go to Sacramento and "take other people with us." I'48-49. Although Guerrero had no idea who Hart talked to before he obtained the idea to go to Sacramento, he did note that there was a gray VW parked outside the office of the same kind which, he observed months later, was driven by Ken Youmans, the company's attorney. I':50.

Martinez did call Sacramento on the company phone to speak to Jorge Leon, then-Deputy Executive Secretary, to set up an appointment. I':50 Hart told him he would give him plenty of information to take to the ALRB. Martinez testified Luis Lopez told him they could appeal the dismissal by going to Sacramento and that they could ask the company for whatever information they needed-VII[1]:31-32. Martinez and Guerrero went to Sacramento with Floyd Hensley and Luis Torres. VII':33 According to Guerrero, Hart promised to reimburse them for their expenses but it is undisputed that he never did so. Martinez' testified that the four employees

---

73. To some extent, Martinez' testimony is corroborated by that of Guerrero; as noted, Guerrero testified they lacked three signatures, one of which was Antonio Acevedo's who had actually signed, the petition; another of which was Onesimo Esparza's, who I can't believe Guerrero seriously believed would sign the petition. Nothing is known of Salcedo's participation. Thus, Guerrero's testimony that Hart actually prevented them from approaching at least two more workers appears false.

went to Sacramento in his car, that he paid for the gas, VII[1]:33, and that Guerrero paid for lunch. VIII':11 Martinez and Guerrero each gave one of their companions ?20.00 for lost wages.

VII':33-34.

* * *

The veracity of Guerrero's account of the decertification campaign pretty much comes down to a credibility contest between him, Martinez and Hart and in such a clash, I must again discredit Guerrero. However, thera are some features of his account which do call for independent treatment. In the first place, his testimony that he promised to fix Michell's tractor if she signed the petition is absurd: I find it hard to believe Respondent would authorize its purported agent to tell an employee she wouldn't be able to do her job if she didn't sign the petition. It is also noteworthy that Victor Garcia would not corroborate Guerrero's testimony about the promises which were supposedly made to him.[74/] Although Garcia was clearly an evasive witness, I cannot conclude his evasiveness was the result of pressure from Respondent. Finally, Guerrero's testimony that he noted the presence of a grey VW in Respondent's parking lot in order to permit him to infer eight months later that the company attorney was assisting in the strategy to overturn the Regional Director's peak determination seems incredible to me.

---

74. Although it is true the younger Garcia did obtain part-time employment with Respondent, it was for only one day a week 6 months later, which hardly seems significant enough to represent a promise made good. I should point out that one of the consistently oddest features of Guerreo's account is the disparity in rewards Respondent was willing to provide those who helped it. Thus, Martinez supposedly received $10,000; the Torreses, a "fortune" in side business; Guerrero, practically nothing.

The most important piece of testimony, however, is Guerrero's account of how the filing of the petition dovetailed with the parties' bargaining. It is ironic that the matter which has given me the greatest difficulty from the initial phase of this **case** should have been settled against General Counsel and the Union in the re-opened hearing by dint of Guerrero's consistent incredibility. I conclude the timing was entirely coincidental.

For all the reasons stated above, I cannot conclude that Respondent initiated or supported the decertification campaign and *I* recommend that the union's election objection and the General Counsel's unfair labor practice allegation concerning initiation and support be, and hereby are, dismissed.

V THE DISCHARGE OF FELIPE SOTO

Felipe Soto, Guerrero[1]s cousin, was rehired by Martinez around March, 1984. I':89[75/] When he was originally hired in 1981, Arlan Knutson told him he was to work for Matias. VIII':55; v':74. Soto testified that during the entire time he worked at Mayfair, only A.rlan Knutson or Matias Guerrero gave him work orders. V: 84-85. He was fired on July 28, 1984.

A few month's before Soto's discharge, Guerrero had begun to undergo his conversion to UFW activist and he and Soto would talk together. I':97 Sometime in May or June, 1984, Guerrero and Soto began to talk to the other workers about petitioning for return to

---

75. As noted earlier, Soto was first hired by Martinez in 1981, but he had been out of work since late in 1982 after being injured in an automobile accident.

the union. I':97; V':73. Once, when Soto was talking to Ricardo Gomez about bringing the union back, Siena Vasquez was standing about 10 feet away from him. V':75 Although Soto didn't mention that Hlena Vasquez ever threatened him, he did testify she insulted him, V':78. Guerrero, however, testified that she once told him and Felipe," I hope you guys get fired." III':55-56.

There is no real dispute about what happened the day Soto was fired. Vasquez asked Martinez to accompany him to the shop in the morning to witness his telling the mechanics they were not to leave the yard without permission of the supervisors. VII':46-47 According to Martinez.. both Soto and Guerrero began to laugh at Vasquez, saying he was not their foreman and he couldn't give them orders. VII[1]:47 Vasquez said he was "a foreman" there and they had to do whatever he said and if they disobeyed [him] they [would be] fired." V':47 Guerrero asked Vasquez if he would fire him for walking out of the yard. Wnen Emilio said "Yes", Matias told Felipe to take a tire out of the yard. VII':47. Vasquez did not testify.

