

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

S & J RANCH, INC.,	)	Case No. 89-CE-90-VI
	)	89-CE-93-VI
Respondent,	)	89-CE-94-VI
	)	89-CE-95-VI
and	)	90-CE-25-VI
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
Charging Party.)	
)	
)	
UNITED FARM WORKERS OF	)	Case No. 89-CL-34-VI
AMERICA, AFL-CIO,)	
)	
Respondent,)	
)	
and	)	18 ALRB No. 2
)	
S & J RANCH, INC.,	)	May 1, 1992
)	
Charging Party.)	
_____)	

DECISION AND ORDER

On July 2, 1991, following an evidentiary hearing, Administrative Law Judge (ALJ) Barbara Moore issued the attached Decision in this matter, which involves six consolidated unfair labor practice charges, five filed against S & J Ranch, Inc. (S & J), and one against the United Farm Workers of America, AFL-CIO (UFW). The ALJ found that S & J unlawfully instigated and supported the signing of a decertification petition,¹ unilaterally increased wages, interfered with and denied access,

¹The ALJ therefore recommended that the decertification election, which was held on November 3, 1989, be set aside. The ballots from that election have been impounded and the UFW's election objections have been held in abeyance pending the outcome of this proceeding.

and assaulted a UFW access taker.² S & J excepts to these findings, as well as to the ALJ's dismissal of the charge against the UFW, which involved allegations of threats and olive throwing during a work stoppage and the throwing of olives and rocks at a vehicle driven by a crew leader.

S & J timely filed its exceptions to the ALJ's Decision, with a supporting brief, and General Counsel filed a brief in response to S & J's exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached decision of the ALJ in light of the exceptions, and briefs filed by the parties and has decided to adopt the findings, rulings, and conclusions of the ALJ, to the extent consistent herewith. Specifically, the Board declines to adopt the ALJ's findings with regard to certain of the incidents of interference with access and with regard to the assault on the UFW access taker. On other matters, the Board's analysis differs somewhat from that of the ALJ. In addition, several of S & J's exceptions warrant comment.

/ / / / /

/ / / / /

/ / / / /

²The ALJ dismissed allegations that S & J unilaterally increased the number of toilets in the fields, unilaterally changed olive picking requirements, fired ten workers due to their participation in the work stoppage, and discriminated against workers by telling them that they would not be employed or would lose work because of their support of the UFW. No exceptions were filed to these findings; therefore, the Board adopts them pro forma.

DISCUSSION

ALLEGATIONS AGAINST THE UFW

In dismissing the allegations that S & J employees, acting as agents of the UFW, engaged in unlawful coercive behavior by making threats and throwing olives at workers who did not join the work stoppage on October 14, 1989³, the ALJ expressly relied on her conclusion that, though UFW representatives were in the general vicinity, there was no evidence that they witnessed any misconduct. Consequently, the ALJ concluded that no agency relationship had been established.

We find it unnecessary to address the agency issue, as we affirm the ALJ's factual findings which show that there was insufficient credible evidence to establish that any unlawful misconduct took place.⁴ While this Board finds no place for violence of any sort in the conduct of agricultural labor relations, in this case we agree with the ALJ that all that was proven by a preponderance of the evidence was shouting by the

³All dates refer to 1989 unless otherwise stated.

⁴In reaching her decision, the ALJ made numerous credibility determinations. To the extent such determinations are demeanor-based, the Board will not disturb them unless the clear preponderance of the evidence establishes that they are incorrect. (David Freedman a Co.. Inc. (1989) 15 ALRB No. 9; IL. Caratan, Inc. (1983) 9 ALRB No. 33.) The Board is not as constrained in reviewing credibility determinations not based on demeanor and is free to draw its own inferences based on the record as a whole. (California Valley Land Co., Inc. (1991) 17 ALRB No. 8; Mann Packing Co. (1990) 16 ALRB No. 15.) Unless otherwise noted, we find no basis in the record to disturb the ALJ's credibility determinations.

marchers which was not in the nature of unlawful threats.⁵

Consequently, this allegation is dismissed.

S & J argues that the ALJ erred in refusing to reconsider her granting of the UFW's motion to dismiss the allegation concerning the throwing of rocks and olives at a van driven by Crew Leader Marcos Cervantes. At the time that the General Counsel finished its case in chief, the only evidence was Cervantes' testimony that the assault was only momentary and ceased immediately after UFW organizer Efren Barajas appeared to have said something to the picketers. The UFW moved to dismiss this allegation for failure to establish a prima facie case and the ALJ granted the motion. Later, Barajas denied that the crowd was throwing anything or that he told them to stop. The ALJ denied motions from S & J and the General Counsel to reconsider her earlier ruling in light of Barajas' testimony.

While we agree that the ALJ's refusal to reconsider her ruling was procedurally sound, we also find Barajas' denial unconvincing in light of the credited testimony of Cervantes as to how the events unfolded. Thus, even if we were to consider Barajas' testimony, we would nonetheless agree that the allegation should be dismissed for failure to prove that the UFW should be held responsible for the misconduct. Alternatively, if Barajas' testimony was correct, then the misconduct did not take place or he was genuinely unaware of it, either of which would

⁵The ALJ's factual findings on this matter are summarized on page 80 of her decision.

also support dismissal of the allegation.

ALLEGATIONS AGAINST S & J

a. Instigation and/or Support of Circulation of
Decertification Petition

We affirm the ALJ's conclusions that S & J, through the conduct of Crew Leader Moises Murillo, personnel employee Jovita Franco, and two labor consultants, unlawfully instigated and supported the signing of the decertification petition⁶. However, our analysis concerning the status of Murillo as an agent of S & J differs somewhat from that of the ALJ.

The ALJ found that Murillo had independent authority to hire and to direct the work of his crew members, and thus fell within the statutory definition of supervisor contained in Labor Code section 1140.4(j)⁷. The conclusion that Murillo had hiring authority was based on an admission by labor contractor Frank Echeverria that another crew leader, Roberto Santoyo, had such authority. We do not agree that the evidence that Santoyo had authority to hire necessarily means that all crew leaders must have the same authority. While it is somewhat probative of the authority of crew leaders in general, we find it unpersuasive in

⁶S & J asserts that the ALJ erred by finding that it committed an unfair labor practice by transporting the two employees who filed the decertification petition to the preelection conference and the election site. However, our review of the ALJ's decision reveals no such finding. Instead, she merely considered that conduct as evidence consistent with her conclusion that S & J was improperly involved in the decertification campaign.

⁷The Agricultural Labor Relations Act (ALRA) is codified at California Labor Code section 1140 et seq.

the absence of other evidence of hiring authority.

Though the evidence of the crew leaders' authority to direct the work of crew members, which consisted of credited testimony of crew members as to the nature of Murillo's duties, is somewhat stronger, we find it unnecessary to determine if Murillo was in fact a supervisor because the evidence persuades us that Murillo had at least apparent authority to act on behalf of management. Labor Code section 1165.4 states:

For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

After examining the above language, along with analogous precedent of the National Labor Relations Board (NLRB), the California Supreme Court set out the following standard for finding employers responsible for the acts of others under the ALRA:

Accordingly, even when an employer has not directed, authorized or ratified improperly coercive actions directed against its employees, under the ALRA an employer may be held responsible for unfair labor practice purposes (1) if the workers could reasonably believe that the coercing individual was acting on behalf of the employer or (2) if the employer has gained an illicit benefit from the misconduct and realistically has the ability either to prevent the repetition of such misconduct in the future or to alleviate the deleterious effect of such misconduct on the employees' statutory rights.

(Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, 322 [172 Cal.Rptr. 720].) The above standard has since been applied by

both the courts and the Board in situations where it was found that nonsupervisory employees were reasonably perceived as having acted on behalf of management. (Superior Farming Co. v. ALRB (1984) 151 Cal.App.3d 100, 118-119 [198 Cal.Rptr. 608]; V. B. Zaninovich & Sons (1983) 9 ALRB No. 54; see also M. Caratan. Inc. (1983) 9 ALRB No. 33 (decertification election set aside where foreman-trainee, though not a supervisor, was reasonably perceived as acting on behalf of management in circulating and filing decertification petition).)

Here, assuming that Murillo was not in fact a statutory supervisor, as defined in Labor Code section 1140.4(j), he was nonetheless reasonably perceived by crew members as acting on behalf of management. Numerous employee witnesses testified that they considered the crew leaders to have the authority to direct their work and make them correct it when it was not done to the crew leaders' satisfaction.⁸ Moreover, the evidence reflects that Murillo circulated the petition openly in the fields during working hours, thereby further making it appear that his efforts had the employer's blessing. Lastly, his efforts were consistent with the conduct of the labor consultants, who we have found to have encouraged the signing of the petition. Considering all these circumstances, we conclude that Murillo's decertification efforts would reasonably be perceived by employees as having S & J's imprimatur.

⁸The ALJ credited this testimony and we find no basis in the record to overturn that determination.

b. Unilateral Wage Increase

The Board affirms the ALJ's conclusion that S & J unlawfully increased wages unilaterally. In addition, the Board agrees that S & J failed to establish that the parties were at impasse or that the UFW waived the right to bargain by insisting on bargaining rather than simply giving a yes or no answer to the proposed increase. Moreover, though S & J claimed in a letter to the UFW that the wage increase was needed to remain competitive, S & J neither expressly raised a business necessity defense nor offered evidence demonstrating the kind of exigent circumstances necessary to excuse its failure to bargain over the wage increase. (See, generally, German, Labor Law (1976) pp. 444-445.)

c. Surveillance of Access Takers

S & J does not deny that its supervisors and guards were often present, though out of earshot, during the time the UFW was taking access. However, S & J insists that such conduct was lawful under the circumstances present. As the discussion below will indicate, our review of the case law indicates that under the circumstances reflected in the record, the ALJ properly concluded that S & J failed to demonstrate a sufficient justification for the nearby presence of its agents.

S & J's exceptions on this point are two-pronged. First, it argues that the presence of its agents was justified because it was designed to prevent the escalation of the pervasive atmosphere of violence and coercion that was first

created by the UFW's unlawful work stoppage on October 14. Since we agree with the ALJ that the General Counsel failed to prove its allegations with regard to the work stoppage, this defense must fail.

Next, S & J claims that its actions were consistent with legal precedent which stands for the proposition that a union has no cause to complain that management observes its activities if it chooses to engage in those activities on the employer's premises. The ALJ recognized the principle asserted by S & J, but concluded that observation of union activity has been found unlawful where it is regular, prolonged or for the specific purpose of observing the activity.⁹

Indeed, the law is clear that an employer is free to go about his business in a normal fashion even if it results in being nearby to union activity. (Tomooka Brothers (1976) 2 ALRB No. 52; Metal Industries (1980) 251 NLRB 1523 (management officials presence in parking lot during union leafletting not improper because it was part of normal duties to be in that location).) However, even where a supervisor has a legitimate reason to be in the general vicinity, it constitutes unlawful

⁹The ALJ also noted that there was testimony, which she credited, that workers were hesitant about talking to the UFW representatives when the S&J supervisors or guards were nearby and that the supervisors and guards refused to leave the area when asked. However, such a subjective perception is not a necessary element of an independent violation of Labor Code section 1153(a). Rather, an objective test is applied to determine if the employer's conduct would reasonably tend to interfere with protected rights. Lawrence Scarrone (1981) 7 ALRB No. 13; American Freightways Co. (1959) 124 NLRB 146 [44 LRRM 1302].

surveillance if he intentionally interjects his presence and listens to conversations between workers and union representatives. (Dan Tudor & Sons (1977) 3 ALRB No. 69; Harry Carian Sales (1985) 39 Cal.3d 209.) This principle is pertinent to the evidence that on a few occasions Echeverria followed the UFW organizers and exhorted the workers that only he could give them work and gave "hard" looks to those speaking with the access takers. As this was clearly unlawful, we uphold the finding of a violation in those instances.

As the ALJ explained, an employer commits a violation when it creates the impression of surveillance of union activity because it has a chilling effect on the freedom to engage in such activity. (See, e.g., Alpine Produce (1983) 9 ALRB No. 12; Hendrix Mfg. Co. v. NLRB (1963) 321 F.2d 100.) We have found no authority to support the argument that being out of earshot precludes creating the impression of surveillance. In fact, logic dictates that the chilling effect of the presence of agents of the employer, while undoubtedly stronger when conversations are overheard, is not dependent on being within earshot. For example, the employer could still readily identify those who talked with union, representatives.

Though the employer's motive is not an essential element of a surveillance violation, it may be relevant in judging the validity of the employer's proffered justification for its presence. As S & J asserts, observation of Union activity may sometimes be justified. However, in the cases cited

by S & J, the observation was found lawful because the union had no right to be on the employer's property. (Porta Systems Corp. (1978) 238 NLRB 192; Spencer Industries (1986) 279 NLRB 565; McGraw Edison Co. (1981) 259 NLRB 702; Chemtronics. Inc. (1978) 236 NLRB 178.)

Here, in contrast, the UFW was legally on the property¹⁰ and the S & J agents were explicitly instructed to observe the access takers. S & J's only purported justification for its observation of access takers was fear of violence such as allegedly occurred during the work stoppage on October 14. However, as we previously determined, the allegations of violence on October 14 were not proven. Furthermore, S & J did not explain why violence was feared merely from the presence of several access takers more than two weeks after the work stoppage and organized march through the fields during which violence was alleged to have occurred. Though no parallel access rights exist under the National Labor Relations Act (NLRA), in an analogous case, the NLRB held that it was unlawful for 11 supervisors to stand near the company gates to observe handbilling because this was out of the ordinary and went beyond any legitimate interest in preserving the integrity of the property.

(Arrow Automotive

¹⁰The California Supreme Court has examined the inherent conflict between an employer's right to control access to its property and employees' organizational rights under Labor Code section 1152. In light of the transient nature of much of the agricultural work force, the court upheld the validity of the Board's regulations providing for limited access to the employer's property for organizational purposes. (A.L.R.B. v. Superior Court of Tulare (1976) 16 Cal.3d 392 [128 Cal.Rptr. 183].)

Industries (1981) 258 NLRB 860.)

In sum, since it is undisputed that the S & J agents were present for the purpose of observing the access takers and since the record does not support S & J's assertion that the observation was justified due to a UFW-created atmosphere of violence and coercion, precedent supports the ALJ's conclusion that this conduct constituted unlawful surveillance

d. Other Interference With Access

The ALJ found that S & J unlawfully interfered with access on several occasions. In its exceptions, S & J addresses only the interference with access on the dates listed in the complaint (October 29 and 31, and November 1), claiming that the ALJ improperly considered other allegations on the theory that they were fully litigated (see ALJ dec., p. 46, fn. 68). S & J asserts that it received unequal treatment because the ALJ denied its motion to amend the complaint to conform to proof of excess access by the UFW.

The Board has often entertained closely related matters not specifically alleged in the complaint but nonetheless fully litigated. (See, e.g., Gramis Brothers Farms, Inc. and Gro-Harvesting, Inc. (1983) 9 ALRB No. 60.) We find that the ALJ correctly applied this principle here. In addition, as the General Counsel correctly points out, there was a timely objection to S & J's inquiry into the issue of excess access, but the evidence of additional denials of access came in without objection.

Moreover, the two incidents of interference found by the ALJ that appear to be the basis for S & J's claim are, to the extent affirmed by the Board, reasonably comprehended within the language of the complaint. One of the incidents, that dealing with Echeverria's disruption of access on November 2, is fairly considered within the allegations of surveillance included in the complaint and found meritorious above.

The other incident, the delay of access on October 28, is also covered by the complaint for the following reason. Paragraph 24 of the Third Amended Complaint alleges that access was delayed "on or about" three listed dates until most workers had already left. No evidence of a denial of access on one of those dates, October 29, was introduced and the ALJ accordingly found no violation on that date. However, evidence was introduced as to identical conduct on October 28, just one day earlier. Therefore, it appears that the date in the complaint was in error, but certainly within the meaning of "on or about" October 29. Since the incident on October 28 was properly entertained by the ALJ, was unrebutted and was not otherwise addressed by S & J's exceptions, there is no basis for overturning the finding of a violation.

S & J argues that the testimony of Ifrael Edeza and Gilberto Rodriguez regarding their alleged detention by security guard Ricardo Regalado on November 1 is too confused and contradictory to be reliable. We agree and do not adopt the ALJ's contrary conclusion. Both testified that they were

detained by Regalado until after most of the workers had left, but the testimony was very vague and particularly unclear as to the time the alleged detention took place and the effect it had upon access.

Rodriguez testified that it occurred between 11:00 and 11:30 a.m. and that access was taken because they saw the workers leaving for the day. He also stated that he understood that the UFW was to be allowed access during the noon lunch hour. Edeza's testimony was very unclear as to dates and times, but he did state that the workers were eating when he and Rodriguez were detained by Regalado. Regalado testified that he detained them because Edeza was not wearing a identification badge and because access was not allowed until noon. Though the ALJ credited Edeza and Rodriguez's claim that Edeza was wearing a badge, we nonetheless find the testimony too vague to establish that any delay actually interfered with access.

Barajas and Zeferina Perez testified that on November 1 they were refused entrance by a security guard, so after 10-15 minutes they got out of their cars and started walking into the fields. They were then given a ride by someone in a van to the location of the workers. Based on Perez' testimony that only a few workers were left, the ALJ found that the allegation was proven. S & J argues that there are so many contradictions between the testimony of Perez and Barajas that they should not be believed.

Though Perez testified that only a few workers were left to talk to, Barajas did not voice that complaint. Moreover,

Perez' earlier declaration was admitted as an inconsistent statement because there she said that 30-32 workers were left, rather than "only a few." Due to the inconsistent testimony as to the number of workers remaining when access was taken, we conclude that it is unclear whether the slight delay in gaining access interfered with the access takers' ability to talk with the workers and this portion of the allegation fails on that basis. In any event, most of the testimony actually centered on Echeverria's interfering presence once they got into the fields, rather than on the number of workers present. Consistent with our discussion above, we find this conduct more akin to unlawful surveillance.

e. Alleged Assault on Access Taker

The ALJ concluded that the weight of the evidence show that security guard Regalado pushed access taker Zeferina Perez in full view of a substantial number of workers, thus constituting unlawful interference with protected rights. We find the evidence insufficient to sustain the allegation.

S & J asserts that the evidence shows that Perez, who insisted on entering the fields without first waiting for the parties to resolve the mix up caused by the UFW entering through the wrong entrance, was in fact the aggressor. Specifically, S & J insists that the ALJ erred in discrediting the testimony of several S & J witnesses who stated that Regalado merely put up his arms in a winglike fashion and Perez ran into him. S & J also claims that the ALJ ignored the inconsistencies between

Perez and Barajas' testimony and their earlier declarations. While Perez testified that she was pushed, in her declaration she stated that Regalado grabbed her arm and twisted it. In his declaration, Barajas stated that he saw Regalado repeatedly push Perez, while at the hearing the testimony reflected a single push.

While this is a close question, we overrule the ALJ for several reasons. One, we disagree with her conclusion that Ranch Manager Charlie Rose and Harvest Superintendent Don Andersen could not have witnessed the incident because their attention would have been focused on their discussion with the other UFW representatives over access. While that scenario is plausible, so was Rose's explanation that he was facing the direction of the incident and witnessed the whole thing. We also give more weight to the fact that Perez' testimony differs markedly from her earlier declaration. Given all the conflicting accounts, as well as the apparent confusion at the scene, we find the evidence insufficient to prove the allegation,

f. Evidentiary Exceptions

S & J also excepts to various evidentiary rulings by the ALJ, including the preclusion of evidence of prosecutorial misconduct, a job description of a crew leader, and various other exhibits. S & J also lists numerous purportedly erroneous rulings on objections and on questions found beyond the scope of direct examination. As the General Counsel points out, S & J has

failed to comply with Regulation 20282(a)(1)¹⁰, which requires that the grounds for each exception be stated. The reason for the regulation is obvious--it should not be for the Board to divine what a party believes is wrong about a ruling or finding of an ALJ. The failure to comply with Regulation 20282(a)(1) is a sufficient basis for dismissing exceptions. (Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co. (1983) 9 ALRB No. 65.)

Here, S & J has provided only general statements of due process principles with regard to the right to cross-examine witnesses, but has not explained how those principles were violated here. No grounds at all are provided for the other evidentiary exceptions. These exceptions are therefore dismissed.

