French Camp, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAN JOAQUIN TOMATO GROWERS, INC./LCL FARMS, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 39-RC-4-VI 19 ALRB No. 4 (May 3, 1993)

DECISION AND CERTIFICATION OF REPRESENTATIVE

On August 3, 1992, Investigative Hearing Examiner (IHE) Robert Dresser issued the attached decision, in which he dismissed election objections filed by San Joaquin Tomato Growers, Inc. (SJTG) and LCL Farms, Inc. (LCL) and recommended that the United Farm Workers of America, AFL-CIO (UFW) be certified as the exclusive bargaining representative of SJTG's agricultural employees in the San Joaquin Valley. Specifically, the IHE found insufficient evidence of misconduct to warrant setting aside the election and concluded that SJTG was the entity to which the bargaining obligation should attach. SJTG and LCL filed timely exceptions to the IHE's decision and the UFW filed a reply brief.

An election was conducted among the agricultural employees of SJTG and LCL on August 11, 1989. After two investigations by the Visalia Regional Director and two decisions on challenged ballots (San Joaquin Tomato Growers, Inc./LCL Farms, Inc. (1990) 16 ALRB No. 10 and San Joaquin Tomato Growers,

Inc./LCL Farms, Inc. (1991) 17 ALRB No. 3), a. final tally of ballots showed the following:

UFW	100
No Union	23
Unresolved Challenged Ballots	65
Unopened Ballots	10
Total Ballots	198

SJTG and LCL filed objections to the election, two of which were set for hearing. In Objection No. 1, it is alleged that the UFW, through its agents, representatives or supporters engaged in a campaign of violence, threats of violence, property damage, and other forms of intimidation and coercion which interfered with employees' free choice to the extent that the results of the election should not be certified. In Objection No. 2, it is alleged that LCL, not SJTG, is the agricultural employer of the employees in question.[1]

The Agricultural Labor Relations Board (ALRB or Board) has reviewed the IHE's decision in light of the record, the exceptions, and the briefs filed by the parties and affirms the IHE's rulings, findings, and conclusions to the extent consistent with this Decision.

DISCUSSION

Objection No. 1--Misconduct

We affirm the IHE's conclusion that the record does not contain evidence of misconduct that is sufficient to warrant

[1]LCL agrees with SJTG that LCL is the agricultural employer under Labor Code section 1140.4, subdivision (c).

setting aside the election.[2] As the IHE pointed out, the evidence of misconduct, which established nothing more than several vague threats unaccompanied by any acts of force, does not begin to match the level of misconduct which the Board has previously found to warrant invalidating an election.[3] In addition, we note two additional factors that further underscore the correctness of the IHE's dismissal of this objection.

First, all of the evidence relates to threats directed at those who refused to observe the strike that preceded the election and none of it relates to the election itself or how employees should vote. In our recent decisions in Triple E Produce Corp. (1991) 17 ALRB No. 15 and Ace Tomato Company, Inc. (1992) 18 ALRB No. 9, we gave substantial weight to this factor in concluding that the evidence was insufficient to affect the outcome of the elections in those cases. As we explained in

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[2]Several times during the hearing the IHE struck testimony because there was no evidence of UFW involvement in the alleged misconduct or because the testimony was too vague to support a finding of misconduct. Conduct not attributable to the UFW may of course still be considered under the third party standard and the vagueness of testimony merely goes to the weight it should be given. In his decision, he acknowledged that this was in error and considered the stricken testimony in making his findings of fact and conclusions of law.

[3]SJTG and LCL except to many of the IHE's credibility determinations. The Board will not disturb an IHE's credibility determinations, particularly those based largely on demeanor, unless the clear preponderance of the evidence establishes that they are incorrect. (David Freedman & Co., Inc. (1989) 15 ALRB No. 9; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531], enfd. (3d Cir. 1951) 188 F.2d 362.) While we do not find an adequate basis in the record to disturb the IHE's credibility determinations, we note that the proffered evidence, even when viewed on its face without reference to credibility, is nonetheless insufficient to warrant setting aside the election.

those cases, this Board in no way condones misconduct, but the proper focus in cases such as these is not just whether any misconduct was proven to have occurred, but whether it would tend to interfere with employee free choice in the election.

Second, most of the proffered evidence consisted of witnesses providing uncorroborated hearsay testimony of threats others had allegedly received and later related to the witnesses. Pursuant to Title 8, California Code of Regulations, section 20370, subdivision (d), hearsay evidence in an investigative hearing may be used to supplement or explain other evidence, but is not sufficient in itself to support a finding unless it would be admissible in a civil action. Since the hearsay evidence here was uncorroborated and does not fall within a hearsay exception, it cannot establish that misconduct occurred.[4]

Objection No. 2—Who Is The Employer?

The IHE utilized several different theories in concluding that the bargaining obligation should attach to SJTG. First, he found LCL to be a labor contractor, thereby making SJTG the employer under the Act.[5] He also concluded that, even if LCL is a custom harvester, SJTG is the more stable entity that should be assigned the bargaining obligation. The IHE also

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[4]In accordance with Triple E Produce Corp. v ALRB (1983) 35 Cal.3d 42, 55 [196 Cal.Rptr. 518], hearsay evidence may be used to demonstrate the dissemination of threats that were otherwise proven to have taken place.

[5]Labor Code section 1140.4, subdivision (c) excludes farm labor contractors from the definition of "agricultural employer" and provides that the entity that hires the labor contractor is deemed to be the employer.

recommended, that SJTG and LCL be found to be joint employers and suggested that they be found to be part of a single integrated enterprise.

After a careful review of the record, we agree that LCL is a farm labor contractor within the meaning of Labor Code section 1140.4, subdivision (c) and that by operation of law SJTG is deemed to be the employer. As this finding is determinative, we need not address any of the other theories utilized by the IHE in finding San Joaquin to be the employer, and therefore do not adopt the IHE's findings and conclusions as to those theories.[6]

A "labor contractor" is one who supplies labor for a fee. (Labor Code § 1682, subdivision (b); Kotchevar Brothers (1976) 2 ALRB No. 45.) A "fee" is defined simply as the difference between the amount received by the labor contractor and the amount paid to those performing the labor. (Labor Code S 1682, subdivision (e).) More often than not a labor contractor is paid an agreed upon percentage above its labor costs. However, it is not uncommon for labor contractors who pay workers

[6]SJTG argued before the IHE and again in its exceptions that it is a commercial shed under the jurisdiction of the National Labor Relations Board (NLRB) and therefore cannot be an agricultural employer subject to the ALRB's jurisdiction. The IHE, apparently based on a single integrated enterprise analysis, found that SJTG was not a commercial shed. While our decision does not reach the issue of single integrated enterprise, we find that the present record does not support finding SJTG' s shed to be anything other than commercial. By the same token, SJTG' s claim is patently fallacious, for there is no dispute that the employees in question here are hand harvesters engaged in primary agriculture. The fact that an employer might also have employees not engaged in agricultural labor does not negate the fact that it is an agricultural employer vis-a-vis its agricultural employees.

under a piece rate to in turn be paid a set fee per unit harvested.[7] Indeed, the Board has previously found harvesting entities who are paid by the ton or other unit to be labor contractors. (See, e.g., Joe Maggio, Inc. (1979) 5 ALRB No. 26; The Garin Co. (1979) 5 ALRB No. 4; Cardinal Distributing Co. (1977) 3 ALRB No. 23.)

Finding that LCL provides labor for a fee by no means ends the inquiry. The essential question is whether LCL provides additional services or has other characteristics sufficient to make it a custom harvester and, thus, place it outside the labor contractor exclusion of Labor Code section 1140.4. SJTG and LCL point to several characteristics that they claim are sufficient to demonstrate that LCL is a custom harvester. Each will be addressed below.

The Board has found the provision of costly or specialized equipment to be characteristic of a custom harvester. (Tony Lomanto (1982) 8 ALRB No. 44; Kotchevar Brothers, supra, 2 ALRB No. 45.) LCL does provide equipment used in the hand-

[7]While we do not adopt the IHE's finding that SJTG was directly responsible for granting or denying increases in the piece rates, the record does reflect that as a practical matter LCL could not grant an increase unless it could count on SJTG agreeing to a corresponding increase in the per ton rate. Indeed, the evidence shows that SJTG routinely granted such increases when requested by LCL to enable it to match wage increases in the surrounding area. The only time SJTG refused a requested increase was when LCL incurred additional costs due to the extension of unemployment benefits to agricultural workers. Thus, it is fair to conclude that the per ton rate paid to LCL was strongly tied to labor costs.

harvesting of tomatoes for SJTG, but it is neither specialized[8] nor particularly costly.

Jim Chavez estimated that the replacement cost of LCL's equipment would be about $400,000 and the present value would be about $310,500. Subtracting the $47,200 of equipment owned by Chavez personally or by the Garcia & Chavez partnership, leaves a total of $263,300. However, much of the equipment listed is not used in the tomato harvest but in the planting and cultivation of other crops that LCL occasionally does for other clients.[9] Therefore, the equipment that LCL provided for the 1989 tomato harvest would have been valued at considerably less than $263,300.

In Jordan Brothers Ranch (1983) 9 ALRB No. 41, the Board found equipment costing approximately $315,000 not to be "costly." In other cases, the Board has been reluctant to classify similar values of equipment as either "costly" or "not costly," but nevertheless found the entities in question to be labor contractors. (Sequoia Orange Co. (1985) 11 ALRB No. 21; S & J Ranch, Inc. (1984) 10 ALRB No. 26.) While we do not consider LCL's investment in equipment to be insubstantial, we do

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[8]As SJTG and LCL point out, where, as here, the tomatoes must be hand-harvested, no specialized harvesting equipment is used. Nevertheless, the fact remains that in this case the provision of specialized equipment is not a characteristic that can be relied upon to demonstrate that LCL is a custom harvester.

[9]Chavez estimated that in 1989 about 75% of LCL's gross income came from the tomato harvesting performed for SJTG. LCL has not harvested tomatoes for any other clients.

not find it costly enough to warrant significant weight in favor of finding LCL to be a custom harvester.

SJTG and LCL accurately state that LCL is responsible for the hiring, firing, compensation, and supervision of the harvest employees. However, this is a typical function of labor contractors and is not necessarily indicative of custom harvester status.[10] (Joe Maggio, Inc., supra, 5 ALRB No. 26; Cardinal Distributing Co. , supra, 3 ALRB No. 23.)[11] On the other hand, the control which SJTG exerts over the harvest, i.e., dictating the fields to be picked, the amount to be picked, and degree of ripeness desired, has consistently been viewed as a factor militating against finding the harvesting entity to be a custom harvester. (See, e.g., Jordan Brothers Ranch, supra, 9 ALRB No. 41; Joe Maggio, Inc., supra, 5 ALRB No. 26.)

SJTG and LCL also rely on the fact that LCL is paid on flat per ton rate and carries the risk of loss during the harvest until the tomatoes are at the roadside.[12] For example, it was

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[10]As noted above, we do not adopt the IHE's findings with respect to SJTG and LCL being joint employers, but such findings are peripheral to the issue of whether LCL is a custom harvester.

[11]Nor does the fact that LCL hires other labor contractors preclude finding that it too is a labor contractor. By its agreement with SJTG, LCL is responsible for providing enough labor for the harvest and during peak times the number of workers that LCL can independently provide is not sufficient. We are aware of no authority that indicates that a labor contractor cannot act essentially as a general contractor and meet its obligations in part through the use of subcontractors.

[12]Once at the roadside, the risk of loss shifts to the trucking company, VPL Transport, Inc., which hauls the tomatoes to the packing shed.

Chavez' understanding that if a load of tomatoes was accidently dumped on the way to the roadside, LCL would be responsible for the value of the tomatoes lost.[13] This risk of loss, while not great, does represent a variance from the basic model of a labor contractor who simply provides labor for a fee. However, such risk is present whenever the provider of labor is paid by the ton successfully harvested and, as noted above, payment by the ton does not preclude labor contractor status. Moreover, while LCL's interest in the quality of the harvest is undoubtedly heightened by its risk of loss, as discussed above, its level of supervision of the harvest is not inconsistent with that of a labor contractor. In sum, while LCL's assumption of some risk of loss is evidence in favor of custom harvester status, there is no precedent for finding this characteristic to be determinative.

Lastly, SJTG and LCL argue that LCL is a stable, profitable company with a long-term relationship with many of its employees and will, therefore, provide stable and effective labor relations as the designated employer for collective bargaining. To the extent this argument is utilized to show that LCL is a custom harvester, it is not persuasive. It is true that LCL, in one form or another, has harvested for SJTG since 1968 and hires many of same employees each year. It is also true that, while Chavez testified that LCL consistently shows a loss for tax

[13]There is no evidence in the record that such losses ever occurred.

purposes, it has had no trouble meeting its payroll and other operating expenses, including a salary for Chavez.

While the relative instability of some labor contractors was no doubt a factor in the decision to exclude labor contractors from the definition of "agricultural employer," the statute does not differentiate stable and responsible labor contractors such as LCL from those who might be described as "fly by night" operations. The critical inquiry is instead whether the provider of labor also provides additional services sufficient to remove it from the definition of "labor contractor." Moreover, though the good will built up over the years between SJTG and LCL has created a situation where LCL can normally anticipate being rehired each year, its ability to hire the prospective bargaining unit members is almost wholly dependent upon being selected by SJTG to harvest the tomatoes committed to SJTG's packing shed. In other words, since the work it receives from SJTG constitutes such a large percentage of its overall business, and all of its tomato harvesting work, LCL's continued existence as a tomato harvesting entity is essentially subject to the whim of SJTG.

In conclusion, we find that LCL does not, in addition to providing labor for a fee, provide additional services sufficient to remove it from the reach of the statutory exclusion of labor contractors. While it does assume some risk of loss during the harvesting process and provides some equipment, it has

none of the characteristics that the Board has previously identified as justifying custom harvester status.

In most of the Board's previous cases, a custom harvester has been found only when the harvesting entity has provided significant additional services, such as full management responsibility or packing and shipping. (See, e.g., Gourmet Harvesting and Packing Co. (1978) 4 ALRB No. 14; Jack Stowells, Jr. (1977) 3 ALRB No. 93.) In the cases which have arguably reflected the lowest threshold for finding a custom harvester, the harvesting entities provided services, not provided by LCL in the instant case, which the Board found to be significant. (Tony Lomanto , supra , 8 ALRB No. 44 [specialized equipment]; Kotchevar Brothers , supra, 2 ALRB No. 45 [costly equipment and hauling].)

CERTIFICATION

We conclude that no misconduct has been proven that would have affected the results of the election. Having found that LCL Farms, Inc. falls within the labor contractor exclusion of Labor Code section 1140.4, subdivision (c), we therefore deem San Joaquin Tomato Growers, Inc. to be the agricultural employer. We therefore order that the results of the election conducted on August 11, 1989, be upheld and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive collective

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bargaining representative of all of San Joaquin Tomato Growers, Inc.'s agricultural employees in San Joaquin and Stanislaus Counties.

DATED: May 3, 1993

BRUCE J. JANIGIAN, Chairman[14]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[14]The signatures of Board Members in all Board decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

CASE SUMMARY

San Joaquin Tomato Growers, Inc./
LCL Farms, Inc.

19 ALRB No. 4
Case No. 39-RC-4-VI

Background

An election was conducted among the agricultural employees of San Joaquin Tomato Growers, Inc. (SJTG) and LCL Farms, Inc. (LCL) on August 11, 1989. After two investigations by the Visalia Regional Director and two Board decisions on challenged ballots, a final tally of ballots showed that the UFW prevailed by a vote of 100 to 23, with 65 unresolved challenged ballots and 10 unopened ballots.

SJTG and LCL filed objections to the election, two of which were set for hearing. In Objection No. 1, it is alleged that the UFW, through its agents, representatives or supporters engaged in a campaign of violence, threats of violence, property damage, and other forms of intimidation and coercion which interfered with employees' free choice to the extent that the results of the election should not be certified. In Objection No. 2, it is alleged that LCL, not SJTG is the agricultural employer of the employees in question.

IHE Decision

The IHE found no proof of UFW involvement in any misconduct, concluding that all of the threats that were proven were made by strikers or picketers who could not be deemed UFW agents. He therefore applied the third party standard in evaluating the evidence of misconduct. The IHE concluded that any threats that were made were nonspecific, not widespread, not repeatedly made, nor accompanied by any acts of force. Further, he found no credible evidence of threats on the day of the election or on the previous day. In comparing the misconduct that was proven with that found sufficient in other cases to warrant overturning an election, the IHE noted that here there was no throwing of tomatoes, dirt clods, or rocks, no damage to vehicles, no moving or shaking of vehicles, no assaults on labor consultants, no threats to call the INS, and no threats of job loss for not voting for the union. In addition, in comparing the facts of the instant case with those found in Triple E Produce Corp. (1991) 17 ALRB No. 15, where the Board upheld the election, the IHE was compelled to reach a similar result.

The IHE utilized many theories in concluding that the bargaining obligation should attach to SJTG. First, he found LCL to be a labor contractor, thereby making SJTG the employer under the provisions of Labor Code section 1140.4, subdivision (c). He also concluded that, even if LCL is a custom harvester, SJTG is the more stable entity that should be assigned the bargaining obligation. The IHE also recommended that SJTG and LCL be found

to be joint employers and they be found to be part of a single integrated enterprise.

The IHE therefore recommend that the election be upheld and that the UFW be certified as the exclusive representative of SJTG's agricultural employees.

Board Decision

The Board affirmed the IHE's conclusion that the record does not contain evidence of misconduct that is sufficient to warrant setting aside the election. The Board agreed with the IHE that the evidence, which established no more that several vague threats unaccompanied by any acts of force, did not begin to match the level of misconduct which the Board has previously found to warrant invalidating an election. In addition, the Board noted that (1) the threats were directed at refusals to join the strike and were not related to the election itself or how employees should vote, and (2) most of the proffered evidence consisted of uncorroborated hearsay which, pursuant to Regulation 20370, subdivision (d) , is insufficient to support a finding.

The Board agreed with the IHE that LCL is a farm labor contractor within the meaning of Labor Code section 1140.4, subdivision (c) and that by operation of law SJTG is deemed to be the employer. As the Board found it unnecessary to address any of the other theories utilized by the IHE in finding SJTG to be the employer, it did not adopt the IHE' s findings and conclusions as to those theories. The Board found that LCL does not, in addition to providing labor for a fee, provide additional services sufficient to remove it from the reach of the statutory exclusion of labor contractors. The Board found that, while LCL does assume some risk of loss during the harvesting process and provides some equipment, these characteristics were of lesser significance than the factors (such as the provision of specialized equipment or management, hauling or packing services) the Board has previously identified as justifying custom harvester status.

Therefore, the Board upheld the results of the election and certified the UFW as the exclusive collective bargaining representative of SJTG's agricultural employees in San Joaquin and Stanislaus Counties.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
SAN JOAQUIN TOMATO GROWERS, INC./ LCL FARMS , INC . ,	Case Nos. 89-RC-4-VI
Employer,	
and	
UNITED FARM WORKERS OF AMERICA AFL-CIO	
Petitioner.	

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CORRECTED DECISION OF THE INVESTIGATIVE HEARING EXAMINER

I. INTRODUCTION

This case was heard by me on thirteen (13) hearing days in Stockton, California, beginning August 12, 1991 through August 31, 1991.[1] Briefs were filed by San Joaquin Tomato Growers, Inc. (hereafter "San Joaquin" or "Employer"), LCL Farms, Inc. (hereafter "LCL" or "Employer"),[2] and the United Farm Workers of America, AFL-CIO (hereafter "UFW", or "Union") in November 1991.[3]

Following meetings of agricultural employees (hereafter employees or workers) at Mathews Road Labor Camp (hereafter Mathews Road) in Stockton on or about July 20 and 21, workers at San Joaquin/LCL along with workers at Triple E Produce Corporation (hereafter "Triple E") and Ace Tomato Company, Inc., (hereafter "Ace") went on strike on July 24.[4] As will be discussed in greater detail infra, I find that the UFW took over

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[1]The last day of hearing which began on August 31st was not concluded until 3:00 a.m. on September 1, 1991.

[2]One of the issues set for hearing is the identity of the Employer and whether San Joaquin and LCL are separate employers, a joint employer, or a single employer. There is also an issue as to whether San Joaquin is an agricultural employer or a commercial entity outside the ALRB's jurisdiction. When I use the term "Employer," I will be referring to both San Joaquin and LCL. When I discuss them separately I will so indicate.

[3]A11 dates will refer to 1989 unless otherwise indicated.

[4]Contrary to the Employer's contention made throughout the hearing that there was no strike at San Joaquin/LCL in July and August of 1989, I find that there was in fact a strike. The distinctive feature of the strike at San Joaquin/LCL was the withholding of labor from the Employer. (See San Joaquin Tomato Growers, Inc./LCL Farms, Inc.,(1990) 16 ALRB No. 10 where the Board found that a strike did occur. (Id. at p.6-7.)

the strike late in the morning on July 26 at Mariposa Ranch (a Triple E field) when UFW organizer Efren Barajas got up on top of a vehicle with Ildefonso Alvarado, a member of the committee which began the strike on July 24, and announced that since the committee had been unsuccessful in obtaining a wage increase and had now invited the UFW to take over, the UFW would take over the strike beginning immediately.

The UFW filed on August 2 a Petition for Certification seeking to represent the employees of the Employer (described as San Joaquin Tomato Growers, LCL Farms, Inc.,) in a unit to include all agricultural employees of the Employer in San Joaquin and Stanislaus Counties. (BX l.)[5] The UFW served Sam Loduca, the General Manager of San Joaquin, with a Notice of Intent to Take Access (NA) on August 7 and filed the NA on August 8.

The Regional Director determined the eligibility period to be July 23 to July 29 (BX 2.) and described the Employer as San Joaquin Tomato Growers, Inc.,/LCL. Farms, Inc. (See BX 2.) The employees employed during the eligibility period were eligible to vote as well as the economic strikers found to be eligible by the Board in its two decisions on challenged ballots to be discussed infra.

[5]Board Exhibits are noted herein in as "BX". There are 18 Board Exhibits. The Employer introduced 29 exhibits which are noted herein as "EX". The UFW introduced 51 exhibits noted herein as "UFWX".

The election was conducted on August 11 with the following results:

UFW	13
No Union	22
Challenged Ballots	185
Total Ballots	220

Because the challenged ballots were outcome determinative, the Visalia Regional Director conducted an investigation of the challenges and thereafter issued a report on December 5. The Board in San Joaquin Tomato Growers, Inc./LCL Farms, Inc. (1990) 16 ALRB No. 10 decided to hold one of the ballots in abeyance, to sustain the challenges to 7 additional ballots, and to open and count eighty-eight (88) ballots. (See BX 9.) On September 17, 1990 the Board denied the Employer's Motion for Reconsideration. (See BX 10.) Pursuant to the Board's Decision, the Regional Director issued a Second Tally of Ballots dated September 19, 1990 with the following results:

UFW	100
No Union	23
Unresolved Challenged Ballots	90
Total Ballots	213

As the unresolved challenged ballots were still outcome-determinative, the Regional Director investigated additional challenges and issued a Supplemental Report in which he found that fifteen (15) of the challenged ballots had been cast by ineligible persons and that ten (10) other challenges should be

overruled and the ballots counted. The Employer filed exceptions. The Board affirmed the Regional Director's findings and recommendations in San Joaquin Tomato Growers, Inc.,/LCL Farms. Inc. (1991) 17 ALRB No.3. The Board then subtracted the fifteen (15) challenged ballots of the ineligible voters from the prior tally resulting in a final Tally of Ballots which reads as follows:

UFW	100	
No Union	23	
Unresolved		
Challenged Ballots	65	
Unopened Ballots	10	
Total ballots	198	(See BX 11)

On April 3, 1991 the Board denied the Employer's Motion for Reconsideration. (See BX 12.) This final tally indicates that the UFW received a majority of the valid ballots cast.

