Reedley, CA

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RAY AND STAR GERAWAN DBA GERAWAN RANCHES and GERAWAN COMPANY, INC., Employer , and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 90-RC-2-VI
GERAWAN RANCHES, A Partnership and GERAWAN COMPANY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 90-CE-32-VI 90-CE-33-VI 90-CE-35-VI 90-CE-38-VI 90-CE-39-VI 90-CE-41-VI 90-CE-44-VI 90-CE-45-VI
GERAWAN RANCHES, A Partnership and GERAWAN COMPANY, INC., Respondent, and FARM WORKER EDUCATION AND LEGAL DEFENSE FUND, Charging Party.	Case No. 90-CE-15-VI 18 ALRB No. 5 (July 8, 1992)

DECISION AND ORDER
AND
CERTIFICATION OF REPRESENTATIVE

On December 23, 1991, Administrative Law Judge (ALJ) Barbara Moore issued the attached Decision and recommended Order in this proceeding based on consolidated unfair labor practice charges and election objections. She found that, as alleged, Respondent engaged in specified violations of the Agricultural Labor Relations Act (ALRA or Act)1 and recommended that the Agricultural Labor Relation Board (ALRB or Board) invoke standard remedies. She also dismissed the Employer's objections to the conduct of the election or conduct affecting the results of the election and recommended that the United Farm Workers of America, AFL-CIO (UFW or Union) be certified as the exclusive bargaining representative of all of the Employer's agricultural employees. Thereafter, Respondent filed exceptions to the ALJ's Decision with a brief in support of exceptions and General Counsel and the UFW filed response briefs.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions, and to adopt her recommended Order, as modified herein, and to certify the UFW as the representative of the

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[1]A11 section references are to the California Labor Code, section 1140 et seq., unless otherwise indicated.

Employer's agricultural employees.[2]

The ALJ found, and we agree, that Respondent violated the Act by its layoffs of May 10, 11 and 12, 1990. However, we modify the ALJ's additional finding that Respondent unlawfully laid off 32 crews from May 15 to June 8, insofar as she found any discriminatory layoffs to have occurred after May 23, 1990, and as to the layoff of the Pedro Lopez crew. We adopt the ALJ's recommendation that the Employer's election objections be

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2In contending that the ALJ was biased, Respondent relies principally on its arguments that the ALJ's factual findings and legal conclusions were so unreasonable as to demonstrate bias. Since we, based on an independent review of the record, find her factual findings and legal conclusions generally to be correct, we find no support in her findings for Respondent's position notwithstanding areas in which we may express disagreement with the ALJ. Respondent contends that the ALJ unfairly impeded its examination of witnesses by directing all counsel and witnesses to be civil to each other. This admonition followed upon an incident in which General Counsel complained that Respondent's counsel was behaving in a threatening manner towards General Counsel's witness. Respondent's counsel admitted laughing at the witness. In these circumstances, the ALJ's instruction appears to have been appropriate.

Respondent also contends that because the ALJ found it necessary to admonish Respondent's counsel, she must have been biased against Respondent. We find nothing in the ALJ's conduct which demonstrates bias. That Respondent's counsel may have chosen, by his own admission, to laugh at a witness and to drop exhibits weighing several pounds, which is shown on the transcript as a loud noise interrupting the hearing, does not entitle Respondent to complain of bias against it when the ALJ takes remedial measures. The ALJ appears to have maintained control of the hearing in an appropriate manner.

As a result of this control we are also able to dispose of General Counsel's motion to bar Respondent's counsel, Mr. Giovacchini, from further appearances before this Board. The ALJ's admonitions appear to have been sufficient to restore order. Trusting that objectionable conduct will not recur in subsequent proceedings, we deny General Counsel's motion.

dismissed for lack of merit.3

DISCUSSION

The May 10-12, 1990 Layoffs

The ALJ correctly found that General Counsel presented a prima facie case that the layoffs which began on May 10, 11 and 12 and lasted until May 14 were unlawfully motivated. The totality of circumstances, including the timing, clear expressions of the Respondent's anti-union animus, and departures from past practice just after the employees had exercised significant statutory rights, establishes a compelling prima facie case. (Sorenson Lighted Controls, Inc. (1989) 286 NLRB 969 [130 LRRM 1010].)

On May 9, 1990, pursuant to a Petition for Certification filed by the Independent Union of Agricultural. Workers, IBPAT, AFL-CIO, in which the UFW intervened on May 4, the Board conducted a representation election among the Employer's agricultural employees. Since the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director conducted an expedited investigation of the challenges. Following the issuance of a revised tally on May 11, he immediately scheduled a runoff

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3Respondent excepts to certain credibility resolutions made by the ALJ. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24.) Our review of the record herein indicates that the ALJ's credibility resolutions are supported by the record as a whole.

election to be conducted on May 15, 1990.

Respondent's defense focused on the testimony of Michael Gerawan who stated that the timing and depth of the May 10-12 layoff resulted from his decision to keep more employees on his payroll up to the date of the initial election than normal at that time of year. Gerawan stated that his purpose in doing so was to affect the outcome of the election, and that he felt the larger turnout to be achieved by retaining a greater number of crews would help him do so.4

Gerawan testified that this strategy resulted in Respondent performing some work before May 10 that normally would have been performed in the weeks following May 15, particularly the thinning of late bearing varieties of tree fruit and the training of shoots on certain varieties of grapes.

Gerawan gave no reason for retaining the greater than normal number of employees early in the season other than his desire to affect the election. He identified no other business advantage arising from retaining more employees than usual early in the season, or from performing some operations earlier than

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4As the ALJ noted, no section 1154.6 violation was alleged. Section 1154.6 is violated when employees are hired specifically for the purpose of voting in an ALRB election, a practice sometimes referred to as packing a unit. Arakelian Farms (1983) 9 ALRB No. 25. The same conduct independently violates section 1153(a) and (c). (Trend Construction (1982) 263 NLRB 295 [111 LRRM 1111].) Respondent cannot and does not claim that it was prejudiced by the absence of an 1154.6 allegation. Rather, in response to General Counsel's prima facie case, Respondent presented as a defense facts that themselves establish a violation.

normal. One of the foreseeable consequences, and, an admitted impact of the strategy of retaining greater than normal numbers of employees in the first 10 days of May was that employees who would normally have worked after May 10 were laid off.

We find that Respondent has not established a defense under the NLRB's doctrine initially embodied in Wright Line, Inc. (1980) 250 NLRB 1083 [105 LRRM 1169], enf'd. 662 F.2d 899, and our own adoption of the Wright Line test in Martori Brothers Distributors (1982) 8 ALRB No 15. In its decision approving the NLRB's Wright Line doctrine of the National Labor Relations Board (NLRB or National Board), in NLRB v. Transportation Management, Inc. (1983) 462 U.S. 393 [113 LRRM 2857], the United States Supreme Court stated that the test placed upon the employer the burden of showing that it ". . . would have acted in the same manner for wholly legitimate reasons." The Court required that the employer show that protected activities had no role in the adverse action alleged to be discriminatory because "It is fair that [the employer] bear the risk that the influence of the legal and illegal motives cannot be separated[.]" Id., at 402.

In Radio Officers Union v. NLRB (1954) 347 U.S. 17 [33 LRRM 2417], the fundamental precedent defining discrimination under the National Labor Relations Act (NLRA) as amended by the Taft-Hartley Act, the United States Supreme Court ruled that "The policy of the Act is to insulate employees' jobs from their organizational rights." There is no clearer example of

employees' exercise of organizational rights under the ALRA than their petitioning the Board to conduct an election. Respondent's explanation for its strategy demonstrates that rather than insulating its employees' jobs from their organizational activity, it laid them off early solely because of their exercise of their right to organize.5

We conclude that Respondent has not shown any lawful reason for the layoff of May 10-12 as a defense to General Counsel's prima facie showing of unlawful motivation. Indeed, the defense presented by Respondent established an unfair labor practice. We therefore adopt the ALJ's order as to this violation.6

5The NLRB has long held that it is unlawful to bring in additional employees to influence the outcome of an election, as well as to postpone normal layoffs, even where no employee loses income because of a layoff or discharge. (Humana of West Virginia dba Greenbrier Valley Hospital (1982) 265 NLRB 1056 [112 LRRM 1306]; Suburban Ford (1979) 248 NLRB 364 [104 LRRM 1091], enf. den. on other grounds, 646 F.2d 1244.) Where employees are laid off as the result of additional employees being hired to affect the outcome of a potential election, the layoffs are discriminatory. (Trend Construction, supra.) Acceleration for unlawful reasons of a layoff that would have happened eventually is discriminatory. (Ehrlich Beer, Inc. (1987) 286 NLRB 671 [129 LRRM 1144]; Brown & Lambrecht (1983) 267 NLRB 186 [114 LRRM 1012].)

6Respondent contends that the ALJ substituted her business judgment for Respondent's as to changes in its staffing patterns in 1990. We find that Respondent has offered no business reason for these changes, but rather, as discussed above, admits that they were made solely because of the employees' exercise of protected rights.

We find it unnecessary to address Respondent's similar contention that the ALJ imposed her business judgment in deciding that they delayed harvest of early varieties of fruit to aggravate the May 10-12 layoff. The finding of discrimination is supported by such undisputed evidence of unlawful motive that this additional evidence would add nothing

May 15, 1990 to June 8, 1990 Layoffs

The ALJ found that the 32 crews laid off on May 10, 11 and 12 experienced substantially more days without work in the period from May 15 to May 23, 1990 than they had in comparable prior years. Against the background of the animus expressed by the supervisors and by Michael Gerawan himself, and Respondent's failure to provide any explanation for the loss of work, the ALJ concluded that a violation was established.

Respondent excepts to this finding, arguing primarily that the ALJ failed to consider the increased number of crews Respondent maintained in 1990 as compared to 1989. Respondent's asserted purpose in maintaining more crews was to prevent a crew shortage that Michael Gerawan testified it had experienced in 1989. Gerawan also testified that a loss of work days and hours for the 32 crews laid off on May 10, 11 and 12 during the May 15 to June 8 period occurred because work normally performed at that time had been completed earlier. As found above, the additional employees retained by Respondent up to May 10 for the purpose of winning the initial election had been assigned work normally done after May 15.

To the extent that the 32 crews' loss of work resulted from Respondent's election strategy of using more employees up to the initial election, such loss of work would be discriminatory as the May 10 to 12 layoffs were. Rather than being insulated from any job impact from their organizational

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to our disposition of this allegation.

activities, these employees lost work as a direct result of such activities. Because that loss of work grew out of their exercise of a statutorily protected right, under Radio Officers, supra, we must conclude that impact was unlawful. Respondent presented no lawful reason why the 32 crews were selected for layoff. Thus, from May 15 to May 23, these layoffs appear to but a continuation of the earlier discrimination already found herein to have occurred on May 10-12.

We therefore agree with the ALJ that layoffs of the 32 crews after May 15 were unlawfully motivated to the extent they resulted from the transfer of work normally done after May 15 to the period ending May 10, and were intended to affect the outcome of the election. We adopt her recommended order as modified herein with respect to this violation.7

7General Counsel failed to take a position as to whether Respondent's use of farm labor contractor crews between May 15 and June 8, 1990 constituted evidence of discrimination. The ALJ ruled that the evidence of Respondent's usage of contractor crews would not be received to show discriminatory motivation in the May 15 to June 8 layoffs. As a result we find no unlawful discrimination on any days lost when Respondent made greater use of farm labor contractor employees from May 24 to June 8, 1990, than it had in prior years.

We note that Respondent normally used few labor contractor crews during the May 15 to June 8 period in 1987, 1988 and 1989. In 1990, Respondent followed its pattern of using almost no contractor crews from May 15 to May 23. It used between 1 and 6 contractor crews from May 24 through June 1, and between 9 and 30 contractor crews from June 1 through June 8. We find that the crew days lost by the 32 crews from May 15 to May 23 resulted from Respondent having performed work normally done in that period utilizing the extra employees retained for the purpose of winning the initial election. The days of work lost by the 32 crews during the May 24 to June 8 period were not inconsistent with the preceding year. In view of General Counsel's lack of a position as to the use of labor contractor crews during this period, we find that the work assigned to the contractor crews

Election Objections

Unrepresentative Vote

The final tally in the May 15 runoff, issued on July 17, 1990, showed a total of 974 valid ballots had been cast from an eligibility list of 1,963 names, the same list used in the initial election. In our decision in Gerawan Ranches, et al. (1990) 16 ALRB No. 8, we found that the Regional Director appropriately followed the Board's Election Manual in proceeding to a runoff election as soon as reasonably possible using the same eligibility list used in the first election.

The ALJ found the turnout sufficiently representative in the runoff election, because almost 50 percent of the total electorate cast valid ballots. Noting that the Board has held elections with lower turnouts sufficiently representative to warrant certification, the ALJ recommended that the turnout objection be overruled. We find her conclusion consistent with existing Board precedent. The NLRB has applied similar percentages in assessing representativeness of turnout.

More recently, in Lemco Construction, Inc. (1987) 283 NLRB 459 [124 LRRM 1329], the NLRB announced that it would no longer consider percentage turnout in evaluating whether an election should be certified, but that it would certify an election as long as the mechanical arrangements and notice were

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did not amount to work discriminatorily denied to the 32 crews discriminatorily laid off on May 10, 11 and 12. Accordingly, we limit the remedy for this violation to the period from May 15 to 23, 1990.

fair. In Lemco, only one of eight eligible voters voted. Five other voters had agreed to vote as a group but arrived at the polls after they had closed because the clock they relied on was several minutes behind the agreed upon official time piece used for the election. The NLRB certified the election, even though only 12.5 percent of eligible voters cast ballots.

The NLRB stated in Lemco that it had abandoned numerical analysis of voter turnout as an independent test for the validity of an election, but that it would consider the adequacy of notice and opportunity to vote and whether any voters were prevented from voting by the conduct of any party or by unfairness in the scheduling or mechanics of the election.

The adequacy of notice is raised in this case as a separate objection, and we will deal with notice issues as they arise in the context of the arrangements for this election, in our discussion of the Employer's notice objection.

The Regional Director here provided, in addition to the two mobile work site polling places provided in the first election, five additional voting sites, located in Fresno, Madera, Reedley, Raisin City and Kerman. The five additional sites were added to facilitate voting by laid off employees, and were located in all areas where substantial numbers of the Employer's employees lived. The Region undertook extraordinary noticing efforts, involving radio spots and personal notice to laid off employees.

The Employer's first objection, apart from asserted

specific inadequacies of notice discussed below, considered under Lemco criteria, amounts to a contention that the voting arrangements were unfair because laid off voters had to travel to voting sites rather than being able to vote at work.

In Community Care Systems (1988) 284 NLRB 1147 [126 LRRM 1077], the NLRB distinguished situations in which it was extremely difficult to vote from those in which it was merely inconvenient. Where voting was made extremely difficult, as in Versail Manufacturing (1973) 212 NLRB 592, 598 [86 LRRM 1603] (employee out of state because of work assignment) and VIP Limousine (1985) 274 NLRB 641 [118 LRRM 1399] (unit of chauffeurs prevented from voting by 20 inch blizzard during voting hours), the NLRB has found employees to have been prevented from voting.

In Community Care Systems, the employees voting consisted entirely of visiting homemakers-housekeepers. The only polling place provided was at the employer's office. Only on days when the employer conducted a general meeting were all the homemakers at the employer's offices. The disputed election was set on a day other than a general meeting day, and to vote, most of the homemakers had to make a special trip to the office not required by the normal course of their duties that day.

The NLRB certified the election, even though only 45 percent of the potential electorate cast valid ballots. The NLRB found the requirement that most of the voters travel to the voting site to have subjected them to an inconvenience, but not

to have prevented them from voting. The Board, citing Lemco, held that the low turnout did not demonstrate that the election arrangements were unfair, noting that it had abandoned the numerical analysis in Lemco.

Applying the NLRB's approach in Lemco, we find that the laid off employees here were at worst subjected to an inconvenience much like the visiting homemakers in Community Care Systems, in that they had to make a trip to the voting site not required by their work routine. The Region made efforts to accommodate the voters by providing five extra voting sites. A polling place was situated within a few miles of the residences of the vast majority of laid off employees. No contention is raised that the scheduling was unfair, and the polls for laid off employees were open after normal working hours. We conclude that under the NLRB's decisions in Lemco and Community Care Systems, leaving aside the issue of notice, that the scheduling and mechanical arrangements for the election were fair and that all eligible voters were given the opportunity to vote.8

8The NLRB in Community Care Systems found that the parties were bound by their stipulation to hold the election on a date when the homemakers were not required to all be present at the employer's office. Our procedures do not provide for stipulated election agreements, since our statute requires that the election be conducted within seven days of the filing of the petition, while the NLRB's median time from filing of a representation petition to issuance of regional director's decision and direction of election is 44 days (1989 NLRB Annual Report, p. 249), allowing time for the parties to reach agreement on all the details of an election on all arrangements for an election in over 75 percent of representation cases. Under our regulations, the voting arrangements are determined by the regional director. The NLRB in Community Care Systems stated that chaos and delay in the NLRB's election procedures

Finally, we observe that in acknowledging Lemco, we are not changing the basis upon which the Board historically has reviewed election turnout. To the contrary, we are merely acknowledging that the NLRB standard is not inconsistent with that long employed by this Board:

> Low voter turnout, standing alone, is not a basis upon which this Board will set aside an election. An election is deemed to be representative where there is sufficient notice, the voters are given an adequate opportunity to vote, and there is no evidence of interference with the electoral process. (Lu-Ette Farms (Sept. 29, 1976) 2 ALRB No. 49; Verde Produce Company, Inc. (May 16, 1980) 6 ALRB No. 24.9

Apart from any considerations of adequacy of notice, we find that the election arrangements here were sufficiently fair and that no party prevented the voters from having the opportunity to vote. We therefore overrule the Employer's first objection.

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would result if it did not hold the parties to the terms of their stipulations, thereby causing parties not to enter into stipulations. The consequences of not upholding reasonable arrangements directed by the regional director for the Board's election procedure, with its much shorter time requirements for conducting elections, would be, if anything, more serious than the abandonment of the stipulated election procedure would be for the NLRB. Parties must show that proper arrangements ordered by the regional director prevented a fair election.

9"[I]t is a well-established principle that in the conduct of a democratic election, where adequate opportunity to participate in the balloting is provided all those eligible to vote, the decision of the majority actually voting is binding on all. The indifference or neglect of those failing to exercise the right given them by law should not be permitted to invalidate an otherwise properly conducted election." (S.W. Evans and Sons (1948) 75 NLRB 811, 813 [21 LRRM 1081].)

Adequacy of Notice

The ALJ found that the notice of election provided in this case was adequate, even though substantial numbers of employees were on layoff. She relied on ALRB precedent holding that even though not every voter gets notice, if all reasonable steps were taken to give notice, then the election should be certified. (Leo Gagosian (1982) 8 ALRB No. 99; Verde Produce (1980) 6 ALRB No. 24.)

Here, the Regional Director instructed the Board agents to visit every voter at the home address on the eligibility list, with special emphasis on labor camps, where heavy concentrations of the Employer's employees resided. The Regional Director also used both paid and public service announcements on two Spanish language radio stations serving the areas where the Employer's employees lived, over the two days preceding the runoff election.

Similar efforts were found adequate in Gagosian, supra, where most of the employees were laid off at the time of the election. In Verde Produce, the Board found that house to house notice and radio spots might have been adequate but concluded that since not even one striker cast a ballot, that at least one significant group of voters not actively working must not have had any notice of the election.

We agree with the ALJ that the use of paid and public service radio announcements and house to house notice to laid off employees were equivalent to the efforts undertaken in

Gagosian and Verde Produce, and were the maximum reasonably possible in the circumstances. No evidence such as the failure of any the laid off employees to vote sufficient to support an inference that any significant group of voters failed to get notice appears in this case.

The Employer contends that because only 13 percent of laid off labor contractor employees voted, the Board is required to infer that they did not get notice. We note that the turnout of laid off farm labor contractors exceeded the rate of employee voting in Lemco. Given the pervasive notice efforts undertaken here, we find that this rate of voting among farm labor contractor employees does not show lack of notice. Other permissible factors, such as the conceded inconvenience of making a special trip to vote and possibly lesser interest, could have accounted for the lower turnout of labor contractor employees.

The notice efforts undertaken herein were adequate in the circumstances, and the Employer has failed to make this showing as to the laid off employees in general.10

10The Employer raises two contentions regarding adequacy of notice. The first is that because the addresses of three of the five polling places established for the convenience of laid off employees had not been fixed until May 14, that all notice given before that date was defective, at least as to the employees who were to vote at those locations since notice was still available for two locations, and since no employee was required to cast a ballot at a specific site. The Employer's argument must be rejected.

The packing shed employees did not get personal notice of the runoff election through Board agents during working hours. The Employer's controller, Alan Huey, was informed on the day of the election that the packing shed employees had not received

We therefore conclude in that Employer failed to meet its burden, and overrule this objection.

Discharge of Pedro Lopez Crew

The ALJ found that Respondent discharged crew boss Pedro Lopez, and thereby discharged his crew.11 Finding that Lopez was discharged because he failed to report back on the union sympathies of his crew as requested by field man Ignacio Angulo, the ALJ concluded that the crew's discharge resulted from Lopez' refusal to engage in an unfair labor practice.

We find that the evidence fails to establish that Lopez was requested to engage in any unfair labor practice. Lopez testified that Angulo asked Lopez to inform himself as to what his crew was saying about the company and the Union and to report back to Angulo...Lopez never complied with these directions. The next time that Lopez came under Angulo's direction, Angulo discharged Lopez, and his crew. The reasons given by Angulo for discharging Lopez were found by the ALJ to be pretextual. However, the record is unclear regarding whether

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notice of the election. Huey faxed a copy of the notice of election to the shed. The Employer made no showing as to whether the shed employees did or did not vote. The Employer has therefore not met its burden of showing that enough votes were affected by the lack of in person notice from Board agent to affect the outcome of the election. We will not set aside the election on the basis of failure of the Board agents to personally notify the shed employees when the voters appear to have had actual notice.

11Pedro Lopez' discharge was not alleged to be violative of the Act, but the resultant discharge of his crew was.

a valid, work related basis for the discharge existed.12

In Parker-Robb Chevrolet, Inc. (1982) 262 NLRB 402 [110 LRRM 1289], the NLRB held that while supervisors could not be discharged for refusing to commit unfair labor practices, they could be required to assist their employer in lawfully opposing union organizing activity. In Rossmore House (1984) 269 NLRB 1176 [116 LRRM 1025], the NLRB rejected its previous analysis that any supervisory questioning of employees about their union activity per se constituted unlawful coercive interrogation. Under this precedent, we find that Lopez' testimony falls short of showing that Angulo had required him to engage in any unfair labor practice. Angulo did not specifically require Lopez to engage in direct interrogation. Lopez could have complied with Angulo's directive by keeping his eyes and ears open to conversations taking place openly in his presence and reporting any positions expressed. Thus, insufficient evidence exists to find that Lopez was required to

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12Respondent contends that the discharge of Lopez' crew cannot be found based on Lopez' discharge, without more, because all members of the Lopez crew were eligible to be hired by other crew bosses. The members of Lopez' crew would have to apply like other new employees with other crew bosses to return to work at Respondent. Therefore, the members of Lopez' crew would remain unemployed until hired as new employees. They were therefore discharged when Lopez told them that he and the members of his crew were discharged. Respondent's position would mean that a discharge could be found only where the employer not only severed and employee's employment, but barred the employee from any future employment. We are unable to accept Respondent's proffered definition of discharge.

engage in coercive interrogation or surveillance.13 We therefore find that no direction to engage in an unfair labor practice is established by Lopez' testimony.

In these circumstances, the reasons for the discharge of the Lopez crew are unclear, and therefore, no violation is established. We shall therefore dismiss this allegation from the complaint.

