Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MANN PACKING COMPANY, INC., Employer, and ERNESTO GARCIA, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	)	Case No. 88-RD-3-SAL 16 ALRB No. 15

DECISION AND CERTIFICATION

A petition to decertify the United Farm Workers of America, AFL-CIO (UFW or Union) as the certified collective bargaining agent of all the agricultural employees of Mann Packing Company, Inc. (Employer) in the State of California was filed on June 17, 1988, by Petitioner Ernesto Garcia (Garcia).[1/] A decertification election was thereafter conducted among the agricultural employees of the Employer by the Regional Director of the Salinas Region of the Agricultural Labor Relations Board (ALRB or Board) on June 23, 1988. The initial tally of ballots indicated that 11 votes were cast for the Union, 29 for "No Union," and 30 challenged ballots remained unresolved. Thereafter, as provided by Title 8, California Code of Regulations

[1/]All dates refer to 1988 unless otherwise indicated.

section 20363, the Regional Director conducted an investigation into the eligibility of voters who cast the challenged ballots. The Regional Director's revised tally of ballots showed that 11 votes were cast for the Union, 29 for "No Union," and 4 challenged ballots remained unresolved.[2/] The Board affirmed the Regional Director's resolution of the challenged ballots in Mann Packing Company, Inc. (1989) 15 ALRB No. 11.

The Union timely filed 10 objections to the conduct of the election or to conduct affecting the results of the election, of which the Executive Secretary set two for hearing, viz.,

(1) whether the Employer improperly instigated, assisted, supported and/or encouraged the decertification campaign, and

(2) whether Ernesto Garcia is an agent of the Employer, and if so, whether he made improper promises of benefits to unit employees.[3/] A hearing on the objections was held before Investigative Hearing Examiner (IHE) Barbara D. Moore on October 9 and 10, 1989, in Salinas, California. The IHE found that Garcia was an agent of the Employer at two meetings of unit employees held one day and two days prior to the election, and that in that capacity he had made statements and/or promises that impermissibly tended to interfere with the free choice of the unit employees in the upcoming decertification election. She also found that while the Employer had no prior knowledge of the circulation and filing

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[2/] The Regional Director sustained the challenges to 26 ballots cast by employees who had not worked during the eligibility period.

[3/] The first issue consolidated objections 1, 2 and 3, while the second issue consolidated objections 6 and 7.

of the decertification petition by Garcia, and had not assisted him in his decertification efforts, company personnel had also engaged in conduct that independently warranted setting aside the election. The Employer filed exceptions with a supporting brief. The Union filed no exceptions to the IHE's decision, nor did it file a response to the Employer's exceptions.

The Board has considered the recommended decision of the IHE and the exceptions and supporting brief filed by the Employer, and has decided to certify the results of the election.

STANDARD OF REVIEW

The chief means by which the Agricultural Labor Relations Act (ALRA or Act) meets its stated goals of ensuring peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations is by the provision of secret ballot elections in which the free choice of those workers for or against representation by a labor organization can be expressed. Whether that choice is between representation and non-representation or between decertification and a continuation of certification, the Board views the effectuation of employee free choice as one of its fundamental goals.

We therefore review objections to decertification elections with the same rigor with which we scrutinize objections to representation elections. (Jack or Marion Radovich (1983) 9 ALRB No. 45.) We are also mindful that we are required to certify the results of a free and fair election pursuant to the provisions of Labor Code section 1156.3(c) unless we are persuaded

that sufficient reasons exist for us not to do so.[4/] (Arco Seed Co. (1988) 14 ALRB No. 6.)

In effect section 1156.3(c) creates a presumption in favor of certification, whether of a representation or decertification election (see, e.g., Ruline Nursery Co. v. ALRB (1985) 169 Cal.App.3d 247 [216 Cal.Rptr. 162]), which a party objecting to an election bears a heavy burden to overcome. (Bright's Nursery (1984) 10 ALRB No. 18.) Since we have long employed a realistic "outcome-determinative" test and have rejected a highly technical "laboratory conditions" standard for determining whether an expression of employee free choice will be set aside (see, e.g., Triple E Produce Corp. v. ALRB (1983) 35 Cal.3d 42 [196 Cal.Rptr. 518]), a party, whether labor organization or employer, objecting to an election can meet its burden by a showing of specific evidence that misconduct occurred and that this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election. (Bright's Nursery, supra, at pp. 6-7.) We may also consider, as an additional factor, the nature and extent of the alleged misconduct in light of the margin of victory. (See, e.g.,

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[4/] Section 1156.3(c) provides in pertinent part:

> If the board finds, on the record of [an objections] hearing, that any of the assertions made in the petition filed pursuant to this subdivision are correct, or that the election was not conducted properly, or misconduct affecting the results of the election occurred, the board may refuse to certify the election. Unless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election.

Silva Harvesting, Inc. (1985) 11 ALRB No. 12 [election set aside where employer's furnishing of grossly inadequate eligibility list reasonably tended to affect employee free choice, and switch of only 6 votes would have changed election outcome].)

AGENCY OF ERNESTO GARCIA

The IHE found the conduct of Garcia at the meeting held on June 21 with the broccoli crew, and the meeting on June 22 with the entire unit, to be within the rule of Futuramik Industries, Inc._ (1986) 279 NLRB 185 [121 LRRM 1314], and therefore sufficient to support a finding of apparent authority on the part of Garcia to speak and act for the Employer. (IHE's recommended decision (IHED) at pp. 48-50.)5/ In Futuramik the employee-agent had attended three meetings between management and employees at which she had stood with the management representatives, and during at least one of the meetings answered questions from the unit directed to the company's president. (Id. at p. 185.) The employee, moreover, had also acted as the agent of the employer in threatening to report other employees to welfare and immigration authorities if they voted for the union. (Ibid.)

Here, by way of contrast, the uncontroverted record shows that Garcia never stood with management representatives at the meeting and never answered questions from the unit directed to the management group. More fundamentally, however, it is also clear

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5/ The Employer's argument asserting the absence of its knowledge or ratification of Garcia's conduct is without merit in the context of apparent authority. The Employer's knowledge or intentions are immaterial when the inquiry goes to the reasonable impact of the putative agent's conduct on third parties.

from the record that the members of the unit could not reasonably believe, under all the circumstances, that Garcia was speaking or acting for the Employer. (See Futuramik, supra, at id., citing Community Cash Stores (1978) 238 NLRB 265 [99 LRRM 1256] and B-P Custom Building Products (1980) 251 NLRB 1337 [105 LRRM 1368].) As the IHE correctly found, the Employer had no prior knowledge of Garcia's decertification efforts and took no part in them.[6/] Garcia's desire to decertify the Union was, additionally, common knowledge in the unit, this being his third attempt to do so. Garcia, moreover, engaged in no conduct on behalf of the Employer that could independently establish agent status.

We thus conclude, contrary to the IHE, that the law of Futuramik does not justify a finding of apparent authority on the part of Garcia. Rather, the opposite is the case since, under the totality of the circumstances, the unit employees would not have believed that Garcia, even under the version of the events credited by the IHE as occurring at the meetings on the 21st and 22nd of June 1988, was speaking or acting for the employer.[7/]

[6/] Cf. footnote 5, supra. Although an employer's knowledge or ratification of an employee's conduct is not dispositive of a claim of agency based on apparent authority, an employer's lack of awareness of an employee's decertification efforts and lack of participation in those efforts is part of the determination whether, under the totality of the circumstances, employees would reasonably believe another employee to be acting or speaking for the employer.

[7/] Cf. M. Caratan, Inc. (1983) 9 ALRB No. 33 (family relationship to management, low-level supervisorial status, and absence of independent motivation for filing decertification petition create basis for apparent agency status), Community Cash Stores, Inc., supra (employee's emissary role in obtaining other employees'

(fn. 7 cont. on p. 7)

EMPLOYER'S CONDUCT Distribution of

"No Union" Caps

The IHE found that the distribution of caps bearing the logo "No Union" following the meeting between company officials and the entire unit on June 22 constituted an independent basis for setting aside the election. (IHED at pp. 56-62.) Under the credited version of the events surrounding the cap incident Lillian O'Connor, the Employer's employee health and safety director at the time of the decertification election, ordered a sufficient number of caps bearing the "No Union" logo on June 21 to enable each member of the unit to have at least one cap if he or she so desired. At the conclusion of the meeting on the 22nd, O'Connor announced the availability of the caps and went to the back of her vehicle where she had the caps in boxes. The workers congregated around the vehicle as the caps were passed out. O'Connor did not pass among the workers distributing the caps, but merely handed them out to any employee that wanted one. At least one of the employees who testified for the Union also took caps. The employees were apparently eager to get the caps as they were all distributed within two or three minutes. Garcia, among other employees, helped distribute the caps.

(fn. 7 cont.)

statements repudiating union and close connection between employee's predictions of consequences of failure to repudiate union and company's subsequent transferrals create appearance of agency status), and Quinn Company (1984) 273 NLRB 795 [118 LRRM 1239] (no apparent agency where supervisor members of unit had independent personal grounds for favoring decertification and circulating petition).

On these facts the IHE found impermissible intrusion into the employees' free choice because 0'Connor was in a position to observe who did and did not take the free caps. (IHED at p. 62.) In reaching her conclusion the IHE relied on a line of National Labor Relations Board (NLRB or national board) cases which we do not find preferable to our own rule as articulated in Jack or Marion Radovich, supra. Relying on other NLRB precedent, however, in Radovich, we adopted our hearing officer's reasonable adjustment of the competing interests in employer free speech and employee free choice. The hearing officer stated that

> [t]he mere distribution of buttons, unaccompanied by any pressure on employees to express a choice in wearing them, is not an unfair labor practice, Farah Mfg. Co. (1973) 204 NLRB 173, 175, nor is it grounds to set aside an election. Black Dot, Inc. (1978) 239 NLRB 929. There is no evidence in this case that any of Respondent's supervisors or agents forced buttons on employees.
> (Administrative Law Officer's Decision at p. 52; emphasis in original.)[8/]

The evidence credited in this case by the IHE likewise shows that neither **O**'Connor nor harvest manager Rudolpho Cazarez, or any other supervisor, forced the "No Union" caps on the employees. On the contrary, the employees sought them out for themselves. Under

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[8/] In a footnote to the Administrative Law Officer's decision which was omitted from the above citation, he distinguishes the situation found in Pillowtex Corporation (1978) 234 NLRB 560 [97 LRRM 1369], a case relied on in part by the IHE in finding conduct sufficient to warrant setting aside the election. In Pillowtex the employees were "approached by a supervisor and offered buttons." (Administrative Law Officer's Decision at p. 52, fn. 43; emphasis in original.) The Administrative Law Officer, whose analysis on the insignia issue we adopted, clearly found the unforced distribution of company campaign materials different from the impermissible conduct in Pillowtex.

the clear principles of Radovich, which we find controlling, there is no violation of employee free choice in O'Connor's conduct sufficient to warrant setting aside the election. We therefore reject the IHE's contrary recommendation.[9/]

Impermissible Promises of Benefit

The IHE also found that supervisor 0'Connor had stated at the meeting of the entire unit on the 22nd that it "would be better" for the crew, and that the crew "would have a lot more work" if the Union were decertified. (IHED at p. 54.) The agency status of O'Connor was clearly established. As it is well settled that such promises of benefit are proscribed when made by an employer or its agents, the IHE concluded that O'Connor's statements furnished yet another basis upon which the election must be set aside.[10/] We disagree as we find the weight of the evidence preponderates against a finding that 0'Connor made the illegal promises of benefit.

The proof that such statements were made by O'Connor consists solely of the testimony of Union witness Salvador Martinez Avalos. Martinez Avalos, however, made no mention of these statements in his declaration given two days after the

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[9/] We also reject the Employer's contention that the absence of a timely filed objection formally alleging such conduct prevented the IHE's finding of a violation of employee free choice as a result of such conduct. Objection 1 set for hearing is broad enough to reach such conduct. Moreover, the Employer clearly litigated the propriety of the distribution of caps by 0'Connor.

[10/] The conjunction of both alleged statements by O'Connor, i.e., that things "would be better" and that the crew "would have a lot more work" renders inapposite the Employer's citation to NLRB precedent on employer statements that are not sufficiently specific to raise an issue of an unlawful promise of benefit.

election. Moreover, no other witnesses corroborated his testimony that such statements were made by O'Connor or anyone else. Nevertheless, the testimony having been given by Martinez Avalos, the burden shifted to the Employer to rebut it.

