STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: NASH DE CAMP COMPANY, Employer And ROMUALDO CARDENAS, Petitioner, And UNITED FARM WORKERS OF AMERICA, AFL-CIO, Certified Bargainin Representative.	Case No. 99-RD-2-VI 26 ALRB No. 4 (June 20, 2000)

DECISION AND ORDER

On September 9, 1999, a decertification election was held among the employees of Nash De Camp Company (Employer). The ballots were impounded pursuant to Administrative Order No. 99-9 (September 7, 1999). After the election, the incumbent union, the United Farm Workers of America, AFL-CIO (UFW) timely filed election objections. On November 22, 1999, the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) issued

an order setting various election objections for hearing and dismissing various others. Upon a request for review filed by the UFW, the Board, in *Nash De Camp Company* (1999) 25 ALRB No. 7, set an additional objection for hearing. On April 13, 2000, Investigative Hearing Examiner (IHE) Douglas Gallop issued the attached decision in which he recommended that Objection No. 2, which posed the question of whether the decertification election was held in the same bargaining unit as that which was certified, be sustained. He therefore recommended that the election set aside. The IHE recommended dismissal of the remaining objections, including one in which the UFW asserted that the decertification petition was barred by a contract agreed to shortly before the filing of the petition. The UFW filed exceptions concerning the contract bar issue and the Employer filed exceptions concerning the unit issue.

The Board has considered the record and the IHE's decision in light of the exceptions and briefs submitted by the parties, and affirms the IHE's findings of fact and conclusions of law, except as discussed below, and adopts his recommended order setting aside the election.

DISCUSSION

The decertification election was held among the employees at the Employer's Ducor Ranch operations, which

apparently constituted the whole of the Employer's operations at the time that a "statewide" unit of the Employer's agricultural employees was certified in 1981. Since that time, the Employer has acquired additional operations, estimated to total approximately fifty ranches, Objection No. 2, as set by the Executive Secretary, posed the question of whether the election was held in violation of the established rule that the only appropriate unit for a decertification election is a unit which duplicates the unit as initially certified, in this case, a statewide unit.

In light of the parties' stipulation that during the pre-petition eligibility period the Employer had 269 agricultural employees at its operations other than Ducor Ranch, and in light of his evidentiary ruling discussed below, the IHE concluded that an outcome determinative number of potential voters were disenfranchised.[1] The Employer attempted during the third day of hearing to introduce evidence to support the assertion that the employees of the additional operations should not be considered part of the certified unit, due to the claimed noncontiguous location of the operations relative to Ducor

[1] 242 employees voted in the election.

Ranch and lack of community of interest among the groups of employees.[2] The IHE excluded most of this evidence on the basis that the issue was not raised in a timely manner. In so ruling, the IHE suggested that the Employer should have raised the issue in a unit clarification petition when the additional operations were acquired (or at least at the time the decertification petition was being investigated) or should have filed its own election objection regarding the unit sought in the petition.

The issue of whether new groups of employees should be considered accreted into a certified unit may be raised whenever it becomes a matter of dispute. While such a dispute may be resolved through the unit clarification process, it may also arise in an unfair labor practice case alleging a refusal to bargain over such employees, or may arise, as here, in the context of election proceedings. (Paul W. Bertuccio (1984) 10 ALRB No. 16; Mayfair Packing Company (1983) 9 ALRB No. 66.) Nevertheless, for the reasons set forth below, we affirm the IHE's disallowance of the Employer's proffered evidence on the appropriate

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[2] Section 1156.2 of the Agricultural Labor Relations Act (ALRA or Act) mandates that bargaining units include all of the employees of the employer in California, unless the employees are employed in two or more noncontiguous geographical areas, in which case the Board has the discretion to determine the appropriate unit or units.

unit placement of the employees in the later acquired operations.

Prior to its attempt to introduce evidence of the proper unit placement of the employees at its operations other than at Ducor Ranch, the Employer had a consistent history of refusing to divulge information about those operations. It is undisputed that the Employer never notified the UFW of its acquisition of additional operations, despite language in the parties' pre-1997 collective bargaining agreements that appeared to require such notice.

In the decertification petition, the petitioner stated that the unit consisted of table grapes and described the unit by providing the address of Ducor Ranch. Question 6(a) on the employer response to petition for decertification form, which requires an agent of the employer to sign under penalty of perjury, asks "Does the certified unit in the Petition for Decertification include all the employer's agricultural employees in California? The Employer answered "yes," even though it had numerous additional ranches employing at least 269 agricultural workers at that time. Question 6(b) asks, "Are the agricultural employees of the employer in two or more noncontiguous geographical areas?" The Employer answered

"no," though it now claims that its additional operations are in noncontiguous areas. It is difficult to reach any other conclusion than that the answers to these questions, which are unambiguous, were deliberately misleading so as to forestall any investigation by the Board's Visalia Regional Office into the propriety of the unit described in the petition.

Despite the Employer's lack of candor, the UFW apparently learned that there might be other operations and filed an election objection questioning whether the election was held among all the employees presently in the unit. Prior to hearing, the UFW attempted to subpoena information concerning the Employer's other operations, for the specific purpose of determining whether the bargaining unit presently consists of employees other than those at Ducor Ranch. Indeed, in a declaration filed in support of the UFWs subpoena, counsel for the UFW states that the information sought is necessary to determine "(1) whether the operation exists in two or more noncontiguous geographical areas; and, if so, (2) whether there are differences in terms and conditions of employment that warrant other than a statewide unit." The Employer moved to quash the subpoena, arguing that this information was irrelevant to issues set for hearing. In lieu of

compliance with the subpoena, the UFW accepted a stipulation that 269 additional agricultural employees were employed during the voter eligibility period.

After engaging in extensive efforts, as described above, to conceal any information concerning its other operations, on the final scheduled day of hearing the Employer reversed course and sought to introduce the very same information in its case in opposition to Objection No. 2. Finding such a maneuver improper, the IHE refused to admit the evidence. We believe this ruling was correct, for the following reason.