On August 17, 1989 San Joaquin filed 5 objections to the election and LCL filed twenty-six (26) objections. The Executive Secretary then issued a notice setting certain objections for hearing and dismissing others. (See BX 5.) The Executive Secretary set for hearing the following objections:

1. Whether the United Farm Workers of America, AFL-CIO (UFW or Union), through its agents, representatives or supporters, interfered with the fair operation of the election process by directing against the employees of the Employer a campaign of violence, threats of violence, property damage, intimidation and coercion which, together, reasonably tended to

interfere with the employees' free choice or created an atmosphere of fear and coercion rendering a free choice of representative impossible;[6]

2. Whether San Joaquin Tomato Growers, Inc., is the agricultural employer of the agricultural employees who voted in this election and, if so, whether San Joaquin or LCL or both should be found to be the agricultural employer for purposes of certification. (See BX 5.)

The Board issued an order on June 27, 1991 denying the Employer's Request for Review of the Executive Secretary's Partial Dismissal of Election Objections. (See BX 8.)

All parties were represented at the hearing and given full opportunity to participate in the proceedings, including examining witnesses[7] and filing briefs.

After I discuss certain evidentiary rulings, I will then separately discuss my findings of fact, analysis and recommendation for the 2 separate objections.

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[6]The Executive Secretary's order specifically stated that the setting of these LCL objections regarding alleged coercion was not based upon declarations that describe incidents occurring at Ace and Triple E. The Executive Secretary stated that those declarations did not appear to be relevant to what might have been experienced by San Joaquin/LCL's agricultural employees. The Executive Secretary also noted the failure to comply with Title 8, Cal. Code of Regulations, § 20365 (c)(2)(A) since those objections did not contain the reference by number to the Ace or Triple E declarations submitted in support thereof.

[7]The record includes the testimony of 10 witnesses called by the Employer and 9 called by the UFW as well as the various exhibits referred to earlier in fn. 5.

II. EVIDENTIARY RULINGS

Before discussing specific testimony and making my findings of fact, it is first necessary to reconsider several of ray rulings. The following represents my final rulings on certain evidentiary questions which I addressed during the hearing.

A. Testimony Regarding Subjective Feelings or Reactions

At the hearing I was presented with the question of whether testimony regarding the subjective reaction (for example, fear) of a witness or of other workers about whom the witness was testifying would be admissible. The Employer had cited the California Supreme Court Decision in Triple E Produce Corp. v. The Agricultural Labor Relations Board, (1983) 35 Cal 3d 42, for the proposition that such testimony was not inadmissable hearsay. I reviewed the decision and ruled at hearing that such testimony was admissible.

I have now reconsidered and I am hereby reversing that ruling. Therefore, in reviewing the testimony, I shall not consider testimony that either the witness or other co-workers were afraid or had some other subjective reaction to alleged threats or alleged misconduct. (See Tr. 11:146 where I erroneously allowed testimony that someone was fearful; see also Tr. IX:52-55 for discussion of dangers of allowing testimony regarding subjective reactions.)[8] I hereby take administrative

[8]References to the Reporter's Transcript are noted herein as "Tr. " followed by the volume number in Roman Numerals and the page numbers in Arabic numerals. There are thirteen (13) volumes.

notice of and incorporate by reference herein that portion of ray IHE decision in Ace Tomato Company, Inc., issued on January 15, 1992, which sets forth my analysis of this issue. (See IHE Decision in Ace Tomato Company, Inc., (89-RC-5-VI at pp. 14-16.) See also Triple E Produce Corp. (1991) 17 ALRB No. 15 which affirmed the IHE's Decision that such testimony is inadmissible.)

B. Small Plant Doctrine

During the course of the hearing, I struck certain testimony and declined to hear other testimony unless there was a showing that the alleged misconduct or threats had occurred in front of eligible agricultural employees of San Joaquin/LCL or that there was some basis upon which I could reasonably conclude that the alleged misconduct or threats were communicated or disseminated to eligible employees. The Employer's position appeared to be that there is a presumption that threats made to some workers may reasonably be expected to have been discussed and disseminated among all employees. I hereby take administrative notice of and incorporate by reference herein that portion of my IHE Decision in Ace Tomato Company, Inc., issued on January 15, 1992, which contains my analysis of this issue. (See Ace IHE Decision in 89-RC-5-VT at pp. 10-13.) Based upon my analysis therein I have concluded here as well as in Ace that I will uphold my rulings declining to adopt the presumption of dissemination or small plant doctrine urged by the Employer.

C. The "County Wide" Theory

At pages 56-58 of its Brief, the Employer requests that

I consider testimony of percipient witnesses to alleged UFW violence and coercion regarding spontaneous reactions of workers to such violence and coercion throughout the San Joaquin County area, regardless of the company for which a particular witness was employed. The UFW strongly opposed the adoption of such a novel theory.

First, the Union pointed to the Executive Secretary's Notice Setting Objections for Hearing wherein the Executive Secretary did not rely upon declarations from workers at Ace and Triple E as they did not appear to be relevant to what might have been experienced or observed by workers at San Joaquin/LCL.

Further, this Board has never recognized such a "county wide" theory. Nor do its decisions in Ace Tomato Company (1989) 15 ALRB No. 7 or in T. Ito S Sons Farms (1985) 11 ALRB No. 36 stand for such a "county wide" theory. This Board has always required that alleged acts of coercion or threats must have affected the particular atmosphere at a specific election.

In addition, the NLRB cases cited are not persuasive as support for the theory asserted by the Employer. Nor does the Employer cite any NLRB Decision which overturned an election in such circumstances. For example in ARA Living Centers Company d/b/a/ Poplar Living Center (1990) 300 NLRB No. 119, a case involving the same Employer at 2 different sites, the NLRB found that a union's publicizing of its picketing at one employer location to employees at another employer location did not threaten to restrain or coerce those employees. However, the

Board clearly required a showing that the statements and/or conduct occurred in a context which would have given them a coercive character before the Board would consider setting aside an election based upon such conduct. In other words, the NLRB still requires a showing that alleged threats or coercive conduct actually occurred and that such conduct or threats created a coercive atmosphere at the particular election.

In James Lees & Sons Company (1961) 130 NLRB 290 the NLRB had before it a case clearly distinguishable from the instant matter. There some 10% of a county's work force was employed by James Lees & Sons Company and there was an intensive and pervasive area-wide campaign against the union conducted by a number of civic and business leaders. The intense and overwhelming anti-union campaign made this a very unique situation which the NLRB found to have been unfairly detrimental to the union and to a free election atmosphere. No such atmosphere existed with respect to the San Joaquin/LCL election.

I stated on the record that the Employer had the burden of presenting evidence at this hearing which showed how San Joaquin/LCL workers were coerced or intimidated so that they did not have a free choice with respect to the election of August 11th. (See Tr. II:44-53.) The Employer took eleven (11) days to present its case in chief and had every opportunity to introduce such specific evidence. Not only is the Employer's proposed "county wide" theory unsupported by either ALRB or NLRB precedent, I note that the adoption of this vague "county wide"

doctrine would conflict with the Legislative mandate to certify an ALRB conducted election unless there are "sufficient grounds" to refuse to do so. See Labor Code § 1156.3 (c).[9]

D. Requirement of Union Involvement

I struck certain testimony because such testimony did not indicate that the UFW was responsible for certain alleged misconduct. (See Tr. 11:149-152 where I struck testimony of Gilberto Lopez.) My review of the Board's Decision in T. Ito s Sons Farms (1985) 11 ALRB No. 36 indicates that my ruling was in error. The Board there set aside an election based in part upon strikers engaging in certain misconduct even prior to the Union's involvement. (Id. at p. 19.) Upon reconsideration of my ruling striking such testimony, I have considered such testimony in reaching my decision.

E. UFW Assertions That It Was Denied Due Process

The UFW asserted in its brief that it was deprived of due process because it put on its case in chief using approximately 38½ hours of hearing during a seventy-five (75) hour period including August 29, 30, 31 and 3 hours early in the morning on September 1. I agree that such a schedule put pressure on all those involved in the hearing process. It is also true that I was trying to expedite the hearing given its unanticipated length. However, it was my understanding that the

[9]The UFW correctly points out in its brief that I stated I would not consider evidence introduced in this hearing to affect my decision in the Ace hearing as that record had been closed and there never was a motion to reopen that record. See Tr. II:44-47.

Union attorney desired to finish the case on August 31. Further, I do not recall nor does ray review of the record reflect that the Union attorney requested additional time beyond August 31 in which to present more of its case in chief.

III. ALLEGATIONS OF VIOLENCE, THREATS OF VIOLENCE, PROPERTY DAMAGE. INTIMIDATION AND COERCION.

A. Findings of Fact

1. Jurisdiction

I find that the UFW is a labor organization as defined in Labor Code § 1140.4 (f). I will discuss infra whether San Joaquin and/or LCL or both are agricultural employers under the Act.

2. UFW Responsibility For The Strike

The parties stipulated that I can consider cited portions of the transcript in the Triple E and Ace hearings. (Tr. XII:5-8.) I note that I was the Investigative Hearing Examiner in the Ace Hearing. I have reviewed and read those portions of the Triple E and Ace transcripts cited by the parties in their briefs.

I hereby take administrative notice of the Board's Decision in Triple E Produce Corporation (1991) 17 ALRB No. 15 where the Board finds that a committee of workers (hereafter committee) and not the UFW was responsible for the strike which began on July 24th. (Id at p. 8.) The Board upheld the decision of the IHE who discussed at some length the role of the committee versus the role of the UFW with regard to the strike and found that it was the committee rather than the UFW which instigated

the strike. (See IHE Decision at pp. 7-12).

I take administrative notice of ray IHE Decision in Ace Tomato Company, Inc. and specifically refer to that portion of my decision beginning at p. 19 and ending at p. 47. I found that the involvement of the UFW in the strike did not commence until July 26th in mid-morning at a Triple E field on Mariposa Road when Ildefonso Alvarado (hereafter Ilde as he was referred to throughout the instant hearing) told UFW organizer Efren Barajas that Triple E had again refused to grant the raise to the workers and that the committee was unable to carry on the strike. Ilde also asked Barajas to take over the strike which Barajas agreed to do on behalf of the Union.

The testimony adduced in this hearing has not changed my conclusion in Ace that the UFW did not take over nor was responsible for the strike until mid-morning on July 26th.

For example, Ilde, who was called as a witness by the Employer, expressly testified that it was he, Luis Magana and the committee which began the strike in July 1989 as a continuation of its efforts in 1987 which resulted in a pay increase in 1987. (Tr. XII:163-177.) His testimony on this point was certainly credible in light of his testimony that he did not like the UFW in 1989 or at the time of the hearing. In fact, he said that if the UFW prevailed in this hearing he would find work at another employer. (Tr. XIII:229.) Given his antipathy toward the Union, his admission that it was the committee's strike until July 26 is consistent with my findings

in Ace as well as the Board's findings in Triple E.[10]

Ilde's testimony that on July 26 he got up on top of a van at the Mariposa field and told the assembled workers that Triple E had denied his request for a raise and that Efren Barajas came on top of the van and invited the people to sign cards corroborates the Union's position that the UFW did not take over the strike until that moment on July 26. (Tr. XII:236.) Ilde's testimony is clear that until that moment it was the committee and not the UFW that was in charge of the effort to get a pay raise. Ilde further testified that the first time that he saw UFW flags was that morning on July 26 at Mariposa Ranch when the authorization cards were being signed. Similarly the first time that people other than Barajas and UFW organizer Augustin Ramirez wore buttons with eagles on their shirts was on July 26. (Tr. XIII:22.) I have credited this aforementioned testimony of Ilde and find it is consistent with that of UFW witnesses Barajas, Ramirez and Dolores Huerta. I note that during this part of his testimony, Ilde seemed open, candid and not nervous. Nor was he demonstrating the type of non-responsive answer which permeated much of his testimony.

According to Ilde, it was on July 27 when the UFW recognized themselves as being responsible for the strike as this is the day when groups of captains were sworn. (Tr. XIII:167.)

At this point, a brief discussion of Ilde's credibility is

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[10]As will be discussed infra the Employer did not prove that Ilde was a UFW agent.

in order. Although Ilde displayed a. good recall of events and dates regarding certain events, I note that he could not recall specific dates in 1991 regarding his employment activities as a lead man, including the date the harvest began. I find that his credibility was affected by his intense dislike of the UFW, both during the strike as well as at the hearing. Ilde felt that he was the main man, the one that the people trusted. (Tr. XII:236.) His status as a leader of the workers was confirmed by Bar a j as, Huerta and Maria Robles. (Tr. XII:44-46; XIII:90; XI: 18-19 .)[11] He was clearly very disappointed when the committee of which he was such an integral part failed to get the pay raise which was the object of the strike which began on July 24. At some point Ilde developed an intense dislike for the Union. He even testified that he was at the hearing to fix a mistake that he made. (Tr. XIII:215.) Throughout his testimony it was clear that he had a story to tell and for that reason his answers were frequently non-responsive.[12] Even the Employer's attorney commented that he would like to get a responsive answer from Ilde. (Tr. XII:235.)

Despite Ilde's strong dislike of the UFW and his presence at the hearing to correct a mistake, I find him to be credible

[11]See UFWX 50, an article from the Stockton Record, describing the strike which began on July 24. The article has a photograph of Ilde addressing a group of workers at Morada Lane, a Triple E Ranch.

[12]For examples of non-responsive answers given by Ilde see Tr. XII: pp, 157, 182-187, 202, 211-214, 219, 237-238 and XIII: pp. 73, 238.

regarding the origins of the strike, when the UFW took over the strike and the conduct of the strike by the committee, his co-workers and later by the UFW. For example, when he was testifying that there were no UFW flags or buttons on July 24 at the Perrin Road Ranch field, (hereafter Perrin Road) he was candid, responsive and not nervous. In contrast when he was testifying about the alleged presence of Efren Barajas at Perrin Road on July 24 and that of John Aguirre at 333 Mathews Road on July 24 at 4 p.m. he appeared nervous, frequently had his hand over his mouth, and was looking down to the floor during his testimony. As will be discussed infra, my impression that he was not being truthful during that part of his testimony was corroborated by the testimony of other witnesses who consistently stated that neither John Aguirre nor Efren Barajas were present at Perrin Road on July 24. I note further that Ilde was promoted to a lead man position in 1991 shortly before the hearing commenced. (Tr. XIII:37.)

Although Ilde testified that he did not want any UFW involvement in the strike and had been misled by Luis Magana as to such alleged Union involvement, I credit the testimony of Efren Barajas and Dolores Huerta that Ilde did help the Union by talking to workers and by assisting the Union in passing out authorization cards on July 26 at Mariposa Ranch. (See testimony of Barajas at Tr. XII: 38-46; and Huerta at Tr. XIII: 91-102.)

Although Ilde testified that he was not in favor of the UFW effort to win an election victory, Huerta credibly testified that

Ilde was aware of the election and that he wanted to help the Union win the election. (XIII:105-10S.)

Ilde testified, that he saw John Aguirre (also referred to as Huero) at the Ma thews Road labor camp (located at 333 Mathews Road) on July 21 along with Barajas. (Tr. XII:157.) This was the day that the work stoppage was discussed with the workers. Ilde added that on July 21 he was not aware that Barajas represented anybody. (Tr. XII:157-160.) Ilde stated that at this meeting he and Luis Magana spoke and that people from the committee which he and Magana had formed in 1987 were present. (Tr. XII: 163.) It was at this July 21 meeting that he and Magana asked the workers whether they wanted the committee to continue to represent them as the committee did in 1987 to get a pay raise. (TR. XII:175-177.) According to Ilde, Barajas did not speak at this meeting. (Tr. XII: 178-179.) This account of the July 21 meeting is consistent with that of Barajas and is consistent with my findings in my IHE decision in Ace as well as the Board's findings in its decision in Triple E except as to the presence of John Aguirre.

The next time that he saw Aguirre was on Monday July 24 at the same labor camp at 4:00 p.m. At this point in his testimony his hand was covering his mouth, he was looking down, he was making inconsistent statements and in general he was a non-responsive witness. (Tr. XII:180.) It was at this meeting, according to Ilde, that Barajas spoke and introduced himself as a representative of the UFW. Barajas then presented John Aguirre

as a faithful follower of Cesar Chavez. (Tr. XII:222-225) During the time he was giving this testimony, Ilde was looking down and rubbing the side of his face. He did not appear to me to be a credible witness during this portion of his testimony. Ilde asserted that at this meeting John Aguirre told the workers that he admired their courage, supported their movement but would be unable to directly help since he was studying at a university in Sacramento. During this portion of his testimony his head was still down, he was looking down and did not testify in a credible manner. (Tr. XII:227-229.)

Ilde did testify that Aguirre was present from time to time at the labor camp until the end of October. This testimony would tend to confirm Aguirre' s testimony that he did go to that labor camp in September and possibly October when he worked for ELDF, the Educational Legal Defense Fund which was a service organization headquartered in La Paz near, the headquarters of the UFW. (Tr. XII:230.)

Ilde's testimony regarding Aguirre, even if credited, does not establish that Aguirre was a Union agent nor does it tend to prove that Aguirre engaged in the type of misconduct which could result in the setting aside of the election at San Joaquin/LCL.

According to Ilde, Barajas picked him up at his home early in the morning on July 24 and drove Ilde to the Morada Lane field for a meeting with the committee which began at about 5 a.m. and lasted until 9 a.m. From Morada they went to Perrin Road arriving at about 9:30. Ilde testified that Augustin Ramirez, an

acknowledged UFW organizer, was also present. Both Barajas and Ramirez told Ilde that they would support Ilde and tighten the cinches (belts) on the ranchers. (Tr. XII:187-200.) Both Barajas and Ramirez deny that they were at Perrin Road on July 24. Even were I to credit Ilde that the 2 UFW organizers were present at Perrin Road on the morning of July 24, his testimony does not support a finding that the Union or workers engaged in any misconduct. However, I have decided to credit Barajas and Ramirez rather than Ilde regarding whether they were present on July 24. In addition to the credible denials by Barajas and Ramirez that they were present at Perrin Road on July 24, I note that initially Ilde was not sure whether Ramirez was present at Perrin Road. (Tr. XII:203.) It was only after several efforts and after I noted that it appeared the witness' memory had been exhausted that Ilde finally placed Ramirez in a line of cars leaving Perrin Road on July 24. (Tr. XII:205-206.) In addition this portion of his testimony also included a number of non-responsive answers to counsel's questions. (See, for example, Tr. XII:202, 211.)

There were other Employer witnesses who attempted to place either Barajas, Ramirez or Aguirre at a field prior to July 26. Mario Vargas testified that he recognized Efren Barajas and that Barajas was present on July 24 at Perrin Road. He testified that Barajas had a cap and a button and that Luis Magana, who was also present, did not wear a button. He also testified that someone named Huero appeared at the 777 Mathews Road labor camp on a

Friday, July 29 and said the people should unite with the Union of Cesar Chavez. This was all he recalled about what Huero said. (Tr. I:131-140.)

His testimony was vague regarding how it was he knew Efren Barajas on July 24 and who it was who explained to him the identity of Luis Magana. Nor was there any effective physical description of Barajas. (Tr. I:112-113.) However, on cross-examination he described Barajas as having light brown or blond hair. (Tr. I:166.) I note for the record that Barajas testified at the hearing and he had black hair. On cross-examination Vargas testified that he was some 200 feet away from people who had flags and buttons. (Tr. I:165.) However, on re-direct examination he testified he was 20 feet from Barajas. Vargas throughout both his direct and cross-examination seemed confused and his answers were much too vague to support any findings. Further, his testimony regarding the presence of flags and buttons on July 24 conflicts with the testimony of Ilde who stated that there were no flags or buttons at Perrin Road on that date. Finally, I discount his testimony about the appearance of Huero since he could not recall very much about what Huero said. His testimony seemed staged. In any event he does not claim that Huero made any threats or engaged in any misconduct.

Rodolfo Alvarado claimed that at a meeting of strikers held at the Sierra Vista housing project about 1½ to 2 weeks after July 24 John Aguirre spoke to the workers. Alvarado testified that a man with a full beard and light tan skin whose name he did

not remember and an older man known as Pancho Villa also addressed the group. These 3 individuals asked if anyone was working and referred to the "S.O.B" who went to work and that "they" would deal with them and prevent them from working. Nothing else was said. (Tr. II:56-58.) It was unclear from Alvarado's testimony where he was when he heard these remarks and to which ranch the speakers were referring. The witness asserted that Huero (John Aguirre) said these things and that no one tried to prevent Huero from saying these things. (Tr. II:58-59.) There were some 300 people present at this meeting and some of them were wearing UFW buttons. (Tr. II:61.) However, it is unclear how many of the workers present were employed by San Joaquin/LCL. In any event, aside from Huero mentioning the word "cabron" there were no other threatening words used by the 3 speakers. (Tr. II:64.) Though his testimony was less than clear, it appeared that some of the workers present yelled "scabs" at small groups of people who were passing by the park where the meeting was held and who were being escorted by a foreman. (Tr. II:64-65.) However, there were no threats made by the 3 speakers or by the workers in attendance at the meeting.

Barajas, Aguirre and UFW supporter Luis Maldonado all credibly denied that Aguirre was present at any such meeting held at Sierra Vista before the election and I so find. However, I find that there were no threats or other misconduct engaged in by the speakers who addressed the workers at Sierra Vista during that meeting. Alvarado just does not describe threats or other

misconduct which could be used to set aside this election. It further appears from his testimony on cross that only 3 families who worked for San Joaquin/LCL resided at the Sierra Vista housing project. (Tr. 11:73-74.) Even if some threat or other objectionable misconduct had occurred during this meeting, it is unclear whether any San Joaquin/LCL workers were present. It also appears that Alvarado did not actually enter the park where the meeting was being conducted. It is, therefore, unclear how close he was to the speakers who were in the middle of the park in the midst of the group of some 300 people.

Maria Robles described someone as Huero and claimed that she saw him twice, one time being in a San Joaquin/LCL field in the third week of July during the time of the strike. She stated that Barajas, Magana and Aguirre had all come to the field. She heard Ilde call one of them Huero. She further testified that Huero talked to people and distributed authorization cards. First, I note that she did not testify that any threats were made by any of these 3 individuals. Second, I found her testimony to be vague. During cross, she stated that she was not sure about seeing the person that she described as Huero though she believed that she saw him in a parade and another time in the field. She was unable to say with any degree of assurance when the first time was that she saw Huero or whether it was at the parade or in the field. (Tr. XI:6.) She does remember a parade at Sierra Vista during the strike where she saw Barajas, Ilde, Augustin Ramirez and Huero. The parade occurred about a week before the

election. I find the testimony of Robles too vague and unreliable to support a finding that Aguirre was at a San Joaquin/LCL field before the election. Nor does her testimony describe the type of misconduct which would result in the setting aside of an election.