CONCLUSION

For the reasons discussed above, the Board affirms the ALJ's conclusions that Respondent unlawfully laid off employees on May 10, 11 and 12, and for the period as modified herein from May 15 to May 23, 1990. We dismiss the allegation that Respondent discharged the Pedro Lopez crew for the reasons noted above. The Board affirms all other conclusions reached by the ALJ, overrules the Employer's objections related thereto, and approves the conduct of the election held.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, said labor organization is the exclusive representative of all

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13In Best Western Motor Inn (1986) 281 NLRB 203 [123 LRRM 1070], the NLRB distinguished directions to supervisors that amounted to no more than requests to keep their eyes and ears open from directions to identify "trouble makers" or "instigators," which required the supervisor to engage in coercive interrogation or surveillance. The former clearly does not constitute an unfair labor practice. Unlike our dissenting colleague, we find the record is inadequate to characterize the discharge as unlawful.

agricultural employees of Ray and Star Gerawan, a partnership, dba Gerawan Ranches, and of Gerawan Company, Inc., in the State of California for the purposes of collective bargaining, as that term is defined in section 1155.2(a).

ORDER

By authority of section 1160.3 of the Act, the Agricultural Labor Relations Board (Board) hereby orders that Ray and Star Gerawan, a partnership doing business as Gerawan Ranches and Gerawan Company, Inc., (herein collectively called Respondent) its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Threatening agricultural employees with discharge or other reprisals for engaging in the exercise of their rights guaranteed by section 1152 of the Act;

b. Interrogating agricultural employees about their union sympathies;

c. Deriding or speaking in derogatory terms about employees because they engage in union activities;

d. Unlawfully discharging, laying off, assigning fewer days of work to or otherwise discriminating against, agricultural employees because of their participation in protected union or other concerted activity;

e. 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. Offer Alejandro Reyna, Viviano Sanchez, and the members of Guillermo Guitron's crew (the "Guitron crew") named in the ALJ's decision immediate and full reinstatement to their former positions of employment, or if their former positions are no longer available, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

b. Make whole Alejandro Reyna, Viviano Sanchez, and the Guitron crew for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful discharge of them. Loss of pay is to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharges. The award shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5;

c. Make whole all members of the crews laid off beginning May 10, 11 or 12, 1990, who were also laid off between May 15 and May 23, 1990, inclusive, for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful layoffs. Loss of pay is to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharges. The award shall also include interest to be determined in the manner set forth in E.W.

Merritt Farms (1988) 14 ALRB No. 5;

d. Preserve, and upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay or makewhole amounts due under the terms of the remedial order;

e. Sign the attached Notice to Employees ("Notice") embodying the remedies ordered. After its translation into all appropriate languages, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order;

f. Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director when the current peak season began, when it is anticipated that it will end, in addition to informing the Regional Director of the anticipated dates of the next peak season;

g. Post copies of the Notice in all appropriate languages in conspicuous places on Respondent's property, including all 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;

h. Upon request of the Regional Director, mail copies of the Notice in all appropriate languages to all employees employed by Respondent during the period from February 1, 1990, until February 1, 1991;

i. Provide a copy of the signed Notice to each employee hired by Respondent during the twelve (12) month period following a remedial order;

j. Arrange for a Board agent or a representative of Respondent to distribute and read the Notice in all appropriate languages to Respondent's employees assembled on Respondent's time and property, at time 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 Respondent to all non-hourly paid employees to compensate them for time lost at this reading and question-and-answer period;

k. Notify the Regional Director, in writing, thirty days after the date of issuance of a remedial order, what steps have been taken to comply with that order. 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 until full compliance is achieved.

DATED: July 8, 1992

BRUCE J. JANIGIAN, Chairman

JIM ELLIS, Member

MEMBER RAMOS RICHARDSON, Dissenting in Part and Concurring in Part:

I agree with the majority position regarding the May 10-12, 1990 and May 15-23, 1990 layoffs, as well as the decision to uphold the results of the election. However, I dissent from the majority's finding that Respondent did not discharge Pedro Lopez and his crew because Lopez refused to engage in an unfair labor practice.

Lopez testified that the day after the runoff election, field supervisor Ignacio Angulo instructed him to find out what his crew members were saying about the United Farm Workers of America, AFL-CIO (UFW or Union) and the Respondent, and then to report back to Angulo what he had found out. Lopez told his crew what Angulo had said, but he never reported back to Angulo what his crew thought about the Union. About a month after the

conversation between Lopez and Angulo, Respondent discharged Lopez and his crew for what the ALJ found to be pretextual reasons.

In Parker-Robb Chevrolet (1982) 262 NLRB 402 [110 LRRM 1289] (Parker-Robb) a supervisor was fired for attending a union organizational meeting. The NLRB overruled its ALJ's finding that the employer had unlawfully fired the supervisor as part of its overall plan to discourage employees' support of the union. The NLRB held that it is not unlawful for an employer to discharge supervisors for their participation in union or concerted activity--either by themselves or when allied with rank-and-file employees--because it is employees, not supervisors, who have rights protected by the National Labor Relations Act (NLRA). Nevertheless, Parker-Robb reiterated that the discharge of supervisors is unlawful when it interferes with the right of employees to exercise their organizational rights or right to engage in concerted activities, as when supervisors refuse to commit unfair labor practices.

In Rossmore House (1984) 269 NLRB 1176 [116 LRRM 1025] (Rossmore) the NLRB overruled a line of cases which had applied a per se rule that an employer's questioning of open and active union supporters about their union sentiments, in the absence of threats or promises, necessarily interferes with, restrains or coerces employees. In Rossmore the employee was an active union supporter who had openly declared his union ties by means of a mailgram sent to the employer. The employer's manager, after

receiving the mailgram, approached the employee and questioned him about the contents of the mailgram; later, he asked the employee why he wanted a union and whether the union charged a fee. The NLRB found that under the totality of the circumstances, the manager's questioning of the open and active union supporter was noncoercive.

The circumstances involved in the discharge of Pedro Lopez and his crew are easily distinguished from Parker-Robb and Rossmore. Parker-Robb is not applicable, because the instant case does not involve a supervisor's own participation in union or concerted activities. Rossmore is not applicable because the instant case does not involve a supervisor's casual, noncoercive conversation with a known union adherent. Rather, Angulo directed Lopez to question his crew members about their union sentiments and report back to Angulo what he found out. Angulo's demand can only be viewed as an unlawful attempt by management to obtain information about whether the crew members favored the Union.

In Ravtheon Co. (1986) 279 NLRB 245 [122 LRRM 1036] the NLRB applied the totality-of-circumstances test enunciated in Rossmore to find that a company manager's questioning of employees regarding whether they or other particular employees had attended a union meeting reasonably tended to interfere with the employees exercise of their statutory rights. One of the factors the NLRB considered important in its decision was that the employees being questioned were not open, active union

supporters at the time of the conversation. Applying the same totality-of-circumstances test in Sunnwale Medical Clinic (1985) 277 NLRB 1217 [121 LRRM 1025] (Sunnwale), the NLRB reached a contrary result where the employer did not have a history of hostility toward union supporters or discrimination against them, and the case involved a casual, amicable conversation between persons who had a friendly relationship.

The circumstances in the instant case contrast sharply with those in Sunnwale. Here, the Employer had demonstrated anti-Union animus, had discharged some employees and threatened to discharge others for their Union activities, and had threatened employees that if the UFW won the election Respondent would close its labor camps and declare bankruptcy. Applying the totality-of-circumstances test, I would find that Lopez was not being asked to engage in a casual conversation with his crew, but was being directed to engage in an unlawful interrogation of his workers to enable Respondent to ascertain which employees favored the Union. Consequently, I would conclude that the discharge of Lopez and his crew, resulting from Lopez' refusal to carry out the interrogation, tended to interfere with, restrain and coerce the employees in the exercise of their statutory rights, in violation of section 1153(c) and (a) of the Agricultural Labor Relations Act.

Dated: July 8, 1992

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

Ray & Star Gerawan dba
Gerawan Ranches & Gerawan
Company, Inc.

18 ALRB No. 5
Case No. 90-RC-2-VI,
et al.

ALJ Decision

The ALJ found that Respondent unlawfully laid off 32 crews following an election on May 9, 1990, in which no choice on the ballot received a majority of votes. Respondent showed strong anti-union animus during this period, the layoff followed immediately after a major exercise of important statutory rights, and was a departure from Respondent's normal practice in that it was more abrupt and deeper than in past years at the same point in the season. Many of the crews were recalled when the region proceeded with a runoff election on May 15, but the same 32 crews continued to experience a higher rate of layoff than the 15 crews not laid off from May 11 to 15, 1990. The ALJ found the layoffs of the 32 crews during this period discriminatory.

The ALJ overruled Employer's objections that the turnout in the runoff was unrepresentative, in view of the fact that at least half the employees on the list voted. The Employer's notice objection was overruled because the region and the parties gave the maximum notice possible in the circumstances.

The fact that each voter did not get notice will not invalidate an election where every feasible step has been taken to make voters aware of the election. Here, the Board had announcements made over radio stations, and Board agents in addition to giving notice to the employees at work, visited as many of the voters' homes as possible, concentrating on the Employer's labor camps, where large number of the Employer's employees live.

The ALJ found that the discharges of the Pedro Lopez and Guillermo Guitron crews and of Viviano Sanchez and Alejandro Reyna were discriminatorily motivated. She found that crew bosses Maximiliano Rios, Cecilio Arredondo and Roberto Lozano engaged in interrogation, threats to discharge, to close labor camps, to cease operations, and to interfere with unemployment benefits and derided employees for their support of a labor organization.

The ALJ dismissed allegations of unlawful discharge as to two groups of employees.

Board Decision

The Board found that the layoffs of the 32 crews on May 10-12 and after May 15, 1990, to be unlawful. The Board rejected Respondent's contention that the layoff was lawful because it

was a natural and foreseeable result of the strategy Respondent utilized to affect the outcome of the first election.

Respondent retained more crews than it historically had up to the date of the initial election, using the additional employees to perform work not normally done until after May 10. Respondent did so because it felt that the additional employees would help it to affect the outcome of the election. The Board held that layoffs resulting from election tactics amounted to discrimination against employees because of their having sought an election, and therefore, instead of being a defense, was further evidence of discrimination. The Board found the layoffs following May 15 to be discriminatory only to the extent that they were not the result of increased use of farm labor contractor crews in the May 24 to June 8, 1990, period.

The Board sustained the ALJ's overruling of the Employer's election objections. The Board reaffirmed its rule that an election will not be set aside based on a low percentage turnout alone, noting that the NLRB has adopted a similar approach. The Board found that the region and the parties undertook every reasonable effort to provide notice under the circumstances, and found that adequate notice of the election had been given.

The Board affirmed the ALJ's finding of discrimination as to discharges of the Guillermo Guitron crew and of Alejandro Reyna and Viviano Sanchez. The Board found the evidence insufficient to establish that Pedro Lopez had been requested to engage in unlawful interrogation or surveillance of his crew, and that the evidence of discharge for pretextual reasons not sufficiently clear to raise a prima facie case of discrimination. The Board adopted the ALJ's findings of 1153(a) violations consisting of threats of discharge, cessation of operations, labor camp closure, interference with unemployment benefits and interrogation and derision of employees for engaging in union activities.

Concurring and Dissenting Opinion

Member Richardson dissented from the majority's dismissal of the violation as to the discharge of the Pedro Lopez crew. In her view, the request to report back what the employees were saying about the company and the Union in the context of the extensive violations disclosed by the evidence held, is sufficient to show that Pedro Lopez, and therefore his crew were discharged because Pedro Lopez failed to engage in interrogation or surveillance.

# # #

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

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America and the Farm Workers Legal Defense and Education Fund (collectively referred to as "union"), the General Counsel of the ALRB issued a complaint which alleged that we, Gerawan Ranches and Gerawan Company, Inc., (collectively referred to as "Respondent" or "Gerawan") had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by discharging Alejandro Reyna, Viviano Sanchez and the crew of Guillermo Guitron and by discriminatorily laying off numerous crews because they participated in Union and/or other protected activities. The Board also found that we violated the law by making various threats, including threatening to discharge people who supported a union, threatening to close our business if a union were elected by our workers, disparaging workers who supported a union, and interrogating employees about their union support. 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 you to know that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because 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.

WE WILL NOT discharge or lay off any employees because they participated in union or other protected concerted activities.

WE WILL NOT threaten any employees with discharge, closure of housing that we provide as a condition of employment, cessation of operations or with interference with any unemployment benefits they may be entitled to because of their union or other protected concerted activities.

WE WILL NOT interrogate our employees about their union membership on activities.

WE WILL NOT refer to our employees in abusive terms because they have

engaged in union activity.

WE WILL offer to reinstate Alejandro Reyna, Viviano Sanchez, and the crew of Guillermo Guitron to their former positions, and we will reimburse them, with interest, for any loss in pay or other economic losses they suffered because we discharged them.

WE WILL reimburse the employees we unlawfully laid off, with interest, for any loss of pay or other economic losses they suffered as a result of our unlawful act.

DATED:

GERAWAN RANCHES, and
GERAWAN COMPANY, INC.,

BY : _____
Representative Title

If you have any questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995.

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: GERAWAN RANCHES, A Partnership and GERAWAN Company, Inc., Employer , and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 90-RC-2-VI
GERAWAN RANCHES, A Partnership and GERAWAN Company, Inc., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos 90-CE-32-VI 90-CE-33-VI 90-CE-35-VI 90-CE-38-VI 90-CE-39-VI 90-CE-41-VI 90-CE-44-VI 90-CE-45-VI
GERAWAN RANCHES, A Partnership and GERAWAN Company, Inc., Respondent, and FARM WORKER EDUCATION AND LEGAL DEFENSE FUND, Charging Party.	Case No. 90-CE-15-VI

APPEARANCES:

Sarah A. Wolfe,
Thomas Giovacchini
Law Firm of Thomas E. Campagne
5108 East Clinton Way
Fresno, CA 93727
for Respondent/Employer

Sally Parsley
for the United Farm Workers
of America, AFL-CIO
Charging Party/Petitioner
and for the Farm Workers Legal
Defense and Education Fund
Charging Party

Freddie A. Capuyan
Visalia Regional Office
Visalia, CA 93291 for the
General Counsel

Before: Barbara D. Moore
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Barbara D. Moore, Administrative Law Judge:

This is a consolidated representation and unfair labor practice case which was heard by me over eleven hearing days in November 1990[1] in Visalia, California. On August 14, the Regional Director of the Visalia office of the Agricultural Labor Relations Board ("ALRB" or "Board") issued a consolidated complaint ("Complaint 1") based on eight unfair, labor practice charges filed by The United Farm Workers of America, AFL-CIO, ("UFW" or "Union") and then, on September 24, issued a complaint ("Complaint 2")[2] on a ninth charge filed by the Farm Workers Legal Defense and Education Fund (LDEF). Both the UFW and the LDEF intervened and were represented by one person at the hearing. Respondent Gerawan Ranches[3] filed answers thereto on August 24 and October 2, respectively, wherein it denied any wrongdoing.

All moving papers[4] were timely filed and properly served.

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[1]All dates herein are 1990 unless otherwise stated.

[2]These two complaints were never consolidated into a single complaint, but an order consolidating all the unfair labor practice allegations with three election objections issued on August 27.

[3]The parties stipulated that the employer herein consists of both Gerawan Ranches and Gerawan Company, Inc. which packs and ships the produce of Gerawan Ranches. The two entities are referred to herein collectively as "Employer," "Respondent," or "Company". There was insufficient evidence to determine the status of Gerawan Enterprises which sells and markets the produce.

[4]In order to conserve resources, I directed General Counsel to dispense with filing copies of those documents normally introduced as the official exhibits since all except the Prehearing Conference Order are part of the record pursuant to

Each party was represented at the hearing and filed a post-hearing brief. Upon the entire record,[5] including ray observation of the witnesses, and after careful consideration of the arguments and positions of the parties, I make the following findings of fact and conclusions of law.[6]

JURISDICTION

Gerawan Ranches and Gerawan Company, Inc., are agricultural employers within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act. ("ALRA" or "Act".) The alleged discriminatees are all agricultural employees within the meaning of section 1140.4(b) of the Act, and the UFW is a labor organization within the meaning of section 1140.4(F) of the Act.

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the Board's regulations. I take administrative notice of the Prehearing Conference Order which issued on October 5.

[5]References to the official hearing transcript will be denoted "volume:page." The parties' exhibits will be identified GCX, PX, RX and JX followed by the exhibit number for General Counsel, Petitioner, Respondent/Employer, and Joint exhibits, respectively. Respondent was directed to provide General Counsel and the UFW access to the source documents for Respondent's exhibits. Subsequently, the parties proffered only one amendment which was to RX3 which I have admitted as JXl.

[6]Near the close of the hearing, the General Counsel filed a motion to exclude Thomas Giovacchini, one of the attorneys representing Respondent/Employer, from the hearing and to bar Mr. Giovacchini from further ALRB proceedings. Since the basis for this motion included both conduct in the hearing room and conduct in the Board's Visalia Regional Office, the latter over which I have no jurisdiction, I referred the entire matter to the Board, and am not addressing the Motion herein. However, there are certain instances where conduct of Mr. Giovacchini which is addressed in the Motion is also a factor relied on by me in a finding, e.g. its effect on a witness.

I find that Mike Gerawan, Philip Braun, Ignacio Angulo, the foremen of the labor contractor crews and the crew bosses of the Company crews at issue herein are all supervisors within the meaning of section 1140.4(j) of the Act. I so conclude based on Respondent's admission of the testimony herein as regards the authority of these persons.

BACKGROUND

A Petition for Certification ("Petition") of a statewide bargaining unit consisting of all agricultural employees of Gerawan Ranches[7] was filed by the Independent Union of Agricultural Workers, International Brotherhood of Painters and Allied Trades, AFL-CIO ("IUAW") on May 2 in the Visalia Regional Office of the ALRB. Thereafter, on May 7, a Petition for Intervention was filed by the UFW.

A secret ballot election was conducted by the Regional Director of the Board's Visalia Regional office on May 9. None of the choices received a majority of valid ballots, so a run-off election between the two top choices, the UFW and No Union, was necessary. Pursuant to Title 8, California Code of Regulations, §20375, the Regional Director ordered the run-off held within 7 days, to wit, on the sixth day following the first election, that is, on May 15.

The challenged ballots in the run-off election were outcome determinative, and the Regional Director issued a

[7] All parties agreed that the packing shed employees of Gerawan Company, Inc. voted in both elections.

Challenged Ballot Report ("Report 2") on May 23. The Company excepted to the Regional Director's recommendation not to count the ballots of individuals who did not work in the eligibility week (April 22 through April 28). The Board rejected these exceptions. (Gerawan Ranches ("Gerawan I") (1990) 16 ALRB No. 8).

The final tally of ballots in the run-off election showed these results:

UFW	564
No Union	410
Unresolved challenged ballots	103
Total	1,077

On May 23, the Company filed various election objections, and, on July 31, the Board set three of them for hearing. Thereafter, as noted above, these objections were consolidated with various unfair labor practice allegations for purpose of this hearing. In its post-hearing brief, the Company abandoned its objection that the election was ordered when the Company was not at 50% of its peak employment.[8] The two remaining

[8]See Employer's/Respondent's brief, p.15. Hereafter, citations to the brief will be designated "R.Br. page," and citations to the General Counsel's brief will be denoted "GC Br. page. Some exhibits admitted as relevant to the withdrawn objection were relevant because they were submitted to the Regional Director and the issue was whether his determination of peak was reasonable based on the information available. General Counsel made clear he was not waiving hearsay objections and admitting the truth of assertions in those various documents. (VI:5-6.) Thus, these documents cannot be used to establish the facts asserted therein. (See, for example, R.Br.p. 79 where Respondent cites maps appended to RX 62 as evidence establishing what areas were thinned.)

objections are that the Regional Director held the run-off election at a time when there was an unrepresentative number of workers on payroll and that there was inadequate notice of the run-off.

Complaint 1 alleges that the Company committed a numerous unfair labor practices near the time of the two elections.[9] General Counsel alleges that:[10]

(1) beginning about a week and a half before the first election, to wit, on or about April 28, Respondent discharged two brothers, Jose and Ramiro Cuevas, and the people who rode to work with them because Ramiro and Jose Cuevas complained about working conditions;

(2) on or about the same date, crew boss Roberto Lozano interrogated his crew members about their union support and asked crew members to sign anti-union declarations without assuring them that there would be no repercussions if they did not do so;

(3) in early May, crew boss Roberto Santoyo told crew members they had been laid off because of the union;

(4) on May 7, two days before the election, a labor contractor foreman, Guillermo Guitron, fired various crew members for engaging in a work stoppage to protest working

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[9] Paragraph 15 of Complaint 1 was withdrawn by the General Counsel.

[10] I allowed General Counsel to make certain amendments to the complaints and refused to permit others. The amendments or disallowances thereof are discussed with the relevant allegation.

conditions;

(5) on May 9, the day of the first election, labor contractor foreman Cecilio Arredondo told his crew the Company would shut down if the union won the election;

(6) on May 10, crew boss Benito Contreras told his crew that field supervisor Philip Braun had stated the Company would fire employees who were involved in union activities and had told Contreras to fire two IUAW election observers and had stated that Contreras' nephew, whom Braun had seen wearing union insignias, was worth "pure shit";

(7) on or about May 10 and May 11, immediately following the first election, the Company unlawfully laid off numerous crews;

(8) from approximately May 12 through June 8, the Company assigned the crews referred to in number 7 above fewer days of work and, on those days, fewer hours of work than had been assigned in prior years;

(9) on May 17, crew boss Pedro Lopez Rodriquez told his crew he had been instructed by field superintendent Ignacio Angulo to find out about their union activity and to report back to the Company;

(10) on June 4, crew boss Roberto Lozano discharged Viviano Sanchez because of his union support; and

(11) on June 11, the Company discharged the crew of Pedro

Lopez Rodriquez.[11]

In Complaint 2, the General Counsel alleges that on February 7, during the time union organising was in its early stages, the Company discharged Alejandro Reyna because of his protected concerted activity and union support and that in early February Reyna's foreman, Max Rios, told crew members the Company would fire workers who supported the Union.

General Counsel alleges that all of the above actions were taken because of the workers' union activity or perceived support of the IUAW and/or the UFW or because of other protected concerted activity.

COMPANY OPERATIONS

Gerawan Ranches is a California partnership; the general partners are Ray Gerawan and his wife Star Gerawan. Gerawan Ranches ("Ranches") is engaged in the growing of stone fruits, specifically, peaches, plums, nectarines and apricots. It also grows table and wine grapes and produces raisins. These same crops were produced during the entire five years immediately prior to this hearing during which time Mike Gerawan, the son of Ray and Star, was ranch manager.[12] (V:87-89.)

Gerawan Company, Inc. is a California corporation whose

[11]I declined to allow General Counsel to amend Complaint 1 to allege that Mr. Lopez also was unlawfully discharged because no good cause was shown for the lateness of the proposed amendment.

[12]His duties consisted of overseeing the production of fruit which included supervising the growing operations as well as the pruning, thinning and harvesting operations.

majority shareholders are Ray and Star Gerawan. Mike's brother Dan is President of the corporation which processes, packs, stores and ships the fruit produced by Ranches.

Ranches has an east side operation which consists of approximately 2,600 acres north of the town of Reedley where it grows peaches, plums and nectarines. It also has a west side operation which encompasses about 2,800 acres between the towns of Raisin City and Kerman on which it grows peaches and grapes. There are also about 220 acres in the town of Visalia on which it grows plums.[13] (V:92.)

THE ELECTION OBJECTIONS

As previously noted, the Company has abandoned its objection that the election was held when the Company workforce was not at 50% of peak employment. The remaining objections are:

1. Whether the Regional Director improperly ordered a run-off election for May 15, among an unrepresentative number of the employer's agricultural employees; and

2. Whether a substantial number of potential voters was disenfranchised because they failed to receive adequate notice of the times and places of the run-off election.