Guerrero and Soto related the same order from Vasquez but omitted any mention of their mocking his authority. According to Guerrero, he said the tire on the welder needed to be fixed since they needed the welder right away. II':29, I':90 He acknowledged getting the order from Vasquez, but said as long "as Arlan Knuston don't say anthing different I will [do] my duty the way I've been doing it." I':91 Guerrero also admitted he told Felipe to disobey Vasquez. I':91 When Soto came back and Vasquez purported to fire him, Guerrero told him he wasn't fired. When Knutson arrived he upheld the firing. Guerrero and Soto say that there never was such

a rule before. I':91.

Plainly, Guerrero authorized Soto to leave the yard and the amazing thing is that he wasn't fired, which I can only attribute to Respondent's reluctance in the circumstances of this case to do anything to him. There is also little question in my mind, and I so find, that the rule was ad hoc,[76/] but General Counsel has not established any nexus between promulgation of the rule and any particular form of protected activity that it was designed to prevent or to punish.[77/] in the absence of such a connection, announcement of the rule itself cannot constitute an unfair labor practice. If the rule were lawfully promulgated, firing Soto for disregarding it could only be an unfair labor practice, if its violation were merely a pretext to justify Soto's termination. On this record, I cannot find sufficient evidence to conclude that Vasquez fired Soto either for his union activities or to threaten Guerrero for his. The record does reveal tremendous hostility between Vasquez and Guerrero, but Guerrero's union activities do not clearly emerge as the cause for that hostility. So far as I can determine, the incident comes down to a contest of wills between Vasquez and Guerrero and in such a case Guerrero (and unfortunately Soto) had to lose.

---

76. Respondent's explanation for the rule, that it was designed to relieve Soto and Guerrero of the burden of having to get things, makes no sense.

77. I should note that the validity of such an analysis has been severely undercut by the recent Court of Appeals decision in Armstrong Nurseries Inc. v. Agricultural Labor Relations Board (1985)164 Cal.App.3d 1040. The analysis has been made only for the purpose of focussing the pretext argument.

I recommend that this unfair labor practice allegation be, and hereby is, dismissed.

VI

THE HARASSMENT OF MATIAS GUERRERO

A.

The Ejection from the Field and Alleged Surveillance

Shortly after Soto was fired, Guerrero who was not working, went to Respondent's fields to obtain signatures on a petition to bring the union back. I': 102. He was driving alongside the fields looking for Gonsuelo Torres and Maria Balderas when he observed Helen Vasquez in her pickup. I':103 When he found Torres and Balderas, he entered the field to talk about the setting up a union meeting when he saw Emilio Vasquez and Manuel Martinez drove up. Vasquez got off his truck and began to yell at Matias to get the hell out of there, that he had no right to be there because its private property. If Guerrero didn't leave, Vasquez said he'd call the sheriff. I':102-103

Martinez testified that he and Vasquez were driving by the fields unaware Guerrero was gathering signatures, IV: 43, although Martinez admitted he generally knew Guerrero wanted the union back. Vasquez asked if it was Matias and Martinez replied that it looked like his truck. IV':30 They pulled in and Vasquez told Guerrero to leave. IV: 31 When Guerrero said it was lunchtime; Vasquez told him it didn't matter, he had no right to be in the fields. Matias left. IV: 32. At all times, Respondent had a policy prohibiting "Unauthorized entry on company property for purposes other than work." Mayfair Packing Company Employee Handbood, G.G. 2, Part V, 3

12. The rule was not so rigidly enforced, however, as to prevent family members from entering the fields at lunchtime to bring lunch to their relatives. IV:42.

Everyone agrees that after Guerrero left, Vasquez and Martinez followed him, but Martinez said it was coincidental; they were merely going in the same direction. IV: 33 It is also undisputed that after Martinez and Vasquez broke off from behind Guerrero, they once again encountered him on the road. Martinez again testified it was by accident. IV':33

In Tri-County Medical Center (1977) 229 NLRB 1262, the national Board held that a no-access rule will be valid:

> Only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaged in union activity."

In this case, Guerrero was ejected from Respondent's work areas pursuant to a clearly disseminated, facially non-discriminatory rule, which was nevertheless not uniformly enforced during lunchtime, and in circumstances in which it is reasonable to conclude Vasquez himself might have concluded he was engaged in concerted activity (talking with Balderas and Torres). I find Vasquez' ejection of Guerrero to be an unfair labor practice.

So far as Guerrero's being followed is concerned, there is nothing so incredible in Martinez' testimony that when they first followed him, it was because they were going the same way, and when they next met him it was accidental, to cause me to alter my conclusions about his general credibility. Accordingly, *I* find no additional interference to have occurred.

B.