The Employer's pattern of conduct, which includes misleading, if not intentionally false, answers in its response to the decertification petition, and an attempt to ambush the opposing party on the last day of hearing with information which it refused to provide in response to an earlier subpoena, constitutes a serious abuse of the Board's processes. A common and accepted sanction for abusing discovery and other processes is the disallowance of the evidence proffered on the subject by the offending party. In *Bannon Mills, Inc*. (1964) 146 NLRB 611, an employer was barred from proffering evidence in its own case in chief which it had refused to produce in response to subpoenas. This approach has been judicially approved.

(See, e.g., *NLRB v. C.H. Sprague & Son Co*. (1st Cir. 1970) 428 F.2d 938, 942; *NLRB v. American Art Industries, Inc.* (5th Cir. 1969) 415 F.2d 1223, 1229-1230.) Further, the Board's own regulations, at California Code of Regulations, section 20262, subdivision (c), and section 20370, subdivision (b), provide that Administrative Law Judges and IHE's have the authority to impose sanctions for failure to comply with, appropriate discovery requests. We believe that these principles are equally applicable to the provision of misleading or false answers under penalty of perjury on the Board's official forms. In light of these considerations, we conclude that protection of the fairness and integrity of the Board's processes more than warrants the IHE's decision to exclude the evidence proffered by the Employer.[3]

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[3] Nothing in this Decision shall be construed as precluding the introduction in any future proceeding of the evidence disallowed in this proceeding.

ORDER

For the reasons set forth above, it is hereby ORDERED that Objection No. 2 is sustained, the election conducted on September 9, 1999 is set aside, and the decertification petition is dismissed.

DATED: June 20, 2000

GEVEVIEVE A. SHIROMA, Chair

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member

MEMBER RAMOS RICHARDSON, Concurring and Dissenting:

I concur with the majority in affirming the IHE's dismissal of Objections 1, 4, 5, and 6.[4] However, for the reasons set forth below, I dissent from the majority's decision to sustain Objection No. 2 and set aside the election.

The parties stipulated that during the pre-petition eligibility period the Employer had 269 agricultural employed at its operations other than Ducor Ranch. While Ducor Ranch apparently constituted the whole

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[4] Objection No. 3 was withdrawn at the request of the UFW.

of the Employer's operations in California when the bargaining unit was certified in 1981, since that time it has acquired numerous other ranches. The decertification election was held only among the Ducor Ranch employees, 242 of whom voted, as the existence of the additional operations was unknown to the Board's Visalia Regional Office at that time.

Before it may be concluded that an outcome determinative number of potential voters were disenfranchised, it is necessary to determine whether some or all of the additional 269 agricultural employees should be considered to have been accreted into the original unit.[5] Obviously, employees not in the bargaining unit cannot be disenfranchised. It is on this very issue, which is central to the merits of Objection No. 2, that the Employer sought to introduce evidence on the third day of hearing.

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[5] Such inquiry must begin with the issue of whether the operations are in two or more noncontiguous geographical areas. This is due to the fact that the certification of a statewide unit does not require that after-acquired operations in noncontiguous geographical areas be considered part of the original unit. If the later acquired operations are contiguous with the original operations, then the Board is mandated by section 1156.2 of the Agricultural Labor Relations Act (Act) to place all the employees in the same unit. If the acquired operations are noncontiguous with the original operations, then the Board has the discretion to determine, based on community of interest criteria, the appropriate unit or units.

The majority has affirmed the disallowance of this evidence due to the misconduct of the Employer in concealing this information prior to its aborted attempt to introduce it into evidence.

I, too, find the Employer's manipulation of Board processes unacceptable, and I am not unsympathetic to the majority's response to that conduct. However, on balance, I find the considerations in favor of reaching the merits of the unit issue to outweigh those in favor of disallowing the evidence. As noted above, determining the proper unit placement of the 269 additional employees is necessary precondition to resolving the objection on the merits.[6] Most importantly, if the unit placement issue is not addressed in this proceeding, no one, including the UFW, the Employer, or the employees who sought the decertification election, will know the present scope of the unit.

While it is true that the UFW or the Employer may file a unit clarification petition or litigate the issue via an unfair labor practice charge alleging a refusal to

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[6] Indeed, it is clear from a declaration filed by counsel for the UFW in support of the subpoena served on the Employer prior to hearing that the UFW fully expected the unit placement of any additional employees to be the central issue to be litigated with regard to Objection No. 2.

bargain, there is no guarantee if or when such an occurrence will take place. In the meantime, the employees, who do not have standing to file a unit clarification petition, and whose protected free choice is a fundamental precept of the Act, are left in the dark as to the proper unit within which to file another petition. By the same token, the failure to address the unit issue leaves in limbo innumerable employees who might otherwise be covered by the certification and, thus, enjoy any benefits that accrue from collective bargaining.

For these reasons, I would remand Objection No. 2 to the IHE to take evidence as to the proper unit placement of all agricultural employees working in the Employer's operations acquired after the original certification in 1981. Such evidence also must include information as to the timing and number of agricultural employees involved in each acquisition, in order to evaluate the propriety of each possible accretion. (See *Renaissance Center Partnership* (1979) 239 NLRB 1247.) As a condition of allowing the Employer to introduce evidence on these issues, I also would order that prior to hearing the Employer comply fully with the subpoena previously served by the UFW and disclose any additional information relevant to the issues I have outlined above. I believe this

approach strikes the, proper balance in favor of deciding this case on the merits and, thus, providing much needed guidance to all parties, while at the same time preventing the Employer from benefiting from its previous abuse of the Board's processes.