The UFW presented 6 witnesses whose testimony was relevant to the issue of when the UFW took over the strike. Efren Barajas testified that he went to a San Joaquin/LCL field only once and that was on July 27 when he served Sam Loduca with a Notice of Intent to Take Access (NA) at the Perrin Road field. He was there with Augustin Ramirez and Ilde when he served the NA on Sam Loduca at about 8:00 a.m. (See Tr. XII: 10-11 & UFWX 47, the NA, which indicates it was served on Sam Loduca on July 27 and filed with the Visalia Regional Office on July 28.) Barajas specifically denied that he was at any San Joaquin/LCL field on July 24. Instead he was at Morada Lane on that date in the morning. (Tr. XII: 20.) This is consistent with his testimony during the Ace hearing.

Barajas testified that he first met John Aguirre (Huero) during the second week of the strike. He visited Aguirre' s house attempting to recruit him because he had heard that Aguirre was a good supporter of the Union. Aguirre said that he could not help in the strike because he was enrolled in school and had to complete his studies. (Tr. XII:23.) Barajas again talked to Aguirre on the day of a march in Stockton which occurred during the third week of the strike and requested that Aguirre assist

the Union, but Aguirre repeated that he was unable to do so. (Tr. XII: 2 4.) Barajas' demeanor during this portion of his testimony was very calm and forthright. He spoke with Aguirre later that day at about 2 p.m. at a restaurant in Stockton where Dolores Huerta and others met for lunch at the conclusion of the march. (Tr. XII:25-27.)[13] During the meal Aguirre indicated an interest in being trained for a legal position. Dolores Huerta stated that she could assist Aguirre by referring him to the UFW legal department. Barajas then testified that Aguirre went to work for the Education and Legal Defense Fund (ELDF) during the last days of September or in the first days of October. (Tr. XII:31-31.) It was in this capacity that Aguirre began working with agricultural employees who resided in the labor camps on Ma thews Road after the strike was over. It was not until January, 1990 that Aguirre went to work for the UFW and was under the supervision of Barajas. Barajas emphasized that Aguirre was not involved in the strike. (Tr. XII:31-34.)[14]

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[13]Because some Employer witnesses had described an alleged Union organizer who was allegedly present at San Joaquin/LCL fields before the election without naming the organizer, I asked Barajas to stand back to back with Employer counsel Robert Carrol to compare their heights. It was agreed that Barajas was about 1 inch taller than Carrol and that Barajas would be some 2 inches taller than Carrol when Barajas wore boots. It was further agreed that Barajas was a bit over 5'10" and that Carrol was a bit under 5'10".

[14]Barajas stated that Aguirre did not have any facial hair in July when Barajas went to his house. This testimony is in contrast with some Employer witnesses who claimed that Aguirre had facial hair in July and August when they claimed to have seen him at the labor camps or in San Joaquin/LCL fields prior to the election. I credit Barajas' testimony regarding Aguirre's physical appearance.

Barajas testified on cross that Tide had told him that Sam Loduca was the owner of the company for which Ilde worked. At that time Ilde was a supporter of the Union, would attend meetings and sometimes would talk at meetings. Ilde was part of the committee that started the strike. Barajas also asserted that on the 26th of July when the committee found that they could not obtain a pay raise, Ilde spoke in favor of the Union. (Tr. XII:38-45.) Barajas did not recall ever asking Ilde to take access to a San Joaquin/LCL field, a factor relevant to the question of whether Barajas had somehow authorized Ilde to be a UFW agent. (Tr. XII:45-46.)

Barajas testified that other than the times he went to Aguirre's house and saw him at the march and luncheon he did not see Aguirre between July 20 and August 11. It is important to note that Barajas testified that he was at the French Camp labor camps every day for the 3 weeks following July 26 and he was also at the Sierra Vista housing project. (Tr. XII:55-56.)

In crediting the testimony of Barajas, I note that he generally testified both on direct and cross in a very calm manner, was forthright in his answers and generally appeared to be telling the truth. His testimony in this hearing was generally consistent with his testimony in the Ace hearing which I credited.[15]

Augustin Ramirez testified that he was a UFW organizer and

[15]There was a stipulation at the hearing that Barajas was in charge of the strike and picketing at Triple E, Ace and San Joaquin/LCL. (Tr. XII:9-10)

arrived in the Stockton area from Napa an July 24 in the latter part of the afternoon and that his first contact with the strike was a meeting of the workers on the evening of July 24. During the time that he was in Stockton assisting Bar a j as in conducting .the strike and the election, he drove either his own 1976 Ford Fiesta or a white VW Rabbit belonging to the UFW. (Tr. XIII: 257-258.)[16]

Ramirez testified that he was present on picket lines during the strike from July 24 about every day that picketing occurred until the strike was over. He also testified that he attended all of the workers' meetings after July 24 until the end of the strike and there were meetings on a daily basis. (Tr. XIII:259-260.) He had met John Aguirre at the UFW march in Stockton on or about August 6. He testified in a credible manner that he never saw Aguirre at any picket line or at any meeting. When asked on cross how he was able to remember the 24th of July, he stated it was his wife's birthday. In general he displayed a good memory, was candid in his answers, looked the interrogator in the eye and gave truthful testimony. (Tr. XIII:277.)

Ramirez also testified that none of the other UFW organizers or supporters were wearing UFW buttons on July 24 at the meeting. He did concede that he was wearing a UFW button but

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[16]Ramirez' s testimony describing the 2 cars that he drove in Stockton during the strike is in contrast with the testimony of Ilde who claimed that Ramirez on the morning of July 24 was at Perrin Road driving a light blue Rabbit. This is another example of an error in Ilde's memory which the Employer attempted to portray as being almost infallible. Compare Tr. XIII:257-259 with Tr. XII:203-205.

he was the only one. (Tr. XIII:264.) He also testified that on July 25 Ilde took him to the different fields where the strike was going on and this is how he came to see Sam Loduca though he did meet him on that day. (Tr. XIII:270.)

The next UFW witness was John Aguirre (also known as Huero) who testified that in July he was attending a class at the University of California at Davis in Sacramento involving court interpretation. Consistent with the testimony of Barajas, Aguirre stated that he first met Barajas in late July or early August when Barajas came to Aguirre's home in an effort to convince him to help the Union. Aguirre told Barajas that he was unable to help because he was focusing on his education. It was then that Barajas invited him to a march which was held on August 6. (Tr. XII:74-76.)

At the march Aguirre saw Barajas and after the march he joined Barajas at a restaurant where Dolores Huerta and others were present. Barajas again tried to persuade him to help in the organizing of the tomato workers, but Aguirre repeated that he was unable to assist because of his focus on school. It was then that he and Huerta talked about a possible apprenticeship program in the Union's legal department. Aguirre indicated that this sounded interesting and Huerta said that she would send him an application. (Tr. XII:80-81.) He later filled out the application to work with the ELDF and sent it to La Paz. The application was to work for the ELDF and the Lupe Program which provided social services to farm workers. He testified he

began working for these programs during the third or fourth week of September. I note that this testimony is consistent with that of Barajas and Huerta. It is further corroborated by UFWX 48 which is comprised of a personnel record form indicating that Aguirre began employment as a community worker with the ELDF on September 15, 1989 and an INS Employment Eligibility Verification (form I-9) which was signed on September 20, 1989 by Aguirre's supervisor David Arizmendi of the National Farm Workers Service Center, Inc. I find that UFWX 48 establishes that Aguirre began work as a community worker for ELDF on/or about September 15.

Aguirre then testified that it was not until the second or third week of September that he first visited the 2 labor camps located on Mathews Road (777 Mathews Road and 333 Mathews Road). During his visit then and his subsequent visits he passed out pamphlets regarding the ELDF and the Lupe programs. He went door to door in the camp. He was there a couple of times in September and a couple of times in October. He further testified he never went to the Sierra Vista housing project which is fifteen (15) miles away from the 2 labor camps situated on Mathews Road. Finally, he testified that he never went to any San Joaquin/LCL field in July or August. (Tr. XII:86-88.) During this portion of his testimony, he seemed sincere and looked at the attorney asking the questions during the examination.

During cross, Employer's counsel pointed out some inconsistencies between Aguirre's testimony at the instant hearing with that given a few week earlier at the Ace hearing.

For example, at the Ace hearing Aguirre did not indicate that he had been active as a worker in the UFW's effort to organize Franzia Winery in 1982. Aguirre responded that as he had been illegally fired by Franzia because of his involvement with the Union he had in essence tried to forget about that incident. He claimed that he told nobody about what happened to him at Franzia. I note that during this part of his testimony he looked right at Employer's counsel Carrol when answering and appeared to be very forthright.

The UFW counsel pointed out that his testimony in the instant hearing did not really conflict with that in Ace regarding how he first became involved or knowledgeable about the Union. Be that as it may, I do find an inconsistency of a minor nature. However, I have carefully reviewed the Ace transcripts and compared them with the instant transcripts and I do not find that the inconsistencies undercut his testimony in the San Joaquin/LCL hearing. His explanation of being tired when he was called to the Ace hearing along with his testimony that prior to the instant hearing he had more time to think about and recall these events lead me to believe that the inconsistency does not impair his credibility. I note further that his denial of any involvement with the strikers, other than his attendance at the August 6 march, was corroborated by the credited testimony of Barajas, Ramirez, Huerta and Luis Maldonado. Though Aguirre testified in English at the Ace hearing and again in English during his initial appearance at the instant hearing, I detected

some problems he had understanding questions in English. For that reason when he was recalled to testify later in the instant hearing I had suggested that he testify in Spanish which he did. (See Tr. XII:98 .)[17]

Another inconsistency pertained to when Aguirre learned about the job with the Union. At the Ace hearing he testified he had learned about the job from the newspaper. At the instant hearing he agreed that he did not learn about the Union job from the newspaper. (Tr. XII:113.)

A third discrepancy is related to the question of when he first met Dolores Huerta. During the Ace hearing he testified that he first met Huerta in December of 1989 or January of 1990 through her brother John. At the instant hearing he testified that he first met her after the march on August 6 at the restaurant. When asked to explain the inconsistency, he testified that during the Ace hearing what he remembered was meeting Huerta at her brother's house around the Christmas holiday. It is true, however, that during his testimony at the Ace hearing on this subject he did say that he did not exactly remember. (Tr. XII:138-142.)

Despite these inconsistencies, which involve relatively minor incidents, I find that Aguirre's assertions that he was not involved in the strike are not only corroborated by the testimony of Barajas, Huerta, Juan Manuel Naranjo, Luis Maldonado and

[17]For examples of his difficulty in either understanding or answering in English see Tr. XII:110, 115, 129, 132 and 146.

Augustin Ramirez, but also UFWX 48 which tends to establish that he began working for the ELDF on/or about September 15. I note Ilde's testimony that Aguirre was present at the Mathews Road labor camps after August 11, the date of the instant election. In addition, I was impressed by the demeanor of this witness as he gave his testimony and as he explained the inconsistencies emphasizing that he had more time to think about and prepare his testimony prior to this hearing than he had before the Ace hearing. I was also impressed by the adamancy with which he denied being involved on any picket line regarding the strike or in any San Joaquin/LCL field during the strike. His denial is consistent with his being enrolled in class during that summer.

When he was recalled, he testified in Spanish, and I believe he better understood the questions because of that. He testified that he had very little sleep prior to his original testimony in the instant matter or prior to his being recalled because of his heavy work load with the Union in the Salinas area. He further testified that he had little time to prepare for his testimony at the Ace hearing and similarly had relatively little rest before testifying at Ace. (Tr. XIII:241-247.) He emphatically denied being involved in the strike except for his participation in the August 6 march. (Tr. XIII:247.) During cross he looked directly at Employer's counsel and was very serious and calm when answering questions.

I find that Aguirre was not involved in any picket line activity regarding San Joaquin/LCL or any other agricultural

employer involved in the strike nor was he engaged in any access taking. I further find that the Employer has not proven that Aguirre engaged in any misconduct connected with the San Joaquin/LCL election. I note that Ilde, even though claiming that Aguirre was present at the French Camp labor camp, never claimed that he heard Aguirre make any threats to any workers. (Tr. XII:225-229.) Ilde also testified he never saw Aguirre at the Sierra Vista housing project. (Tr. XIII:47.)

Dolores Huerta testified that she is a First Vice-President of the UFW and she first met John Aguirre in 1989 at a Mexican restaurant following the march. During the meal, Barajas said that the Union should ask Aguirre to work for the Union. Aguirre replied that he was thinking about a career in law at which point Huerta informed him of the apprenticeship program and said she would send an application to him. (Tr. XIII:86-87.)

She next testified that she had not known Ilde prior to the 1989 strike but that she was aware that he was considered one of the leaders of the strike. Barajas introduced her to Ilde at a labor camp sometime before the march. She claimed that Ilde stated that he was glad the Union was involved in the strike. She advised him that strikes are hard to win, and they discussed the possibility of an election. According to Huerta, Ilde's attitude was that of someone trying to be helpful. (Tr. XIII:89-91.) In fact, Ilde said he would help the Union. (Tr. XIII: 102.)

According to Huerta, Ilde was a good leader and Ilde had said he was one of the first leaders of the strike. Ilde

gathered people to come to the meetings and also told workers to help gather UFW authorization cards. Ilde was a good speaker and spoke to large groups of workers. He appeared to be a strong and confident leader and was very articulate. (Tr. XIII:108.)

However, she also testified that during a small meeting when she and Barajas were explaining to Ilde and 1 or 2 other workers the need to get workers involved in collecting authorization cards for an election Ilde showed some impatience and wanted to know exactly when an election could be held. She explained that it could be held faster when a strike was in progress and that an election was a good way to gain the workers the protection of the Agricultural Labor Relations Act (ALRA). (Tr. XIII:95-100.)

Huerta testified that she attended some 5 or 6 rallies at the French Camp labor camps located on Mathews Road. She did not see John Aguirre at any of the rallies. She can not remember Aguirre being involved with the Union during the strike though he may have been. (Tr. XIII: 103-105.) She further testified that Aguirre began working for the Union in January of 1990. Before beginning work for the Union, he worked for the ELDF sometime after the August 6th march. (Tr. XIII: 105.) Regarding John Aguirre, he signed up workers for the Lupe Program. She explained that ELDF are the services given to people who come into the Community Union Program, also known as the Lupe Program. (Tr. XIII:111.) When asked when John Aguirre began signing up workers for the Community Union Program, she said that she wasn't sure but thought it was in the fall of 1989

after the strike. (Tr. XIII:111)

Throughout her testimony Huerta made references to her efforts during the strike to keep the strike non-violent. For example, she said that one of the important reasons to get workers involved in obtaining authorization cards was to keep the strike non-violent. In addition, she asserted that Ilde wanted to beat up Luis Magana, the other main leader of the committee, because Magana was meeting secretly with Roy Mendoza, a leader of another union. Huerta claimed she told Ilde that he could not do that and that she and Barajas as made efforts to prevent Ilde from fighting with Magana. (Tr. XIII:106.)

During cross-examination, though not always remembering specific dates, she had a good memory for events and specifically recalled that elections were held in Triple E, Ace and San Joaquin/LCL in August. She also appeared to be honest with her answers on cross and during both direct and cross she would frequently take time in trying to remember the events before she gave her answers. (Tr. XIII:114.)

Her testimony on cross was consistent with her testimony on direct and that of John Aguirre regarding how it was that Aguirre came to apply and be accepted for the ELDF program. She confirmed that Aguirre had wanted to become an attorney and she told him that one had to join the ELDF program before one could join the attorney apprenticeship program. (Tr. XIII:122.)

I found Huerta to be a very credible witness. For a high ranking Union officer with many responsibilities, she had good

recall about events occurring during a strike conducted 2 years prior to the hearing.

The next UFW witness was Luis Maldonado, an agricultural employee of Ace Tomato during the strike. He testified that he lived at the labor camp located at 777 Mathews Road. Though he remembers seeing John Aguirre at a march originating at a labor camp during the strike, he never saw Aguirre on a picket line nor did he ever see him at the labor camp located at 333 Mathews Road. The next time following the march that he saw Aguirre was at Maldonado's labor camp (777 Mathews Road) where Aguirre talked about discounts for prescriptions. This occurred some 3 or 4 weeks after the strike was over. He testified that he was sure of his testimony. (Tr. XIII:136-140.)

During his testimony both on direct and cross, the witness appeared to be honest, would look either at the attorney or the interpreter during his testimony and had a warm laugh which he displayed on occasion and was consistent with his calm demeanor. He was an older witness who was candid and direct in his testimony. I credit the testimony of Luis Maldonado.

Alvaro Mata, originally subpoenaed by the Employer, testified on behalf of the UFW. He worked during the strike for a company he referred to as Loduca Farms Company. He claimed that Jimmy Chavez gave orders for Loduca. (TR. VIII:145.) Regarding the origin of the strike, Mata testified that Luis Magana asked the workers to go on strike to get a raise for each trip to the tomato gondola. (Tr. VIII:114.) Though he initially

testified that Barajas and Magana came to the fields on July 24, he did not remember if Barajas spoke. He later testified that he did not recall if Barajas was there on the 24th though he believed that he was. (Tr. VIII: 105.) I found that the witness testified in a direct and honest manner. Even though he had some difficulty remembering specific dates, I find that his testimony helps to establish that Luis Magana had a leading role in beginning the strike and prompting the workers to ask for a pay raise. Clearly his testimony does not establish that Luis Magana was affiliated with the UFW. (Tr. VIII:113-114.) Nor did he appear absolutely certain that Barajas was at Perrin Ranch on July 24 with Magana.

Based upon the above-described and credited testimony in this hearing, the record and Board decision in Triple E Produce Corp. (1991) 17 ALRB No. 15 at p. 8, the record and my IHE Decision in Ace Tomato, I find that the committee of workers led by Luis Magana and Ilde was responsible for beginning the strike on July 24 and that the UFW did not take over the strike nor was responsible for the strike until July 26 at about 10:30 or 11:00 am. I further find that John Aguirre was not a UFW agent during the strike or at any time before the election nor was he involved in any capacity in the strike or the instant election. I have credited the reliable testimony of Barajas, Ramirez, Huerta and Maldonado as well as the denial by Aguirre of any involvement with the strike over the testimony by the Employer witnesses.

3. Alleged Incidents of Threats, Violence or Coercion

Since the Employer has the burden of proof to persuade the trier of fact to set aside the election,[18] I shall address each of the main incidents described in the Employer' s Post-Hearing Brief.

(a) July 24-Perrin Road Ranch

The Employer offered the testimony of several witnesses regarding what occurred at July 24 at Perrin Road Ranch (Perrin Road). Mario Vargas testified that he was a tomato picker working for LCL Farms and that the strike began on July 24. He worked that day at Perrin Road arriving at about 7:30 in the morning. He claimed that he saw flags from the Union. However, I note that his description of the flags was very vague. He then incredibly testified that he recognized Efren Barajas who had a button. Also present was Luis Magana, but Magana did not have a button. (Tr. I:107-111.) His testimony was vague regarding how he knew who Efren Barajas was and who had explained to him the identity of Magana. (Tr. I:112-113.) He next testified that thirty (30) or forty (40) of the one hundred (100) people present were wearing buttons. It was Magana who told the people to join the strike for more benefits. Barajas said that the workers should unite and stop work. Vargas further stated that all the people stopped working and that Barajas was talking with the aid of a bull horn about Cesar Chavez and the strike. It is

[18] I will discuss the nature of that burden in the Analysis section.

important to note that he does not state that either Barajas or Magana made any threats when they addressed the workers.

However, Vargas does testify that some of the strikers threatened him in various undefined ways. His description of the threats was too vague to support a finding. Further, none of the strikers who made these threats was identified. (See Tr. I:117-119.) It also appears that whatever threats were allegedly made came from workers who were some 200 meters from where Vargas and other workers were located near the field. (See Tr.I:118-119 & EX l.)[19] At this point his testimony appeared to be confused and inconsistent. (Tr. I:120-121.)

Vargas testified that his son Mario Vargas and his daughter Maria de Lurdes Vargas were with him on the 24th but that they did not work for the remainder of the strike. It is important to note that during his direct testimony he mentioned nothing about his daughter being threatened with rape. (Tr. I:124.)

Vargas stated that Barajas did not threaten him at any time. I further note that Employer witness Ilde testified that no one wore buttons, had flags or made threats on the 24th at Perrin Road.[20]

Vargas also testified that Alvaro Mata, an LCL worker, told

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[19]EX is a hand-drawn map of Perrin Road and shows where Vargas was located in relation to Perrin Road. Please note that there was another Employer Exhibit 1 which was rejected, and I have made as part of the record a list of the 2 rejected Employer exhibits.

[20]Please see discussion of Vargas' testimony regarding the involvement of the UFW at pp. 19-20 supra.

him that some unidentified persons threatened that they would break cars. First, I find that this testimony is vague and speculative. (Tr. I:147-148.) Further, Mata himself testified that he was not threatened at anytime during the strike. Similarly Vargas' testimony that Benjamin Mata stated that he was not going to work because of threats he had received on the 24th was vague hearsay unsupported by any direct evidence. (Tr. I:151-157.)

The remainder of Vargas' testimony failed to establish that any misconduct had occurred. His testimony regarding Martin Mausinae did not establish any misconduct and it turned out that Mausinae had never talked to the witness regarding the strike. Further I struck Vargas' testimony regarding Antonio Mendes since the threats allegedly related in a hearsay manner by Mendes were vague and Mendes worked for Ace Tomato, not San Joaquin/LCL. (Tr. I:158.)

During cross, Vargas testified that the only strikers whom he knew were Magana and Barajas. He did not know the names of any other strikers. Again I find this to be unlikely. (Tr. I:165.) He stated that Barajas had light brown or blond hair. (Tr. I:166.) Barajas has black hair.

Vargas testified that all the strikers had threatened him for an hour and had said that the workers should not continue to work or they would break the cars. (Tr. I:170.) Ilde's credited testimony was that at certain times strikers at the edge of a field would utter generalized threats addressed to those who

were inside the field. However, that type of generalized threat not directly made to individual workers and made from a distance of 200 meters (or even 200 feet) is not the type of misconduct, even if established, which would result in the setting aside of an election. As the UFW was not responsible for the strike on July 24, even if such generalized threats were made to a group of workers 200 meters or feet away from the strikers I do not believe that would be sufficient to set aside the election using the third-party standard.

During much of his testimony, the witness appeared to be confused. I find that his testimony was frequently vague and usually incredible. I do not credit the witness in his efforts to place Bar a j as at Perrin Road on July 24 or his effort to place Huero (John Aguirre) at 777 Mathews Road labor camp on July 29. In any event he did not claim that either Barajas or Aguirre uttered any threats or engaged in any misconduct on those respective dates.

The next Employer witness was Rodolfo Alvarado. When describing events on July 24 at Perrin Road, he does not testify that Barajas was present. Instead he testified that Magana and Ilde were there. According to Alvarado, Huero was also there. Employer' s counsel seemed surprised by this latter answer. (Tr. II:5-6.)

Alvarado had worked for about 8 years picking tomatoes for San Joaquin/LCL. (Tr. II:2.) On July 24 he arrived a little before 8 a.m. and eventually there were some 300 people from his

crew near Perrin Road. Strikers began arriving about 9 a.m. and some wore buttons with an eagle. (Tr. II:5.) The strikers were about 15 or 20 feet away from him and he recognized some of the strikers. The only ones he could identify were Luis Magana and Ilde. Alvarado testified that there was no leader. He then said that 3 people were the leaders. One was Luis Magana whom he claimed had a beard. The other one was Huero and Huero had a full beard. It was at this point that the Employer's counsel was surprised and tried again to have the witness testify about the individuals who were allegedly in charge of the strikers. (Tr. II:6-9.) He testified that Ilde spoke but that Huero did not speak. At this point the witness had not identified Barajas as being present. Later in his direct testimony he describes a fourth man with a full black beard. I find that the witness's testimony as to who was present was inconsistent and vague and would not support a finding. For further examples of his vague testimony see: Tr. II:9-11.