The Additional Allegations of Harassment

According to Guerrero, several days after he was followed, he was in the shop when Emilio arrived and cursed at him, telling him he was going to be watched and fired. I':108 Freddy Gomez, who witnessed the encounter, did not mention any threat of firing; he testified that Vasquez said "You son-of-a-bitch; you are going to do what I say and if you don't do it I am going to send you to hell." V':117; VI':27. Gomez also testified Vasquez told him he didn't want to see him talking to Matias anymore. V':118.

In August 8 the two men had another run-in which was recorded on tape and has been made a part of the record. During the encounter, Guerrero accuses Vasquez of being drunk; Vasquez tells Guerrero to move his truck; there are some unintelligible words exchanged between Guerrero and Martinez and, according to Guerrero, the episode ended when he ran to put out a fire. I':lll-112.

The final confrontation took place on August 25 when Guerrero found the shop doors locked upon his coming to work. This incident, too, is on tape and has been translated for the record-Guerrero reached inside to unlock the door just as he had done many times before. I':113-114 When Vasquez arrived—drunk again according to Guerrero—he called him a prostitute and a son-of-a-bitch. From all that appears on the tape, Vasquez was mad because Guerrero had appeared on the Farmworkers' radio station to accuse Respondent's supervisors of instigating the decertification effort. I':114-115.

According to Arlan Knutson, when he arrived at the shop on

August 25, Helen Vasquez told him Guerrero had opened the door after she had told him to wait until it was unlocked VIII':40. After talking to Guerrero, who acknowledged that he had "broken into" the shop, Knutson decided that Guerrero's disobeying Vasquez' order merited a suspension for three days pending discharge. Following an investigation of the incident, Lamar Hart determined that Helen Vasquez' direction may not have been sufficiently clear to hold Guerrero responsible for insubordination (G.C. Ex. H). Although the Company expressed a concern that Guerrero seemed unwilling to follow his supervisor's instructions, he was informed that he would lose no pay as a result of the incident (G.C. Ex. H).

There is obviously bad blood between Guerrero and Vasquez, and the record is replete with accusations made by Guerrero to company officals against both Siena and Emilo Vasquez. As I have noted before, it simply is not clear by a preponderance of the evidence that this severely distorted relationship was caused by Guerrero's union activities. Indeed, considering that Guerrero recorded two conversations unbeknownst to Vasquez, it is noteworthy that Vasquez doesn't mention Guerrero's union activities as a cause of his anger. That Vasquez may have been angered by Guerrero's radio accusations still does not make his "attack" upon Guerrero unlawful since I have found the accusations false and they cannot be considered protected. See e.g., Missouri Towing and Barge Inc. (1981) 257 NLR3 189.

The final incident of alleged harassment involves a criminal charge filed against Guerrero by Manual Martinez in the Call of 1984. Martinez filed the charge when his wife and children

told him they saw Guerrero shoot at the window of their home. It is undisputed that the District Attorney moved to dismiss the charge at the preliminary hearing, apparently because Guerrero had a number of alibi witnesses. It is also undisputed that LaMar Hart and Jim Melahan attended the hearing; they did so, as Hart testified, because he was curious as to why his employees were shooting at each other.

General Counsel and the union argue that Melahan's and Hart's presence was a form of intimidation of Guerrero. The major premise of General Counsel's argument appears to be that, because the charges were dismissed, they were false and, therefore, were filed to retaliate against Guerrero. It follows, the argument continues, that since Hart and Melahan appeared at the hearing, they were either "directing" the retaliation against Guerrero or ratifying it. The essential difficulty with the argument is the falsity of its premise: while Guerrero is presumed innocent until proven guilty, I cannot rely on that presumption to conclude that the charges were unfounded. Indeed, under the circumstances, the dismissal was not equivalent to an acquittal, Penal Code section 1387, and the District Attorney specifically reserved the right to re-file the charge.[78/] Balancing Hart's and Melehan's right to attend a public proceeding against whatever impression of "harrassment" against Guerrero which their presence might create, in

---

78. Since it is clear that the validity of the charges turns upon credibility of witnesses, I believe the Board is precluded from finding that it was an unfair labor practice for Martinez to have filed them. See Bill Johnson's Restaurants v. N.L.R.B. (1985) _____ U.S. _____ 13 LRRM 2643.

circumstances in which I cannot conclude Martinez' charges were false, I can find no unfair labor practice. I recommend these allegations of discrimination and harrassment of Guerrero be, and hereby are, dismissed.

VI

THE BARGAINING

A.

Facts

The parties began their negotiations for a new contract in August, 1982 after expiration of the contract. (GCX 11A, B.) When negotiations began Joe Walter was representing the company and Ben Maddock the UFW. In late September or early October, labor relations consultant Tom Dillon took over negotiations for the company (II:17-18); somewhat later Ken Schroeder replaced Maddock as the union's negotiator. (III:80.) Dillon did not have authority to agree to a contract: his job was "to articulate the company's position, to listen to the Union's position, to assist the company in evaluating proposals and to make recommendations. (III:18)

In late October 1982, before Dillon and Schroeder replaced their predecessors, the parties had met and exchanged proposals. The company proposed two changes in the previous contract: adding "grandparent" to the list of decedents for whose burial one could obtain bereavement pay and a 25£ raise on March 1, 1984 to be applied as the union saw fit between wages and RFK. (IV:13.) The union counted by withdrawing its demands concerning the rest period, travel, conditional contributions to the pension plan, holidays and job classificiations. (IV:20.) Despite the existence of these

other proposed changes, subcontracting quickly became the major focus of discussion. The union felt that the company was doing more harvest subcontracting than the union thought it would when it negotiated the previous contract and workers were losing work and benefits. The union wanted to modify the subcontracting language to delete the walnut harvest, to limit the amount of work done by supervisors, to generally limit subcontracing to operations for which the company did not possess sufficient equipment, and to lower the number of hours a worker needed in order to qualify for vactions. (IV:20.)