[13]The operations are divided into sub-units designated by ranch and block numbers from 1 through 54. Numbers 34, 35 and 36 refer to the Visalia properties; numbers 40-49 comprise the west side operation, and the remaining numbers comprise the east side operation. Even though 1,000 acres of the east side operation is owned by the corporation rather than Ranches, Mike Gerawan manages the entire east side.

OBJECTION #1.

The Company argues that it laid off so many workers immediately after the first election (it acknowledges the number was unprecedented, see R.Br.p.76) that there were not enough workers remaining on payroll to warrant holding a runoff election right away because the likely number of voters would be so low that it would not be representative of the true size of its work force. Rather, the Company contends the Regional Director should have delayed the run-off election for two or three weeks until the size of the work force increased. (R.Br.p.18; RX61.) The Company recognized that, by and large, these would be new workers so that, in effect, there would be a new election. The Company would thus have a second chance to win.

There is no doubt the Company understood that the delay it requested would result in mostly new voters since it links this current objection with its position, already rejected by the Board in Gerawan I, that the run-off election should have been held not among employees who worked during the original eligibility period but among those who worked during or immediately preceding the week of the delayed run-off election. (R.Br. p.18) In Gerawan I, (at p.8) the Company acknowledged there had already been substantial turnover even in the six days between the first election and the run-off.

In addition, in support of its initial request to delay the run-off, the Company informed Ed Perez, the Board

agent in charge of the election, that it had laid off various labor contractors who would not be rehired. (X:235.) Finally, the Company was well aware of the fact that layoffs would reduce the likelihood that workers would vote since Mike Gerawan testified he kept crews doing busy work prior to the first election in order to increase voter turnout which he believed would help the Company win the election. Mr. Gerawan was so convinced of the importance of keeping workers on payroll until the election that he had them perform work which later had to be redone and which resulted in lower productivity. (See discussion below regarding the layoffs as alleged unfair labor practices.)

Regional Director Lawrence Alderete saw the same situation the Company did, but his concern was that those workers who had availed themselves of the statutory right to petition for a collective bargaining representative and those who had been eligible to vote in the first election not be disenfranchised.[14] (X:83-84,91-92,100-101,121-122.)

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[14]Based on his 14 years' experience at the ALRB, the last 6 as a Regional Director, he believed that delaying the run-off would increase the likelihood that eligible voters who had been laid off would not vote. Presumably they might leave the area or find work elsewhere. The Company argues Mr. Alderete's only reason for not delaying the run-off was because he wanted to make sure that the same people who "supported the unions" would be able to vote in the run-off. (R. Br. 20-21.) While the words are accurately quoted, as is often the case with quoting only a portion of a statement, this extract does not fairly characterize Mr. Alderete's testimony. Counsel for the Employer asked Alderete about his reasons for setting the run-off for May 15 numerous times, and Alderete repeatedly explained he was concerned that the same individuals who were eligible to vote in the first election would be able to vote in the run-off, and, in

Mr. Alderete testified that his decision when to set the run-off was based on not only on his concern about disenfranchising voters but also on his belief that the Board's regulations providing that a run-off should be held within seven days of the first election should be read strictly.[15] He further testified that balancing these two concerns with the need to have time to notify eligible voters of the second election, he chose to set the run-off for six days after the

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this particular instance, he specifically included those who had petitioned for the election which, at one point, he described as those who supported the union. It is clear that Alderete was referring to those workers who had petitioned for the election and was not indicating he was trying to time the run-off election so the UFW would win as is implied by the Company. A fair reading of Alderete's testimony is that his concern was that the run-off election be held quickly so as to maximize the likelihood that the largest number of eligible voters would be able to vote.

[15]Initially, Alderete stated he did not believe he had discretion to delay a run-off election beyond the seven days. When asked about the case of Jack T. Baillie (Baillie), he acknowledged there could be special circumstances where a run-off would be held beyond such time but stated that the situation in this case was quite different from that in Baillie, and he did not consider this case one where he should go beyond the time set in the Board's regulations. (X:69-71, 98-99.)

This case is completely different from Baillie and Mel-Pack Vineyards, Inc., (1979) 5 ALRB no.32 cited by the Company. In both those cases, the necessity for a run-off election was not even known until substantially after the original elections because of delays in resolving challenged ballots. The Act requires expedited elections in agriculture because there is often substantial employee turnover between the time a petition for recognition is filed and the time of an election. This same concern applies equally to the time lag between an original election and a run-off, and the facts here reflect such a turnover. The Board has already rejected these two cases as precedent for changing the eligibility period herein which issue the Company persists in trying to re-litigate. I find nothing in these cases which gave Alderete any reason to delay the run-off.

first election.[16] (X-.91-92.)

The Company's sole support for this objection is its contention that the turnout in the run-off was so low that the vote was not representative. The exact turnout is not possible to resolve precisely because there are discrepancies in the record as to the number of eligible voters,[17] and there are unresolved challenged ballots from both elections meaning, of course, that the exact number of eligible voters in each election cannot be determined. Taking the most conservative figures, however, which means assuming that none of the challenged ballots in the run-off would have been counted,[18]

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[16]Ed Perez as the Board agent in charge made the initial decision to conduct the run-off on May 15, but his decision was submitted to Alderete for approval. (X:228-230.)

[17]In Gerawan I, the Board uses the number 1,969 eligible voters in making certain calculations but does not specify the source for this number. I note it is the same number the Company uses in its brief here. (R.Br., p.16.) This figure, however, does not comport with the documents introduced by the Company. RX47 lists 57 packing shed employees, but the brief claims 65. RX 45 and 46 were represented to be listings of direct employees of Gerawan Ranches, the former exhibit listing employees by crew, and the latter exhibit listing them alphabetically. However, RX 46 contains 1,387 names (counting an individual named Joe Jacques whose name is handwritten on the computer sheet as having been ill.) RX45 (including Jacques) contains 1,402 names. Because many of the names on the exhibits listing labor contractor employees are not clearly legible, it is not possible from this record to determine the precise number of such individuals working in the eligibility week.

[18]According to the Revised Tally of Ballots in the second election (RX3), there were 974 valid votes cast and 103 unresolved challenged ballots.

the turnout in this election was approximately 50%.[19]

This turnout is not so low as to warrant throwing out this election and ordering a new one. In Leo Gagosian Farms, Inc. (Gagosian) (1982) 10 ALRB No.50, the Board upheld an election where only 39.6% of the eligible voters voted. In Sun World Packing Corporation (Sun World) (1978) 4 ALRB No. 23, there had been substantial employee turnover between the 'first election and the run-off, and there was less than a 30% turnout in the latter. The Board found the turnout sufficient and did not order a new election.

Based on the foregoing, I find that Regional Director Alderete was properly concerned that he should maximize the potential turnout of eligible voters in the run-off election and reasonable in his assessment that the best way to do this was to hold the run-off within the seven days after the original election as provided for in the Board's regulations.

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[19]The Tally of Ballots and Revised Tally of Ballots in both elections show 1,940 persons on the eligibility list. Using this number, 50.2% of those eligible voted (974 divided by 1,940.) But this number apparently does not accurately indicate the number of eligible voters because in the Regional Director's Challenged Ballot Report and Supplemental Challenged Ballot Report to the first election, the parties stipulated that one worker (Juan Manuel Villa Jimenez) and 34 other workers were eligible but were not listed on the eligibility list. Adding 35 to 1,940 yields 1,975 workers eligible to vote which yields a turnout in the run-off of 49.3% (974 divided by 1,975). Using the Board's figure of 1,969 eligible voters yields a turnout of 49.5% in the run-off. (974 divided by 1,969.) The variation in these percentages is sufficiently small that I do not find the differences problematic and include my calculations only for the sake of completeness.

I find no evidence Alderete's decision was based on any factors other than those cited by him.[20] Accordingly, I recommend this objection be dismissed.

OBJECTION #2

This observation is intertwined with the preceding one. Both are predicated on the argument that the election should be

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[20]Counsel for the Company, Tom Giovacchinl, accused Regional Director Alderete of absenting himself from his office so as to avoid service of a subpoena from the Company and also took great exception to the Regional Attorney telling him that Alderete would seek to quash the subpoena. (See, for example, 17:168-169; V:8-9 and VI:6-7.) Clearly communicated by Counsel by his tone of voice and manner was the insinuation that Alderete was being evasive and uncooperative and trying to avoid testifying because of a bias against the Company.

The subpoena issue first surfaced Friday afternoon. November 9. The following Monday was a state holiday. Alderete credibly testified he was in Sacramento on Tuesday on agency business, and Mr. Giovacchini acknowledges he was so informed by the regional staff on Wednesday morning. As appears on the record, Mr. Alderete came into the hearing room that same morning while Mr. Giovicchini was accusing him of trying to avoid service of the subpoena. (VI:6-7.) This conduct belies Mr. Giovicchini's accusations, and there is no evidence Mr. Alderete did anything other than go about his business.

Further, Alderete credibly testified that as a courtesy to Mr. Giovacchini, he had instructed the Regional Attorney to inform him that he (Alderete) might move to quash the subpoena. Alderete further credibly explained that he took this action because in his 6 years as Regional Director he had never been subpoenaed, and he wanted to keep his options open until he checked agency policy as to his testifying. (X:104.) The policy of the National Labor Relations Board ("NLRB" or "national board") has long been not to allow such testimony without written approval. [NLRB Rules and Regulations, 1987, as amended in 1988, section 102.118.] Alderete's explanation is both credible and reasonable. Even if he did not tell the Regional Attorney to explain why he might move to quash, he was under no obligation to do so until such a motion was actually filed. I find no evidence Alderete engaged in any improper conduct suggesting any underlying bias against the Company. I credit Alderete that he made his decision when to hold the run-off election based on his reading of the Board's regulations and his concern that eligible workers not be disenfranchised.

overturned because turnout was so low that it does not represent the wishes of the Company workforce.

Precedent of both this Board and that of the NLRB does not support the Company's position in this case. Gagosian restates long-standing ALRB precedent that low voter turnout alone is not a sufficient basis to overturn an election. So long as there is sufficient notice and eligible voters have an opportunity to vote and there is no evidence of interference with the electoral process, the election will stand.

In Gagosian, only 18% of the eligible voters were working on election day. Here, approximately 45% of the eligible voters were working depending on which number one uses as a base.[21] Even where the number of potential voters who do not receive notice is sufficient to affect the outcome of an election, the election results will be certified if the Regional Director made reasonable efforts to notify the electorate. (Gagosian)

The precedent of the NLRB is the same as that of this Board. In Rohr Aircraft Corp. (Rohr) (1962) 136 NLRB 958, an outcome determinative number of voters was on layoff at the time of the election.

The NLRB reiterated its rule that the Regional Director

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[21]RX3, as amended by JX1, and RX4 show 885 eligible voters working on the day of the run-off. No matter which of the three possible numbers of eligible voters one uses (1,940 or 1,969 or 1,975), the percentage of eligible voters at work is about 45% or much larger than in Gagosian. (45.6%, 45%, or 44.8%, respectively.)

had discretion in providing notice and found no abuse of that discretion. The Regional Director is required to provide as much notice as is reasonably possible under the circumstances, and even where some people do not vote because they did not receive notice, the election will be upheld if the Regional Director met this standard.

In both Gasosian and Sun World, this Board acknowledged the logistical nightmare which would result if it were to require Board agents to provide notice of elections to each potential voter, especially where such voters no longer work for the employer. The NLRB also holds that individual notice is not required. (Rohr)[22]

The efforts made by the Regional Director in this case went beyond the usual notification efforts and were at least as extensive as those used in Gagosian. Perez and Alderete testified they learned on Friday afternoon May 11, after resolving sufficient challenged ballots from the first election, that a run-off would be needed and about an hour or so later decided on May 15 as the date for the run-off.[23]

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[22]That case is different from Gagosian and Sun World to the extent that the Regional Director did not know of the existence of the individuals on layoff prior to the election, and no party suggested that notice at the employer's premises was not sufficient. The NLRB noted that the parties knew of these workers' existence and were free to contact them, and, in fact, the intervenor had contacted employees who were on layoff.

[23]Alderete testified he was not sure whether he had received the May 11 letter from counsel for the Company (RX 61) at the time the May 15 date was set, but he considered both that letter and the May 14 letter (RX 62) when he received them, but concluded they did not warrant delaying the date. (X:68,70,94.)

(X:94,231.) Perez was able to notify the Company almost immediately of this decision but could not reach anyone from the UFW until later that day. (X:231-232.)

The regional office arranged for frequent radio announcements[24], and all voters who were working were contacted.[25] Notice was given to labor contractor foremen and crew bosses who were requested to pass on such notice to eligible voters who were no longer working. Both the Company and the UFW were asked to help notify voters, as they were obligated to do, and both co-operated. (V:13, 15-16, 22-23, X:78, 96, 229-230, 233.)

Further, there were extensive efforts by regional staff to visit eligible voters at their homes. Agent Perez established three or four teams, each with two field examiners, who took lists of eligible voters containing addresses supplied by the

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There was no evidence whether the date stamped on the letters accurately reflects the date or the time a document is received.

[24]The announcements gave the date of the run-off and the names of the towns, but not the specific sites, where voting would occur. (X:78, 229-230.)

[25]Board agents told those who were working that they would vote at the work site and that there would be additional sites for voting in the evening. They were informed that on the day before and the morning of the election they would be told where the voting sites were located, and they were so notified. (X:229-230.) Somehow, the packing shed employees were not notified until the morning of the run-off as to the location of their polling place. However, all but eight of the eligible voters at the shed were working that day and were told about the election. (V:20-21; RX5.) There is no evidence that any of them were prevented from voting due to the time they received this notice which I note was relatively early in the morning.

Company and went house to house in four major geographical areas. (X:229-230,235.) Mr. Perez spent most of Saturday arranging the addresses in geographical clusters to facilitate visiting as many as possible, and he visited some of the addresses on his way home that day. The teams then spent all day Sunday and Monday, May 13th and 14th, going to the homes.[26] They told all the people they contacted to spread the word about the run-off election. On election day, the teams went out again to contact eligible voters they had not previously reached.[27] (X:233.)

The teams visited eligible voters both in Company crews and in labor contractor crews. (X:237.) Many of the crews that had been laid off were still living in the Company's labor camps, so the teams made a special effort to visit the camps and inform people about the run-off election. (X:236.)

Further, in the initial election, there were only two

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[26]Alderete believed Perez determined on either Friday or Saturday afternoon which specific towns to use for the voting sites and that this information was communicated to the people who were contacted on Sunday and Monday by the teams and were broadcast on the radio on those days. (X:78-80,87.) The precise locations, however, were not determined until the day before the run-off, but there is no showing that this prevented any people from voting. In Sun World, no notice of the election was provided until the very day of the election. Further, in that case there were no media announcements as there were here.

[27]Respondent argues that the Board agents contacted no more than 50% of all the addresses on the list. (R.Br. p.20) In the first place, this testimony was struck because the Company made a valid objection to it, so it is not in evidence. Second, the addresses represent only a portion of the voters to be contacted. It will be recalled that everyone who was still working was contacted.

voting sites. In the run-off, to compensate for the potential effect of the layoffs, there were five additional sites for voting. (X:43-45) Three of these sites were designated specifically for labor contractor crews who were not working the day of the run-off because the crews were concentrated in these specific areas. (V:60-62.)

In sum, not only were the usual election Notification procedures utilized here, there were extensive public broadcasts, house to house visits and the addition of five evening voting sites located in the major areas where voters, both working and non-working, were concentrated. Further, both the UFW and the Company knew of the run-off on Friday and had the weekend and Monday to notify eligible voters.[28]

I find these efforts were sufficient, especially in view of the fact that this Board, like the NLRB has repeatedly stated that individual notice such as was made here to workers' homes is not required.[29] I recommend this objection also be

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[28]I note that the Company had recalled 19 of the 43 laid off crews (44.2%) to work by the day of the run-off. (X:234-235.)

[29]The situation here is quite different than in Verde Produce Co.,Inc. ("Verde") (1980) 6 ALRB No. 24, where the Board declined to certify an election where only 29.7% of those eligible voted. In Verde the election was held within 48 hours because there was a strike, but not a single striker voted although the strike was still going on, and not a single employee who was not at work on election day voted. Here, the turnout was significantly larger, and while it is not possible from the record to tell just how many voters who were not at work voted, RX 48 shows that at least some labor contractor workers voted. (RX1.) Further, the notification efforts in this case were more substantial than in Verde. This case is also distinguishable from Pacific Farms (1977) 3 ALRB No.75, where there was only an 11% turnout.

dismissed.

Having recommended dismissal of both objections, I also recommend the election results be certified. In addition to the foregoing, both objections should be dismissed and the election results certified because I have determined that the layoffs which are the basis for both objections were unlawful. (See discussion below). One cannot rely on one's own misconduct to set aside an election. (Pacific Farms)

THE UNFAIR LABOR PRACTICES

1. THE ALLEGED DISCHARGE OF JOSE AND RAMIRO CUEVAS AND THEIR CO-WORKERS.

General Counsel alleges (paragraph 8 of Complaint 1) that on or about April 28,[30] Respondent discharged Jose Manual Cuevas Gonzalez, Ramiro Cuevas, Hector Salinas, Antonio Cuevas Gonzalez, (listed in the Complaint as Antonio C. Gonzalez) Benito Garcia and four other employees in the crew of Carlos Moreno (crew #290) who rode to work with Jose Cuevas.[31]

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[30]Over Respondent's objection, I allowed General Counsel to amend the date of the alleged discharge from May 4 to April 28. The change is minor since the Company records (RX26) show that April 28 was the last date worked by the Cuevases (which Respondent does not dispute), and General Counsel had previously informed Respondent of the discrepancy.

[31]Neither Jose nor Ramiro Cuevas could name the other workers who rode with them and who were allegedly discharged on April 28. However, they testified that usually there were about 9 or 10 people in the van, and RX26 and RX50 show that besides the five men named above, four other men worked only four hours on April 28 and did not work thereafter. (i.e. Rafael Delgado, Sabino Acosta, Benjamin Gonzalez and Javier Romero). In the absence of any other explanation for them having the same number of hours as the Cuevases', I infer that these were the other individuals who rode with the Cuevases. Of these, all had worked

Respondent denies that it discharged any of these workers and asserts that Jose Cuevas quit, and the other workers left with him because he was their ride to work.

The parties stipulated that the last day of work for Ramiro Cuevas, Jose Cuevas, Antonio Cuevas Gonzalez and Benito Garcia was April 28, 1990, and stipulated that they and Hector Salinas were agricultural employees. Based on the crew sheets, I find the other four individuals also were agricultural employees.

A day or two before these workers' last day of work, the crew was waiting for work to start and Ramiro complained to foreman Moreno that there were no cups for drinking water. Moreno replied that Ramiro should find a can in the field to use for drinking. One or more of the crew objected to Moreno's remark[32] and stated they were not animals to be drinking out of a can. However, there being no cups, Ramiro found a can which the crew used the rest of the day. (II:89-90; 136-137.)

Moreno confirmed the incident but remembered only Ramiro and Jose speaking and believed it occurred on their last day of work. (VI:173-174.) However, he had to be led to describe this incident since previously he had been unable to cite any specific complaints by Ramiro and had stated only that Ramiro

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at the Company before the 28th although three for only a few days, and four had not worked - at least in Moreno's crew - for several days prior to the 28th.

[32]Ramiro could not recall specifically which workers made the comment but said it included both people whom Jose drove to work as well as people who did not come with him. (II:155-156.)

complained all the time about working conditions. (VI:172.)

On April 28, the crew was on morning break. Jose, Ramiro and the people who rode with them were sitting together. Moreno yelled over to Jose not to bring any more new people. Jose, at Moreno's request, had been recruiting extra workers because Moreno had permission to expand the crew. Jose replied he had asked the day before if he should bring workers, and Moreno had told him he should do so.[33] (II:92, 139)
Jose then stated that he would not bring any more workers, and Moreno replied to the effect that indeed Jose would not because he (Moreno) was going to fire them all.[34] Both Jose and Ramiro testified Moreno told them to go ahead and leave.

Moreno's version is that after he told Jose he did not want him to bring new people he explained his reasons for not

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[33]Jose testified that he transported however many people Moreno told him to bring, which was usually between 7 and 10 people. He charged all of them except his brothers $3.50 per day. (II:102, 120, 124.) He readily acknowledged that he usually brought different people each day but stated that whenever he told Moreno that some person no longer wanted to work, Moreno would just tell him to bring someone else. (II:120, 126-127.) He also readily admitted that he would not be able to bring the same people every day which would result in his losing money because he would have fewer riders. (II:120.)

[34]Ramiro did not mention this statement but focused instead on his statement to Moreno that Moreno had been getting angry at the workers on numerous occasions. After he fired them, Ramiro told Moreno he wouldn't give them cups and "got after them" as if they were his children. (II:139.) I do not find this an inconsistency, rather, simply different witnesses focusing on different aspects of an incident.

wanting him to do so.[35] This testimony sounded contrived and was unconvincing. According to Moreno, Jose responded by throwing shovels and cursing. Jose then said to the workers he had brought, "let's go." (VI:178-179.) Moreno told these other workers they could stay, that no one had run them off. They said they had to leave because they had ridden with Jose. (VI:179.) He denied telling Jose he was fired. (VI:180.) The entire group went to the office where they told the secretary that Moreno had fired them. The secretary instructed Ramiro to bring Moreno back to the office. Ramiro went to get him. Moreno responded to Ramiro with an obscenity and told Ramiro not to boss him around and refused to go to the office. Moreno confirmed he refused to go to the office with Ramiro. (VI:181.)

Ramiro returned to the office and told the secretary Moreno would not come. (II:141.) The secretary told them to come back the next day, and they could work with a different foreman. (II:98, 142.)

They returned the next two days[36] but were not

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[35]Moreno testified he thought Jose had been transporting people to work for about a week and that he had told Jose twice already not to bring different people. He believed Jose brought the same people twice and then brought different people. (VI:192.) RX26 shows that only three of the people who rode with Jose on April 28 had not worked the day before, and each of them had worked previously in Moreno's crew. However, two people who Jose had brought on April 27 did not come on the 28th. (Jesus Cortes and Maria Cortes.)

[36]I took administrative notice that April 29 was a Sunday which Ramiro testified was not a normal workday. (II:152.) RX 17 shows that one crew worked that day. I conclude that at

successful in obtaining work. The second time, the secretary told them there would not be any more work.[37] (II:98-99, 142-143.)

They then went to a UFW office where they complained about being fired and received UFW buttons. (II:99-100-145.) Prior to this time, Jose had not worn a UFW button, nor had he seen any of the people to whom he gave a ride wear UFW buttons. (II:121-122, 144.)

Within a few days, Jose, Ramiro and Moreno met at a school in town. Jose and Ramiro testified they were wearing UFW buttons; Moreno testified they were not. All agree that Moreno promised them work the following day. Jose and Ramiro maintain Moreno said he would pick them up. Moreno says they did not

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most they may have been mistaken about the day not that they did not return.

[37]They testified the reason they went to the office was because they did not believe Moreno had any good reason to fire them, and they wanted to get work in a crew other than Moreno's. Ramiro acknowledged he did not know whether it was a practice at Gerawan that if they were fired from one crew they could apply for work with another crew. (II:155.)

On cross-examination, Ramiro acknowledged none of them asked for a final pay check, and, in response to a leading question from counsel answered affirmatively when asked if the reason he did not do so was because he did not believe he had been fired. On re-direct, he reaffirmed he had been fired. (II:175-176.) Viewed in context, Ramiro's affirmative answer was not a recanting of his earlier testimony that he was fired. From the context, I infer he meant only that he believed they would find work elsewhere at Gerawan. I also find that not asking for a final pay check is not determinative of whether they quit or were fired since their focus was on remaining employed by the Company.

discuss how they would get to work.[38] (II:100-101; 145-146; IV:181-185.)