CONCLUSION

For the reasons discussed above, the Board affirms the ALJ's conclusions that S & J unlawfully supported the signing of the decertification petition, unilaterally increased wages, and interfered with access through both surveillance and denial of access. Further, we adopt the ALJ's recommended remedy for those violations, including the setting aside of the decertification election. Since the decertification petition was improperly tainted by employer involvement, it was invalid from the outset and therefore did not raise a bona fide question concerning

¹⁰Board Regulations are codified at California Code of Regulations, Title 8, section 20100 et seq.

representation. In addition to those allegations dismissed by the ALJ and not excepted to, we dismiss two of the allegations of interference with access and the allegation of assault on an access taker, due to insufficiency of the evidence.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent S & J Ranch, Inc., (Respondent) its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Initiating, sponsoring, supporting, approving, encouraging and circulating a decertification petition among employees;

b. Refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union) by making unilateral changes in wages, rates of pay or other terms or conditions of employment;

c. Interfering with lawful access by UFW representatives either by prohibiting them from taking access or by delaying access, thereby reducing their allotted time or causing them to miss talking to workers;

d. Engaging in surveillance, or creating the impression of surveillance, of employees while they speak to Union organizers who are taking access;

e. In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of

their rights guaranteed by Labor Code section 1152;

2. Take the following affirmative action designed to effectuate the policies of the Agricultural Labor Relations Act (Act).

a. Upon request of the UFW, rescind the unilateral wage increase implemented on or about March 12, 1990;

b. Upon request of the UFW, bargain collectively in good faith with the UFW with respect to the wages, rates of pay and other terms and conditions of employment;

c. Sign the attached Notice to Agricultural Employees (Notice) embodying the remedies ordered, and after its translation by a Board agent into all appropriate languages, reproduce sufficient copies of the Notice in each language for the purposes set forth in the remedial order;

d. Post copies of the Notice in all appropriate languages in conspicuous places on Respondent's property, including places where notices to employees are usually posted, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed;

e. Mail copies of the Notice in all appropriate languages, within thirty (30) days after the issuance of a remedial order, to all employees employed by Respondent during the period from October 19, 1989, until October 19, 1990;

f. Arrange for a Board agent or a representative

of Respondent to distribute and read the Notice in all appropriate languages to all of Respondent's employees on Respondent's time and property, at times and places to be determined by the Regional Director. Following the Reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. All employees are to be compensated from time spent at the reading and question and answer period. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees to compensate them for time lost at this reading and question and answer period;

g. Notify the Regional Director, in writing, within thirty (30) days after the date of issuance of this order, that steps have been taken to comply with it. Upon request of

/ / / / /

/ / / / /

/ / / / /

the Regional Director, Respondent shall notify him/her periodically thereafter, in writing, what further steps have been taken in compliance with the remedial order.

DATED: MAY 1, 1992

DATED: BRUCE J. JANIGIAN, Chairman¹¹

IVONNE RAMOS RICHARDSON, Member

¹¹The 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.

CASE SUMMARY

S & J RANCH, INC.
(UFW)

18 ALRB No. 2
Case Nos. 89-CE-90-VI, et al.
89-CL-34-VI

Background

This matter involves six consolidated charges, five against S & J Ranch (S & J) and one against the United Farm Workers of America, AFL-CIO (UFW). S & J was alleged to have instigated and/or supported the signing of a decertification petition, unilaterally increased wages and changed other terms and conditions of employment, discriminated against workers who took part in a work stoppage, interfered with and denied access, engaged in surveillance, and assaulted a UFW access taker. The UFW, through S & J employees acting as its agents, was alleged to have engaged in threats, and rock and olive throwing during a work stoppage on October 14, 1989.

ALJ's Decision

The ALJ found that S & J unlawfully instigated and supported the decertification petition which resulted in an election on November 3, 1989. She found that the petition was circulated and supported by various agents of S & J, including a supervisor, two labor consultants, and a personnel employee. She therefore recommended that the decertification election be set aside. The ALJ also found that S & J unilaterally implemented a wage increase despite the UFW's request to bargain, delayed access on several occasions until most or all of the workers had departed, interfered with access by disrupting conversations between workers and access takers, engaged in surveillance of access, and assaulted an access taker who tried to walk past a security guard. The ALJ found the evidence insufficient to sustain allegations that S & J unilaterally increased the number of toilets in the fields, unilaterally changed olive picking requirements, fired ten workers due to their participation in the work stoppage, and warned workers that their employment would be jeopardized if they supported the UFW.

The ALJ dismissed the allegations concerning threats and rock and olive throwing because she concluded that it was not shown that any misconduct that occurred was by anyone acting as an agent of the UFW.

The Board's Decision

The Board affirmed the dismissal of the allegations against the UFW, but did not address the issue of whether those allegedly engaging in misconduct were acting as agents of the UFW. Rather, the Board relied on the ALJ's factual findings, which showed that

the evidence was insufficient to establish that any actionable misconduct took place.

The Board affirmed the ALJ's conclusion that agents of S & J circulated and supported the signing of the decertification petition, thereby rendering the petition invalid and requiring the setting aside of the election. However, rather than adopting the ALJ's finding that a crew leader who circulated the petition was a statutory supervisor, the Board relied on principles of apparent authority to find that the employees would have reasonably viewed the crew leader as acting on behalf of management.

The Board also adopted the ALJ's conclusions that S & J unilaterally increased wages, interfered with access, and engaged in surveillance. However, the Board reversed as to two of the alleged incidents of interference with access and as to the alleged assault on an access taker, finding that the evidence was insufficient to carry the General Counsel's burden of proof. With regard to the surveillance violation, the Board held that the fact that supervisors and guard stayed out of earshot does not preclude finding an unlawful chilling effect upon employees' right to communicate with union representatives. In addition, the Board agreed with the ALJ that S & J failed to establish a legitimate justification for its observation of access.

Lastly, the Board dismissed several evidentiary exceptions for which S & J failed to provide grounds as required by Regulation 20282(a)(1).

* * *

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

MEMBER ELLIS, Concurring and Dissenting:

I concur in the result reached by colleagues, with one exception. In my opinion, S & J did not engage in unlawful surveillance when its supervisors and guards merely observed access takers from a distance out of earshot. As my colleagues have noted, employers may continue with their normal business activities even if it results in being in the vicinity of union activity. (See, e.g., Tomooka Brothers (1976) 2 ALRB No. 52.) Moreover, agents of the employer may remain in the area if they can establish a legitimate reason, such as protecting the integrity of the property, which outweighs any interference with protected rights. (Spencer Industries (1986) 279 NLRB 565; McGraw Edison Co. (1981) 259 NLRB 702; Chemtronics, Inc. (1978) 236 NLRB 178.)

Here, my colleagues conclude that S & J established no legitimate reason for its nearby presence because the supervisors

and guards were intentionally observing access and because their purported fear of violence was unfounded. I believe that S & J had a legitimate right to keep track of activity on its property as long as its people stayed out of earshot and did not otherwise actively interfere with access. It is unreasonable to expect property owners to allow anyone, especially nonemployees, to have totally unsupervised access to their property. Because I find no convincing evidence in the record that this conduct had any appreciable effect upon access rights, I would strike the balance in this instance in favor of S & J's interest in ensuring the integrity of its property.

DATED: MAY 1, 1992

JIM ELLIS, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
S&J RANCH, INC.,	)	Case No. 89-CE-90-VI
	)	89-CE-93-VI
Respondent,	)	89-CE-94-VI
	)	89-CE-95-VI
and	)	90-CE-25-VI
)	
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO,)	
Charging Party.)	
<hr/>		
	)	Case No. 89-CL-34-VI
)	
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO,)	
Respondent,)	
)	
and)	
)	
S&J RANCH, INC.,)	
Charging Party.)	
<hr/>		

Appearances:

Stephanie Bullock, Esq.
Robert H. Murray, Esq.
for the General Counsel

Howard A. Sagaser, Esq.
for the Employer

Sally Parsley
for the United Farm Workers
of America, AFL-CIO

Before: Barbara D. Moore
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law Judge:

This case was heard by me in Fresno, California, on December 4, 5, 6, 7, 11, 12, 13 and 14, 1990. The case proceeded on the Third Amended Consolidated Complaint ("Complaint") issued on December 3, 1990 by the General Counsel of the Agricultural Labor Relations Board ("ALRB" or "Board").

The Complaint encompasses six charges.¹ Five charges² allege violations of the Agricultural Labor Relations Act ("ALRA" or "Act") by S&J Ranch, Inc.³ ("Respondent," "Company" or "S&J.") The remaining charge (89-CL-34-VI) alleges violations by the United Farm Workers of America, AFL-CIO ("UFW" or "Union").

All of the moving papers were timely filed and duly served. All parties were given full opportunity to participate in the hearing, and all parties filed post-hearing

1. Two other charges, 89-CE-86-VI and 89-CE-97-VI, were withdrawn. The remainder were consolidated for hearing in the Consolidated Amended Complaint which issued on September 27, 1990. Both the Company and the Union filed answers thereto, and pursuant to Title 8, California Code of Regulations, section 20230, the allegations in the Second and Third Amended Consolidated Complaints also are deemed denied.

2 Charges numbered: 89-CE-90-VI, 89-CE-93-VI, 89-CE-94-VI, 89-CE-95-VI, and 90-CE-25-VI. Because most of the charges are against the Company, for ease of writing, I will use the term "Respondent" when referring to it, and, when discussing the charges against the UFW, will refer to it as "Respondent Union."

3 General Counsel withdrew its allegation that S&J and Dole Food Company were a single employer or, alternatively, joint employers. The parties stipulated it was understood that General Counsel was not waiving its right to litigate the issue at a later date. (See pages 9 and 10 of the official hearing transcript. Hereafter, references to the transcript will be cited: "volume:page.")

briefs. Based on the entire record⁴, including my observation of the demeanor of the witnesses, and on the parties' arguments at hearing and in their briefs, I make the following findings of fact and conclusions of law.

I. CASE BACKGROUND

Following an election on October 22, 1982, the Union was certified as the exclusive bargaining agent of all agricultural employees⁵ of S&J on June 1, 1984. (S&J Ranch, Inc. (1984) 10 ALRB No. 26.) Immediately after its certification, the Union, on June 9, 1984, requested bargaining. Respondent refused to bargain in order to test the validity of the certification. The matter came before the Board which found Respondent had unlawfully refused to bargain, ordered it to begin negotiations, and extended the certification of the Union. (S&J Ranch, Inc., (1986) 12 ALRB No. 32.)

Respondent appealed the Board's decision to both the Fifth District Court of Appeal and the California Supreme Court. Both courts summarily denied S&J's petitions for review.

⁴ I directed General Counsel to dispense with introducing the "official exhibits" in order to eliminate the extra time and money required to prepare them since all of the documents generally contained therein, except the Pre-Hearing Conference Order ("Order"), are already part of the record pursuant to the Board's rules. I hereby take administrative notice of that Order which issued on November 16, 1990. On page 2 thereof, there is a reference to foreman and supervisor "Trinidad Contero." The parties stipulated the correct surname is "Qunitero" and further stipulated that he is the person listed in paragraph 5(a) of the Complaint.

⁵ Later, the unit was changed to encompass only S & J's agricultural employees in Madera County. (See, S&J Ranch, Inc. (1986) 12 ALRB No. 32.)

After the Supreme Court's denial, bargaining finally began nearly six years after the original election. The parties held 24 negotiation sessions between June 22, 1988, through November 1, 1989. (JX1.)

On Friday October 13, 1989," workers complained to UFW negotiator Efren Barajas about working conditions, including inadequate drinking water and toilets, and also expressed their frustration that a contract had not yet been signed. They told him they wanted UFW representatives to go with them to speak to the Company about their dissatisfaction with these matters. (V: 59-60; 65.)

On the following day, October 14, approximately 100 to 200 S&J employees, with Barajas and another UFW agent, John Aguirre, acting as spokesmen, engaged in a work stoppage for part of the morning. Barajas demanded on the spot negotiations of the "many problems" the workers had. Company personnel declined, stating that another negotiation session was already scheduled for November 1, about two and one-half weeks away.

A few days after the work stoppage, a decertification petition began circulating. The petition was filed with the Board on October 25 but was dismissed because it did not have enough valid signatures. Another petition was filed on October 31st with a sufficient showing of support, and an election was held on November 3rd. The election results have not been certified.

⁶ All dates hereafter are 1989 unless otherwise indicated.

The parties met on November 1st, but believing that the Company had unlawfully instigated and supported the decertification effort, the Union canceled the negotiation session scheduled for November 2nd. As of the time of the hearing, no further bargaining had occurred.

II. THE ALLEGED UNFAIR LABOR PRACTICES

As noted previously, there are charges against both the Union and the Company. The Complaint alleges that the Company committed the following unlawful acts:⁷

1. unilaterally increased wages;
2. instigated and supported the decertification campaign, including allowing the petitions to be circulated during regular paid working hours;
3. unilaterally increased the number of toilets in the fields;
4. unilaterally instituted less burdensome requirements for picking olives;
5. fired ten workers because of their participation in the work stoppage;
6. discriminated against workers telling them it did not want to employ them because of their support for the Union;
7. through its agent, a security guard, committed assault and battery on a female UFW representative;

⁷ The Company admits that it increased the number of toilets but contends it did so only to remain in compliance with federal law. (See, Occupational Safety and Health Standards For Agriculture, Part 1928, (52 C.F.R §16095 (1987).) It also admits it unilaterally changed the picking requirements and raised wages but denies that either change was unlawful.

8. denied UFW representatives access and engaged in surveillance of conversations between said representatives and workers; and

9. threatened employees with loss of work because they supported the UFW.

The Complaint alleges two violations against Respondent Union. First, that the Union, through 100 to 150 "picketers", threw olives, threatened to remove nonstriking employees by force, and rushed at nonstriking employees. Second, that the Union, through the "picketers", threw rocks and olives and damaged the windshield wiper of a vehicle driven by Marcos Cervantes.

Both the Union and the Company made motions to dismiss after General Counsel's case in chief. I granted both motions in part, and dismissed the following allegations:

1. that portion of paragraph 5(b) of the Complaint alleging that Jovita Franco was a confidential or managerial employee but not the allegation that she was a Company agent. (VI:38-39.);

2. those portions of paragraph 14 that crew leaders Miguel Molina, Tomas Reyes, Roberto Santoyo, and an unnamed crew leader circulated the decertification petitions (VI:42,46.);

3. paragraphs 22 and 26 alleging threats of loss of work (VI:55,57.); and,

4. paragraph 27 alleging that the Union was responsible for rocks or olives being thrown by various demonstrators which resulted in damage to the windshield wiper of crew leader Marcos

Cervantes' van.⁸ (VI:6.)

Having set the stage by providing a context to the development of this specific case and having brought matters up to their current status, I now turn to a consideration of the remaining allegations and the parties' defenses thereto.

III. COMPANY OPERATIONS

At all times relevant herein, S&J was a California Corporation with its principal place of business in Madera County. The Company principally grows citrus, almonds, pistachios and olives, but also grows minor amounts of other crops.

The Company employs the largest number of workers during the olive harvest which in 1989 lasted approximately six weeks, beginning in the first part of October and extending to the middle of November. Peak employment occurred from approximately the last half of the third week of the season into the fourth week. (II:16-17; II:32.)

In 1989, the Company employed approximately 25 olive pickers directly and also contracted with F&F Contracting Co., owned by Frank Echeverria, a labor contractor, (also known as

⁸ Both General Counsel and Respondent request that I reconsider this ruling because UFW representative Barajas while testifying in regard to the allegations in paragraph 28 asserted that he never saw any rocks thrown. I decline to reconsider my ruling. As a matter of legal procedure, the ruling was predicated on whether General Counsel had sustained its burden of proof based on the evidence produced at the time it completed its case in chief. I found it had not and dismissed the allegation. As a result, Respondent Union had no duty to produce evidence on this issue, and were I to depart from normal legal procedure and reverse my ruling, due process would require that Respondent Union be allowed to introduce any relevant evidence on the issue.

"Pancho") who provided the vast majority of olive harvesters for S&J. He provided approximately 250-300 olive harvesters each day during the peak of the harvest.

At the times material herein, Philip Pierre was Vice-President of S&J Ranch. Charlie Rose was the ranch manager, and Don Anderson⁹ was the harvest superintendent. Jerry Alien, also a superintendent, assisted Anderson.

Anderson, Alien, and Rose all were regularly in the fields every day, checking the production and the quality of the picking. (VII:142-144.) Rose, Anderson and Pierre determined when to pick which orchards and set the picking requirements. Anderson, Alien, and Rose generally saw Echeverria every day. It was usually Anderson who would tell Echeverria which fields to pick and would give him the picking instructions. If the picking instructions needed to be changed, Anderson would tell Echeverria.¹⁰ Similarly, if there were a problem with the way the olives were being picked, Anderson would talk to Echeverria and tell him there was a problem in the field that needed to be taken care of, (VI:126; VII:142-144.)

Sometimes, he would give instructions to Echeverria's assistant David Alverado. There was never an occasion when he could not find one or the other of them; thus, he never had occasion to give instructions to the crew leaders whom Echeverria employed to assist him and Alverado. (VI:141.)

⁹ The transcript erroneously identifies him as "John."

¹⁰ Echeverria could not vary these instructions without checking with Company management.

The Company admits the supervisory status of Echeverria, Pierre, Anderson, and Rose, and it is clear from testimony that Alien is also a supervisor. The Company disputes the supervisory status of the crew leaders.¹¹

IV. THE STATUS OF CREW LEADERS

In 1989, the crew leaders were Jesus Cardenes, Moises Murillo (misspelled in the transcript as "Arello"), Marcos Cervantes, Roberto Santoyo, Miguel Molina, Luis Huante, Thomas Reyes and Jose Troncoso. Each crew leader had his own crew composed of 40 people. The crew was further divided into groups, usually consisting of 4 or 5 workers, all of whom put the olives they picked into one bin.

Echeverria was first called as a witness by General Counsel. He testified as to the duties of the crew leaders collectively and did not indicate that any of them occupied a different status or had different duties than others. (II:43.) According to him, the crew leaders' duties were to furnish the ladders for the harvest workers, to make sure the tractors were in proper running order, and to provide enough toilet facilities, drinking water and cups for drinking. (II:43.) They did not keep track of the number of hours the employees worked;

¹¹ Respondent proffered RX12 which is a job description of a crew leader in the pest control department who is a direct employee of the Company. I directed Respondent's Counsel to make an offer of proof showing the job duties of this individual were sufficiently similar to the job duties of the crew leaders employed by Echeverria in the olive harvest to make the job description relevant. Respondent did not provide an offer of proof sufficient to establish such relevancy, and the exhibit was rejected. (VI:161.)

Echeverria and Alverdo did that.¹² (VIII: 52-53.) Nor did they keep track of the number of bins picked by the workers; the forklift drivers did that. (VIII:53.)

According to Echeverria, if crew leaders observed fruit which had not been picked, they would notify him or Alvarado immediately. Echeverria would go out to the field and check the picking and tell the people to improve their work. (II:43; VIII:49.) He insisted crew leaders did not have the authority to take any action on their own. (II:44.)

Echeverria testified the majority of the crew leaders, no specific number was given, had two-way radios which they used to contact him or Alvarado if equipment broke down or workers were leaving fruit on the trees or in the event of injuries.¹³ He did not say what happened if a crew were picking improperly and the leader was one of those who had no radio or for some other reason could not contact Echeverria or Alvarado.¹⁴

Crew leaders were paid on an hourly basis rather than piece rate as the harvest employees were paid. They did not receive any fringe benefits such as paid holidays, vacation or

¹² Employee Antonio Santos testified to the contrary, stating, that Santoyo, and sometimes Murillo, as well as "other various administrators" would punch his time card. (V:10-11.)

¹³ Molina testified that he had a radio so that in the case of emergency or "something where they had to speak to the boss" they could do so. (VIII:213.) He did not say anything about one of its purposes being to notify Echeverria whenever a worker needed to be corrected.

¹⁴ For example, Echeverria failed to appear as scheduled to testify one afternoon, and Respondent's counsel initially could not locate him.

insurance; however, Alverado did receive such benefits. (II:36,45.) They did not do any of the same work as the crews.

Echeverria first testified that only he had the authority to hire people and to discipline or fire them. (II:34-35.) He did not mention any exception to this policy. However, after several workers testified that they were hired by Santoyo, Echeverria, when recalled to testify as part of Respondent's case, changed his testimony and acknowledged that Santoyo hired people, but then stated that Santoyo was the only one who could do so.¹⁵ He maintained that the other crew leaders could bring people to him and suggest that he hire them, but it was his decision.¹⁶

¹⁵ Fidel Garcia and Antonio Salas worked in both Santos' and Molina's crews in 1989. Each testified that so far as he could see, Santoyo and Molina had the same duties. (IV:95, 97-98; V:147.) Similarly, Antonio Santos, who worked for Santoyo and Murillo, testified that both seemed to have the same duties. (IV: 147-149.)