We believe the Employer did effectively rebut it for the following reasons. Initially, we reject the IHE's negative credibility assessment of the testimony of supervisors O'Connor and Cazarez due to her finding that the meeting of the entire unit on the 22nd commenced at approximately 9:00 a.m. rather than the late morning time testified to by O'Connor and Garcia.[11/] The IHE, however, neglected to consider the fact that the contemporaneous declarations of Union witnesses Perez Herrera, Abel Mora, and Hilario Alcaraz all indicated a late morning starting time for the meeting, rather than a 9:00 a.m. starting time. Moreover, Union witness Alcaraz, the Union's representative at the Employer's operations at the time of the decertification election, testified that the meeting at which the entire unit was present i.e., on the 22nd, commenced "around noon, close to noon,

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[11/]The significance of the starting time of the meeting consists in its relationship to the Employer's asserted reason for the meeting. The Employer contended that the meeting on the 22nd was for the purpose of communicating to the unit members information about the time and place of the decertification election obtained at the pre-election conference the same morning. If, as the IHE found, the meeting commenced about 9:00 a.m., it would have started and finished before that information would have been available at the pre-election conference that began in the Salinas ALRB regional office at or about 9:30 a.m. and lasted between one-half hour and an hour. The Employer's asserted reason for the meeting would then have been demonstrated to be false, allowing the inference of a different and improper purpose, namely, to give Garcia a platform to campaign for decertification of the Union.

could have been twelve or 11:30, or something like that." While the conflict between the Union witnesses' contemporaneous declarations and their testimony was not considered by the IHE, we find that conflict highly relevant for purposes of credibility assessment. (See, e.g., Krispy Kreme Doughnut Corp. v. NLRB (6th Cir. 1984) 732 F.2d 1288, 1290-1291 [116 LRRM 2251].) We also find Alcaraz's testimony as to a late starting time, which was unmentioned by the IHE, highly probative in favor of the later time.[12/] In sum, as between the Union witnesses' contemporaneous declarations indicating a late starting time, and their testimony based on recollection over 16 months after the event indicating an early starting time, we credit the more contemporaneous declarations; we credit Alcaraz's testimony and declaration as to a late starting time; and we credit 0'Connor's and Garcia's testimony as to a late starting time since it is consistent with the testimony of the Union's own witnesses. We therefore find that the preponderance of the evidence indicates a later, rather than an earlier, time for the meeting on the 22nd when the entire unit was present.[13/]

[12/]We reject any negative inference as to supervisor Cazarez's credibility drawn by the IHE based on his initial statements that he recalled the meeting of the entire unit as starting at about 9:00 a.m., and his subsequent uncontradicted statement that the unit meeting occurred after the pre-election conference. We believe that Cazarez's honest testimony of a poor memory due to advancing age sufficiently explains his confusion as to the starting time.

[13/]The Employer's argument that the starting time of the all-unit meeting is controlled by a stipulation entered into on the first day of the hearing is erroneous. The parties stipulated that "the

(fn. 13 cont. on p. 12)

Since that is so, we find no reason to discredit Cazarez and O'Connor, as the IHE did, based on the starting time of the meeting. Their testimony as to the content of the meeting on the 22nd where the entire unit was present, including their denials that either one of them made promises of benefits to the unit in the event the Union were decertified, is therefore credible unless discredited for other reasons.[14/] As they testified that neither of them made impermissible promises of benefit and their denials were corroborated by credible testimony from the Employer's other witnesses, we find that the preponderance of the

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(fn. 13 cont.)

Employer paid the broccoli crew for some bins for time that the crew spent at a meeting on June 21, 1988, which occurred at approximately 10:30 in the morning, and lasted for approximately 15 minutes, where harvesting supervisor Rudy Cazarez and personnel director Lil O'Connor were present." The parties subsequently agreed that the date was the 21st or the 22nd of June. Unfortunately, under both parties' versions of the facts O'Connor and Cazarez met with the broccoli crew, alone or together with the other unit employees, on both days, and compensation was provided to the broccoli crew for the meetings on both days as well. Thus the stipulation is not specific enough to dispose of the issue of the starting time of the meeting on the 22nd. No party asserts that the meetings began at the same time on both days.

[14/]We find no reason to discredit Cazarez and O'Connor based either on their responses to questioning from unit members at the meeting on the 22nd with the entire unit, or on their selection of the time at which to notify the unit of the upcoming election. Their wary response to questions from the Union representative Alcaraz as to negative impacts on present benefits or policies of a decertification decision is understandable, and Cazarez's partial inability to recall Alcaraz as the source of such questioning is insignificant in light of his admittedly poor memory. We find nothing irregular in their waiting until notified by the Board that sufficient signatures had been gathered on the petition to justify holding an election before notifying the unit that an election would occur. We also reject the IHE's discrediting of 0'Connor on the basis of bias in favor of the Employer after she had left the company's service. (See David Freedman & Co., Inc. (1989) 15 ALRB No. 9 [employee no longer employed by respondent company truly disinterested].)

evidence is against the making of impermissible promises of benefit by O'Connor.[15] We therefore reject the IHE's contrary finding.

As the Union has failed to bear its burden of demonstrating conduct that reasonably tended to interfere with employee free choice, and in view of the wide margin of victory of the "No Union" vote, we will follow our statutory mandate to certify the results of that choice.

CERTIFICATION

It is hereby certified that as a result of the election held among the agricultural employees of Mann Packing Company, Inc. on June 23, 1988, a majority of the valid ballots having been cast for "No Union," the United Farm Workers of America, AFL-CIO, lost its status as, and therefore no longer is, the certified representative of those employees for purposes of collective bargaining as defined in Labor Code section 1155.2(a) concerning

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[15] We reject any diminution of credibility in the Employer's worker witnesses based solely on their participation in decertification efforts against the Union. In the absence of some actual proof of special affection for, or particular benefits from, their employer, employees who do not desire union representation are not to be discredited merely because of their attitude toward the union. (Krispy Kreme Doughnut, supra, at p. 1292.)

employees' wages, hours, and working conditions DATED:

November 1, 1990

BRUCE J. JANIGIAN, Chairman[16/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[16/] 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.

Mann Packing Co., Inc. (UFW)

Case No. 88-RD-3-SAL
16 ALRB No. 15

CASE SUMMARY

Background

A petition to decertify the United Farm Workers of America, AFL-CIO (UFW or Union) as the certified collective bargaining representative of all the agricultural employees of Mann Packing Co., Inc. (Employer) in the State of California was filed on June 17, 1988, by petitioner Ernesto Garcia. A decertification election was thereafter conducted among the agricultural employees of the Employer by the Regional Director of the Salinas Region of the Agricultural Labor Relations Board (ALRB or Board) on June 23, 1988. The initial tally of ballots indicated that 11 votes were cast for the Union, 29 for "No Union", and 30 challenged ballots remained unresolved. Thereafter, as provided by Title 8, California Code of Regulations, section 20363, the Regional Director conducted an investigation into the eligibility of voters who cast the challenged ballots. The Regional Director's revised tally of ballots showed that 11 votes were cast for the Union, 29 for "No Union", and 4 challenged ballots remained unresolved. The Board affirmed the Regional Director's resolution of the challenged ballots in Mann Packing Company, Inc. (1989) 15 ALRB No. 11.

Investigative Hearing Examiner's Decision

The Union timely filed 10 objections to the conduct of the election or to conduct affecting the results of the election, of which the Executive Secretary set two for hearing, viz., (1) whether the Employer improperly instigated, assisted, supported and/or encouraged the decertification campaign, and (2)-whether Ernesto Garcia was an agent of the Employer, and if so, whether he made improper promises of benefits to unit employees. A hearing on the objections was held before Investigative Hearing Examiner (IHE) Barbara D. Moore on October 9 and 10, 1989, in Salinas, California. The IHE found that Garcia was an agent of the Employer at two meetings of unit employees held one day and two days prior to the election, and that in that capacity he had made statements and/or promises that impermissibly tended to interfere with the free choice of the unit employees in the upcoming decertification election. She also found that while the Employer had no prior knowledge of the circulation and filing of the decertification petition by Garcia, and had not assisted him in his decertification efforts, company personnel had also engaged in conduct that independently warranted setting aside of the election. The Employer filed exceptions with a supporting brief. The Union filed no exceptions to the IHE's decision, nor did it file a response to the Employer's exceptions.

Board Decision

The Board found that Garcia was not clothed with apparent authority to speak or act for the Employer. Following Futuramik Industries, Inc., (1986) 279 NLRB 185 [121 LRRM 1314] the Board determined that even if Garcia had made the statements attributed to him by the union's witnesses, he had not stood with the Employer's management personnel during the meetings in question, nor had he answered questions from the unit directed to the management personnel. Under Futuramik, supra, therefore, he would not have been perceived by the members of the unit to be acting on behalf of the Employer. The Board noted its conclusion was confirmed by the facts that it was common knowledge within the unit that Garcia was attempting to decertify the Union, the present being his third attempt to do so, that the Employer had no prior knowledge of Garcia's present decertification efforts and had not assisted him therein, and that Garcia had engaged in no other conduct that could be construed as acting on behalf of the Employer. Following its decision in Jack or Marion Radovich (1983) 9 ALRB No. 45 the Board found the uncoerced distribution of caps bearing the logo "No Union" among the members of the unit did not warrant setting aside the results of the election, and found that the preponderance of the evidence was in favor of company health and safety director Lillian O'Connor's not having made impermissible promises of benefit to the unit members. The Board therefore found that the Union had not met its burden, and ordered the results of the decertification election to be certified.

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

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STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

In the Matter of:

MANN PACKING COMPANY, INC. Employer, and ERNESTO GARCIA, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargaining Representative.	)	Case No. 88-RD-3-SAL

Appearances:

Ernesto Garcia
Petitioner

Terrence R. O'Connor
of Dressier & Quesenbery
for the Employer

Emilio Huerta
of the United Farm Workers
of America, AFL-CIO
for the Union

Before: Barbara D. Moore
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

BARBARA D. MOORE, Investigative Hearing Examiner:

I. PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On January 22, 1976, pursuant to an election conducted by the Agricultural Labor Relations Board (hereafter "ALRB" or "Board"), the United Farm Workers of America, AFL-CIO (hereafter "UFW" or "Union") was certified as the exclusive bargaining representative of all the agricultural employees of Mann Packing Company, Inc. (hereafter "Mann," "Company" or "Employer") in the state of California, excluding employees in the Employer's off-the-farm packing shed. (Mann Packing Company (1976) 2 ALRB No. 15) The UFW was recertified on January 30, 1986, following a decertification election wherein the Union obtained a majority of the votes cast.[1]

On June 17, 1988, yet another Petition for Decertification (hereafter "Petition")[2] was filed with the Board. The petitioner was Ernesto Garcia a mechanic employed by the Company. Pursuant to the Petition, the Board held an election among all unit employees on June 23, 1988. The Tally of Ballots showed the following results:

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[1] and other facts relating to the procedural history of this case are contained in the Board's Decision in Mann Packing Company, Inc. (hereafter "Mann Packing") (1989) 15 ALRB No. 11 of which I take administrative notice.

[2] I take administrative notice of the Petition and other salient documents in the Board's official files in the instant matter, including the Objections To Conduct Of The Election And Conduct Affecting The Results Of The Election filed by the UFW on June 28, 1988.

UFW	11
No Union	29
Challenged Ballots	30
Void Ballots	0
TOTAL	70

Since the number of challenged ballots was sufficient to determine the outcome of the election, the Regional Director of the Board's Salinas office investigated the challenges and issued a Challenged Ballot Report to which the Union filed objections. The Board affirmed the Regional Director's decision,[3] and, on August 14, 1989, he issued a Revised Tally of Ballots which showed the following results:

Union	11
No Union	29
Unresolved Challenged Ballots	4
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Meanwhile, on June 28, 1988, the UFW had timely filed objections to the conduct of the election. Since the remaining challenged ballots would not change the election results, the Board, on September 15, 1989, issued its order setting various of the objections for hearing,[4] to wit:

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[3]Mann Packing, supra, 15 ALRB No. 11.

[4]See, Order Setting Objections for Investigative Hearing; Order Dismissing Objections, Notice of Opportunity To File Request For Review (hereafter "Order") dated September 15, 1989.

1. Whether the Employer improperly instigated, assisted, supported and/or encouraged the decertification campaign (Objections Nos. 1, 2, and 3); and

2. Whether Ernesto Garcia is an agent of the Employer, and, if so, whether he made improper promises or (sic) benefits to unit employees. (Objection Nos. 6 and 7.)

I conducted a hearing on these issues in Salinas, California, on October 9 and 10, 1989.[5] All parties appeared either personally or by representative and participated in the hearing. Only the Employer filed a post-hearing brief.[6] Based on the entire record, including my observations of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

II. JURISDICTION

Mann is an agricultural employer within the meaning of section 1140.4(c)[7] of the Agricultural Labor Relations Act (hereafter "ALRA" or "Act.") The UFK is a labor organization within the meaning of section 1140.4(f) of the Act, and Ernesto Garcia is an agricultural employee within the meaning of section 1140.4(b).

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[5]References to the hearing transcript will be denoted as Volume; page.

[6]TheUnion requested an extension of time to file its brief which request was denied as untimely by the Board's Executive Secretary since it was not filed prior to the due date for the brief as required by the Board's rules. (Cal. Code Regs., tit. 8, section 24080(b)).