Dillon and Schroeder had their first meeting on November 23, 1982. Because both men were new, the meeting was devoted to reviewing the status of negotiations. Dillon noted the union wanted almost a 50% increase in the 38£ RFK contribution rate in the previous contract. (III:32.) During this review, the union agreed to drop even more of its demands (GCX 12, Notes II/23/82), so that subcontracting and RFK could emerge as central. After a caucus the parties took up subcontracting in detail and touched upon RFK with Dillon "wondering aloud" what the union 's reaction would be if Respondent stood on the 38¢ contribution to RFK. 111:33. Although the details of Schroeder's reply are vague, according to Dillon, Schroeder argued that 38£ would not cover the costs of the plan. With respect to subcontracting, Dillon told Schroeder the company felt it was not violating the spirit of the contract. He conceded that some harvesting equipment was idle, but maintained that the fact of idle equipment did not necessarily mean that unit memebers had less work: rather, the equipment was idle because the company

did not have a full complement of equipment. He told Schroeder that if the company could not subcontract the harvest, it would have to buy hundreds of thousands of dollars worth of new equipment. Dillon emphasized that freedom to subcontract was so important to the Respondent that it would take 'a strike on the issue. (GCX12, Notes 11/23/82, III:39; IV:23.) Finally, Dillon suggested a multi-year agreement as an additional way to hold down costs. (III:39-40; GCX 12.) The meeting ended with Dillon promising to send a written proposal. He also asked Schroeder if he could make a deal without the negotiating committee present. Schroeder said if Dillon presented a proposal, he would take it to his people. (GCX 12, III:41.)

Dillon presented a written proposal before the next meeting. (GCX 13(A), (B).) The proposal offered little different form what the previous contract contained except for addition of grandmother and grandfather to the list of relatives in the Bereavement article, reduction of the employer's RFK contribution from 38¢ to 35¢, or the diversion of 17¢ from a propsed total 25¢ economic package effective January 1, 1983 to maintain benefits (leaving 8* for wages), the duration of the contract to be the subject of future negotiations.

When the parties next met on December 3, 1982, Schroeder expressed disappointment in the company's proposal. In view of the small wage increase propsed by the company, Schroeder rejected the idea of a multi-year agreement. (GXX 12; III:47; IV:24.) He and Ben Haddock, who was also present, explained that maintenance of benefits effective January 1 was unacceptable because the trustees

of the plan required contribution levels to run from September to September. Indeed, Haddock even argued that it was an unfair labor practice not to pay higher contribution rates in order to maintain benefits. (OCX 12, Notes 12/3/82; II:48.) Schroeder and Haddock charged that subcontracting cost the workers money during the last contract term because the company contracted out more work in 1982, than in 1981 and unit employees worked 3000 fewer hours. (GCX 12.) Walters disagreed, arguing that the company harvested fewer acres overall. (III:50.) With Haddock in turn disagreeing with Walters' assement, the union caucused after which it withdrew the proposal to modify the grievance and arbitration article, dropped MLK, stayed with the one year contract, stood on their holiday and vacation proposal, insisted on 55¢/hour for RFK with a maintenance of benefits provision effective up to 60£ an hour (including a re-opener if the costs of maintaining benefits exceeded 604/hour); lowered the proposed wage increase to 40¢/hour for all classifications, and held on subcontracting. (IV:26-27; 111:52; GCX 12.)

The parties broke for lunch only to resume their discussion of subcontracting" upon their return. Dillon began by outlining why the company needed to subcontract during the past season. He explained that the company did not have the equipment necessary to harvest the crop which had matured late and rapidly because of the rains. (GCX 12.) If the rains hadn't delayed the harvest, Hart explained, they could have harvested more slowly, shaking the trees twice, but the weather made it necessary to harvest quickly. (GCX 12.) They explained that the company was not trying to circumvent

the contact, Schroeder then requested information showing the blocks harvested, the dates of harvest, and the number of hours worked by contractors and by union members in 1981-82. (IV:27.)

The next meeting was scheduled for January 5. Prior to the meeting, Dillon requested a postponement until the 7th and the parties agreed to meet on the 12th. This meeting was cancelled because of fog. (IV:29.)