He then testified that Ilde got on top of a car and that Huero and Magana were by the car. It was then that Ilde said that the UFW should take over the strike. (Tr. II:11-13.) Alvarado is the only witness to place Huero at Perrin Road on July 24 without Barajas being present. His testimony regarding events of the 24th are clearly inconsistent with that of the other witnesses and he may be confused and in fact be describing what occurred on July 26 rather than July 24 regarding the point at which the UFW took over the strike.

In unclear testimony the witness, apparently referring to July 24, stated that some thirty (30) strikers representing the UFW uttered vague threats regarding what would occur if workers did not obey there instructions. The threats were apparently about the possibility of a fight or blows. However, the testimony is vague, the persons who allegedly uttered the threats are not identified, and the testimony seemed to be rehearsed. (Tr. II:16-18.) When asked who made the threats, he testified that Ilde said some of those things but that no one else said these things. I note that Ilde credibly testified that he did not make any threats either on the 24th or on any other date. I credit Ilde over Alvarado.

Neither Alvarado nor any other Employer witness described any type of violence occurring on July 24. For example, there is no testimony of assaults, batteries, rock throwing or the throwing of tomatoes.

After finally describing someone who could fit the description of Barajas, Alvarado testified that after Ilde spoke when Ilde was near or on top of the car, a man with a full beard spoke and asked the workers to join the union of Cesar Chavez. This man invited the workers to go to Mariposa Road. Again there is no testimony by Alvarado of any type of violence surrounding this incident. (Tr. II:20.) It appears that he might be describing events that occurred on July 26th rather than July 24 an I find so. In summary, his testimony is too unreliable to support a finding that Barajas was present at Perrin Road on the

24th or the 26th.

Alvarado testified that he went home after leaving the field on the 24th. During cross Alvarado testified that at about 9:30 a.m. on July 24 Jimmy (apparently Jimmy Chavez) gave the order that there would be no work that day. All the workers left and then the strikers left. He was called by his foreman Juan Chavez to go to work on/or about July 31. Alvarado declined as he did not want any problems. After being asked the question again, Alvarado stated that he had heard of some cars being damaged and this is why he did not go to work. (Tr. II:20-27.) However this hearsay testimony was vague and unreliable. (Tr. II:27-28.)

The next Employer witness was Ildefonso Alvarado (Ilde). He testified that he did not hear any threats or comments of any kind nor did he see any misconduct at Perrin Road on July 24. (Tr. XIII: 16.) He further testified that on July 24 at Perrin Road there were no UFW flags and no one was wearing UFW buttons. The first time he saw UFW flags was on July 26 in mid-morning at the Mariposa Road Ranch (a Triple E Ranch) when the authorization cards were signed. He further testified that the first time he saw people other than Barajas or Augustin Ramirez wear buttons with eagles was on July 26. (Tr. XIII:22-23.)

This testimony contradicts that of other Employer witnesses such as Rodolfo Alvarado and Mario Vargas. For reasons already discussed, I credit Ilde regarding his version of what occurred at Perrin Road on July 24. During this portion of his testimony

Ilde seemed open, was candid, and was not nervous. Ilde went on to explain that the workers knew before July 24 that there would be a strike because Ilde had told the workers and supervisors about the strike on July 22. He repeated that he never threatened anyone. He asserted that all the workers on July 24 were waiting for a signal to leave the field. The workers stopped on July 24 in order to get a pay raise. (Tr. XIII:29-30.)[22] Ilde reiterated that no one including the committee, himself, Barajas or Aguirre made any threats on July 24 or at any other time. (Tr. XIII:29.)

Jimmy Chavez, the owner of LCL Farms, testified that no one picked tomatoes on July 24 at Perrin Road because of the work stoppage. He testified that the workers showed up, hung around and then Ilde arrived and asked people to go with him and the workers left the field. (Tr. VIII:69-70.) Very importantly Chavez did not mention that Barajas, Augustin Ramirez or John Aguirre were present at Perrin Road on July 24. The only name that he mentioned was that of Ilde. (Tr. VIII:69-70.) I credit Chavez's testimony on this point regarding events on July 24.

Sam Loduca testified that he recalled 'the work stoppage on a Monday in July (I find this to be the July 24 work stoppage)

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[22]I have not considered Ilde's testimony that it may be that a certain number of workers were afraid. I have already ruled earlier that I will not consider such testimony about the subjective reaction of employees. The rationale for this ruling is even more clear here where Ilde denies that there were any threats or misconduct. This means that there would be no objective basis for workers to be afraid that their cars might be damaged or about the possible consequences should they decide to work.

when he was told there was trouble in the field. He talked to Jimmy Chavez who told him it was a work stoppage. He then testified that 2 men approached him from a crowd of workers. However, his testimony was very evasive at this point and I find that the events he was describing occurred on July 27 rather than July 24. (See Tr. XI:92-97.) I further note that Loduca was unsure whether he was describing events of the first day of the strike. (Tr. XI:97.) Loduca does not describe any threats or misconduct made by strikers.

I find it significant that Jimmy Chavez, who was present on July 24 at Perrin Road, did not testify that any misconduct or threats were made by the strikers or anyone else during the strike. Nor does Loduca who may have been present on July 24 (I find he definitely was present on July 27) testify as to any threats or misconduct on July 24 or at any time during the strike.

Alfonso Madrigal testified that he was employed by LCL Farms in 1989 as a truck driver. He worked during the harvest. (Tr. IX: 49.) On July 24 he went to an LCL field and at about 8:30 a.m. Ilde arrived and began talking to the workers. He told the workers that there was going to be a work stoppage. At that point the workers got into their cars and left the field. (Tr. IX:108-109.) He also claimed that Efren Barajas was talking to the workers. (TR. IX:109.) However, on cross it appeared that he was at least 50 meters away from Barajas and could not hear what Barajas was saying. In addition there were 6 trailers

between him and Barajas as well as about 250 workers. I further note that he could not recall the names of the 3 people with whom he was talking. (Tr. IX: 111-113, 149.)

The UFW called several witnesses regarding events of July 24. First, Efren Barajas denied that he was at Perrin Road on July 24 or at any time other than July 27. (Tr. XII:20.) I also note that I found in my IHE decision in Ace that Barajas spent most of July 24th (including all of the morning) at Morada Lane, a Triple E Ranch.

Augustin Ramirez testified that on July 24 in the morning he was at the Napa UFW office. (Tr. XIII:257-259.) He did not arrive in the Stockton area until the late afternoon or early evening on July 24 and the first thing he did was attend a meeting at one of the labor camps on Ma thews Road. He testified that for the first few days that he was in Stockton he drove his own personal tan 1976 Ford Fiesta. Towards the end of the strike he drove a white vw Rabbit belonging to the UFW. The first time he went to an LCL field was on July 25 when Sam Loduca stated that he would not talk to anyone with a Union button. This was on Tuesday.

Ramirez also testified that at the July 24 meeting in the early evening he was the only one who had a Union button on. (Tr. XIII:263-264.) As previously discussed, I have found Ramirez to be a credible witness. I note that his testimony on cross is generally consistent with his testimony on direct, he was forthright in his answers and did not seem to be holding

anything back.

I have already discussed Aguirre's credited testimony that he never was at Per r in Road on July 24. I note that I Ilde did not place John Aguirre at Perrin Road on July 24. (Tr. XII:214-217.) Although he placed Augustin Ramirez there, I have credited Barajas and Ramirez rather than Ilde and find that Ramirez did not arrive in the Stockton area until late in the afternoon on July 24 and therefore was not at Perrin Road on the morning of July 24. The fact that the NA was served on July 27, not July 24, further confirms my finding that Barajas was not present at Perrin Road on July 24 and that the Union was not involved with nor responsible for the strike at that time.

Manuel Naranjo testified that he worked for San Joaquin Loduca (LCD from 1986 through 1989. Though he did not remember the date or even the month when the strike began, he testified he arrived about 7:00 in the morning on the first day of the strike at Perrin Road. He testified that Barajas was not present at that ranch on the first day of the strike. However, Ilde was present and it was Ilde who took the workers out of the field and who was responsible for the work stoppage. (Tr. XIII:153-155.) When he denied that Barajas was at Perrin Road on the first day of the strike, he appeared to be open and honest and he shook his head no as he denied that Barajas was present. He further testified that on July 24 no one threatened anybody. The reason that workers left was because they wanted a raise and the Employer did not wish to give it to them. Naranjo also claimed

that on July 24 Ilde left the field with Tide's father-in-law. (Tr. XIII:160.)

Finally, Naranjo testified that though he was on the picket line he never saw Aguirre on any picket line nor at any labor camp meeting. He has known Aguirre for years. (Tr. XIII: 161.)

Although he did not manifest a good memory regarding dates or details concerning events during the strike, I do credit his testimony that Barajas was not present on July 24 and his testimony that he did not see Aguirre at a picket line or at a labor camp (the witness lived at the labor camp located at 333 Ma thews Road, one of the French Camp labor camps). (Tr. XIII: 158.) The witness also denied that he was a member of the committee that started the strike. (Tr. XIII:175-176.)[22]

Based upon my findings above, I find further that the UFW was not responsible for activities on July 24 at Perrin Road. I also find that there was no misconduct or specific threats made by strikers against agricultural employees at Perrin Road. It is clear that Ilde and Magana on behalf of the committee organized the July 24 work stoppage and strike and it was conducted in a peaceful manner.

[22]The witness, whose real name is Juan Manuel Naranjo though he was referred to as Manuel Naranjo during the hearing, denied ever having shot at anyone' s van during the strike. He further denied that anyone ever accused him of doing that or that he had a red car in 1989. (Tr. XIII: 178) Although I stated on the record in the instant hearing that I would not allow testimony which came in during this hearing to affect my decision in the Ace case, I thought that I should note his denial for the record.

b. July 26-Perrin Road Ranch

The Employer presented little evidence regarding alleged misconduct on July 26 at Perrin Road. Maria Robles in testimony that was unclear as to whether she was referring to July 24 or July 26 testified that she arrived at Perrin Road as depicted on EX 1 at 7 or 7:30 a.m. and saw about fifty (50) people including people from the Union. She stated that some of her companions were going to make a work stoppage and told workers to support them and not to go to work. She claimed that she knew Efren Barajas and Barajas told her to join with them and Cesar Chavez promising that the Union would give them economic help. (Tr. X:107-108.)

In rather vague testimony she then described speaking with Ilde on the same day at about 8:30 a.m. and asserted that Ilde also told her that she should join with the other workers and that the Union and Cesar Chavez were going to give support during the strike. She said she told Ilde that she could not afford to go on strike. (Tr. X:109-110.)

Later that morning she spoke with someone named Martin who is a worker at LCL. Martin told her that he had been at Mariposa Road, a Triple E Ranch, and that they did not allow the workers to go to work, that they "punched the tires, and broke windows, and even beat the drivers." (Tr. X:lll-112.) However, Martin was never called by the Employer to testify, so Robles' testimony is uncorroborated hearsay. It is too non-specific as to the identity of the perpetrators, and the time and place of the

alleged threats or incidents of misconduct to support a finding. Rabies claimed that Martin asserted that if the workers went to work at San Joaquin/LCL that "they" were going to do the same. (Tr. X:114.) It does not appear that Robles gave much credence to Martin's alleged statements since she testified she told Martin she was going to go to work and she pointed out her car to him, in essence daring him to do something. (Tr. X:114.) This hardly demonstrates a coercive atmosphere.

Interestingly Robles testified that Ilde told her that morning at the edge of the field that the Cesar Chavez Union is good. (Tr. X:109-110.) This tends to corroborate the testimony of Dolores Huerta and Efren Barajas that initially Ilde did support UFW efforts after the UFW took over the strike.

Her testimony regarding events of July 26 as well as events to be discussed infra was generally vague, non-specific and based on hearsay to a large extent. Certainly she did not testify that Barajas or any other Union agent made any threats or themselves engaged in any misconduct on July 26. (Tr. XI:3.) Nor does it appear that Robles was entirely sure of the date (July 26) that she first claimed to have seen Barajas. She was directed to that date on 2 occasions by Employer counsel (see Tr. X:106, 110.) and on cross she conceded that she was "not very sure of the dates." (Tr.XI:4.) I, therefore, credit Barajas' specific denial that he was at a San Joaquin/LCL field other than on July 27 over Robles' admittedly uncertain testimony that she saw him at such a field on July 26. Robles was unhappy that a strike had been called

because she did not wish to lose work and money. She was then mad at Barajas for trying to persuade her why she should join the strike. (Tr. XI:3.) She claims to have remembered Barajas in a San Joaquin/LCL field on July 26 because she was mad at him, Ilde and Martin. I find this testimony to be rather unusual and unreliable. (Tr. XI:13.)

Regarding Huero, she conceded she was not sure about the first time that she saw him and whether it was in a parade or in a field. She did recall seeing him at a parade at the Sierra Vista housing project along with Barajas, Ilde, Augustin Ramirez and co-workers. (Tr. XI: 6-9.) She said she was not sure about seeing Huero but she knows she saw him in a parade and at another unspecified time in a field. (Tr. XI:6.)

She voted in the election and stated that nothing occurred in the fields to change her vote. (Tr. XI: 10.)

When discussing Augustin Ramirez, she claimed that he worked for Triple E or Ace. (Tr. XI:10-13.) This is an example of her unreliable testimony.

During cross she did concede that people went out on strike because they wanted a raise of 10¢. She stated that Ilde was the main one causing the disturbances. (Tr. XI:16-19.)

Finally, she states that she does not like the Union. (Tr. XI:21.)

Ilde testified that on July 26 Maria Robles told him that on July 24 some people from the committee had threatened her. (Tr. XIII:17.) I note, however, that Ilde's testimony regarding

the nature of the threat conveyed to him by Maria Robles was rather vague and Robles did not tell him on July 26 the date that the threat or threats allegedly occurred. (Tr. XIII:17-21.) In addition, Robles did not indicate during her testimony that she had been threatened on July 24 (or at least it was not clear from her testimony that she claimed to have been threatened on July 24). Finally, Ilde asserted that he did not hear any threats or see any misconduct on July 24.

In contrast with Robles' vague and unclear testimony is the denial by Efren Barajas that he was at Perrin Road on July 26. (Tr. XII:10, 20-21.) He further specifically denied threatening to break cars or car windows or puncture tires. (Tr. XII:21.) I credit his denials that he engaged in any misconduct. His denials are consistent with the absence of specific evidence that such threats were made and is consistent with the testimony of Ilde as well as UFW agents and supporters.

Based upon the above-discussed testimony, I find that the Employer failed to prove that any threats or other type of misconduct occurred at Perrin Road on July 26. Maria Robles was not a very credible witness and her testimony conflicts with credited testimony of Barajas and other Union witnesses.

c. July 27

In less than clear testimony Mario Vargas claimed that he had spoken with Barajas on July 26 and that Barajas had told him to go to Marianis to help with the work stoppage. Vargas did not go to Marianis that day and his description of what Barajas said

to him certainly does not amount to a threat. (Tr. I:124.)

Vargas asserts that he saw Barajas again on July 27 at 6:00 in the morning at Marianis. I note that his testimony reflects that he was not comprehending the questions very well and that he appeared quite confused. (Tr. I:124-128.) He testified that at Marianis, Barajas was trying to get workers not to go to work and that he was taking down license plate numbers. Though the witness could not hear what the workers in the cars leaving Marianis said, he assumed that they were going out to work. (Tr. I:127-129.) He then stated that the workers commented that they were going out to work in order to earn more money. (Tr.I:129.) In any event, he did not testify that Barajas made any threats to these workers or engaged in any misconduct regarding these workers.

Although Barajas testified he was present early in the morning at Marianis, I find that he engaged in no misconduct there. There is no evidence that Barajas, even assuming that he wrote down license plate numbers, wrote down the license plate numbers of San Joaquin/LCL employees. Nor is there any indication that he wrote down a substantial number of license plates. Finally, the writing down of license plate numbers in the absence of a coercive atmosphere cannot be used to set aside an election.

Barajas testified that on July 27 he and Augustin Ramirez along with Ilde went to Perrin Road and served Sam Loduca with a NA. (Tr. XII: 10.) He served Loduca because he was advised by

Ilde that Loduca was the owner. (Tr. XII: 11-15; see also UFWX 47 which is the NA and shows that it was served on Sam Loduca on July 27 by Barajas). When Barajas served the NA on Loduca, Loduca threw it to the ground. This testimony is consistent with that of Jimmy Chavez who agreed that Loduca threw the paper on the ground and told Barajas to leave and that Barajas had no right to be there. (Tr. IV:84-85.) Ilde also testified that Barajas served the NA on Sam Loduca on July 27 at Perrin Road. There is no Employer evidence that the UFW or anyone else engaged in any misconduct on July 27 at Perrin Road. Barajas specifically denied that he threatened anyone there on July 27 or at any other time. (Tr. XII: 21.)

I find that the Employer has presented no evidence indicating that strikers and/or the UFW engaged in any misconduct on July 27 at Perrin Road.

d. Unspecified Days

The Employer presented several witnesses who testified about alleged incidents involving threats or other misconduct which occurred on other dates prior to the election. For example, Ilde testified that certain workers reported threats to him. His testimony is, of course, hearsay. He testified that Maria Robles reported that someone threatened to break her car. I've already discussed this and found that the alleged threat, if made at all, was vague, made by a co-worker and was not really taken seriously by Maria Robles.

The next specific threat that he referred to involved

Serafino Gonzales, but the maker of the threat is not identified, the nature of the threat is vague, the date of the threat is not specified and the person threatened, Gonzales, did not testify. (Tr. XIII:190-191.) Ilde then testified about some vague threats allegedly made to Jesus Gamboa. However, Gamboa is a supervisor and there is no evidence that the threat reported by Gamboa was made to Gamboa in the presence of agricultural employees of San Joaquin/LCL. (Tr. XIII: 192-193.)

Ilde then alleges that some eighteen (18) workers from Oaxaca, Mexico may have related threats to him. Again, there is no other testimony about these alleged threats, nor is there identification of the perpetrators, the nature of the threat, the date or time of the threat or the names of any of the eighteen (18) individuals who were allegedly threatened. (Tr. XIII:193-194.) Again I must discount this testimony as well.

He testified that Rodolfo Alvarado told Ilde that Alvarado was threatened and that apparently his family was threatened. (Tr. XIII:194.) There is a lack of specificity regarding the context in which the threats occurred, the identity of the people making the threats, the nature of the threats, the date, time or the place where the threats were made. I will therefore, not rely on this testimony. I further note that when Rodolfo Alvarado testified he did not testify about threats to his family in any specific way.

Ilde then testified that Mario Vargas received a threat

related to his daughter in that some unidentified persons during some unspecified day were "making reference of raping her." (Tr. XIII: 195.) I ruled that this testimony was too vague and prejudicial to be relied upon. I further note that Mario Vargas testified in this hearing and mentioned nothing about a rape threat against his daughter. I, therefore, discount this testimony.

Ilde testified that Manuel Naranjo told him that the members of the committee should go to the house of Gamboa and destroy his van or "give him punches." (Tr. XIII:202.) I granted a motion to strike this testimony since there is no clear evidence that Gamboa ever learned about this threat or that any misconduct against Gamboa ever occurred.. Further, I note that Gamboa is a supervisor and not an agricultural employee.[23]

Alfonso Madrigal testified about a number of vague threats which other workers told him about. He asserted that Austraberto Juarez told him that he, Juarez, was threatened by people from the Union and that was why he was not going to work. (Tr. IX:49-50.) First, this is hearsay testimony about what another worker told the witness. Secondly, the implied message is that Juarez was afraid because of the alleged threats. I have earlier ruled that I would subjective testimony. However, even if this type of testimony regarding the hearsay statements of Juarez were

[23]Ilde stated that he spoke with Gamboa and Gamboa said that he did not deserve threats. (Tr. XIII:205) However, it is unclear what threats he might have been referring to and I am unable to make a finding based on his vague testimony.

admissible, I find the testimony is extremely vague as to content, identity of the individuals responsible for making the threats, time and place of the threats and as to whether other workers were present when the threats were made. Although Madrigal subsequently stated that Efren Barajas and Luis Magana were the ones who had threatened Juarez, I find that these hearsay statements are not reliable. (Tr. IX:62-63.) When I asked for further clarification regarding the nature of the threats, the witness stated that Juarez told the witness that "they" told him that they would break his car and slash his tires if he went to work. (Tr. IX:63.) I find his testimony to be unreliable hearsay.

I have not considered testimony by Madrigal that on the second occasion when he asked Juarez why he did not go to work Juarez said that he was afraid. (Tr. IX:65-67.) I found Madrigal to be an untrustworthy witness who gave stock answers. I thought it was more than coincidental that he asked several workers on at least one or more occasions why it was they were not going to work and the answer was that they were threatened and were afraid. For example, he also asked Alvaro Mata why he didn't go to work and, according to Madrigal, Mata said because he was threatened by people from the Union. However, Mata testified at the hearing that he was never threatened by people from the Union or by anyone else. (Tr. IX:80 for Madrigal's testimony.)

In light of the express denial by Mata that he was

threatened or told anyone he was threatened, I discredit the testimony of Madrigal. (Tr. IX:80.) In addition, Madrigal could not recall more of the conversation and he could not remember when it was that Mata said that Barajas had allegedly threatened him. (Tr. IX:80-86.)[24]

Madrigal testified that he asked his friend Javier Sandoval, an LCL worker, why he hadn't gone to work and that Sandoval told him he had been threatened with a similar type of threat as that related by other workers to Madrigal. However, I find that this threat was vague. Madrigal's testimony regarding this incident was sketchy at best. (Tr. IX:95-98.) At this point I struck his testimony regarding Juavier Sandoval in part because he did not recall if Sandoval told him who made the threat.

I further note that Madrigal was much more hesitant and more nervous on cross than he was on direct. On cross he conceded that Juarez was sometimes on the picket line and that some of his friends told him they were on strike because they wanted a raise. In fact a majority of workers told him that. (Tr. IX:104-105.) I find that it is much more likely that his friends and others with whom he spoke were not working because they supported the strike rather than because they were given vague threats by UFW agents or supporters. He even conceded that though he wanted his

[24]It was at this juncture that I said on the record that I might well reconsider my earlier rulings in the instant hearing regarding whether I should allow testimony concerning the subjective feelings of alleged employees who are not subject to cross-examination. I have ruled in this decision that I was in error in allowing such testimony, and I have not considered such testimony.

friends to go to work (he worked throughout the strike) , they knew what they wanted to do. (Tr. IX:105-107.)

Madrigal admitted that no one ever threatened him during the strike. (Tr. IX:139.) In fact, no one asked him to join the strike. (Tr. IX:118.)

Finally, though he claimed that he saw Barajas at Perrin Road during the morning of July 24 (Tr. IX: 141-142.}, on re-cross he admitted that he did not hear what Barajas said and that there were a number of trucks between him and Barajas as well as a number of workers. (Tr. IX:149.)

I have discounted Madrigal' s testimony without regard to the facts that his uncle, Trino Aguirre, was an LCL supervisor or that Madrigal served as a company observer.