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

III. COMPANY OPERATIONS

The Company's operation is located in the Salinas Valley. Mr. Don Nucci and Mr. Bill Ramsey are owners of the Company. Mr. Rudolpho (Rudy) Cazarez is harvest manager. At the time of the election,[8] ms. Lil O'Connor was the Company's health and safety director. She also functioned as the personnel officer and, as such, was responsible for labor relations.

At the time of the election, there was only one. harvest crew, the broccoli crew, which was supervised by foreman Abel Munoz and was composed of 28 employees. There were also approximately 13 tractor drivers and irrigators employed at that time, as well as two mechanics, Ernesto Garcia, who is the decertification petitioner, and David Maturino. (II:20; 69.) The bargaining unit consisted of all of the above classifications.

IV. ISSUES PRESENTED

The UFW contends that the election should be set aside because the Company instigated and/or improperly assisted the decertification campaign. In support of this contention, the Union asserts that the Company:

(1) allowed Mr. Garcia to conduct his decertification activities during working time for which time he received his normal salary;

(2) permitted him to use the company pickup truck assigned to him while engaging in such activities;

(3) gave him the opportunity to speak to bargaining unit employees at two meetings convened by Mr. Cazarez and Ms.

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[8]By the time of the hearing, Ms. O'Connor had ceased working at Mann; to all appearances the parting was amicable.

O'Connor, where he and they urged the workers to vote against the Union and promised the employees benefits if they rejected the Union;

(4) purchased caps imprinted with the slogan "No Union" which were distributed to employees by Mr. Garcia and Ms. O'Connor at one of the aforementioned meetings.

The Union asserts that the foregoing conduct was not only improper but also establishes that Mr. Garcia acted as an agent of the Company and that therefore the filing of the Petition was invalid. Finally, the Union asserts that Ms. O'Connor's admonition to unit employees on the morning of the election to vote "No Union" is additional evidence of the Company's active anti-Union role in the campaign and supports the Union's claim that the Company overstepped the line of a permissible "No Union" campaign and improperly encouraged and supported the decertification.[9]

The Company denies that it acted improperly in any way and specifically denies:

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[9]Counsel for the Employer objected to admission of this evidence arguing that it was irrelevant because (1) Mr. Garcia was not present at the incident, which, I note, Ms. O'Connor did not deny occurred, and (2) because it pertained to Objection Number 8 which the Executive Secretary dismissed on the ground that there was no evidence that Ms. O'Connor made any statements on the occasion in question which "had a tendency to intimidate, coerce or frighten voters into voting for the no-union choice." (See, Order, and, also, the hearing transcript at I:21-22; 109-III.)

I ruled the evidence was admitted not for the purpose of showing intimidation or coercion regarding the conduct objected to in Objection 8 (i.e., blocking the employees' entrance into the fields) but rather as relevant to those objections which were set for hearing, i.e., that the Company actively campaigned against the Union and that the totality of the circumstances demonstrated that the Company crossed the line of permissible campaigning and improperly assisted the decertification efforts of employees.

(1) that Mr. Garcia acted as its agent;

(2) that its supervisors made any promises;

(3) that the Company instigated the decertification campaign;

(4) that Mr. Garcia addressed the employees at the meetings called by the Company; and

(5) that Mr. Garcia distributed or helped distribute the "No Union" caps which the Company admittedly purchased.

The Company further takes the position that Mr. Garcia did not campaign on company time but argues in the alternative that, if he did, the Company did not know about it. Finally, the Company admits that Mr. Garcia used his company pickup truck when he campaigned but contends that this use did not constitute improper support because all employees with company vehicles were allowed unrestricted personal use of the vehicles, and the Company never attempted to monitor or regulate such personal use.

V. THE PETITIONER, ERNESTO GARCIA

Mr. Garcia has been employed as a mechanic at Mann since approximately 1974. In the past, Mr. Garcia was a member of the UFVO ranch committee, and he helped negotiate the first contract between the Company and the UFW. (II:181.) He was also the UFW shop steward for the mechanics at Mann. (II:195.)

He testified this is the third tine that he has tried to decertify the UFW at Mann. He stated his most recent previous effort was three or four years prior to this one. (II:216-217.)

Mr. Garcia's work at the time of the decertification campaign is relevant to several issues. At the times material

herein, his duties as a mechanic included repairing company machinery or vehicles in the field and performing work in the mechanics' shop. There is no evidence he had any supervisory duties.

He was assigned a company pickup truck and allowed to drive it home because, if necessary, he was expected to respond to repair calls when he was off duty. He testified without contradiction that there were no restrictions on his personal use of the truck.[10] In fact, he testified he had used his company pickup for Union business when he was shop steward.

Mr. Garcia was paid by the hour. There was a time clock in the shop, and Mr. Garcia punched his timecard when he arrived in the morning and when he left at night. He was paid for the entire time noted on his timecard including a half hour lunch and two fifteen minute breaks each day.[11]

One of the issues is whether the Company allowed Mr. Garcia to circulate the petition and campaign for decertification on work time. Consequently, it is necessary to

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[10]Lil O'Connor and Rudy Cazarez were also assigned company vehicles Mr. Cazarez estimated approximately 18 to 20 Company employees, including David Maturino, the second mechanic, were assigned company vehicles. Both Ms. O'Connor and Mr. Cazarez testified there was no restriction on the personal use of the vehicles.

[11]His lunch time was normally about noon, but he testified he typically ate "lunch" during his morning break (about 10:30 a.m.) and was then free to use his half hour at noon as he saw fit. (I:139.)

examine his timecards because they show the hours he worked and was paid for. There are discrepancies between the timecards themselves and the testimony "about them which requires some explanation.

Bonnie Buel (also spelled "Boel" in the transcript) prepared the payroll for the Company during the times at issue herein and has done so for the past 19 years. (I:36.) Ms. Buel testified that Union Exhibits[12] 1 through 4 are the timecards for Mr. Garcia and Mr. Maturino for the weeks ending June 7, 14, 21 and 28, 1988.[13] She also testified the time clock used by the mechanics was inaccurate as far as the date display but accurately recorded the hours worked. (I:38.) She further testified that it is nonetheless possible to determine the correct date for each day reflected in U.Exs. 1-4 by referring to the week ending date.

Upon examination of the records, however, I find that Ms. Buel's testimony raises certain problems. U. Ex. 1 is the time card for the week ending June 7, but according to the 1988 calendar, June 7 was not a Sunday as reflected on the card but a Tuesday. While it is not necessarily unusual in agriculture to have a pay period run from a Wednesday (June 1) through a Tuesday (June 7), it would be unusual for employees to work a consistent

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[12]Hereafter, Union exhibits will be designated as U. Ex. number and Employer exhibits as Emp. Ex. number.

[13]A11 dates referred to hereafter are 1988 unless otherwise specified.

six day work week which regularly includes Sundays as a work day and Tuesdays as a non-work day as would be the case if the week ending dates on these exhibits are accurate.

Further, according to Ms. Buel's testimony, the last day reflected in U.Ex. 4 is June 28. Counting back, June 23 is reflected as a Tuesday whereas in fact it was a Thursday. Another problem is evident because if one counts back to the 21st on U.Ex. 3, it does not reflect that Mr. Garcia worked that day. June 21 is the date that O'Connor and Cazarez met with the broccoli crew. While the Company disputes the Union's claim that Mr. Garcia was present at the meeting, it has never claimed that Mr. Garcia was absent from work that day.[14]

In view of the above, it is apparent that the inaccurate date stamp is not the only error in these records. After considering various possible interpretations, I conclude that the Monday reflected in U.Ex. 1 refers to the Monday which fell during the week of June 1 which was May 30. In that case, the work week would be Monday through Saturday which is the norm in agriculture; June 23 would fall on a Thursday as it in fact did;[15] June 21 would be a work day for Mr. Garcia; and, finally, the day Mr. Maturino

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[14]Indeed that would be most unlikely since Mr. Garcia testified that the other mechanic, David Maturino, was on vacation that week and that he (Garcia) was responsible for all the mechanical work on the ranch.

[15]See, U.Ex. 4 which would end on June 26 rather than June 28.

worked, as reflected in U. Ex. 3, would be June 15 which comports with testimony elicited by Respondent's counsel from Ms. Buel. (I:45.)

VI. THE BEGINNING OF THE DECERTIFICATION CAMPAIGN

A. Initiation of the Decertification Effort

Ernesto Garcia and three fellow workers, Ruben Mejia (sometimes spelled "Majia" in the transcript), Serafin Vargas and Rigoberto Perez, were the main employees involved in the decertification campaign. Mr. Mejia, who was no longer working at Mann by the time of the hearing, did not testify. Although both Mr. Perez and Mr. Vargas were more active in the campaign than they admitted during their testimony, it is clear that Mr. Garcia was by far the most active. (I:25; 162; II:101; 120 123; 216.)

There was no obvious event which precipitated the instant decertification effort. Ms. O'Connor and Hilario Alcaraz, the paid UFW representative at the Company (and a member of the broccoli crew), both testified that only the typical labor relations problems were evident prior to the filing of the petition. However, as noted earlier, Mr. Garcia has previously attempted to decertify the Union.

Mr. Garcia flatly denied receiving any aid or advice from Company supervisory or management personnel prior to his filing the petition. (II:193-194.) Perez and Vargas made similar denials. (II:105: 111; 123.)

The only Company supervisory/management personnel to testify were Rudy Cazarez and Lil O'Connor. They each testified

they first became aware of the petition after it was filed, and they denied any role in initiating the decertification effort; however, each of them was unsure when and how they found out about the filing. (II:7; 30-33; 76-77: 82; 88.) In view of the fact that they were in charge of the entire campaign on behalf of the Company, I find their uncertainty curious. There are other aspects of their testimony on this issue which are also odd and sometimes contradictory. (See discussion, below at pp. 26; 46).

B. Circulation and Filing of the Petition

The Union asserts that the Company provided financial assistance to Mr. Garcia in that it allowed him to collect the necessary signatures[16] and file the petition on Company time using his company pickup truck. There is no dispute that he used the company truck for these and virtually all of his decertification activities and that he did not pay for gasoline or otherwise reimburse the Company for such use.

Francisco Herrera Perez, Abel Mora and Salvador Martinez Avalos are all long-time workers with the Company; Mr. Perez and Kr. Martinez have worked at Mann since 1974, and Mr. Mora began work there in 1975. They are all members of the broccoli crew.

They were called by the Union, and each of them testified that their first awareness of the decertification campaign was on

[16]A decertification petition must be signed by 30 percent or more of the employees in the bargaining unit. (Section 1156.7(c))

June 16 when Mr. Garcia came to the company labor camp[17] and circulated the petition among the crew. All agreed that this occurred after the crew had finished work for the day although their estimate of the exact time varied from 1:00 p.m. to 3:00 p.m. (I:6-7; 82-83; 115.)

Mr. Garcia's testimony regarding when he circulated and filed the petition was often vague and frequently contradictory. Initially, he testified he collected the signatures during working hours. (I:138.) Then, he changed his testimony and said he had gone to the crew during his lunch hour. (I:140.) Later, he again changed his testimony and stated that he was on a parts run to Salinas and happened to see the company bus going into the camp so he stopped to circulate the petition. (II:183; 198.)

After he had finished circulating the petition,[18] Mr. Garcia gave it to Ruben Mejia who promised to obtain more signatures. (II:186-187.) Garcia returned to the camp the next afternoon, June 17, to retrieve the petition from Mejia.[19] He testified this was after the crew had finished work and he thought he also had finished work for the day. (II:198; 201.)

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[17]The camp served as a gathering place from which company buses transported the broccoli crew members to the fields in the morning and to which the buses returned the workers at the end of the work day.

[18]He estimated he spent only 5 to 10 minutes at the camp. None of the other witnesses testified how long he was there.

[19]None of the UFW witnesses testified about this second visit.

For the reasons set forth below, I find that Mr. Garcia's visits to the crew on both June 16 and 17 were on Company time for which he was paid. I consider first the events of June 16.

I conclude that Mr. Garcia went to the camp at the end of the crew's work day. I do not credit his testimony that he went to the crew during his lunch break. From the context, I infer he means the noon hour, in which case this testimony contradicts his more credible testimony elsewhere, on another issue, that the crew ate lunch in the field. Thus, they would not have been at the camp during the noon hour.[20]

Nor do I credit his testimony about the parts run. Initially, he testified he did not recall whether he had gone to Salinas for parts during the week in question. Then, he testified that he must have done so because the other mechanic was on vacation. Only then did he finally testify that he in fact was on a parts run when he stopped to circulate the petition.[21]

I do credit the testimony of Francisco Perez, Mora and Martinez. Their testimony was not marred by the inconsistencies

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[20]There is no evidence that he took his lunch hour late that day so that it would have coincided with the time the crew finished work. Moreover, his manner suggested that he was merely trying to give an explanation to counter his initial testimony that he visited the crew on his work time.