The parties next met on February 1. Schroeder advised the company's negotiators that the trustees of RFK had advised the union they could guarantee the 55¢ rate through September, but that the 38* the company was presently paying was a "problem" because the trustees were requiring employers to pay increased contributions. Dillon inquired what would happen after September and Schroeder replied the trustees were attempting to keep costs down. (GCX 12; IV:33.)

When discussion turned to subcontracting, Dillon presented more information justifying the company's intensive use of subcontracting in 1982. He also provided some of the data requested by the union. According to the date provided, the company harvested approximately 2,278 acres in 1981 and of these 987 acres were subcontracted; in 1982 the company harvested a total of 2114 acres and of these 819 acres were subcontract.[79/] Thus, the total acreage harvested declined by 7% and the amount subcontracted declined by 10%. Schroeder told him the figures were meaningless since the hours reported by the company for work performed by union

---

79. Dillon also provided the names of the subcontractors.

members had showed a 25% decline. (GCX 12.)

Dillon explained that subcontracting was not the reason for the decline in hours worked; rather, a variety of factors were at work: the 1982 season started later, less shaking was required because the rains beat the fruit from the trees, a considerable number of acres were pulled from production, and tonnage simply varies from year to year. Schroeder continued to press for the data he had previously requested on the blocks harvested, the tonnage produced, and the hours worked by subcontractors in 1981 and 1982.

On wages, Dillon pointed out that the company's 25¢/hour wage offer was in excess of the rate of inflation and that it was even better than what it had granted its other unionized employees because it was across the board and not just applicable to a few classifications, finally, it was effective immediately. He further explained that the dried fruit industry was in trouble and needed to achieve economies.[80/] Schroeder replied that a 25¢ economic package was insufficient, since RFK alone "needed" a 17¢ an hour increase, which left only 8¢hour for wages. The meeting ended with Dillon's agreement to provide more information. The next scheduled meeting was postponed in order to permit Dillon to obtain the information. Dillon promised some data, but told Schroeder he could not give him specific information about blocks. (III:66.)

The parties met as scheduled on February 16. The company had additional information which Indicated, as Schroeder had argued,

---

80. Schroeder testified that the company's other contract had a COLA, higher wages to begin with and a maintenance of benefits clausn. IV 85.

that union members did harvest fewer tons and worked fewer hours in 1982 than in 1981. (OCX 12.) Dillon repeated that this was the result of the later start in harvesting, the fewer acres in production and the bad weather. With respect to the union's request for information, the company could not provide the hours worked by subcontractors since such information was not kept. (III:68-69, IV:35, RX 12.) Dillon said the company predicted an increase in production in 1983 as a result of which the employees who didn't qualify for vaction in 1982, because of the reduction in hours, would once again qualify. Dillon emphasized again that the company would not yield on subcontracting.

On economic issues, the company now offered 17¢ on RFK effective 3/1, and 10¢ on wages, effective 1/1/83. Schroeder again insisted that any RFK increase be retroactive to September. Dillon said no, pointing out again that the walnut market was depressed. He emphasized that the company was not pleading inability to pay, but only stressing that its market position had to be taken into account. Schroeder then asked Dillon some questions about the company's other labor contract which Dillon had earlier used as a basis of comparison. The Union's representatives then caucused and, upon returning, told Dillon the economic proposal was lower than the preceding one because the earlier 25¢ increase spread between RFK and wages would have been effective January 1. (III:71; IV:36.) The company caucused and returned with a new 27¢ proposal to be split between RFK and wages with 17¢ going to RFK and 10¢ going to wages effective January 1, 1983. (III:71; IV:36.) Dillon told Schroeder this was the company's final offer and if the union

resorted to economic action the offer was withdrawn. (RX 12.) Schroeder said the company would be hearing from the union. (GCX 12; III:74; IV:37.)

The parties were not to meet again until June 7, 1983. In the meantime, Dillon began to take part in the ferrous steel industry negotiations and was very busy throughout April and May. (III:87.) Schroeder, however, did not even call Dillon about another meeting until March 24; until then he was busy trying, among other things, to figure out how to respond to Respondent's "final" offer. (IV:38-39.) When Schroeder called Dillon on March 24, Dillon told him he was very busy and couldn't meet until April unless the committee could come to San Jose. (IV:40.) Schroeder rejected the idea because it would cost the workers money. (IV:40.) According to Schroeder, had the parties met at the end of March, he would have made some concession on wages, but he would have stood on the union's RFK and subcontracting proposals. IV: 52-53. Nevertheless, he never responded to Dillon's February 16th offer. Schroeder next called Dillon on April 20 and left a message for Dillon to call him. (III:90; IV:41.) Dillon was not able to return the call until May 9 when he could only apologize for the additional delay and convey his hopes to be able to meet in late May. (III:90.)