¹⁶ Emiliano Rojas testified that his crew leader, Murillo, told him on several occasions that if he knew anyone who wanted a job, Rojas should let Murillo know. (V:33-34.) This testimony is not sufficient to show that Murillo had the power to hire or to effectively recommend hiring. However, based on Echeverria's initial testimony wherein he made no distinction among crew leaders, his admission that Santoyo could hire and the testimony of workers that Santoyo's duties appeared no different than those of other crew leaders for whom they worked, I find all the crew leaders had the same basic duties and could hire people. I decline to credit Echeverria's belated distinction. The ability to hire is a primary indicia of supervisory authority, and I do not believe Echeverria initially would have failed to mention Santoyo's unique position if it were true. Rather, I find that faced with credible testimony of several witnesses, he decided to characterize Santoyo as an exception to his prior testimony. I note that by the time Echeverria was recalled, the allegations against Santoyo had been dismissed.

Numerous workers¹⁷ testified that the crew leaders regularly inspected their work to see that they had done the picking properly and directed them to redo any trees which the crew leaders determined were not picked properly. (IV: 93-94, 135-136, 147-148; V:33-34, 45, 147-149; VI:5-8. It was clear the workers regarded the crew leaders as being in charge of the crew. (IV:93,97; V:147, IV:135-136, IV:147-148, V:33.)

Two workers, Fidel Garcia and Antonio Salas, testified to specific instances when their crew leader, Molina, insisted that they go back and repick trees which he determined had not been picked properly. In each case, since they had not done the work Molina ordered them to correct, Salas and Garcia refused.¹⁸ In both instances, Molina would not let them go on to pick new trees until they complied with his orders. Faced with this directive, both men left. (IV:107-108, 113-114; V:149, 165-167.) In neither case did Molina contact Echeverria or Alvarado before issuing his ultimatum.

At the time of the hearing, Molina was still employed by Echeverria. He testified he was essentially a foreman but simply did not have the title. His primary job was to make sure the trees did not have any fruit left on them. (VIII:23,26,30.)

He testified he could not fire anyone; nor could he

¹⁷ Enrique Nava, Antonio Salas, Fidel Garcia, Antonio Santos, Jose de Salas, Emiliano Rojas (whose name is erroneously spelled "Ameliano" in the transcript) and Julian Garcia.

¹⁸ Salas explained that if a worker has to repick a tree or pick up olives, he loses time, and there is less fruit to gather than on a tree which has not yet been picked. Since he was paid piece rate, both factors caused him to get less pay. (IV:129.)

send anyone home without first checking with Echeverria. He denied sending anyone home during the 1989 olive harvest because they did not follow his instructions and asserted he did not recognize the name Antonio Salas. (VIII:25.)

According to Echeverria, Salas quit working because on three occasions in a three-day period, he told Salas and his brothers they had to improve their work. One of them replied to Echeverria that they were not going to work anymore. He told them the job was there so long as they did their work correctly, but they never came back to seek work.¹⁹ (VIII: 50-52.)

Regarding Fidel Garcia, Molina testified he advised Echeverria ("Pancho") by radio that Garcia "had left and didn't want to do his work right...." (VIII:25.) Echeverria corroborated that Molina called and said he had asked Garcia to talk to Echeverria. He said he went to the field and encountered Garcia who was already walking out. Garcia threw the bucket of olives and told Echeverria, "I'm not going to pick olives." Echeverria asked him why, and Garcia simply said he definitely was not picking any olives and walked away. The next day, Garcia returned to work, apologized for his behavior, and asked Echeverria if he could return to work.²⁰ Echeverria said, "Okay," but Garcia would have to do the job. (VIII:45-50.)

¹⁹This contradicts Salas' testimony, which I credit, that he returned to work on October 20th. If Salas had not returned to work, I would have expected Respondent to corroborate Echeverria's testimony with payroll records or daily crew sheets or some such evidence.

²⁰ I do not credit this testimony since the next day was the day of the work stoppage in which Garcia participated. (V:150.)

I credit Garcia and Salas that Molina, on his own authority, told them they could not pick any more trees until they obeyed his order to repick. Even Molina said he had already told Garcia this by the time he called Echeverria. Neither man contended he was actually fired by Molina, and I make no finding Molina had such authority, but it is clear they believed they had to obey.²¹ (IV:108, 114; V:149, 155-156, 165-167.)

Antonio Santos testified he was in Moises Murillo's crew and in addition to directing picking, Murillo would oversee bringing in and removing olive bins. (IV: 101-103, 147-149.) According to Murillo, he worked as a forklift driver in the 1989 harvest season, and his only duties were to bring in and take out boxes, to take water to the workers and to pick up trash or clean out the bathrooms. (IV:81.)

He testified he never gave instructions to the workers on how to pick fruit; nor did he ever tell the crew members that they had to go back and repick a tree. He also testified he did not recall ever telling Echeverria that any of the olive pickers were not performing their job correctly.²² (IV: 82-83.)

Based on the foregoing, I find that crew leaders Santoyo, Murillo and Molina could hire workers and could order them to correct work without first checking with Echeverria. I

²¹ Similarly, worker Antonio Santos testified that only Echeverria would tell them to get out if they could not do the job correctly. (V:45.)

²² I do not credit Murillo. His testimony contradicts that of not only the workers but also Echeverria in that Echeverria made no exceptions when he testified crew leaders oversaw picking and reported him.

find that they could not fire workers but could prevent them from continuing to work, thereby depriving them of income, at least until Echeverria (or Alvarado) could be consulted.

I do not credit Echeverria and Molina that every time a worker did not pick properly, Echeverria would be called to deal with the situation. In the first place, the incidents with Molina demonstrate otherwise. In the second place with 250 to 300 workers and the many matters needing attention during harvest, I do not believe Echeverria and Alvarado would have the time to travel to the field and speak with an individual worker every time there was a problem with picking.

V. BARGAINING

As noted earlier, the Company and the Union began negotiating for a contract in June of 1988. In 1989, Efren Barajas headed up negotiations for the Union until August 16th, when Dolores Huerta took over. (III:159-160; VI:151-152.)

The relevant bargaining history is set out in JX1. Briefly, on August 16th, the Company made an interim wage proposal²³ and requested the Union inform it by close of business on August 18th whether it objected to the Company

²³ The proposal was marked as RX13, but I sustained General Counsel's objection to its admission because it was not identified or provided to General Counsel by Respondent as required by the Pre-Hearing Conference Order. (VII:20-23.) There were a number of other instances where Respondent similarly failed to comply with the Pre-Hearing Conference Order, in some cases failing to inform General Counsel of its intention to introduce documents until the very moment Respondent's counsel offered them into evidence. In each instance, I rejected the proposed exhibit unless I found that Respondent could not reasonably have anticipated the need for the proffered exhibit. (VI: 162-206; VII:4-15.)

implementing the proposed increase. (VI:162.) Barajas told Pierre the Union would not agree to the interim proposal, and the Company did not implement it. (VII:17-19.)

The Union then asked the Company to clarify its August 16th proposal. In response, on September 7th, the Company submitted a full contract proposal including a wage proposal. (See Exhibit A to JX1.)

A new Company economic proposal was submitted to the Union on September 18th. (Exhibit C to JX1.) The following day, the Union submitted a revised wage proposal and during the course of negotiations that day amended its proposal. (Exhibits G-1 and G-2 to JX1.) In response to these economic proposals, the Company provided the Union a revised wage proposal on October 10th. (Exhibit H to JX1.)

Matters were coming to a head in negotiations. At the session on October 10th, the Company negotiator told Huerta that the Company did not have much room to move on wages and urged the Union to make a counterproposal so "...the company and the Union could go ahead and take it to the employees for a vote for approval of a contract." (VII:26.) Dolores Huerta responded that it was time to get a contract "or go to war" (Id.) Despite the parties' postures, at the negotiating session the next day, Dolores Huerta asked what the wages for each individual employee would be under the October 10th proposal.²⁴

²⁴ On October 16th, the Company FAXED a break-down by individual employee of the wages that would be paid under the October 10th proposal. (RX24.)

Two days later, on October 13th, workers met with UFW representatives to discuss the progress of negotiations. Workers complained about the lack of toilets and drinking water and not having a contract and asked the Union to help put on a demonstration to express their frustrations.²⁵ (III: 104, 106-108; V:59-60; VI:64.) The following morning, UFW agents Efren Barajas and John Aguirre helped them stage a work stoppage.

VI. THE WORK STOPPAGE

The Company had agreed to the Union taking access before work on Saturday, October 14th. Barajas and Aguirre arrived about 6:00 a.m. and met with workers who were gathered just inside the ranch from Avenue 12 on a private dirt road. (See GCX4, a photocopy of a map of the Company fields and adjacent roadways.) This road was referred to as the center drive and is depicted on GCX4 as a blue line which bisects field 6-2 in a north/south direction.

Echeverria was the main General Counsel witness regarding the alleged acts of violence. He testified Aguirre led about 120 workers in a march down the center drive from north to south. Barajas was at the rear of the group.

The activity began at about the area marked "2" on GCX4. (VI:68.) He heard the workers yelling, "Get out of the

²⁵ Seven years had elapsed since the original election when the workers selected the UFW as their bargaining representation, and negotiations had been going on for some 16 months. Not only had no contract been signed, but under the Company proposal, those who worked for labor contractors--the vast majority of Company workers--would receive lower wages than workers employed directly by S&J and were not eligible for fringe benefits. (See Appendix A and Letter of Understanding, Exhibit A to JX1.)

field or we are going to make you get out." He also testified they were throwing rocks, pieces of tar, and sticks, and were yelling, "Get out, we're going to make you get out." (I:70.) He testified that Aguirre was only about 15 feet away when people were throwing rocks. (I:76, 84.) He did not hear Aguirre tell the people to stop throwing rocks.²⁶

One individual got on a tractor which was running, set the tractor in neutral, and the tractor rolled down the hill and crashed into a tree. Another individual, whom Echeverria did not recognize as working for him,²⁷ who smelled of alcohol, picked up a piece of tar and came right up to Echeverria. Echeverria testified he became frightened and went off into the trees.²⁸ (1:72-74.) Echeverria acknowledged he did not know if either Aguirre or Barajas observed either of these incidents.

²⁶ In response to a leading question as to whether Barajas told them to stop, he replied in the negative. However, in his direct testimony there is no indication Barajas was in the vicinity. In fact, if Aguirre was right by Echeverria at the front of a crowd of 120 people and Barajas was in the rear, it is likely Barajas would not have seen any such activity.

²⁷ There is no evidence this person was affiliated with the Union, and I note that in relation to another matter Echeverria had to ask Emiliano Rojas who had worked for him for some time for identification. Thus, I do not find sufficient evidence to infer this person was not a worker.

²⁸ On cross-examination he was asked what was said by the person who came up to him with a rock. There was no such testimony, but I infer the reference was to this incident. The interpreter translated the remarks as: "Let's kill this rip-off." The actual Spanish words mean "to get rid of or finish this burglar" according to the interpreter. I infer this remark refers to the allegations that Echeverria was charging too much for transportation and housing and not paying high enough wages. The person also said, "let's kill this son-of-a-bitches's son." (I:77-79.)

He heard Aguirre speak to the gathering of people, saying in Spanish: "Come on, everybody, outside. Let's get together." Echeverria testified Aguirre also said, "Don't work. We need you people get out (sic). "Get out of the field." (I:74.) Aguirre also yelled, "Chickens, get out of the field. Let's get together. Follow us or you'll be sorry." (I:75.)

According to Echeverria, all of this activity occurred in the loading area near the southwest corner of field 6-1 (see GCX4), and he estimated the yelling and throwing sticks started a little after 7:00 or 7:15 a.m. and continued for 40 to 60 minutes. (I:86-87.) While this was occurring, about half of the workers, approximately 100 people, were in the field on ladders picking olives. The marchers were yelling: "get off the ladder or we're going to make you come down." (I:79-80.) Approximately 20 to 25 people who were attempting to work asked him if it was safe for them to stay there. He testified that their faces showed that they were scared and stated, "They were running. I had people running all over the field." (I:81, 87-88.) Asked to name some of the 20 to 25 people, the only ones he could name were Jose Troncoso²⁹ and Troncoso's family.

Troncoso testified that about 7:00 a.m. on October 14th, he and his family—his wife, two daughters, a friend of one daughter, and his son-in-law—were working about four trees in from the center drive. They were at the south end of Field 6-2,

²⁹ It is not clear whether Troncoso was a crew leader at this time since the evidence shows only that by the latter part of October he had moved from picker to crew leader.

in the area marked in pinks on GCX4. (I:95.) A group of people, he did not say how many, with Aguirre and Barajas at the front came about two trees into the field.

Aguirre and Barajas said, "son of a bitches."

Initially, Troncoso said no one in the group did anything else, but then he said some of the people threw olives "towards" him and his co-workers. (I:99-100.) At first he started to say the group ran toward his family but corrected himself and said, "no, no, let us not say they ran. They just went onward to the rest of the family." (I:102.) He and his family went further in the fields to hide.³⁰ After about 15 minutes, they resumed picking because the group had left. (I:99, 102.) He estimated the marchers were in the fields for about two hours and that he and his family worked all but those 15 minutes. (I:100-102.)

Jose Troncoso's daughter Regina, who appeared to be 15 or 16 years old, also testified. According to her, approximately 20 people were calling for those who were working to "come out or get out." Her group remained working for about 15 minutes and then went to hide in a bin because "someone", Regina had no idea who, had said that the Union people would hit the workers. (I:112.) She acknowledged she did not actually

³⁰ Respondent's counsel asked a leading question, asking Troncoso how he felt when he saw 100-150 people come into the field throwing olives toward him and his family. Troncoso replied "Well, I felt afraid." (I:103.) There was virtually no feeling behind the testimony, and it sounded insincere. Moreover, since he had to be drawn into the response, it is not very convincing. In any event, the relevant legal issue is not whether Troncoso was subjectively afraid but rather is an objective standard of whether the proverbial reasonable man would have been afraid in the situation.

believe anyone was going to hit her. (I: 120-121.)

According to her, neither Aguirre nor Barajas left the roadway and went into the field. (I:120.) Only about five people came into the field, and they were making motions with their hands and whistled.³¹

She went further into the orchard where her mother and father were because the people who had been working with her had left. (I:116-119.) By this time, the five who had come into the field had rejoined the others and left.

Ms. Troncoso was a believable witness. She seemed sincere and did not exaggerate. Where her testimony differs from her father's, I credit her. Thus, I do not credit that Aguirre and Barajas were present or that olives were thrown.³²

There are significant discrepancies in the General Counsel's and the Company's version of events. In the first place, Echeverria testified that the allegedly violent activity all occurred in the area marked "2" on GCX4, but also testified that from 7:00 or 7:15 a.m. until about 7:45 or 8:15 a.m. Union supporters were marching down the center drive going into fields sending people running all over. Yet, of all these people

³¹ The following day, the interpreter indicated that she had thought about her interpretation and believed she had not conveyed the proper connotation of the whistling. According to the interpreter, the word in Spanish ("chiflete") has an insulting meaning akin to a Spanish phrase which translates, "to fuck your mother." (II:116-118.)

³² Not only did I find Ms. Troncoso more believable, but the swearing is out of character with Barajas since even Echeverria who tended to exaggerated greatly said verbal abuse was not much of a problem with Barajas.

affected, the Troncosos' are the only ones he could name who were afraid, and Troncoso and his daughter testified the incident they described occurred at the south end of field 6-2 about 7 a.m.

These descriptions clash with Pierre's testimony wherein he said he arrived where Aguirre, Barajas and the demonstrators were gathered at the spot marked "2" on GCX4 about 7:15 a.m. Charlie Rose was already there. Pierre believed work was to begin at 7:30 a.m. and was concerned the demonstration would continue into work time. So he radioed a supervisor to bring a video camera. Despite the fact that he was at precisely the same place at the same time Echeverria says all the violence was occurring, Pierre mentions nothing about it and calls for the camera only because the demonstration may last past time for work.

There is no testimony as to when the camera arrived, but Pierre testified he directed Charlie Rose as to what to tape. He testified³³ the first scene depicted on the tape (GCX5)³⁴ is John Aguirre³⁵ sitting in his car, a white Volkswagen Rabbit, in the center drive at the location marked "2". Rose's

³³At the hearing, the tape was played on a video cassette recorder (VCR) which had a counter (not a time display). The tape was stopped at various points, and Pierre testified to what was depicted from one number to another on the counter. The portion of the tape admitted was from zero to 444 on the counter.

³⁴I admitted the tape over the objection of the UFW which objected both on the grounds of relevance and because, as the Company admitted, the tape shows only certain events or portions of events. In other words, the camera was turned off and on, moved to different locations, and the Company recorded only what it wanted to record, omitting the rest.

³⁵GCX2 is a photograph of Aguirre.

voice says it's five to 7 and then says it's five to 8. Pierre testified he independently recalled it was about 7:50 a.m.³⁶

The next scene on the tape shows the camera being operated from that same location, facing south, recording the marchers (from the rear) as they march south down the center drive. Pierre testified he believed the group reached the southern boundary of field 6-2 about 8:30 a.m. and remained in that area until about 9:00 a.m. when a deputy sheriff arrived in response to a call from the Company. (I:54.)

Thereafter, the tape shows Barajas (a photograph of him was admitted as GCX1), Aguirre, Pierre (shown wearing a white shirt and talking to Barajas who is saying he already talked to "him" referring to Echeverria who is wearing a grey jacket and whose back is to the camera) and the deputy, moving to the edge of the group and speaking amongst themselves for several minutes with Aguirre periodically addressing the workers.³⁷

Barajas and Aguirre are attempting to get Pierre to negotiate about the "problems" the workers had. Pierre refuses to do so, saying a negotiating session was scheduled for November 1st—about two and a half weeks away. Pierre tells the workers they have to go to work or leave. Aguirre speaks to the workers,

³⁶ Whatever the time, I infer the march had not started since Aguirre, who headed it, is still in his car. Moreover, Rose's calm tone, supports this conclusion. Whether Pierre or Echeverria is correct as to the time is not critical since the charge against the Union is violence.

³⁷ The interpreter was able to translate most of his comments which consists not of threats but exhortations to the people to stand united against being exploited. (I:140-142.)

and they leave the fields and go to the Company office where they positioned themselves along the road. Pierre testified the workers left the field at approximately 9:30 a.m. at which time harvesting began.³⁸ (I:60.)

Most of the videotape depicts the gathering and discussion just described. Less than a minute is devoted to the workers marching down the center drive. It shows not a single incident of the type testified to by Echeverria.

Moreover, the tenor of the voices and the whole manner of the marchers depicted on the videotape are inconsistent with the repeated violent acts set forth in Echeverria's testimony. He has marchers rushing into the fields, frightening workers on ladders, sending people running all over.

The crowd is boisterous. The workers are chanting slogans such as the UFW rallying cry, "Viva La Raza," but the mood is anything but violent. The Troncosos' testimony too is of a far different character than that of Echeverria. Further, worker Emiliano Rojas credibly testified he saw no violence or threats. While no one person would likely have seen everything that occurred, if Echeverria's testimony were accurate, some

³⁸ He also testified that he sent workers home at 11:30 because they were afraid. I do not credit him because supporting evidence such as payroll documents or the sheriff's report which would have corroborated his testimony were not introduced and RX30 shows the harvest that day was over 90% of the amount harvested the day before. I find it highly improbable that this would be the case if work lasted only two hours. These factors cause me to doubt Pierre as to the time frame. Barajas testified he was sure they were not in the fields past 8:00 a.m., but because he was initially evasive on this issue, I do not rely on his testimony either.

disturbance would have been noticeable.

I do not credit Echeverria's testimony as to the acts of violence he described. His testimony is either contrived or so exaggerated that if there is any truth to it, there is no way to discern what portion might be credible.

I have credited the testimony of Regina Troncoso and that of her father to the extent it is consistent with hers. I do not rely on the denials of Barajas and Aguirre as to any violence or threats having occurred.

Barajas can best be described as a reluctant witness. He was guarded and seemed to view the hearing process as a game of cat and mouse, although when pressed he would give an answer.³⁹

Aguirre was so evasive that I do not credit him on any of the important issues. He testified he could not recall if the workers had planned to work on the 14th⁴⁰, what time he arrived, how long they were in the field, whether he had ever

³⁹ For example, despite some initial equivocation, he ultimately acknowledged that at least for a time, the marchers were spread across the entire center drive. And, despite a certain amount of initial evasiveness, he eventually acknowledged he, Aguirre and the marchers were on the Company's property beyond their permitted access time because it was a "special case" but left when Pierre told the marchers they must start work or leave. His testimony on both points is borne out somewhat by the videotape which shows marchers across the center drive with vehicles attempting to pass on the right side of the crowd. The camera is then turned off from which I infer that the vehicles, which had not stopped but were still trying to move around, continued to make their way alongside the road or else the Company would have kept taping.