[21]watching him testify, it was clear that he picked up the idea from counsel's line of questioning. Moreover, this was his third version of events which obviously causes me to doubt its truth. I note that in this version, he acknowledged the crew was returning to the camp at the end of its work day, which contradicts his testimony elsewhere that the visit occurred during lunch. (I:140; 198.)

and contradictions which characterized his accounts. They all testified to the same essential facts but did so in words which seemed their own and not as if following a script prepared for them. Further, here and elsewhere, they showed no propensity to exaggerate or to tailor their testimony.[22]

Although the crew had finished work for the day, Garcia was still on Company time for which he was paid.[23] In his initial testimony, he admitted that this was the case, and he also stated generally that he received his normal wages for the hours he spent campaigning. (I:136; 138; 146-147.) Further, in this specific instance, even if his visit occurred at the latest time estimated by the Union's witnesses, the evidence shows he was on duty and was being paid[24] since his timecard for June 16 (U.Ex. 3)

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[22]For example, Mr. Mora testified that although he saw Mr. Garcia at the camp, he readily acknowledged he did not hear what Garcia said. (I:83.) He made no effort to embellish his testimony as witnesses sometimes do. Salvador Martinez showed similar restraint when describing both the events of the 16th as well as another visit by Mr. Garcia to the camp on June 22. (II:115; 123.)

[23]Even if I were to credit his testimony about the parts run, it would not change my ultimate finding because the parts run would have been on paid work time because it was part of his job duties and he had not punched out for the day yet. Thus, he would have been paid for the time he spent at the camp.

[24]The Employer argues in its brief that Garcia's visit should be considered his break time--meaning one of the two fifteen minute paid breaks to which he was entitled. There is no evidence to support this argument. Mr. Garcia did not testify he was on his break; nor is there any other evidence to support such a finding. In fact, as already noted, Garcia initially testified he conducted his efforts in support of the decertification campaign on paid work time.

shows that he was credited with working until 4:05 p.m.[25] There is no dispute that he was paid in full for the hours reflected in the timecards.

With regard to June 17, Mr. Garcia has acknowledged that his visit to the crew occurred at the end of their work day. I find that Mr. Garcia had not yet finished work but was still on paid work time.

The petition and accompanying proofs of service bear a time clock stamp from the Salinas regional office which indicates the petition was received there on June 17 at 4:15 p.m. The proofs of service attached to the petition and signed by Mr. Garcia attest that he personally served the petition on the employer at 3:30 p.m. on June 17 and on the UFW at 3:40 the same date.[26]

Mr. Garcia's timecard for June 17 (U.Ex. 3) indicates that he worked, and thus was paid, until 4:00 p.in.[27] In order to

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[25]Here and elsewhere I have identified dates on the timecards according to the interpretation of these exhibits which I explained previously. I note that even according to the dates given by Ms. Buel, Mr. Garcia worked until 4:00 p.m. Thus, in either case, he solicited the signatures during his paid work time.

[26]Pursuant to Cal. Evidence Code, sections 1220 and 1280, the proofs of service accompanying the petition are admissible to prove the facts stated therein.

[27]Even if one uses the dates testified to by Ms. Buel, U. Ex. 3 reflects that he worked and was paid until 4:01 p.m. In fact, the only day that week that he is not credited with having worked until at least 4:00 p.m. is the last work day, and that cannot reasonably have been June 17.

have served and filed the petition when he did,[28] he must have gone to the camp to pick up the petition before 4:00 p.m. Thus, his visit occurred on paid work time. The same is true of his service of the petition.[29]

VII. MR. GARCIA'S INDIVIDUAL CAMPAIGN ACTIVITIES

A. Visits to the Labor Camp

Francisco Perez testified that on the afternoon of June 21, Mr. Garcia was waiting at the camp when the crew arrived at the end of its work day. He told the crew members that if they rejected the Union, the Company would provide enough work for two or three crews rather than only the one crew employed at the time of the decertification campaign.

Garcia further told them that if the Union were gone, the Company would start a field cut and pack operation. Mr. Perez

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[28]Serafin Vargas testified that they served the petition on the Union after filing it at the ALRB office. He could not recall when they served the Company. (II:124-125.) I do not credit Mr. Vargas' recollection. The proofs of service attest that Garcia served the petition prior to filing it. Further, the times stated therein by Mr. Garcia are likely to be more accurate than Vargas' recollection since Garcia made those statements at the time of the events.

[29]Mr. Garcia 's punch out time on June 17 is handwritten rather than stamped by the time clock. There is no evidence why this occurred. This fact obviously raises the question whether Mr. Garcia was physically present at 4:00 p.m. But whether he returned to punch out after serving the petition and before filing it, or whether he signed out and left work before 4:00 p.m. is not necessary to resolve. The important fact is that he is credited with having worked until 4:00 p.m., whereas he obviously went to the camp before that time in order to retrieve the petition and serve a copy of it at the UFW's office in Salinas at 3:30 p.m.

explained the significance of instituting such an operation is that it would result in more hours of work for the crew and more people being hired.[30] (I:14.) Garcia also told the crew that if the Union were gone they would be able to obtain a better contract with the Company with higher pay than the Company had negotiated with the UFW. (I:14.)

According to Mr. Perez, Mr. Garcia again came to the labor camp the next afternoon, June 22, about 3:00 p.m., after the crew had finished work for the day. (I:18-19.) He could not recall what Mr. Garcia had said to the crew.

Salvador Martinez did not recall Mr. Garcia visiting the labor camp on June 21 but did recall that he came to the labor camp on the afternoon of June 22 after the crew got out from work. Mr. Garcia told the crew he wanted to talk to them because the election was the following day.

He urged the crew members to think about their vote. He promised that if they voted to get rid of the Union that he would form a committee to negotiate with the Company. He further promised that, if the Company did not negotiate a good contract with the workers, he would work to bring the Union back. (I:123.)

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[30]After the election, the Company did add a field cut and pack operation to the machine harvest it had been using at the time of the election. (I:16.) There was no evidence, however, whether as a result of this change the broccoli crew had more hours of work or whether the Company was employing more workers than during the election period.

Mr. Garcia acknowledged he went to the labor camp twice and talked to the crew. He could not recall the dates and testified they might have been June 21 and 22. (I:142-143; 147.) He also admitted that on one occasion he told the workers he would form a committee so they all could negotiate with the Company.[31]

I credit the testimony of Mr. Perez and Mr. Martinez as to the timing of Garcia's visits and his remarks. They had better recall than Mr. Garcia. Further, his testimony is not inconsistent with theirs.

He acknowledged that he at some time made comments similar to those ascribed to him by Mr. Martinez, and he acknowledged that Perez and Martinez might have been correct as to the dates. He also did not refute the remarks attributed to him by Mr. Perez.

In view of the fact that Mr. Garcia is credited with having worked until 5:55 p.m. and 4:00 p.m. on the 21st and 22nd, respectively, I find that his visits were on paid work time. As noted earlier, when he first testified he freely acknowledged that he was paid for the time he spent campaigning and specifically mentioned visiting the camp on the afternoon of the 21st although from the context I conclude he meant the 22nd. (I:143, 146-147.)

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[31]He acknowledged that following the election he did not do so, (II:158-159.)

B. Distribution of Leaflets

None of the witnesses called by the UFW testified to receiving any leaflets. Mr. Garcia testified, however, that he distributed two anti-union leaflets.[32]

On one occasion, he stopped at the camp on his way to report for work and put leaflets on the seats in the company bus. Another time, he went during his noon lunch break to the field where the crew was working. He again placed leaflets on the seats in the bus. (I:162; 164.)

On neither occasion did he talk to any of the individual workers. In the first instance, the crew had not yet arrived at the camp.[33] In the second, they were still in the field working.[34]

In addition to these two occasions, he also gave some leaflets to Rigoberto Perez, Serafin Vargas and Reuben Mejia to pass out to the crew, to Raoul Alvarez to distribute to the

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[32]see, U.Exs. 10 and 11. U.Ex. 10 has inset in the upper left corner a miniaturization of Emp. Ex. 1. There is no evidence who wrote the handwritten dates on U. Ex. 10 and 11, nor whether they accurately reflect when the leaflets were prepared or distributed, Garcia testified that he had the copies made at a business in Salinas and denied making them at Mann's offices. (I:161-162.) No corrobative evidence, such as a billing invoice was produced; nor, however, was any evidence refuting his testimony introduced.

[33]Mr. Garcia 's testimony elsewhere corroborates that during the week before the the election he came to work before the crew began work. (1:165; II: 209.)

[34]He testified that although the crew normally ate lunch at noon, the actual time varied because they usually waited until they got to the end of a field before breaking for lunch. (I:166; II:206; 208.)

irrigators, and to Alvaro Soto to give to the tractor drivers. (1:162.) There is no evidence whether Mr. Garcia gave the leaflets to these five co-workers while he was on Company time nor whether they distributed them on Company time.[35]

C. Garcia's Discussions with the Crew in the Fields

Mr. Garcia testified that in addition to the foregoing activities, he went to the fields and talked to the crew about decertification once or twice during the noon lunch hour.[36] (I:150; II:212.) Ifrael Edeza and Manuel Benitez from the UFW were also present on these occasions. Garcia testified he stayed with the crew "-- [h]ow ever long Edeza and Benitez were out there. We left at the same time." (Id.)

Mr. Edeza, a non-employee UFW representative, testified he went to the company every day during the decertification campaign and spoke to the crew during their noon lunch hour. (I:70.) He stated that he remained the full 30 minutes allowed by law.

On two or three such occasions, according to Edeza, Mr. Garcia was also present. Mr. Edeza testified that Mr. Garcia

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[35]Francisco Perez testified that he observed both Mejia and Serafin Vargas collecting signatures, but he was not asked about the circumstances of their doing so.

[36]Hilario Alcaraz testified to one such visit by Garcia where Garcia told the crew that the Company was not going to sign a new contract with the Union but said that if the workers voted against the Union, the Company would give them more work. (I:50-51.) When asked if Garcia said who had told him this, Alcaraz replied, "No, he (Alcaraz) didn't know." (Id.)

would stay with the crew until the workers went back to work, and then Garcia would leave in his pickup truck. (I:73.)

Garcia questioned Edeza whether he (Garcia) left the crew at the same time Edeza did, and Edeza replied that Garcia would still be there when Edeza left. Garcia then pressed Edeza as to how he could have observed Garcia leave in his truck if Garcia remained with the crew after Edeza left. Edeza modified his earlier testimony and stated that on one occasion he saw Garcia leave but on the other occasions Garcia was still there when Edeza left. (I:77-78.)

I was not persuaded by Mr. Edeza's attempt to reconcile his testimony. I infer from his original testimony that he and Mr. Garcia left the crew at the end of the 30 minute noon lunch period. There is no evidence to refute Garcia's testimony that he made these visits on his lunch time.

VIII. CAMPAIG ACTIVITIES INVOLVING COMPANY PERSONNEL

Rudy Cazarez and Lil O'Connor summoned the crew twice to talk about decertification. On June 21, they interrupted the broccoli crew at work in the field and spoke to the workers. On June 22, the day before the election, they notified various Company supervisors to tell the other bargaining unit employees—tractor drivers, irrigators and mechanics--go to the field where the broccoli crew was working. Cazarez and Ms. O'Connor spent about 15 minutes talking with all the employees

about decertification.[37]

On both occasions, the workers were paid for the time spent at the meetings. The hourly workers were paid for a full day's work, and the broccoli crew was credited with having picked enough bins of broccoli to compensate them for the time.[38]

The foregoing facts are not disputed. There is substantial disagreement, however, as to what happened at the meetings.

Resolution of the disputed facts is critical to resolution of Garcia's agency status and other significant issues. Thus, I have set forth the conflicting testimony in some detail below.

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[37]Only Francisco Perez testified that the tractor drivers and irrigators were present at both meetings. I conclude he was mistaken and credit the testimony of the other witnesses. Hilario Alcaraz testified only about the meeting which included the tractor drivers and irrigators which he said occurred on June 21. Based on the testimony of the other witnesses, I find he was mistaken as to the date. Thus, his testimony is not inconsistent with the fact that he apparently was absent on June 21.

[38]Lil O'Connor and Rudy Cazarez testified the Company always paid workers for time spent in meetings called by Company supervisors. UFW witness Mora acknowledged that the Company sometimes paid the crew when Company representatives stopped the crew's work, for example, when there was a special order or when there were meetings about quality, safety or productivity, but he stated it was not a universal practice; rather, he testified, they were usually paid when the meeting took a long time, but he gave no example of what he meant by "a long time." (1:106.) There is no evidence they were paid for meetings not related to their work duties other than these meetings about decertification.

A. The Events of June 21

1. The Union's Version

This meeting occurred in the field where the crew was working, sometime around 10:00 a.m. and, according to each of the Union witnesses, lasted about 15 minutes. Union witness Abel Mora testified that Mr. Cazarez told the crew there would be an election and that he wanted them to vote "No Union." (I:84.) Lil O'Connor also told them to vote "No Union," he testified, although he also said he could not understand her very well. (I:86.)