Moreno did not pick them up, and they neither contacted the Company nor drove themselves there. They went to Moreno's house later that day to ask why he did not pick them up. Only Jose spoke to Moreno who, according to Jose, simply said there was no work. (II:102, 146.)

Only Moreno testified that during this meeting at the school that there was any discussion about the last day of work. According to him, he asked why Jose had left, and Jose replied he did not like the way Moreno worked. Jose also said he did not like bringing only a few people to work. (VI:181-183.) I find this testimony unlikely. It makes no sense that on the heels of such comments, Jose would ask for and accept work with Moreno.

Moreno testified he never had any further discussion with Jose or Ramiro and had to be led to describe a conversation at Moreno's home which he said occurred about a week later. At that time, Jose and Ramiro came to the house to pick up the checks for the people who had ridden to work with them.[39]

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[38]There was no discussion as to why Moreno was going to pick up them since previously they had ridden in Jose's van. (II:155-161.) I note that elsewhere Jose testified he did not drive his van until be began to charge people to transport them to work. Since only he and Ramiro were offered work, Jose would not be bringing paying passengers.

[39]There is a disagreement as to whether Ramiro was present which is of no real importance since nothing of substance occurred. Respondent's brief cites to testimony that Ramiro was drunk, but that testimony was stricken pursuant to objection, and

DISCHARGES

In order to prove that an employer has discriminatorily discharged or laid off an employee, the General Counsel typically must prove by a preponderance of the evidence that the employer knew or believed that the employee engaged in concerted union activity and discriminated against the employee for that reason. (Scarrone)

Once the General Counsel has made a prima facie case, the burden shifts to Respondent to prove it would have taken the adverse action even absent the worker's protected activity. (NLRB v. Transportation Management Corp. (Transportation Managements) (1983) 462 US 393 [113 LRRM 2857]; Wright Line (1980) 251 NLRB 1083 [105 LRRM 1169], enf'd. NLRB v. Wright Line (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].)

General Counsel has proved that Ramiro engaged in protected concerted activity (the drinking can incident) and that Respondent knew of it. I find foreman Moreno's testimony that Ramiro complained all the time about working conditions too general to establish that on such occasions Ramiro was engaged in protected concerted activity. Thus, there is but one instance of protected concerted activity.

To establish the requisite nexus, General Counsel relies on Ramiro's and Jose's testimony that after raising the issue of transporting workers, Moreno told Jose he was fired. General Counsel asserts this was a pretextual reason and

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therefore it is improper to cite it as evidence.

because of this, and the timing, I should conclude the firing was unlawful. I do not find the evidence strong enough to do so.

In the first place, I did not find any of the witnesses so credible-or incredible-that I can determine whether the Cuevases were fired. The extrinsic evidence could fit either scenario. Since I cannot resolve the issue, General Counsel, having the burden of proof, fails.

Secondarily, even if I were to find that Moreno fired them, I am not persuaded there is a causal connection. There is nothing to suggest Moreno was upset with Cuevas for protesting the lack of drinking cups. Moreno's response when Ramiro Cuevas came to bring him to the office causes me to seriously doubt that Moreno would be angered enough to fire Cuevas. More in character would be for him to dismiss their protest by telling them to drink out of a can--the issue being of no further concern to him.

I recognize that the incident occurred in the middle of a union organizing effort and at a Company which was strongly anti-union and where, as I find below, there were many instances of anti-union conduct, but even so, I do not find the requisite causal connection, and I recommend this allegation be dismissed.

General Counsel alleges the Company also unlawfully refused to rehire Jose and Ramiro Cuevas. I decline to consider this allegation because it was not brought up at the

Pre-Hearing Conference, nor has General Counsel established good cause for the failure to do so. Especially because there are several such instances in this case, I am inclined not to give General Counsel latitude in this instance.

2. THE PEDRO LOPEZ RODRIQUEZ CREW.

General Counsel alleges that on or about May 17, Mr. Lopez[40] told his crew that the Company had told him to engage in surveillance of, and to interrogate them about, their Union activities and to report to the Company what he found out. (paragraphs 11 and 18 of Complaint 1) General Counsel further alleges that on or about June 11, Respondent discharged the entire crew working for Mr. Lopez.[41] Respondent contends that only Mr. Lopez was discharged, and asserts he was discharged because he was not supervising his crew correctly in that they were not picking properly.

Mr. Lopez was the sole witness testifying for the General Counsel on these allegations. He testified he was hired in 1989 by Mike Gerawan and brought his own crew with him. (IV:73-74.)

RX32 shows that Lopez and his crew worked at least from

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[40]The parties stipulated the person referred to in paragraph 6 of Complaint 1 is Pedro Lopez Rodriguez and that the person there identified as Pedro Angulo is Ignacio Angulo. The complaint is amended accordingly. (IV:103.)

[41]As noted previously, I refused to allow General Counsel to amend the complaint to allege the discharge of Mr. Rodriquez, in contrast to his crew, as an unfair labor practice because General Counsel had not timely notified Respondent that he intended to make the amendment. For the same reason, I declined to allow him to amend paragraph 18 to allege a second incident. (IV:67.)

May 3, 1989, until November 6, 1989. They began work again on April 4, 1990, and worked in the harvest from May 20 until June 11, the day Lopez was fired.

According to RX33, which lists the crew members, not only Mr. Lopez but his entire crew with the exception of Francisco Rodriguez, ceased working on June 11. Of the 38 people in the crew, only Rodriquez continued to work, and, subsequently, three more individuals went to work with the Company after a gap in employment ranging from 6 weeks to nearly 3 months.[42]

The day Lopez was discharged, he testified that Ignacio Angulo, who supervised him, told him late in the day that the boss had said he was no longer needed, that he was fired and should turn in the equipment.[43] (IV:83.) Nothing else was

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[42]Mr. Lopez testified that approximately 10 members of his crew continued working with the Company, but the Company records do not support this figure, and absent more specific testimony from Lopez identifying the people, I rely on the Company records. Here, as in a number of other places, Respondent improperly cites as evidence material which is not part of the record. RX34, (cited at R.Br.p. 61) was not admitted into evidence because as to the four employees listed in RX33 as working after June 11, it was redundant and as to the workers who had ceased work prior to June 2, it was not probative since they were not part of Lopez's crew when he was discharged. (XI: 22-29) Similarly, RX35 (cited at R.Br.p. 62) was not admitted because there was no showing the situations therein were comparable to Lopez's situation. For example, there was no showing those foremen had brought their crews with them to Gerawan, and there was no union campaign at the time these foremen were fired. Since the charge is that Lopez's crew was fired because Lopez did not report on Union activity in the crew, the former practice, if there was one, is not probative.

[43]The question was translated using the singular form of "you." (IV:95.)

said, and Lopez went to his crew and told them they had been fired. (IV:84.)

Mr. Lopez testified that during the time he and his crew worked in 1990 (about 5½ weeks) they were warned once about talking,[44] and also on one occasion were warned they had picked unripe fruit. Following this latter warning, Lopez testified he spoke to the crew and told them to correct the situation, and they were never again warned about that problem.[45]

Lopez testified that the day after the recall election, Angulo spoke to Lopez privately. Angulo told him the Union had won the election but had paid people who did not work for the Company to sign up (apparently meaning to vote in the run-off election that had occurred the day before). (IV:78.)

Angulo then instructed Lopez to find out what his fellow foremen and Lopez's crew members said about the Union and the Company and what they were going to do. He further told Lopez to report back to him what he had found out. (IV:78,80-81.)

Lopez spoke to his crew immediately after Angulo left. (IV:93.) General Counsel questioned Lopez as to what he said

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[44]There was testimony that the Company had a rule prohibiting workers from talking. (IV:93.)

[45]On cross-examination, Mr. Lopez answered the question whether he had been sent home on several occasions during the time he worked at Gerawan in 1990 by quickly acknowledging he had been. (IV:98.) I place little importance on this answer because there was nothing in the question or its context which referred to being sent home for disciplinary reasons as opposed to being sent home for some other reason--lack of work for example.

to his crew about Angulo's remarks, and Lopez replied that he told them Angulo wanted to find out what they were going to do. General Counsel asked Lopez, "Do about what?" He responded that he did not know because Angulo had not said. (IV:81-82.)

He never reported back to Angulo anything about the Union. (TV:84.) There is no evidence that his crew engaged in any Union activity before either election.

Ignacio Angulo testified he has worked for the Company since 1978 and was still employed at the time he testified. Supervisors such as himself oversee certain blocks. Consequently, the specific crews they supervise vary because crews are shifted among the various blocks. (IX:22-23.) On any given day, Angulo would have 3 to 5 crews reporting to him.

Mr. Angulo testified he recalled firing Mr. Lopez sometime between June 10 and June 15. He was asked if he recalled what work the crew was doing, but he bypassed answering and moved straight to saying why he had fired Mr. Lopez which he stated was because Lopez dropped too much fruit, picked fruit that was too green and "could never get control of his men." (IX:9.) He repeated this last remark several times. (IX:11-13, 16-17.) He testified he had trouble with Lopez' crew "all the time" in the 5 or 6 days they worked for him in 1990, but he only sent them home on May 22. (IX:24.)

Angulo also offered testimony that Lopez and his crew were disciplined both in 1989 and 1990 for talking too much, but it became clear that he based his testimony on hearsay from other

supervisors, and, furthermore, that as to 1989 he was wrong about Lopez' crew being sent home for this offense.[46]

He again contradicted himself saying, at one point, that he sent Lopez' crew home in 1990 for talking too much but that he did not do so on the same day, May 22, that he sent them home for dropping fruit. (IX:17-18; 21-22.) Elsewhere, he testified Lopez only worked for him on the 22nd and on the day he fired him, which, of course, means there was no other opportunity for him to have sent Lopez home. And yet again, when I asked him whether he had sent Lopez' crew home in 1990 for talking, he stated he had not done so but had only heard from other foremen that it happened. (IX:25-26.) Elsewhere, he stated he could not recall whether Lopez' crew had been sent home in 1990. (IX:23.)

From the foregoing, it is clear that Angulo had supervised Lopez only occasionally. In fact, initially, he testified he supervised Lopez only 2 days in the 1990 season, so his personal knowledge of the work of Lopez' crew was quite limited. (IX:11-12.) He recanted his testimony about the crew being sent home in 1989 and 1990 for talking.

On the day Lopez was fired, Angulo testified he talked to

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[46]He testified he learned of the problems with Lopez' crew talking too much from fellow supervisors because they all talked to one another because they want to be aware of what is happening, and the communication ensures that they know what is going on with the crews. (IX:22-23.) This is the nature of most workplaces and very believable. It also belies his testimony that he was not concerned about Union activity because knowing what was going on was none of his business.

Lopez early in the morning and at least twice more during the day, but Lopez never corrected the crew's work. So, he told Lopez to have his crew pick up the fruit that had been dropped and that he was finished for the season. (IX:10-11.)

Angulo did not point to any behavior that was worse than the crew's performance in 1989, which if there was a problem, was not serious enough to prevent their being rehired, nor serious enough to cause anyone other than Angulo to discipline the crew either during the 3 weeks they were harvesting in 1990,[47] or during their work earlier in the season.

Angulo testified he fired Lopez but not his crew because it was Lopez' job to control the crew, and it was his fault if they did not work properly. He testified that crew members, were free to obtain work with any other crew boss. In response to a leading question, he testified it had always been the case that when a crew boss was fired, the crew members could

[47]As noted, the various exhibits proffered by Respondent to show that the crew did not work on certain days was rejected as not probative because no foundation was offered to show why the crew did not work. Thus, RX17 was not admitted as to dates beyond June 8 to show Lopez' crew did not work or worked fewer hours than other crews. There are many reasons crews do not work on a given day or are sent home early. For example, it is very common in agriculture for crews to be sent home when they finish a block, when weather or market conditions dictate curtailing harvest or because there is not enough work for all crews on a particular day. It would be highly speculative to conclude that the fact that a crew did not work or went home early was because of poor work performance without specific testimony that such is the case. Angulo's testimony is far too general to qualify as a sufficient foundation, especially in view of the fact that he supervised Lopez' crew only occasionally, and there is no showing he was supervising them during the time they did not work and thus would have had any knowledge as to why they did not work.

continue working.[48] (IX:12-13.)

I am not persuaded by Angulo's testimony. He said nothing to Lopez or the crew to indicate he was not firing the crew as well as Lopez, and since they were people Lopez had hired and brought with him, it is most logical to expect they would go with Lopez. Further, Lopez was a supervisor. He reasonably believed he and his crew were fired and so informed them.[49]

The failure of Angulo to separate Lopez from the crew led to the result one would expect. The entire crew, except for one person, left with Lopez; only three members ever returned and that was much later. The Company never indicated to the crew members they could work for other crew bosses, nor is there any showing that at that time work was available in other crews. I find Angulo fired both Rodriquez and his crew. If Angulo had intended to fire only Lopez, he could easily have made that clear.

Angulo denied asking Lopez if he knew how his crew members felt about the Union, saying he did not want to know because it was not his business. (IX:8) He also denied asking Lopez to

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[48]As noted above, I refused to admit RX35 which Respondent's counsel offered to show two instances where crew bosses had been fired but crew members kept working. There was no foundation laid by any witnesses with direct knowledge about the firings which would show those incidents were similar to the one involving Lopez, e.g. whether they also had brought their own crews with them versus supervising workers employed directly by the company.

[49]See Superior Farming Co. v. Agricultural Labor Relations Board (1984) 151 C.A. 3d 100 where the court held the Employer had committed an unfair labor practice when a non-supervisory crew leader mistakenly relayed that the crews had been fired.

find out how the crew members felt about the Union. (IX:9.) He said he recalled only one conversation about the Union with Lopez. It was before the election, and Angulo told Lopez to encourage his crew they should vote however they wanted, and not even "bother telling us who they vote for." (IX: 7-8.) This statement sounded disingenuous when he made it, and I do not credit it.

Despite the fact that he remembered this discussion, he could not recall talking to Lopez after the run-off election although he acknowledged he probably did. (Id.) Nor could he be sure he had a similar a conversation with any other crew leaders. (IX:15-16.)

I find it improbable that Angulo would specifically remember such a conversation only with Lopez. It would have occurred more than a month before he fired Lopez, and there is no reason any such innocuous conversation would be more memorable with him than any other crew leader.

I also find Angulo's protestation of detachment about the Union not credible in view of negative personal experience he described and the fact that the Company was also strongly anti-union.[50] Mike Gerawan freely admitted he did not like

[50]Although he acknowledged he knew the Union won and was not happy about it, he professed total lack of interest in whether employees wore Union buttons, saying he had no idea whether anyone in Lopez' crew did since he looked only at their work. (IX:13,19) He evaded the question whether he wanted the Union to lose saying it wasn't up to him whether it won or lost. (IX:18-19.) He also denied wanting to find out what the Union would do after it had won the election. (IX:20.)

unions, and his tone of voice was harsh and his manner very emphatic when he so stated. He has a perfect right to such feelings, and even has legal right to oppose unionization. But I find it impossible to believe that, with such strong feelings from top management, and his own personal negative experience with the UFW, that Angulo, a high ranking Company supervisor, possessed the kind of detachment he professed. This is especially so since the negative feelings he voiced pertained to the Union urging workers to work slowly. Such conduct would be of special importance to Angulo whose responsibility was to see that the crews worked properly.[51]

I credit Mr. Lopez as to the surveillance issue. At the time he testified, it was clear he would not benefit from doing so. And while one may argue that he bore a grudge against the Company for firing him, and thus might testify falsely, I saw nothing in his demeanor to indicate such animosity. His manner was credible. I did not find Mr. Angulo's protestations that he was unconcerned about what happened so far as the union was concerned nor do I credit his testimony about the crew's work, all of which causes me not to credit his denial that he asked Mr. Lopez to engage in surveillance.

However, Mr. Lopez' testimony as to what he told the crew is too vague for me to determine whether what he said

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[51]In his zeal to show his disinterest in the Union, Angulo denied things as to which there was no evidence. Thus, he denied seeing any union representatives speak to Lopez' crew and denied talking to Lopez about whether workers would be paid depending on their vote. (IX:8,13.)

would give the crew the impression that it was under surveillance. Section 1153(a) prohibits conduct which reasonably tends to interfere with or restrain employees from exercising their rights under the Act. Absent it being clear that Lopez gave them reason to understand they were under scrutiny I find no reason for them to be restrained. Consequently, I find no violation and recommend dismissal of this allegation.

I find General Counsel has established a prima facie case that the discharge of Mr. Rodriquez and his crew was due to the fact that Mr. Lopez failed to report back to Mr. Angulo. Although the discharge occurred nearly one month after the conversation between Angulo and Lopez, Mr. Lopez and his crew did not work for Mr. Angulo between May 22 and the day of the discharge. Further, I did not believe Mr. Angulo's stated reason for the discharge. He showed a propensity to exaggerate when describing problems with the crew, and no documentary evidence was introduced to show the crew's productivity was reduced on the day it was discharged.

The proffering of a reason found to be untrue supports an inference that the true reason is unlawful. I find the reason asserted by Mr. Angulo was a pretext and that the true reason was because Mr. Lopez did not follow through on Mr. Angulo's instructions to report back about union activity. The crew was discharged as a consequence of Mr. Lopez' discharge which violates section 1153(c) and 1153(a) of the Act. RX33 contains

the names of the crew members who were discharged. The parties agreed at hearing that only those who were working on June 11, 1990 are within the class of discriminatees.

3. ROBERTO SANTOYO'S CREW

General Counsel alleges that in early May, Roberto Santoyo, a foreman at the Company, told his crew members they had been laid off because of the Union.[52] (Paragraph 19 of Complaint 1.) The layoff itself is not alleged as a violation, simply Mr. Santoyo's statement. (G.C.Br.p. 33) Respondent denies any such incident occurred.

Mr. Santoyo was in charge of a crew of about 31 people working for Contreras and Sons who had been hired by the Company. He was assigned to work at Gerawan sometime in April, and his crew was laid off in early May. (VI:116-117.) GCX1 is the crew sheet for his crew for the date May 1 which, according to RX16, is the last date he and his crew worked.

Arturo Guzman was the sole General Counsel witness testifying on this matter. According to Mr. Guzman, on the day they were laid off, Santoyo told him and other crew members

[52]General Counsel ascertained the correct date only after reviewing Respondent's crew sheets and then notified Respondent of the proposed changes. (II:9-10.) I refused to allow General Counsel to allege a second incident because the General Counsel learned of the incident between the time of the Pre-Hearing Conference and the start of the hearing but did not inform opposing counsel until the motion to amend was made on the fourth day of hearing. No good cause was shown for the lateness of the amendment or the failure to disclose. (IV:110-112.) The complaint was amended, over Respondent's objection, to change the date of the alleged incident from June to early May and from having occurred in a orchard to having occurred at a crew member's house.

they were laid off because their work was not good. (IV:115.) Either later that same day or the following afternoon, Guzman and three other men who had been working in the crew (Efren Negrete, Leonel Radillo and Lupe Pas (also spelled Paz)) were together at Guzman's home.

Mr. Santoyo came by, and they asked him about work. He replied that there was no problem, that he had work available the next day with another company. (IV:116.) Someone asked why they had been laid off, and Santoyo replied it was because "the Union wanted to come in, or else was coming in, something like that." (Id.)

On cross-examination, Mr. Guzman testified that Mr. Santoyo did not explain why he was changing his initial statement about why the crew was laid off. (IV:129-130.) He did not say whether anyone asked Santoyo about the change or whether Santoyo explained what he meant by his reference to the Union.

Mr. Santoyo was Respondent's only witness on this allegation. He testified he was told by someone to stop his crew from working and for them to take their ladders outside the field. He was not given any reason.[53] (IV:117-120.) He had only worked at the Company for a short time and did not

[53]He also testified he was told "that was all...." (VI:117.) General Counsel interposed a hearsay objection, and Respondent stipulated the testimony was offered to explain Santoyo's conduct and not for the hearsay purpose of establishing the truth of the statement made. Thus, this portion of the statement is not evidence that there was no more work.

know who told him to stop work. (IV: 117.) Since he was not given an explanation, he did not give one to his crew.[54]

He denied ever speaking to his crew about the union or knowing whether any of his crew engaged in union activity at Gerawan. (IV:21.) He further denied that the person who told him to stop work ever said anything about the union. (Id.)

He was asked by Respondent's counsel if, after they left Gerawan, he ever discussed with any of his crew why they had left Gerawan. He responded that they "never spoke about that again". (VI: 122.) General Counsel argues that this statement indicates he had discussed the matter before and contradicts his testimony that he never told his crew why they were laid off. (G.C.Br.p. 34.) Although General Counsel's point is literally correct, I was not persuaded by the context and Santoyo's delivery that this is what he meant.

Both Guzman and Santoyo presented credible accounts. Guzman, however, was not even sure exactly what Santoyo said about the Union. Santoyo, on the other hand, testified he said nothing about the layoff one way or another. His testimony was positive and clear. On balance, I am not more persuaded that I should believe Guzman rather than Santoyo, and I find General

[54]He testified that when he was laid off, there were other crews working toward them from the other end of the field. Santoyo testified he assumed they were being laid off for lack of work because his crew and another crew were completing a block. Although there was no objection, Santoyo's statement is speculation, and I do not rely on it.

Counsel has not met his burden of proof.

4. THE ALLEGED DISCHARGE OF GUILLERMO GUITRON'S CREW.

General Counsel alleged in paragraph 9 of Complaint 1 that 26 members of Guillemo Guitron's crew (identified by name in the complaint) were discharged for joining in union and/or protected concerted activity. General Counsel indicated at trial that this allegation covered employees listed in RX28 who worked in Guitron's crew on May 2, 3, 4, or 5 but who did not work on May 7.[55] (VI:64, 77, 83.) In its brief, General Counsel contends, based on RX 28 and RX54, that 20 individuals are encompassed within paragraph 9.[56]

Respondent, on the other hand, contends that only nine workers are encompassed within paragraph 9 of Complaint 1 because anyone else in RX28 either was not named in the complaint or had a last date worked prior to May 7. (R.Br.p. 35.) Respondent agrees that of the names listed by General Counsel, those marked in bold are encompassed within paragraph 9. (R.Br.p.35.)

Respondent's argues that there was substantial interchange

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[55]I granted Respondent's motion to dismiss any allegation that a discharge occurred on any date other than May 7. (VI:64.)

[56] These workers are: Juan Manual Jimenez, Rene Reynosa Dominquez, Faustino Sanchez Altamirano, Jacinto Aparicio Pedro, Paulino Sipriano Paulino, Gregorio Paulino Sipriano, Roberto Reynosa Mejia, Juan Carlos Guiterrez, Noe Bernal, Fabian Marguez Chavez, Fabian Vasques Chavez, Hilario Ponce Fuerte, Everado Morales M., Jose Guiterrez, Felix Bonilla, Roberto Hildalgo, Oscar Renteria, Carmelo Hernandez, Sotero Baldes and Jorge Fermin. General Counsel excludes 6 individuals from Guitron's crew who worked on May 7 but in a different crew. (G.C. brief p.37.)

between Guitron's crew and the crews of Apolonio Munoz, Hector Vivian and Marcus Morales and that, consequently, workers who worked in one of these crews on May 9 should be excluded from the class of discriminatees because they were merely following a normal pattern of interchange. (See RX54, GC Br. p. 38) Prior to May 5, RX54 shows only 6 interchanges. I do not find this establishes a pattern of interchange. However, I do not include in the class those individuals who otherwise would come within it but who worked on May 9 because of Fermin's testimony that none of those who protested worked after May 7.

Respondent also claims that 7 employees in Guitron's crew who did not work on days prior to May 5 (the last day worked by Guitron's crew prior to the work stoppage) were not discharged. General Counsel argues that the mere fact that certain people did not work that day does not mean they had ceased working and thus were not discharged but shows only that for some reason they did not work on May 5. (GC Br. pp 38-39.)