DATED: June 20, 2000

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

NASH DE CAMP COMPANY Case No. 99-RD-2-VI
(UFW) 26 ALRB No. 4
(Romualdo Cardenas)

Background

On September 9, 1999, a decertification election was held among the employees of Nash De Camp Company (Employer). 242 employees voted in the election. The ballots were impounded pursuant to Administrative Order No. 99-9 (September 7, 1999). The United Farm Workers of America, AFL-CIO (UFW) timely filed election objections, some which were set for hearing by the Executive Secretary and the Board (see Nash De Camp Company (1999) 25 ALRB No. 7). On April 13, 2000, Investigative Hearing Examiner (IHE) Douglas Gallop issued a decision in which he recommended that Objection No. 2, which posed the question of whether the decertification election was held in the same bargaining unit as that which was certified, be sustained. In light of the parties' stipulation that during the pre-petition eligibility period the Employer had 269 agricultural employees at its operations other than at Ducor Ranch, where the election was held, and in light of his ruling that the Employer did not timely raise the issue of whether the 269 employees should not be considered part of the certified statewide bargaining unit, the IHE concluded that an outcome determinative number of potential voters were disenfranchised. He therefore recommended that the election set aside. The IHE also recommended dismissal of the remaining objections, including one in which the UFW asserted that the decertification petition was barred by a contract agreed to shortly before the filing of the petition. The UFW filed exceptions concerning the contract bar issue, and the Employer filed exceptions concerning the unit issue.

Board Decision

The majority affirmed the IHE's findings and conclusions. However, in affirming the IHE's refusal to allow the Employer to introduce evidence that the 269 agricultural employees who were not included in the election should not be considered part of the certified bargaining unit, the Board relied on the following considerations. Prior to its attempt to introduce such evidence on the last scheduled day of hearing, the Employer had a consistent history of refusing to divulge information about the operations it acquired since the original certification. In its written response to the decertification petition, the Employer stated, under penalty of perjury, that the petitioned for

unit, which consisted only of the workers at Ducor Ranch, included all of its agricultural employees in the state. The Employer also stated in its response that it did not have agricultural operations in two or more noncontiguous geographical areas, which is a statutory prerequisite for having other than one, statewide, bargaining unit. Prior to hearing, the UFW attempted to subpoena information concerning the Employer's other operations, for the specific purpose of determining whether the bargaining unit presently consists of employees other than those at Ducor Ranch. The Employer moved to quash the subpoena, arguing that this information was irrelevant to issues set for hearing. In lieu of compliance with the subpoena, the UFW accepted a stipulation that 269 additional agricultural employees were employed during the voter eligibility period. Then, on the final scheduled day of hearing, the Employer attempted to introduce the very evidence that it sought to quash, evidence which was contrary to the Employer's sworn statements in its response to the petition.

The Board concluded that the Employer's pattern of conduct constituted a serious abuse of the Board's processes that warranted the IHE's decision to exclude the proffered evidence. Therefore, the Board sustained Objection No. 2, set aside the election, and dismissed the petition.

Concurrence and Dissent

Member Ramos Richardson concurred with the majority in affirming the IHE's findings and conclusions as to Objection Nos. 1, 3, 4, 5, and 6. However, with regard to Objection No. 2, Member Ramos Richardson would remand to the IHE to take evidence as to whether the employees in the operations acquired after the original certification should be considered to have been accreted into the unit. While she, too, found the Employer's manipulation of Board processes unacceptable, she would strike the balance in favor of deciding the case on the merits and providing much needed guidance to all parties as to the present scope of the bargaining unit.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 99-RD-2-VI
NASH DE CAMP COMPANY,	)	
Employer,	)	
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Certified Bargaining Representative,	)	
and	)	
RCMUALDO CARDENAS,	)	
Petitioner,	)	

Appearances:

Spencer H. Hipp
Littler Mendelson
Fresno, California
For the Employer

Thomas P. Lynch
Darcy Griffin
Marcos Camacho, A Law Corporation
Keene, California
For the Union

Stephanie Bullock
ALRE Visalia Regional Office
For the Regional Director

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: On September 2, 1999,[1] Romualdo Cardenas (hereinafter referred to as Petitioner) filed a petition to decertify the United Farm Workers of America, AFL-CIO (hereinafter Union) as the exclusive collective bargaining representative of the agricultural employees of Nash De Camp Company (hereinafter Employer). Petitioner had previously filed a decertification petition on August 26, in Case No. 99-RD-l-VI, which was dismissed for an insufficient showing of interest. The Agricultural Labor Relations Board (ALRB or Board) conducted an election pursuant to the herein petition on September 9, and the ballots were impounded, as directed in Board Administrative Order No. 99-9 (September 7, 1999).

The Union filed timely objections to the conduct of the election, some of which were set for hearing by the Regional Director of the Board's Visalia, California regional office, and others were dismissed. Upon the Union's request for review, the Board, in (1999) 25 ALRB No. 7, set an additional objection for hearing. Representatives for the Employer, Union and Regional Director appeared before the undersigned and presented evidence concerning the objections on February 15, 16 and 17, 2000.[2] Those parties have filed briefs, which have been duly considered.

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[1] All dates hereinafter refer to 1999 unless otherwise indicated.

[2] Petitioner did not appear at the hearing.

Upon the testimony of the witnesses, the documentary evidence received at the hearing and the oral and written arguments of the parties, the following findings of fact and conclusions of law are issued:

OBJECTION TWO[3]

As described by the Acting Executive Secretary, the issue is, "Whether the election was held in violation of the established rule that the only appropriate unit for a decertification election is the existing unit; i.e., a unit which duplicates the unit as initially certified or, as in this instance, all the agricultural employees of the Employer in the State of California as per the Board's decision in Nash-De Camp Company (September 4, 1981, 7 ALRB No. 26), and whether eligible voters may have been disenfranchised. (See, e.g., Campbell Soup Co. (1955) 111 NLRB 234."

On September 4, 1981, the Union was certified as the exclusive collective bargaining representative of, "All agricultural employees of Nash-De Camp Company in the State of California." At the time of the election, all of the Employer's agricultural employees worked at its grape operations known as the Ducor Ranch, located in Tulare County, California. The

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[3] Objection 2 is discussed first, because the factual chronology best lends itself to said treatment and, in the undersigned's opinion, the result is dispositive of the case.