Mora testified Mr. Garcia also addressed the crew. Garcia stated the Company was not going to sign a new contract with the Union, but that, if the UFW were decertified, the Company would sign a contract with the workers which would allow the workers to cut and pack in the field.[39]

Salvador Martinez, also a crew member and witness for the Union, testified to essentially the same facts as Mr. Mora, adding that Garcia said the contract the Company was willing to sign with the workers would be a better one than it had negotiated with the Union. (I:117-118.) He corroborated Mora that Ms. O'Connor took an anti-Union stance, testifying that she told the crew it would be a lot better for them if they voted against the Union. (I:118.) In contrast to Mr. Mora, however, he testified that Mr.

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[39]As noted earlier, the significance of the field cut and pack is that it provides more work, and thus more pay.

Cazarez did not urge a "No-Union" vote but, rather, told the crew the decision was up to them. (I:119.)

Francisco Perez, also a crew member and witness for the UFW, gave a different account. He testified that Cazarez told the workers "[t]hat we were going to have a talk, a few words, together with Ernesto."[40] (I:11.) Mr. Garcia then addressed the crew and told them he was attempting to decertify the Union because if there were any layoffs he had the lowest seniority and would be the first to be laid off.[41]

Garcia assured them this was his only motive for pursuing decertification and that the Company was not paying him anything. He then asked them to support his efforts. (I:11.) Mr. Cazarez and Ms. 0'Connor reiterated that the Company was not paying Mr. Garcia and that Garcia was seeking decertification because he was concerned about his seniority. (I:13.) Perez could not recall anything else.

2. The Company's Version

Ms. O'Connor testified that Mr. Cazarez simply informed the crew that the ALRB had notified the Company that a

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[40]This testimony differs only slightly from that of Mora and Martinez who testified that Mr. Cazarez, Ms. O'Connor and Mr. Garcia all approached the crew and that Cazarez told the crew "they" wanted to talk to them.

[41]Elsewhere, Mr. Garcia testified that the Company had already laid off a number of mechanics, and he feared if the UFW were not decertified that Mann would go out of business as had some other companies in the area who had been under contract with the UFW. (I:150-151; 155-158.)

[d/]ecertification petition had been filed and that there would be an election at the ranch. (II:10; 32.) Cazarez further said they would be meeting with the ALRB to learn the details and would talk to the crew again when they knew more. (Id.) The discussion lasted only perhaps five minutes, and, as far as she could recall, she did not address the crew. (II:10.)

Mr. Cazarez testified to much the same effect. He said Ms. O'Connor had told him about the petition on that very day, June 21, and they discussed informing the workers.[42] They went to the field where the broccoli crew was working, and he told them a decertification petition had been filed and there would be an election. He stated they would keep the crew posted as to where and when the election would be held.

Rigoberto Perez and Serafin Vargas,[43] both members of the broccoli crew, essentially corroborated Mr. Cazarez and Ms. O'Connor. (II:94; 116.) They also both testified, in summary fashion and in response to leading questions, that neither Cazarez

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[42]Ms. O'Connor testified she learned about the petition from owner Don Nucci about a week before the election, perhaps on the same day (June 17) that Mr. Garcia filed it. She could not explain why she and Cazarez waited until the 21st to inform the workers. She also did not testify whether she notified Cazarez about the petition but did testify that Cazarez came to her on the 21st and asked her to accompany him to tell the workers about the election.

[43]It will be recalled that Perez and Vargas assisted Garcia in his decertification efforts. Perez and Vargas denied this, but I credit Garcia and the Union witnesses who testified to the contrary.

nor O'Connor made any promises either at this meeting or the one on the 22nd as to what would happen if the Union were decertified. (II:106-108; 116.)

B. The Events of June 22 1.

The Union's Version

Francisco Perez and Abel Mora placed this meeting as occurring at approximately 9:00 a.m., before the crew's morning break. Mr. Cazarez also initially testified, on two occasions, that the meeting was in the morning before the crew's break—about 9:00 a.m.--or even a little before.[44] (II:68; 79.) Serafin Vargas also testified that the meeting occurred before the crew took its morning break which he said generally was held between 9:00 a.m. and 10:00 a.m. Ms. O'Connor, on the other hand, testified from the outset that the meeting occurred after the pre-election conference, at approximately 10:30 or 11:00 a.m.

As noted earlier, Cazarez and O'Connor had directed the various supervisors to have the tractor drivers, irrigators and Mr. Garcia all meet at the field where the broccoli crew was working. They did so along with several of the supervisors. Cazarez estimated they waited about 10 minutes until the crew worked its way to the edge of the field, and then he called all the workers together.

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[44] Later, Cazarez was shown a copy of the ALRB Pre-Election Conference Check-Off List and Attendance Roster (Emp. Ex. 4) which indicated the Pre-Election Conference was held from 9:30 a.m. to 10:30 a.m. He then testified that he and Ms. O'Connor met with the crew after the pre-election conference. (II:87.)

According to Mr. Mora, Garcia again spoke to the workers and essentially repeated what he had said the previous morning. (I:90; 100.) Hilario Alcaraz then asked Garcia, "...why do you interfere with this, don't interfere with the workers.... You have your own job." (I:92.)

Mora testified he did not hear Alcaraz accuse Mr. Garcia of being paid by the Company; but he then testified that Garcia made an obscene remark to Alcaraz as to what he (Garcia) was going to do with the money Alcaraz supposed the Company was paying him (Garcia.) (I:94.) According to Mora, Alcaraz did not appear to hear Garcia's remark. He did not testify that Garcia made any other statement either to Alcaraz or to the workers.[45]

Mr. Mora testified that Ms. O'Connor simply told the workers to vote "No Union." (I:95.) He did not testify that Mr. Cazarez made any statements.

After this, Mr. Garcia distributed some caps which had the slogan "No Union" printed on them and urged the workers to vote against the UFW. Mr. Cazarez told the foreman to give the crew members their break, and the meeting ended. (I:95.)

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[45]Francisco Perez testified he heard Alcaraz accuse Garcia of interfering but did not hear the accusation that Garcia was being paid by the Company. He did not say anything about the obscene remark Mora ascribed to Garcia. Perez said the remark about interference was made on the 21st, but I conclude he was mistaken as to the date, since he thought all of the workers were present at both meetings. Martinez testified none of the workers responded when Garcia spoke to the crew.

Mr. Martinez testified that both Garcia and O'Connor told the workers to think about their vote because it would be better for them if they voted the Union out. (I:121) Ms. O'Connor added that there would be more work if they got rid of the Union. (Id.) As on the day before, Cazarez told the workers to think about it but said that whether they voted for or against the Union that it was their decision.[46] (I:122; 128.)

Mr. Francisco Perez testified that Mr. Cazarez stopped the crew and told them they were going to talk awhile. Thereupon, Mr. Garcia told them they had less work because the Company was planting fewer fields of broccoli, and they had to work hard to get rid of the Union. (I:17.) The clear import of his remarks is that there would be more work if they did so. He corroborated that Mr. Garcia distributed the "No Union" hats. (I:17-18.) He recalled that both Mr. Cazarez and Ms. O'Connor also spoke to the crew, but he did not remember what they had said. (I:18.)

2. The Company's Version

In addition to the witnesses who testified about the June 21 meeting, the Company called Raoul Alvarez, an irrigator, and Alvaro Soto, a tractor driver, to testify about the meeting on the 22nd.[47] Mr. Garcia also testified on this issue.

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[46]On cross-examination, the Company attorney asked Mora whether he thought Ms. O'Connor or Mr. Cazarez had more authority at the Company, and Mora replied that Mr. Cazarez did. (I:131.) No evidence was introduced as to whether Mr. Mora's opinion was accurate, nor whether it was shared by other workers.

[47]It will be recalled that Mr. Alvarez and Mr. Soto helped Mr. Garcia distribute anti-union leaflets.

Both Mr. Cazarez and Ms. O'Connor testified that Cazarez merely informed the workers that the election would be held the following day and gave them details such as where and when and other logistical information about the election. He then told the workers they could vote however they chose, and the Company would live with it. (II:13-14; 70-71.) Ms. O'Connor denied that she told the employees to vote "No Onion."

Ms. O'Connor testified that Hilario Alcaraz asked if the medical benefits would remain intact if the UFW lost the election. She replied that he knew under state law that the Company could not make any promises. (II:27.) Cazarez testified that someone asked if there would be insurance if the Union lost to which Ms. O'Connor replied the Company was not allowed to make any promises.[48] (II:72.)

Neither Rigoberto Perez, Alvarez, nor Vargas testified to any discussion about medical benefits or insurance. They all

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[48]Observing Ms. O'Connor's demeanor, including her tone of voice, the clear import of her testimony was that Mr. Alcaraz's question was a set up, i.e., an attempt to get the Company to improperly make a promise. If such were the case, I find it odd that Cazarez would not remember that it was Alcaraz who asked the question. The tone of both witnesses struck me as self-serving and an attempt to make a proverbial mountain out of a molehill. Mr. Cazarez[1] testimony regarding Hilario Alcaraz's supposed question about older workers struck me the same way. Their demeanor on those points stands in contrast to that of the three Union employee witnesses who did not indulge in gratuitous efforts to advance the Union's version of events and discredit the Company's. (See discussion at p. 15 and fn. 36, supra.) I note in any event that the Union does not claim that Cazarez or O'Connor made any promises about medical or other insurance benefits.

simply testified in conclusory fashion in response to leading questions that neither O'Connor nor Cazarez made any promises as to what would happen if the Union lost the election. II:106-108; 150.)

Perez and Vargas generally corroborated O'Connor and Cazarez that they talked about the logistics of the election, but, again, both testified in a very perfunctory manner.[49] (II:95; 118.) Perez especially was not a convincing witness. He testified in very summary fashion, almost in a monotonous tone, as one who knows the bare elements he is supposed to testify to but nothing more.[50] He decidedly did not give the impression of a witness trying to give a full account of what he remembered as best he

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[49]Alvarez testified that Cazarez said nothing more than that there would be an election the next day. During his examination on direct, Perez testified that Cazarez only told the crew the date and time of the election. It was not until later that he remembered to relay the other information Cazarez says he gave. (II:102.) Vargas was somewhat more forthcoming but again sounded as if he had memorized the major points to recite and "did not remember" anything else. (II:117-118; 120-121.)

[50]See, fn. 49, supra. Similarly, although he has worked for the Company for more than 14 years and knows all the supervisory personnel, he initially testified that O'Connor and Cazarez were the only Company supervisory personnel present. He had to be led before he testified that his own foreman was there. He still denied that any other supervisors were present whereas the testimony of several other witnesses establishes that they were present. II:98-99.) I concluded that because the presence of the supervisors was not an important issue, Mr. Perez was not prepared on this point and did not know what he was supposed to say. He thus denied they were there.

could.[51]

Cazarez, O'Connor, Vargas, Alvarez and Perez all denied that Garcia addressed the employees as the Union's witnesses testified he did. (Id.) Garcia testified to the same effect.[52] (I:151-152.)

Five of the above witnesses testified that the only comments Garcia made were in response to an accusation Alcaraz made to Garcia that Garcia was trying to decertify the Union because the Company was paying him to do so.[53] Garcia responded by

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[51]I note also that there is a history of animosity between Mr. Perez and the Union. He sued the UFW when he lost his position as a paid Union representative at Mann. (II:106.) He also filed one or more lawsuits against the Ufw accusing its Executive Board of stealing money from the Union members. (II:105.) In turn, Cesar Chavez, leader of the UFW, sued Mr. Perez for 25 million dollars. (II:106.)
In light of the foregoing, I find Mr. Perez' response to a question regarding his bias against the UFW inherently incredible. He responded that he liked the UFW. (II:105.)

[52]A11 of them testified that Garcia stood with the employees, who were gathered in semi-circle fashion facing O'Connor and Cazarez, and that he did not stand by, and thereby align himself with, O'Connor and Cazarez. (II:70; 96; 117-118; 150.) Emp. Ex. 3 is a diagram prepared by Ms. O'Connor showing where people were located. There is no evidence that it is not accurate. I note the Union witnesses never testified Garcia left the employees to stand next to O'Connor and Cazarez.

[53]They are O'Connor, Cazarez, Rigoberto Perez, Garcia himself, and Alvarez. Alvarez could not recall specifically what Alcaraz had said but was sure it was about Garcia being paid. Mr. Vargas testified that although he was standing only some 10 feet from Mr. Garcia, he did not hear any words exchanged between Alcaraz and Garcia. I do not credit Vargas in view of the testimony of Mr. Garcia and the other witnesses. Company witness Alvaro Soto, a tractor driver, also did not recall Alcaraz and Garcia having an exchange. I do not credit him on this point, and, in fact, I have generally discounted his testimony because typically his recollection was poor, and he did not listen carefully to questions before responding. (II:122.)

loudly denying that this was the case. He told the workers he was seeking to decertify the Union only because the Company had already laid off a number of workers, and he had the lowest seniority and would be next in line in the event of future layoffs. (II:12-24; 72-73; 97; 149-150; 157.)