Rodolfo Alvarado testified that on or about July 31 his brother Serafino Alvarado told him that Ilde told Serafino that Serafino should not go to work and that Ilde did not want problems with Rodolfo. Serafino also told Rodolfo that Ilde had said that if Rodolfo worked there would be damage to his car. (Tr. 11:30.) Not only is this unreliable hearsay at a multiple level, but it is contrary to Ilde's credited denial that he made any threats. Rodolfo Alvarado's testimony is much too vague and unreliable to support any finding.[25]

Gilberto Lopez testified that he worked for LCL as a tomato picker in 1989 but did not work on July 24 as several co-workers

[25]Clearly whatever occurred did not affect Serafino regarding the San Joaquin/LCL election as Serafino was a Triple E employee in 1989.

invited him to participate in the strike at Morada Lane, a Triple E field, that morning. (Tr. II:88-89.) Lopez went to Morada Lane for the purpose of supporting the strike and getting a pay increase. (Tr. II:94-95.)[26]

This witness testified that he did not work during the strike because of fear that something would happen to him. This is the type of testimony I shall not consider when preparing this decision consistent with my ruling discussed supra.[27]

Lopez testified that some unnamed co-workers threatened him during the strike. (Tr. II:115-116.) He claims that he was threatened at French Camp (one of the labor camps on Ma thews Road) on an unspecified date. In nonspecific testimony he stated that he thought that if he did go to work "he would be taken out." This is very unreliable testimony and cannot support a finding. (Tr.II:118-122.)

He then testified that some of the strikers on the picket line at Morada Lane uttered some vague threats. It is unclear that they were addressing Lopez, who was one of the strikers on

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[26]I ruled that I would not allow testimony as to what occurred at Morada Lane, not a San Joaquin/LCL field, unless there was a showing that San Joaquin/LCL workers were coerced or threatened there. (Tr. II:103-104.)

[27]There is also a question as to whether this witness was an eligible San Joaquin/LCL employee. He voted challenged but my review of the 2 Board decisions concerning the challenged ballots indicate that they did not resolve his challenge. I further note that I could not locate his name on the eligibility list (BX 7.). However, because I find that his testimony was too vague and unreliable to support any finding of coercion, whether or not he was eligible is not relevant to my discussion of the objection regarding coercion and threats.

the picket line. (Tr. II:121-126.) He repeated that it was his co-workers who were uttering these threats. (Tr. II:137.) After a couple of efforts by Employer counsel to elicit from the witness the name of Efren Barajas as one of the people present at Morada Lane who was allegedly uttering these threats, the Employer attorney actually mentioned the name of Efren Barajas in oral argument in the presence of the witness. I ruled that since the witness understood some English and because I observed that as soon as the Employer attorney mentioned that name the witness signaled that he wanted to say something, I would strike testimony regarding Barajas' possible involvement at Morada Lane. (Tr. II:138-140.) The witness testified that he was threatened by no other persons other than co-workers. (Tr. II:140.)

Lopez testified that Alvaro Mata did not work during the strike because Mata was also afraid that "they" were going to damage his car. (Tr. II:144-147.) In addition, to my ruling that I would not consider the subjective reaction of individuals, I note that the threat described by Lopez was vague and speculative. Further, Mata denied that he had been threatened.[28]

Lopez' s testimony as to threats related to him by other workers is hearsay and hearsay cannot itself support a finding. Title 8, California Code of Regulations, section 20370(d).

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[28]As previously discussed, I have reversed my rulings granting motions to strike for failure to tie the UFW to alleged threats with the UFW. See, for example, my ruling at Tr. 11:149 where I struck testimony regarding an alleged threat to Mata. I have considered this testimony even though not tied to the Union.

Alvaro Mata testified that no one threatened him during the strike and he did not tell anyone that he had ever been threatened. (Tr. VIII: 9 3.) Since I have credited Mata's testimony, I have discounted the testimony of Employer witnesses Lopez and Madrigal who claim that Mata told them that he had been threatened.[29]

Based on the above credited testimony and discussion of events occurring on unspecified days, I find that the Employer has failed to prove that any substantial threats or misconduct occurred on these days.

e. Alleged Threats or Misconduct Occurring in Labor Camps Or Other Locations

The remaining Employer evidence regarding coercion or threats pertained to alleged incidents occurring primarily at labor camps. For example, Maria Robles testified that during the second week of the strike she visited the Sierra Vista Apartments to see Raquel Acevedo who worked for LCL. At about 2 p.m. a number of people were arriving from work. She claimed that some unidentified people from the Union were outside the houses yelling at those who were returning from work that they were

[29]The UFW requested in its Post-Hearing Brief at p. 5 fn. 7 that I take administrative notice of what I observed preceding the appearance of Mata to testify. Initially, the Employer wished to call Mata and asked that the Board enforce a subpoena. See EX 3 & BX 18. The Visalia Regional Office succeeded in persuading Mata to appear at the hearing pursuant to the subpoena. After Employer counsel Robert Carrol spoke with Mata outside the hearing room, Carrol stated on the record that he was not going to call Mata. It was then that UFW counsel observed Mata leaving the hotel where the hearing was being conducted. UFW counsel Lyons immediately left the hearing room and brought Mata back several minutes later where he testified as a UFW witness.

"scabs", "s.o.b.'s" and "starving them to death." These unnamed people said that they were unable to get the raise that the Union wanted because of the strikebreakers. (Tr. X:116-118.)

Robles then testified in a vague manner about an incident that afternoon where 2 unidentified persons took away 2 buckets of tomatoes from someone holding the buckets and threw the buckets on the ground. Robles does not know who these people were nor does she know the identity of the person from whom the buckets were taken. In a demonstration at the hearing it appeared to me that the taking of the buckets was not done in an overly forceful manner even if such an event actually occurred. (Tr. X:120-122.) Robles testified that Rodolfo Alvarado was present when this incident occurred. I note, however, that Alvarado did not testify about this event. Nor does the record indicate whether the person from whom the buckets were taken was even a San Joaquin/LCL worker. It could just as well have been an Ace worker or a Triple E worker.

Her testimony is too vague to permit a finding of coercive conduct. First, I don't believe that Robles was a credible witness, so I doubt-that the incident occurred. Secondly, even assuming that some such incident did occur, the record is devoid of sufficient evidence to indicate how many, if any, eligible San Joaquin/LCL workers observed the conduct and whether or not the person from whom the bucket was taken was an eligible San Joaquin/LCL employee. The incident occurred far from San Joaquin/LCL fields and from the Employer's workforce. I also

discount Robles' testimony that she observed this type of "thing" at least ten (10) times. There is no other substance to this evidence and I find it is too vague and unreliable to allow me to base a finding thereon. (Tr. X:124.)

Robles next testified about alleged threats to Olga Ramirez and a Mrs. Saucedo. However I struck Robles' testimony for reasons set forth in my ruling found at Tr. X:130-132. In short, the hearsay, vague testimony could not possibly support a finding of coercive conduct. Nor could the subjective reaction of these 2 individuals suffice to form a basis for a finding of coercion. Further, for reasons discussed above, I have determined that generally Mrs. Robles was not a credible witness.

Rodolfo Alvarado testified that some 1| weeks after the strike began he was present for a short time at a meeting held at the Sierra Vista camp during which Huero was asking whether those in attendance knew of anyone that was going out to work and that they should talk to them to prevent them from going to work. The witness then testified that Huero stated that "they" would deal with "the son-of-a-bitch" that would go out to work. This was the only thing he recalled Huero saying. (Tr. II:58.) I find that this testimony was vague and there is no indication that the alleged threat was directed towards a specific individual or that any specific worker who worked during the strike was in fact threatened. Alvarado stated that the only bad words used by any of the 3 speakers allegedly representing the Union were "cabron" and "scab". The comments were made at a meeting of labor camp

residents to solicit their continued support of the strike. The witness later stated it was the labor camp residents who were yelling, "scabs", not any of the main speakers.

For reasons discussed supra I have discounted much of the testimony of this witness. His selective memory as to what he recalled being discussed at this meeting was a strong indication of the unreliable nature of his testimony. The meeting of the residents was held in a large park and those in attendance were scattered about. Spouses and children were present. Alvarado did not even go into the park but rather stayed on the street at the edge of the park. (Tr. II:82-85.) The witness agreed that it was a "social gathering." (Tr. II:85.) It further appears from the witness's testimony that a foreman had brought a group of workers from Fresno to work during the strike and it was at this group that other workers yelled the word "scabs" as the group passed by the park. (Tr.II:85-86.) Finally, I have already found that Aguirre was not present at this camp during the strike.

I also note that the witness testified that most of the workers who lived at the Sierra Vista camp were employed by Triple E, not by San Joaquin/LCL. (Tr. II:29; 74.) Alvarado testified that only 3 families consisting of about fourteen (14) workers lived at Sierra Vista and there is no evidence that any of them were present during the incidents discussed above.[30]

[30]I am striking Alvarado's testimony that he was afraid that "they" would damage his car. There is no objective basis for this expressed fear, so it is a subjective reaction which is

I have already discussed the testimony of Gilberto Lopez regarding alleged threats made to himself and Alvaro Mata at the labor camp on French Camp Road. I have found that neither Lopez nor Mata were threatened.

In an enlightening comment on picket line conduct, Ilde testified that frequently people screamed at replacement workers without making specific threats. There may have been nonspecific threats shouted by strikers. In any event a group of captains was formed by Efren Barajas and Augustin Ramirez to control the words used by the strikers. (Tr. XIII:36.) This testimony is consistent with that of Barajas.

Ilde's testimony regarding Maria Robles was also of interest. He testified that Robles was afraid only of not being able to work because of the strike. She had to pay much more rent than many of the strikers. Robles was in the minority of those individuals who wished to work. According to Ilde, Robles was not afraid of the strikers. (Tr. XIII:31-32.)

With respect to the various threats related to Ilde, Ilde testified that he did not discuss any of these threats with LCL workers other than some committee members. (Tr. XIII:239.) It would, therefore, appear that these hearsay threats were not disseminated to more than a handful of San Joaquin/LCL workers.

Dolores Huerta testified that after the Union took over

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hereby stricken. He further indicated that he was walking around talking to Triple E workers for a few minutes during this meeting at Sierra Vista. (Tr. 11:840 His description of his conversations with Triple E workers does not in any way tend to establish an atmosphere of fear or coercion.

the strike she met with Ilde and other workers and told them that it was important for the workers to get involved in obtaining authorization cards in order to keep the strike non-violent. (Tr. XIII: 100.) Huerta also testified that she told Ilde not to beat up Luis Magana when she became aware 'that Ilde was mad at Magana for allegedly speaking with an agent of another labor union. (Tr. XIII: 95-98.) The point of this incident is not that Magana in fact spoke with a representative of another union but that Huerta, as an agent of the UFW, made an effort to reduce the potential for violence.

I find based upon the above-discussed testimony that the Employer failed to prove that any violence, coercion or other misconduct occurred at any labor camp or at any agricultural field. The Employer witnesses were either not trustworthy or their testimony was too vague to support any finding that any misconduct occurred.

B. ANALYSIS

(1) Alleged Incidents of Threats, Violence & Coercion

The burden of proof in an election proceeding under Labor Code section 1156.3(c) is on the party seeking to overturn the election. (TMY Farms (1976) 2 ALRB No. 58; Bright's Nursery (1984) 10 ALRB No. 18; NLRB v. Golden Age Beverage Company (5th Cir. 1969) 415 F.2d 570: NLRB v. White Knight Manufacturing Company (5th Cir. 1973) 474 F.2d 1064, 1067.) The Board has long recognized that this is a heavy burden, requiring an objecting party to come forward with "specific evidence that

misconduct occurred and that this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election." (Bright's Nursery (1984) 10 ALRB No. 18, pp. 6-7; see also Agri-Sun Nursery (1987) 13 ALRB No. 19, p. 5. See also NLRB v. Griffith Oldsmobile, Inc. (8th Cir. 1972) 455 F.2d 867, 871.)

In Kux Manufacturing Co. v. NLRB (6th Cir. 1989) 890 F.2d 804 [132 LRRM 2935], a court of appeals stated that,

> '[B]allots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees. NLRB v. Zelrich Co., 344 F.2d 1011, 1015 [59 LRRM 2225] (5th Cir. 1965). Thus, the burden of proof on parties seeking to have a Board-supervised election set aside is a "heavy one.' Harlan 14 Coal Co. v. NLRB, 490 F.2d 117, 120 [85 LRRM 2312] (6th Cir.), cert, denied, 416 U.S. 986 [36 LRRM 2156] (1974); see also NLRB v. First Union Management Inc. , 777 F.2d 330, 336 [120 LRRM 3437] (6th Cir. 1985) (per curiam) . This burden is not met by proof of misconduct, but ' [r]ather, specific evidence is required showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.' NLRB v. Bostik Div. USM Corp., 517 F.2d 971, 975 [89 LRRM 2585] (6th Cir. 1975) (quoting NLRB v. White Knight Mfg. Co., 474 F.2d 1064, 1067 [82 LRRM 2762] (5th Cir. 1973)) . (Id. at 808 [2939].)

I have found that no UFW principal engaged in any misconduct affecting San Joaquin/LCL workers. In light of the Employer's position that certain strikers and UFW supporters were agents of the Union, it is necessary to briefly review what is required to establish agency. The Board has held that the burden of proof in determining union agency is on the party asserting the agency relationship. (San Diego Nursery (1979) 5 ALRB No. 43, p. 7.)

The Board held in San Diego Nursery that the fact that employees sought advice and met with UFW officials during the organizing campaign is insufficient to establish apparent authority under the ALRA. (Id. at p. 7.) Otherwise, the ability of unions, "to advise and encourage workers wishing to seek union representation" would be hindered because of the potential liability for the misconduct of individual employees and would also infringe upon employees' section 1152 rights to self-organization. (Id. at p. 7.)

Again, the Kux decision is instructive,

> ' Generally, a union is not responsible for the acts of an employee, unless the employee is an agent of the union.' Kitchen Fresh, Inc.. v. NLRB, 716 F.2d 351, 355 [114 LRRM 2233] (6th Cir. 1983). The conduct of pro-union employees will only be attributed to a union where the union has ' instigated, authorized, solicited, ratified, condoned or adopted' the conduct. Id. 'The test of agency in [a] union election context is stringent, involving a demonstration that the union placed the employee in a position where he appears to act as its representative; it is not enough that the employee unilaterally claims representative status.' Tuf-Flex Glass v. NLRB, 715 F.2d 291,296 [114 LRRM 2226] (7th Cir. 1983) (emphasis in original) (citation omitted). Kux Manufacturing Co. v. NLRB (6th Cir. 1989) 890 F.2d 804, 809, [132 LRRM 2935, 2939].)

The Employer here did not establish that the UFW expressly granted authority to any worker or striker. Rather, Efren Barajas' testimony is unrebutted that the only authorized UFW agents besides himself in the San Joaquin/LCL election were Augustin Ramirez and Dolores Huerta. Nor has the Employer established apparent authority which would require some type of ratification or acquiescence from the UFW. (Furukawa Farms, Inc.

(1991) 17 ALRB No. 4, pp. 15-18.)

In Kux, a union organizer had employees form an In-plant Organizing Committee (IPOC) for the purpose of soliciting union authorization cards and persuading employees to vote for the union. The committee members solicited support for the union at work and attended organizational meetings where they assisted the union organizer in answering employee questions. In addition, the organizer told workers that they could contact one of the committee members if they could not reach the organizer. Some committee members made threats of job loss once the union got in as well as physical threats. However, the court affirmed the Board's ruling that since membership in the IPOC was open to all interested employees and its sole function was to distribute information and solicit authorization cards, the IPOC members had so few responsibilities and such limited authority that no one would mistake them for agents. (Id. at p. 29-39.)

Similarly, after the Union took over the strike late in the morning of July 26, some members of the committee then became UFW supporters and helped to gather support for the Union regarding the strike and, presumably, for the election. There is no substantial evidence that Barajas authorized the strikers to be in a position where they would appear to be representatives of the Union. Nor is there evidence that Barajas or other Union agents ratified, condoned or adopted the conduct of the strikers.

In Kux, the company also argued that an employee who was not a member of the IPOC was an agent of the union because he was

so active and vocal in his support for the union. The court held, however, that there was no evidence that the union organizer ever authorized this employee to speak on behalf of the union, nor was there evidence that he endorsed any of the employee's statements or that he even knew that the employee was making such statements. "Evidence which merely shows that an employee spoke and acted in support of unionization on his own initiative does not demonstrate agency status."
(Id. at p. 2940.)

In a recent decision, this Board has found pickets who are supporters not to be union agents. (Triple E Produce Corporation (1991) 17 ALRB No. 15.) The facts in Triple E are very similar to the ones in the instant matter. There was a strike situation which was the product of independent employee action implemented prior to the intervention of the UFW. As was the case with Triple E, the strike at San Joaquin/LCL included picketing, epithet calling, and demonstrations of hostility toward replacement employees. It is also accurate that when engaged in picket line activities, the striking San Joaquin/LCL employees were acting in the same manner basically as they had prior to the involvement of the Union. And, some of the pickets, like the Triple E pickets, did wear UFW buttons and carried UFW flags after the Union took over the strike.

In Triple E, the Board held that "the pickets comprised a [1] large and amorphous' group whose members were not necessarily viewed as Union agents by nonstriking employees." Campaign

activity alone does not establish the requisite close connection with the Union. (Certain-Teed Products Corp. v. NLRB (7th Cir. 1977) 562 F.2d 500, 509-510 [96 LRRM 2504].)" (Id. at p. 8; see also Pleasant Valley Vegetable Co-Op (1982) 8 ALRB No. 82 where the Board stated it would not base a finding of agency on weak evidence because "the consequences of Union agency by ' apparent authority' often are contrary to the self-organization rights guaranteed under section 1152 of the Act." Id. at pp. 7-8; see Agri-Sun Nursery (1987) 13 ALRB No. 19 at p. 6; Matsui Nursery, Inc. (1983) 9 ALRB No. 42 at p. 4.)[31]

In Stripco Sales v. NLRB (7th Cir. 1991) 137 LRRM 2544, the court of appeals rejected an employer's claim that a union had engaged in intimidation and coercion of workers by vandalizing the automobiles of a bargaining unit employee who refused to sign a union card and a supervisor. Both individuals told other workers that the union was responsible for the property damage. The worker's car was vandalized in the employer's unfenced parking lot and the supervisor's car was vandalized in front of his home, both incidents occurring about a month before the

[31]ln Certain-Teed Products Corp. v. NLRB (7th Cir. 1977) 562 F.2d 500, the court held that members Of the in-plant organizing committee who were involved in leafletting and encouraging employees to sign authorization cards were not union agents. There were no specific members of the in-plant organizing committee, and anyone who attended a meeting could be a member. In addition, union organizational literature and buttons were available to all employees to take. Nor did the union organizer ask specific employees to solicit cards or leaflets. Although this case did not involve threats but rather related to comments about the waiver of initiation fees, it is instructive for its discussion of union agency. (Id. at pp. 509-510.)

election. However, the employer was unable to persuade the NLRB that there existed a sufficient connection between the vandalism and the union. The court agreed with the NLRB that the union was not responsible for the acts of vandalism and the court upheld the election. (Id. at p. 2548.)

In Kitchen Fresh, Inc. v. NLRB (6th Cir. 1983) 716 F.2d 351, the court of appeals upheld the NLRB's finding that a principal in the in-plant organizing committee was not an agent of the union regarding the circulation of certain rumors. The court states that the party seeking to prove that a worker is a union agent must show that the union instigated, authorized, solicited, ratified, condoned or adopted the employee's actions or statements. (Id. at p. 355.) To clothe an employee with apparent authority to act on behalf of the union, the party seeking to hold the union responsible must show that the employee received from the union sufficient authority to create a perception among other workers that the employee acts on behalf of the union and that the union failed to repudiate or disavow the worker's statements or actions. (Id. at p. 355.) Finding that the principal was not an agent of the union, the court noted that the worker held no formal position with the union. Even though the record established that the worker was clothed with some authority to act on behalf of the union, it appeared that the union disavowed the rumor. (Id. at p. 355.)

At different points in the hearing, the Employer appeared to assert that such individuals as John Aguirre, Juan Manual

Naranjo, Ilde and Luis Magana were agents of the UFW. There was, however, a failure of proof to establish that the Union through Efren Barajas or any of the other Union agents (e.g. Augustin Ramirez or Dolores Huerta) expressly granted authority to any of these individuals or to anyone else.

Nor did the Employer establish that any of the alleged agents had apparent authority to bind the Union. Board precedent is clear that strikers and workers on the picket line do not become union agents without more. (See Triple E Produce Corporation, supra.)

The Employer cites in its brief 2 clearly distinguishable cases for the proposition that the UFW is somehow responsible for the mass actions of its members.

In United States v. International Union, U.M.W. of A. (1948) 77 F. Supp 563, the District Court judge had to determine if the president of the United Mine Workers had violated a court order to halt a strike. The case had nothing to do with an election or whether a union or union agents had engaged in coercive conduct prior to an election. The judge found that the union president had in essence asked union members to strike and could not avoid a contempt citation just because he had not used the word "strike" in his communication to the union members. Further 87% of the workers who walked out were actual members of that union. Here there is no evidence that the strikers were actually union members. Though some had signed authorization cards, the record does not indicate that any paid dues or enjoyed the benefits and

obligations associated with union membership. Therefore, the Union can not be said to have the same control over the strikers as the president of the Mine Workers Union presumably had over his union members.

Similarly, Vulcan Materials Co. v. United States Steel Workers (5th Cir. 1970) 430 F.2d 446 involved a secondary boycott case, not a Board conducted election. Further, there is no evidence that the strikers in San Joaquin/LCL were actually UFW members.

As the Employer has failed to carry its burden to demonstrate that certain named individuals were Union agents, it must now be determined which standard to use to evaluate the conduct of the Union supporters and strikers. Where a party is involved and found responsible for certain activity, a stricter standard will be applied. For example, if the misconduct is attributable to the union, an election will be set aside if it may reasonably be said to have affected the outcome of the election. (See Baja's Place (1984) 268 NLRB 868.) Where, however, as in the instant matter, there is no substantial evidence of union responsibility or complicity, then the Board applies a third-party standard. "The test for setting aside an election because of third-party conduct is whether the conduct was so aggravated that it created an atmosphere of fear or reprisal making employee free choice impossible." (Triple E Produce Corporation, supra; Id. at pp. 8-9.) Both the ALRB and NLRB give less weight to misconduct attributable to union

supporters or workers than to union officials, organizers or agents. (T. Ito S Sons Farms (1985) 11 ALRB No. 36 at p. 10; see also Agri-Sun Nursery (1987) 13 ALRB No. 19; See also State Bank of India v. NLRB (7th Cir. 1986) 808 F.2d 526, 539; NLRB v. Hydrotherm, Inc. (4th Cir. 1987) 824 F.2d 332.

I note that in two recent Board decisions the margin of victory is considered as a factor in assessing whether the election should be set aside. (Triple E Produce Corporation, supra, see IHED at p. 50; Furukawa Farms, Inc. (1991) 17 ALRB No. 4 at p. 33.) Here, the Union enjoyed a large margin victory.

The Employer cites in its brief several cases which should be discussed. In Steak House Meat Company, Inc. (1973) 206 NLRB 28, the union received four votes and no union received three. A 16-year old part-time employee was threatened with death by a co-worker if he voted against the union. The co-worker brandished a knife at the time. A week later and a week prior to the election, the same co-worker threatened the employee again. Several says prior to the election, the young worker who had been threatened was again threatened by another co-worker if the union lost the election. As a result of these threats, the young worker did not vote.