⁴⁰ In contrast, Barajas acknowledged the workers had planned a demonstration for that day.

seen a copy of GCX4⁴¹, whether some people were trying to work during the demonstration or whether demonstrators left the road and went into the field. (VI: 59-62; 66-69, 76-80.)

VII. THE COMPANY BRINGS IN LABOR CONSULTANTS AND GUARDS

Immediately after the work stoppage, the Company increased the number of labor consultants from one to six⁴² and hired approximately six to eight security guards. Pierre testified he decided to hire the guards and consultants because of the violence that occurred during the work stoppage,⁴³ and guards were in place by the morning of the 16th, the first workday after the work stoppage. (VII:67-68.) From the

⁴¹ Zeferina Perez, a UFW organizer who frequently took access during the times material herein, readily acknowledged the Union had copies of the map.

⁴² Since 1983 the Company had been utilizing the services of a labor consulting firm--the Farm Employer's Labor Service (FELS). John Diaz, an employee of FELS, had been visiting the S&J Ranch each week. His primary function was to open channels of communications between the direct employees of the ranch and management. (VII:119, 121-122.)

⁴³ Despite the fact that Pierre referred specifically to the work stoppage. Respondent introduced testimony from two workers, Esteven Murillo and Uvaldo Herrera, as to events which occurred after the work stoppage, which Respondent argues demonstrated an ongoing atmosphere of fear of violence. (This testimony was admitted solely in support of the Company's defense to the surveillance charge, and not as part of the charge against the Union because it was introduced long after General Counsel had rested, and there was no motion to reopen the record in that portion of the case--nor from the state of the record does it appear there would have been sufficient basis to support such a motion.) The testimony of Murillo and Herrera does not justify Respondent's constant surveillance of UFW representatives and their discussions with employees. In the first place, Pierre's decision was made before these events occurred. Further, the incident of some oranges being thrown at Mr. Herrera was isolated and apparently of short duration, and there is no evidence of Union involvement. (VII:15.)

testimony herein, it is clear the guards' main purpose was to control and oversee the access taken by the UFW representatives.

After the work stoppage, Pierre was informed by supervisors, whose names he could not recall, that there were allegations circulating among the workers regarding minimum wage violations, overcharges for services that Echeverria was providing, and excess deductions being taken from their checks.⁴⁴ Pierre had FELS send out additional personnel to determine whether there was any basis to the allegations he was hearing, to assure employees that the Company would provide security in light of the work stoppage on the 14th, and, most importantly, to avoid having the workers go into a full-scale strike and disrupt the harvest which was almost at peak.⁴⁵ (VII: 75-76, 120-122, 133-134.)

In addition to Diaz, five other FELS representatives went to the ranch and, according to a FELS invoice (GCX6), spent numerous hours every day at the ranch from October 19th through

⁴⁴ RX27 is a photocopy of a document titled "Boycott Dole" which Pierre testified he received from one of his superintendents which purports to be from the UFW and accuses S&J Ranch of employing labor contractors who provide substandard housing, pay less than minimum wage, and charge exorbitant amounts for transportation and other services. The document was introduced only to corroborate Pierre's testimony that such allegations were circulating among the employees.

⁴⁵ The workers did not seem especially to feel the need for increased security since they wanted to know from the FELS representatives why the guards were on the ranch. Further, no reason appears why he needed the FELS people to determine this since the Company had a close relationship with Echeverria who had worked for S&J for some ten years before he started supplying contract workers which he had done for three or four years.

the election.⁴⁶ Diaz and Montolongo were the only two who testified. According to Diaz, he spoke to the employees of Echeverria only on October 16th. He remembered being accompanied by Montolongo and Espinosa but could not recall if anyone else was with them. Echeverria took them⁴⁷ to talk to a small group of people who had been complaining about wages or "something like that,"⁴⁸ and they talked to those workers.

Other than this one time, he testified he only went to the ranch when there were access problems and, on these occasions, he was at the entrances to the ranch, not actually in the fields. He had no recollection how many such incidents there were, even to the point that he said he could not recall if there had been only one such incident or more than one in the nearly three weeks between October 16th and the election on November 3rd. (VII:122-123, 127-128.)

He also professed he could not begin to approximate how many times he went out to the ranch--not even whether he was there for the majority of each week or less than half of a week. In contrast, Pierre who testified before Diaz, readily

⁴⁶ The other representatives were: Martin Montolongo, Richard Espinosa, Gabriel Rojas, Hilda Coleman, and John Barrientos. Respondent admits that Diaz, Montolongo and the other FELS representatives identified in GCX6 at all times relevant were its agents.

⁴⁷ According to Montolongo, no one from the Company ever took him to a group of workers and then left. (VII:140.) I do not credit him.

⁴⁸ Elsewhere, he testified that employees asked him whether they were still going to have work, told him they were frightened and that a lot of promises were made. He relayed the employees' comments to Pierre. (VII:120.)

acknowledged that Diaz was at the ranch virtually every day during the period.⁴⁹(II:25-27.)

Diaz testified that after Pierre told him there was going to be an election, he went to the fields and told the workers they should not vote for the Union. (VII:123-124.) He had no idea when this occurred. He denied ever circulating a decertification petition or telling workers that the Company would be circulating such a petition which they should sign. (VII:123.) He acknowledged that sometime between the work stoppage and the election, workers asked him about a paper that was circulating regarding the Union, but he had no idea when that occurred or on how many occasions. He told them he did not know what they were talking about, but encouraged them to read and to ask questions about anything they were going to sign and to be sure what they were signing. (VII:129-130.) This testimony contradicts his prior testimony that, with one exception, he only went to the ranch regarding access problems.

Montolongo testified that he usually circulated among Echeverria's workers by himself except on perhaps two or three occasions. He testified variously that the only person who accompanied him was Richard Espinosa⁵⁰ and that Espinosa was

⁴⁹ GCX6 is a copy of the bill the Company received from FELS for services rendered by the various labor consultants. It reflects how many hours each consultant spent on which days at the ranch. For some unexplained reason, the bill does not reflect any time spent by Diaz.

⁵⁰ According to Montolongo, Espinosa is perhaps an inch or so taller than Montolongo (who described himself as being 5'9" tall and weighing 170 pounds), weighs 180 pounds, wore glasses and had short black hair with a little grey in it. Espinosa did

one of those who accompanied him. (VII: 138-140.)

On one occasion, he spoke to a group of employees who were picking olives. He explained who he was, and the reason he was there, i.e., the complaints and also explained that the security guards were there in order to keep order and to protect individuals and company property. He testified that people were concerned as to why the guards were on the premises. (VII: 134-135.)

During the entire time he was circulating among the workers, he never saw anyone walking about with a paper, but he knew something was being circulated because the workers asked him about it. (VII:141.) He told them he wasn't really sure what they were talking about until they said someone wanted them to sign something. He simply told the workers to make sure they read anything they were asked to sign and not to let anyone intimidate them into signing anything unless they wanted to.

(VII:140-141)

He insisted he was not asked about this by the workers until after everything, presumably he means both petitions, had been filed. Later however, he testified he had been out in the field only two, three, or four days when the subject was raised. This would be roughly between October 21st to 23rd which was several days before the first petition was filed and the time when most of the signatures were gathered. I credit this latter

not have a beard, but Montolongo had a beard, and a mustache, and both were streaked with grey. Both men were medium to dark complected. (VII:137-139.)

testimony.

He denied circulating a decertification petition or telling employees they should sign such a petition or that the Company was circulating such a petition which they should sign. He maintained it was only after the Company attorney told him a decertification petition had been filed and there was going to be an election that he talked to the workers about it.⁵¹ At that time, he told them that the Company's position was "no union" and that if the Union was elected, dues would be deducted from their paychecks which was not necessary because the Company had a policy to speak to the employees whenever the employees wanted. (VII:135-136.)

I did not find either Montolongo or Diaz credible on most points. Diaz' asserted lack of recollection goes far beyond an honest inability to recall. He was at the ranch virtually every day for nearly three weeks and yet maintained he had no idea whether he spent even a majority of one week there. Further, as noted, his testimony is internally contradicting.

Nor did I believe Diaz' description that FELS people simply walked around among the workers waiting for them to start conversations. It is highly unlikely that workers would approach unidentified persons and air complaints against their bosses. Thus, the techniques described by Diaz are not calculated to provide the information the FELS people were instructed to obtain. I do not believe that Diaz took such a lackadaisical

⁵²This contradicts his earlier testimony that he talked to them before the first petition was filed.

approach to implementing the instructions of a steady client.

Rather, I believe he was not telling the truth about his activities.

I also find Diaz' and Montolongo's denial of knowledge of the circulation of the decertification petitions unbelievable. They are professional labor consultants, and they were in the fields circulating among the workers for nearly a week or more while the first petition was being circulated. Over 200 signatures were gathered on just four days during that time.⁵² The evidence shows there was no effort to conceal this activity. I simply do not believe that labor consultants in this situation would be unaware of such activity.

Also, their demeanor in reciting their supposed responses to workers' questions about the petition was completely unconvincing. Both gave standard, pat responses and very much gave the impression of reciting a position rather than truthfully recounting events.

Montolongo gave exactly the opposite impression of a witness trying to tell "the whole truth." He was so programmed to deny any knowledge of the petition being circulated that he would deliver denials even before General Counsel could finish

⁵² GCX6 shows substantial hours for the FELS representatives virtually every day between October 19th and election day, November 3rd. GCX12 is a photocopy of the petition with employees' signatures blacked out but the dates of those signatures visible. (Each line contains a signature and the date signed.) GCX12 shows signatures beginning on October 18th and continuing through October 31st, with 156 signatures gathered on one day--October 20th--and 66 signatures gathered on October 23rd.

asking the questions.

Three different employees testified that FELS representatives spoke to them.⁵³ Reyes de la Torre testified that beginning about three days after the October 14th work stoppage, two gentlemen, whom he called "strike breakers", one whose name was Diaz and the other whose name he did not know but who had a beard, presumably Montolongo, came to the field where Reyes was working. There were also foremen present.⁵⁴

Diaz told the workers the Union would not give them the benefits the Company was giving them or, rather, the Union would deduct money to cover the benefits whereas the Company would not deduct money from their paycheck. After this, the bearded man came to the fields every day up until the time of the election. (III:209-211, 217-219.) I credit Mr. De la Torre over Diaz.

Emiliano Rojas testified that he returned to work on October 19th and worked until November 3rd. A little while after lunch on the first day he returned to work, he was on his ladder picking olives. Foreman Jose Troncoso called to him and the other workers⁵⁵ to come down, that some consultants wanted to speak to them for a short while.

The consultants asked Rojas and his companions if they

⁵³Julian Garcia also so testified, but I decline to credit him because of various inconsistencies and errors in his testimony on this point and other matters. (See footnote 61.)

⁵⁴ This may be the incident when Echeverria brought the consultants to the field, but this is not clear.

⁵⁵ This refers to the other workers who were picking into the same bin as Rojas.

wanted to sign the petition to take the Union out because the Union would not do anything for them. The workers asked the consultants why they were coming around now and not before. The consultants replied that from that time on they were going to help them out whether they had problems with water or whatever it was they needed.⁵⁴ After speaking with them, the consultants went to another row of trees to speak to other workers. (V:40-42.) After that, he observed the two labor consultants in the field nearly every day. (V:44.)

Employee Pascual Timorres testified that approximately a week to a week-and-a-half before October 28th, two men, one slim and one heavy-set came to the field and gave him and his co-workers flyers which said "No Union." The workers stopped work long enough to gather about and be given the flyers. (IV:57-58.) The thinner man told the workers that the Union promised them many things but that it was not true. None of the workers were paying much attention to him, so he did not say much else. (IV:58-59.) Although his description does not clearly

⁵⁶ Although Troncoso testified, he did not contradict Rojas' testimony, and I credit Rojas. On cross-examination, Rojas estimated the consultants spoke to them for approximately 10 minutes, but he recalled only the statements set forth above. He made no attempt to quote the consultants, but only repeated the gist of their remarks. (V:84-85, 87.) RX10 is a declaration signed by Rojas wherein he stated: "The consultants took approximately 20 minutes in telling us to sign petitions." I do not find the discrepancy in the estimated time of how long the consultants spoke to the workers significant enough to reflect adversely on Mr. Rojas' credibility or recollection. It is not a substantial time difference given that one year had elapsed by the time he testified. Further, I do not discredit his testimony because he could not recall 20 minutes worth of conversation. A year after a discussion, one would be expected to remember only the highlights of a conversation, not everything that was said.

match Diaz, Espinosa or Montolongo, it is reasonable to infer that the people were FELS consultants. I credit Timorres.

VIII. THE DECERTIFICATION EFFORT

a. The Company and the Decertification Petitioners

Alice Thompson and Sandra Mackzo filed both decertification petitions. General Counsel asserts Respondent was aware of and facilitated their circulation of the petitions. Juan Zapata, a mechanic in the Company shop and also a member of the UFW negotiating committee at the Company, testified that a few days after the October 14th work stoppage, Charlie Rose come into the shop about noon and spoke to Mackzo and Thompson.⁵⁷ He left, and about five minutes later Mackzo and Thompson also left. This incident occurred about noon, and the two women still had not returned at 12:30 despite the fact that their normal lunch time was just that half hour period. After they returned, Zapata tried to speak with Thompson. He testified that although previously she would share lunch with him and other workers and chat with them, after the she spoke to Charlie Rose, she "did a complete 180" and no longer would speak to them. (IV:9-10.) Zapata readily acknowledged that after the work stoppage, he could not say that either Mackzo or Thompson was in favor of the Union. He testified that prior to that time, Mackzo was undecided, and he was not asked what Thompson's previous

⁵⁷ Mackzo and Thompson worked in the parts department which was approximately 5 to 10 yards from where Zapata worked. From his work location in the shop, Zapata could see through a window in the parts department. Neither Mackzo nor Thompson testified, and Rose did not dispute Zapata's testimony.

views were. (IV:19-20.)

It is uncontested that Mackzo and Thompson rode to the pre-election conference with Charlie Rose and stationed themselves alongside the Company representatives during the conference. (III:70; 11:56-57; VII:153-154.) Rose testified without a hearsay objection that the two women had asked him if they could ride with him because their husbands had told them if they went to the meeting not to come home if they went alone. Since he was their boss, they said if they rode him, their husbands would not be mad at them when they returned. (VII:153-154.) On cross-examination, Rose acknowledged that he seldom if ever gave rides to workers unless it was connected to their work. He testified he considered transporting people to the doctor and for Company business or to pick up vehicles that were connected with work to be work related reasons. (VII:165-166.)

It is also uncontested that Rose drove Mackzo and Thompson to the election site on election day. (III:71; IV:46-47; VII:154-155.) Similarly, it is not contested that Rose drove them from the election site to the Company office. Further, Rose did not rebut the testimony of Barajas that Mackzo, Thompson, Pierre, the Company attorney, a labor consultant, and everyone from the Company's side were also at the Company office, and the petitioners remained in the office for approximately one-half hour. (III: 71-72.)

According to Rose, he gave the women a ride to the polling place because they were told that they could serve as election observers and there were not supposed to be any vehicles

in the election area. They asked Rose to take them to the election site, and he agreed. When they arrived at the polling site, Mackzo and Thompson were told they could not serve as observers and would have to vote with all of the other workers. So, Rose drove them back to the office where their cars were parked. (VII:154-155.)

b. Circulation of the Petitions

Mackzo was in charge of the parts department and usually stayed in the office. Thompson sometimes would leave to collect parts in town. (IV:6.) The Company tried to keep someone on hand at all times, and prior to October it was rare that one or the other of the women would not be in the parts department. (IV:7-8.) Zapata observed, however, that in the next two weeks after Charlie spoke to them, perhaps two or three times a week, Mackzo and Thompson were absent one or two hours at various points during the day well before or after their normal lunch time of 12:00 to 12:30. (IV:8-9, 12-13.)

Zapata readily volunteered that the amount of time he worked in the shop, versus working in the field, varied daily, but insisted he had ample opportunity to observe the absences because from about the time of the work stoppage until the November 3rd election, he was in the shop most of the time repairing an almond harvester. This also meant that there was less work going on which required him to go to the fields, so he could catch up on repairs in the shop. (IV: 21-22, 33-34, 28-29.) No one disputed Zapata's testimony. I found him quite credible.

Only two workers, however, Pascual Timorres and Reyes de la Torre, testified that Mackzo or Thompson asked them to sign the petition. Each credibly testified that Jovita Franco, a woman who worked in the Company office,⁵⁸ and two women who matched the descriptions of Mackzo and Thompson⁵⁹ asked them to sign the petition. Both incidents occurred on October 28th between approximately 11:00 and 11:30 a.m.

Timorres testified he was picking olives in his crew which was supervised by foreman Reyes. (IV:54-56.) Only Jovita spoke, and she asked the workers to sign a paper that was against the Union. (IV:56-57.) Reyes de la Torre, a direct employee of the Company since 1972, testified that Jovita spoke to him and some other workers and asked them to sign a paper "so there could be new elections or voting." She also said if they signed the paper, it "would finish all the problems." He had seen her speak to a number of other employees individually, but they all told

⁵⁸ Mr. de la Torre testified about Franco's position at the Company. He stated that he spoke to Franco about taking vacation and also that every year when the Company sent workers the application to start work in the olives, he would fill it out and turn it in to Ms. Franco. She would then take the workers' photographs for identification. (III:214-216.) He also spoke to Ms. Franco in order to obtain money he was due since he was leaving his job. She told him they would mail him a check. (III:214.) Zapata testified that Ms. Franco attended a negotiation session approximately one month prior to the strike, and sat on the side of the table with the representatives from the Company. (IV:16, 18-19.)

⁵⁹ Mackzo was described as Caucasian, about 5'5" tall with blonde hair, weighing about 125 lbs., and approximately 35 years of age. Thompson is Hispanic, about 37 or 38 years old, has dark brown hair, is slightly taller than Mackzo and weighs about 15 lbs. more. Thompson speaks Spanish; Mackzo does not. (IV:8.)

her to see him because the Union had placed him in charge of the people.
(III:208-211.)

In addition to Reyes de la Torre, Guadalupe de la Torre, a worker and member of the UFW negotiating committee, testified that on one occasion he asked Ms. Franco for a pension check on behalf of another worker who was in Mexico. She told him he would have to get a letter authorizing her to give de la Torre the check. He did not see her confer with anyone before she gave him this instruction. (IV:38.)

Pascual Timorres also testified about Ms. Franco's duties. He testified he talked to her about tax withholding and, after he had been notified to report to work, he would report to Jovita at the office and she would take his photograph for a Company I.D. card and copy his Social Security card and passport. She would also let him know what day he was supposed to begin work.⁶⁰ In 1989, he asked her to change his reporting date because he was still working for another company. She did so without checking with anyone, but the preceding year he had also been granted permission to finish work at that same company. It is not clear who gave the permission in 1988. (IV:52,72.)

Timorres also testified that when he needed some documents from S&J for amnesty purposes, he asked Ms. Franco for them. (IV:53.) He further testified that when he went to the office, some other office person would take him back to see Jovita, and that he observed various other office workers go in

⁶⁰ I do not infer that she decided the date but rather that she relayed it to him. (IV:50-52.)

and ask Jovita questions. (IV:61.)

Ms. Franco did not testify, and none of the Company personnel who testified addressed her duties. Thus, this testimony of the various workers is un rebutted, and I credit them that she had the responsibilities they observed.

Seven workers testified that crew leader Moises Murillo⁶¹ circulated the decertification petition during work time. Antonio Salas testified that he returned to work on about October 20th, and approximately one week thereafter he and his three co-workers were working in a field when they were approached by Murillo, who asked them to sign some papers so they could work for the Company. This occurred sometime before the lunch hour. (IV:99-100, 138.) Salas added that Murillo had some caps⁶² which he was giving to people. When Salas asked for

⁶¹ Employee Julian Garcia was not sure whether it was Murillo or Molina. (V: 138-139.) Since he was uncertain and his was the only testimony referring to Molina, as noted earlier, I dismissed the allegation that Molina circulated the petition. He also testified that he was asked to sign the petition prior to the work stoppage. (V:125-126.) I do not credit this testimony because of the overwhelming testimony that the petition was circulated after the work stoppage. He also testified that people whom I infer were FELS representatives spoke to him, but his testimony was internally inconsistent as to the timing of these incidents. These inconsistencies coupled with his other confused, incorrect testimony causes me to give his testimony no weight.

