

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GALLO VINEYARDS, INC.,)	
)	
Respondent,)	Case Nos. 03-CE-9-SAL
)	03-CE-9-1-SAL
and)	
)	
UNITED FARM WORKERS OF)	30 ALRB No. 2
AMERICA, AFL-CIO,)	(November 5, 2004)
)	
Charging Party.)	
_____)	

DECISION AND ORDER

On December 19, 2003, Administrative Law Judge (ALJ) Nancy C. Smith issued her decision in the above-referenced case, in which she found that Gallo Vineyards, Inc. (Respondent, Gallo or Employer), through the conduct of two supervisors, unlawfully assisted, supported, and encouraged the solicitation of signatures on a petition to decertify the incumbent exclusive bargaining representative, United Farm Workers of America, AFL-CIO (Union or UFW). The proposed remedy included a recommendation that the decertification election held on March 13, 2003,¹ should be set aside, and the petition for decertification dismissed (Case No. 03-RD-2-SAL). The ALJ dismissed an allegation (not contained in the complaint) that Gallo unlawfully

¹ The ballots were impounded by the Regional Director pending the resolution of the allegations in this case.

interrogated a witness and attempted to persuade him not to testify at the hearing, on the grounds that it was not fully litigated. Both parties timely filed exceptions to the ALJ's decision. Gallo excepts to numerous rulings and conclusions by the ALJ, including her refusal to disqualify herself in this case, her conclusion that there was unlawful assistance given to the decertification effort, and her decision that the appropriate remedy included setting aside the election petition.

The UFW excepts to the ALJ's ruling concerning the alleged unlawful interrogation of a witness.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties, and the written and oral arguments presented through the Board's September 10, 2004 hearing, and has decided to affirm the ALJ's rulings, findings, and conclusions and to adopt her recommended order, unless otherwise noted in this Decision.

THE FOREMENS' INVOLVEMENT IN THE CIRCULATION OF THE PETITION

A. Supervisory Status of Foremen Gonzales and Perez

Gallo, which grows wine grapes on seven ranches in the Sonoma County area, employs agricultural workers directly and through labor contractors. The parties stipulated that the decertification petition was filed on March 6 by employee Roberto Parra. Mr. Parra's status as an employee is not at issue. The conduct at issue in this case

involves the foremen of two labor contractor crews.² One of the crews at issue was provided by labor contractor Israel Gonzales, and the foreman was Mario Crispin Perez. The other crew was provided by labor contractor Romulo Amaro, and the foreman was Jose Luis Gonzales. The conduct of Mario Perez and Jose Luis Gonzales is at issue in this case, with the General Counsel alleging that the two are supervisors, or that the crew members would reasonably perceive them as acting on behalf of management.

We adopt the ALJ's findings³ that Gonzales and Perez were supervisors and further had apparent authority to speak on Respondent's behalf.

B. Gonzales' and Perez' Alleged Unlawful Conduct

1. Jose Luis Gonzales

Eriverto Ramirez Andrade, a worker in Jose Luis Gonzales' crew, testified that on February 22, 2003, Sergio Alva, a supervisor for Romulo Amaro, came to the block where Gonzales' crew was pruning and spoke with Gonzales. As Amaro was leaving, Gonzales called Ramirez over to him in front of the crew. He gave Ramirez two sheets of paper and told him to get the crew to sign the papers to get rid of the two percent and to get rid of the Union. According to Ramirez, this occurred while the crew

² While the testimony does not clearly establish the number of labor contractor crews, it was established that each crew had about 18 members. The record does not include an official figure for the size of the bargaining unit, but the Board agent's post-election report submitted to the Regional Director indicated that 327 people were on the voter eligibility list and 301 voted without challenge.

³ We find that the ALJ properly received Gonzales' challenged ballot declaration subject to the hearsay exception for admissions against interest rather than an official record. We also note that the ALJ did not give great weight to the declaration.

was working and he was paid for this time. When Gonzales gave Ramirez the papers, the closest workers were about 20-25 meters from Ramirez and Gonzales. Some members of the crew poked fun at Ramirez when Gonzales called him out of the rows.