Although none of the threats were attributable to the union, the national board set aside the election because of threats of bodily harm and reprisals directed at a 16-year old employee with the obvious aim of influencing him to vote for the union. The national board found that under the circumstances the character

of the misconduct was so aggravated that it created an atmosphere of fear and reprisal rendering a free expression of choice impossible. (Id. at p. 29.)

In Sequatchie Valley Coal Corporation (1986) 281 NLRB 726, the national board set aside the election based upon third-party conduct which included a threat to a co-worker to "burn him out." The threat was followed within a couple of days by the perpetrator of the threat visiting the homes of the neighbors of the victim bragging about burning out the victim and his wife. The victim of the threats spoke with six other employees about this threat.

Another co-worker threatened the same individual by stating that unless he supported the union, he would "sick" the maker of the threat on him.

Yet another co-worker told the victim that if the union did not get a contract within a couple of months, there is going to be a strike and "that's when the killing will start." The co-worker then elaborated that, "Union people have people in the woods to do that." (Id. at p. 726.)

There were yet other threats of violence including shooting and choking. The union's margin of victory was 31 to 19.

In light of this series of serious threats which were disseminated among a significant number of employees, the national board found that the cumulative effect of these threats created an atmosphere of fear and coercion which precluded a fair

election.

In Teamsters Local 703 (Kennicott Brothers Company) (1987) 284 NLRB 1125, union agents threatened an employee with physical harm and then brutally assaulted the employer's president and its manager in the presence of approximately 15 unit employees and customers. The national board set aside the election even though the incidents of threats and violence occurred three months prior to the election. The union had won the decertification election by a 12-10 margin.

In Sub-Zero Freezer Company, Inc. (1984) 271 NLRB 47, the NLRB set aside an election based on third-party threats of a very serious nature. The threats included threats of physical violence and damage to automobiles. The threats occurred in the context of a significant amount of property damage and the man making the threats was much larger than the two women against whom the threats were made. In addition, the person making the threats underscored the threats when he waited outside the lunchroom on election day, "scrutinizing the voters." (Id. at p. 1523,) Further, many employees were aware of the threats and the election was so close that a change in just one vote would have resulted in a different outcome.

In light of my findings that no Union agent made any threats and that no third party made any threats comparable to the ones discussed in the above-cited NLRB cases and considering the Union's large margin of victory, I find those cases distinguishable and inapplicable to the facts of the instant

matter.

Likewise, the two ALRB decisions cited by the Employer are also distinguishable. In T. Ito & Sons Farms, supra, there were threats of job loss, threats to call the migra (the Immigration & Naturalization Service), and threats made on election day. The threats in Ito had two purposes which were to coerce workers to join the strike and, on election day, to vote for the union. (Id. at p. 16.) The Board found that, "the threats were widespread, directed at a large portion of the voting unit (i.e., nonstrikers), repeatedly made, accompanied by some acts of force, and made during the time workers were waiting in line to vote." (Id. at p. 16.)

In the instant matter, I have found that threats were not widespread, were not repeatedly made, nor were they accompanied by some acts of force. Further, there were no allegations of threats made on election day and I find that none were made on election day or the day before the election. Nor were there any threats to call the migra or that replacement workers would lose their jobs. (Id. at p. 16.) Finally, there was no rejuvenation of threats at or near the time of the election.

In Ace Tomato Company, Inc. (1989) 15 ALRB No. 7, the Board found that incidents of actual, as opposed to merely threatened, violence occurred on the day of the election itself and within the three days leading up to the election. (Id. at p. 4.) The Board pointed to an incident where three days before the election union supporters bombarded the car of a labor consultant with

tomatoes and hard dirt rocks, surrounded it while pounding on it with their fists, and rocked the car as if intending to overturn it. This occurred before a substantial portion of the work force. Further, on the same day strikers bombarded some crew members with hard dirt clods and unripe tomatoes. Some of the workers who were struck with the clods and/or tomatoes actually cried out in pain. At least 150 persons observed this assault. (Id. at p. 6.) Then on the day of the election, a car containing an employer labor consultant was surrounded in or around the polling area by 70 union adherents who attacked the car with hard dirt clods and unripe tomatoes. The car was then rocked by 30-35 of the union supporters. The Board pointed out that these incidents of violence and assaults were witnessed by a very substantial number of employees.

In the instant matter, no such violent conduct occurred. There were no instances of violence or assaults against Employer labor consultants. Nor was there any improper conduct on election day. Indeed, there was no throwing of tomatoes, dirt clods or rocks at any time. There was no damage to vehicles. There was no moving or shaking of vehicles. There were no threats made by Union agents, nor was there any specific threats made by third-parties. There is no credible evidence that any worker was dissuaded from voting in the election. I find that the UFW made efforts to monitor strikers and supporters. Ilde testified that on July 27 Barajas appointed picket captains. Dolores Huerta and Barajas involved workers in soliciting

authorization cards and stressed non-violence. Huerta and Barajas made efforts to prevent Ilde from fighting with Magana.

Unlike the situation in Ito where the Board found that four strikers punctured the tire of a vehicle of a non-striker parked at the edge of the field, I am unable to find on the credited testimony that strikers caused vehicle damage to replacement workers.

Though the above two cases are clearly distinguishable from the instant matter, it is important to note that in both of those decisions the Board used an objective standard by which they evaluated and measured the misconduct. For example, in Ito the Board held that the subjective reaction of the employer's general manager to an assault was "irrelevant to a determination as to whether Vasquez' actions would reasonably tend to coerce the 50 employees who witnessed the incident or those who may have heard about it. (See Triple E Produce Corp., supra, 35 Cal.3d 42.)" (T. Ito & Sons Farms, supra, 11 ALRB No. 36 at p. 15, fn. 14.) In other words, the subjective reaction of a person threatened or otherwise coerced is irrelevant to whether the election should be set aside. (Id. at pp. 10-11.) Similarly, the Board in Ace Tomato Company, Inc., supra, relied on the Ito decision.

The Board's recent decision in Triple E Produce Corporation, supra, where the Board upheld a strike election in a very similar factual setting is clearly applicable precedent. Based upon my findings, the two factual situations compel the same result.

I have further found that whatever misconduct did occur was not in close proximity to a Union presence and was not ratified nor instigated by the Union. I have, therefore, applied the third-party standard to the events discussed above.

Similar to the Board's finding in Triple E Produce Corporation, supra I have found in the instant matter that, "There was no consistent pattern of conduct revived through the election or designed to influence the manner in which employees would vote or whether they ultimately would vote at all. At most, the record reveals isolated and unconnected incidents in which striking employees sought to persuade their replacements to withhold labor in support of the strike." (Id. at pp. 10 and 11, fn. 4.)

I also note that the Union enjoyed a substantial margin of victory in the instant election similar to that found in Triple E.

Application of the third-party standard to the specific findings I have made clearly requires that this election be upheld. There, was no misconduct at Perrin Road on July 24, on July 26, on July 27, or at any other time. Nor did the Employer prove that misconduct occurred at Marianis on July 27 or on any other date. Further, the Employer failed to prove that substantial threats or misconduct occurred on other unspecified days discussed supra. Finally, I have found that the Employer did not prove that substantial threats or other coercive conduct occurred at labor camps during the strike. Even if some limited

type of misconduct did occur, there is no evidence that substantial numbers of San Joaquin/LCL workers observed the incidents or heard about them.[32]

C. RECOMMENDATION

Based upon my findings of fact and analysis, I have concluded that no aggravated misconduct occurred and that the workers were able to freely decide whether or not to select the Union during the election. No UFW organizer or agent made any threats, nor did Union supporters or strikers make threats. There is no evidence that any worker was deterred from voting by a coercive atmosphere. I, therefore, recommend that this objection be dismissed.

IV. Who Is Statutory Employer For Purposes Of Collective Bargaining

A. Introduction

For many years Sam Loduca (Sam or Loduca) was in charge of both San Joaquin and LCL. Although Loduca gave up his stock in LCL in early 1987, he still made key decisions regarding LCL labor relations through the election in 1989. At the time of the election he was a member of the Board of Directors of the Lathrop Farm Labor Center which was and still is as of the date of this

[32]No matter what misconduct may have occurred in Triple E (where the Board upheld the election) or in Ace (where I, as the IHE, recommended that the election be upheld), there was absolutely no substantial misconduct proven involving San Joaquin/LCL workers. Though I have found that no cars were damaged, I note that the NLRB has upheld elections where a union was found responsible for car damage (see Avis Rent-A-Car System, Inc. (1988) 280 NLRB 580) and where unidentified third-parties vandalized cars of a worker and a supervisor (see Stripco Sales v. NLRB (7th Cir. 1991) 137 LRRM 2544.)

hearing the landlord of LCL. When analyzing the relationship between San Joaquin and LCL, it is also important to consider the relationship of LCL with several other entities, none of which have been controlled by Sam Loduca's relatives. These entities include VPL Transport, Inc., SPJ, Lathrop Farm Labor Center, Loduca & Chavez, and a company, L&L Transplant, owned by Sam and Frank Loduca which sold to San Joaquin tomato plants for transplanting.

My review of the record indicates that LCL is not a financially sound business entity. It usually loses money on an annual basis and is unable, without the assent of San Joaquin, to provide pay raises or additional benefits to its employees. On the other hand, San Joaquin has substantial assets, appears to make a profit on an annual basis and is in a much sounder financial position to provide employment for the harvesting employees than is LCL. Even were this Board to find that LCL is a custom harvester, there is no doubt that San Joaquin is the more stable entity upon which to affix the bargaining obligation. For reasons to be discussed infra, I find that San Joaquin is not a commercial operation outside of the jurisdiction of the ALRB.

B. Findings Of Fact

1. San Joaquin Tomato Growers, Inc.

(a) History

San Joaquin was incorporated in I960 or 1961. (Tr. I:76-77.) Though Loduca testified initially that San Joaquin's business was the packing, shipping and selling of green tomatoes

(Tr. 1:10.), it became apparent from the testimony of Jimmy Chavez (Jim, Jimmy or Chavez) that San Joaquin also engaged in fanning activities including the planting of tomatoes on land owned by some of the owners of San Joaquin. (Tr. IX:19-20; VIII:10-12, 76-78; X:50-52.) Chavez testified that LCL provided the workers who did the planting for San Joaquin. (Tr. X:50-52; VIII:77-78.) The use of LCL workers to do some of the planting as well as all the harvesting of tomatoes grown by San Joaquin is additional evidence of the integrated operation controlled by San Joaquin. If the Board agrees that LCL is a labor contractor rather than a custom harvester then San Joaquin is responsible for LCL's harvesting employees.

In 1960 at a time when Loduca was already involved with San Joaquin, San Joaquin entered into an agreement with Loduca Farms, a sole proprietorship owned by Sam Loduca, to harvest San Joaquin's tomatoes.[33] Sam Loduca controlled both San Joaquin and LCL for many years. Whatever negotiations occurred between San Joaquin and LCL from the early sixties until early 1987, when Loduca relinquished his shares in LCL to Jimmy Chavez, were really conducted between Sam Loduca wearing the hat as president of San Joaquin, and Sam Loduca wearing the hat of president of

[33]Loduca Farms was incorporated by Sam Loduca in 1968. (See UFWX 2S3 representing the articles of corporation and minutes of first board meeting of Loduca Farm Labor, Inc. respectively.) Loduca Farm Labor Inc. was later renamed LCL Farms, Inc. (See UFWX 8, 9, & 10).

LCL Farms.[34]

At the time that Loduca retired in 1990 following the 1989 election, the shareholders included himself, Albert Fonseca, Tom Perez, Daniel Perez, Earl Perez and Mike Perez. These individuals were shareholders in 1989. (Tr. I:10.)

During the second time that Loduca testified when he was called as a UFW witness, he conceded that San Joaquin did engage in the growing of tomatoes in Blythe. (Tr. XI:144-146.) This is additional evidence that San Joaquin, in addition to its packing, shipping and selling operation, also engaged directly in growing tomatoes and other farming activities.

LCL also supplied workers to plant on property owned by Tanaka and Dutra. (Tr. VIII:78.) Chavez further testified that LCL in the past provided equipment used for planting including row-tractors and planters. However, at some point in the mid 1980's San Joaquin bought their own row-tractors and planters. For that reason all LCL had been doing in the recent past was to provide labor for the planting. (Tr. IX:18, X:52.) Chavez further testified that none of LCL's other clients from 1985-1990 supplied the planters as did San Joaquin. (Tr. X:17.) This cuts against the Employer's position that LCL is a stand-alone custom harvester with respect to San Joaquin.

Sam Loduca further testified that he paid labor contractor

[34]The nature of negotiations between San Joaquin and LCL are important as they show the complete dominance of San Joaquin over LCL and they will be discussed in more detail in the section on LCL.

Juan Reyes approximately $30,000 in April and May of 1989 to do planting for San Joaquin on property owned by the Perez Brothers or the Perez Trust. (Tr. XI: 154-158.) It appears that labor contractor Juan Reyes does planting work under the supervision of San Joaquin (although Loduca was somewhat unclear as to whether LCL Farms was involved with respect to those 2 months) and that the same labor contractor does harvesting under LCL' s supervision. (Tr. XI:154-158.) The evidence suggests that San Joaquin does more than just pack and ship tomatoes.

San Joaquin also operates a packing shed in Blythe and grows tomatoes in partnership with the Hull Brothers and Haskell Jacobs. They farm approximately 250 acres. In fact, 2 or 3 mechanics and helpers from the San Joaquin shed in the Stockton area also work in the Blythe shed. (Tr. XI:144-148.)

San Joaquin has not had a labor contractor license. (Tr. I:26.) However, the labor contractor license used by LCL Farms is in the name of Jimmy Chavez and Sam Loduca.

In 1989 San Joaquin had contracts with about fifteen (15) growers. These growers did not hire anyone but LCL to do the harvest of tomatoes. San Joaquin hired LCL to do the harvest for these fifteen (15) growers.

Sam Loduca hired Jimmy Chavez, the current president of LCL, when Chavez was 17 years of age, to work for Loduca Farm Labor, Inc. back in the 1960's. (Tr. I:80-81.) Chavez became a trusted employee of Loduca's and became a shareholder in Loduca Farm Labor, Inc. in 1968 and eventually was given Sam Loduca's shares

as well as Vincent Loduca's shares of LCL's stock by early 1987. (Tr. I:9.6.) They maintained a very close relationship even after Sam transferred his shares of stock. For example, I have credited Chavez' s testimony that he immediately notified Sam of the 1987 work stoppage even though Sam was no longer a shareholder or officer in LCL. Similarly, Chavez also notified Sam of the 1989 work stoppage as well as the 1990 work stoppage at LCL.[35] Another example of the close relationship is that LCL, at Sam's request, kept on its insurance policy an employee who had worked for San Joaquin. San Joaquin then reimbursed LCL for payment of the insurance premium. (Tr. XI: 159.)

There are many other examples of the close relationship between Sam and Jimmy Chavez (and between San Joaquin & LCL Farms). LCL leases office and shop premises from Lathrop Farm Labor Center (Lathrop) which is run by Leonard (also known as "Leo") Loduca, Sam's brother. Sam Loduca is a member of the board of directors. It turns out that San Joaquin in 1939 reimbursed Jimmy Chavez for the rent that LCL paid to Lathrop. Although San Joaquin kept some equipment on the premises leased to LCL and used one of the shops, I find that in essence the payment by San Joaquin to LCL is a least a partial reimbursement for the rent LCL pays to Lathrop. This reimbursement

[35]A1though Sam and Chavez attempted to explain Chavez's notifying Sam of these work stoppages on the basis that Sam was president of San Joaquin for whom LCL was harvesting tomatoes, I find that the real reason Chavez notified Sam is because Sam was in control of labor relations for LCL Farms in 1987 and 1989 for all practical purposes. This will be discussed further under the section related to LCL.

demonstrates not an arms length business relationship between San Joaquin and LCL. San Joaquin is clearly very involved in a number of business and labor relation functions of LCL. (Tr. XI:159-161.)

The close relationship survived Sam's relinquishment of his LCL shares to Jimmy in 1987 and endured through the election of August 11, 1939. Further, my review of the record indicates that the close relationship between San Joaquin and LCL was ongoing as of the time of the hearing in this matter.

(b) Income, Expenses & Assets

Sam testified that the assets of San Joaquin were valued in 1989 at approximately 1/2 million dollars. San Joaquin leased the packing shed from the Perez Brothers, who are shareholders in San Joaquin. (Tr. I:50-51.) In addition to packing shed equipment, San Joaquin owned a couple of Peterbilt trucks, an International truck, automobiles and some planters. (Tr. XI:248.) San Joaquin also owned 2 farm tractors and 2 "yard goats" which are shuttle trucks. (Tr. I:48.)

San Joaquin employed 300 packing shed employees including 5 office persons, 4 or 5 mechanics and 2 salespersons. (Tr. I:26.)

San Joaquin's expenses in 1989 in growing tomatoes was $3,769,738.44. (Tr. XI:56; see also UFWX 44a)[36] A review of UFW Exhibits 44(a), (b) , and (c) & UFWX 45 clearly demonstrates

[36]The parties stipulated that the ledger sheets which constitute UFWX's 44(a), (b), (c) represent San Joaquin's expenditures respectively for growing tomatoes, shed expenses, and administrative expenses.

that San Joaquin does several million dollars of business a year and, .as will be seen infra, is a much sounder entity financially than is LCL. I further note the testimony of Barbara Kelley, the office manager of San Joaquin, who explained UFWX 45 and how it represented the dollar volume of sales of tomatoes sold by San Joaquin. I found that, although she did not prepare this document herself, she did copy a ledger pursuant to a UFW subpoena and that UFWX 45 accurately reflects the dollar volume of sales of tomatoes by San Joaquin for the time period set forth on the exhibit. (Tr. XI:137-139.)[37] Based upon my review of UFWX 44 and 45 as well as the testimony of Barbara Kelley, I find that San Joaquin showed a substantial profit for 1989.

(c) Customers and Relationships With Other Entities

Sam Loduca testified that in 1989 San Joaquin had contracts with fourteen (14) or fifteen (15) different growers who owned land where tomatoes were grown. (Tr. 1:22-24.) Most of the agreements were 50-50 deals wherein San Joaquin would advance each of the growers $600.00 an acre and in return would receive 50% of the profits after all costs of growing and harvesting were deducted. (Tr. XI:42-44.) However, from time to time different deals were entered into. He had written contracts with everyone except Tony Dutra with whom he had an oral contract. (Tr.XI:42.)

[37]In my ruling admitting UFWX 45 I specifically advised Employer counsel that I found the figures contained in UFWX 45 to be accurate and that if the Employer disagreed with the accuracy of the amounts therein that I would accept evidence from the Employer indicating that the figures were inaccurate. I note that the Employer failed to come forward with such evidence. (Tr. XI:137-139.)

He had 100% deals in 1989 with Dutra and with Fonseca-Brown. A 100% deal means that San Joaquin would have no money invested in the crop so that either Dutra or Fonseca-Brown could ship with anyone that they might choose. If they shipped with San Joaquin they would be charged for the service. (Tr. XI: 194-195.) However, Loduca later testified that the Dutra deal occurred only in 1989 and was a one-time deal. The same was true with Fonseca-Brown which was in tomatoes but was unique because ordinarily onions would be planted but that particular year the onion crop was lost. It was not a regular deal which was to be repeated. (Tr. XI:195, 266.) There were no 100% deals in 1990. (Tr. XI:266.) On re-direct, Loduca testified that in 1988 San Joaquin had 100% deals with West Side Farms and with Marchini Brothers. I find that those 100% deals were not repeated and they were unique. (Tr. XI:269.) It appears from the record that the 100% deals mentioned above were unique and not regular contractual relationships. It also appears that there were no 100% deals with a particular grower more than one time. In any event, I find that 100% deals with particular growers were not done on a regular basis by San Joaquin. I find, therefore, that San Joaquin is a agricultural employer, not a commercial employer and is subject to the ALRA.

Sam Loduca described the business relationship between San Joaquin and VPL, a corporation owned by his brother, Vincent Philip Loduca. San Joaquin hired VPL to haul its tomatoes. (Tr. XI: 161-162.) A review of UFWX 46(b) shows a check made out

to V. P. Loduca dated October 9, 1989 and signed by Sam Loduca representing a payment of $11,377.60 for hauling tomatoes during a 1 week period. This evidence indicates the close family connections between different entities owned by the Loduca family and utilized in some manner in the tomato operation. Though they are separate legal entities, it appears that all these entities work closely together to grow, harvest, haul and sell the tomatoes.[38]

Testimony by several witnesses indicates that San Joaquin representatives spent substantial time in the fields of the 14 or 15 growers during the harvest season. For example, Loduca testified that Frank Tenente, San Joaquin's field manager, spent 100% of his time in the fields between June and November, the harvest period. (Tr. 1:52-56.) Loduca testified that he would meet with Tenente once a week during the harvest to discuss the progress of the tomatoes, farming practices including such things as irrigation and spraying, and other matters. Either Tenente or Loduca would call the farmers if there were problems. Sometimes they would call just to keep in touch. Further, Tenente did speak with LCL. (Tr. I:55-56.) Tenente was responsible for signing contracts and maintaining personal contact with the

[38]UFWX 46 (a) and (b) include checks payable to, among others, growers with whom San Joaquin has 50/50 deals. In part, the checks help to establish that San Joaquin is an agricultural employer. Some of the checks also help to establish the interconnected family operations which are controlled by San Joaquin. For example, Sam's brother, Frank Loduca, runs the shed in Blythe. (Tr. XI:144.) For additional reasons why these exhibits were admitted see: Tr. XI: 167-168.

various growers. Tenente would schedule when the growers would. plant their tomatoes and he called the shots on pre-planting, including watering. (Tr. I:52-53.)

Loduca would "occasionally" drive by different fields to see if Chavez and LCL were doing a good job harvesting.

He would even call Chavez and tell him to "straighten out". (Tr. I:23-26.) In addition, San Joaquin would tell LCL which fields to pick. (Tr. I:24.) Loduca further testified that he would fire LCL if Chavez did not do a good job. (Tr. I:26.) Loduca also claimed that San Joaquin had no role in disciplining LCL employees. It was Chavez who would hire the labor contractors including Reyes. San Joaquin would pay LCL but would not pay the contractors used for harvesting directly. (Tr. I:28.) Though San Joaquin carried a 10 million dollar insurance policy, there was no insurance paid for by San Joaquin to cover mistakes made by LCL in the harvest. (Tr. I:29.) Loduca referred to LCL as a custom harvester. Loduca also testified that he would coordinate with Tenente regarding how many fields would be picked and when the picking would occur. (Tr. I:94-95.) Regarding Loduca's control or supervision with respect to LCL, Loduca did concede that he would tell Chavez if the tomatoes were right and if they were not that Chavez would have to take care of it. (Tr. I:100.)

Frank Tenente testified that during the harvest he would see Jimmy Chavez all the time. He reviews the rows and tells Jimmy what color and size tomatoes San Joaquin wants. Its

Jimmy's responsibility to make sure that the proper tomatoes are selected. (Tr. VII:62.) Tenente claimed that he never spoke with LCL workers but that he only spoke with Jimmy regarding the quality of the pick. He referred to Jimmy as a contractor. (Tr. VII:64.) I note that Tenente appeared to be quite nervous during this part of his testimony and that his voice was breaking. He clearly did not want to be testifying. Tenente further claimed that he did not in 1989 talk with LCL's foremen. Again I was not impressed by his credibility during this testimony and note that he was looking down and appeared to be very tense. (Tr. VII:84.) In short his demeanor was not trustworthy. Tenente also claimed that he never told Jimmy Chavez that he had a problem with tomatoes picked or talked to a foreman regarding the color problem. (Tr. VII:84-85.)