⁶² RX16 consists of two invoices from a company for caps to be shipped to FELS with order dates of October 31st and November 2nd (and two invoices from FELS to S&J for "No Union Caps" dated November 2nd and 10th). Pierre testified S&J did not order any "No Union" caps other than the ones reflected in RX16. (VII:84-85.) Although Salas did not say the caps Murillo had were "No Union" caps, there is no evidence any other caps were handed out. Since the caps were not ordered until the very day the second petition was filed, I do not credit Salas.

one, Murillo replied, "No," because he wanted Salas to sign the petition. (IV:100-101, 125-126.)

Murillo admitted that he circulated the petition among the majority of the workers. He denied giving anything to workers who signed the petition but was not asked specifically about caps. (IV:86.)

Worker Enrique Nava testified that Murillo asked him and the four others in his crew on three occasions to sign the petition. On at least two of the occasions, the crew was working when Murillo spoke to them. (VI:13-15.) On the first occasion, Nava also observed Murillo speak to workers in another crew while carrying papers with him. (VI: 12-15.)

Fidel Garcia was in Nava's crew. Both agree they were together when Murillo presented the petition. However, Garcia testified Murillo twice came to the labor camp and on the third occasion they were leaving work. (V:150.) I have no basis to credit one witness over the other, so I find General Counsel has not established the petition was circulated during work hours.

Garcia credibly testified that besides the three times when Murillo asked him to sign the petition, he saw Murillo asking other workers in the field to sign the petition every day. Sometimes, he saw him in mid-morning and sometimes in the afternoon. On at least some of those occasions, the workers were picking when Murillo spoke to them. (V:154-155.)

Emiliano Rojas testified that after approximately the 19th of October, he observed Murillo carrying papers around the ranch asking people to sign them. s Murillo did so virtually all

the time after the strike. (V: 44.) On one occasion, which occurred after the labor consultants had spoken to him, Rojas was just arriving at work, and Murillo approached him and asked him to sign the petition. Conversely, Rojas also testified that Murillo told him that because he knew that Rojas was "tight... with the union" he was not going to ask him to sign. (V:43-44.) Because of these inconsistencies, I do not credit Rojas.

Jose de Salas is the cousin of Antonio Salas and regularly works with Antonio. Sometime after the strike, he thought approximately October 20th, Salas was picking olives at the top of a tree when Murillo asked him to sign a paper so that he could work with the Company. Murillo also had caps with him. Salas did not sign, and Murillo simply headed off to another crew. This was the only occasion when Murillo asked him to sign such a paper. (IV: 140-141.)

This is essentially the same testimony given by Antonio Salas, Jose's brother. Again, because of the time the caps were ordered, I do not credit Jose.

Olive harvester Antonio Santos testified that he returned to work approximately one or one and a half weeks after the work stoppage. On three different occasions, he was approached by Murillo who asked him to sign "this paper where we confirmed that we did not need the union." (IV: 150-151.) The first time was the first day he was back to work. It was in the morning, and Santos was picking along with 10 workers. So far as he knew, Murillo spoke only to him.

The second occasion was the next day in the afternoon.

Santos was working, Murillo spoke to him and then went to speak to the other 10 members of the crew. Santos asked what benefits there were to signing, and Murillo answered that the Company was paying very well and that they did not need a Union. He further told Santos that the Union was trying to screw them because they were going to "discount a percentage of our check." Murillo also told him the petition was to get rid of the Union.⁶³ (V:16-17.) He estimated Murillo spent approximately five minutes with each worker. (IV: 151-152.)

Murillo approached him on a third occasion a few days after the second one. The third incident also occurred in the afternoon nearly at the end of the work day. Murillo asked Santos and three other workers to sign the petition. Santos testified he signed the paper because he was tired of Murillo

⁶³ On cross-examination, he testified these remarks were made on the first day. RX9 is a declaration signed by Mr. Santos, dated October 21st. Therein, he declared that on October 20th, Murillo was collecting signatures without explaining his purpose. Santos declared that Murillo said "sign this paper guys, this is not an important paper, this is just with the purpose of having your names." Santos' declaration is in Spanish, but the portion just quoted was contained in the declaration in English. Santos further declared that he looked at the papers that Murillo was carrying and that the first sentence said: "We do not want to be represented by a Union or other institution." The declaration is inconsistent with Santos' testimony on cross, but not his testimony on direct because the declaration was executed after the first incident but before the second. I so conclude because the declaration refers to only one conversation and was executed the day after the first incident. I find that, at most, Santos, when he testified, may have been unsure as to what Murillo said on which day. There is no inconsistency that Murillo was circulating a decertification petition, which Murillo admits. I credit Rojas as to Murillo's remarks even though he was unsure as to when they were made.

asking him.⁶⁴ (IV: 153-154.)

Santos testified he observed Murillo with the papers in the field virtually every day for approximately one week. (IV:154; V:30-31.) He observed Murillo ask six or seven other people on Santos' crew to sign the petition, but did not see him ask anyone other than them.⁶⁵ (V:30-31.)

Murillo testified that he began circulating a decertification petition after the work stoppage because he and some other workers had talked and "wanted the Union to let them work peacefully." The only person with whom he could remember speaking was Alice Thompson, and the talk began the Monday after the strike. (IV:88-89.)

He testified he asked Thompson if there was a way to get rid of the Union, and she said she would see about it. Thereafter, she gave him the petition to circulate. There is no evidence as to how soon after Murillo's inquiry Thompson provided the petition, nor how the petition was prepared, nor what she did to "see about" getting rid of the Union. (IV:87-88.)

He further testified that he asked the majority of the workers to sign the petition, and that the majority of those

⁶⁴ On cross-examination, Santos testified there was a fourth occasion that Murillo approached Santos and asked him to sign the petition "... so all of this can finish" and it was then that Santos as well as his co-workers signed the petition. (V:19-20.) This discrepancy does not cause me to discredit his testimony, and I find Murillo approached him several times.

⁶⁵ On cross-examination, Respondent's counsel inquired of Santos as to how well he could see. Santos credibly replied that standing at the top of a ladder picking olives, he could see quite well into the next row of trees and into the area around him. (V:13-14.)

workers he asked signed it. He estimated he spent approximately three days circulating the petition and testified he did so only before work, during lunch,⁶⁶ and after work. He denied he ever circulated the petition during working hours. (IV:124; VII:116.)

I have credited Fidel Garcia that he observed Murillo asking workers to sign the petition during, harvesters' work time and when Murillo would not have been on his lunch hour (i.e. mid-morning and afternoon). I have also credited Santos that Murillo spoke to him at least twice while Santos was working and spoke to others while they were working at times when it was unlikely Murillo would have been in his lunch hour.

I do not credit Murillo's testimony to the contrary, both because I find it improbable that he would have been able to talk to the majority of workers and get them to sign in the few days he most intensively circulated the petition⁶⁷ and because I did not find his testimony regarding his duties as crew leader worthy of belief.

IX. DENIALS OF ACCESS AND SURVEILLANCE

In paragraphs 4 and 25 of the Complaint, General Counsel alleges that on various dates after the decertification petition was filed, Respondent denied access to UFW

⁶⁶ He did not testify whether he circulated the petition during his lunch hour or during the lunch hour of the employees whom he was soliciting. (IV:85-86.) The time periods likely would not have coincided because although hourly workers had a specific time for lunch, but piece rate workers ate lunch whenever they wanted.

⁶⁷ This is especially so given that he spoke to Santos three or four times, and it is likely Santos was not the only worker he contacted more than once.

representatives by not allowing them to speak to Respondent's employees and by engaging in surveillance of conversations between UFW representatives and employees.⁶⁸

All of the dates on which the Company allegedly denied access occurred after the filing of the decertification petition at which time the Union was permitted to take access pursuant to the Board's access regulations that pertain to organizing activity rather than pursuant to post-certification access rules as set forth in O.P. Murphy (4 ALRB No. 106.) Thus, the Union was permitted to take access one hour before and one hour after work and one hour during lunch.⁶⁹

Each of the UFW representatives who testified stated that at various times in late October⁷⁰ and on November 1st and 2nd, as well as other dates, security guards, Company supervisors, specifically Trinidad Quintero, Augustin Garcia, and Echeverria, remained nearby while they attempted to talk to workers so that workers could see that they were being observed while speaking to the Union representatives. The Company admits

⁶⁸ Respondent in its brief addresses only the three dates specified in the Complaint. However, the alleged denials on other dates were fully litigated, were closely related to the allegations in the Complaint, and thus are properly before me (Gramis Brothers Farms, Inc., and Gro-Harvesting, Inc., (1983) 9 ALRB No. 60.)

⁶⁹ Pierre instructed Company personnel of the UFW's right to take access at these times. (VII: 81-82. Since piece rate workers could eat lunch whenever they wanted, the parties agreed the Union would take access between noon and 1:00 p.m.

⁷⁰ None of the Union representatives testified that they were denied access on October 29th and that allegation is dismissed.

that Company personnel and agents were instructed to remain within sight of the Union organizers while they were speaking to workers but were told not to get close enough to overhear their conversations. (VII:80-82.)

a. BARAJAS

Barajas took access on October 27th three times: once during lunch; once at 3:30 p.m. when the direct employees finished work; and once at 5 p.m. when the contract workers (Echeverria's people) completed work for the day. (III:56-57.) On at least one of these occasions, security guard Rick Regalado was only some 20 to 30 feet from Barajas while he was attempting to speak to workers. (III:123.)

Barajas testified that when he drove into the ranch Regalado followed Barajas in his white pickup with his security lights on top of the truck flashing. If Barajas were on foot, Regalado would follow and station himself so that he was visible to the workers to whom Barajas was trying to speak. (III:55-57.) Barajas requested that Regalado leave, but Regalado responded that he was following instructions. (Id.)

On October 28th, Barajas again took access at noon in the area by the shop. Regalado again followed Barajas' vehicle with the security lights on the top of Regalado's truck flashing. He parked next to Barajas' vehicle and remained nearby as Barajas attempted to talk to the workers. Barajas acknowledged that he was driving on one of the interior dirt roads which the supervisors and workers used to go from one side of the field to the other. He also acknowledged that Regalado told him that he

should not use the road, but he countered to Regalado that it was regularly used by supervisors and workers. He denied Regalado told him he should not use the road because of safety reasons. He also acknowledged that on at least one occasion he drove down a row of trees when he was taking access and explained he did so because the Company was moving workers, and he was attempting to locate them.⁷¹ (III:58-59, 124-125.)

That same afternoon at 3:30 p.m., he again came in the 12th Avenue entrance by the shop.⁷² A security guard, whom Barajas could not identify, refused to open the gate saying he had instructions not to let anyone, especially the Union, come in. Barajas requested that the guard check with the Company because he was entitled to take access. The guard used his radio, and, approximately 30 minutes later, Don Anderson appeared and told the guard that Barajas indeed had the right to take access. However, by that time, none of the workers were still in the area.

On October 30th, Barajas used the 10th Avenue entrance

⁷¹ Respondent argues that such conduct justified its use of security guards. I do not credit this because Pierre made his decision to hire the guard immediately after the work stoppage.

⁷² RX3 is a photocopy of a map of Respondent's acreage with the olive fields marked with X's. It is the same as GCX4 and shows various public roads adjoining the Company's property. There are also numerous private roadways through the olive fields on which vehicles regularly travel. RX3 and GCX4 do not show these interior roadways. Access to the fields from adjacent public roadways is controlled by gates. A vehicle is not able to enter the fields from a public road unless the gate is opened. (II:18-19.)

near the Company office to take access. While he was speaking to workers, Regalado drove up in his truck and parked his truck with the lights on top flashing and stayed there the entire time Barajas was talking to the workers. (III:61-62, 130.)

On October 31st, Barajas entered the ranch at noon, using the 10th Avenue entrance, to speak to workers in a field nearby. Supervisors Trinidad Quintero and Augustin Garcia were in the area some 50 feet away observing him speak to the workers. Echeverria appeared, and the workers immediately stopped speaking with Barajas.

Echeverria instructed the workers to move to another location. Barajas acknowledged the workers had been working when he began speaking with them; however, it was the agreed upon time for access (i.e the noon lunch hour.) Since Echeverria had told the workers to change locations, Barajas went to another crew who was working nearby and spoke to them. He did not follow the first group because he did not know how far they were going to be moved, and by following them he would be losing time which could be spent talking to other workers. (III:62, 64-66, 130.)

Barajas' testimony is essentially uncontroverted since Regalado admitted he regularly used his security lights whenever he drove through the fields.⁷³

⁷³ I do not credit Regalado that he did so because of concern for workers' safety. His demeanor was totally unconvincing and clearly conveyed he is one of those people who is very impressed with the authority they possess and enjoys flaunting it. Workers and supervisors drove vehicles on the interior roads, so no reason appears why Regalado would need his lights on when there is no evidence the others had vehicles so equipped.

b. EDEZA AND RODRIQUEZ

Ifrael Edeza (the transcript erroneously spells his first name "Efrael") was an organizer for the UFW during the times material herein. Mr. Edeza testified to several instances when the Company interfered with his attempts to take access, but was unsure of the dates and times of the incidents. Thus, he changed his testimony on these points several times making it difficult to follow his accounts.⁷⁴

According to Edeza, on October 31st, he and another organizer, who was not named, attempted to take access at the ranch and were prevented from doing so by a security guard, also unidentified, who said he had orders from the Company not to let them enter. (II:125-126.) Various workers who were coming out of the fields told Edeza that they had finished work for the day. (Id.) He testified first that he could not recall whether he was allowed to enter the fields at all that day and then that he was finally allowed to enter the fields about dusk but by that time the workers had left. (II:125-126, 133.) At another point, he testified that he had been trying to take access during the lunch hour and had arrived at the edge of the roadway at approximately 10:30 in the morning and was not allowed to enter

⁷⁴He testified at one point that he attempted to take access twice on November 1st, which is consistent with his testimony that his declaration (RX2) related only to the events of November 1st. I note, however, that the declaration clearly states that the events occurred on two dates, October 31st and November 1st, and the changes are initialed by Mr. Edeza. Moreover, in his testimony elsewhere, he indicated that the events he was testifying about took place on two days although he was initially confused as to which events occurred on which days. (II:135-236, 125-127, 133, 123-124.)

by the security guard. (II:133.) Elsewhere, he testified that he was trying to take access from 11:00 to 12:00 or possibly 1:00 to 3:00. (II:125.) He maintained that he was not able to speak to any of the workers since they had already left. (II:126.) Because of the significant internal inconsistencies, I do not credit his testimony.

On November 1st, according to Edeza, he and fellow organizer Gilberto Rodriguez arrived at the ranch at approximately 11 a.m. in order to take access at noon.⁷⁵ Security guard Regalado followed them in his truck with the lights on top flashing for approximately one mile at which time Edeza stopped because he observed some workers. (II:134.)

Regalado demanded in a loud voice that Edeza provide him identification with a picture on it and specifically asked to see his immigration papers. Edeza testified he was wearing the Union authorization card that organizers typically wore when taking access, and so he pointed to the card on his chest telling the Regalado to look at his identification. Regalado told Edeza that the card was worthless, and Edeza protested that he always used that form of identification. (II:121-124.) All of this took place in front of a crew of workers sitting some 50 feet, or

⁷⁵ The ALRB, like the NLRB, is a specialized labor board with institutional expertise. Based on that expertise derived from evidence in numerous cases, I note that it is not uncommon in agriculture to arrive before the access time because it is often difficult to locate workers in fields or groves', and an organizer wants to be sure he or she is ready to go in and speak to the workers when the time for access arrives rather than wasting the access time trying to find workers.

less, away. (II:122-123.)

There is no evidence whether Edeza provided the requested form of identification, but Regalado eventually let him proceed. By then, however, he had only a few minutes to talk to the workers because the allotted time was used up in his confrontation with Regalado. (II:140-141.) Furthermore, Regalado remained in the vicinity during the time that Edeza was speaking to the workers. (II:123.)

Rodriguez essentially corroborated Edeza's testimony, saying they were both wearing their identification cards when Regalado first stopped them. (II:106.) Rodriguez further testified that Regalado told them he had orders from Charlie Rose not to let them enter. They were allowed entrance approximately one-half hour later, but by that time, virtually all the workers had left, and they were able to speak to only three or four workers. (II:106-107.) Rodriguez testified that while he and Edeza were speaking to the workers, Regalado and approximately four or five supervisors were visible nearby for the entire time. (II:87-90.) Edeza also testified that some supervisors arrived, but he did not pay much attention to them. (II:124.)

Regalado referred to his report to refresh his recollection of the incident and testified that he stopped UFW organizer Gilbert Rodriguez and another man whose name he did not recall when they tried to take access because it was only 11:45 a.m. (IV:87-89, 91-93.) He radioed Charlie Rose who told him to stop the organizers and to tell them they would not be allowed to enter prior to the noon access time. Regalado turned on

the amber lights on the top of his truck to attract their attention--not for safety reasons--and pulled them over.

One of the men had identification, but the other did not. When Regalado asked to see identification, the man reached into the glove compartment and pulled out a badge. It seemed to Regalado that he extracted a card at random. Regalado insisted the individual show him identification with a picture. (VI:90.) Regalado acknowledged that the list of authorized Union representatives he had been given was in his truck and that he did not ask the man to wait while he checked the list to see if the name on the badge matched the name of an authorized Union representative.

Regalado further testified that Rodriquez and Edeza started to leave the ranch but then turned their car into another avenue. Regalado testified he demanded identification. It is not clear whether he was referring to this second incident or to the demand he made when he first encountered the two individuals. (VI:90-91.)

Initially, he testified that it was still not noon when he stopped them the second time. Later, after General Counsel pointed out that according to his report the men left the field at 12 minutes after noon, he testified it might have been noon or even later when he stopped them the second time in the avenue. (VI:115-118.) He also changed his testimony and stated that while he was detaining Edeza, Rodriquez left and entered the field. (Id.) Still later, Regalado testified that at some point the two individuals were allowed access to the fields and that he

stationed himself so that he could maintain visual contact with them.

(VI:93.)

I credit Edeza and Rodriguez. Their testimony was mutually supportive without sounding contrived. Edeza seemed a sincere, truthful witness. Although his testimony about events on October 31st was terribly confused as to time frames, I had no sense he was being evasive or dishonest.⁷⁶

Edeza testified to another incident, but as was typical, he could not remember on which day it occurred. It appears the incident occurred on October 31st or November 2nd. Whatever the date, Edeza testified he went to the shop and encountered various workers who were coming out and told him they had finished work for the day. Echeverria was there, and came over to Edeza and told him to "get the hell out of there."⁷⁷ Echeverria also told Edeza that he (Echeverria) did not want to see Edeza there. (II:126.) Edeza remained speaking to the

⁷⁶ RX2 was admitted as an inconsistent statement wherein Edeza declared that access was permitted one hour before quitting time. While the statement is an incorrect description of the permissible time for access, I have carefully reviewed the transcript, and this statement is not inconsistent with Edeza's testimony because he testified specifically only as to the time for lunch access. (II:140-141, 143-144.) He did not testify that he took access at a specific time at the end of the work day. Thus, the statement does not establish that he was trying to take access at an improper time.

⁷⁷ Echeverria denied he made the statements and added that he was once a union representative at a dairy and knew not to make such remarks. (VII:57.) I credit Edeza because I found him generally credible whereas I have discredited Echeverria on several counts. Echeverria's demeanor at trial showed him to be quite excitable, and although he may have known better than to make such statements, his demeanor is consistent with him reacting spontaneously in the fashion described by Edeza.

workers who were waiting for their ride and told Echeverria that speaking to the workers was one of the rights that the law provided to him. There were other foreman in the area, but none of them said anything to Edeza. (II:126-127.)

C. BARAJAS AND PEREZ

On November 1st, Zefrina Garcia Perez (hereafter "Perez") and Efren Barajas⁷⁸ attempted to take access off of Avenue 12. Both Perez and Barajas agree that a security guard prevented them from driving their car into the ranch property. Perez testified that the guard attempted to handcuff Barajas, but Barajas made no reference to such an incident. I do not credit Perez.

Barajas spoke with the guard for approximately 15 minutes, but was unable to convince him to let them enter. He and Perez then decided to walk around the guard into the field which they did. (III:66-67.) Both Perez and Barajas testified that after walking for some distance, a worker who was driving by stopped and drove them to a place where there was a group of workers. According to Perez, virtually all of the workers had left. She also testified that Quintero and Echeverria were present while they tried to talk to the workers who appeared reluctant to speak to them in the presence of their bosses. (II:153-156.)

"Barajas did not mention Quintero, but testified that

⁷⁸ There may have been a third person named Abel who took access with them. Perez and Barajas have different recollections.