Ramirez signed the paper, which was part of the showing of interest for a decertification petition, and then circulated it to the rest of the crew. Ramirez testified that he went from row to row asking his co-workers, who were working, to sign the paper. While he was circulating it, Jose Luis Gonzales was present at the worksite. According to Ramirez, some of the workers told him to go away and some signed it. In all, he gathered nine signatures, including his own. He gave the papers back to Gonzales 30-40 minutes later. Gonzales told him to put them in Gonzales' truck, under some of the papers in the truck. Ramirez told Gonzales to take the papers or he would throw them away. When Ramirez gave the papers back to Gonzales, the crew was close to the end of their rows, closer than when Ramirez received the papers from Gonzales. Prior to circulating the petition, Ramirez asked Gonzales whether it would harm him to present the petition to the crew. According to Ramirez, Gonzales told him that he (Gonzales) could not do it, but Ramirez could.

Jose Luis Gonzales denied that he gave any papers to Ramirez. He also denied that he ever saw Ramirez circulating anything. He testified that he would notice any worker who was out of his assigned row and would also notice immediately if a worker was walking into the rows of other workers. Gonzales said that on February 22, 2003, at approximately 1:30 p.m., he went with supervisor Sergio Alva to two different blocks of vines, so that Alva could show him how the pruning was to be done on the

following day and also so that he and Alva could actually do some pruning in order to test at what rate the workers would prune.

Sergio Alva testified, but he could not remember anything that he might have done while at work on February 22, 2003. He generally confirmed that he would work with the foremen to demonstrate the kind of pruning the foremen and their crews would do when they started work at a new block. He also confirmed that if a crew was going to be paid piece rate, he and the foreman would test different spots of the block to set the rate for the workers in the crew.

The ALJ credited Ramirez' testimony concerning Gonzales' involvement in circulating the petition, rather than Gonzales' denial, because Ramirez testified in a detailed, straightforward, and sincere manner. She observed that he did not embellish his testimony and responded in the same fashion both on direct and cross-examination. She also observed that he did not seem to have particular ties to the UFW. As a current employee of Gallo, testifying adversely to his employer's interests, she found his testimony particularly compelling (citing *ShopRite Supermarket Inc. (1977)* 231 NLRB 500, fn. 22). Ramirez also indicated that he would have preferred not to testify, but that when called upon, he did so.

The ALJ generally found Gonzales to be an evasive witness. In addition to noting that he changed his testimony several times with regard to his duties and responsibilities as foreman, he also testified inconsistently regarding what he knew about the decertification petition. First, he testified that he heard about people signing something, but did not see any papers being signed. He also said that he heard the

workers talking about how they were going to make a petition to get rid of the 2 percent. Later, he testified that he did not hear anything about their wanting to circulate a paper to get rid of the 2 percent and he never heard that they were going to circulate any paper or document. The ALJ also noted that Gonzales' manner when responding to questions by the General Counsel and the UFW was at times argumentative and hostile, and that he attempted to avoid answering direct questions and answered only parts of others.⁴

2. Mario Crispin Perez

The ALJ found that a decertification petition was circulated by employee Javier Duran Farias in the crew supervised by Mario Crispin Perez. She found that minutes before the petition was circulated to the crew, in the words of the declaration of crew member Cecilio Morales credited by the ALJ, that “the manager of our crew [Perez], had told us a moment before that he was going to give us a sheet to sign so that the union would not take away the two percent” (union dues withheld pursuant to the collective bargaining agreement).

Following Perez' announcement, every one of the 18 members of the crew signed the petition. Perez was present when the petition was circulated.

⁴ In addition to Gonzales' denial that he ever gave the papers to Ramirez, he stated that on the day that Ramirez circulated the petition, he had gone with Alva to the block where the crew would be working the following day. The ALJ observed that even if she credited that testimony that he left the area at approximately 1:30 p.m., vis-à-vis other testimony of the timing of the circulation of the petition, he still would have had time to give the papers to Ramirez and give Ramirez 30 minutes to circulate the petition and return it to Gonzales before he left.