The testimony of Jimmy Chavez, which I generally credit, regarding Tenente's participation in the harvest conflicts somewhat with that of Tenente. For example, Jimmy testified that usually Tenente tells him which tomato fields to pick and when to pick them. Tenente goes by the fields, sees how they are looking and determines if any tomatoes are being left behind and if the color is okay. If Tenente had problems he sometimes spoke to foreman Aureilo Lopez and would tell Lopez that workers were leaving tomatoes behind. Tenente would also speak to Juan Chavez the same way (Chavez is also a supervisor for LCL), and Tenente would sometimes tell Jimmy what to do if he saw something wrong. (Tr. IV:68-75.) This credited testimony indicates that Tenente

exercised somewhat more control over the daily harvesting than Tenente or Sam would concede.[39] There were additional discrepancies between the testimony of Tenente and Chavez regarding the work stoppages in 1987 and 1989.

San Joaquin/LCL employee Alvaro Mata testified that the employer is Loduca. Mata stated that Chavez gives orders for the Loduca Company. (Tr. VIII: 107-115.) Although I do not find that Mata saw Sam Loduca on a daily basis in the fields during the 1989 harvest, I do credit his statement that it was his impression that Loduca was running the operation. Employer witness Alfonso Madrigal testified that Sam Loduca came to the field twice a week in 1989 and spent time with Madrigal's uncle, Trini Aguirre, in the fields. (Tr. IX:133-235.) This testimony is consistent with that of Mata and carries weight since Madrigal knows Sam Loduca. Trini Aguirre is a foreman for LCL. (Tr. III:108-116.)

Even Employer rebuttal witness Ilde testified that San Joaquin tells the supervisors of LCL each day what color and size of tomatoes to pick. (Tr. XIII:37-39.) Finally, agricultural employee Juan M. Naranjo testified that in his view Loduca and LCL are the same. At the very least this perception of workers and supervisors that Loduca runs LCL means that the transfer of

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[39]I generally found Jimmy Chavez to be a candid and honest witness. He manifested a great deal of patience over his several days of testifying. There were a couple of occasions, however, regarding important questions pertaining to control of labor relations where I found that Chavez was not as forthright as he ordinarily was.

ownership of LCL from Sam Loduca to Jimmy Chavez was not publicized. In fact, Chavez testified that he made no effort to advise anyone of the transfer of stock which gave him control of LCL. Both Sam Loduca and Jimmy Chavez testified that there were very few negotiations between San Joaquin and LCL regarding the specifics of the agreement by which San Joaquin hired LCL to do all of its tomato harvesting. This is not surprising since from the early 60's until 1987 Sam Loduca was in charge of both corporations even assuming that Jimmy Chavez began to exercise more control of the LCL operation in the early 80's. One would not expect Sam to enter into lengthy negotiations with himself.

According to Loduca, in 1989 San Joaquin had an oral agreement with LCL requiring LCL to do all the harvesting and furnish all the equipment. Chavez had insurance and was liable for everything up to delivering the tomatoes to the roadside. San Joaquin would designate the fields to be picked and how many loads would be picked from each field. (Tr. I:18-19.)

Loduca testified that LCL receives a flat fee per ton and has the risk of loss until the tomatoes reach roadside. (Tr. I:22.) Sam testified that the first agreement between San Joaquin and LCL, like all the others, was oral. It was entered into in 1960 when Sam did the harvesting as owner of LCL's predecessor. (Tr. XI: 66-67.) When asked if he and Jimmy Chavez ever negotiated any agreement, he answered yes and that they had negotiated once or twice. However, it appears that one of those examples of negotiation involve the purchasing of equipment when

Sam told Jimmy to buy San Joaquin equipment since Jimmy was also buying equipment. It had to do with Army G.I. trucks. He did not remember if Jimmy charged him anything for buying the trucks or if there was a charge or commission paid by San Joaquin to Jimmy. (Tr. XI:70-73.) This is an illustration of the less than arms-length relationship between San Joaquin and LCL.

The next example of a negotiation according to Loduca was in 1983 or 1984 when Sam and Jimmy Valente (then a shareholder in San Joaquin) negotiated a price for picking. Sam did not remember what anyone said during the negotiations and all he knew was that they came to an agreement. His memory was very spotty regarding this negotiation. (Tr. XI:74-75.) Again, at that time Sam was in charge of LCL as well as San Joaquin.

The only other time that he and Jimmy negotiated was when the general industry raised the price paid per unit and Jimmy had to come to him for more money to be able to pay his workers a going wage. (Tr. XI:76-77.)

Another factor indicating the close relationship between LCL and San Joaquin over the years is the fact that the agreement between the two was oral rather than written. I note that the vast majority of San Joaquin's contacts with its growers were written except for the one with Dutra.

Jimmy Chavez testified LCL was paid about $60.00 per ton by San Joaquin. (Tr. VI: 2-3.) The terms were first agreed to back in 1972 or 1973. LCL would supply the labor and equipment for the harvest. The only persons present then were Sam Loduca and

himself. The negotiation was conducted in a joint office shared by Vincent Loduca, operating as a trucking firm and LCL. (Tr. VI: 4-5.) There was also an understanding that if LCL had to pay a higher wage San Joaquin would reimburse LCL. (Tr. VI:6-7.) The only time that LCL was not reimbursed for some extra expense was when unemployment went into effect and social security was increased in a particular year. San Joaquin did not reimburse LCL for the extra wage costs that year. (Tr. VI: 8-9.) This occurred before Sam transferred his stock to Chavez. Chavez was clear in his testimony that whenever LCL had to increase wages to workers San Joaquin would reimburse LCL exactly for the amount of the increase. This testimony shows the complete reliance of LCL on San Joaquin. Chavez also testified that the packing house generally sets the harvest rate. (Tr. VIII:81-86.) Chavez estimated that between. 1968 and 1989 he and Sam spent a total of 1½ hours discussing financial arrangements between San Joaquin and LCL. The discussions occurred in 1972 when LCL purchased certain equipment, in the year when unemployment insurance came in, in 1987 when a pay raise was granted to workers and in 1990 when a pay raise was granted. He claimed that there was no discussion in 1989. (Tr. VIII-.87-89.) In fact, when the time spent during each of these four so-called negotiations is added up it totals approximately 37 minutes. (Tr. VIII:88- 89.) I find that there were no arms-length negotiations between Sam and Jimmy Chavez regarding the price paid per ton and that San Joaquin basically did what it chose to do. I further find that

San Joaquin absorbed any pay increase which had to be paid due to higher wages being paid by Ace Tomato and Triple E Produce. (Tr. VI:6-10.) I also note that at this juncture Chavez was taking more time to answer these key questions as he realized how crucial they were to a determination of the identity of the employer. His demeanor was also different than it was on other days during which he testified. I note that he appeared to be under severe pressure and at times his mouth moved although he was not really speaking. This did not happen on other days on which he testified.

The other important subject regarding labor relations concerns whether it was San Joaquin or LCL which decided whether or not to give pay raises in 1987, 1989, and 1990. This will be discussed infra under the section pertaining to LCL.

2. LCL Farms, Inc.

(a) History

Sam testified that what is now LCL was incorporated in 1968 and the incorporators were Sam, his brother Vincent Loduca and Jimmy Chavez. He claimed that LCL was a custom harvester since 1968. (See Tr. I:10-13 and UFWX 2, 3, 7, 8 & 10 which reflect the incorporation of Loduca Farm Labor, Inc. in 1968 and its name change to LCL Farms, Inc. in 1973.) Both Sam and Jimmy refer to LCL as a custom harvester. (Tr. I:11-12; III: 11-12.)

Jimmy testified that certain former San Joaquin workers came over to work for LCL including some supervisors and a foreman.

(Tr. III:108-116.) Sam was president and had 75% of the stock, Philip Loduca, was vice-president with 12½%, and Jimmy was secretary/treasurer with 12½%. Jimmy testified that from 1968 to the date of the hearing he was basically in charge of running LCL Farms. Philip Loduca relinquished his shares sometime in the early 1980' s and Sam Loduca relinquished his shares in early 1987. (Tr. 111:12-14.) See also UFWX 4 showing the cancellations of Sam's 15,000 shares on January 1, 1987 and UFWX 5 showing that Vincent Loduca's 2,500 shares were canceled on November 7, 1984.

Jimmy testified that he did not pay any money for the shares he received from Philip and Sam. Rather he gave his time over a number of years. Jimmy testified that Sam felt that Jim had earned ownership of LCL because of the time that Jim put in. In a similar vein Sam testified that Jimmy had worked hard for LCL as well as its predecessor, had handled large payrolls in an honest manner and had helped make LCL what it was. (Tr. 1:44; XI: 206-207.) However, Sam also testified that he had told Jimmy in the early 80's that he did not need the money and that he did not want liability for equipment that was used on the road. (Tr. XI:206-207.) He testified that from 1968 to early 1987 he did not take out more than $10,000 from LCL. At the time of the relinquishment of Sam's shares in 1987, the value of those shares were somewhere in the neighborhood of $50,000 to $60,000. (Tr. XI:206-207.) Philip had drawn money from LCL for only about two years. (Tr. VIII:49-51.) In any event, Jimmy agreed that it

was a "hell of a deal" for Sam and Philip to relinquish their shares in LCL to him. (Tr. VIII:52.) Though I do not doubt that Jimmy worked very hard for Sara Loduca and LCL, it was also clear to me from the record and my observation of the witnesses during the hearing that Jimmy felt indebted to Sam for Sam's generosity. This is corroborated by the fact that Jimmy did vehicle repairs for San Joaquin as well as for a few other businesses including shareholders of San Joaquin without charge. (Tr. IX:21-22; X:16.)[40]

Jim testified that it was his idea to change the name in 1973 so that the Highway Patrol would not harass them as much, (Tr. VIII:57.)

Although Jimmy testified that his control over LCL increased, he conceded that even in the mid 1980 Ts he would always make sure it was okay with Sam until sometime around 1984-1985. (Tr. VIII:58-60.) As will be seen infra, however, Sam Loduca played a key role in deciding whether or not to grant pay increases in 1987, 1989 and 1990 to LCL workers.

LCL is a licensed farm labor contractor. (See UFWX 51 at p. 21.) However, until 1991 the license was issued in the name of LCL Farms and Sam Loduca. (Tr. IV:70.)

It would appear from Jimmy's testimony that one reason that Sam did not receive very much money from LCL Farms is that there was a conscious effort to hide whatever profits LCL might have

[40] Jimmy's testimony that Sam was very generous can also be construed as making it likely that Jim would help out Sam and/or San Joaquin out of gratitude. (Tr. VIII: 54-56)

had. The last time Sam received any money from LCL was in the 1970 's. Jimmy testified that Sam and Jimmy had set up SPJ for tax purposes. The accountant had told them that if LCL showed a profit that Sam and Jimmy could put the money in SPJ to "kind of hide the money in, I guess." (Tr. IV-.53-54.) Jimmy admitted that he and Sam would place LCL profits into SPJ so as to hide the money and avoid taxes. (Tr. IV: 54.) Phil Loduca was also involved. This admission that certain actions were taken for tax purposes serves to undercut the stated reasons for Sam and Vincent relinquishing their LCL shares to Jimmy.

(b) Income, Expenses & Assets

The LCL headquarters and shop are located in Lathrop some fifty-four (54) miles from the San Joaquin headquarters. As previously discussed, the LCL headquarters are rented from the Lathrop Farm Labor Center which is owned by Sam Loduca and his older brother Leo Loduca. (Tr. I:81.) Jimmy testified that LCL did not pay rent to Lathrop but instead paid taxes and insurance and maintained the premises. It appears that Lathrop does not do any other business except rent space to LCL. (Tr. IV:20-22.) See also EX 18 which sets forth expenses incurred by LCL with respect to the premises it rents from Lathrop. Also see UFWX 22 which include the articles of incorporation of Lathrop and a statement by Domestic Stock Corporation filed on May 1, 1986 which shows that Sam is a member of the board of directors. I find that Sam Loduca was a member of the board of directors in 1989.

The insurance policy carried by LCL lists as named insured, in addition to LCL, the Lathrop Farm Labor Center, Inc. and SPJ, Inc. (See UFWX 17.) SPJ is the corporation which was set up for the rental of equipment and as a. means to avoid taxes by LCL. See UFWX 13 which consists of the Articles of Incorporation showing that SPJ Inc. was formed in 1975 by Sam Loduca, Vincent Loduca and Jim Chavez and a statement by Domestic Stock Corporation dated May 27, 1988 indicating that Vincent P. Loduca is the chief executive officer and that Jim Chavez was the secretary. Again as no one factor is itself determinative of the employer question, nevertheless the insurance policy paid for by LCL Farms Inc. which insures Lathrop Farm Labor Center and SPJ shows the very close relationship between the entities involved in the tomato growing, harvesting and shipping operation all of which operations are controlled in some manner by Sam or a member of his family. It is clear that Lathrop, engaging in no other business than renting space to LCL, is one component in what appears to be an integrated operation which includes the growing, harvesting and shipping of tomatoes. I am not suggesting that the existence of one or more corporate entities which are designed to avoid the payment of taxes is in any way illegal. It does appear , however, that several of these reportedly separate legal entities are really part of an overall tomato operation. I also note that neither Ace Tomato nor Triple E Produce use custom harvesters.

Jimmy Chavez testified that a substantial amount of LCL

equipment was purchased from or obtained from Sam Loduca. (Tr. III:18-22.) EX 9 is a listing of vehicles and equipment owned by LCL, by Jim or by a partnership of Garcia & Chavez. This is some of the equipment used in 1989. A review of EX 9 shows that a number of vehicles were given to LCL by Sam in 1968 when Sam was president of both San Joaquin and LCL. I added up the values of all of this equipment as related by Jim Chavez and came out with a figure of approximately $310,550.00. However, I note that the John Deere 48/40 wheel tractor worth $23,000.00 and the John Deere 29/50 wheel tractor worth $18,000 for a total of $41,000.00 are owned by Jim Chavez, not by LCL. Further, the partnership of Garcia & Chavez own twelve (12) International planters, 8 Cramer precision planters at $400.00 each for a total of $3200.00 and 6 Lilliston corn planters at $150.00 each for a total of $900.00. Subtracting these amounts from the value of the property indicate that the total value of vehicles and equipment used and owned by LCL in 1989 equals approximately $263,350.00. I note that it was VPL which owned the tubs used for hauling the tomatoes (Tr. I:71.) and I further note that LCL does not own any tomato harvesting machines.

Chavez testified that LCL owns only three vehicles (2 pickups and a Bronco) which LCL uses in its farming operations. (Tr. IV: 26.) However, LCL uses in its operation a number of other vehicles owned by different entities and individuals including a number of Loduca family members (Tr. IV:26-34). See also, UFWX 17, specifically the sheets of

paper following the blue tab labeled Auto. A review of these business auto coverage form declarations shows that a number of vehicles utilized by LCL and listed on this insurance policy paid for by LCL belonged to a number of individuals including Frank Loduca, SPJ, Inc., Jim Chavez, Jean Chavez (his wife) and Leo Loduca.[41] See also UFWX 11 which is a listing of vehicles registered to LCL.

With respect to the vehicles registered to owners other than LCL listed in UFWX 17, it does not appear from the testimony of Jimmy that LCL reimbursed the owners of these vehicles for their use in the 1989 harvest. (Tr. Vll:49-58.) Further, there is no guarantee that the vehicles not owned by LCL would be made available to LCL in future harvests. And the availability of these vehicles owned by different entities and members of the Loduca family further confirm the very close relationship between these various entities and individuals which undercuts the Employer' s argument that LCL is a stand-alone and independent custom harvester. Even were the GMC Suburban owned by SPJ not utilized in the 1989 harvest, nevertheless it does appear on the insurance policy (UFWX 17.) and it appears that LCL is paying insurance for an SPJ truck even though it was not used in the harvest. (Tr. VII: 58.) Since the name of Leo Loduca appears on the roster of San Joaquin employees as previously discussed in

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[41]In addition to being a director and the executive officer of the Lathrop Farm Labor Center Inc, Leo Loduca is also listed as an employee of San Joaquin. See EX 29 which is a roster of San Joaquin employees at p. 3.

fn. 41, the use or viability of Leo Loduca's vehicles in the 1989 harvest suggests another connection between LCL and San Joaquin. It was here that Jimmy testified that to his knowledge Leo Loduca had no connection with San Joaquin. This is one of the few instances where Jimmy's testimony was not reliable. (Tr. VII:54-60.)

A review of EX 19, a list of vehicles and premiums for 1989 apparently paid for by LCL Farms, shows that the insurance for a number of vehicles owned by other entities and individuals listed in UFWX 17 were apparently paid for by LCL. This tends to establish a less than arms-length relationship between LCL and the other entities and individuals involved.

Chavez estimated that the replacement value in 1989 values of his equipment would be about $400,000. The actual value in 1989 if he had to sell it at a fire sale would be between $175,000 to $200,000. (Tr. III:26.) I find that the value of LCL's assets is substantially lower than the value of San Joaquin assets.[42] LCL does not own any real property. Although San Joaquin does not own the real property on which its shed is located, Sam and his brother Leo do own real property including the land on which LCL has its offices and shed. If the Board concludes that San Joaquin is running an integrated operation which includes VPL, SPJ as well as the Lathrop Farm Labor Center, this would increase the margin between the value of San Joaquin's

[42]I find that Sam Loduca's testimony that the assets of San Joaquin were worth 1/2 million dollars did not include the value of the Blythe shed.

assets and those of LCL.

Although LCL had a few customers other than San Joaquin (Tr. III:16-18.), about 3/4 of its income in 1989 was earned from work performed for San. Joaquin. (Tr. VI:29-30.) There is no question that without income derived from its work for San Joaquin, LCL would have a much reduced work force. Chavez also testified that LCL derived approximately 3/4 of its income from San Joaquin work in 1990. (Tr. VI:30.)

Jimmy Chavez testified that LCL does not make any money. They did not make any money in 1989. When asked if LCL ever makes any money, Chavez replied, "we always show a loss at the end of the year." (Tr. III:102.) Chavez then clarified that LCL always shows a loss on the tax returns. He further clarified that he makes enough money to buy equipment, make his payroll, and pay himself a salary. It's just that he doesn't have to pay taxes. (Tr. III:102.) His payroll in 1989 was $900,000 in wages and in addition he had to pay social security, unemployment and workers compensation. (Tr. III:38, 101.) In 1989 LCL harvested 1,700 acres of tomatoes for San Joaquin employing, including labor contractors employees, from 450 to 500 workers over a period of almost fifty (50) days. (Tr. VI:29-30.) However, San Joaquin reimburses LCL only for direct payroll expenses. (Tr. VI:6-10.) This was pursuant to an oral agreement between San Joaquin and LCL entered into, according to Chavez, in 1972 or 1973 by which San Joaquin stated that if an increase in wages were necessary there would be a corresponding increase in the per

ton rate paid to LCL. (Tr. VI: 4-10.)

Aside from LCL's work harvesting for San Joaquin, the only other company for which LCL harvested in 1989 was Dutra Farms, during which harvest Chavez did employ about 150 workers. (Tr. VI:26-29.) Not only did LCL harvest onions for Dutra, but LCL also did the planting and the cultivation as well as the shipping of the onions. (Tr. VI:26-27.) For its other several customers in 1989, LCL would do things such as planting corn. In those operations it was usually Jimmy Chavez and one other worker who performed all of the operations. (Tr. VI:30-31.) See Tr. III:14-15 for a listing of LCL's other clients during 1989.

Consistent with Chavez's testimony that LCL shows an annual loss, the Employer introduced exhibits for periods ending February 28, 1989 and February 28, 1990 entitled Statement of Income and Expenses. EX 23 for the period ending February 28, 1989 shows income of $2,134,377.76 and expenses of $2,036,924.68 for a net income of $97,453.08. EX 24 for the period ending February 28, 1990 and which presumably covers the harvest of 1989 shows year-to-date income in the amount of $1,865,660.81 and expenses of $1,886,407.61 for a net loss of $20,746.80. These statements are consistent with Chavez's testimony that LCL shows an annual loss at least for the year ending February 28, 1990. Those records combined with the testimony of Chavez does not indicate that LCL is a profit making operation. I further note Sam Loduca's testimony, corroborated by that of Jimmy Chavez,

that Loduca received no more than $10,000.00 from LCL over the course of many years. (Tr. XI:206-207.) All of these factors point to a conclusion that LCL Farms is used as a means to avoid taxes (as is SPJ) and is not a very economically sound business.

The net loss for LCL for the year ending February 28, 1990 reflected on EX 24 is corroborated by Jimmy's testimony that LCL usually shows a loss and by the fact that Sam Loduca took out what appears to be less than $10,000.00 over a period of many years. (Tr. 111:102; XIII:49-51.) Similarly, Philip Loduca, during the many years he was a shareholder for LCL drew money for only a couple of years and the amount was not substantial. (Tr. XIII:49-51.) It appears therefore that LCL usually did not make a profit nor did it pay its shareholders more than a very insignificant dividend.

Over the course of its existence LCL has had to borrow money in order to maintain its operation. Many businesses do borrow money to conduct their operations, but given the net loss for the year ending February 28, 1990, I suggest that it is relevant to take a look at LCL's credit picture. For example, in 1981 LCL borrowed $25,000.00 from Jim Chavez and $25,000.00 from the partnership of Loduca and Chavez. Although it certainly appears that the loans were repaid, it also appears that these loans were necessary for the survival of LCL. Should such loans for whatever reason not be forthcoming then LCL would have a more difficult time surviving. See UFWX 16. I further note that since all 20,000 shares of LCL are now owned by Jim Chavez and

that Sam and Vincent Loduca are no longer shareholders, it may not be as easy for LCL to obtain loans from members of the Loduca family. See UFWX 16 which contains documents confirming that Jim is the sole owner of the shares of LCL and that Jim and members of his immediate family are the officers of LCL.

Again, though not itself determinative, the Valley Commercial Bank turned down LCL for a line of credit in 1989 or 1990. (Tr. VII: 116.) See also, UFWX 27 (which shows that an SPJ account at Valley Commercial Bank was closed), EX 13 (which shows that the same amount of money was deposited in Union Safe Deposit Bank to open a new SPJ, Inc. account) and EX 12 (which states that the LCL account at Valley Commercial Bank was closed on November 28, 1990 for the reason, "Turned down for line of credit.") I find it significant that LCL was turned down recently for a line of credit given the fact the LCL shows a net loss for the fiscal year ending February 28, 1990.[43]

Additional loans were made in 1989 from the partnership of Jim Chavez and Jorge Garcia in amounts of $7,500.00 (see UFWX 30 at p. 2, check No. 706), and $9,000.00 (UFWX 30, p. 5, check No. 743). Though there is no indication that Jorge Garcia opposed these loans and though I find that the loans were repaid, the point is that LCL needs these types of loans to survive and this is a factor in determining whether LCL or San Joaquin is the

[43]It is true, however, that LCL was able to obtain a line of credit in a similar amount of money, $100,00.00, from the Union Safe Deposit Bank.

more stable entity for purposes of collective bargaining.[44]

Jimmy Chavez was a. signatory on other bank accounts as well. For example, he and Vincent Loduca had an account in the Union Safe Deposit Bank (See EX VIII & UFWX 29). As of a statement dated February 13, 1989, the account was inactive. However, it was Loduca and Chavez which loaned LCL $25,000.00 in 1981 as discussed above. See UFWX 12.