Echeverria came up to them and told them that they could not talk to the workers. (III:132.) Perez⁷⁹ also testified that Echeverria tried to prevent them from speaking to the workers. She testified he told them to leave the workers alone because it was almost time for them to leave, and she and Barajas should not be there. She did not leave but attempted to talk to the three or four workers who were present. (II:156-157.) She also testified that Echeverria told her that she could not talk to the workers until he finished talking to them but, she said, Echeverria was not speaking to the workers but simply going around gathering ladders. (III:26.)

Unlike the alleged remarks to Edeza, Echeverria did not testify about this incident. Rather, he testified generally that he knew Union representatives had the right to take access and he stayed away from them. (VIII:57.) I credit Barajas and Perez.

d. HUERTA, BARAJAS AND PEREZ

On November 2nd, Barajas, Perez, and UFW Vice-President Dolores Huerta⁸⁰ took access about 6:00 to 6:30 a.m. at the

⁷⁹ RX5 is a declaration executed by Ms. Perez on November 1st which was admitted as a prior inconsistent statement. In the declaration, she testified that the worker who gave them a ride took them to a group of approximately 30 to 32 workers. At hearing, she testified there were never as many as 30 workers there. (III:22-23, 25.) Given the fact that over a year had passed between the time she executed her declaration and gave testimony in this case, I do not consider this is a significant discrepancy warranting an adverse inference regarding her credibility. I do find the declaration is more likely to be accurate since events were then fresh in her mind.

⁸⁰ Huerta recalled UFW organizer Gilberto Rodriguez accompanying Barajas, but Barajas did not mention him. (Compare II:85 with 111:68.)

ranch. Perez and Huerta remained in one area while Barajas went off to speak to workers in another part of the field. Thus, they were not in a position to observe one another for much of the time they were taking access. (II:85; III:141-143.)

When they first arrived, supervisors Garcia and Quintero were in the area, and Barajas asked them to leave so the Union representatives could speak with the workers. They responded that the Company had given them instructions to stay there. (III: 68, 69, 145-146.)

Quintero and Garcia stationed themselves on a sort of mound from where they could see what was going on and where the workers could see them. (II:55-56; III:70.) Dolores Huerta estimated that the two men were sometimes as close as 20 feet from the group of workers to whom she was speaking. She and Perez asked them to leave the area as Barajas had done, but they refused to do so. (II:55-56.) The two men remained within sight of the organizers and the workers during the entire time the organizers took access.⁸¹ (III:41.) Various workers told

⁸¹ Respondent attempted to discredit Perez and Huerta by eliciting testimony which differed somewhat as to whether Garcia and Quintero remained in precisely the same place or whether they moved about as the organizers moved about. I am not persuaded that the discrepancies in the testimony reflect adversely on the witnesses' credibility. Respondent places too much emphasis on a very literal interpretation of Huerta's testimony that the men did not move. I find her testimony not that inconsistent with that of Perez who testified that the organizers themselves moved no more than a short distance during the time they were taking access and that of Barajas who testified that Garcia and Quintero were in the same place when Barajas returned as they had been when he had first gone into the field. (III:147-148, 27-30; II:65-68. See also III:43; II:65, 68, where Perez and Huerta both estimated they walked only some 25 feet while moving from one group of workers to another.) The focus of the witnesses'

Perez they could not talk to her very well because the foremen were present.⁸² (Id.)

Both Perez and Huerta also testified that virtually the entire time they tried to talk to the workers, Echeverria refused to leave the area and repeatedly told the workers to whom they were speaking, in a very loud voice, that the Union did not have any work for them and that he was the only one that had work. He remained close by, repeating his remarks for perhaps 20 minutes or more until it was time for the people to begin working.⁸³ (II:55-59, 65-66, 80-81, 157-159.)

According to Barajas, in addition to talking to the workers, Echeverria was making noise with one of the tractors

testimony was that the two men stayed and observed to whom the Union representatives spoke, not whether they remained rooted to the spot. All of them consistently testified to this fact. Moreover, it is clear from testimony of Respondent's own witnesses that Company personnel kept organizers in sight as they had been instructed by Pierre.

⁸² The workers' statement is offered not for the hearsay purpose of establishing the truth of the matter asserted therein but to corroborate Perez's testimony that the workers were aware the foremen were present and could see them.

⁸³ Barajas corroborated that Echeverria told the workers they did not have to listen to the UFW people, that he gave them work, that the Union did not give them anything but only promised them things. (III:68.) He testified that Echeverria was speaking loudly enough that his voice could be heard at least 25 to 30 feet away even though the workers were only about 15 feet away. (III:70.) Barajas recalled that Echeverria repeated essentially the same thing over and over again. On cross-examination, he testified he did not remember at what point he first heard Echeverria make the comments, but that he did remember him making the statements to the workers when he (Barajas) came out from the fields and back to the area where Perez and Huerta were taking access. (III:149-150.) I do not take this to controvert Huerta's and Perez' testimony that Echeverria had made similar comments earlier.

saying he had to place boxes so that the workers could begin picking. Barajas testified that he did not see Echeverria performing any of that work, and that Echeverria simply walked back and forth giving dirty looks to the workers who were speaking to the Union representatives.⁸⁴

After most of the workers began working, Huerta testified, one group of workers was still standing around. She asked them why they had not yet been put to work, and they told her they were waiting for equipment.⁸⁵ (II:74-79.)

According to Echeverria, he recalled an instance when Ms. Huerta and three other representatives came to the field about 6:30 in the morning. He was preparing for work performing

⁸⁴ Echeverria specifically denied staring or glaring at workers and again referred to his prior experience as a union representative saying he knew not to disturb union people meeting with workers. (VIII:56-57.) I discredit Barajas' testimony about the tractors since he was not in the area most of the time. I find "dirty looks" an exaggeration and credit instead Huerta's characterization of "hard looks".

⁸⁵ Respondent introduced RX1 contending that Huerta's statement therein "at the same time" is inconsistent with her testimony that she spoke to these workers after her previous conversations with other workers, implying that all of her conversations were during work time. (Resp. brief, pp. 85-86.) Reviewing her testimony carefully, I do not find any significant inconsistency. The declaration is relatively brief, and the sequence of events is clearly not the thrust of the declaration. The allegedly inconsistent phrase is simply a general statement that the comments by Echeverria and her conversation with this group of workers occurred in the same general time frame not in the same instant. She not only acknowledged that the workers should have been working, she testified she was asking them why they had not been put to work. (Her declaration states she suspected it was because they were Union supporters, but that is not an allegation in the Complaint; nor was it litigated.) Echeverria's testimony corroborates that of Huerta since he too stated that everyone had gone to work except the group of approximately 20 workers to whom she was speaking when he came out of the fields. (VIII:75-76.)

tasks such as checking the oil, the tires, and the fuel, making sure that equipment was ready to go just as he did every day. He further testified, that work was supposed to begin at 7 a.m.⁸⁶ He came out of the field about 7:30 a.m. and saw some workers talking to Huerta. He told the men everyone else was working, and it was time for them to be in the fields. Huerta responded that she needed to talk to them. Echeverria testified he replied that she was keeping the men from work, and told her if she wanted to keep them, she should give them a job. (VIII:56.) Nothing further was said, and the workers immediately went to work. (VIII:56.)

The testimony of the Union representatives regarding Quintero and Garcia is uncontroverted, and I credit them. I also credit Huerta and Perez as to Echeverria's repeated remarks. Both testified credibly, the behavior is consistent with his demeanor at trial, and I have found him unconvincing in other matters.

I find that, as she acknowledged, Huerta was still talking to a group of workers after work had begun. I credit her specific testimony that she was asking them why they had not been put to work rather than Echeverria's interpretation that she was detaining them.

X. THE ZEFERINA PEREZ INCIDENT

On October 19th, Barajas, Perez, several other Union organizers and workers who were assisting them, took access at

⁸⁶ Barajas corroborated that the Company had told them work would start at 7 a.m. (III:140-141.)

Road 38. The guard allowed them entrance even though he did not have a list of the people who were supposed to be taking access that day.

Don Anderson observed the Union organizers and supporters and radioed Charlie Rose who in turn radioed security guard Regalado to prevent them from going into the fields because they did not know how many organizers there were and whether they were on the list of representatives authorized to take access.⁸⁷ (VI:84, 136-137.) Rose, security guards Regalado and Valenzuela, and Anderson, as well as a County Deputy Sheriff, all converged on the scene. In addition, Barajas identified Augustin Garcia and Trinidad Quintero as well as two labor consultants, Martin Montolongo and another whose name Barajas was not sure of, as being present.

At least some of the organizers were preparing to enter the fields, and Rose told them that they were supposed to enter through the main gate and be checked in so the Company would know who was entering and be able to verify that all the organizers left at the appropriate time. The organizers responded that the workers were using the gate on Road 38, so they decided to use the same road. They stated they were going to go into the field and start talking to the people, but Rose told them to wait because he had called Pierre who was on his way. (VII:145-246.)

The number of people present was estimated differently

⁸⁷ Pierre also credibly testified that they had expected the Union to take access at the same location they had used previously and the list was there.

and ranged somewhere between 14 and 25 with the correct number probably more toward the higher end. (VIII:166; VI:144.) There was a lot of confusion engendered by so many people being present.⁸⁸

Adding to the confusion, is the fact that, at least initially, the guards had the sirens and the flashing lights on the tops of their trucks operating. Voices were also raised.

In an incident with so many people present, each focused on what he or she was doing, it is not surprising that different people have varying accounts of what occurred. The essential disagreement is whether Regalado simply stood in front of Perez and attempted to block her entrance into the fields with his body or whether he pushed her.⁸⁹

⁸⁸ For example, Regalado repeatedly changed his testimony as to whether the Union organizers were still in their cars when he arrived, whether they were all out of the cars and walking into the fields, or whether some were in their cars and some were just getting out. (VI:96-99.) Similarly, various witnesses were unsure whether Phillip Pierre was present during the actual incident between Regalado and Perez. (III:118, 173, 193-194; II:173-175.)

⁸⁹ The Company videotaped at least part of the events, but it was not until nearly the end of the hearing that Respondent indicated any intention to introduce the videotape into evidence. The proffered exhibit was rejected because Respondent did not comply with the terms of the Pre-Hearing Conference Order requiring that all evidence which a party intended to introduce be disclosed to opposing parties by a date certain and because there is even a question whether a copy had ever been provided to the General Counsel or the Union. (III:50-52.) I find the delay was unreasonable and allowing the tape into evidence would set a bad precedent because attorneys could easily avoid deadlines simply by claiming they had not realized earlier that the evidence was pertinent. Deadlines serve to expedite the hearing process and make it more orderly. The standard is not a subjective one but whether counsel's reason for failing to comply was reasonable. I simply do not believe it is expecting too much of Counsel to have anticipated the relevance of a videotape of

According to Perez, she was attempting to enter the fields when Regalado stepped immediately in front of her and blocked her. She testified that he said, variously, "Get out of here." "Get out of here, son of a bitch. This is not your property you are on private property. Get out. Get out. Get out." (II:147-148, 173.) Regalado placed the open palm of his hand in the middle of her chest and pushed; he pushed her in the same manner in the upper chest between the shoulder and the neck. (II:174.) She testified he did not grab and twist her arm, but only pushed her.⁹⁰

After Regalado pushed her, Perez told him, "Do not push, stupid. Do not touch my body." Regalado told her, "Get out of here, God damn it." (II:174-175.) He pushed her hard enough that she had to put one foot out in front of the other in order to regain her balance. (II:147-148.)

Both she and Barajas testified there were a number of workers in the area who observed the incident. Perez estimated there were 35 to 40 workers. (II:149.) Barajas estimated there were two crews of workers approximately 30 feet away, but did not

the events surrounding an alleged assault and to have notified opposing counsel on time.

⁹⁰ RX4 was introduced as an inconsistent statement. It is a declaration signed by Ms. Perez dated October 19th wherein she stated the security guard grabbed her by the arm and twisted her arm. (II:176-177.) The language in the declaration, which was executed on the very same day of the incident, is much stronger than her testimony at trial, but the difference in the specific acts attributed to Regalado do not cause me to believe she fabricated the episode.

estimate how many individual employees that represented.

Bernardita Cortez was helping the Union organize people and observed the incident. According to Ms. Cortez, as they started to go into the field, Regalado placed himself in front of them and said they should not go in. Perez asked him why not, stating it was the proper time and they were allowed to take access. Regalado repeated that she could not go talk to the workers. Perez again asked why not, stating it was the proper time for access, she had her identification, and she had permission to be there. (III:188-190.)

As Perez started to walk toward the field, Regalado pushed her with the open palm of his hand placed against Perez's left shoulder at the upper part of the chest between the shoulder and the neck. (III:190, 202, 205-206.) Regalado shoved Perez so hard that she almost lost her balance. (III:190, 205.) Ms. Cortez testified she understands enough English to know that Regalado spoke to Perez in English saying "shit" and "God damn it." (III:201-202.) Ms. Cortez was asked if Regalado grabbed Perez' arm. She testified she did not see him do so, but that he could have because at the same time he pushed Perez, he put his hand on her. (III:201-202, 205.)

Ms. Cortez could not recall where Barajas was the time of the incident.⁹¹ She stated she was distracted by the

⁹¹ According to Barajas, he "saw and heard" Perez scream and saw Regalado give her a heavy push. Perez tried to walk into the field, but Regalado kept himself positioned in front of her. (III:50-52, 118, 119-121.) Regalado was screaming at Perez to get out. (III:123.) Barajas walked over toward them and told Regalado to stop being abusive and not to do that to a woman.

incident as well as frightened and upset by it and thus was not especially observant as to who else was in the vicinity.

Regalado is the only one who testified that Perez had already gone several trees deep into the field when he caught up with her. I discount this testimony because so many other people, including Company witnesses, testified they were well in sight. Similarly, no one beside Regalado testified that the guard Valenzuela was also with him when the alleged pushing incident occurred. Valenzuela did not testify.

According to Regalado, he and the other guard cut across the trees and stepped in front of Perez, stretching their arms out shoulder height in a wing-like fashion so as to block her entrance into the field. He acknowledged that they placed themselves immediately in front of her, saying first that she continued to walk toward them but then saying she did not take any steps, "she was right there." (VI:111.)

He testified Perez told him, "I'm going through" and attempted to walk through him pushing up against him. She then began to say that he had grabbed her and cried out, "Let me go. Stop grabbing me." He denied that he shoved her or grabbed her arm and twisted it. Rather, he said, his arms were still out-stretched in the air. (VI:86.)

Charlie Rose and Don Anderson gave virtually the same testimony. According to Rose, he was telling the organizers to

actually observed the incident. From his demeanor when he stated he "saw and heard," my immediate reaction was that he heard Perez scream and turned to see what was going on.

wait for Pierre to arrive, and Perez refused to do so, saying she was going to go in the fields. (VIII: 158-159; VIII: 145-146.) He instructed Regalado not to let the organizers enter the field.

Both Rose and Anderson testified they were at an angle from Perez and Regalado. Regalado stretched his arms out in a wing-like fashion, according to Rose, and Perez and the fellow who was with her walked straight into Regalado.⁹² At that point, Perez began yelling several times that Regalado had pushed her.

Rose said he observed the entire scene because he was afraid they were going to use force to try to go through Regalado, and Regalado did not push Perez. (VII:146-147.) The man who was right behind Perez stopped when she walked into Regalado, and then Perez turned around. (VIII: 159-160.) According to Rose, it was at this point that Pierre arrived, and Barajas went over to where Pierre, Rose, and the others were gathered. Perez came over there as well, and they all stood around and talked about what had happened. (VII: 147.)

Anderson used the very same words as Rose and described Regalado as standing in front of Perez with his arms spread in a wing-like fashion. Regalado told Perez, "Hey, wait a minute. You can't go on (sic) the field until we get this resolved.

He testified he did not see Regalado shove Perez, but when asked whether there was any contact between them, he

⁹² Ms. Cortez testified that another person, Miguel Cortez, was nearby.

acknowledged there might have been, saying she could have collided with him when he put his arms up.⁹³ (VI:139,144.) Despite the fact that he remembered the incident between Perez and Regalado, Anderson said he could not recall whether at the time it occurred he had been involved in the general discussion that was occurring about the access issue. (VI:145-146.)

As with Barajas, I doubt that Rose and Anderson actually observed the incident, and find that in the absence of Pierre, they were engaged in debating with Barajas the "wrong gate" issue. I do not credit Rose that he was completely focused on Regalado and Perez because he feared she would force her way past Regalado. Finally, their testimony sounded too pat when they delivered it.

Zeferina Perez was an older woman, apparently in her 50's, standing perhaps 5' tall and with a slight build. (GCX3) Security guard Regalado appeared to be in his 20's, was of medium height, with a very burly build. Despite her diminutive stature, Perez gave the impression of being determined and feisty. Nonetheless, Rose's statement is simply not credible.

Ms. Cortez seemed to try to give an honest account of what she saw and what she remembered. Although Respondent elicited testimony that a few days after the strike Ms. Cortez had applied for work at the Company and was not hired, she testified convincingly that she was not upset because of this and

⁹³If she did, I find it was not because, as Respondent argues, she tried to walk through Regalado but because, as he acknowledged, he positioned himself immediately in front of her.

bore no grudge against the Company because they had not hired her. (III:195, 203-204.) I credit Ms. Cortez whose testimony essentially corroborated that of Perez.

XI. THE EMILIANO ROJAS INCIDENT

Emiliano Rojas⁹⁴ testified that on October 13, 1989, he and some other workers spoke to UFW representatives and told them they wanted to speak to company representatives because there were no toilets and no drinking water at the ranch. The following day, Saturday, October 14, he arrived at the ranch at approximately 6 a.m. Efren Barajas and Zeferina Perez were on the roadway at 12th Avenue.

Many of the workers gathered together and went into the fields, urging other workers to come out and support them. (V:64.) Mr. Pierre came to the location where they were gathered, and, thereafter, the Sheriff arrived.

The workers left the area and went to the Company office, but since it was a Saturday, the office was closed, and they could not speak to anyone, (Id.) Approximately half of the 200 workers who had been gathered at Avenue 12 went to the office. Mr. Rojas did not do anything different from the other employees either at the fields near Avenue 12 nor at the Company office. (V:64-65, 67.)

On Monday, October 16, "s he worked until the end of

⁹⁴ The transcript incorrectly spells his name "Amilliano."

⁹⁵ GCX11 was admitted as a prior inconsistent statement. Having reviewed the declarations and Rojas' testimony, I am satisfied there is no inconsistency as to when he returned to work. Portions of three declarations (with relevant parts

the day. Moises Murillo told him Echeverria wanted to see him. Rojas and two of the nine individuals⁹⁶ who rode to work with him went to the middle road in the field where Echeverria was located.⁹⁷ There were also two workers from Fresno whose names Rojas did not know.

Rojas testified that Echeverria told them that everyone who had been on strike on Saturday was fired. Rojas said he understood Echeverria to be referring to him and the nine people

highlighted by a yellow marker) made by Mr. Rojas were admitted into evidence as prior inconsistent statements. (RX10, RX11 and portions of a declaration dated November 15th which was read into the record at V:116-117.) Although on page 3 of RX10 Rojas stated "we didn't go to work after the strike until the 19th of October, elsewhere in that declaration and in GCX11 (admitted as a prior consistent statement), he states the date was October 16th. It is clear the October 19th date refers to when he returned after being "fired." The declarations are not models of grammatically correct, polished writings. Thus, too much emphasis on punctuation can easily distort meaning, and one must carefully consider context. I am also not persuaded that the reference on page 3 of RX11 to October 14th is actually an inconsistency since, in context, it appears most reasonably to refer to the events described just previous to the date rather than the material which follows.

⁹⁶ Ricardo Gonzalez, Sylviano Gonzalez, Tibucio Gonzalez, Carlos Gonzalez, Luis Morales (also spelled "Morellos" in the transcript), Lorenzo Huerta Rueda, Frederico Chavez, Fortino Morales, and a worker named Lopez. Ricardo and Sylviano were the two who accompanied Rojas.

The reference on pages 1 and 2 of RX10 regarding Rojas' nine riders being present at the meeting with Echeverria is inconsistent with Rojas' testimony. Despite General Counsel's argument (GC Brief, page 78) that the comment is susceptible of more than one interpretation, I believe Respondent's interpretation that Rojas declared the nine were with him when he spoke to Echeverria is the most reasonable interpretation.

⁹⁷ Although in GCX11 Rojas stated that he met with Echeverria at the shop, in RX10, he referred to the meeting as taking place where Echeverria was located in the fields which is consistent with his testimony. I do not find this a significant inconsistency.

he regularly drove to work because Echeverria was speaking about them as a unit. He did not understand Echeverria to be referring to the entire 200 workers who had participated in the work stoppage on Saturday.