I agree with General Counsel that those workers who were members of Guitron's crew that week but who did not work in his crew at Gerawan on May 5 are encompassed within the class of discriminatees. I do so because there is no evidence they had left Guitron's crew, and including these people brings the number of protesters close to the 20 to 22 people that Guitron acknowledges did not work on May 7. Based on Guitron's and Fermin's estimates of 20 plus people, the reasonable inference

is that these people were part of the protesters.

Based on the foregoing, I find the discriminatees consist of: Juan Manuel Jiminez, Faustino Sanchez Altamirano, Paulino Sipriano Paulino, Juan Carlos Gutierrez, Fabian Marquez Chavez, Fabian Vasquez Chavez, Hilario Ponce Fuerte, Everado Morales, Jose Guiterrez, Felix Bonilla, Ruberto Hidalgo, Oscar Renteria,[57] Carmelo Hernandez, Sotero Baldes and Jorge Fermin.

Guillemo Giutron worked as a crew foreman at Gerawan from about mid-April until May 7. He worked for Mike Sandoval who, in turn, worked for the labor contractor Contreras and Sons.[58] His Gerawan workers all lived at a labor camp as did about 13 other people who worked for Guitron but not at Gerawan. Marcus Morales[59] and Apolonio Munoz worked for Guitron as foremen of two crews. (VI:96-97.)

Jorge Fermin, General Counsel's only witness on this allegation, worked in Guitron's crew. He testified that Guitron observed UFW representatives at the labor camp solicit workers' signatures on Union authorization cards. Fermin

[57]Oscar Renteria is listed in RX54 as having worked on May 7. However, RX28, which includes the daily crew sheets, shows he did not work that day. I find RX28 more reliable and note that Respondent agrees Renteria is in the class.

[58]Jorge Fermin testified Guitron had approximately 53 to 55 workers. (I:110-111.) RX28 shows 44 people in the crew at Gerawan.

[59]Morales' employment at Gerawan ended on May 5. RX24 and RX54 show that Morales did not work on May 7 or May 9 which is the last day covered by RX54.

signed a card. (I:103-105.) Guitron acknowledged he saw some people from a union at the camp speak to crew members but denied he saw anyone sign cards. (VI:97.)

Just a few days after the Union representatives visited the labor camp, approximately half of the crew members who lived at the camp, about 26 workers, engaged in a work stoppage protesting the fact Guitron sold them tortillas that were spoiled, charged them excessive fees for gas used to heat water at the camp, cashed their paychecks without their permission, and called the crew members names such as "possum."[60] (I:105-106, 112, 115; II:4.) This protest occurred on Monday, May 7. The work stoppage consisted of Fermin and the other workers not leaving the camp and reporting to work when Guitron's assistant came to get them. Later in the day, Guitron came and asked the protesters why they had not reported to work. They recited the problems stated above and also the price Guitron charged them for transportation. (I:107-108.)

Guitron acknowledged that some of the crew complained about spoiled tortillas and excessive charges for transportation. He stated he did not recall if he ever called the workers "possum." (VI:99.) Guitron testified he only cashed the checks of workers who wanted him to do so and never charged for doing so. (VI:112.)

Still later in the day on May 7, those workers who had

[60]Fermin had been part of a group who had previously complained to Guitron about various problems. (I:128.)

refused to work told Guitron they were ready to work, but he said the Company had told him there was no more work. (I:109, 120-121.)

Fermin did not work at Gerawan after May 7. He looked for work for about two weeks and then found work with the UFW.[61] He testified that those who had participated in the work stoppage did not work after May 7 but that some of those who did not participate worked one day, but he did not know if they worked after that one day.[62] (I:122,129.)

Guitron acknowledged that approximately 20 to 22 crew members did not show up for work on May 7. (VI:102-103.) He also acknowledged he went to the camp and spoke to them. When he asked why they did not come to work, he testified they said they had to sign some papers for the Union or something like that.[63] (VI:99,102.) (IV:99-101.) Elsewhere, he mistakenly stated the conversation occurred on Sunday the 6th. (102-103.)

Guitron denied discharging the crew and denied he was

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[61]Respondent argues this evidence of bias. I find no more evidence of bias than in any instance where a person with a stake in the outcome testifies.

[62]Respondent argues Fermin was lying because he did not work at Gerawan after May 7 and would not have known who did and did not work. (R.Br.p.37.) But there is no evidence Fermin immediately vacated the camp and was not in a position to see who went to work. I note that workers who had been laid off were still at the labor camp and were contacted there by Board agents regarding the run-off election. (See discussion, supra.)

[63]After General Counsel objected on hearsay grounds to this statement, Respondent's counsel stated he was not offering this to prove the matter stated.

discharged by Gerawan. (VI: 107, 114.) He testified that after May 7, he went to work for a different contractor.[64] He further testified he offered to take the crew with him and some, of them, including some of the people who had voiced complaints went with him. (VI :107-108.) However, not a single person who engaged in the work stoppage at Gerawan on May 7th went with him when he left.[65] (VI : 105-107.) GUitron acknowledged he could not name the people he offered to take to the new job but testified he knew it included those who refused work on May 7th because he knew people's faces but not names.

I credit Fermin as to the problems the crew had with Guitron and that the crew engaged in a work stoppage to protest them. I found Fermin more credible than Guitron. Further, I

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[64]I granted General Counsel's motion to strike Fermin's testimony that Guitron told the crew there was no more work for him at Gerawan and he would be returning to Mexico, which Respondent challenges stating it finds it odd that I would allow only statements not favorable to Gerawan. (R. Br. p.37) It is basic evidentiary law that hearsay is not admissible unless there is an exception. The Evidence Code (section 1220) provides an exception for hearsay statements made by a party to the action (including his representative--here Guitron) offered against the party. Obviously, favorable statements do not come within the admission exception to the hearsay rule which, as the name suggests, applies only where the statement is damaging to the proponent of the statement (the theory being it is not susceptible to the usual unreliability of hearsay statements.) Had Guitron's statement been admitted, it would have contradicted his testimony that he went to work for another contractor after May 7. (VI:107)

[65]Respondent contends I should have allowed him to inquire whether Guitron had worked for the same contractor at about this time in prior years. I reaffirm my ruling that such an inquiry was unlikely to lead to probative evidence and would have led to an undue consumption of hearing time. (Evid. Code 352.)

find it most improbable that in the midst of a Union organizing campaign with an employer who was strongly anti-union that a group of workers would not show up for work and tell their foreman it was because they went to sign union papers since unauthorized absence would be grounds for discipline - absent, of course, an unlawful motive.

I find Guitron discharged the protesters when he told them there was no more work. I do not credit that he offered them work elsewhere. The discharge violates section 1153(a) of the Act.

5. THE ALLEGED STATEMENTS BY BENITO CONTRERAS[66]

General Counsel alleges in Paragraph 17 of Complaint 1 that on June 7, crew boss Benito Contreras, at Respondent's orchard, told employees that Philip Braun (a field supervisor) had told Contreras:[67] (1) that employees who were involved in Union activities would be discharged; (2) that Braun had instructed Contreras to discharge two of his crew members who had acted as observers for the IUAW in the election the previous day; and (3) that Braun told Contreras he had seen Contreras' nephew wearing a Union button and that the nephew was "pure shit" and was not the kind of employee the Company wanted.

I granted General Counsel's motion to amend the complaint

[66]Erroneously spelled "Bonito" in the transcript which is hereby corrected.

[67]Contreras' crew is one of the crews allegedly laid off on May 10 or 11.

to change the date from May 10 to June 7, but I refused to allow any amendment alleging that Respondent had discriminatorily brought in labor contractor crews to replace the Contreras crew because General Counsel did not provide sufficient reason to justify making such a significant amendment at such a late date. Respondent objected to both amendments asserting there was no charge which supported an incident on either May 10 or June 7.[68]

Initially, I ruled that the alleged statements came within the ambit of charge number 90-CE-41-VI and refused to dismiss the allegation. Later, General Counsel sought to amend the date from May 10 to June 7. Upon my inquiry, General Counsel represented that Benito Contreras made essentially the same remarks on each date, but to different people, and he did not have a witness available to testify as to the earlier events.

[68]General Counsel has substantial latitude in pursuing allegations in a complaint which were not specifically alleged in an unfair labor practice charge so that he may include matters which surface during the investigation of a charge. This same policy is followed by the NLRB. The rationale of such a policy is that the two Boards have the responsibility of enforcing pubic rights.

In Porter Berry Farms (1981) 7 ALRB No.1, for example, the Administrative Law Judge (ALJ) and the Board allowed amendment of a complaint to add an allegation of a threat and an incident of surveillance to an existing allegation of a discriminatory refusal to rehire which occurred 2 to 3 months earlier than the preceding two events despite the fact that the underlying charge alleged only the refusal to rehire. The Board's decision was approved by the Court of Appeals. (169 C.A 3d. 247)

The amendment in Porter Berry Farms is substantially broader than that sought by General Counsel here, and I there decline to accede to Respondent's renewed objection to the amendment. (R. Br. p. 51.)

(III:65-84.)

I admonished General Counsel that he should have raised the issue of there being two instances earlier. However, the substance of the allegation is not changed, and there was ample time for Respondent to make any necessary adjustments to respond to the change. Respondent was on notice at the Prehearing Conference that an incident alleging these statements were made would be litigated.

Two witnesses, Damien Olivar and Doroteo (misspelled "Doretteo" in the transcript which is hereby corrected) Lopez, both of whom were members of Contreras' crew, testified in support of these allegations. Olivar testified that approximately three days before the first election[69] both the IUAW and the UFW were soliciting signatures in Contreras' crew. Virtually all of the 32 crew members were wearing buttons for both Unions. Philip Braun was walking among the crew at the time, and Mr. Olivar asked Contreras to tell Braun that he should not be present. Contreras did so, and both he and Braun moved out of the area. (IV:5-10.) Doroteo Lopez testified to essentially these same facts and said, so far as he knew, this was the first time Braun would have been aware of the crew's

[69]RX16 and RX17 indicate that no crews worked on May 6, but I do not find this undermines Olivar's testimony both because he gave the date as approximate and because I find his error is, at most, a mistake which is easily understandable since nearly a year and a half had passed sine the alleged incident and his testimony. Originally, RX16 showed two crews working, but Respondent indicated this was an error, and I corrected RX16 and initialed the change.

support for a union. (III:91-98, 158.)

Olivar and another crew member, Juan Servin, were observers for the IUAW. Both attended the ballot count. Olivar sat at the table where the votes were being tallied and assisted in counting them. He saw both Braun and Mike Gerawan there and believed they saw him. (III:10-11; IV:10-11, 34.) Olivar did not wear any Union buttons after the ballot count and was not sure whether other crew members did so or not. (IV:35-36.)

Mr. Lopez had worked for the Company since 1986 and had worked through the end of the 1990 grape harvest-which ended only about 2 weeks before the instant hearing. (III:120-121.) He testified that the crew only worked part of the day June 6 and did not work on June 7.[70]

On the morning of June 7, he, Damien Olivar, Miguel Serrano and another crew member named Manuel (whose last name neither Lopez nor Olivar knew) went to Contreras' house to ask why they were not working when labor contractor crews were. He testified they were especially concerned about the layoff on June 6 because they saw labor contractor crews come in, and it was clear there was work remaining to be done. (III:142, 149-150.)

Referring to this most recent layoff, Contreras told

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[70]He also testified he believed he did not work for 2 or 3 days after June 7. (III:122-127; 130-131) However, RX51 shows he and the crew returned to work on June 8, and I rely on the records.

them they had been laid off because of the crew's Union support. Lopez asked how the Company knew they supported the union, and Contreras replied it was because Mike Gerawan and Philip Braun had seen Olivar and Servin act as observers.[71] (III:98-100, 109-110)

During this discussion, Mr. Contreras told them he would let them know when they would be returning to work. (III:138-139) Lopez testified contradictorily that the crew did and did not ask about the layoffs which occurred prior to June 6, but stated several times that Contreras never attributed any of the earlier layoffs to the crew's union activity. (III:146, 163, 165-168) Lopez testified on several occasions that part of the reason June 6 was important was because, previously, they had not been laid off for 2 or 3 consecutive days. (III:131, 149, 167.) As noted, the crew was laid off for only one day, June 7.[72] Mr. Olivar testified to essentially the same facts. (IV:10-13.)

According to both Lopez and Olivar, Contreras also told them that Braun had told Contreras that if he (Contreras) had

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[71]Elsewhere, Mr. Lopez testified he believed Mike Gerawan and Philip Braun knew of his and the crew's union support as of the time the union solicited signatures (which occurred about 3 days before the election) but was not sure if they knew prior to that time. (III: 153, 155.)

[72]Mr. Olivar, like Mr. Lopez, was sure he was laid off for 3 days from June 6 to June 9 and stated he had pay stubs. However, General Counsel never introduced any such documentary evidence, and Respondent was directed to supply General Counsel with the source documents for RX51. (IV:46, 48, 55-57.) Consequently, I infer RX51 is correct and that the June 6 layoff was for one day only-June 7.

not given Olivar and Servin permission to be absent, he should fire them for spending election day acting as observers rather than working. Contreras said he told Braun he could not fire them because he had given them permission. This conversation occurred the day after the first election. (III:110-111; V:13-14.)

Braun left, and a while later Benito was called to the Company office where Mike Gerawan also told Contreras he should fire Olivar and Servin because they had been observers. He told Mike he could not do so because that was not a good reason, and they had been working for him ever since he became a foreman. Then, he told Mike he could fire them if Mike signed a paper saying it was he who fired them because he did not want them working for the company. Mike declined, saying he did not want problems (Lopez' version) or did not want to dirty himself. (Olivar's version) (III:113; IV:16.)

Mike then told Contreras that he had two extra people in his crew and that he could eliminate the excess by firing Olivar and Servin. (III:114-115; IV:15-16.) Lopez testified there were not extra people in the crew. (III:114.) Both men also testified that Contreras said he told Mike that not only could he not fire Olivar and Servin, but that if they left on their own and then returned later seeking work that he would hire them. (III:114; IV:16.)

In this same conversation, according to both Lopez and Olivar, Contreras told them that the day after the Union

represenratives were distributing union buttons in the field, Braun saw a worker, Contreras' nephew, working in a tree and wearing a Union button. Other workers were also wearing them.

Braun told Contreras to tell everyone to take off their buttons and throw them away. Contreras said he could not do that because he could not interfere in people's personal affairs and their wearing buttons was not related to their work.[73] (III:173; III:116-118.) Olivar testified the nephew had buttons on his cap, and Braun told Contreras to tell him to throw away the cap and the buttons. Otherwise, his version is essentially the same as Lopez' version. (IV:16-17.)

Contreras stated that Braun then said that the people wearing buttons were "worth shit" and that the Company wanted "donkeys who would carry a load" (Olivar's version), or

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[73]Respondent's counsel asked Mr. Lopez if these were his own words or if he had spoken to a lawyer about his testimony, and the General Counsel offered that he would represent that he had prepared Mr. Lopez. I stated I accepted the representation. Respondent's counsel contends that both General Counsel and I were seeking to protect Mr. Lopez by preventing him from answering because we anticipated he would lie and say he had not spoken to an attorney. Both from General Counsel's demeanor and from having observed him in numerous hearings, I have no doubt that Respondent's counsel's accusation is untrue. I have never seen Mr. Capuyan engage in such tactics, and I am convinced that from the context of counsel's questions he inferred, as did I, that Respondent's counsel wanted to argue that if Lopez had spoken to a lawyer, the phrase was possibly that of a lawyer, and so General Counsel believed it would save time to admit Lopez had spoken with him. Based on my impression that this was what Mr. Giovacchini was seeking, I accepted General Counsel's representation, because I believed it provided Respondent with the fact he needed to make his argument. I did not anticipate that Respondent's counsel was trying to elicit a negative response. I do not believe General Counsel anticipated this fact either.

"donkeys to work" (Lopez* version), "not political people." (III:117; IV:17.) Contreras replied that this was not something for him to get involved in, and the conversation ended. (Id.)

In 1990, Contreras started work at Gerawan in January and was still working at the time he testified in November. (VII:100-101, 108-109.) He acknowledged that Lopez, Olivar and Servin were in his crew but stated he did not know anyone by the name of Manuel other than someone who had began work very recently, in September. (VII:101-102.) RX51 shows two individuals named Manuel working in Contreras' crew.

He was asked if Braun had asked him whether he had given Olivar and Servine permission to be observers. He did not answer directly but replied Braun did not even know the two men had not gone to work. (VII:108.) He testified he had not given them permission to miss work to serve as observers and did not know about it until after election day. He did not say how he learned about it then. (VII:103-104, 107.)

He testified his nephew and the majority of the crew wore Union buttons. (VII:108.) Respondent's counsel asked a series of leading questions to elicit denials that Contreras had made various statements attributed to him.[74] He denied that Braun told him to fire anyone who was a Union observer, that Mike Gerawan told him to fire Olivar or Servin, or that he

[74]Philip Braun did not testify so, of course, did not deny the statements attributed to him.

ever spoke with Mike about the Union. (VII:103-104.) He also denied that Braun told him to tell his crew not to wear buttons or caps from the Union or that Braun said anyone who was a Union supporter was "worth shit." (VII:104-105.) He also denied he ever told Lopez, Olivar or Servin that Mike and Phil knew they were engaged in Union activity or knew that Olivar and Servin had been observers for a Union. (VII:103.)

All of these denials were terse, phrased the same way and stated without any explanatory comments. His demeanor during questioning on both direct and cross-examination was reserved to the point of being taciturn and was in stark contrast to his volubility when asked about other less significant matters. (VII:113-118.)

Olivar and Lopez testified to the same essential facts. I do not find their similar accounts to be the result of fabricating testimony. Rather, I believe it stems from Mr. Olivar being especially well prepared because of Mr. Lopez' experience while testifying.

Respondent's counsel engaged in a lengthy cross-examination of Mr. Lopez. Counsel's tone and manner were often hostile and disrespectful. I had to admonish Mr. Giovicchini more than once about his conduct, including admonishing him not to yell at Mr. Lopez, and these warnings were by no means issued every time Mr. Giovicchini raised his voice. At one point, Mr. Giovacchini, who had turned in his chair so his back was toward me, resorted to laughing at the witness (Mr.

Giovacchini's version) or baring his teeth at Mr. Lopez (Board agent Art Gonzalez' version). Whatever his expression, from the context, it was clearly derogatory and disrespectful.

Since tempers were flaring on both sides, in an effort to forestall further recriminations and consumption of hearing time, I cautioned both sides to calm down and not to be uncivil. The fact that I admonished both sides does not detract from the fact that Mr. Giovacchini's behavior was clearly beyond the pale of a vigorous, aggressive cross-examination. Throughout, Mr. Lopez maintained a respectful attitude when Mr. Giovicchini asked a question, continued to try to answer the questions fully, and kept his composure. Mr. Lopez' behavior serves to enhance his credibility.

While some of the testimony of Lopez and Olivar is logically implausible, such as why they would ask how Braun and Gerawan knew the crew was pro-union when Braun had seen them with union buttons, on the whole, I found both men generally credible. Since at least Lopez finished the season, his testimony could subject him to adverse treatment so far as obtaining further work. In this sense, his situation is akin to that of an employee who is still working for a company and testifies against the company. Because of the potential for adverse consequences, such testimony is entitled to strong weight.

Contreras was asked only whether he recalled or remembered a meeting in June with Olivar, Lopez, and Servin about why the

crew did not work, so, as General Counsel notes in his brief, Contreras did not specifically deny he had a conversation with them. (GC Br. p.53.) However, he did specifically testify that the men never asked him why they had been laid off. (VII:102.) Also, as General Counsel argues, Contreras never denied saying the Company did not want people who supported the union. (GC Br. p.53.) Nor did he deny that Braun said the Company only wanted "donkeys" who would work hard, not political people.

These factors, coupled with Contreras' guarded manner when questioned on the alleged violations versus his normal volubility, coupled with my overall impression of Lopez and Olivar being credible and not being shaken during lengthy grilling on cross-examination, cause me to credit them and to find that Contreras made the statements as alleged.

Since he was still working for the Company, it is not surprising that Contreras would disavow the statements attributed to him, but I did not find him convincing. I find he told Olivar, Lopez and Servin what he did because he was a foreman with good relations with his crew, but it is too much to expect he would undermine his livelihood by corroborating their testimony.

I have considered Respondent's point that it is unlikely a foreman would fail to fire a worker upon the direction of the top boss (Mike Gerawan), but such things do happen, especially where one feels one is being asked to do the dirty work for

someone else as was clear Contreras did based on what he told Olivar and Lopez. Also, Mr. Gerawan suggested reasons which could justify Contreras' firing the two men, which Contreras resisted, but Gerawan did not go so far as ordering Contreras to do it. Mr. Contreras did not deny that Lopez and Olivar had been members of his crew since the beginning. My sense was he had a good relationship in his crew, and that this fact reasonably accounts for his response to Mr. Gerawan.[75]

I have also considered Respondent's argument that if it had made the threats as alleged, then it likely would have laid the crew off for longer than it did. Respondent was referring to the one day layoff on June 7, but, in fact, the General Counsel alleges numerous lay-offs of this crew and others in paragraph 7 of Complaint 1.

Respondent argues that I should disbelieve Olivar's and Lopez's statement that Conteras told them they were laid off for June 7 because they supported the Union both because the layoff was so long after their Union activity became known and was for such a short time. This argument ignores the fact that General Counsel alleges the layoff for June 7 was part of ongoing layoffs beginning right after the first election. According to RX17, Contreras' crew was laid off nine times during this period whereas prior to the election it had worked regularly. (RX17.). Respondent argues that the Company had a

[75]Lopez testified Contreras had never lied to the crew. (III:172-173.)

new policy of working crews with each crew having every 7th day off. (R.Br.p. 57) This is no answer, however, since the crew never worked 6 days in a row during this time.

Respondent also argues that the testimony of Olivar and Lopez that Contreras told them when he said they were laid off that he would let them know when it was time to return to work, and did so within 2 or 3 days, is inconsistent with their testimony they were discharged for Union activity. (R.Br.p. 56.) They never made such a claim.

I credit Olivar and Lopez that Contreras told them Braun said the Company did not want people who supported the Union, but wanted donkeys who would work and not be political and that he threatened the Company would discharge those who supported the Union. In this context "political" is clearly meant to refer to union supporters. I also credit that Contreras told them Braun and Gerawan tried to get Contreras to fire Olivar and Servin. I also credit their account of Contreras' statements as to Braun's comments on the day he saw Contreras' nephew and other crew members with Union buttons.

I also credit them as to Contreras' statements that the crew was laid off on June 7 because of its support for the Union. One has to examine Mr. Lopez' testimony carefully to differentiate between questions referring to <u>when</u> he asked Mr. Contreras about being laid off versus <u>which</u> layoffs he asked Contreras about. Clearly, they only asked Contreras about the layoffs when they were laid off on June 7 and not before.

However, Lopez' testimony as to whether the conversation on June 7 referred to layoffs prior to then as well is contradictory. (Compare III:166, 168 with III:165, 169-171.) Because it is contradictory, I do not find it sufficient to establish that Contreras told them the earlier layoffs were because of their Union activity.

The above described anti-union statements clearly violate Section 1153(a) since they tend to interfere with employees' free choice to engage in Union activity. They also establish strong anti-Union sentiment on the part of Gerawan management.