Notice of Election described the unit as "Grapes - Tulare County."

The Employer and Union entered into three collective bargaining agreements in the 1980s, the last of which expired on June 1, 1985. All three of these agreements contained clauses recognizing the Union as the exclusive representative of the employees covered by the Board's certification. In addition, the three agreements contained clauses stating that employees working on after-acquired property would by covered by the agreements to the extent permitted by law.

The parties did not enter into another agreement until a contract effective on October 1, 1997.[4] That agreement contained the same recognition clause, but deleted the after-acquired properties provision. The October 1, 1997 agreement stated that the Employer would meet and confer concerning new or changed operations. The agreement contained a subcontracting clause for certain grape operations, specifying the permitted circumstances.

The parties negotiated a successor agreement in 1999. They agreed to continue the same recognition language and a modified version of the meet and confer provisions concerning new or changed operations. The parties further agree to either the same, or a slightly modified subcontracting clause.

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[4] The Union requested negotiations in 1994, but was unable to reach agreement with the Employer.

The parties have historically negotiated only for Ducor Ranch grape workers, and the agreements have only covered those employees. The Union contends this is because it was never aware that the Employer employed any other agricultural workers. The Employer acquired one or two additional ranches sometime prior to 1988, and since that time, has acquired many additional farm properties. Currently, the Employer operates about 50 ranches, covering 16,000 acres. These ranches mostly produce a variety of tree fruit, but also some grapes. The fields are primarily worked by employees of contractors.

The Employer also planted an orange grove at one border of the Ducor Ranch. It harvested oranges from some point after 1994 until about two years ago. The Employer used contractor employees to harvest the oranges, and a few of its' "steady" employees for off-harvest work on the trees.

It is undisputed that the Employer never notified the Union of any of its farming operations, other than the Ducor Ranch grape vineyard. The Employer also operates packing sheds and coolers, and has notified the Union's negotiators these are commercial in nature, and not covered by the certification. The Union's negotiators denied they were aware that the Employer had agricultural employees, other than the grape workers at the Ducor Ranch, as of the decertification election. They further

denied being aware that the citrus grove at Ducor Ranch was operated by the Employer.

Three Union negotiators testified they were generally told the Employer's tree fruit operations were "commercial," a contention denied by employer negotiators. Nevertheless, the Union submitted a request for information to the Employer, dated April 21, 1994, asking for details regarding the Employer's operations, including the use of contractors, and no information was provided concerning farming operations other than the Ducor Ranch. It is also noted that the terms of the last 1980"s collective bargaining agreement, which provided for such notice, would have still been in effect.

The Employer contends that the Union must have been aware of its tree fruit operations. The only direct evidence of this is a letter from 1999 negotiator Gustavo Romero, stating he had read a newspaper article regarding the sale of the employer, which refers to the tree fruit operations, and two comments by Union President, Arturo Rodriguez, in 1999, asking how the Employer's tree fruit harvest was going. Romero testified, denying knowledge of agricultural employees off the Ducor Ranch during the 1999 negotiations, while Rodriguez did not testify. The Employer also points to the proximity of the former citrus operation to the grapes grown at Ducor Ranch, and the participation by some of the "steadies" who performed off-harvest work on the trees in the Union's negotiating committee.

The Employer further refers to a unit clarification petition filed by the Union in 1994, in Case No. 94-UC-i-VI, alleging that the farming operations of manager David Evans should be included in the unit. In that case, however, the Employer contended that Evans' company was a separate entity, and the Union withdrew the petition. In addition, the Employer points to the above-cited changes in the 1997 agreement, and the appearance of the subcontracting clause. The Employer submitted additional 1999 newspaper articles primarily dealing with its sale, one or two of which refer to the Employer conducting tree fruit operations.

Under all these circumstances, Employer, at best, has only established some very general and mostly hearsay-based awareness by one or two of the Union's officials, commencing in 1999, that the Employer was conducting tree fruit operations. The Union might well have assumed these were "commercial," as are the packing operations. Even if the Employer did not intentionally mislead the Union concerning its other operations, it was under an affirmative obligation to give notice, under the contract and pursuant to the 1994 information request, and failed to do so. Furthermore, even if the Union was fully aware of such other operations, there is no evidence that any Union official ever affirmatively declined to represent the employees working

therein.[5] The decertification petition herein set forth the Ducor Ranch agricultural employees as the appropriate unit. The Employer, in its response to the petition, stated that the petition included all of its agricultural employees in the state, and failed to mention its other agricultural operations. The Board agent investigating the petition noticed the discrepancy between the unit set forth in the petition and the certified unit, and the election was conducted in a statewide unit. Nevertheless, the Employer submitted a voting list consisting only of its Ducor Ranch employees, and never advised the Board agent of its tree fruit operations. Thus, the election was only conducted at Ducor Ranch.

In its response to the petition, the Employer estimated 279 employees in the unit. The petition was supported by a showing of interest consisting of 242 signatures.[6] A total of 242 individuals appeared to vote in the election, of whom 13 were challenged. Prior to the hearing, the Union served detailed subpoenas duces tecum concerning the nature and extent of the Employer's agricultural operations, which the Employer moved to

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[5] Even under the 1997 agreement, the Employer was obligated to meet and confer concerning new properties, which implies notice Said contractual term did not, in itself, affirmatively show a disclaimer of interest by the Union, even assuming the Union could decline to represent the full statutory unit.

[6] The Region permitted Petitioner to use the same showing of interest in this case as he had in Case No. 99-RD-l-VI.

quash. In lieu of producing those documents, the Employer and Union stipulated that during the payroll eligibility period prior to the election, there were 269 agricultural employees at its ranches in California, other than the Ducor Ranch. The Employer added the following to this stipulation:

> Nash De Camp is willing to make this stipulation without waiving any objection(s) it may have on the basis of relevance, materiality or any other basis. For example, as stated during the telephone conference last week, it is Nash De Camp's contention that the 1981 certification is limited by its March 1981 date. Thus, it is Nash De Camp's contention that the 1981 certification apply [sic] to and has applied only to the Ducor Ranch, the ranch at which the 1980 certification election took place.