(V:37, 39, 69, 84) Rojas informed the people who rode with him of what Echeverria had said about them all being fired. (V:39.)

Mr. Rojas was allowed to return to work on Thursday, October 19, because Mr. Barajas spoke to individuals in the Company office and thereafter told Rojas and his co-workers that if they went to speak to Echeverria they would be allowed to return to work.⁹⁸ They did so, and upon showing Echeverria identification, they were allowed to return to work. (V:70, 107.)

Mr. Echeverria testified that he knew that he had spoken with Rojas "off and on" during the season but could not recall a specific conversation with him and Ricardo and Sylviano Gonzalez. He emphatically denied he ever told Rojas he was fired for participating in the work stoppage. (VIII:59.)

He testified that on the 16th he did pass out flyers (RX31) at the loading area to every worker he could find. The flyer urges workers to think carefully because, among other things, under certain circumstances, they can lose their jobs if they strike.

Respondent's brief generally tries to make mountains

⁹⁸ Pierre corroborated this testimony. He acknowledged that he received a complaint from Mr. Barajas on behalf of various workers who believed they had been fired. Pierre told Barajas that he was not aware anyone had been fired, but if Barajas would tell him the names and social security numbers, he would check into the matter. (VII:71-74.)

out of molehills so far as Rojas' testimony is concerned. In an effort to aggressively argue its position, the brief distorts his testimony. Similarly, Respondent is disingenuous when it argues it is illogical it would fire workers when it was distributing RX31 urging workers not to strike. A quick, effective way to inhibit a strike is to fire persons such as Rojas who have participated in a work stoppage thereby sending the message that workers had best be careful before they engage in such activity.

Respondent's overzealous arguments notwithstanding, I decline to credit Rojas. While I do not find the degree of inconsistency argued by Respondent, there are improbable elements in his version. It is odd that Echeverria would deliver his message to only part of Rojas' crew and apparently part of another crew—those from Fresno--if he were firing everyone. It is also odd that he would tell five people that everyone who participated in the work stoppage (100 to 200 workers) was fired, and yet Rojas understood he really did not mean that and interpreted it to mean only Rojas and his riders.

Rojas was generally a good witness, and I have credited him on other points. I am not convinced he was fabricating a story here. He may well have misinterpreted the flyer and whatever Echeverria said when passing them out. The legal nicety of being permanently replaced versus being fired is easily lost on a layperson.

XII. UNILATERAL CHANGES/UNLAWFUL BENEFITS

a. Toilets

Three workers, Emiliano Rojas, Antonio M. Santos,

and Antonio Salas, testified that after the strike there were more toilets in the field and the toilets were closer to where the workers were harvesting. Prior to the strike, according to Rojas, the toilets were never moved; consequently, as the workers made their way through the fields, the toilets would be further and further away--sometimes as much as one-half mile from the workers. (IV:98-99, 126-127, 149-150; VI:46-47, 52-54, 90-91.)

Mr. Echeverria acknowledged that he increased the number of toilets after the strike, stating that he did so because there were more workers, and, in order to comply with Federal law, he needed to keep a ratio of 1 toilet to 20 persons.⁹⁹ He further acknowledged that the toilets were closer together than they had been prior to the strike, but maintained it was because the crews were working in closer proximity to one another. (VIII: 67-68.)

Rojas testified there were not more workers after the strike than there had been previously. (V: 90-91) The Company did not introduce any payroll records or similar evidence to substantiate Mr. Echeverria's assertion. Echeverria testified he provided from 250 to 300 workers, thus, at most, three additional toilets would have been required by law if the work force had increased by 50 workers. Although the workers' testimony is subjective, I credit them over Echeverria.

⁹⁹ Administrative notice is taken of sub-part 1928.110 of Title 29 of the Code of Federal Regulations, Occupational Safety and Health Standards for Agriculture which, at subsection (c)(2)(i), requires that 1 toilet facility be provided for each 20 employees or fraction thereof.

b. Change In Requirements Regarding Picking Olives

During the 1989 season, the Company never notified the Union that it was going to change its requirements regarding how olives were to be picked. Nor did the Company ever present any proposals during negotiations regarding such a change. (III:76.)

Four employees, Antonio Salas, Antonio Santos, Emiliano Rojas, and Enrique Nava, all testified that after the strike, they no longer had to pick up olives which had fallen on the ground, and they no longer had to pick olives that were on the very tops of the trees. (IV:96, 127-128, 154-155; V: 45-46, 89-90; VI:10.)

Mr. Rojas testified that not having to pick up the olives from the ground did not have any effect on the amount of money he earned, but Mr. Salas indicated that it did. General Counsel did not introduce any payroll records or other evidence to support Salas' contention, and I decline to credit him over Rojas. (IV: 128-129; V:45-46.)

Pierre testified that although workers are paid piece rate for everything they pick, it is important to the Company that they pick only good quality olives which will be accepted by the processor. (VII:52.) This is because the price paid by the processor or canner may vary from \$10.00 per ton to more than \$600.00 or \$700.00 per ton depending on the quality of the olives. The \$10.00 per ton figure means the processor received a

sizeable number of culls¹⁰⁰ and small olives. (VI:130; VII:52, 59-60.) He testified the Company's desire to minimize the number of culls was the only reason the Company changed its picking instructions in 1989. (VII: 65-66.)

When olives reach their peak size, the objective is to harvest as many as possible before they become overripe thereby becoming culls. In 1989, this condition occurred in approximately mid-October.

Fruit on the tops and shoulders of the trees ripens before the remainder of the fruit because it receives more sunlight. Pierre and Anderson testified this is one reason they would not require employees to pick fruit from those parts of the tree as they reached the part of the season where the olives tended to become overripe. (VI: 130-131; VII:65-66.) The two men testified in general and provided no specific evidence that the condition of the olives changed materially between October 14th and the time the picking instructions were changed.¹⁰¹

Don Anderson testified generally that if the crew which was harvesting by hand came into the field more than a couple of days after the machine harvest, the olives on the ground would

¹⁰⁰ Any olive which cannot be used whether because it is overripe, shriveled or too bruised, is referred to as a cull.

¹⁰¹ Each day Pierre received a report from each canner/processor showing the grade and quality of olives received the preceding day. RX25 is a photocopy of a grade and quality report from one such processor. Comparing this exhibit with RX30 shows that RX25 accounts for only a fraction of the olives harvested on each day. Thus, as General Counsel contends, the records are selective and incomplete, and do not provide significant corroboration that any of the conditions described in general actually obtained in 1989.

have gotten soft and begun to shrivel, and it would make no sense to harvest them.¹⁰² (VI:131.) RX30 provides some support that this occurred in one field.¹⁰³

Anderson specifically testified that the picking instructions were no different than those in effect in prior years. (V:132.) General Counsel provided no evidence which contradicts either this testimony or Pierre's testimony that the change was due to an attempt to reduce the number} of culls.

Despite the fact that most of their testimony was framed in general terms, on balance, I credit Pierre and Anderson. To find otherwise, would mean they deliberately left good quality olives behind which thereby reducing income to the Company. With a decertification effort occurring, an employer might go to some lengths to demonstrate to its workers that it can make life easy or difficult by making changes such as these, but I am not persuaded that such was the case here.

///

///

¹⁰² He also testified that if it were hot, the fruit would deteriorate so quickly on the ground that it would not make sense to pick it up. (VI:130.) There is no evidence, however, that this was a factor in why instructions were modified in 1989.

¹⁰³ The Company grows primarily Manzanillo olives (also referred to as Queen olives because of the large size) and some Sevallano and Ascalano olives. The latter two varieties are very susceptible to bruising and therefore are never mechanically harvested. Thus, only the Manzanillo olives would account for picking instructions being changed because hand harvesters followed the machine harvest several days later. (VII:57-59.) RX30 does reflect that in field 602 the Manzanillo machine harvest ended on October 11th whereas the hand harvest continued through October 23rd.

c. Wage Increase

Briefly recapping the status of bargaining, the last full proposal was the Company's proposal dated September 7th which was modified by its September 18th economic proposal. Thereafter, the Union countered on subcontracting, hiring, seniority, and wages. The September 7th proposal from the Company indicates many tentative agreements between the parties on a number of significant issues including an agreement on hiring added as of September 19th. (See p. 4 of Exhibit A to JX1.)

Negotiation sessions were held on October 10th and 11th, but no negotiation sessions were held after November 1st.¹⁰⁴ These matters remained until on February 23, 1990, Pierre wrote to the Union proposing to implement the wages contained in its October 10th proposal. He stated the Company's intention to implement the new wages for the payroll period beginning March 12, 1990. A copy of the wage schedule was attached. Pierre further stated that unless the Union notified the Company in writing prior to March 11, 1990, that it objected to the wage implementation, the Company would assume the Union had no objection. (See GCX7)

On Tuesday, March 7th, Barajas telephoned Pierre just as Pierre was leaving the office for the remainder of the week on business. Barajas said he had received the letter and wanted to

¹⁰⁴ It will be recalled that the Union canceled the negotiation session scheduled for November 2nd because of the impending decertification election which it believes Respondent unlawfully instigated and supported.

meet with Pierre concerning the proposed increase. Pierre told Barajas that he might be able to meet with him on Friday. On Wednesday, March 8th, he telephoned Barajas and told him he would not be back on Friday. He also said he wanted to know whether the Union approved or disapproved of the wage increase or whether Barajas had certain (i.e., specific) concerns and asked Barajas to put his response in writing.

Barajas sent Pierre a letter memorializing their telephone conversation and reiterated that he proposed a meeting with Pierre to discuss the ramifications of the wage increase. He gave several telephone numbers where Pierre could reach him and arrange such a meeting. (GCX8) Barajas stressed in his testimony that in both his oral and written responses, he conveyed that the Union was opposed to implementation of the wage increase and wanted to negotiate that issue along with remaining matters.¹⁰⁵ (III:165-166.)

The Company did not respond to the March 7th letter, and on March 16, 1990, Barajas again wrote to Pierre stating he wanted a meeting because a simple "yes" or "no" response to the proposed wage increase was not sensible because there were several things to discuss. Therein, he again requested an immediate meeting.¹⁰⁶

Thereafter, Pierre wrote to Barajas on March 20, 1990,

¹⁰⁵ Barajas acknowledged that he did not specify the issues or areas that the Union wanted to discuss.

¹⁰⁶ RX29 is the original of GCX9, Barajas' March 16th letter, with an envelope attached with a date stamp indicating it was received at the S&J Ranch on March 19, 1990. (VII:93-96.)

(GCX10) acknowledging receipt of Barajas' letter of March 16th. In this letter, Pierre recapped his view of events since February 23rd and stated that:

because the Union failed to state that it was objecting to the wage increase and failed to provide a letter as represented by [Barajas] in the March 8, 1990 telephone conversation, S&J Ranch implemented its proposed wage increase.

Pierre also referred to Barajas' March 16th letter, and stated he was still unclear as to whether or not the Union was objecting to the wage increase, and was uncertain "as to what there is to discuss" and requested Barajas set forth in writing what issues he believed needed to be discussed in order to assist Pierre "in determining whether or not there is a need for a meeting, in light of all of the circumstances...." (GCX10)

The same day that Barajas received Pierre 's letter, he contacted the Company workers who told him they had already received their checks with a wage increase. (III:173-179.) Barajas testified he decided not to respond to Pierre's letter because he believed Pierre was engaging in gamesmanship since he did not believe Pierre could reasonably doubt that the Union had indicated it was opposed to the Company implementing the wage increase and wanted to negotiate wages as well as remaining issues. Barajas testified he further believed it made no sense to contact the Company since Pierre's letter confirmed the Company had already implemented the increase. (III:168-171, 180.)

LEGAL ANALYSIS AND CONCLUSIONS

I. THE OCTOBER 14 WORK STOPPAGE

General Counsel alleges that from slightly before 7:00 a.m. until slightly after 8:00 a.m. on October 14, the UFW led 100 to 150 strikers through the Company's fields past the 7:30 a.m. starting time for work. Except for the time element, this fact is not in dispute. General Counsel contends the UFW violated section 1154(a)(1) of the Act because it is strictly liable for any acts of violence or threats which occurred during the demonstration because Union agents participated therein.¹⁰⁷

General Counsel specifically states that it is not contending that the mere presence of a large number of employees engaging in a work stoppage is inherently coercive.¹⁰⁸ (GC Brief, p. 118, fn. 35.) Rather, it argues that where a union leads a large number of agitated, excited, uncontrollable employees on strike, the group's acts are inherently coercive. General Counsel acknowledges that the acts complained of herein were of short duration and were spontaneous rather than planned. Consequently, it specifically avers that it does not allege

¹⁰⁷ Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO (hereafter "Roofers"). (1977) 227 NLRB 1444.

¹⁰⁸ The gravamen of the General Counsel's allegation against Respondent Union is the Union's responsibility for violent acts committed during the course of the work stoppage. Consequently, I do not address the Company's first two contentions. (Resp. Brief, pp.24-28.)

they relieved the Company of its obligation to bargain with the UFW. (GC Brief, p.118, fn.35.)

Based on my findings of fact, supra, the only evidence of violent acts or threats is as follows:¹⁰⁹ (1) Regina Troncoso heard about 20 marchers in the roadway yelling to those who were working to "come out or get out [of the field];" (2) approximately five of the marchers went into the field where Regina and Jose Troncoso (and other family member's and a friend of Regina's) were working and motioned with their hands for them to leave work and whistled in a vulgar manner; (3) Regina and the others ran to the interior of the field, and Regina and her friend hid in a bin because the others they had been working with had left the area; (4) the five marchers had rejoined the rest of the group by the time Regina and her friend hid; (5) the Troncosos and the friend ceased work for about 15 minutes during this incident and then resumed work. There is no evidence that any Union agent participated in or was aware of this activity.

The cases cited by General Counsel, Roofers and Western Conference of Teamsters (hereafter "Teamsters") (1977) 3 ALRB No. 57 are readily distinguishable on their facts. In both cases, agents of the unions had been involved in significant and repeated acts of violence which were much more egregious than any conduct alleged to have occurred here--much less the conduct

¹⁰⁹ It will be recalled that the testimony of Estevan Murillo and Uvaldo Herrera was admitted only in support of the Company's defense to the surveillance allegations since it was proffered long after General Counsel had completed its case in chief regarding the work stoppage.

that I have found actually occurred.¹¹⁰

This Board in the Teamsters case enunciated the principle well. The union was liable because its agents, "having once established a pattern of conduct clearly violative of the Act, [were] liable for subsequent striker misconduct in conformity with that pattern...because of the failure of its agents to act effectively to curb striker misconduct within their knowledge." (at p.2.) (citations omitted).

Similarly, in Roofers, the National Labor Relations Board (hereafter "NLRB" or "national board") stressed that the union had not taken any steps to disavow the unlawful acts and to disassociate the union from them. Thus, it was not necessary to establish the identity of each picketer or his connection with the union in order to hold the union responsible.

The case of Local No. 3887, United Steelworkers of America (hereafter "Steelworkers") (1960) 129 NLRB 6 [46 LRRM 1474] cited by the Company is distinguishable for the same reasons. There, a union agent was involved in repeated incidents of violence and in the very incident which S&J cites in its brief.¹¹¹

///

¹¹⁰ "Moreover, there are other cases which stand for the proposition that a union is not liable for picket line misconduct absent a showing of agency. (See for example, Longshoreman ILWU (1984) 79 NLRB 1487.)

¹¹¹I also find the cases cited by Respondent on mass picketing distinguishable. They relate to blocking of ingress and egress which is a specific aspect of labor law and not an issue herein.

The Company also cites the recent case of Avis Rent-A-Car System (hereafter "Avis") (1986) 280 NLRB 580 to support the argument that the UFW is strictly liable for the conduct of the marchers herein even though no Union agents were present when the acts complained of occurred and even though they were unaware of the acts.

Applying Avis would indeed make the Union strictly liable, and under the applicable ALRA precedent, there is no strict liability but only the liability of a principal for the acts of its agents. (Vista Verde Farms v Agricultural Labor Relations Board (hereafter "Vista Verde") (1981) 29 Cal. 3d 307 The Board recently affirmed its adherence to this standard in Furakawa Farms (hereafter "Furakawa") (1991) 17 ALRB No. 4. Consequently, I do not believe Avis is applicable precedent under the Act, and I decline to apply it.¹¹²

Under traditional agency principles, an agency relationship is based on either actual authority or apparent authority. (Furakawa) I find neither here. Therefore, I find the UFW was not responsible for the acts I have found occurred. Consequently, the allegation against the Union is dismissed.

///

¹¹²Moreover, in Avis there was evidence the union knew of the complained of conduct. (Fn. 3, p. 580.) I also note that Avis is out of step with longstanding NLRB precedent, and the NLRB did not say it was overruling such precedent. I have found only one case where the NLRB itself has cited to Avis, and it found it unnecessary to apply it. So the actual effect and application of Avis to a case where there is no involvement of a union agent and no union knowledge of the complained of conduct remains to be seen.

II. The Status of Crew Leaders

The definition of "supervisor" is found in section 1140.4(j) of the Act. The indicia of supervisory authority are stated in the disjunctive. That is, the possession of any one of the enumerated powers is sufficient to establish supervisory status if it requires the use of independent judgment. (Dave Walsh Company (1978) 4 ALRB No. 84; Dairy Fresh Products Co. (hereafter Dairy Fresh) (1977) 3 ALRB No. 70.)

The criteria listed in the statute are primary indicia of supervisory status. There are also secondary factors such as the ratio of supervisors to rank and file employees, whether the individual considers herself a supervisor and whether employees consider the person to be a supervisor. These factors constitute evidence of supervisory status. (Morris, The Developing Labor Law, 2d ed. (hereafter "Morris") pp. 1454-1455.)

I have found that all the crew leaders had the same duties and responsibilities and that one of those responsibilities was the ability to hire workers. The authority to hire is one of the most significant of the primary indicia.

Turning to the secondary indicia, if the crew leaders here are found not to be supervisors, the ratio would be very high (one supervisor to 125 or 150 non-supervisory employees, i.e. Echeverria and Alvarado supervising 250 to 300 workers.)¹¹³ (Iron Mountain Forge Corp. (1986) 278 NLRB 255;

¹¹³It is clear that Rose and Anderson and other Company managers did not supervise Echeverria's workers but dealt only with him or Alvarado.

Ukegawa Brothers, Inc. (1983) 9 ALRB No. 26; Dairy Fresh.) As noted, one's belief that she or he is a supervisor is evidence of such status. (Mayfair Packing Company (1983) 9 ALRB No. 66, citing Karahadian & Sons, Inc. (1979) 5 ALPS No. 19.) Crew leader Molina testified he was essentially a foreman but just did not have the title. Also, it is clear from the testimony of all the workers that they considered the crew leaders to be foremen. The specific incidents involving Fidel Garcia and Antonio Salas show they believed they had to follow Molina's orders.

Based on the foregoing, I find the crew leaders are supervisors. Therefore, they are agents of the Company, and the Company is responsible for Murillo's actions in circulating the decertification petition.¹¹⁴ I have dismissed the allegations that other crew leaders circulated the petition. Based on my factual findings, supra, I dismiss the allegation that Echeverria circulated the petition but find he unlawfully supported the decertification effort by taking the FELS representative to speak to workers against the Union before the petition was filed.

III. The Status of Jovita Franco

As noted previously, I dismissed the allegation that Ms. Franco was a confidential employee, but the question remains whether she was an agent of the Company such that her circulation

¹¹⁴Even if I did not find them to be supervisors, I would find Murillo was an agent of Respondent because he had the apparent authority to act on behalf of management. (V.B. Zaninovich & Sons (1983) 9 ALRB No. 54; Nick J. Canata (1983) 9 ALRB No. 8; Shop Rite Foods. Inc. (1963) 141 NLRB 1013).

of the decertification petition is attributable to Respondent. Resolution of this question regarding clerical employees with personnel functions requires careful consideration because such employees are often identified with management because of their duties. Yet, non-confidential clericals working in an employer's agricultural operations are part of the unit¹¹⁵ and therefore have a right to file decertification petitions. It is important that this right be protected; however, it is equally important that management not be able to circumvent the law by having an employee act as its agent in a decertification effort thereby violating the legal stricture that one may not by indirect means accomplish that which he is prohibited from doing directly.

Under both the National Labor Relations Act (hereafter "NLRA") and the ALRA, a principal may be held responsible for the acts of an agent whom the principal has placed in such a position that persons dealing with the agent reasonably believe the agent's act to be authorized. (Morris, at p. 238.) The question of "apparent authority" is viewed from the employees' vantage point. (Vista Verde.)