6. THE ALLEGED THREATS BY CECILIO ARREDONDO [76]

General Counsel alleges that on or about May 10, crew boss Cecilio Arrendondo told his crew, which was working at one of Respondent's orchards, that Respondent would cease operation and turn over its lands to a related business entity and would discharge it's current employees if there were Union victory. (Paragraph 16 of Complaint 1)

General Counsel called only one witness to testify in support of this allegation. Bonifacio Fonseca worked in Arrendondo's crew in April and May. Sometime between the two elections, Fonseca asked Arrendondo what had happened with the Union. Arrendondo replied that if the Union won, the people from the Union would bring in their own people and displace the current workers. Arrendondo also told Mr. Fonseca that if the

[76]Sometimes misspelled "Arrondondo" in the transcript (e.g. III: 13 et seq.)

Company lost, it would close the camps and declare itself broke or bankrupt. (II:178-181; III:25,28.)

Mr. Fonseca could not recall Mr. Arrendondo's exact words, but his testimony was sufficiently clear. It is not necessary that a witness remembers the exact words. According to Mr. Fonseca, two other crew members, named Pedro and Enrigue (he could not recall their last names) were present during the conversation. Neither was called by the General Counsel.[77]

On cross-examination, Mr. Fonseca either contradicted himself or became confused about a number of details such as exactly what kind of work he was doing when the conversation occurred, whether he was working in the trees or on the ground, where Pedro and Enrique were positioned in relation to him, how many days he worked between the two elections and so on. These are tangential matters, and Mr. Fonseca was testifying a year and a half after the events. I do not find it unusual that he would not remember such matters clearly. One usually tends to remember the crux of an incident rather than all the surrounding details especially where, as here, the whole episode could not have taken more than a few minutes.

Further, his testimony was interrupted with long exchanges regarding evidentiary issues which exchanges were conducted entirely in English. Respondent's counsel, Mr. Giovacchini's,

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[77]RX53 is the daily crew sheet for Mr. Arrendondo's crew for May 9 and May 10. There is only one person named Pedro and that is Pedro Lopez. RX53 shows he worked May 9 and 1½ hours on May 10. No one named Enrique worked either day according to RX53.

tone both during these exchanges and during his questions to the witness was often strident, sarcastic and argumentative. He yelled at the witness and waved papers at him. I admonished counsel more than once but by no means as often as he engaged in such behavior. (e.g. III: 12-13,22-23,25,26-26,30,32-34,35-38,39-42,46-48,50-51,54-55,57,59.) That such conduct served to confuse the witness is not surprising. Confusion does not necessarily equate to being untruthful.

Mr. Foncesa was generally consistent about the essentials of what Arredondo said, and that only he, Pedro and Enrique were in the immediate vicinity. The fact that RX53 does not reflect that Enrique worked those two days does not persuade me that Fonseca was lying.[78] He was not sure which day Arredondo spoke with him, and Arredondo acknowledged a person named Enrique worked in his crew although he was not sure if it was at this approximate time. (VII:70-71.)

Arredondo, like Fonseca, was not sure what work the crew

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[78]In support of its contention that Mr. Fonseca is not credible, Respondent states that I noted that Mr. Fonseca was adding statements that he had not testified to previously. (R. Br. p.48) This statement distorts what I said and creates the misimpression that I was commenting on Mr. Fonseca's credibility. What happened is Respondent's counsel asked Mr. Fonseca if anything else was said by Mr. Arredondo during the conversation. The Union objected that the question had been asked and answered. I overruled the objection stating that in response to counsel's having asked the same question twice just moments before, each time Mr. Fonseca had expanded on his prior answer. (See, III:28-29.) That is, the conversation was being described in pieces. It is quite clear that I was not indicating, as Respondent now contends in its brief, that Fonseca was adding new testimony, never heard before, and that this indicated that his testimony was unbelievable.

was doing at the time of the alleged incident or how many days the crew worked between the two elections. (VII:73-76.) But, unlike Fonseca, his testimony was not disrupted as much, nor was he questioned in an accusatory manner which is clearly move unsettling to a witness.

Further, Mr. Arredondo repeatedly failed to squarely deny matters, qualifying his answers by saying he did not recall or did not believe he had said something or simply avoided answering the question. (VII:68-69.) He did deny that he ever told anyone in his crew that the Company would declare bankruptcy if the union won and that Fonseca asked him what happened to the union. (VII:69; 71-72.)

Fonseca's manner was that of an honest witness who when confused by counsel's tactics (e.g. asking questions of a general nature and intermixing them with questions requiring detail and then being sarcastic and accusatory when Fonseca could not recall) became increasingly unsure of himself because he could not remember these specific details.

Arredondo could not remember some of the same material Fonseca could not recall, and Arrendondo was less responsive and more evasive. I credit Fonseca.

Mr. Arredondo's statement clearly violates section 1153.(a). Carefully phrased predictions as to what will happen if a Union wins an election (based on objective facts) are lawful. Threats as to what an employer might choose to do are not. (NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM

2481].

7, THE DISCHARGE OF VIVIANO SANCHEZ AND THE STATEMENTS OF ROBERTO LOZANO

General Counsel alleges (paragraphs 10, 13 and 14 of Complaint 1) that on or about April 28, Company crew boss, Roberto Lozano, (crew #428) interrogated members of his crew as to whether they had signed union authorization cards and threatened that if they supported the union, the Company could cause them to lose unemployment benefits by recalling them to work at a time when the crew normally did not work for the company and were not in a position to do so.

General Counsel further alleges that on the same day, crew boss Lozano, at his residence, asked crew members to sign declarations concerning statements made by union organizers regarding Respondent's withholding money from the workers' paychecks. Lozano allegedly made the request without assuring the workers that their participation was voluntary and without explaining the purpose of the request.

Finally, General Counsel alleges that on or about June 4, Respondent discharged Viviano Sanchez, a member of Lozano's crew because he supported the union and because he publicly asked Mike Gerawan how much the crew would be paid.

Mr. Sanchez was the sole witness for General Counsel in support of these allegations. He testified he began working at Gerawan in August 1986. He and the other crew members, including Lozano, all came from the same area of Texas. The

crew had a pattern of working from April to September at Gerawan and then returning to Texas. (IV:132-133, 171-172.)

a. Lozano's Statements

Mr. Sanchez testified that one morning before work, prior to the first election, some representatives from the IUAW visited the crew in the fields asking for their signatures on Union authorization cards. Lozano was standing close by while Sanchez and approximately twelve other people signed cards. Sanchez remembered his wife, Maricela Sanchez, signing, and also named co-workers Julio Macias, Esther de Macias, Manuel Saenz, Maria Elena Saenz and Rosa Saenz ("Saenz" is misspelled in the transcript "Sanez") as persons who signed. (IV:133-134.) Mr. Sanchez estimated the union representatives were present for about fifteen minutes, and this was the only union activity in the crew of which he was aware. (IV:178.)

Sometime after the IUAW representatives left, Lozano addressed the crew and asked whoever had signed cards for the union to raise their hands.[79] Sanchez testified the twelve

[79]Respondent argues that I should discredit Sanchez because it is unbelievable that Lozano would make this request if he had seen the workers sign the cards. (R. Br. p.69.) I am not persuaded by this argument. Asking individuals to publicly demonstrate that they support the union can be a method to make them uneasy. They are aware they stand out. Further, with 32 to 40 crew members (Lozano said 32; Sanchez said about 40 people) and more than one IUAW representative, Lozano may have not been sure he could tell who signed versus who was only spoken to. The testimony is not inherently unbelievable, and Sanchez' demeanor was credible. I find his account more believable than Lozano's testimony that the crew, knowing he had observed them sign the cards, for some inexplicable reason went to him and volunteered that they had signed the cards.

who had signed raised their hands. Lozano then told the crew not to sign any papers and warned that they probably would not get the unemployment benefits they usually received when they were laid off in September because the Company would call them to do pruning which was work performed after the time the crew was normally laid off and had returned to Texas. (IV:135-136, 138, 125-176.)

Mr. Lozano readily acknowledged that he was aware of Union activity in his crew, and he described the same incident Sanchez had related about the Union visiting the crew. (VI:138-139.) Lozano also acknowledged that he knew that Sanchez and the six others whom Sanchez named, as well as some other workers, had signed cards to support the Union but testified they volunteered to him they had signed. (VI:140-142.) Lozano further testified that "many times" the union came to talk to his crew. (VI:145.)

Despite this testimony, when asked by Respondent's counsel if anyone in the crew ever started a conversation with him about the union, Lozano testified the he and the crew "...never touched on that point or issue about the union." (VI:147.) But then later, Lozano acknowledged that the same people he earlier had named had told him they wanted the union. (VI:149.)

Lozano replied affirmatively to a leading question as to whether the workers initiated the conversation when they told him they had signed for the union. (VI:150) This response was

after several questions as to whether the workers spoke to him about the union because he had questioned them to which he gave unresponsive answers. (Id.) He testified that his only response was to tell them, in effect, that they knew what they were doing. (VI:150.)

He denied saying what would happen to those workers who had signed cards. (VI:151.) He denied asking those who signed to raise their hands or telling anyone they would be denied unemployment[80] (erroneously transcribed as "an employment") and denied ever telling any crew member not to sign union cards. (VI:152-153.)

Lozano contradicted himself about whether he and the crew discussed the union and then had to be led to testify that it was the workers who initiated the conversation about the union which conversation he had previously denied occurred. This type of contradiction is much more significant than the confusion or contradiction regarding issues such as where people were standing, precisely what they were doing and other tangential matters. Also, he became defensive even when questioned by the Company's attorney, hastening to deny he had done anything improper when the question contained no such implication. (VI:142, lines 24-27.)

Based on the foregoing, I credit Mr. Sanchez that Mr. Lozano interrogated the crew and then threatened them with

[80]Mr. Sanchez readily acknowledged that the crew was not recalled by the Company after they went to Texas in September.

loss of unemployment benefits in order to discourage them from supporting the union. Sanchez acquitted himself well as a witness, his demeanor was sincere, and I find his account about the interrogation more probable than Lozano's.

Mr. Lozano's interrogation and threat clearly violate section 1153(a) of the Act since they tend to interfere with, restrain and coerce employees in the free exercise of their rights under the Act.[81]

b. The Discharge of Viviano Sanchez

Mr. Lozano acknowledged that he fired Mr. Sanchez and testified he did so because Sanchez's work was poor and because Sanchez made fun of him. (VI:154.) Later, however, he avoided saying he had fired Sanchez and instead testified he told Sanchez to "straighten up" or not to come back and that Sanchez did not come back to work, i.e. Sanchez voluntarily quit. (VI:64.) Respondent admitted at the Pre-Hearing Conference that Mr. Lozano had discharged Mr. Sanchez.

Mr. Sanchez' last day of work was June 4 and on that day he worked a full day. (RX31.) He gave the following account of that day. He testified the crew was performing an operation known as "tipping" for which one uses clippers. (IV:

[81]Mr. Sanchez also testified to a conversation which occurred at Lozano's home where Lozano asked crew members to sign a document. I sustained Respondent's objection to Mr. Sanchez testifying as to what the document stated since General Counsel did not establish that an exception to the best evidence rule (Cal. Evid. Code §1505) applied. Since General Counsel was unable to prove the contents, it is not established that Lozano's request was unlawful, and I will dismiss paragraph 14 of Complaint 1.

166-167, 206-207.)

According to Sanchez, he had been working, and Lozano came to him and told him he was fired because he was singing (as in singing a song, not as in being an informant). Sanchez testified he had sung at work during the five years he had worked for the Company and, prior to being fired, he had never been disciplined for doing so. (IV:161,163,167.)

Mr. Lozano testified that on Sanchez' last day the crew was performing an operation called "junking" which he explained was removing small bunches of grapes from the vines and discarding them.[82] (VI:154-156.) The workers were supposed to discard the small bunches of grapes and leave the larger bunches. They were also supposed to remove the leaves from below the bunches so air could circulate but not remove the leaves above the bunches because this would allow the sun to burn the grapes. (VI:156-159.)

Lozano testified Sanchez was discarding the larger bunches rather than the smaller ones and was removing the leaves from the top rather than the bottom. (VI:156, 159-160.) According to Lozano, he reprimanded Sanchez three times and warned him again early in the afternoon. Rather than improving, Sanchez' performance became worse. He discarded even more of the large bunches. (VI:157.)

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[82]According to RX31, on June 4 the crew was engaged in work identified by the Company as Labor Code 208 which, according to RX19, is thinning. The work described by both men fits within this general description.

According to Lozano, Sanchez had been working in this same fashion for about a week by the time he fired Sanchez. On these occasions, just as on the day he fired Sanchez, he asked Sanchez "please to perform a good job, to not throw down good fruit." (VI:161.) But Sanchez' performance just got worse. (VI)

Lozano testified he fired Sanchez only because of his poor work and not because he was singing. Lozano said that the singing was not a problem. (VI:160-161.) According to Sanchez, no supervisor or foreman ever warned him about not following orders or about doing poor quality work. (IV: 165-266.)

I do not credit Mr. Lozano. I simply do not believe that for more than a week he would have tolerated Mr. Sanchez discarding good bunches of grapes and leaving vines in a condition that the remaining crop would be damaged. There is also no evidence why Sanchez' work after 5 years would suddenly deteriorate so much. I credit Sanchez.

Respondent argues that Mr. Sanchez was one of several people in Mr. Lozano's crew who signed authorization cards and that none of them, including Mr. Sanchez' wife, was fired.[83]

[83]According to RX31, Mrs. Sanchez continued to work after her husband's last day of work, but the records continue for only 3 days to June 7. (XI:10-14.) Mr. Lozano testified Mrs. Sanchez continued to work with him until his crew began work which women did not do at which point she went to work in the packing shed. (VI:164-166.) Mr. Lopez gave no estimate how long Mrs. Sanchez continued to work for him, and despite the fact that Respondent prepared documents, some mere variations on a theme, to substantiate its positions, it introduced no documentary evidence

Respondent argues there is no reason to have singled out Mr. Sanchez.

General Counsel, however, argues that there was a reason to single out Mr. Sanchez. Namely, that on behalf of the crew Mr. Sanchez confronted Mike Gerawan about the crew's wages.

Respondent's objected to Mr. Sanchez testifying as to Mike Gerawan's statements because Gerawan spoke in English and someone interpreted his statements to the crew in Spanish. Respondent renews this objection in its brief. (R.Br. p.67.) At hearing I overruled Respondent's objection and allowed Mr. Sanchez to testify about this incident including testifying to statements by an interpreter as to what Mike Gerawan said. I reaffirm that ruling.[84] This incident occurred two or three

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corroborating Mr. Lozano's testimony. Where a party has stronger evidence in its control and fails to introduce it, it is proper to infer the evidence would not be favorable to it. (The Garin Company (1985) 11 ALRB No. 18) I draw such an inference here, especially since Lozano did not testify how long Mrs. Sanchez continued to work.

[84]Certainly Mr. Gerawan expected that his remarks would be translated to the workers, and whether or not he designated a specific person to act as his interpreter, he assumed the risks involved in the translations by relying on this method of communication. It would be impossible to have a standard that the interpreter be called to testify since in agriculture the identity of the interpreter may not be known because it is very common for crew members to translate for other crew members when a foreman or other supervisor addresses the crew or individuals in the crew. It is also very common that crew members know each other only by nickname or not by name at all. To require that the employee specifically designate the interpreter would provide great opportunity for mischief since the employer could allow anti-union remarks to be translated and never be accountable so long as he did not designate the interpreter. In this instance, however, there is circumstantial evidence the interpreter was acting as Mr. Gerawan's agent because the interpreter introduced Mr. Gerawan to the workers.

days before the first election. (IV:149.) Mr. Gerawan was addressing the crews of Roberto Lozano and or Ruben Lozano. The interpreter introduced Mike Gerawan and said that Mike stated there was no other Company that paid better and that "the chains should be broken so that everyone could freely vote."

Mike also said that anyone who wanted to ask a question could do so. (Id.) Earlier, Sanchez and the other 6 people he had named as signing Union cards, as well as some others whose names he could not presently recall, had talked amongst themselves as to whether the wage of $4.90 they were currently receiving would continue to be paid in the harvest since previously they had been paid $3.00. (IV: 154-155, 160, 195-196.) So, Mr. Sanchez asked Mike if the Company would continue the $4.90 per hour rate to the crew into the harvest. I find it was clear he was asking on behalf of the entire crew not just himself.

Mike responded by asking Sanchez why he continued to work at the Company if it was not to his advantage to do so. (IV: 193.) Sanchez replied that he needed the work. (IV: 156-157.) Mike then asked Sanchez what crew he worked in, and Sanchez told him. Mike then asked how long Sanchez had worked there, and Sanchez said it was five years. Mike asked him again why he continued to work for the Company, and Sanchez again answered that he needed to work. (IV: 158, 190-193, 201.) Then, one of Foreman Roberto Lozano's daughters said, in

effect, that if people were satisfied they should continue working for the Company, and if they did not like it, they should leave and go elsewhere. (IV:159-160.)

Mike Gerawan's testimony about the incident differs somewhat.[85] He did not mention that he asked Sanchez who he worked for, but he did not specifically deny asking Sanchez that. (VIII:10) Also, Mr. Gerawan testified that when Mr. Sanchez said he had worked for the Company for five years, his response was to ask Sanchez why he would stay so long if he did not trust Mike Gerawan or the Company. (VI11:10-11.) Mike Gerawan said nothing about one of Roberto Lozano's daughters making a remark, but, again, he did not deny it.

I credit Sanchez. Sanchez acquitted himself well as a witness. He held up well under a cross-examination that was long and aggressive-sometimes even hostile with Respondent's counsel, Mr. Giovacchini, yelling at the witness and slamming the 2½ inch thick red bound book of Respondent's exhibits on the floor. (e.g. IV:178-179, 188, 198.) Despite this, Mr. Sanchez continued to answer questions fully, remained generally

[85]Respondent takes exception to my not allowing it to present testimony from Mr. Gerawan regarding alleged statements by the UFW threatening workers' unemployment benefits. (R.Br. pp.70-71.) Any such threats are not the subject of an unfair labor practice, nor are they cited by Respondent as justifying any alleged unlawful conduct engaged in by Respondent. In short, the testimony has no relevance to any issue in the case which is why it was excluded.

consistent, did not exaggerate[86] and gave the impression of a sincere witness.

Mr. Gerawan, on the other hand, even though not subject to an aggressive, much less hostile cross-examination, was guarded in his answers. Further, he did not specifically deny asking Sanchez for whom he worked or deny the statements of Lozano's daughter. Moreover, even by Mr. Gerawan's own account, he responded to Sanchez' questions as to a challenge, both implying that the question was improper and suggesting displeasure with it as if it were disloyal to the Company to ask about one's wages. Mr. Gerawan's response has a definite edge of hostility and suggests that perhaps Sanchez should not be working for the Company if he could ask such a question.[87] In view of the nature of his response, it seems quite plausible he would want to know who the person asking the question was. Asking Sanchez who he worked for would make it easy to identify him. General Counsel has established that Mr. Sanchez engaged in union activity and in protected concerted activity and that the Respondent knew of these activities. To establish the casual connection, General Counsel points to two classic

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[86]For example, he did not say that Mr. Gerawan asked for his name when given the opportunity to do so by Respondent's counsel but reiterated that Mr. Gerawan had only asked in whose crew he worked.

[87]I note this is much the same response that Max Rios, the foreman of alleged discriminatees Alejandro Reyna, made when Reyna questioned Rios about wages. (See discussion below.)

indicia of unlawful motive: shifting reasons[88] regarding Mr. Sanchez's discharge and an unbelievable reason advanced for the discharge. I find Mr. Lozano's reasons for firing Mr. Sanchez were pretextual and conclude Respondent's true reason was unlawful.

I have considered that the discharge occurred approximately a month after Lozano's threat and Sanchez' exchange with Mike Gerawan. The timing cuts both ways. The discharge occurred prior to the discharge of Pedro Lopez Rodriguez' crew which I have found was unlawful and during the time Respondent was unlawfully reducing work by laying off crews. (See discussion below). It is not that distant from the election, especially since the election results if certified, meant a UFW victory. It is not as if the UFW had gone away.

On the other hand, there is no evidence anything occurred during the month to rekindle animus toward Mr. Sanchez. This fact tends to undermine General Counsel's case.

It is not necessary to establish an unlawful discharge that the employer be blatant and fire someone immediately on the heels of protected activity. Mr. Gerawan showed himself to be very bright and demonstrated a good understanding of issues at trial. I believe he might well delay retaliation so as not to be obvious about it.

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[88]Lozano testified he fired Sanchez, then testified Sanchez quit. He testified he fired Sanchez in part because Sanchez made fun of him but gave no evidence of any such conduct by Sanchez.

On balance, I find General Counsel has established a prima facie case albeit with a weakness which might well be rebutted if Respondent had a good reason for firing Mr. Sanchez. However, I find its reasons pretextual and conclude that its discharge of Mr. Sanchez violated section 1153(c) and section 1153(a) of the Act.

8. THE DISCHARGE OF ALEJANDRO REYNA

General Counsel alleges in Complaint 2 that: (1) on or about February 7, Respondent discharged Alejandro Reyna because he engaged in protected concerted activity, and (2) on or about February 2, Reyna's foreman, Max Rios, told his crew that Respondent would discharge employees who supported the union if the union won the election.

Respondent admits that it discharged Mr. Reyna but contends it was for cause. In response to the Prehearing Conference order directing Respondent to set forth the specific reasons it fired Mr. Reyna, Respondent's counsel, Ms. Wolfe, wrote a letter to General Counsel, dated October 15, wherein she stated that Reyna had been discharged for violating Company rules and arguing with his foreman Rios when Rios gave orders.[89]

[89]Respondent cited this letter when General Counsel objected to RX52 which was proffered to compare Reyna's productivity to that of other crew members. General Counsel objected that Respondent did not cite slow work as a reason for discharging Mr. Reyna. Respondent argued that based on Mr. Rios' testimony that Mr. Reyna talked to employees, causing both him and them to work more slowly, slow work was encompassed within the stated grounds of failure to follow orders. I admitted RX52 over General Counsel's objection, but I indicated to Respondent

it was a very close question whether its letter could even arguably be construed to encompass slow work. I was according Respondent the benefit of the doubt in admitting RX52 in order to allow Respondent to make its best argument.

However, I do not believe that the reasons stated in the letter were meant to include slow work. Respondent was ordered to give the specific reasons it discharged Reyna, and if Respondent had at that time intended to assert that Reyna's slow work was one of the bases for its firing him, I believe it would have so stated.

RX52 is relied on by Respondent to show Reyna was a slow worker. Aside from the fact that I do not believe Rios' decision to discharge Reyna was based on his slowness, I find RX52 has only limited probative value in establishing the inference Respondent would have me draw because it contains such limited information.

First, it covers only a week's time whereas, according to Rios, the problem with Reyna was long-standing. This, of course, raises the question of whether this small sample is at all representative of Reyna's work pattern. Had there been evidence that Reyna's slowness had recently worsened, then such selective data would have more relevance.

Second, there is no testimony to establish that these statistics compare apples to apples rather than apples to oranges. This is so because the most essential element missing from the comparison is that Reyna and the person he was compared to did the same kind of work for the same amount of time. For example, Rios testified that when they worked in Ranch 16, some trees were large and some were small. Obviously, if one person were assigned rows with small trees and another rows with large trees, logically one could do more four foot trees than eight foot trees in the same time.

I find it hard to believe, for example, that on January 30, Reyna did 14 trees versus someone else doing 156 trees, if the work was comparable. Such a large discrepancy would seem to have led to some form of disciplinary action being taken against Reyna, yet there is no such evidence.

Further, workers are sometimes assigned partial rows and have to move around or wait once they have finished their partial row until other workers finish full rows. In short, such variables have not been eliminated, which compromises the value of the information in RX52. Such information was certainly in Respondent's control, and in view of the large amount of information provided on various matters, the failure to provide more complete information which would make RX52 meaningful, causes me to give no weight to the exhibit. It was Respondent's burden to support RX52 rather than General Counsel's burden to rebut the information because it is the moving party's responsibility to provide a sufficient basis for supporting the conclusion it seeks.