In its response to the petition, the Employer left blank a section questioning whether it had employees working in noncontiguous geographic areas of California. The Employer failed to raise this issue in its petitions to revoke, or at the above-cited telephone conference, which was conducted to resolve those subpoena issues. Although given the opportunity to give an opening statement; in which it could have raised the issue, the Employer declined. Late on the third day of the hearing, the Employer, for the first time, raised as an issue the appropriateness of including its tree fruit employees in the unit, based on geographic separation and lack of community of interest. The Union strenuously objected to the introduction of this issue, and demanded a continuance for preparation should such evidence be heard. The undersigned determined that the

issue was not raised in a timely manner and, for the most part, refused to hear evidence thereon.[7]

Although the Notice of Election described the voting unit as "Grapes - Tulare County," the Board's Decision in (1981) 7 ALRB No. 26, and the Certification of Representative clearly show that the Union has represented a statewide unit since 1981. The voting unit in a decertification election is coextensive with the certified unit, absent a subsequent modification through unit clarification or accretion proceedings. Mayfair Packing Company (1983) 9 ALRB No. 66. See also footnote 5, above. Under section 1140.4(c) of the Agricultural Labor Relations Act (Act), the employees of a contractor engaged by an employer are deemed employees of the employer for collective bargaining purposes, and are included in the unit. See Sequoia Orange, Co., et al. (1985) 11 ALRB No. 21; Cardinal Distributing Company (1977) 3 ALRB No. 23.

The Employer's argument, that the certified unit consists

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[7] The undersigned is still convinced of the correctness of that ruling. The Employer should have raised this issue in unit clarification petition(s) when it engaged contractors to work on the properties it acquired or, at the latest, during the investigations of the decertification petitions. See Sumner Peck Ranch, Inc. (1984) 10 ALRB No. 24, at page 4. It is also noted that the Employer failed to file election objections under Labor Code section 1156.3(c) challenging the unit set for the decertification election. See Coastal Berry Company, LLC (1999) 25 ALRB No. 1, footnote 1, and Administrative Order 99-2. Nevertheless, should the Board disagree, the undersigned is prepared to hear evidence on said issue, and rule accordingly.

only of the Ducor Ranch employees, is not sustained by the facts. Its' reliance on Sumner Peck Ranch, Inc., supra, is misplaced inasmuch as the unit issue in that case concerned a ranch which was formerly part of a certified unit, purchased by a successor employer then operating ranches never subject to the certification. The Employer's subsidiary argument, that the Union somehow agreed to limit the unit to those employees, would only be binding if the agreement was based on lack of geographic contiguity, and the Board concurred. With that exception, the parties do not have the authority to exclude agricultural employees from bargaining units. See R.C. Walter & Sons (1976) 2 ALRB No. 14. The Employer does not contend that the evidence it submitted concerning the Union's conduct shows an agreement that there should be separate units, based on the statutory exception.

Assuming the Union could, in effect, disclaim interest in only a portion of the certified unit, the United State Supreme Court has held that disclaimers of bargaining rights must be clear and unmistakable. Metropolitan Edison Co. v. NLRB (U.S. Sup. Ct., 1983) 460 US 693, at page 708, footnote 12 [112 LRRM 3265]. See also Armco, Eastern Steel Division, Ashland Works (1986) 279 NLRB 1184 [123 LRRM 1335]; enforced (CA 6, 1987) 832 F2d 357 [126 LRRM 2961]. If the employer relies on contractual language to establish the waiver, the National Labor Relations Board (NLRB) has held that such language must also be clear and unmistakable. Further the matter must be "fully discussed and

consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter." Rockwell International Corp. (1982) 260 NLRB 1346 [109 LRRM] 1366]; Mead Corp. v. NLRB (CA 11, 1983) 697 F2d 1013 [112 LRRM 1279]; General Tire & Rubber Co. (1985) 274 NLRB 591 [118 LRRM 1400]; enforced, (CA 6, 1986) 795 F2d 585 [122 LRRM 3152].

If the employer relies on the parties' collective bargaining history to establish a waiver, but the provision does not appear in the contract, such waiver will be found where the Union has consciously yielded its position. This normally requires that the matter was fully discussed and consciously explored. New York Mirror (1965) 151 NLRB 834 [58 LRRM 1465]; Bunker Hill Co. (1973) 208 NLRB 27 [85 LRRM 1264], (1974) 210 NLRB 343 [86 LRRM 1157]. Mere silence or inaction does not show a conscious exploration of the subject. Litton Precision Products (1966) 156 NLRB 555 [61 LRRM 1096]; J.C Penney Co. (1966) 161 NLRB 69 [63 LRRM 1309]. A union may waive bargaining over an issue by inaction, but only does so where it is timely informed of an issue in sufficient detail to make a decision as to what action needs to be taken. Coalite, Inc. (1986) 278 NLRB 293 [122 LRRM 1030.

The facts herein do not establish that the Union waived its representational rights concerning the Employer's tree fruit employees. There is no affirmative conduct attributed to the

Union showing a disclaimer and, at least until 1999, there is every indication that the Union had no knowledge of the Employer's other ranches. The contractual provisions from the agreements of the 1980's, which continued until 1997, if anything, showed a desire to represent employees on newly acquired properties. The subsequent deletion or modification of those provisions, in itself, did not affirmatively show a change in the Union's position. Assuming one or two of the Union's representatives did acquire a general, hearsay-based awareness of the Employer's tree fruit operations, their failure to demand bargaining or file a unit clarification petition does not establish the type of affirmative conduct sufficient to establish a disclaimer, even assuming the Union, under the statute, could choose to represent only a portion of the certified unit.[8]

The record shows that more employees were disenfranchised than went to vote in the election. Even in the absence of a tally of ballots, this would potentially be outcome determinative. Therefore, it will be recommended that Objection 2 be sustained, and the election set aside. Coastal Berry Company, LLC (1999) 25 ALRB No. 1; Pioneer Nursery/River West,

[8] The Employer also contends that because the Union "disappeared" for some 10 years, it has waived its' bargaining rights. Again, a mere failure to negotiate does not establish a waiver. See Dole Fresh Fruit Company (1996) 22 ALRB No. 4, at pages 39-40. At any rate, the Union has actively represented those employees it was aware of for over the past ten years.