Dillon and Schroeder agreed to meet the week of May 23, IV:41; III:91. By this time, according to Schroeder, the union was prepared to offer what it would finally offer when the parties eventually met two weeks later. Shortly before the parties were to meet, Walter called Schroeder to put off the meeting until June 7 by

which time the decertification drive was underway. At the meeting, the union withdrew its subcontracting proposal, proposed a 15¢ wage increase on January 1 (as opposed to its earlier insistence on retroactivity) and 55* on RFK retroactive to September 1, 1982. It withdrew its proposals on all other subjects. IV:72; III:92-94. In terms of economics, then, the parties were now a nickel apart on wages and on retroactivity from September to January on RFK Schroeder estimated the difference between the two proposals was about $6,000. VII:41; IV:88-90.[81]/

The company caucussed. Dillon said the proposal surprised him: the company had been prepared to stick at its final offer but the union's movement was so great, he felt he could neither reject it nor accept it. Generally, he saw the proposal as hopeful. He and Joe Walter, who was also present, promised to take it to the "highest levels" of management and to get back to Schroeder by June 13 at the latest. IV: 44. Walter testified that, although it was clear the proposal would not be immediately very costly, VII:61,[82]/

---

81. The union made the concessions, Schroeder explained, only in order to get a contract. IV:42-43. I do not believe the union's concessions were unrelated to the existence of the decertification campaign. Indeed, at one point Schroeder testified that Respondent's rejection of its offer (to be discussed shortly) made it clear to him that the company was in bad faith, IV: 92, and the concessions might have been designed to test the company's willingness to agree. Indeed, the union filed 1153(e) charges shortly after the company rejected its offer. In a case in which the union's concern to overturn the decertification election has clearly dominated every other aspect of its conduct, I discount Schroeder's testimony. Thus, I also discount Schroeder's testimony that the union was ready to make its final offer at the end of May.

82. Walter testified the costed out the proposal before June 8 when he met with Joe Perucci to discuss it. VII:40.

the company was concerned that if it capitulated on the principle of retroactivity in the funds, precedent for ever rising medical costs would be set, especially in view of the fact that negotiations would soon begin for next year's contract. VII:41-42. Moreover, the company thought the union was in a weakened position because of the filing of the decertification petition and now hoped for sven greatar movement, VII:43-44.[83/] Accordingly, the company rejected the offer on June 13, 1983 in a phone call from Dillon to Schroeder followed by a letter confirming the rejection and offering to bargain further.

B.

Analysis and Conclusions

General Counsel and the union rely on a variety of factors to support their argument that Respondent failed to bargain in good faith. Between the two of them, they characterize Respondent as guilty of the following indicia of bad faith: changing negotiators and, specifically, choosing as negotiator a man without any experience in agricultural labor relations and failing to invest him with sufficient authority to negotiate; failing to provide

---

83. Hart testified he became aware of the existence of the decertification campaign when he was served with the petition on June 10. 1:97'. General Counsel claims that Melehan testified he heard of the existence of the petition from Hart by June 8 when he and Walter met with Perucci to discuss the union's offer. Melehan, however, did not testify he knew of the existence of the decertification campaign when he talked to Perucci on June 8: what he said was Hart mentioned the decertification campaign when he called him 2 or 3 days after the meeting with Perucci at which the commpany decided to reject the proposal. VII:43. Melehan testified that the existence of the decertification campaign gave the company grounds to hope for further concessions, but was not the reason for rejecting the offer. VII:41-42.

information; delaying meetings and being dilatory in submitting counterproposals; adhering to predictably unacceptable proposals and failing to compose differences.

A few claims may be quickly disposed of before turning to the more problematical contentions. Thus, I reject the contentions that Respondent's changing negotiators, its choosing Dillon and circumscribing his role are signs of bad faith. It is true, as General Counsel points out, that our Board has found evidence of. bad faith when a Respondent changed negotiators, taut it was not the fact of the change which evidenced bad faith, but the delay resulting from the change which was critical and, at that, only because it was exemplary of a Respondent's overall dilatory approach to bargaining. Thus, in O. P. Murphy (1979) 5 ALRB No. 63, the Board concluded that Respondent "engaged in many dilatory tactics, causing negotiations to be slow moving and lacking in substance," including the changing of negotiators. In this case, however, Dillon's assumption of Walter's place caused no particular delay in negotiations.[84/] Furthermore, although i can conceive of a case in which selection of a negotiator so unversed in skill and knowledge would be indicative of bad faith, it is impossible for me to understand why General Counsel treats Dillon, a labor relations consultant with nearly a decade of experience, as such a person. Finally, I reject the

---

84. According to Walter, the previous Mayfair contract was negotiated between him and Ben Haddock quickly, almost casually, but when he saw subcontracting emerging as a major issue in the October 22 meeting, he felt he was in over his head and the company needed a professional negotiator. VII:54. The evidence thus contradicts the contention that the company changed negotiators for the purpose o^{c} delay.

argument that Dillon's lack of authority to agree on behalf of Respondent evidences bad faith. Dillon was not so constrained in his role that negotiations were essentially being conducted with an invisible party outside the room. See Paul Bertuccio (1962) 8 ALRB No. 101, ALJD, p. 85.[85/]

---

85. See also Great Western Broadcasting Corporation (1962) 139 NLRB 93 in which the Board affirmed the following statement of the law:

> The failure of employers to confer competent authority upon their bargaining representatives, sufficient to permit their entry into binding agreements, cannot be considered necessarily probative of bad faith. (Citations omitted.) The character of their agent's powers, however, may well be a factor worthy of consideration, when such judgments are required. (Citations omitted.) Herein, the General Counsel contends that the Respondent firm, when negotiations reached their llth hour, demonstrated that the power of its representative had been limited to the transmittal of proposals; such a manifestation is characterized as a signficant part of the totality of Respondent's conduct, demonstrative of its failure to bargain in good faith.
>
> Petersmeyer's testimony, however — which record evidence with respect to the history of negotiations confirms — reveals that spokesmen for the firm were free to discuss all contract proposals and counterproposals, to promote the clarification and limitation of disputed questions thereby, and to propose tentative compromises, subject to later formal presentation as part of a complete written proposal. While the Respondent station did fail or refuse to vest its representatives with plenary powers, they were more than mere couriers. Throughout the negotiations — particularly subsequent to the significant August sessions previously noted — Corbett, together with Respondent's general manager, provided his principals with appraisals of the union demands, and forwarded recommendations calculated to promote a contractual settlement.
>
> Some greater delegation of authority to Respondent's spokesmen might well have expedited negotiations. Employers, however, cannot be faulted for their failure to give bargaining representatives the authority to make final on-the-spot commitments relative to contract proposals, without an opportunity to consult with their principals. (Citations omitted.) Whatever judgment may be warranted by

Indeed, Dillon's authority is not much different in substance than that of Schroeder Who could only tentatively agree[86/] subject to disapproval of the membership. IV:60.

Although the union mades no claim that Respondent failed to provide information,[87/] General Counsel contends that Dillon's delay in providing this information, and his provision of information showing less subcontracting in 1982 than in 1981, indicates bad faith because the information was "meaningless." It is true that Schroeder requested the information on December 3 and did not receive all of it until February 16, and that Dillon first supplied information supporting Respondent's claims, but it is hardly fair to characterize the information he supplied as meaningless. The parties were bargaining over the subcontracting clause because the

---

(Footnote 85 contintued——)

> the record, therefore, with respect to Respondent's course of conduct — considered in various other respects — the station's management cannot be found to have violated its statutory duty by some initial failure to give its collective-bargaining representatives sufficient authority to permit effective contract negotiations.
>
> 193 NLRB at 130.

86. Of course, the fact that Dillon could not even tentatively agree distinguishes his authority from that of Schroeder. In terms of the potential for mischief, the power to tentatively agree subject to rejection, is, in theory, at least as disruptive of the bargaining process as Dillon's inability to commit since it could raise hopes which Dillon's more limited authroity could never raise. Because of this, it seems to me that absent a showing that Respondent intended to limit Dillon's authority for the purpose of frustrating agreement, no conclusion can be drawn from the scope of his authority in this case.

87. Probably because the record is clear that, once Schroeder received sufficient information from the company to confirm the Union's contention that its members worked fewer hours in 1982 than in 1981, its own bargaining position was solidified.

union linked the loss of unit work to an increase in subcontracting. The company's position was not that there was no loss of unit work/ but that the loss was not due to the increased use of subcontractors. The information it initially provided bore directly on that issue; indeed, more so than the information it later supplied which, though it confirmed the loss of hours, did not establish any connection between the diminution of hours and subcontracting.

This brings us to the pace of negotiations. There is no question that negotiations were conducted at a leisurely pace, which the parties' previously amicable relationship does much to explain. Moreover, the parties only met four times from October 22, 1982 until Feburary 16, 1983 when Respondent submitted its final proposal. While not a particularly active schedule, it was certainly sufficient for their real differences (subcontracting and RFK) to surface and to be explored. After February 16, they were not to meet again until June 7, 1983. At least part of the delay was attributable to the union, which didn't reply in any way to the company's final offer until March 24 -- little more than a month — and then only to request a meeting, but not to make a counter-proposal. From March 24 until June 7, Dillon was consistently unavailable, a period of $2^{1/2}$ months. It should be emphasized, however, that Schroeder, too, was less than vigorous since he had a final offer on the table to which he made no direct response.

Our Board has consistently emphasized delay as one factor in determining bad faith. See, e.g., Sam Andrews (1985) 11 ALRB No.

5. Earlier, in Montebello Rose, Inc./Mt. Arbor Nurseries (1979) 5 ALRB No. 64, the Board treated a two month delay in submitting counterproposals as indicative of bad faith. See also McFarland Rose Production (1980) 6 ALRB No. 18, p. 22.[88/]

There is no question, as Respondent points outs, that the union was partly responsible for the pace of negotiations, for it showed little urgency in commencing bargaining and in responding to the company's final offer. Moreover, there is no evidence that Dillon's inability to meet was for other than legitimate reasons; and no credible evidence indicates that Respondent purposefully channelled negotiations toward the shoals of the decertification

88. Our Board appears to put more weight on delay than some commentations believe the national Board does. For example, Gorman emphasizes that under the "totality of circumstances" test delay becomes unlawful-only when there is proof of unlawful purpose behind it:

> The statute in unqualified terms requires the parties to "meet at reasonable times." An employer's refusal to meet with the union at all is obviously a violation of the Act . . . . In most litigated cases, however, the employer does not refuse outright the union's demand for bargaining but rather engages in dilatory tactics which protract the intervals between meetings.
>
> [A number of] decisions condemn the failure to meet at reasonable times as sufficient alone to violate the duty to bargain, but are careful to note that this conduct occurred in the context of other behavior which betokened bad faith, such as other unfair labor practices. Perhaps the decisions rely on "all of the circumstances" because it is otherwise difficult to determine exactly what are the "reasonable times" at which the parties must meet. The elastic concept invites the conclusion that a delay of a certain period can be "reasonable" when done in good faith but not when other indicators suggest that the purpose of the delay is to frustrate negotiations.d

election [89] still in accordance with Board precedent, the delay from the end of March until June 7 cannot be ignored in determining the question of Respondent's bad faith.

The only other factor relied on by General Counsel and the Union is whether Respondent showed any willingness to compose differences,[90] principally in connection with the proposal of June 7 when the Union left its previous subcontracting position and so little money separated the parties. Respondent, of course, was not required to yield no matter how small its econimic differences with the union were, Labor Code section 1155.2, so long as its differences were fairly and honestly held.[91] It is only when the

89. In considering the question of delay, I take no account of Respondent's delay in providing information since it is clear that such delay as is evident had no effect on the parties' positions.

90. Perhaps the most famous statement of the principle appears in N.L. R.. B. v. Reed & Prince Manufacturing Company (1st Cir. 1953) 205 F.2d 131 in which the court stated:

> While the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union, if §8(a)(5) is to be read as imposing any substantial obligation at all.

The facts in this case, however, made it clear that the court's statement about the employer's obligation to make "some reasonable effort in some direction to compose his differences with the union" does not mean that if a union compromises on one important principle, the employer must compromise on the other for in Reed & Prince the employer made no serious effort to bargain at all. In this case, Respondent made serious proposals.

91. Carl Joseph Maggio, Inc. v. Agricultural Labor Relations Board (1984) 154 Cal.App.3d 40, 58.

failure to compose differences indicates an intention to frustrate agreement that it can be held to have bargained in bad faith. In this connection, Respondent's reasons for refusing to yield on RFK do not appear either unreasonable or frivolous. To the extent Respondent's rejection of RFK was based partly on economics, it not unreasonably felt a concession on retroactivity could have a compounding effect since the 55£ rate was only guaranteed through September 1983 and negotiations for a new contract would soon begin again. To the extent Respondent also took into account the possibility that the decertification election might force the union to make greater concessions, its exploitation of the union's apparently diminished ability to exert economic presure does not seem much different from exploiting any other bargaining advantage:

> It is not illegal for a party to take advantage of *a.* shift in economic strength in a bona fide attempt to obtain agreement on original proposals seen as furthering its best interest. Here, after the strike, it was not illegal for Atlas to use its dominant bargaining position in seeking contract terms most favorable to it.
>
> The courts and the board have recognized that an employer's successful weathering of a strike changes the bargaining parties' positions. In N. L. R. B. v. Alva Alien Industries, Inc., 369 F.2d 310, 318, 63 LRRM 2515 (8th Cir. 1966).
>
> Atlas Metal Parts Co. v. NLRB (7th Cir., 1981)660 F.2d 304.

So long as the Respondent did not outright refuse to bargain with the union upon the filing of the decertification petition, there is nothing unlawful in its hoping that the election might facilitate agreement on its terms. Indeed, the union took it into account in making its own concessions. Since the only powerful indication of bad faith is the fact of delay which is not per se conclusive on the question of motive, I recommend the election

objection and the unfair labor practice allegation based upon the refusal to bargain be, and hereby are, dismissed. I further recommend the results of the election be certified.

RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Preventing, limiting, or restraining off-duty employees from entering and remaining on the premises of Respondent's for the purpose of contacting, visiting, or talking to any agricultural employee on the premises.

(b) In any like or related manner, interfering with, restraining, or coercing agricultural employees in their right to communicate freely with union organizers or agents on the premises of Respondent's labor camps.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Agricultural Labor Relations Act (Act):

(a) 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.

(b) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from October 28, 1981, until the date on

-so-

which the said Notice is mailed.

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

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

(e) 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: April 24, 1985

THOMAS M. SOBEL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office by United Farm Workers of America, AFL-CIO, the certified, exclusive bargaining agent for our agricultural employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Sam Andrews' Sons, had violated the law- After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by denying off-duty employees access to agricultural employees at our fields. 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 hereafter prevent, limit, or restrain any organizers or agents from entering and remaining on the premises of our labor camps for the purpose of contacting, visiting, and/or talking with any agricultural employee.

WE WILL NOT in any other manner restrain or interfere with the right of our employees to communicate freely with any union organizers or agents on the premises of our labor camps.

Dated: MAYFAIR PACKING CO.

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 HOT REMOVE OR MUTILATE.