Two witnesses, Mr. Reyna and a fellow crew member, Rafael Verduzco, testified for General Counsel in support of these allegations. Reyna testified he began work for Gerawan Ranches toward the end of 1988 and worked there until March 1989 when he was laid off. In April 1989, he returned to Gerawan Ranches performing thinning. He then moved directly into harvesting where he stayed until approximately August at which time he went to work in the packing shed for Gerawan Company, Inc., where he worked until the third week of September.[90]

He then went back to Gerawan Ranches to work in the pruning, apparently in November. He continued work until his discharge on February 7, 1990. He then returned to work at Gerawan Company, Inc., at the packing shed, during the week ending June 2 and remained there until October 20. No testimony was elicited as to how he was rehired.[91]

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[90]RX36 shows Reyna's work history for 1989. It does not reflect work at the packing shed nor during April in the thinning.

[91]Respondent argues that the fact that Reyna returned to work proves that it did not fire him for his protected concerted or Union activity. The hiring also may be nothing more than an effort by Respondent to limit its liability should its February 7 discharge of Reyna be found unlawful. By itself, the mere fact of rehire does not negate a prior unlawful motive.

Respondent also argues that Reyna's work history suggests he provoked his discharge in February. It bases this argument on the fact that RX36 shows he left work in early February 1989 and returned in June, and in 1990' he followed a similar pattern of leaving in early February and returning to work in June 1990. (RX37) There is no evidence of any motive for Reyna to provoke a discharge rather than simply leave as he did in 1989. Being discharged normally would prevent an employee from being rehired later whereas simply quitting would not moreover, in this case, Reyna did not voluntarily leave in 1989, he was laid off which undercuts Respondent's argument that he had some work schedule

As of November 6 when he testified, Reyna had not returned to work at any of Respondent's operations. There is no evidence whether normal procedure would be for Respondent to notify Reyna if work were available or for Reyna to contact the Respondent to inquire whether there was work. Reyna testified he had not contacted the Company because pruning work did not usually begin until November 10, and he testified on November 6. (1:28-30.)

a. Reyna's Protests About Wages and Working Conditions

In January 1990, Reyna was working in the crew of foreman Max Rios. He testified that late that month the crew was concerned about what price they would be paid to work on some trees. The crew selected Reyna to act as spokesperson to discuss the matter with Rios. Reyna asked Rios how much the Company would be paying. Rios replied he did not know. Rios told the crew, in effect, that if anyone did not like the price being paid at the Company, they could leave. Since Rios did not know the price, inferentially, he meant if anyone did not like whatever price the Company chose to pay. No one in the crew, including Reyna, made any response, and the crew went to work when it was time to do so. (I:12.)

On cross-examination, Reyna was asked whether it was

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elsewhere he wanted to follow in 1989. Further, the schedules do not even show a pattern. In 1989, he was laid off in March, returned in April and worked continuously until work in the packing shed ended. In 1990, there was a break in employment from the February 7 discharge until mid-June when he went to work in the packing shed.

not the common practice to discuss prices. He answered that with Rios it was and that it happened almost every time they moved to a new block of trees or shifted from one type of work to another. (I:35-36.) Reyna testified that the Company would set the piece rate by letting the crew work for a while to determine how much it would have to pay so that a worker would earn whatever amount the Company wanted to pay per hour.[92] (I:33-34.)

On another occasion in early February, Rios told the workers they would not be using either ladders or a pole[93] to wrap rope around the tree limbs to support the limbs when they got heavy with fruit. Reyna, on behalf of the crew, asked how they were supposed to do the work, and Rios replied they would have to climb up into the trees. Reyna protested the trees were too tall, and it was not safe. Rios responded that they would do the work the way the Company said to do it. (I:13, 40.) Reyna repeated that the trees were too tall. (Id.) He testified the trunks of the smaller trees were about 3 feet high and the taller ones about 5 feet high. He also testified these trees were grafted.

Rios, still in the presence of the crew, addressed Reyna

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[92]Reyna testified that in 1988 and 1989, the Company paid better than it did in early February 1990, so the subject had not come up as often in prior years. (I:37-38.) Thus, Reyna's activity as crew spokesperson was of relatively recent origin.

[93]Workers sometimes used long poles with rope running through a hook on the end in order to place the rope around the tree limbs.

specifically and told him that if he knew that what the Company was ordering was against the law, why didn't Reyna leave so the others who did not know could go ahead with the work. He told Reyna that Reyna was only opening their eyes. (I:13-15.) Nothing more was said, and the crew went to work. (I:15.)

Reyna testified he and some other workers only climbed into the smaller trees, and three or four workers did not climb into the trees at all. (I:38-40.) He used a branch to string rope around the limbs of the larger trees much as he would have used a pole. (I:40-41.) He recalled they worked in that area for only a short time and then were sent home. He did not know why they were sent home. (I:40.) Rios did not say anything to him about how he did his work. (I:43-44.)

Rafael Verduzco had worked with Reyna at another company, and Reyna got him a job with Respondent. (II:50.) He worked only from December 1989 until about mid-February 1990, and during this entire time he worked in Rios' crew with Reyna. (II:26-27.)

Verduzco confirmed that Reyna acted as spokesperson for the crew in asking Rios about the price of trees, but he believed the incident occurred in early February whereas Reyna said it was in January. (I:32; 11:14, 29, 60-61.) He phrased Reyna's inquiry slightly differently than Reyna did, testifying that Reyna asked why the Company could not pay more money rather than simply asking what the price was. These are minor inconsistencies.

Mr. Verduzco also testified that Rios' response was slightly different than what Reyna testified to. He corroborated that Rios in essence said the Company could not pay more and, if they didn't like it, they could leave. (II:13-15.) He, too, acknowledged that it was common to discuss price with Rios before starting work and testified that this was true after Reyna left as well. (II:38-39.)

Verduzco also corroborated the essential elements of Reyna's testimony about the incident involving the tying or roping of the trees without using ladders. (II:17-18, 62-63.) He corroborated that Rios told Reyna that if Reyna knew it was against the law[94] to have the workers climb the trees he should leave and let the crew alone and not open their "arms". (The transcript incorrectly states "arms" rather than "eyes" and is hereby corrected. (II:19.)

b. Rios' Response To Reyna's Protests

Max Rios did not recall the specific incident in late January or early February when prices were discussed, but he denied saying to the crew that anyone who didn't like the price could leave. (VII:21) Rios often had trouble following questions and gave many nonresponsive answers. Moreover, his answers were sometimes inconsistent. Asked about a specific incident where the crew complained about prices, he stated the

[94]I sustained Respondent's objection that Verduzco's testimony that it was against the law could not be used to establish that as a fact since there was no foundation to show that Verduzco knew this to be true. (II:18-19.) Obviously, this is true as to Reyna's testimony on this issue as well.

workers always complained and were never happy. (VII:8.) But at another point, in response to essentially the same question, he stated they did not complain because in the summer they were paid by the hour and were well paid. (VII:7-8.)

With regard to Reyna's protest about not using ladders, Rios testified about tying operations in three ranches or blocks--Ranch 11, Ranch 16 and Ranch 17. Much of his testimony on this issue, was confused and contradictory.[95] (See, VII:22-25, 28-31, 36-37)

He did confirm that in one block with grafted trees Reyna objected to roping the trees without using ladders saying it was against the law. (VII:28-29.)

But then, later, he testified that Reyna made some complaints, but he could not recall what they were and generalized that Reyna was always challenging his orders, saying they were wrong. (VII:30-31, 37.)

Rios maintained that after the crew complained about not using ladders in the grafted trees, he told Reyna and the others to do the work however they could, i.e. they could use ladders if they wanted. (VII:23.) Some workers used ladders, and some worked from inside. (VII:28.) Those who stood on the trees wanted to do so because it was easier and faster to work

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[95]He also had difficulty remembering what kind of fruit trees and which ranch they were working on much as General Counsel witness Bonafacio Fonseca did, but Rios was not under the stress of a hostile cross-examination. (VII:32.)

this way.[96] (Vll:23, 28.) He testified he did not insist they do this. (VII:29.)

Respondent's counsel asked Rios several times if Reyna refused to perform the work as directed, that is, standing in the tree. Despite repeated openings to do so, Rios never so testified. Twice he said they had hardly begun work when a supervisor moved them to another ranch. (VII:29, 33.) Another time, he non-responsively answered that Reyna was always "discussing." (VII:30.) Still another time, he testified no one refused to work standing in the trees. (VII:33-35.) This corroborates Reyna's testimony that he did not refuse to perform the work as directed and that they worked on the ranch for only a short time.[97] (1:26-27.)

c. The Union Activity

In addition to the complaints Reyna made on behalf of the crew regarding working conditions, Rios also observed Reyna and Verduzco, along with other crew members, signing union

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[96]Mike Gerawan testified there is a lot of growth from the base of grafted trees which makes it difficult to reach the main limbs around which one needs to tie the rope. It is easier in such cases to work from inside standing in the crotch of the tree. (V: 110-111.)

There is no evidence why workers being paid piece rate would choose to do a job in a way that took more time and was more difficult to accomplish and would thus cause them to lose pay. In any event, Rios testified he rescinded his order to climb into the trees, so I find Rios did not have Reyna fired because he refused to perform his job.

[97]Rios likened this complaint by Reyna to Reyna's frequent questioning of his orders, even though Rios never said that Reyna refused to follow the order since Rios rescinded it and allowed workers to use ladders or not as they saw fit.

authorization cards. In addition, Reyna and Verduzco were greeted enthusiastically by one of the UFW representatives who remembered them from when they had worked for another employer, Metzler, where the UFW had a contract.[98] This event occurred in early February which Verduzco identified as the approximate time union organizing at the Company began. (I:15-18, 45, 58-60; II:19-20, 40, 44-50, 56.) Reyna acknowledged that Rios did not interfere with the Union's discussion with the crew. (I:60.)

Both Reyna and Verduzco testified that after the representatives left and the crews went to the fields, Rios asked Reyna what advantage the workers would have with a Union. Verduzco and several other workers were present. Reyna responded the Union provided insurance and other benefits. (I:18-19.)

According to Mr. Reyna, Rios replied that the Union was not going to beat the Company because the Company had a lot of influence in Sacramento, that the Union had tried to organize the Company before and had failed. He also said the Company would fire those who signed up and supported the Union. (Id.) Verduzco testified in less detail but confirmed that Rios said that the Company would fire those who supported the Union and

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[98]Verduzco testified Rios already knew he and Reyna had some experience with the UFW because Rios knew they had worked at Metzler. There is no indication, however, that Rios considered them UFW supporters prior to this time. Verduzco, in fact, testified he was not involved in union activity at Metzler. (II:56.)

that there had been a previous union organizing campaign which was unsuccessful because the Company had a lot of influence. (II:21.)

Both men acknowledged that while they were working, Reyna was the only one in the crew who was fired. (I:60-61; 11:29.) Verduzco was laid off only a couple of weeks after Reyna left. It is not clear whether the entire crew was laid off at the same time. (II:27)

Rios recalled the incident in late January or early February described by Reyna and Verduzco when the Union solicited signatures. (VII:37-38.) He recalled the Union representative and Reyna greeting each other as if they were friends. He did not recall the Union person greeting anyone else as if she knew them. (VII:43.) It was not clear whether he had seen the representatives speaking to his crew on other occasions. (VII:37-38.)

He first denied that immediately after this incident there was any discussion with the crew about the Union or Union benefits but then testified that Reyna said the time would come for the Company and the foremen because they abused the workers. (VII:43-44.) Later, he acknowledged he was not sure this remark was made at that time because Reyna "was always saying things." (VII:43-44.)

He also denied there was any discussion of what the Company might do if the Union won the election or that he said the union would not win because the Company had influence in

Sacramento. (Id.) He also testified there was no discussion about workers who signed union cards, but when asked more specifically if he told them they would be fired, he said "No, no, I told them that they were free" which obviously indicates there was some discussion of the issue.

Rios later acknowledged he and the crew sometimes conversed about the Union but said the discussions occurred long after Reyna had been fired and that it was the crew who asked him about the union. On such occasions, he would respond only that he could not tell them anything because he had never been in a union. Later, however, he modified his testimony and stated he told them there were circumstances under which they could lose their seniority if the union came in. (VII:45-47.)

d. Reyna's Discharge

Reyna's discharge occurred soon (a matter of days or a week or so at most) after the acknowledged union and other concerted activity described above. Reyna testified about the discharge as follows. The crew started work in a new field where they were going to be tying and untying rope in the trees. Reyna and the crew gathered around Rios, and Reyna asked how much they would be paid. Rios replied between 12 and 18 cents. (I:20.)

The crew had worked only a while when field supervisor Philip Braun arrived and spoke to Rios who then came and told the crew they would be paid eight cents. The whole crew verbalized its objections to the rate, but did not stop

working. Braun later came back, again spoke to Rios, and Rios told them they would be paid twelve cents. (I:20-21, 64-66.)

The crew continued working for some time, but about 2:00 p.m. Reyna told Rios they were stopping work for the day. Normal quitting time according to Reyna was about 3:00 or 4:00 p.m. (I:64-66.) Reyna testified first that they were quitting because their hands were sore from pulling on the rope to loosen it. (I:22, 64-66, 69.) At another point, he said the crew was tired.

Rios told them they would not have a job the next day if they quit, but Braun said they could leave and return the next day. (I:24-25.) The workers quit as they finished the row in which they were working. (I:68.)

Rios told Braun he was fed up with Reyna, and either Reyna had to go, or Rios was going to quit. (I:66-67.) Braun said they should go to the office, and the entire crew did so.

Only Reyna, Rios and Braun went into the office. Reyna waited in the reception area while Rios and Braun went into a back room. A short while later, Rios came out and told Reyna he was fired, and his paycheck would be ready the following day. (I:25-26.)

Reyna requested a written reason for his discharge. Rios refused, so Reyna asked Braun who also refused. Mike Gerawan was also there, and Reyna asked him. Gerawan initially refused, but later said he would give Reyna a written notice

the next day when Reyna picked up his final check.[99] (I:26.)

Mr. Verduzco testified to essentially the same facts as Reyna did as to what occurred in the field on the day Reyna was discharged. (II:24-25.) He confirmed that after Rios said that either Reyna had to be fired or he (Rios) would quit, Braun told them to go to the office.[100] (II:57.) The entire crew went because Reyna and Rios provided the transportation for the crew. (II:60.)

On cross-examination, after answering a long series of leading questions affirmatively, Verduzco answered affirmatively that Rios told the whole crew he was sick and tired of the whole crew. This is a perfectly permissible technique of cross-examination, but the trier of fact must determine whether such an answer represents the witness' true testimony. From Verduzco's testimony as a whole, and from his

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[99]Reyna identified RX2 as the document Gerawan supplied. The document was admitted only to show that Gerawan kept his promise, but not for the impermissible purpose of showing that the reasons in the letter were the true reasons why Reyna was actually fired. Not only is the letter inadmissible hearsay; it is obviously self-serving as well.

[100]Verduzco does not understand English, and Braun spoke to Rios and Reyna in English. Respondent objected that Reyna's statements to Verduzco as to what Braun said are hearsay. (II:36-38.) I sustained counsel's objection in part and overruled in part and stated that Braun's statements translated by Reyna could come in but not to establish the truth asserted in any statements made by Braun. I now believe my ruling was too restrictive and that Braun's statements translated by Reyna should have been admitted in their entirety. The situation is akin to that discussed in the section regarding Mr. Vivian Sanchez. By relying on Reyna's translating to the crew, Braun assumed the risk as to how his statements were translated, and Verduzco's testimony as to Braun's statements is admissible.

demeanor in answering, I am convinced he was lulled into an affirmative answer. I am convinced his answer was not a true inconsistency but rather resulted from lack of careful attention to the entire question because in the series of previous questions Respondent's counsel had been, for the most part, repeating Verduzco's testimony and asking if it were correct.

I am especially convinced that such was the case here since Rios himself never said he stated he was sick of the entire crew, and, in fact, his testimony is to the opposite effect. Namely, that Reyna was the problem. (See, VII:56-57 where he blamed Reyna for discouraging the crew members about such things as wages and roping the trees. See also, VII:61 where he stated that once Reyna left, the people worked "very happily.") For these reasons, I do not credit Verduzco's response as establishing that Rios said he was sick of the entire crew.

It was apparent from Rios' testimony that he did not specifically recall whether there was a discussion about price the day Reyna was fired. (VII:52-53.) His testimony centered on his frustrations with Reyna. He testified he told Braun that Reyna was always giving him trouble and that he was fed up with Reyna who was always talking to the people and discouraging them. Rios described the kinds of things Reyna would say as "...things about the Company, the prices, that he didn't like that about the tying of the strings because it was

very hard to do." (VII:57.) Rios also referred to the incident about not using the ladders which was described above. (VII:59.) He further testified Reyna was "never in agreement or accepting the orders." (Id.) Asked to specify, Rios again cited tying and removing rope and prices. Then, he added that Reyna worked slowly. (Id.) Rios further stated that Reyna complained more than anyone--that Reyna would always talk back, and was never happy. (VII:63.)

Rios obviously had trouble remembering exactly what happened the day he fired Reyna. Not only did he not remember about the discussion regarding wages, he was unsure about other matters. First, he stated the crew did not complain about sore hands because that day they were not tying rope but untying it. (VII:48-49.) Then, he said he did not recall if the crew said they were quitting because of sore hands, and, still later, he testified the crew quit because they were tired. (VII:55.)

Then again, he could not recall if the crew quit early, nor could he recall if it was Reyna who said the crew was tired. (VII:53-54.) He testified he did not order them to go back to work because Braun was there, and Braun said the crew could quit.[101] (VII:55.)

Respondent asked a leading question as to whether Rios

[101]Because Reyna's testimony is contradictory and Rios' is so vague, I cannot determine whether the crew quit because of sore hands or because they were tired. The issue is not critical since Braun gave them permission to stop work and finish the job the next day and since Rios' determination to get rid of Reyna was based on his accumulated dissatification with Reyna and not just the events on Reyna's last day of work.

fired Reyna because of Reyna's effect on the performance of the crew, and Rios replied that was part of the reason, and the other part was Reyna's refusal to follow orders. (VII:62.) Respondent's counsel then asked several leading questions to attempt to elicit testimony from Rios that he received a bonus based on the crew's performance which would be reduced by Reyna's slow work, but Rios' response clearly showed this was not part of his motivation for firing Reyna. (VII: 61-63.)

It is undisputed that Rios was aware of Reyna's Union support and his protests about wages and the crew's being required to rope trees without ladders. I find the complaints were made on behalf of the crew as well as himself. I credit Reyna and Verduzco about the specific incidents in late January or early February and again on February 7 that Reyna spoke to Rios on behalf of the crew about what wages the crew would be paid.[102] Thus, it is established that Reyna engaged in union

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[102] Respondent objects to the fact that I refused to allow it to introduce a document marked as RX2 as a prior inconsistent statement. Reyna testified that he signed RX2, which was prepared by a UFW representative, after someone said they were going to orally translate to him in Spanish what was written in English.

Initially, I overruled the UFW's objection to introduction of the document which was based on the fact that RX2 is written in English, which Reyna is not able to read well, and that there was no showing who had written the declaration and no signed attestation by the preparer that she/he had accurately translated what Reyna said and accurately read it back to him before Reyna signed it. (I: 80-83)

Based on Reyna's testimony, which included the fact that he spoke in Spanish to someone who then spoke in English to a third person who wrote RX2, I directed the official interpreter to read RX2 in Spanish to Mr. Reyna before proceeding to have him questioned about its contents. (I:84) While it was being read it him, Mr. Reyna interrupted several times and credibly testified

that there were numerous discrepancies between RX2, as being read to him by the interpreter and what he recalled telling the UFW representative. (I:82-92.)

Reyna testified that there was material left out, material that was different from what he had said, and things he had never said such as that he assisted the union. (I:92.) I believed Reyna, especially on the latter point, because the more active he was with the union, the more that would support the claim that it was his union activism which caused his discharge. Since he was denying that he made a statement which would strengthen his case, I credited his testimony that he had not made the statement and his other testimony that RX2 did not accurately reflect what he said.

I questioned General Counsel and the UFW representative, neither of whom had any information about where the declaration came from, and instructed both of them to take immediate action to try to identify the preparer so the person could be called to testify. I then directed Mr. Reyna to maintain contact with the General Counsel so that if he needed to be recalled, in the event the person who prepared the declaration could be found, he would be available. Mr. Reyna helpfully volunteered that the person who prepared RX2 had been in the UFW office in the town of Parlier. (I:92-101.)

Throughout the remainder of the hearing, I had General Counsel and the UFW report regularly as to their efforts to locate the person, (e.g. III:4-7, 85-86; IV:68-69,108-111, 211-213; 7:9-10, IX:26-29, 161-162; X:4-6.) Both parties diligently pursued the matter; but were unable to locate the person who prepared the declaration. At one point, the representative at hearing for the UFW and the LDEF, Ms. Parsley, stated she had been instructed by her supervisors that any information she obtained from anyone in the Union would be privileged. I ruled that although there is a privilege that exists between the union and a discriminatee which is akin to the attorney/client privilege that this was not such a situation. I stressed that should the UFW fail to cooperate fully, I would either drew an adverse inference in Ference or strike Reyna's testimony on the points at issuein RX2. I declined to accept Respondent's suggestion that the proper remedy would be allowing introduction of RX2 because it simply does not meet the standards for a prior inconsistent statement. I am convinced the UFW responded and cooperated fully and that both Ms. Parsley and the General Counsel diligently sought to locate the person who prepared RX2.

In order to be a prior inconsistent statement, ipso facto the statement must be the witness' statement, and, based on Reyna's testimony, I was convinced that the variations between what he testified he told the Union, compared to what was written in RX2, were so substantial that RX2 could not fairly be characterized as his statement. This is an example of the kind of problem which unfortunately can occur when, rather than having

activity and protected concerted activity and that Rios, an agent of the Company, knew of his activity. The question then becomes why Rios insisted Reyna be fired.

From the overall thrust of Rios' testimony, it is clear that he felt Reyna questioned his authority, which Rios once described as Reyna seeming to want Rios' job. Rios was frustrated because Reyna was never in agreement with or accepting of his orders. (VII:57-59.) Consistently when asked to specify his problems with Reyna, Rios mentioned the disputes about prices and the tying of the trees.

I am convinced that these were his major considerations and that Reyna working slowly was a makeweight argument added belatedly. Rios never indicated he ordered Reyna to work faster or that he ever gave any warnings to Reyna about working too slowly. Thus, I do not believe this complaint is reasonably included within Respondent's stated reason that Reyna refused to obey orders. As such, whether Reyna worked too slowly was not a part of the reason Rios wanted him fired. This conclusion is bolstered by Rios' testimony that any effect on his bonus occasioned by the pace of the crew's work was not significant to him.

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declarations taken by our trained Board agents, parties are required to provide them and they are prepared by unknown, possibly untrained persons who do not even affix the proper attestation.

I do not believe it is proper to admit RX2 under these circumstances. I note further that Respondent cross-examined Mr. Reyna aggressively for approximately five hours and fully explored all issues.

Based on the timing of Reyna's discharge, coming shortly after the complaint about wages and unsafe working conditions (regarding the trees without ladders), and Rios' acknowledgement that these were the types of incidents he meant when he said Reyna would not accept his orders, I find that Rios insisted Reyna be fired because of Reyna's concerted activity. Even if there were other elements (such as slow work) which entered into Rios' determination to get rid of Reyna, Reyna's protected concerted activity was the overwhelming reason for Rios' wanting Reyna fired.

Thus, I find General Counsel has established a prima facia case. Respondent has not rebutted it by showing it would not have discharged Reyna had he not engaged in protected concerted activity. Reyna's discharge violates section 1153(a) of the Act. (Wright Line; Transportation Management.)