Inc. (1983) 9 ALRB No. 38; Sequoia Orange, Co., et al. {1985} 11 ALRB No. 21, at pages 9-10.

OBJECTION 1

The Acting Executive Secretary describes this issue as, "Whether the parties' negotiations for a new collective bargaining agreement had progressed to such a stage that it could be deemed adequate to invoke the Labor Code section 1156.3(a)(4) contract bar so as to nullify an otherwise bona fide question concerning representation and warrant invalidation of the petition for decertification."

The Employer and Union began negotiating a successor to the 1997 agreement on May 19, 1999. They exchanged and discussed proposals over the course of several meetings, leading to the final formal session, on August 13. On that date, the Employer presented two package proposals. Both required the Union to withdraw the many outstanding grievances and unfair labor practice charges which were then pending. The Union was willing to accept the Employer's last package proposal, except that it wished to maintain about three grievances and/or charges. The Employer rejected this, maintaining that all such outstanding matters be dropped.

On August 23, negotiator Guadalupe Martinez met with Stephen Carl Biswell, the Employer's president and chief executive officer. At the meeting they resolved all outstanding grievances

and charges except for one. Biswell agreed that, other than, resolving this grievance, the parties had agreed to all terms for a contract. On the following day, Martinez spoke with Biswell by telephone, asking if the Employer intended to appeal the final grievant's claim for unemployment insurance benefits. Biswell stated he did not yet know if an appeal would be filed, and would let Martinez know, once the Employer decided. On the morning of August 26, the Union obtained agreement to withdraw the final grievance. That afternoon, the Union hand delivered and mailed an unconditional acceptance of the Employer's last proposal of August 13, agreeing to withdraw all pending grievances and unfair labor practices.

The Union's constitution requires ratification of all collective bargaining agreements. Its opening proposal specified that the Union could modify or change its positions up to ratification. The Employer's and Union's witnesses disagree as to whether the Union verbally preconditioned agreement on ratification during negotiations. Witnesses for the Union testified that the contract was ratified in a series of meetings, concluded on September 3, which the Employer disputes, based on circumstantial evidence to the contrary. Irrespective of these disagreements, it is undisputed that, assuming ratification was necessary and did take place, it was not accomplished until one day after the petition herein was filed.

The Employer initially refused to recognize the agreement,

based on lack of ratification and its receipt of the decertification petition. Subsequently, the Employer drafted an agreement, to be voided, if the Union were decertified. The agreement was transmitted to the Union on September 30, and executed by Union representatives sometime prior to October 18. The Employer has not yet executed the agreement, but it appears that all new terms and conditions therein were implemented, after the petition was filed.

Union negotiators testified that it generally takes at least two weeks after agreement for the parties to draft and fully execute the contract. They also testified that their practice is not to sign agreements until the membership has ratified them. The actual withdrawal of the outstanding grievances and unfair labor practice charges took place after the petition in this case was filed.

Section 1156.3(a)(4) of the Act provides that a representation petition is barred if there is an existing collective bargaining agreement. Section 1156.7(b)(l) specifically requires such a contract to be "in writing and executed by all the parties thereto." The Union concedes that under National Labor Relations Act, the NLRB has developed a "bright-line" rule requiring execution of the contract as a precondition to barring the petition. Applachian Shale Products Co. (1958) 121 NLRB 1160 [42 LRRM 1506]; Terrace Gardens Plaza, Inc. (CA DC, 1996) 91 F3d 222. [153 LRRM 2073].

The Union has submitted extensive arguments, which will not be repeated in detail,[9] as to why this rule should not be applied under the Agricultural Labor Relations Act. The undersigned, to be succinct, finds these arguments unconvincing. The statutory language is clear and unambiguous, and appears to follow the NLRB rule. The Union notes that the NLRB rule is not codified, but was developed by case law. Contrary to the Union's argument, the undersigned believes that the codification of this requirement under our Act leaves less, and not more room for interpretation. The Board recently affirmed its general policy of following NLRB precedent in cases involving objections to conduct of election. Coastal Berry Farms, LLC. (1998) 24 ALRB No. 4. In that case, the Board read section 1156.3(c)[10] so as to comport with the NLRB rule, even though by its wording, the section might have been interpreted differently.

The Union's policy arguments are also unpersuasive. The undersigned fails to see why the execution of contracts requirement is less applicable to the agricultural setting than it is to industrial employers. On the other hand, as the NLRB has discovered, once the contract bar is invoked prior to execution, one becomes involved in a plethora of time-consuming

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[9] It is presumed that these arguments will be reiterated in future proceedings.

[10] This section deals with who may file objections to the conduct of elections.

line-drawing exercises, the outcomes of which perfectly reasonable people may well disagree.[11]

The Regional Director's representative, in her brief, contends that even if an employer's grounds for refusing to execute an agreement are baseless, or constitute an unfair labor practice, the execution requirement remains in effect under NLRB case law. Bowling Green Foods, Inc. (1972) 196 NLRB 814 [80 LRRM 1101]; Terrace Gardens Plaza, Inc., supra. In the latter case, the Court specifically refused to create a rule deeming a contract executed as of the date of the unlawful refusal to sign it.

Even assuming there should be an exception to the execution requirement, where a party has unlawfully refused to sign an agreement, there is no unfair labor practice charge assigned to this proceeding.[12] In any event, although the Employer initially denied that agreement had been reached, the Union has failed to preponderantly establish that, even had the Employer completely

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[11] Indeed, the instant case presents such a scenario. On the one hand, it is clear that the Union accepted the Employer's last package proposal prior to the filing of the petition. On the other, it is not unreasonable for the Employer to argue that acceptance was contingent on withdrawal of the unfair labor practice charges and grievances, ratification by the membership and drafting of specific language acceptable to the parties, all of which took place after the filing. In light of the other findings reached herein, no conclusion is reached as to which position has greater merit.