After a few moments of back and forth comments between the two men, Mr. Cazarez told them that was not why they were there, broke up the dispute and ended the meeting. (I:170; II:24; 74.) Cazarez said he told the crew foreman, Munoz, to give the crew a break following the meeting. (II:74.)

At this point, Ms. O'Connor told the workers she had "No Union" hats to give away.[54] she opened up the back of her company vehicle and began to pass out hats imprinted with the slogan "No Union" which the Company had bought. Several workers, including Mr. Garcia, took caps and passed them out to other workers.[55] (I:144; II:26-27; 52; 97; 150; 151.) The crew then took their break, and the other employees went back to work.

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[54]I credit Mr. Garcia's initial testimony that she so characterized the caps. He immediately caught himself and retracted his testimony and said she didn't say "Union" or "No Union" caps. (I:144.) Mr. Garcia was a very sharp witness who showed an excellent grasp of what evidence was and was not favorable. From watching his demeanor, I believe that rather than correcting a misstatement, his retraction was an attempt to recover from his first, unguarded statement.

[55]Both Cazarez and Vargas denied seeing Garcia pass out caps, but Garcia acknowledged he had done so.

C. The Events of June 23, Election Day

Several UFW witnesses testified that early in the morning on the day of the election, Ms. O'Connor and the Company attorney Mr. O'Connor came to the Company labor camp where the entire crew was boarding the bus to go to work. Ms. O'Connor yelled to the workers to remember to vote "No Union." (I:21; 23-24; 52-55; 96-99; 124-126.) Ifrael Edeza, the non-employee UFW representative working on the campaign, added that Ms. 0'Connor also had caps imprinted with the slogan "No Union" which she was passing out. (I:71-72.)

No evidence was introduced to rebut the testimony regarding Ms. O'Connor's comments to the crew on the morning of election day. Ms. O'Connor did not testify on this point. Each of the Union witnesses testified in a credible manner. Accordingly, I credit their account that she urged them to vote against the UFK. I discount Edeza's testimony about the caps because no other witness mentioned them.

D. Further Credibility Resolutions Regarding the Events of June 21 and June

The Company argues that I should not credit the Union's witnesses as to the events of June 21 and 22 because, although the Union submitted declarations from each of them in support of its

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objections,[56] only Mr. Mora's declaration describes two meetings.[57] The Company also argues that the details of the two meetings set forth in Mora's declaration are very similar and therefore suggest that he was describing only one meeting.

In the first place, I do not agree with that characterization of Mora's declaration. He states the meetings were at different times, and he describes the distribution of "No Union" caps and Cazarez giving the crew a break as occurring only at one meeting.[58]

Also, I find the Company's argument odd since it agrees there were two meetings. The number of meetings is not the issue.

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[56]The parties stipulated to introduction of English translations of the declarations of Ifrael Edeza, Salvador Martinez, Francisco Perez Herrera, Hilario Alcaraz and Abel Mora. I left the record open for receipt of same. Counsel for the Employer, Terrence R. O'Connor, submitted a letter to me dated October 23, 1989, wherein he stated he was submitting a stipulation signed by him and by the petitioner Mr. Garcia along with the agreed upon translations of the declarations. He further stated that he had sent a copy of the signed stipulation and translations to the Union representative Mr. Emilio Huerta. Mr. Huerta filed the copy of the stipulation with his signature dated October 24, 1989.
though the Union did not ask its witnesses to explain the potential discrepancy between their declarations and testimony, it had the opportunity to do so and has stipulated to admission of the translated declarations. Consequently, I find no impediment to their admission. The declarations, stipulations, and cover letter are hereby admitted as Joint Exhibits 1 through 8, inclusive, in the order submitted.

[57]In fact, only three of the five declarations address the meetings Mr. Martinez did not mention any meetings, nor did Mr. Edeza who, as a non-employee, would likely not have been present.

[58]Although he does refer to the meeting on the 21st as occurring at the end of the field whereas it was the meeting on the 22nd which occurred at the edge of the field, I do not find this outweighs the other facts indicating there were two meetings.

The real dispute, of course, is about Mr. Garcia's role and the comments of Cazarez and O'Connor.

It appears, then, that the Company's argument is as follows: (1) the Union's witnesses testified that Mr. Garcia spoke at two meetings; (2) some of the declarations refer to him speaking at only one meeting; (3) therefore, Mr. Garcia did not speak at either meeting.

The logical flaw in the argument is obvious. It would be more logical to conclude that Mr. Garcia spoke at one meeting at least since the declarations and testimony are consistent on this point.[59]

There is a further problem with the Company's argument. When a declaration omits a fact which is so important that it is unlikely the declarant would have neglected to include it, and the declarant later testifies to that fact, the omission may well be viewed as a significant inconsistency and may even support a finding that the testimony is false.

Here, however, the Union filed declarations to support ten objections. Three of the four declarations filed by the workers cover more than one subject. The purpose of the declarations is to present facts which, if proved, establish a prima facie case. Setting forth facts describing two meetings where essentially the same thing happened is superfluous.

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[59]The fact that they are consistent does not, of course, necessarily establish their truth, but it is a significant factor to consider.

The objections and the declarations had to filed within five days after the election. In view of the limited time and the cumulative nature of the evidence, I do not find the failure to refer to two meetings is the type of omission which is so significant that it is probable that a second meeting did not occur.

Based on the testimony of both Company and Union witnesses, I find that Cazarez and O'Connor met twice with the crew. The question of what happened on each occasion is the real issue and to answer that question I turn to an assessment of the witnesses' testimony.

Whether testimony is consistent with objective facts is one factor which is very helpful in resolving credibility issues. There is one very significant extrinsic fact in this case.

Francisco Perez and Abel Mora both testified that the meeting on June 22nd occurred about 9:00 a.m. before the crew took its morning break. Serafin Vargas who testified for the Company also so testified; Mr. Cazarez so testified on two occasions. Both Mora and Cazarez also testified that at the end of the meeting, Cazarez told the crew foreman to give the members of the crew their break.

The timing of the meeting is significant because Cazarez and O'Connor did not attend the Pre-election Conference until 9:30. If they met with the workers about 9:00 a.m., they would not have known the details of where, when and how the voting would

take place because such details are worked out among the parties at the Conference. (II:11.) Obviously, if Cazarez and O'Connor did not know this information, their testimony that all they did at the meeting was convey this information to the workers is false.[60]

Relating the time of one set of events to another is a common occurrence. Thus, it is quite believable that the workers would relate the time of the meeting to their break. I find it unlikely that they would be so far off on timing as to recall that the meeting took place about 9:00 a.m., before the morning break, if, in fact, as O'Connor testified, it began at 10:30 or 11:00 and thus would not have ended at 10:45 or 11:15.[61]

The significance of the break time was not apparent to me or presumably the UFW representative or its witnesses when they testified because the Company witnesses had not yet presented their version of events, namely, that on the 22nd O'Connor and Cazarez only relayed details of the election to the workers. Thus, I can see no reason Perez and Mora would have fabricated

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[60]I note that in recounting what happened, none of the Union witnesses mentioned Cazarez and/or O'Connor talking about the logistics of the election. Nor, however, were they specifically asked if this subject was discussed.

[61]According to Cazarez' modified testimony, the meeting took place even later since he testified the Conference began late and did not start until 10:00 or 10:30. Consequently, under this version, the meeting with the crew would have begun about 11:00 or 11:30.

their testimony.[62]

Further, Vargas and, initially, Cazarez corroborated Perez and Mora as to the time of the meeting. I find Cazarez' initial testimony reliable because it was given as a background detail when he was first describing the meeting and not when his guard was up because the significance of the timing was apparent; namely, after he was shown the Pre-Election Conference Roster.

Based on the foregoing, I find the meeting on the 22nd took place before the Conference and therefore do not credit the testimony of Company witnesses that Cazarez and O'Connor used the meeting to relay the details of election logistics. Since this was the primary explanation Company witnesses gave for the meeting, and since there must have been some significant reason for the Company to gather its entire workforce of 35 to 40 people, plus various supervisors, and to pay them for approximately one half-hour,[63] there must be another explanation for the meeting.

I do not believe the Company assembled its entire workforce simply so Cazarez could tell the workers it was their decision how to vote and then without comment pass out "No Union"

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[62]One could argue that the witnesses deliberately downplayed the information, but, from the context of their testimony and the demeanor of the witnesses, I am convinced that is not the case.

[63]The crew was paid for the 15 minutes they spent in the meeting plus receiving their 15 minute paid break. The other employees were paid for the 15 minutes spent in the meeting, the 10 minutes Cazarez estimated they all waited for the crew to work its way to the end of the field, and whatever time it took them to assemble.

caps. I credit the testimony of the Union witnesses that the Company used the meeting to urge the workers to vote against the Union and promised there would be more work if they did so.

The accounts of Union witnesses Mora and Martinez are generally corroborative although there are some inconsistencies.[64] I credit Martinez as to Cazarez[1] remark that the employees could vote however they chose because I do not think he would have made the admission if it were not true. I find, though, that both Garcia and O'Connor urged the workers to vote against the Union,[65] and that both of them stated there would be more work if the Union were decertified.[66]

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[64]I have relied on them more than Perez because with his confusion as to dates it is difficult to be sure what happened on which date. His testimony does corroborate that Garcia at one meeting with Cazarez and O'Connor present promised the workers more work if they decertified the Union. The one flaw in Martinez' testimony is his failure to mention the dispute between Alcaraz and Garcia. I believe that is attributable to the way he was questioned. He was asked specifically if any one responded to Garcia's statement that it would be better for them if they voted against the Union. (I:121.)

[65]I therefore do not credit Mora that Cazarez told the crew on the 21st to vote against the Union. Neither Mora nor Francisco Perez testified that Cazarez made such a remark on the 22nd. I have considered that Cazarez[1] statement is somewhat inconsistent with O'Connor's directive to vote "No Union." But it is no more inconsistent with that directive than with the uncontested distribution of the " No Union" caps.

[66]Ms. O'Connor's exhortation to vote against the Union at this meeting is consistent with her conduct on the morning of the election. Moreover, I found Martinez and Mora generally more credible. (See discussion, infra.) I find Ms. O'Connor's promise that it would be better for the workers if they decertified the Union, i.e., there would be more work, consistent with her demeanor at hearing. She was very articulate and very intelligent but also demonstrated a certain outspokenness in contrast to Cazarez' more reserved demeanor. Thus, I do not find the different nature of their remarks odd.

On one point, I do not credit the Union witnesses. I find the exchange between Mr. Alcaraz and Mr. Garcia took place as described by the Company witnesses in that, in addition to accusing Garcia of interfering, I find he accused Garcia of being paid by the Company. Mr. Mora's testimony corroborates that of the Company witness since he refers to Garcia mentioning the money Alcaraz believes the Company paid Garcia.[67]

Because I do not believe the Company witnesses as to the meeting on the 22nd, I also discredit their version as to the events on June 21. I credit Mora and Martinez that Garcia told the crew the company would sign a contract with them and give them more work if they decertified the Union and that Garcia and O'Connor urged them to vote against the Union with O'Connor adding that it would be better for them if they did so.

If it were not for the discrepancy as to the time of the meeting on June 22, then the credibility resolutions would rest largely on demeanor. As set forth earlier in this decision, Mora, Martinez and Francisco Perez overall showed generally good recall and testified in a forthright manner. On the whole, they answered questions much more completely than most of the Company witnesses, and Martinez and Perez readily acknowledged facts favorable to the Company.

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[67]I thus credit Mora that Garcia made the remark attributed to him. Since even Alcaraz did not appear to have heard it, I do not ascribe any importance to the fact that no other witness testified to hearing it.

Rigoberto Perez was not credible when he testified he liked the UFW in light of the history of animosity between them. He also testified in a flat, monotone manner and gave only the most cursory responses. His manner was that of a witness who has learned the major points he is supposed to address and not that of a witness honestly attempting to recall events and convey them fully.

Mr. Alvarez had a similar manner. Most of his testimony was in response to leading questions. He too gave mostly conclusory testimony as if he knew only the high points he was supposed to cover. For example, he testified that the sum total of Cazarez' remarks on the 22nd was that there would be an election the next day.

I have already stated that I have discounted Alvaro Soto's testimony. Kis testimony suffered from the same basic problem as Rigoberto Perez and Alvarez, but Soto was simply less adept at remembering his lines. At first he could not even remember the meeting on the 22nd, and then he swore Ms. 0'Connor had not told the workers to vote "No Union" while at the same time he admitted he did not recall what she had said. (II:166.)

Mr. Vargas was somewhat more forthcoming than the preceding witnesses, but much of his testimony too appeared less a true recounting of events and more a conclusory statement of the major points of the Company's defense.

Mr. Garcia was a very articulate and astute witness who was quick to pick up on ways to modify his testimony to advance

his and the Company's position. As such, I found him less candid than the three Union witnesses.

Ms. O'Connor was also very articulate and had a very clear grasp of the issues. Both she and Mr. Cazarez, however, were quite vague as to when and how they found out about the petition which is most odd since a decertification campaign is quite a significant event. Cazarez' testimony that he did not learn of the petition until the 21st is contradicted by her testimony that he came to her on that date to suggest they talk to the workers. I have already noted my adverse finding as to their candor about Alcaraz's comments at the meeting on the 22nd.