In addition to paying off two promissory notes in the amount of $100,000.00 each to Valley Commercial Bank in 1989 and 1990 (See EX 15a & 15b.) I note also that LCL paid off a loan from Union Safe Deposit Bank for $8,904.00 on May 10, 1991).

A review of UFW Exhibits 33 through 37, which reflect the balances during the twelve months of 1989 for three LCL accounts, a Jim Chavez/Jorge Garcia account and an SPJ, Inc. account are of limited use as it is difficult to determine the nature of the deposits or expenditures from these exhibits alone. It appears that the only account for which Sam Loduca's name is still on a signature card is that with the Bank of Agriculture and Commerce. (See UFW No. 32 & UFW No. 21.) It does not appear, however, that

[44]I note also that checks were written on this Chavez/Garcia account to San Joaquin Tomato Growers (See UFWX 30 at p. 2, check register No. 711), Leo Loduca in the amount of $2,000.00 regarding a pickup (See UFWX 30 at p. 3, check register No. 773), and L&L Transplant in the amount of $1,781.34 (See UFWX 30 at p. 4, check register No. 765). I note these checks only as yet another indication of the close connections between San Joaquin and a number of entities including the partnership of Garcia and Chavez. I am not suggesting anything untoward regarding these checks, but I do find that there are a number of connections between allegedly separate entities which together participate in the operation controlled by San Joaquin.

Sam Loduca signed any checks on this account in 1989. The account was open at the time of the hearing. (Tr. VI: 104.)

However, in 1989 Sam Loduca did sign nine checks on LCL Account No. 1000667 at the Valley Commercial Bank.[45] The significance of these checks bearing Sam Loduca's signature is to show that Sam Loduca was still playing a role in the conduct of LCL operations. Even though these 9 checks or at least most of them were signed at a time when Jimmy Chavez was out of the state, nevertheless, these checks demonstrate that Sam Loduca was still a key player for LCL. I note further that the bank honored these checks.

In addition, 2 of these checks (Nos. 8195 & 8197.) are payable to the Internal Revenue Service for a total amount of $2,837.14 for penalties. Though the record is not clear for what these penalties were assessed, the fact that the IRS assessed the penalties is some indication of a problem with LCL procedures and/or finances.

With respect to the oral contract between San Joaquin and LCL regarding San Joaquin's payment to LCL for harvesting tomatoes, Jimmy Chavez confirmed that there was not more than some 39 minutes of negotiations in 18 years. (See Tr. VIII: 86-90 and 22-24.) I find that unless San Joaquin agreed to increase the rate of pay to LCL per ton, LCL was financially unable to grant any wage increases. I further find that it is the packing

[45]See UFWX 39 for six of the nine checks. Three more checks were mentioned in testimony. See Tr. XI: 142. The three checks were signed in March of 1989.

shed which sets the wage rate paid to tomato harvesters.[46]

The only time that Sam did not give LCL what was necessary to cover labor costs was the year (the witness was unsure of the year) when unemployment went in and San Joaquin refused to reimburse LCL for the costs of providing the unemployment insurance. Again at this time Sam Loduca was president of both corporations. (Tr. VI:24.)

Jimmy Chavez testified that he was paid for the major repair work that he performed in 1989 on San Joaquin equipment. (Tr. VIII:74.) In fact, he collected approximately $3,100.00 for the work he did on San Joaquin vehicles. See UFWX 40(a) and 40(b), which are bills from LCL Farms to San Joaquin for the costs of some of these major repairs. Jimmy Chavez did the work summarized in these bills. It appears he did the work in the spring of 1988 and he prepared the bill in June or July of 1989. The bill was paid in July or August of 1989. (Tr. IX:7-13.) The bills were paid after the election. It is curious that the work was done in 1988 but not paid for until August 16, 1989, after the election. See EX 25, which is a check to pay for the truck

[46]The oral contract agreed to back in 1973 was in effect in 1989. (Tr. VI: 4.) According to Jimmy Chavez the agreement required that LCL supply the equipment and take care of the labor. San Joaquin would pay them and in 1989 paid them around $60.00 a ton. (Tr. VI:3 .) LCL was responsible for harvesting the tomatoes and bringing them to the roadside where someone else would transport them to the shed. Again, when this contract was entered into, Sam Loduca was president of both San Joaquin and LCL, (Tr. VI:3, 4.)

repairs and a fuel bill.[47] Jimmy Chavez conceded that he did some free labor for San Joaquin when he worked on their trucks. (Tr. IX:9-10.) In addition, it appears that San Joaquin would charge auto parts on LCL accounts. (Tr.IX:14.) Even if San Joaquin reimbursed LCL for all the parts (and I assume that they did), it is still a convenience for San Joaquin and shows a very cooperative relationship between San Joaquin and LCL. (See also UFWX 40(c).)

As previously discussed, San Joaquin in essence reimbursed LCL Farms for rent that LCL paid to Lathrop Farm Labor Center. (See EX 26 which shows that San Joaquin paid $1,200.00 in rent in March of 1989 to LCL.)

Yet another small indication of the financial problems experienced by LCL is found in reviewing UFWX 26, one of the checking accounts for LCL Farms Trucking Account. It shows at least two non-sufficient fund charges for a statement date of February 28, 1990. (See also UFWX 41 which shows several additional returned checks.)

(c) Customers and Relationships With Other Entities

San Joaquin is the only company for which LCL harvested

[47]San Joaquin had keys to gas tanks which were in the name of LCL until 1989 or 1990. San Joaquin field manager Frank Tenente had a key. The tank was used in 1989. Later the tanks were moved from LCL. This occurred substantially after the election. (Tr. IX: 11-13.) This shows again the very close relationship between San Joaquin and LCL where LCL appears to act in the best interests of San Joaquin. Even though, ultimately, San Joaquin reimbursed LCL for the cost of the gas used, it was nevertheless a convenience for San Joaquin to be able to use the LCL pumps and be billed sometime after incurring the costs.

tomatoes in 1989. And San Joaquin is the only entity which reimburses LCL for salary increases. (Tr. VI:35.) For example, Dutra, with whom LCL has a contract involving onions does not reimburse LCL for pay increases. (Tr. VI:23-28.) It certainly appears, therefore, that with respect to San Joaquin, LCL is more like a labor contractor than an independent custom harvester as it might be with respect to Dutra. It is also interesting to note that LCL made a payment of approximately $2,000.00 to Fonseca Farms (Fonseca is a shareholder of San Joaquin) for the rental of equipment. (Tr. VI:51-53. See also UFWX 24, check No. 08628.) In 1989, San Joaquin parked a number of vehicles at the Lathrop Farm Labor Center. It is unclear whether San Joaquin paid rent to LCL for the privilege of parking its vehicles there. (Tr. IX:47-48.) This is further evidence that a close relationship between LCL and San Joaquin existed. Jimmy testified that LCL has not done custom harvesting work for Ace and Triple E as those two companies do their own harvesting. They use labor contractors. (Tr. X:18.)

Chavez also testified that there was no interchange of agricultural employees between San Joaquin and LCL in 1989. (Tr. X:87-88.) The only exception would be Estaban Mendoza who worked for both LCL and San Joaquin, but he is not sure if that was in 1989 or 1990. (Tr. X:88.) In any event, it does not appear that there was any substantial interchange of employees or supervisors in 1989 between San Joaquin and LCL.

LCL sublets its truck to VPL. (Tr. VII:11.) Again, this

shows an interconnectedness between the various operations constituting the growing and harvesting of tomatoes controlled by San Joaquin.

(d) Labor Relations Including Requests for Wage Increases

San Joaquin exercises substantial quality control through Sam giving Jim Chavez orders about whether the crops were right and that Chavez would have to take care of it and through Frank Tenente telling LCL supervisors Aurelio Lopez and Juan Chavez what to do in specific circumstances. (Tr. I:100; IV:69-75.) Up until 1990 the labor contractor's license of LCL was in the names of both LCL and Sam Loduca. (Tr. IV:75.) I have also described the reasons for my findings that San Joaquin basically controlled whether or not LCL could give a wage increase to its workers. Jim Chavez testified that between 1972-1987 there were several wage increases. However, he did not recall if he talked to Sam Loduca before the increases were made. But he did not deny talking to Sam before such increases were given. After all, Sam was in charge of LCL until he relinquished his shares in 1987.

I further find that it was Sam who decided to give the pay increase in 1987 after he relinquished control of LCL Farms. Jim Chavez conceded that the workers approached Sam, not Jim, for the 1987 raise. (Tr. VI:14.) Jimmy stated that Sam was there when the workers asked for that raise in 1987. (Tr. III:104.) Sam told the workers that he was going to Triple E and talk to them. The next day the workers received the raise. (Tr. III:119.) It was Frank Tenente, San Joaquin's Field Man, who told Jim Chavez

that Triple E had agreed, to pay 5 cents more. (Tr. III:123-124.) All that Jim Chavez did during the 1987 meeting between Sam and the workers was translate. (Tr. III:125.) None of the workers, including Ilde and Naranjo, said anything to Jim Chavez. I discredit Prank Tenente's testimony that he was not involved in communicating Triple E' s decision to raise their workers' wages in 1987. Frank Tenente was not a trustworthy witness for reasons stated, supra. I also specifically discredit Sam Loduca's testimony to the contrary. Loduca was an evasive witness with respect to several issues including his involvement in wage increases as well as his involvement with confronting Efren Barajas when Barajas served him with the NA. (See for example, Tr. IV:84-85, where Jimmy Chavez agrees with Efren Barajas that Sam Loduca threw the NA on the ground and told Efren Barajas to leave in 1989.) Further corroboration for my finding is contained in testimony of Frank Tenente who said that in 1987 though Jimmy Chavez had the authority to decide about the raise he had to discuss it with Sam Loduca. (Tr. VII: 100.) This clearly shows that Sam Loduca was in charge of labor relations of LCL in 1987. (See also, Tr. VIII:47.)

I specifically discount Jimmy's later testimony where he claimed that it was he on behalf of LCL who gave the raise. See Tr. X:3.) This testimony was not as specific or as strong as his earlier testimony during examination by UFW counsel and there was more chance for coaching at this later date. I also note that at one point Sam Loduca testified that he could not remember

anything about the 1987 wage increase (Tr. XI: 91) whereas on a. later date in the hearing he claimed to recall that it was Chavez who decided to raise the wages. (Tr. XI:213-222.) This testimony was most unreliable. I also find that with respect to the 1989 request by workers for a wage increase that it was Sam Loduca who made the decision not to grant the increase. I have already found that it was Sam Loduca who ordered Efren Barajas off the property on July 27 of 1989 when Barajas attempted to serve Sam with an NA. (See Tr. IV: 84-85.) In addition, Ilde corroborates Barajas' testimony that he served Sam Loduca with the NA and that Loduca threw it on the ground. (Tr. XII:245-250.) Ilde also claimed that Sam before July 27, 1989 had decided to give the workers an increase but then he was angered when he saw authorization cards which Ilde showed him. (Tr. XII:245-250.) The fact that it was Sam Loduca who threw Efren Barajas off the property again demonstrates the lead role Sam had in 1989 in LCL's labor relations.

Even on July 27, 1989, Jimmy testified that none of the workers ever came to him because they thought that Sam was still the owner of LCL. (Tr. III:126.) In addition, it was Jimmy who advised Sam of the rumor that workers were going to come to the field on July 27 to demand a raise. (Tr. III:153-154.) Certainly if Jimmy was in charge of LCL's labor relations at that point in time, there was no need for him to have advised Sam

Loduca of the rumor that workers wanted a raise.[48] As further corroboration that it was Sam who was in control of labor relations on July 27, 1989, I note that Augustin Ramirez testified that Sam dropped the NA on July 27 and told Barajas and Ramirez, "Get out of my fucking fields." (Tr. XIII :260-261.) This testimony is consistent with that of Jimmy Chavez, Ilde and Barajas. The testimony also shows that Sam Loduca did not like the UFW and I find that his testimony in this hearing was colored by that antipathy.

With regard to the 1990 pay raise, Sam Loduca testified that he made the decision to raise the wages of the workers after they began picking and after speaking with Nate Esformes, the head of Triple E, and negotiating with Jimmy Chavez. Loduca agreed that Chavez could raise the price per bucket two and a half cents. (Tr. XI:88-89.) See also Loduca's testimony at Tr. XI:233-235 where Loduca testified that he and Tom Perez, now the president of San Joaquin, decided they would tell Jimmy Chavez to raise the salary of the workers two and a half cents a bucket. Jimmy Chavez testified Sam agreed to cover a wage increase of two and a half cents a bucket by raising the price per ton by $2.50. Sam told Jimmy that the increase in the price per ton would cover his increased labor costs. (Tr. VI-.22-23.) I, therefore, find that it was Sam Loduca who made the decision to raise the wages of the

[48]For examples of Sam's rather evasive testimony regarding the 1989 wage increase request see Tr. XI:90-97.

LCL workers in 1990.

Based on the above testimony I conclude that the important aspects of LCL labor relations were controlled by San Joaquin and Sam Loduca through 1990.

(3) VPL Transport, Inc.

VPL is a trucking company owned by Vincent Loduca, Sam Loduca's brother. It hauls tomatoes for San Joaquin. (See UFWX 23.) VPL owns the tubs used for hauling the tomatoes. (Tr. I:71.) LCL sublets a truck to VPL which is used for hauling tomatoes. (Tr. VII:11.) It should be noted that Vincent Loduca was a shareholder in LCL before he relinquished his shares in 1984. Although VPL has been incorporated since 1987, it performs the trucking operation for San Joaquin and is part of what might be an integrated operation.

(4) S.P.J., Inc.

Sam Loduca, Vincent Phillip Loduca and Jim Chavez were incorporators of S.P.J. in 1975. (Tr. IV:35-36. See also EX 4 & UFWX 13.) According to Jimmy Chavez, S.P.J was set up to hide money for tax purposes. If LCL showed a profit, money would be put into S.P.J. to hide the money. (Tr. IV:54.) Initially, S.P.J. would rent equipment to LCL though the equipment apparently first belonged to LCL and was then transferred to S.P.J. and subsequently rented back to LCL. Again, this was done for tax purposes. It appears that tax laws were used to create several different entities to perform the entire tomato growing, harvesting and selling operation to reduce taxes. The main point

is that the operation appears to be an integrated operation rather than separate stand alone entities. (Tr. VI:67-72.) LCL and S.P.J. attorney John Patridge confirmed that S.P.J. was set up for tax purposes. (Tr. VI:88.)

Initially, Sam had 37,500 shares and Vincent and Jimmy had 6,250 shares each. Sam transferred all of his shares to Jimmy Chavez in 1987. There was no consideration paid by Jimmy for these shares. Patridge did not think that that was unusual. However, it underscores the very close relationship between Sam Loduca and Jimmy Chavez and undercuts the Employer's position that Jimmy Chavez is a stand-alone custom harvester. Vincent Loduca has retained his twelve and a half percent interest. (See EX 6 regarding the transfer of Sam Loduca's shares. See also EX 13, UFWX 27 & 28 regarding S.P.J. bank accounts.)

Initially Jimmy Chavez testified that S.P.J. owned property in 1989 used by LCL. He referred to a Peterbilt truck and he thought but didn't really recall that LCL paid something for the rental of the truck. It also appears that LCL did not pay rent for vehicles owned by S.P.J. used in the 1989 harvest. (Tr. VII: 152-154.)

Sam Loduca resigned as director and president of S.P.J. on May 1, 1987. (See EX 6.)

(5) Garcia and Chavez

Although Jimmy Chavez testified that the Garcia and Chavez partnership had no relationship with Sam or San Joaquin, the partnership had been a client of LCL. (Tr. VII:2.) In addition,

as previously discussed, the partnership loaned LCL considerable sums of money. (See Discussion, supra, and UFWX 30.)

(6) Lathrop Farm Labor Center, Inc.

This corporation managed by Leo Loduca, Sam's brother, owns the property on which LCL has its offices and shop. Sam Loduca is on the Board of Directors. (See UFWX 22.) It appears that San Joaquin reimburses LCL for rent that LCL pays to Lathrop Farm Labor Center and LCL charges some rents to San Joaquin for San Joaquin's storing some of its equipment on this property. At the very least, it seems like a very cozy relationship which is not arm's length. Although it is true that LCL pays property taxes, maintains the premises and pays sewer and water, I find that there is a less than arm's length relationship between LCL, Lathrop Farm Labor Center, Inc. and San Joaquin. (Tr. VII:8-10 & EX 26 regarding monies paid to San Joaquin by LCL.) I note that in 1990, while litigation was pending regarding the election in this matter, San Joaquin moved its equipment and gas tank from the Lathrop Farm Labor Center to property owned by Al Fonseca, one of the owners of San Joaquin. (Tr. X:55; IX:46-48.) I find that these moves were made in anticipation of litigation in this matter. There is no other plausible explanation. Additional evidence of a close relationship is found in a common insurance policy which covers LCL, the Lathrop Farm Labor Center and S.P.J. (Tr. IV:20-22.)

(7) Loduca and Chavez

The partners are Jim Chavez and Vincent Phillip Loduca. It

was formed in the 1970's to do row crop farming. LCL provided the labor. The entity basically ceased functioning by the early 80's. (See EX 8 & UFWX 29 regarding the partnership's bank account.) The partnership loaned LCL substantial sums of money for its operations. (See for example, UFWX 16 at p. 2 and Tr. VIII:2. See also UFWX 12 for the authorization for LCL to borrow money from the partnership.) I note that the authorization occurred in 1981 when Sam Loduca was still president of LCL. Again, this demonstrates a very close relationship between these various entities.

(8) L&L Transplant Company

Sam Loduca testified that L&L Transplant Company is owned by Sam Loduca and Frank Loduca. (Tr. XI:61.) Mr. Garcia, who is partners with Jim Chavez in Garcia and Chavez, has purchased pepper plants from L&L Transplant. (Tr. XI:63.) Frank Loduca is Sam Loduca's brother. San Joaquin purchased plants from L&L Transplant Company in 1989. The purpose of describing the operation of L&L Transplant is merely to show the interconnectedness between San Joaquin and a number of companies which it either controls or which are controlled by members of the Loduca family and San Joaquin.

C. Analysis

Is LCL a custom harvester or a labor contractor? The definition of agricultural employer is found in Labor Code section 1140.4(c). It specifically excludes a labor contractor. The employees provided by a labor contractor are deemed the

employees of the agricultural employer who has contracted for their use with the labor contractor. (See Tenneco West (1977) 3 ALRB No. 92 [modified on other grounds, 6 ALRB No. 13].) Someone holding a labor contractor's license can be an agricultural employer. See Napa Valley Vineyards, Inc. (1977) 3 ALRB No. 22. Where for example a labor contractor acts as a custom harvester, the Board will look at the "whole activity" of both the custom harvester and the grower who contracts for the custom harvester's work and determine which entity will provide the most stable basis for a collective bargaining relationship. (See S&J Ranch (1984) 10 ALRB No. 26.) A labor contractor who supplies specialized harvesting equipment along with the workers and who transports the crop to the processor, has been found to be a custom harvester and may be deemed the employer of the harvesting workers. See Kotchevar Brothers (1976) 2 ALRB No. 45; see also Gourmet Harvesting & Packing (1978) 4 ALRB No. 14.

It is true, however, that the entity which controls the harvest is the employer because of its overriding interest in the agricultural operations. See Sequoia Orange Company (1985) 11 ALRB No. 21; S&J Ranch (1984) 10 ALRB No. 26; See Rivcom Corp. v. Agricultural Labor Relations Bd. (1983) 34 Cal.3d 743.

The Board's decision in Tony Lomanto (1982) 8 ALRB No. 44 sets forth a number of factors which may be used to determine if a labor contractor is also a custom harvester. Finally, the Board in a recent decision set forth certain factors to be utilized in determining whether employers are in fact joint

employers. See Michael Hat Farming Co. (1991) 17 ALRB No. 2.

Based upon my findings of fact, I have determined that LCL is a labor contractor, not a custom harvester. LCL does not have the same type of expensive and specialized harvest equipment that Tony Lomanto had. Lomanto had 16 harvesting machines with a capital investment of several million dollars. LCL's investment is somewhere between $200,00.00 and $400,00.00. It does not use harvesting machines. (See Tony Lomanto, supra, at pp. 8, 9; see also Jordan Brothers Ranch (1983) where the Board found that over $300,000.00 of equipment not enough to find custom harvester status.) I further note that what LCL receives as payment per ton for tomatoes harvested from San Joaquin is adjusted to directly pay for any increases in LCL's labor costs. I have further found that Frank Tenente and even Sam Loduca have a certain amount o£ control over the daily harvest operations of LCL workers. Frank Tenente has specifically told LCL supervisors what they must do to carry out the harvesting operation. In addition, I have found that Sam Loduca has controlled whether or not pay raises are given to LCL employees and is viewed as the employer by LCL workers. In fact, Jimmy Chavez has conceded that he had not publicized the fact that he had acquired in 1987 Sam Loduca's LCL shares of stock.

It is San Joaquin who decides what to plant and oversees the irrigation as well as the harvest. They have quite a bit of control over the farming operations as well. Another entity, VPL is responsible for hauling the crop to be processed at the

packing shed. It seems that although Sam Loduca and Jim Chavez testified that LCL is a custom harvester, workers and the parties themselves realize the great dependence of LCL on San Joaquin.

Although many of the LCL workers have worked for LCL for a number of years, I find that the other factors discussed above outweigh the factor of continuity of employment enjoyed by some LCL workers.

Even if the Board concludes that LCL is a custom harvester, that does not end the enquiry. Instead, the Board must review the record to determine whether LCL or San Joaquin is the more stable agricultural employer and fix the bargaining obligation accordingly. (See S&J Ranch (1984) 10 ALRB No. 26.)

I have found that LCL generally shows a net loss each year. It appears that San Joaquin is a profitable organization. I have also found that the value of San Joaquin's equipment exceeds that of LCL. Further, the fact that several shareholders of San Joaquin own much of the acreage on which the tomatoes are grown and harvested gives San Joaquin a greater interest in the continuity of the tomato growing and harvesting operation. There is no question that San Joaquin is a much more stable and financially secure entity and that the bargaining obligation should be placed on San Joaquin. There is little doubt that fixing the obligation solely on LCL would not provide workers with a reliable and stable bargaining partner.

I also note the Board's decision in Michael Hat, supra, where the Board found a joint employer relationship. There, the

Board found that two separate entities co-determined the essential terms and conditions of employment. See Michael Hat Farming Co. (1991) 17 ALRB No. 2 at p. 2. Should the Board find that LCL is a custom harvester and could therefore be the statutory employer, I would recommend that the Board apply the criteria set forth in Michael Hat and find that San Joaquin and LCL are joint employers.

Finally, I find that San Joaquin is not a commercial operation. Applying the criteria set forth in Camsco Produce Co., Inc. (1990) 297 NLRB No. 157, I find that the 100% deals (contrasted with 50/50 deals in which San Joaquin was directly involved) were not done on a regular basis and that therefore Camsco does not require this Board to find that San Joaquin is a commercial operation outside of the Board's jurisdiction. I find that San Joaquin is not a commercial operation.

D. Recommendation

I recommend that the UFW be certified as the collective bargaining representative of San Joaquin's agricultural employees employed in the San Joaquin Valley. The LCL workers involved in this election are San Joaquin workers for purposes of collective bargaining. The UFW may file a unit clarification petition regarding any San Joaquin agricultural employees in the Blythe area.

DATED: August 3, 1992

Robert S. Dresser

ROBERT S. DRESSER
Investigative Hearing Examiner