[12] The Regional Director's representative advised, at the hearing, that an unfair labor practice charge alleging an unlawful refusal to execute the agreement is still under investigation.

cooperated, the contract would have been fully executed prior to the filing of the petition. To the contrary, even under the most favorable scenario, it appears that, due to preparation time, transmittal between the parties and the ratification vote, it is highly unlikely that this agreement would have been executed prior to the September 2 filing date. Accordingly, it will be recommended that Objection 1 be overruled.[13]

OBJECTION 3

This objection was described as, "Whether employees may have been under the perception that the Employer was promoting the decertification effort as a result of the activities of employee Samuel Cervantes insofar as he appeared to have free access to employees, traveling to different crews in a Company truck, in order to solicit employees' signatures on the decertification petition during paid work time and whether said conduct tended to interfere with employee free choice."

The Union's request to withdraw this objection was granted at the hearing.

OBJECTION 4

This objection was set for hearing by the Board, and alleges chat Ducor Ranch Manager, Adrian Michael Marquez, engaged in an act of violence against Union access-taker Salvador Madrigal

[13] In light of these findings, the parties other arguments concerning this objection will not be discussed.

Grageda (Madrigal), in the presence of employees. Marquez, Madrigal, Foreman Rosendo A. Lujano and Union Regional Manager, Roman Pinal testified concerning this incident. All slanted their testimony in varying degrees, to exaggerate the misconduct of the opposing side, and/or to minimize the misconduct of the side they supported. The facts set forth below are a summation of what probably happened, taking into account the witnesses' biases.

On August 30, 1999, Madrigal, accompanied by Pinal, drove onto the Employer's property to take access for a break commencing at 9:00 am. Marquez spotted the vehicle and followed them, because it was too early to take access, to check their identities and to ensure they were wearing identification tags. Madrigal parked on a dirt road, with Lujano crew workers on both sides, and Marquez parked behind them. Marquez approached Madrigal, who was still inside the vehicle, and raised access issues with him, including the fact that the 9:00 break had not yet been called.

Either just before or just after Lujano called for the break,[14] Madrigal opened the door to the vehicle, striking

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[14] Inasmuch as Madrigal's conduct would not have justified violence, even if he had merely exited his vehicle shortly before the break, it is unnecessary to reach a final determination on this issue. It is noted, however, that it appears unlikely that having just been told by Marquez to wait for the break, Madrigal would have prematurely exited his vehicle, and Lujano, called by the Employer, initially indicated that Madrigal began leaving the
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Marquez on the leg. Either with his leg, or his entire body, (depending on who is to be believed) Marquez returned the door, striking Madrigal on the shin and head. This purportedly caused a minor bruise on the shin, and perhaps some redness to his forehead.[15] Marquez immediately stepped back, and Madrigal and Final proceeded to take access. Marquez then left the area. A few crew members either approached Madrigal, or he approached them (depending upon whether Madrigal or Final was more accurate on this issue) and briefly discussed Marquez's conduct.

After taking access, Madrigal met with the Union's other access takers and reported the incident. He was advised by the Union's legal department to contact the Tulare County Sheriff's Department, which Madrigal did. When the sheriffs arrived, Madrigal instituted a citizen's arrest, and Marquez was driven away in handcuffs. There is no evidence that employees witnessed the arrest, but the following day, Marquez and other Union agents widely distributed flyers showing a picture of Marquez in handcuffs, and describing him as combative, incorrigible and

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vehicle after he called for the break.

[15] Although Madrigal contends photographs were taken of the shin bruise, no explanation was given for why none was produced at the hearing.

always against the workers. No further prosecution took place.[16] Actual violence between the parties to an election campaign, when witnessed or disseminated to employees, constitutes grounds for setting aside an election. The test is whether the misconduct created "an atmosphere in which employees were unable to freely choose a collective bargaining representative." T. Ito & Sons Farms (1985) 11 ALRB No. 36, at pages 9-10. Serious, actual violence, as opposed to threats of violence, readily establishes a coercive atmosphere. Ace Tomato Company, Inc./George B. Lagoria Farms (1989) 15 ALRB No. 7. In addition, excessive force directed against union access-takers by employer representatives may constitute grounds for overturning an election, even if there is no actual violence. Anderson Farms Company (1977) 3 ALRB No. 67, at pages 8-11.

The case which most closely supports the Union's position is Security Farms (1977) 3 ALRB No. 81. In that case, there were two physical confrontations between employer and union representatives. In one incident, a company official, accompanied by a security guard, approached an organizer, ordered the organizer to leave the property and threatened to call the sheriff's department. After some discussion regarding access

[16] The Union attempted to introduce evidence concerning an incident, about three weeks earlier, where Marquez allegedly pushed a female worker to the ground. The Union did not contend that the incident was related to the election, and said testimony was not permitted.

rights, the organizer stepped out of his vehicle, at which point the employer representative pushed him back into the vehicle and slammed the door. Sheriff's department officers later arrived. The Board found that the employer's conduct violated section 1153(a), irrespective of whether the organizer was entitled to take access, and listed it as a ground for setting aside an election among the employer's agricultural employees.

The Marquez incident fails to establish an atmosphere of coercion preventing employee free choice, irrespective of the whether the ballots, if counted, would show the election was close, and assuming all of the eligible voters were aware of what happened. What took place was a brief exchange of bumps from the door, initiated (whether intentionally or negligently) by Madrigal, and resulting, at the most, in a minor bruise. Unlike in Security Farms, supra, Madrigal and Final were not prevented from taking access, Marquez did not act overtly to force Madrigal back into the vehicle, and he immediately stepped back after the exchange took place, permitting Madrigal to exit. Also unlike in Security Farms, Marquez did not call in the police authorities. Indeed, it was Marquez who was arrested, to the employees' knowledge. While the election in Security Farms was overturned, the employer in that case engaged in another, more violent eviction of union organizers, and engaged in additional conduct coercive of employee free choice.