I also credit Reyna's and Verduzco's testimony that Rios told the workers the Company would fire those workers who signed cards and supported the Union and that the Company would defeat the Union because the Company had a lot of influence. I do so because on other issues I have found Reyna and Verduzco credible and because Rios was equivocal and contradictory in his testimony as to any discussions with the crew about the union. These statements clearly would tend to restrain and coerce employees in evidencing support for a union, and they violate section 1153(a) of the Act.

I also conclude that Reyna's union support was an element

in Rios' decision to get rid of Reyna. It is a reasonable inference that, given Rios' existing frustration with Reyna's protests about wages and working conditions, his concerns would be accentuated by his perception that Reyna was supporting the Union and had a friendly relationship with a Union organizer. Such conduct indicated Reyna was pursuing yet another avenue of independence from Rios' authority.

I conclude that the specter of Reyna, already an outspoken "troublemaker," having union connections and actively supporting the Union, cannot but have been perceived by Rios' as likely to accentuate his problems with Reyna. Thus, I find an anti-union motive as an added element in his decision to get rid of Reyna, and I find no evidence rebutting this conclusion. Consequently, I find Reyna's discharge also violated section 1153(c) of the Act.

9. THE LAYOFFS AND REDUCTION IN WORK TIME.

Paragraph 7(a) alleges that on or about May 10, Respondent laid off twenty crews employed directly by it, specifically, crews numbered: 62, 130, 162, 168, 170, 180, 240, 282, 334, 374, 380, 396, 404, 406, 410, 412, 454, 466, 472, and 475. Paragraph 7(a) further alleges that at this time, Respondent laid off 13 crews it employed through farm labor contractors. These crews are identified therein by the name of the labor contractor with the name of the crew foreman in parentheses. These crews are: (1) Three crews of labor contractor Felix Gonzales, namely, those of foremen Gabriel, Jose and Marcial;

(2) Three crews of Octavio Labor Contractor, namely, the crews of foremen Gregorio, Tomas and Chella; (3) One crew of Vincent Florez Contractor whose foreman was Ignacio, and (4) Six crews of labor contractor Contreras & Sons, namely, those of foremen Adan, Beto, Guillermo, Hector, Isidro and Javier.

Paragraph 7(b) alleges the unlawful layoff on May 11 of eleven additional crews and on May 12 of one additional crew. The crews are not specified in the complaint but are identified in RX15.

Paragraph 7(c) alleges that from May 12 through June 8, Respondent assigned to the crews referred to in Paragraph 7(a) and 7(b) fewer days of work and, on those days, fewer hours of work than in prior years. General Counsel has apparently abandoned his claim that the crews had fewer hours of work since he does not mention it in his brief. Accordingly, I recommend dismissal of this allegation.

Respondent's defense is that the layoffs occurred because there is a normal gap in operations which in 1990 occurred between one and 10 days later than usual because Mike Gerawan decided to keep crews working through the first election when normally they would have been laid off. (V:125.) The result, it contends was the Company ran out of work on May 10, the day after the election.

Respondent contends that not all the crews alleged in paragraphs 7(a) and (b) to have been laid off were in fact laid off and points to RX15 to support this contention.

(R.Br.Fn.34, p.80.) Based on RX15 and RX16, I conclude that three of the contractor crews listed in paragraph 7 (a) are incorrect. There is no showing that an Octavio Labor Contractor crew with a foreman named Chella was laid off on May 10 or May 11. With respect to Contreras & Sons, the crew headed by Guillermo is apparently that of Guillermo Guitron whose last day of work was May 7, and the crew of foreman Hector Vivian was laid off on May 9. These three crews should be dismissed from this paragraph of the complaint.

With regard to the crews laid off on May 11, RX15 shows 11 crews laid off that date which is the same number alleged in paragraph 7(b) of Complaint 1. RX15 also shows one crew laid off on May 12. I conclude the crews in RX15 are those referred to in the Complaint.[103]

a. The Layoffs On May 10, 11 and 12.

Mike Gerawan testified that the peak period in the thinning of the stone fruits is "a single definable peak period"[104]then, there is a one to two week gap in employment where the number of people on payroll begins to drop. (V:119-120.) The number of workers begins to climb again when the

[103]I note a discrepancy in the records, however, in that RX17 shows three crews in addition to those listed in RX15 with a last day worked as May 11--crews 166, 172 and 252. I am unable to determine the status of these three crews.

[104]Thinning usually begins mid-April and continues through the third week in May and is completed by the first of June. The work peaks just prior to pit hardening and then drops off. Pit hardening is the date the pit inside the fruit hardens and one tries to complete thinning before pit hardening is completed-although Gerawan conceded this does not always occur.

harvest in stone fruit and the thinning in grapes begins, and it builds toward a second peak which goes until the end of harvest although it "tails off and goes back up ... depending on the fruit." (V:120.) At one point, Gerawan said the second peak occurs approximately mid-May when the stone fruit harvest begins, while elsewhere he said it occurs from the end of May to mid-June. (V:118; V:120-121.)

Respondent concedes the layoffs on May 10, 11 and 12 were not in conformity with prior years, stating that "the mid-May gap in number of employees was more defined in 1990 than in previous years."[105] (R.Br.p.76.) Respondent contends this discrepancy is due to two factors. First, fewer people were needed to perform thinning in the stone fruit according to Mike Gerawan because he had decided, long before any union activity, to prune heavily in order to reduce the need for thinning and to have larger fruit than in the prior year. (V:12-123; VI:ID-12, 26-27, 36-38; VII:40-41.) Second, he wanted to keep people on payroll until the election because he thought it would enhance the Company winning, so he had them perform certain tasks earlier than in previous years. Thus, he delayed normal lay offs by 1 to 10 days. When the election was over, there

[105]Mr. Gerawan testified that labor contractor crews are generally laid off first and are called back last because, generally, they are not as familiar with the work at the Company, and, also, the Company attempts to lessen the severity of the gap between the thinning and the harvesting so as to keep its direct employees working. (V:119.)

was no work remaining, and he laid off the necessary crews.[106] (V:124-125, 127-128; VIII:111-113.)

Gerawan testified that during this 1 to 10 day period when he kept crews working, he had them perform several tasks which normally would not have been done until later. He had them thin the later maturing varieties of stone fruit rather than doing this after the trees had naturally dropped their fruit. As a consequence, not only did he pay to thin fruit which would have dropped off naturally, he ended up with less fruit to harvest than he had anticipated. (VI:28-30; VII:163-164) It is a reasonable inference that this also cost the Company money since he had less fruit to harvest and sell than he had expected.

He also had the crews perform cane tucking some 7 to 50 days earlier than normal. Some of this work had to be repeated toward the end of May because the canes had not been quite long enough so they did not stay tucked into the wire supporting the grape vines as they should have. (VI: 30-31; VI:124)

He also had the crews remove unwanted growth from the trees and grape vines. These operations were known as suckering (referring to both fruit trees and grapes) and

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[106]Mike Gerawan stated at one point that he believed there were approximately the same number of crews working in 1989 as in 1990 during the week of the first election. (V:46.) At another point, he stated there were more people on payroll in 1990 than in 1989. (VII:156.) According to RX19, the number was similar in 1987, 1988 and 1990 (242 week ending 5/9/87, 249 week ending 5/14/88 and 265 week ending 5/12/90) but substantially less in 1989 (161 crews in the week ending 5/13/89.).

removal of tendrils and lateral growth in the grapes. The suckering in the trees was performed between one week to one month earlier than normal.[107] (VI:33, RX19.)

According to Gerawan, he ran out of work at the time of the first election not only because some work was done earlier than normal but also because some work took less time than usual because he had more people working since he had delayed layoffs. He specifically mentioned shoot removal, suckering, and tendril removal, all of which are operations in the grapes, as having begun at the normal time but which finished in less time than usual. (VI:31-32, 36; VII:122-123) However, he also testified to the contrary that suckering was performed earlier than normal. (VI:28-30)

Mike Gerawan testified that at the time he decided to lay off the crews he did not know a run-off election would be needed. (VII:157-158.) He acknowledged he knew what the ballot count was, except for the unresolved ballots. (X:157-158.) The challenged ballots were not opened until May 11, but, according to Ed Perez, the Board agent in charge of the election, on May 10, even before all the votes were counted, the possibility of a run-off was already being discussed with the parties, including Mr. Cal Watkins, the Company's attorney at that time. (X:94.) Mr. Watkins corroborated Mr. Perez'

[107]At another point, he contradicted himself and said tendril removal was performed at the normal time but, because he had more crews working, it was completed in less time than usual. (VI:31-32.)

testimony. (V:54.) Based on the above, I find that Mr. Gerawan knew that a run-off probably would be needed when he decided to lay off the crews. He impressed me at the hearing as being quite bright, he was obviously intensely interested in the outcome of the election, and I have no doubt he was able to understand the likely need for a run-off election based on how the votes in a three way election were coming in.

As Respondent concedes, the 1990 layoff was more pronounced than in prior years. The Company laid off more crews, and it laid them off suddenly as opposed to prior years when work tended to taper. The layoff in 1990 was the largest in both absolute numbers and as a percentage.

From May 10 to May 12, the Company laid off 75.4% of its workforce, including all the labor contractor crews.[108] (57 crews minus 14 crews = 43 divided by 57 = 75.4%) If one uses the highest number of crews working the week of the election (59 crews), the dropoff is even greater--76.3%. The previous year, the reduction was only 54.5% (32 crews minus 15 crews = 22 crews divided by 37 = 54.5%) for the week May 7 through May 13, 1989. Since Mike Gerawan testified he kept crews working

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[108]In this and the following calculations, I have omitted Sundays because few, if any, crews typically worked that day at this time of year. I have compared the highest number of the crews working at any time during the week ending period with the lowest number in that week whereas General Counsel used the number of crews working at the end of the relevant week. (G.C. Br.p.42.) Further, at least as to 1990, General Counsel apparently erred and divided 42 crews laid off by 47 crews whereas he should have divided by 57 which is the total number of crews working on May 10.

from one week to ten days longer in 1990, it is also instructive to look at this earlier period in 1989. In the week of April 30 to May 6, 1989, the workforce dropped 64.3% (56 crews minus 20 crews = 36 divided by 56 = 64.3%).

In 1987 and 1988, the reduction in the workforce was significantly less than in either 1989 or 1990. For the week of May 8 through May 14, 1988, the drop was 48% (50 minus 26 = 24 + 50 =48%). For the preceding week, May 1 through May 7, 1988, it was only 40% (65 minus 39 = 26 divided by 65 = 40%).

In 1987, the drop off in the week of May 3 through May 9 was a mere 16.7% (42 minus 35 = 7 divided by 42 = 16.1%). And for the prior week of April 26 through May 2, it was only 11.9% (42 minus 37 = 5 divided by 42 = 11.9%).

Not only was the reduction in crews larger in 1990 than in any of the prior years, it was more precipitous. Here, one needs to look at the period of one week to 10 days prior to May 10 since in prior years this is when layoffs usually would occur according to Mike Gerawan. From May 1 to May 3, 1987, hardly any layoffs occurred. The crews drop from 40 to 37 and then begin to climb back to the low 40's. In 1988, the number drops from 65 to 55. In 1989, it drops from 56 to 42. All of these reductions are significantly more gradual than in 1990. (RX16 and RX17.)

General Counsel looks at the number of bins harvested as set forth in RX24 and argues that since the Company only harvested 1.39 bins by May 15, the 19 crews recalled by the

Company after May 11 and before the May 15 run-off could not have been needed to harvest such a small amount of fruit. From this, General Counsel concludes there was other work to be done on these days which shows the reasons advanced by Respondent for the layoffs were pretextual. (G.C. Br.p.46.)

I am unable to duplicate General Counsel's figure of 1.39 bins. According to my reading of RX24,[109] no fruit was harvested on Sunday May 13 or Monday May 14, but 91.62 bins were harvested on May 15 which was the day of the run-off election. I find the significant fact is that since this quantity of fruit was available, there are indications the precipitous layoff was not required by a virtual absence of work. For example, according to RX24, the Company harvested more May Fire--an early variety of nectarine--between May 8 and May 15, 1990 (138.87 bins) than it did in the period May 6 through May 10, 1989 (112.34 bins).

Further, in 1989,[xxo] all the May Fire had been harvested by May 10 whereas in 1990 the amount harvested on May 15 compared to May 12 is a 57% increase. There is no evidence that May Fire matured later in 1990 than in 1989, so the fact that all the May Fire was harvested by May 10 in 1989, and that

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[109] RX24 shows the number of pounds of fruit harvested which is then divided by 1,000 pounds to determine the approximate number of bins which number is then indicated to the right side of the pounds column as a total of bins harvested per day.

[110] The years 1987 and 1988 are not helpful in this comparison since no May Fire was harvested in 1987, and very little in 1988.

such a large amount was harvested on May 15, 1990, suggests that May Fire nectarines may have been available for harvest between May 11 and May 15 in greater numbers than were picked. Similarly, RX 23 shows that from May 8 through May 15, the Company harvested more bins in 1990 (183 bins) than in prior years for the same period. (36, 107 and 158 bins in 1987, 1988 and 1989, respectively.)[111]

In order to prove a violation of the Act, General Counsel need not prove that Respondent was aware of the Union sympathies or activities of all the crews which were laid off. General retaliation by an employer against its workforce, especially immediately on the heels of protected Union activity, can discourage the exercise of employee rights just as effectively as adverse action against only known union supporters. (New Life Bakery, Inc.,) (New Life) (1991) 301 NLRB No.66; Birch Run Welding & Fabricating v. NLRB (Birch Run) (1984) 269 NLRB 756 [116 LRRM 1159], enf'd. (6th Cir. 1985) 761 F.2d 1175 [119 LRRM 2426].

Timing is always a significant factor in determining

[111]Respondent's counsel, using RX21 as a base, asked Mr. Gerawan to calculate the difference between the actual number of bins harvested in 1990 versus the number of bins that had been projected for the year and to calculate the market value of that amount of fruit so as to demonstrate that Mr. Gerawan did not leave valuable fruit unharvested in order to lay off crews on may 10 and May 11. (VII: 171-176.) The calculation is, meaningless since the projected number of bins is not a real number. It by no means controverts the potential for delaying the harvest for a few days or spreading it out over more days in order to manipulate the layoffs just as Mr. Gerawan manipulated work to keep crews working through the election.

whether the motive is discriminatory. Here, the mass layoffs occurred the very day the votes were being counted and it was becoming clear that a run-off election would be likely. Coming just after employees had exercised their rights by voting in large numbers for two unions and before they voted in a run-off election, the layoffs could hardly have occurred at a more coercive time.

The fact that the layoffs departed from past practice also supports the inference that they were discriminatory. (Birch Run) The foregoing indicators of unlawful motive are coupled with strong anti-union sentiment by the Company. Mike Gerawan candidly admitted his hostility, and the degree to which he opposed unionization is evident by the fact that he was willing to absorb monetary losses in order to try to defeat the union (e.g. keeping workers on payroll to vote in the first election by having them perform work so early some of it had to be redone (cane tucking) or resulted in a lesser crop (later maturing stone fruit).

In addition, the layoffs occurred amidst unlawful discharges, threats of discharge and closure of the business if the union won, statements of anti-union sentiments to workers, threats of loss of unemployment benefits for union supporters, and interrogation of workers about their union sympathies.

Based on the foregoing, I find that General Counsel has established a prima facie case. The burden of proof now shifts to Respondent to demonstrate that it would have taken the same

action absent its unlawful motives. (Wright Line; Transportation Management)

In rebuttal, Respondent states that the layoffs were the result of a normal gap in employment which occurs after the thinning and before the harvest in the stone fruit, but that the layoffs occurred from one week to 10 days later than usual because crews were kept on payroll through the election. The Company admits that the gap in 1990 was more "defined" than in prior years. The evidence shows it was larger and more precipitous than in other years.

The early cane tucking and thinning of late varieties of stone fruits supports the Company's contention that it was assigning makework to be done. This, in turn, tends to support the Company's position that it had virtually no work to be done once it had achieved its goal of keeping workers employed so they could vote.

On the other hand, there are facts which do not support the Company's assertion. The Company used the layoffs as a basis for seeking, in effect, a new election (see discussion supra), but when it became clear that the run-off election would be held promptly, it recalled 19 of the 43 crews it had laid off (44%) by the day of the run-off election. (RX15) There is no satisfactory explanation how in such a short time work materialized for such a large percentage of the crews. This fact calls into serious question whether the large layoff was required by lack of work or whether there were other

reasons for it.

Further, if the Company had, as it claims, timed the work so it would last through the first election, one would expect crews to have been on layoff on May 10, the day after the election. Instead, the Company waited until it had good reason to know the unions had generated enough votes to force a runoff election before it ordered the layoffs.

There is also a factor which distinguishes this layoff from prior layoffs which calls into question whether the layoff had to be as drastic as it was. By delaying the normal time of the layoffs, the Company had in effect bridged the gap which occurred in most years. The normal gap came as thinning was dropping off but harvest work had not begun. In 1990, the Company kept the crews working so long that the harvest had already begun before there were any layoffs. In other words, the usual reason for layoffs had been partly eliminated. On May 15, a substantial amount of fruit was harvested, and it is not at all clear that none of it could have been harvested before.

It is clear from Mike Gerawan's testimony that there is quite a bit of flexibility whereby work assignments can be manipulated. This fact makes it difficult to isolate the effect of various factors. I tend to believe that some reduction in the workforce was necessary although the timing of beginning it on May 11 versus May 10 is still troubling. However, because of all the factors I have listed and the fact

that I find the subsequent layoffs of the crews also were discriminatory, I do not believe that the size and timing of the layoffs was a function of workload alone.

From all the evidence, I conclude that Mr. Gerawan's reasons for the layoffs were mixed. I find the layoffs were motivated in part because of a reduction in available work and in part by his anger that the employees had voted for the union in sufficient numbers that a run-off would be necessary. I further find that a significant element in his decision was the opportunity the layoffs presented for obtaining a new election.[112] I find the latter two elements were powerful motives and that absent them Respondent would not have acted as it did.

Accordingly, I find that the layoffs on May 10, 11 and 12 violated section 1153(c) and 1153(a) of the Act.

b. The Layoffs From May 15 Through June 8.

General Counsel alleges that the crews that were laid off on May 10, 11 and 12 were thereafter laid off more frequently between May 15 (when recalls began) through June 8, 1990, inclusive, than they were during the same time period in prior years. After May 15, 1990, there were no labor contractor

[112]General Counsel did not allege a violation of section 1154.6 of the Act which makes it an unfair labor practice to wilfully arrange for persons to become employees for the primary purpose of voting. Although I believe the issue has been fully litigated in the sense that Respondent had produced whatever evidence it had to justify the layoffs, the nature of the allegation is significantly different, and Respondent has not had an opportunity to present any argument on this point. Therefore, I decline to find a violation on this ground.

crews working at all during the relevant period, so this analysis is limited to the 32 Company crews listed in RX15. I have used RX17 to compare the number of days these crews were laid off in 1990 as compared to 1988 and 1989. I have excluded 1987 because 19 of the 32 crews either did not work during the relevant period.

RX 17 shows that in 1990, the 32 crews had 197 days of layoff compared to 75 days in 1989 and 86 days in 1988. (Sundays are excluded from these calculations because it was not a typical workday.)

The comparison is not exact because in 1989, six of the crews did not work during the relevant period (crews 290, 374, 380, 404, and 454). However, all but one of these crews did work in 1988. Similarly, 5 crews did not work in 1988 but did in 1989 (crews 61, 396, 466, 472, 475 and 496). Since the discrepancy between 1990 is so great compared to both 1988 and 1989, I find these variations relatively minor. I also find it is reasonable to treat the crews as a group because I have found they were unlawfully laid off, in effect as a group, on May 10, 11 or 12. Because of the large discrepancy in days on layoff for these crews in 1990 versus 1989 and 1988, because of the timing of the layoffs in 1990, and because of the anti-union atmosphere including threats, interrogation and unlawful discharges, I conclude the layoffs of these 32 crews between May 15 and June 8, 1990, inclusive, were discriminatorily motivated. Respondent has not proven that it would have laid

the crews off but for its discriminatory motive. Accordingly, I find the layoffs violated 1153(c) and, derivatively, section 1153(a) of the Act.

REMEDY

Having found that Respondent violated sections 1153(a), and (c) of the Act by the above described conduct, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Upon the basis of the entire record, the findings of fact and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

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

1. Cease and desist from:

a. Threatening agricultural employees with discharge or other reprisals for engaging in the exercise of their rights guaranteed by Section 1152 of the Act;

b. Interrogating agricultural employees about their Union sympathies;

c. Deriding or speaking in derogatory terms about employees because they engage in union activity;

d. Unlawfully discharging, laying off, assigning fewer days of work, or otherwise discriminating against, agricultural employees because of their participation in protected union or other concerted activity;

e. 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. Offer Alejandro Reyna, Viviano Sanchez, the members of Pedro Lopez Rodriquez' crew ("the Lopez crew"), and the members of Guillermo Guitron's crew named in this decision ("the Guitron crew") immediate and full reinstatement to their former positions of employment, or if their former positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges of employment;

b. Make whole Alejandro Reyna, Viviano Sanchez, the Lopez crew, and the Guitron crew for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful discharge of them. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharges. The award also shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5;

c. Make whole all members of the crews laid off on May 10, 11 or 12, 1990, who were also laid off between May 15 through June 8, inclusive, for all wage losses or other economic losses they have suffered as a result of Respondent's unlawful layoffs. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful suspension and discharge. The award also shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5;

d. Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay or makewhole amounts due under the terms of the remedial order;

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

f. Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional

Director of the anticipated dates of the next peak season;

g. 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;

h. Upon request of the Regional Director, mail copies of the Notice in all appropriate languages to all employees employed by Respondent during the period from February 1, 1990, to the date of mailing;

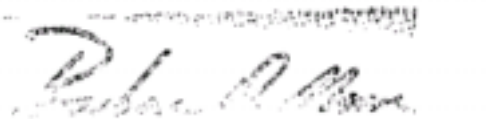
i. Provide a copy of the signed Notice to each employee hired by Respondent during the twelve (12) month period following a remedial order;

j. Arrange for a Board agent or a representative of Respondent to distribute and read the Notice in all appropriate languages to Respondent's employees assembled 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;

k. Notify the Regional Director, in writing, thirty (30) days after the date of issuance of a remedial order, what steps have been taken to comply with that order. 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 until full compliance is achieved.

DATED: December 23, 1991



BARBARA MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board [ALRB or Board] by the United Farm Workers of America and the Farm Workers Legal Defense and Education Fund (collectively referred to as "union"), the General Counsel of the ALRB issued a complaint which alleged that we, Gerawan Ranches and Gerawan Company, Inc., (collectively referred to as "Respondent" or "Gerawan") had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by discharging Alejandro Reyna, Viviano Sanchez and the crews of Pedro Lopez Rodriquez and Guillermo Guitron and by discriminatorily laying off numerous crews because they participated in Union and/or other protected activities. The Board also found that we violated the law by making various threats, including threatening to discharge people who supported a union, threatening to close our business if a union were elected by our workers, disparaging workers who supported a union, and interrogating employees about their union support. 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 you to know that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because 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.

WE WILL NOT discharge, threaten, or disparage any employees because they participated in union or other protected concerted activities.

WE WILL offer to reinstate Alejandro Reyna, Viviano Sanchez, and the crews of Pedro Lopez Rodriquez and Guillermo Guitron to their former positions, and we will reimburse them, with interest, for any loss in pay or other economic losses they suffered because we discharged them.

WE WILL reimburse the employees we unlawfully laid off, with interest, for any loss of pay or other economic losses they suffered as a result of our unlawful act.

WE WILL NOT interrogate our employees about their union support.

DATED:

GERAWAN RANCHES, and
GERAWAN COMPANY, INC.,

By: _____
Representative Title

If you have any questions about your rights as a farm' worker or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite A, Visalia, California 93291. The telephone number is (209) 627-0995

DO NOT REMOVE OR MUTILATE