On the whole, I found the three Union witnesses more inclined to answer questions completely and not inclined to exploit opportunities to advance the Union's position. Further, none of the three seemed to have an axe to grind so to speak. There is no evidence they were especially supportive of the Union.

In contrast, all of the Company witnesses had an obvious interest in the proceeding. Each of the employee witnesses called by the Company assisted in the decertification activities although Rigoberto Perez and Serafin Vargas sought to minimize their roles. Ms. O'Connor and Mr. Cazarez, as the Company representatives in charge of the campaign, clearly have an interest in establishing that they acted properly, and this interest obviously transcends Ms. O'Connor having left the Company.

Finally, there is the fact that Mora, Martinez and Francisco Perez are still employed at Mann. The law recognizes

that employees do not lightly testify adversely to their current employer's interest because of the potential for retaliation.[68] When they do so, their testimony is entitled to significant weight.[69]

The foregoing discussion explains why, in most respects, I have credited the Union's witnesses over the Company's witnesses.

Analysis and Conclusions

In determining whether to set aside an election, this Board and the National Labor Relations Board (hereafter "NLRB" or "national board") apply the same standards to both decertification and initial certification elections.[70] The critical inquiry is whether employees are able to express a free and uncoerced choice or whether misconduct occurred which tended to affect the results of the election. (Radovich; Texaco v. NLRB (hereafter Texaco) (5th Cir. 1984) 722 F.2d 1226 [115 LRRM 2509]. Because of the importance of voter free choice, conduct which does not rise to

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[68]The fact that such retaliation would be illegal does not negate the risk thereby and alleviate the pressure not to do so. Retaliation can be subtle and difficult to prove. Moreover, at best, legal redress takes many years.

[69]Georgia Rug Mill (1961) 131 NLRB 1304 [48 LRRM 1259] at fn. 2., enf'd. in pert. part. (5th Cir. 1962) 308 F.2d 89 151 LRRM 2144].

[70]Jack or Marion Radovich (hereafter "Radovich") (1983) 9 ALRB No. 45. In Radovich, this Board specifically rejected applying more stringent restrictions on employers' speech in a decertification campaign than in the original election.

the level of an unfair labor practice may nonetheless warrant setting aside an election.[71]

An employer may conduct a "No Union" campaign, but it may not make threats or promise benefits nor may it bargain directly with its employees. (Radovich.) Thus, while an employer may express a preference for no union, it must be neutral in its actions. (Texaco.)

Further, an employer may not instigate its employees to initiate a campaign to decertify their certified bargaining representative nor encourage, support or assist any of its employees who are engaged in such an effort. The decision whether or not to decertify is that of the employees in the bargaining unit, and the employer must not interfere with that decision. (Abatti Farms, Inc. (hereafter " Abatti.") (1981) 7 ALRB No. 36.

Thus, it has been held by both this Board and the NLRB that any employer involvement which is more than "ministerial" is improper.[72] Consequently, an employer may answer inquiries from

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[71]Morris, The Developing Labor Law 2d. ed. Fourth Supplement 1982-1987, p. 171 et seq. The NLRB applies this same standard. With the NLRB though, since its blocking charge policy is broader than that of the ALRB, the issue generally arises in the context of an unfair labor practice proceeding. (See, Cattle Valley Farms and Nick J. Canata (1982) 8 ALRB No 24.)

[72]Peter D. Soloman and Joseph R. Soloman, dba Cattle Valley Farms/Transco Land and Cattle Co. (hereafter "Cattle Valley") (1983) 9 ALRB No. 65; Abatti; Movie Star, Inc. (1963) 145 NLRB 319 154 LRRM 1387] modified on other grounds (5th Cir. 1966) 361 F.2d 346 [62 LRRM 2234].

employees as to how they might withdraw from the union, but the employer crosses the line if it implants the idea of decertification or if it encourages its workers to pursue decertification. (Cattle Valley, supra; Abatti, supra.)

In this case, I find no direct evidence that the Company initiated or instigated the decertification campaign. There is no evidence that anyone from the Company spoke to Mr. Garcia before he filed the instant petition or encouraged him to do so.

The mere fact that, as both Mr. Alcaraz and Ms. O'Connor testified, there was no evidence of employee unrest nor any particular labor difficulties prior to Garcia filing the petition is insufficient to support an inference that the Company generated the decertification campaign. This is especially true since Mr. Garcia has been involved in previous efforts to decertify the UFW at Mann."[73] Further, although I found both Ms. O'Connor and Mr. Cazarez vague and even contradictory in their accounts of when and how they learned the petition had been filed, there is insufficient evidence to conclude therefrom that the Company instigated the decertification effort.

There remains the question of whether Mr. Garcia was an agent of Mann and whether Mann is accountable for his conduct.

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[73]Although Mr. Alcaraz, the UFW representative at Mann at the time of the instant campaign, accused Mr. Garcia at the June 22 meeting of having been paid by the Company to institute the campaign, he made no such claim when he testified. The Union offerred no evidence at hearing to support that earlier accusation.

Section 1156.7(c) provides that only agricultural employees may file a decertification petition. Consequently, this Board has held that an "...employee-agent's filing of [such a] petition becomes the act of the employer just as clearly as if the employer itself...had filed it." (M. Caratan, Inc. (hereafter "Caratan") (1983) 9 ALRB No. 33 and cases cited therein.) There, the Board observed that to hold otherwise would allow an employer to circumvent the Act by permitting it to, in effect, file the petition by inducing or ordering an employee to do so on its behalf.

Following NLRB precedent,[74] the Board in Caratan, supra, looked to whether the decertification petitioner had apparent authority which is determined by whether the employees could reasonably have believed the petitioner was acting on behalf of management. The Board found an agency relationship and therefore set aside the election.[75]

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[74]See, for example, American Door Company, Inc. (hereafter American Door) (1970) 181 NLRB 37 [73 LRRM 1305.]

[75]One Board member dissented in Caratan, supra. The dissent did not quarrel with the NLRB standard applied by the majority but, rather, contended that while typically an employer is held accountable for the conduct of its supervisors, who are deemed its agents, an employer is not normally held responsible for the acts of bargaining unit employees. Hence, the dissent argued, no agency relationship should be found unless it could be shown that the employer itself had acted in such a manner that would lead employees reasonably to believe that the unit employee/decertification petitioner was acting on behalf of the company. Failing to find such evidence in Caratan, supra, the dissent would have upheld the election. Whatever differences exist between the majority and dissent in Caratan, they are not at issue here because the evidence which would establish agency involves overt action by the employer and thus would satisfy the concerns expressed in the dissent.

In this case, the most compelling evidence of agency consists of the testimony which I have credited that Lil O'Connor and Rudy Cazarez, agents of the Company, gathered all bargaining unit employees, and allowed Mr. Garcia to address them promising them benefits if they voted to decertify the UFW. If the credited facts establish that Mr. Garcia was an agent of the company, then the Company then would be held accountable for all of his conduct in the decertification campaign whether or not Company supervisors or managers had knowledge of that conduct. (Futuramik Industries, Inc. (hereafter "Futuramik") (1986) 279 NLRB 185 [121 LRRM 1314].

In Futuramik, the NLRB found that an employee, Sanchez, had apparent authority to act on the employer's behalf based on the fact that Sanchez had stood next to the president of the company in all the campaign meetings held by the company during the election campaign and, on at least one occasion, answered a question addressed to the president. The NLRB held that these incidents would reasonably have caused employees to believe that Sanchez acted on behalf of management and reflected its policies. Consequently, the employer was held responsible for threats made by Sanchez to other employees without regard to whether the employer knew of the threats. The national board upheld the election objections and set aside the elections.

I find no material difference between Futuramik and this case. On the 21st, Mr. Garcia accompanied Mr. Cazarez and Ms.

O'Connor to the crew and Mr. Cazarez told the workers either that "they" wanted to talk to the crew or that the workers were going to have "a few words" with Mr. Garcia. On the 22nd, Mr. Cazarez told all the employees gathered at the edge of the field that they were going to talk again. On both occasions, in the presence of O'Connor and Cazarez, Mr. Garcia urged the employees to decertify the Union and told them there would be more work and the Company would sign a contract with them if they did so.

By these acts, the Company allied Mr. Garcia with itself just as strongly as the employer and petitioner were allied in Futuramik. Conveying the message that the Company and the decertification petitioner were working together toward the common goal of decertifying the Union is the common thread in these two cases.

The Company here clearly conveyed to its workers that Mr. Garcia had apparent authority to speak for the Company, and the Company sanctioned his conduct by demonstrating to the workers that it and Mr. Garcia were joined in a common purpose. (Community Cash Stores, Inc., (hereafter "Community Cash") (1978) 238 NLRB 265 [99 LRRM 1256]) Based on the foregoing, I find Mr. Garcia was an agent for the Company.

However, I do not find that the apparent authority conferred on Mr. Garcia reverts to the time of his filing and circulating the petition. As noted previously, there is no direct evidence the Company induced Mr. Garcia to file the petition.

This case is distinguishable from Caratan, where the petitioner's close relationship to management was known to employees at the time he filed the decertification petition. It is more akin to the case of Quinn Company (hereafter "Quinn") (1984) 273 NLRB 795 [118 LRRM 1239] where the NLRB found the Employer did not instigate employees to file a decertification petition since they had begun the process before the Employer involved itself by holding informational meetings,[76] in the same vein as another NLRB case, I find that in filing the petition Garcia may have been engaged in conduct the Company desired, but that is not the same as his doing so at the Company's direction. (Sperry Gyroscope Co. (hereafter "Sperry") (1962) 136 NLRB 294 [49 LRRM 1766]. Thus, I do not find, as this Board did in Caratan, that the filing of the petition was invalid.[77]

The Company is, however, accountable for all of Mr. Garcia's conduct subsequent to the meeting on June 21, whether it was specifically aware of it or not.[78] I also find it reasonable to hold the Company accountable for his conduct preceding that

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[76]The meetings in that case, unlike here, did not involve acts by the Employer giving the petitioners apparent authority to speak for the Employer, but the principle is the same.

[77]I reach this conclusion because I am not convinced Garcia filed the petition at the Company's behest. Rather, I believe the Company subsequently took advantage of the situation.

[78]NLRB v. Birmingham Publishing Co. (hereafter "Birmingham") (5th Cir. 1958) 262 F.2d [43 LRRM 2270].

meeting where he articulated the same themes advanced in the meetings on the 21st and 22nd because employees would reasonably perceive that he was speaking for the Company.

This conduct thus includes not only Mr. Garcia's promises to the workers of the benefits to them if they decertified the Union which he made at the June 21 and 22 meetings, but also the similar remarks he made when he spoke to the crew on his visits to the labor camp and the fields on the 21st and 22nd, even though there is no evidence any Company supervisory or management personnel were present.[79]

The promises Mr. Garcia made are clearly prohibited under both NLRB and ALRB precedent. Neither an employer nor its agent may seek to induce employees to decertify the union by making promises or threats. (Radovich; Quinn; Viacom Cablevision of Dayton, Inc. ((hereafter "Viacom") (1983) 267 NLRB 1141 [114 LRRM 1132]; Felsenthal Plastics, Inc. now known as Grede Plastics, A Division of Grede Foundries, Inc. (hereafter "Grede Plastics") (1975) 219 NLRB 592 [90 LRRM 1006].)

The inquiry does not end here, however, since two further issues must be addressed. As previously noted, an election will

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[79]It may also include his distribution of the leaflets. There is no showing if they were distributed after the June 21 meeting. Nor are there English translations so that I can determine if their content makes promises similar to those I have found objectionable. Since a finding on this issue is merely cumulative, I have determined there is no need to seek the evidence which would enable one to make the necessary findings.

be overturned only if the misconduct tended to affect the results of the election. Further, there is the question whether Mr. Cazarez' statement that the workers were free to vote for the Company or the Union was a sufficient disavowal of Mr. Garcia's (and Ms. O'Connor's) statements, thereby absolving the Company of responsibility.

Mr. Garcia's statements that the Company would provide more work if the UFW were decertified, and his specific allusion to the fact that there was less work because the Company was planting fewer fields of broccoli, are clearly the type of statements which would tend to affect the outcome of the election. (Quinn; Viacom; Gerde Pasties.) The same is true of his statements that the Company would not sign a contract with the Union but, if the workers got rid of the Union, it would sign a contract with them which was better than the previous Union contract. These latter statements amount to an attempt to bargain directly with the employees which is prohibited. (Radovich.)

Mr. Garcia made these statements in the presence of Mr. Cazarez, the harvest manager, and Ms. O'Connor, the labor relations representative. He then repeated them on his own visits to the crew on the afternoons of the 21st and 22nd while the association between him and the Company was still fresh in the workers' minds. The incentive of a binding contract with more work and more pay is a promise which touches the very heart of the employment relationship.