In all these circumstances, it will be recommended that

Objection 4 be overruled. See Asarco Incorporated Mission Unit (1986) 279 NLRB 867 [123 LRRM 1253].

OBJECTION 5

The issue is, "Whether the work of certain crews was halted for upwards of 15 minutes, with loss of pay, in order to penalize UFW organizers who took work site access and who then either delayed their departure . . . or remained near the work site after the foreman had announced the end of the access (or break) period and whether such "punishment" inflicted on the employees in retaliation for conduct by the Union tended to interfere with employee choice."

Marquez testified that harvest crews were stopped on two or three occasions, for 15-minute periods, because Union access-takers continued talking to employees after the break periods, and this was highly disruptive to the work of the crews. Marquez gave no dates for these incidents. Crew members are paid on an hourly and bonus piecerate basis. Crew members were paid their hourly rate during these stoppages. Marquez claims the workers lost no piecerate bonuses, because the same employees harvested the entire crops involved, and with or without the stoppages, they would have had the same amount of work.

According to Madrigal, after the August 30 incident with Marquez, as he and Final were leaving the fields at the end of the access period, Lujano told the crew, "All of you guys are

going to be punished for 15 minutes because you are talking with a Union organizer." Although Final was with Madrigal at the time, and testified at the hearing concerning the Marquez incident of August 30, he did not corroborate this testimony.

Lujano's supervisory status is disputed, but will be assumed for the purposes of this Decision. He denied ever making such a statement or ever stopping his crew. Lujano testified the access takers did not overstay their access period that day, and neither Madrigal nor Final testified that this took place.

At best, Madrigal's testimony would appear to be incomplete, absent some indication he and Final overstayed their access period, or that Lujano told the crew members this was why they were being stopped. More critically, Final, who was a more reliable witness that Madrigal, in that he was less inclined to slant and exaggerate his testimony, did not corroborate this allegation. Accordingly, even if Lujano was a statutory supervisor, there is insufficient credible evidence to find that the statement was made.[17]

The Board will set aside an election based on non-violent misconduct attributable to a party where the objecting party proves that the conduct tended to interfere with employee free choice to the point that it affected the outcome of the election.

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[17] Marquez was present at the outset of this access period, but left-the area before Lujano's alleged statement.

The test to be applied in determining the coercive impact of such misconduct is objective, and not subjective. Furukawa Farms, Inc. (1991) 17 ALRB No. 4; Agri-Sun Nursery (1987) 13 ALRB No. 19. Retaliation by employers against employees for their union activities may constitute grounds for overturning an election. The factors considered include the pervasiveness of the conduct, the size of the voting unit, the proximity of the conduct to the election and the closeness of the election. Anderson Farms Company (1977) 3 ALRB No. 67; Sam Andrews' Sons (1977) 3 ALRB No. 45; Valley Farms (1976) 2 ALRB No. 42; cf. Bud Antle, Inc. (1977) 3 ALRB No. 7.

Inasmuch as the ballots in this election have been impounded, it cannot be determined how close the vote was. Furthermore, the record does not disclose the dates on which the crews' work was stopped, so proximity to the election cannot be determined. Nevertheless, even if the vote was very close, and the stoppages were ordered just before the election, it would be concluded that the Employer's conduct was not sufficiently coercive to overturn the election.

The uncontradicted testimony of Marquez establishes that the orders were given because Union access takers overstayed their allotted time, and employees continued to speak with them. The entire crews were stopped because this was causing considerable disruption. Although employees not engaged in this conduct were also stopped, one has to speculate as to whether they lost any

wages as the result. Under these circumstances, said conduct cannot be said to have reasonably tended to affect the outcome of the election.

OBJECTION 6

The Acting Executive Secretary describes this Objection as follows: "Whether, on September 8, 1999, a crew foreperson promised employees in the Garza crew that they should expect a wage increase (to $6.00 an hour the following January), whether, on the same date, supervisor Marquez advised the Jacinto crew they would be better off negotiating directly with the Employer because the Company's wage and benefit plan was superior to that which the Union had accepted in negotiations, and whether the statements promised improved benefits for a no-union vote."

There was no evidence presented concerning statements by a crew foreperson to employees in the Garza crew. Marquez gave the only testimony concerning his statements to crew members. A day or two before the election, in response to employee questions concerning the ongoing contract negotiations, he conducted meetings with two crews. Marquez told the employees that there would be an election within the next few days, and the Employer had a proposal on the table, which the Union did not accept, in his opinion, until it "got wind" of the decertification petition. Marquez told the employees the Employer had offered a wage increase to $5.95 per hour. He told the employees to vote for

the Union if they wanted representation and if not, to vote against.

An employee asked if wages would increase to $6.00 per hour. Marquez said no, he could not promise raises, but only tell them the Employer's proposal. He said there were no plans to change the way the ranch was operated. In response to a question, Marquez told the employees there were no plans to change their insurance coverage regardless of election outcome. Marquez denied he promised any benefits for voting against the Union.

If an employer promises employees benefits prior to an election, this may establish grounds to overturn the results. Royal Packing (1978) 5 ALRB No. 31; Anderson Farms Company, supra. The evidence, however, fails to establish that Marquez made such a promise. To the contrary, his uncontradicted testimony was that he specifically told the employees he could not make any promises. Accordingly, the objection, as phrased, is not supported by the evidence and should be overruled.[18]

[18] It is noted that the Union did not argue this objection in its brief.

RECCOMMENDED ORDER

Based on the foregoing, it is hereby ordered that Union's Objection 2 is sustained, the election set aside and the petition dismissed. It is further ordered that Objections 1, 4, 5 and 6 are overruled, and the Union's request to withdraw Objection 3 is approved.

Dated: April 13, 2000

Douglas Gallop
Investigative Hearing Examiner