In Benjamin Coal Company and Empire Coal Company, Inc. (hereafter "Benjamin Coal") (1985) 294 NLRB No. 44, the NLRB found a payroll clerk was an agent of the employer and held the company responsible for her unlawful promises of benefits during an election campaign. As in Vista Verde the standard was

¹¹⁵Point Sal Growers and Packers (1983) 9 ALRB No. 57; Anderson Farms Co. (1978) 3 ALRB No. 48; Dairy Fresh Products Co. (1977) 2 ALRB No. 55.

whether apparent authority "was conferred under conditions enabling employees to conclude reasonably that Respondent was in fact speaking through the alleged agent." (at p. 44, ALJD (Administrative Law Judge's Decision), citing Enterprise Aggregates Corp. (1984) 271 NLRB No. 152 ALJD, p. 9, fn. 18.)

The facts in Benjamin Coal supporting agency status are somewhat stronger than here because in addition to having access to payroll records and personnel files, the clerk could, on her own, interpret applicants' eligibility for payroll benefits and during the election campaign, management had her conduct meetings explaining benefits, including how unionization would affect those benefits.

The factual situation in Fabricut Inc. (1978) 238 NLRB 768 is more instructive. There, a clerical employee, one Linda Back, maintained employee personnel files. She answered employees' questions regarding timecards, paychecks, and insurance and benefit programs, and she helped them file insurance claims. She interviewed applicants for employment, had them fill out applications, checked the forms for completeness, and sometimes asked additional questions and recorded the answers on the application. When newly hired employees reported for work, she gave them the employee manual and told them about company rules. On one occasion, she discussed the results of an evaluation with a worker.¹¹⁶

¹¹⁶ Ms. Back also attended some supervisors' meetings and was present when a supervisor discussed information about employees' union activities, but there is no showing employees knew of this, and since the issue is apparent authority, I do not

The NLRB found agency status based on Ms. Back's access to confidential personnel information and her functioning as a conduit for information between management and employees. Specifically, her role in interviewing applicants, although routine, coupled with her explanation of rules and policies to new employees, and her one discussion of an evaluation, made her appear a spokesperson for management.

In this case, Ms. Franco's role regarding processing workers when they reported for work, giving them reporting dates, granting Timorres permission to report to work after his scheduled date, her access to personnel files--including immigration matters--and her involvement with processing benefits, are similar in nature to Ms. Back's duties. Further, the fact that office personnel took workers in to see Ms. Franco and asked her questions indicates she occupied a position of some authority in the office.

Based on the foregoing, I find employees would likely perceive Ms. Franco as an arm of management, and I find her to be an agent of Respondent. Consequently, her role in circulating the decertification petition is attributable to Respondent.

IV. Further Findings re the Company's Role

In addition to Murillo and Franco whom I have found to be agents of the Company, there were six labor consultants in the field during the time the petitions were being circulated, and I have found their testimony that they were

find this factor significant.

oblivious to this activity unworthy of belief. Company management, security guards,¹¹⁷ and Echeverria, Murillo's boss and a Company agent, were in the fields constantly throughout the workday. It cannot seriously be doubted that Respondent was well aware of the decertification activity, especially in view of the fact that Rose had talked to the petitioners the first work day after the stoppage. Yet, Respondent never took any action to disavow Murillo's or Franco's conduct. The company had a duty to do so and by failing to act, gave the impression that it condoned their actions. (Venus Ranches (1977) 3 ALRB No. 55.) See also IAM v. NLRB (1970) 311 U.S. 72.)

In H.J. Heinz Co. v. NLRB (1941) 311 U.S. 514, the United States Supreme Court held an employer liable for actions of group leaders who were supervisors in getting employees to join one union over another. Even though the employer did not direct or authorize the actions, it knew of them but took no action to tell workers the acts were unauthorized. Recognizing the realities of the workplace, the Court opined that the employer had the power to prevent the acts which were inhibiting to the workers' free expression of self-organization but failed to do so. Its failure to act was condemned as an unfair labor practice so that the company would not reap the advantages of the unlawful activity.

¹¹⁷There was nearly one labor consultant and one guard per crew as regards Echeverria's people. (Six consultants, six or eight guards and, at most, seven or eight crews based on Echeverria's testimony that he supplied 250 to 300 workers divided into crews of 40 people.)

The same principles apply here. Both the NLRB and the ALRB consider any supervisory involvement in a decertification effort beyond what has been termed "ministerial" to be improper. (Cattle Valley Farms (1983) 9 ALRB No. 65; Abatti Farms, Inc. (hereafter "Abatti") (1981) 7 ALRB No. 36; Silver Spur Casino (1984) 270 NLRB 1067.) Here, Respondent's conduct was clearly more than ministerial since it is responsible for Murillo's conduct as well as that of Jovita Franco. Murillo instigated the petition, and both he and Franco circulated the petition openly during working hours.¹¹⁸

Moreover, the Company is responsible for the acts of the FELS representatives who both circulated the petition on one occasion and encouraged the decertification effort by speaking against the Union while the petition was being circulated. I have discredited Montolongo's and Diaz' testimony as to the purpose of the many hours they spent at S&J prior to the petitions being filed and infer that they were primarily there to appease the workers and keep them from striking which they did mainly by attempting to discredit the Union. I find S&J has violated section 1153(a)(1) of the Act.

V. Denial of Access and Surveillance

General Counsel alleges that Respondent violated section 1153(a) of the Act by denying access to UFW representatives by prohibiting access and by delaying access so that many workers had left the area by the time the Union

¹¹⁸The same is true regarding Mackzo and Thompson who, based on all the evidence, I find were mere figureheads.

representatives were able to gain entry. Relatedly, the General Counsel alleges the Company violated section 1153(a) by having Company supervisors and agents, including security guards, place themselves so they could observe the Union representatives during the time they were taking access with the result that workers could see they were being observed.

The Company admits the latter allegation but contends its surveillance was not unlawful because Company agents were instructed to stay at a distance where they could not overhear the conversations, and because the surveillance was reasonable in view of the violent acts which occurred during the work stoppage on October 14th.

It's position regarding the alleged access denials has two components. First, it contends they are factually untrue. Next, it argues that it was permitted to deny access under West Foods, Inc. (hereafter "West Foods") (1985) 11 ALRB No. 17, but it allowed the UFW to have access after the work stoppage and before it was entitled to organizational access when the decertification petition was filed, and General Counsel has alleged only "a few isolated" denials of access. (Resp. brief, p. 65.) Apparently, this is an argument that there was no violation because the denials were de minimus.

While I agree with Respondent that the alleged access violations should not be viewed in isolation from other events, unless Respondent was permitted to prohibit access, the fact that access was denied only in some instances is no defense against the finding of violations as to those instances.

Both at hearing and in its brief, Respondent muddies the waters by repeatedly referring to access prior to the filing of the decertification petition and raising the issue whether the Union went beyond agreed upon access. It is important to keep clear that the only allegations of denial of access refer to incidents which occurred after the filing of the decertification petition at which time the Union was entitled to organizational access. (Patterson Farms, Inc. (1982) 8 ALRB No. 57.) Thus, the Union was entitled to access before work, after work, during breaks and during the lunch hour.

Based on my findings regarding the violence during the work stoppage and the Union's conduct thereafter while taking access, I find Respondent was not permitted to deny the Union access. Its reliance on West Foods is misplaced because in this case there is no serious misconduct attributable to the Union.

Consequently, the issue of legal liability is determined by my factual findings. I conclude that Respondent violated section 1153(a) by denying access to Efren Barajas, Zeferina Perez, Gilberto Rodriguez and Ifrael Edeza in the incidents described, supra.

Turning to the question of surveillance, I find that the surveillance were not justified by the small, isolated threats which occurred.¹¹⁹ I also disagree with Respondent's arguments that the surveillance was lawful because its agents did

¹¹⁹My conclusion would not be altered even if I were to credit the allegation regarding the damage to the windshield wiper on Mr. Cervantes' van. While in no way condoning any such conduct, Cervantes himself stated it was over instantly.

not eavesdrop but merely placed themselves so they could see which workers talked to the Union with the obvious result that the workers would know they were being observed. Surveillance through binoculars has been found to be unlawful. (Ukegawa Brothers, Inc. (1983) 9 ALRB No. 26.)

An employer violates the Act when it creates the impression among employees that they are under surveillance because such conduct tends to highlight the Company's anxiety about union activity and tends to inhibit employees in their freedom to engage in union activity. As with all section 1153(a) violations, it is the coercive tendency of the employer's actions rather than its motive or the actual effects that is relevant. (Alpine Produce (1983) 9 ALRB No. 12.)

Respondent's citation to various NLRB cases to support its argument that it is not a violation of the NLRA if a supervisor observes union activity if the union chooses to conduct same in full view of the employer is not persuasive. These cases find such observations unlawful when they are regular, prolonged or for the specific purpose of observing the union activity.¹²⁰

Thus, in Better Val-U Supermarkets of Rockville, Inc. (1969) 174 NLRB 171 [70 LRRM 1169], the NLRA found a violation

¹²⁰ See, for example, Gainesville Manufacturing Co., Inc., a subsidiary of Spencer Industries, Inc. (1984) 271 NLRB 1186. Further, this Board has consistently recognized that access is particularly critical in the agricultural setting, hence the access regulation which has been given court approval. There is no comparable NLRB access regulation.

where a company's general manager observed two employees, one of whom signed an authorization card while in plain view, talking to a union organizer on the sidewalk in front of the company store. Noting the general rule that if the union chooses to organize in a fishbowl, the mere presence of a company official "without more specific evidence that it was not for a legitimate purpose, or that it was for the purpose of observing the [union activity], establishes neither surveillance...nor a reasonable basis for the impression of surveillance...." (at p. 174, quoting from Atlanta Gas Light Company (1966) 162 NLRB 436 [64 LRRM 1051]), the NLRB nonetheless found that the general manager's express purpose was to observe the Union activity and to impress the employee that the company was watching.¹²¹ It found such conduct constituted unlawful surveillance.

In the case of Hoschild Kohn (1982) 260 NLRB 167, the employer increased the number of security guards from 2 or 4 to 8 or 12 after a union organizing campaign. The guards were instructed to keep an eye on activity. The guards lined up chairs in front of the store so they could watch into the shopping mall. The Union organizers were "right outside" the mall. One guard, who could see employees talking to the union

¹²¹Comments by the general manager about the one employee signing the authorization card showed the intent. Here, the company admits its purpose was to observe the activity, and I conclude it well understood the coercive effect such constant, visible surveillance would likely have on employees' willingness to talk to Union representatives. Whether such was part of the employer's motive for its actions is not relevant since, as already noted, it is the coercive tendency which is unlawful.

organizer, had a note pad and appeared to write on it.¹²²

The NLRB found the guards were engaged in surveillance and created the impression of surveillance rather than fulfilling a legitimate interest, and found the employer had violated the NLRA. The national board noted that when an employer sets out to campaign against the union, one of the risks it takes is that out of zeal, ignorance or otherwise, its agents will overstep the mark.

I find Respondent herein engaged in surveillance when its agents stayed in close proximity so as to observe Barajas, Perez, Huerta, Edeza and Rodriguez in the various incidents described in the factual discussion, supra, and thereby violated section 1153(a.)

V. The Zeferina Perez Incident

General Counsel alleges that Respondent violated section 1153(a) of the Act when its agent, security guard Rick Regalado, in the presence of Company workers pushed UFW representatives Zeferina Perez. It is clear that physical battery of a union representative has a coercive effect which chills employees organizational rights.¹²³ Based on my credibility findings that Regalado shoved Perez in full view of a substantial number of Company employees, I find Respondent,

¹¹² While this may enhance the sense of surveillance, I do not find the writing necessary to constitute surveillance since a person with a good memory can achieve the same result as one who takes notes.

¹²³ Tex-Cal Land Management, Inc., (1977) 3 ALRB No 14.

through its agent Regalado, violated section 1153(a).

VI. The Firing of Emiliano Rojas

General Counsel alleges that Respondent, through its agent Frank Echeverria, unlawfully discharged employee Emiliano Rojas and nine other workers because they participated in the October 14th work stoppage and thereby violated sections 1153(a) and 1153(c) of the Act. Based on the fact that I did not credit Rojas that he was fired, this allegation is dismissed.

VII. Unilateral Wage Increase

General Counsel alleges that Respondent's increase in wages implemented on March 12th was an unlawful unilateral change. The Company does not dispute that it unilaterally raised its employees' wages in March 1990. Rather, the Company argues that it was lawfully permitted to do so for two reasons:

(1) the parties had reached impasse on wages at the time the Company implemented its previous proposal. This fact, it asserts, is established by the Union's failure to provide a counterproposal on wages following the Company's October 10th proposal (Exhibit H to JX1) up until the time of the instant hearing;

(2) the Union engaged in dilatory bargaining tactics as reflected in its failure to provide a counterproposal or to say whether or not it approved or rejected a proposal for a wage increases.

Apparently, the Company argues the alleged dilatory conduct constituted bad faith bargaining which relieved Respondent of its obligation to engage in further bargaining.

The Company also apparently contends that the Union was required to give an unequivocal "yes" or "no" answer to the proposed wage increase and to state the specific issues about which it desired to negotiate, and that its failure to do so constituted a waiver.

The Act requires an employer to bargain in good faith with the certified bargaining representative of its employees with respect to wages, hours and other terms and conditions of employment. Before changing wages--or any other mandatory subject of bargaining--an employer must give notice and an opportunity to bargain to the union.

Here, the Company gave the Union notice of its proposed change, but I find it gave the Union no meaningful opportunity to bargain. A union is not required to bargain about wages in isolation, but may insist on bargaining about a total package. (Mario Saikhon, Inc. (1987) 13 ALRB No. 8.) Here, the parties had reached agreement on a number of major items. The Union was within its rights to insist that wages not be separated from the remainder of a contract which it was under pressure from the workers to get signed. I do not accept Respondent's argument that the parties were at impasse. Even after the posturing of both parties on October 10th, there was room for movement. Following her rhetoric of wanting a contract or waging war, Ms. Huerta asked for a breakdown of the Company's October 10th wage proposal to see how it affected each worker.

I also do not accept the Company's contention that it did not know whether the Union was opposing the proposed wage increase. While Barajas never said the precise words "the Union

objects", it is absolutely clear from his oral and written communications that he was objecting to singling out wages and wanted to negotiate them as part of an overall contract.

The Company's contention to the contrary is disingenuous, and Barajas reacted reasonably when he characterized it as gamesmanship. This is especially so since even after the Company implemented the increase, Pierre wrote Barajas saying he (Pierre) was not sure if Barajas was objecting or not. If the Company was unsure, it had no right to act unilaterally.

Under these circumstances, I do not believe Pierre's request that Barajas give him a set of specific items to be discussed so that Pierre could decide if there was a need to meet was sincere. I find the Company was on notice that the Union objected to the proposed wage increase and that the Union wanted to negotiate wages not in isolation but as part of an overall contract.

The Company did not give the Union any meaningful chance to bargain but simply implemented the wage increase. A unilateral change in a mandatory subject of bargaining such as wages is a per se violation of the Act. (NLRB v Katz (1962) 369 U.S. 736 [50 LRRM 2177].) The Company acted at its peril in making the change. (Nish Noroian Farms (1982) 8 ALRB No.25.)

A union is certified until decertified. Since I have found that S&J unlawfully instigated, supported and assisted the decertification effort, I will recommend that the election be set aside. Consequently, S&J's duty to bargain has continued

uninterrupted, and I find it violated section 1153(e) and (a) of the Act when it unilaterally increased the piece rate and hourly wages on March 12th.

VIII. Changes In Toilets and Picking Retirements

Originally, General Counsel alleged these changes as unilateral changes and, consequently, violations of the duty to bargain and as discriminatory, acts because they were occasioned by the workers' protected concerted activity. (See paragraphs 16, 17, 18, 19, 21, 29, 30, 31 and 32 of the Complaint.) It contended the acts violated sections 1153(a), (c) and (e) of the Act. It has apparently abandoned the section 1153(c) and (e) allegations and now contends only that the changes were an unlawful grant of benefits designed to encourage workers to support the Company and decertify the Union. As such, it argues they are violations of section 1153(a).

Based on my finding that the changes in picking requirements were no different than in prior years and were made for lawful business reasons, I dismiss the allegation as to this issue.

With regard to increased number of toilets and their closer proximity to the workers, I have discredited the reasons given by the Company for the change. However, I find no unlawful unilateral refusal to bargain or grant of benefits because I infer that the reason the Company made the changes was because the work stoppage, which was led by UFW agents Barajas and Aguirre, was motivated in part by the workers' complaints that there were insufficient numbers of toilets. While there is no

specific evidence this complaint was made known to the Company as part of the work stoppage (and even some evidence to indicate that the workers' problems were not specified), I conclude that the complaint was made. It is the most logical explanation for why the change occurred. Since the Union joined in the workers' complaints by virtue of its role in the work stoppage, it would be anomalous to find the employer guilty of an unfair labor practice because it acceded to the Union's demands, rather than negotiate about them. For the same reason, I find no basis to conclude an unlawful grant of benefits. These allegations are hereby dismissed.

REMEDY

Based on the entire record, the findings of fact and conclusions of law herein, and pursuant to section 1160.3 of the Act, I recommend that the Regional Director of the Board's Visalia Regional Office set aside the decertification election. I dismiss the allegation against the Union and the various allegations against the Company as noted, supra, and I issue the following recommended:

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent S&J Ranch, Inc., (Respondent) its officers, agents, successors, and assigns shall:

1. Cease and desist from:

- a. Refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union) by

initiating, sponsoring, supporting, approving, encouraging and circulating a decertification petition among employees or by making unilateral changes in wages, rates of pay or other terms or conditions of employment;

b. Interfering with access by UFW representatives either by prohibiting them from taking access or by delaying access thereby reducing their allotted time or causing them to miss talking to workers;

c. Engaging in surveillance of employees while they speak to Union organizers who are taking access;

d. Assaulting UFW representatives who are attempting to take or taking access;

e. Interfering with access taken by UFW representatives;

f. In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Act;

2. Take the following affirmative action designed to effectuate the policies of the Act.

a. Upon request, bargain collectively in good faith with the UFW with respect to the wages, rates of pay and other terms and conditions of employment;

b. Sign the attached Notice to Agricultural Employees (Notice) embodying the remedies ordered, and after its translation by a Board agent into all appropriate languages, reproduce sufficient copies of the Notice in each language for the purposes set forth in the remedial order;

c. Post copies of the Notice in all appropriate languages in conspicuous places on Respondent's property, including places where notices to employees are usually posted, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed;

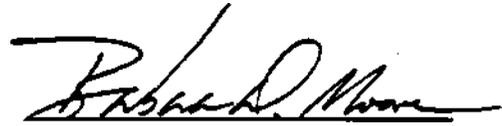
d. Mail copies of the Notice in all appropriate languages, within thirty (30) days after the issuance of a remedial order, to all employees employed by Respondent during the period from September 1, 1989, until the date of mailing;

e. Arrange for a Board agent or a representative of Respondent to distribute and read the Notice in all appropriate languages to all of Respondent's employees on Respondent's time and property, at times and places to be determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. All employees are to be compensated for time spent at the reading and question and answer period. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees to compensate them for time lost at this reading and question and answer period;

f. Notify the Regional Director, in writing, within thirty (30) days after the date of issuance of a remedial

order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter, in writing, what further steps have been taken in compliance with the remedial order.

DATED: July 2, 1991

A handwritten signature in black ink, appearing to read "Barbara D. Moore". The signature is written in a cursive style with a prominent initial "B" and "M".

BARBARA D. MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we, S&J Ranch, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the United Farm Workers of America, AFL-CIO (UFW) because we unilaterally raised wages without bargaining with the UFW. The Board also found we violated the law because we: (1) unlawfully instigated and supported an effort to decertify the UFW; (2) denied and delayed UFW representative's access to employees; (3) were responsible for the acts of our agent, a security guard, who pushed a female UFW representative; and (4) engaged in surveillance of UFW representatives while they were taking access. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farm workers these rights:

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

Because you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above. In particular:

WE WILL NOT instigate or unlawfully support, encourage or assist any decertification campaign against the UFW.

///

WE WILL NOT make any changes in your wages, hours or conditions of employment without first notifying and negotiating with the UFW, the certified bargaining representative of our employees, about such changes.

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours and conditions of employment.

WE WILL NOT deny or delay UFW representatives from taking access to our employees when it is the proper time for taking such access.

WE WILL NOT physically assault any UFW representative.

WE WILL NOT engage in surveillance of UFW representatives while they are-taking access.

DATED:

S&J RANCH, INC.

By:

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Visalia, CA 93921. The telephone number is (209) 627-0995.

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

DO NOT REMOVE OR MUTILATE