These comments were made in close proximity to the election and to the entire workforce. They were repeated by Garcia on several occasions to the 28 man broccoli crew which is the vast majority of the bargaining unit. Moreover, according to Mr. Garcia the availability of work and the fear of layoffs was an issue of particular concern because of past layoffs and a decline of work.

Thus, unless Mr. Cazarez' remarks constitute a sufficient disavowal, there is no question but that the election should be set aside. (Community Cash.) To be effective, a retraction or disavowal must clearly and specifically refute the improper speech.[80] Cazarez said nothing to discount the promises that there would be higher wages and more work or that it would "be better" for the employees if they got rid of the Union. Absent specific reassurance that their freedom of choice would not affect the employment relationship, Cazarez' statement is insufficient to relieve the Company of responsibility for Mr. Garcia's conduct and speech.[81]

Thus, I find that the election should be set aside because of the unlawful promises made by Mr. Garcia as an agent of

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[80]Passavant Memorial Area Hospital (hereafter "Passavant") (1978) 237 NLRB 138 cited in Agri-International, Inc. a wholly owned subsidiary of Gold Kist, Inc. d/b/a Golden Poultry Co. (1984) 271 NLRB 925.

[81]Passavant; see also, Birmingham, where the employer's failure to deny the employee's authority to promise salary raises and other benefits supported an inference he was clothed with authority to speak for employer.

the Company herein. The promise of Ms. O'Connor that it would be better for the workers if they decertified the Union and that there would be more work if they did so, standing alone, is an independent ground for setting aside the election for all the reasons previously stated. She clearly was a Company agent.

If I were not to credit the testimony of the Union's witnesses regarding the meetings on June 21 and 22, I would not find sufficient evidence to support a finding that Mr. Garcia was an agent of the company. Absent Mr. Garcia's status as an agent of the Company, I would not find grounds to overturn the election based on his conduct.

There is no evidence any Company supervisory or management personnel were present when Mr. Garcia spoke to the employees other than at the two meetings with Cazarez and O'Connor. As a non-supervisory bargaining unit employee, Mr. Garcia would have been free to make the statements he did since there would be no evidence the Company encouraged, authorized or ratified his conduct nor any basis for the workers to believe he was acting on behalf of management.[82] (Times-Herald, Inc. (1980) 253 NLRB 524 [105 LRRM 1642].

The mere fact that he circulated the petition and visited the labor camp to urge the employees to support his efforts to

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[82]One might argue that the fact that Mr. Garcia made promises which only the Company could fulfill conveyed to employees that he was speaking for the Company. I find this evidence too tenuous to warrant such a finding. (Nish Noroian Farms (1982) 8 ALRB No. 25)

decertify the Union on paid working time is insufficient to warrant setting aside the election. This is especially true when there is no evidence that supervisory or management personnel were aware that he did so.[83]

In Abatti, this Board set aside the election, but there a foreman had given an employee time off to circulate a decertification petition and there was other evidence of improper employer assistance.[84] Similarly, in Texaco, where the NLRB set aside the election, the employer not only knew employees were using paid worktime in anti-union election activities, it made the petition available for employees to sign in a foreman's office. One supervisor even circulated the petition.

Merely permitting the circulation of a decertification petition on company time or permitting employees to discuss, during working hours, decertifying the union is not necessarily sufficient to support a finding of employer instigation of, or improper assistance to, a decertification campaign. (TNH Farms, Inc. (1984) 10 ALRB No. 37; Radovich.)

[83]Mr. Garcia had a good deal of independence in his work schedule. He could take his lunch hour at his discretion if he had to work during the noon hour. His duties could take him from the shop to the fields and sometimes to the labor camp. Under these circumstances, I would not infer that his supervisor would necessarily be aware of his apparently short absences to campaign, and I find no improper employer assistance. (Sperry.)

[84]Even in Abatti, permitting the collection of signatures was deemed "less significant involvement" of the employer (See, Administrative Law Officer's Decision at p. 55.)

Similarly, I find no unlawful assistance in Mr. Garcia's use of his Company pickup truck. The uncontroverted evidence is that there were no restrictions on his or other employees' use of such trucks. In the absence of any evidence that the Company attempted to monitor his use of the truck or had any knowledge he was using it for campaign activities, I find no unlawful assistance.[85] (Sperry; Comite 63, Sindicato de Trabajadores Campesinos Libres (1988) 14 ALRB No. 13.)

There is also the issue of the distribution of the "No Union" hats by Ms. O'Connor and Mr. Garcia. The general rule is that the mere distribution of campaign buttons and similar insignia by an Employer, absent pressure to wear them, is not prohibited. (Radovich.)

A review of the cases to determine when there is prohibited pressure reveals that that NLRB's decisions turn on whether it believes that the Employer's offering of campaign insignia effectively requires employees to declare their sentiments regarding the Union. If so, such conduct is akin to interrogation and constitutes unlawful interference with the employees' free choice and may be grounds for setting aside an

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[85]This case is distinguishable from those of Milco Undergarment Co., Inc. (1953) 106 NLRB 767 [32 LRRM 1550], enf'd (3d Cir. 1954) 212 F.2d 801 [34 LRRM 2166], cert. den. (1954) 348 U.S. 888 [35 LRRM 2129] and Ohio Power Company (1939) 12 NLRB 6 [4 LRRM 117], enf'd in pertinent part (6th Cir. 1940) 115 F.2d 839 [7 LRRV 458]. In those cases, there was employer knowledge of use of the company vehicle plus other serious prohibited conduct.

election.[86] Conversely, where employers have simply made campaign insignia, such as buttons or hats, available to employees in a neutral location where supervisors have not observed who did and did not take the insignia, the NLRB typically finds no improper conduct. (Farah Manufacturing Company, Inc. (hereafter "Farah" (1973) 204 NLRB 173 [83 LRRM 1358].

In the case of Black Dot (1978) 239 NLRB 929 [100 LRRM 1051], the NLRB refused to set aside an election where there was no coercive conduct by the employer other than setting out a basket of pro-Employer and anti-Union buttons in the employees' cafeteria with a sign informing workers of their availability. There was no supervisory involvement in the distribution of the buttons.[87]

Similarly, in Acute Systems, Ltd, d/b/a/ McDonald's (hereafter "McDonald's") (1974) 214 NLRB 879 [99 LRRM 1531], a divided NLRB found no impropriety where buttons were left in locations where employees would have to go such as by the time

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[86]Since, as noted previously, the NLRB often evaluates such conduct in the context of unfair labor practices because of its blocking charge policy, such conduct is often denominated unlawful interference in violation of section 8(a)(l) of the National Labor Relations Act (hereafter "NLRA"). The unfair labor practice cases remain applicable precedent.

[87]The Company went further in protecting its employees. It admonished its supervisors not to comment to employees about the buttons, and. when the Union told employees the Employer was trying to determine whether employees supported the Union, the Employer promptly sent a notice to employees that wearing or not wearing a button would in no way favorably or adversely affect any employee.

clock.[88]

Conversely, where there is the opportunity for supervisors to observe whether employees take the insignia, the national board generally finds the proffering of the insignia improper.

In the case of Pillowtex Corporation (hereafter "Pillowtex") (1978) 234 NLRB 560 [97 LRRM 1369], for example, the supervisor walked through the employees' work stations and put an anti-Union button on the sewing machine of each employee. The NLRB set aside the election finding that each employee was forced to make an observable choice which amounted to an interrogation of the employee's sentiments.[89]

The NLRB also set aside an election in a case where at various meetings before an election, the company president told employees, "I will be wearing this badge today and tomorrow--these are available for everyone to wear. If you wish, take one as you leave."[90] (The Chas V. Weise Co. (hereafter "Weise") (1961) 133 NLRB

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[88]Although on at least one occasion a supervisor pinned a button on an employee, and then lied about the incident at hearing, the NLRB found the incident was jocular and thus did not set aside the election.

[89]see also, the case of Tappan Company (hereafter "Tappan") (1981) 254 NLRB 656 [106 LRRM 1126], In Tappan, the foreman stood next to employees' machines with an armful of anti-union T-shirts. The method utilized in Tappan, like Pillowtex, exerted pressure on employees and restrained their free choice in the election.

[90]The badge read: "Vote on the right side-- Vote "No".

765, 766 (48 LRRM 1709].) The employer told its supervisors to wear the badges and to give them only to employees who requested them.

The national board found undue pressure and upheld the finding of its Regional Director that:

> ...By making available such badges, even if not urging employees to wear them the employer was in effect providing a means by which employees would be placed in a position of making an open declaration of preference. If the employees accepted and wore the badge, it was tantamount to expressing an overt anti-union preference, while, on the other hand, if the employees refused to accept the badge, or did not wear it, he thereby indicated a pro-union sentiment, or, at the least, failed to indicate an anti-union sentiment.
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> (at p. 766.)

The national board rejected the employer's argument that its conduct should not be objectionable since similar conduct by unions was permissible. The NLRB stated there was a critical difference in the two situations.

Because of the employer's control over the tenure and working conditions of the employees, its making campaign insignia available under the circumstances present in Weise "placed employees in the position of declaring themselves as to union preference just as if they had been interrogated as to such preference, and thereby interfered with the free and untrammeled choice of the employees." (at p. 766.) The NLRB found the above conduct sufficient in and of itself to set aside the election without considering the remaining issues.

An important difference between Weise and McDonald's is that in Weise, the NLRB found the prohibited conduct consisted of

merely making the buttons available. I note, however, that the statement of policy in Weise is somewhat broader than the facts of the case since apparently supervisors did distribute the buttons albeit ostensibly only to employees who asked for one.

In that regard, the facts are similar to the instant case where Ms. O'Connor did not pass among the employees handing out the caps but stood by the back of her vehicle and handed them to any employees who came forward to get them. The cases are different to the extent that here there is no evidence of a comment as pointed as that made by the company president in Weise, supra.

In Phillips Industries, Inc. (1989) 295 NLRB No 75, however, the NLRB found no impropriety where a high level supervisor distributed pro-employer T-shirts but did so only to employees who asked for them. There are no other facts as to the circumstances of the distribution.

In Schwartz Manufacturing Company (hereafter "Schwartz") (1988) 289 NLRB No. 7, the NLRB found no violation where an employer held a meeting and urged employees to vote "No Union" and passed out hats with the company logo and "Vote No" buttons. A non-supervisory employee (albeit the son of a foreman) passed out the hats.

The NLRB distinguished Pillowtex and Tappan from the facts in Schwartz, stating that in Schwartz there was no direct involvement by supervisors in distributing the caps and also no

evidence that supervisors observed employees as they left the meeting, although there were supervisors standing outside when the employees left. The national board, however, specifically found and relied on the fact that there was no evidence how far away the management or supervisory personnel were or whether they saw the employees. There were no management or supervisors in the meeting room when the employees accepted or refused the hats.

Based on the foregoing cases, it is clear that the critical point is whether the employees' free choice is restricted. Thus, cases where buttons or other insignia are left where employees can, unobserved, choose to take them or not, there is no improper conduct. Where a choice must be made in the presence of a supervisor, whether the supervisor hands the insignia to individual employees as in Tappan and Pillowtex or simply tells employees they are available as in Weise, then the employees' free choice has been restricted.

Although a supervisor distributed T-shirts in Phillips, the distinguishing fact there is that the supervisor did not approach the employees or even make the T-shirts available under his watchful eye but simply gave them to employees who came to him and asked for them. Again, the employee made a free choice and was not constrained to make the choice in the presence of the supervisor.

In the instant case, there was direct supervisory involvement in that Ms. O'Connor distributed the hats. Mr. Cazarez

was also present during the distribution. There were only 35 to 40 employees. Whether they took the hats was observable by Ms. O'Connor at least.

Although the boxes of hats were in Ms. O'Connor's company vehicle and workers came up to get hats, rather than Ms. O'Connor passing among the workers to distribute them, the facts here are significantly different from those in Farah, McDonald's, or Black Dot, where the insignia were placed in neutral locations such as the cafeteria or the time clock, out of the presence of supervisors and managers. Here, the presence and involvement of supervisors rendered the distribution improper. (R.C. White (1982) 262 NLRB 575 [111 LRRM 1078].)

While most of the cases I have referred to involve objectionable conduct or unfair labor practices in addition to the improper distribution of campaign insignia, the case of Weise, demonstrates that such interference with employee free choice standing alone warrants setting aside the election. Moreover, in this case, this improper conduct is combined with the unlawful promises of management and its agent Mr. Garcia.

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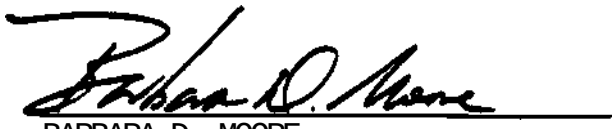
Based on the Company's improper promises made by its agents Lil O'Connor and Ernesto Garcia, and the Company's admitted distribution of "No Union" caps by Ms. O'Connor, I recommend that the election be set aside.

DATED: March 30, 1990



BARBARA D. MOORE
Investigative Hearing Examiner