The ALJ discredited the testimony of Javier Duran Farias, another member of the Perez crew, to the extent that it was inconsistent with Morales' declaration. Duran testified that near the end of February 2003, he circulated the petition to the members of the crew. Duran said that he circulated the petition at lunch, when Perez was not present, and that he had received the petition from Roberto Parra when they met at a gas station. Duran said that all of the members of his crew signed the petition on the one day that he circulated it. He testified that he gave the completed paper to Parra. While acknowledging that he heard there was an effort to get rid of the union, Perez denied knowing of a petition being circulated. Duran and another crew member, Aquilino Perez Juarez, testified that Perez was not present (or at least nearby) when Duran circulated the petition to the crew. In the portions of his testimony discredited by the ALJ, Morales also said that the petition was circulated over various days at work, and he signed it during work hours.

Field examiner Octavio Galarza took the Morales declaration. Galarza testified that he personally spoke with Cecilio Morales and questioned him about the circumstances surrounding his signing of the petition for the decertification election. Galarza stated that he prepared the declaration based on what Morales told him, asked Morales to read the declaration; and that Morales initialed each page and then signed the declaration.

The ALJ credited the original statement made by Cecilio Morales in the declaration given to Octavio Galarza that he had signed the decertification petition after Perez, the foreman of his crew, told the crew that he was going to give the crew a sheet to

sign.⁵ For various reasons, the ALJ did not credit Morales' testimony at the hearing.

Morales was eighteen years old at the time of the hearing. The ALJ observed that he was extremely nervous while testifying. She noted that he had met on two occasions with Charley Stoll, Respondent's counsel, and Guadalupe Leon, Senior Human Resources Manager for Gallo and that, although it occurred only a week before his testimony, Morales could not remember what was discussed at the first meeting, could not remember where the meeting took place, or how he even heard about the meeting. The ALJ viewed his failure of memory as indicating that he was afraid that he would say the wrong thing about these meetings. The ALJ further observed that his demeanor conveyed an extreme reluctance to be present and nervousness about what could be the outcome of his appearance. In response to a question by counsel for the UFW, Morales admitted that he told UFW organizer Salvador Mendoza that he did not want to lose his job by coming to testify. At the hearing, he also testified that he was afraid to say something wrong and that he did not want to lose his job for being at the hearing.

The ALJ did not credit the testimony that Perez was not present when the

⁵ Respondent objected to the admission of the Morales declaration as hearsay. The ALJ found it admissible for the truth of the matter asserted because it was a prior inconsistent statement, citing Evidence Code section 1235. Under that section, prior inconsistent statements are admissible for the truth of the matter stated, as long as the declarant is given an opportunity to explain or deny the prior statements. Here, Morales was questioned about his declaration, about whether he read it, and whether the statements in it were true. The ALJ found the hearsay statement of Perez, related by Morales in his declaration to be admissible, presumably as an admission against interest, because she found Perez to be a supervisor.

petition was being circulated. She noted that Duran first said he did not know where Perez was when he circulated the petition, then testified, after being confronted with a prior declaration, that Perez was having lunch, but apart from the crew. The ALJ observed that Duran seemed obviously flustered by the questions about Perez' whereabouts. Juarez similarly backtracked after first saying that Perez was not present, saying Perez was around, but far away. The ALJ noted that the testimony of all the witnesses put the circulation during working hours, and found it not credible that Perez would not have been aware of the circulation of the petition.⁶ She therefore concluded that Perez assisted in the solicitation of signatures on the decertification petition.

The resultant credited account of the solicitation in the Perez crew is that very shortly, apparently within minutes, after Perez told the entire crew he was presenting them with the petition so the Union would not take the two percent, every employee in the crew signed the petition.

C. Discussion of Gallo's Exceptions as to Perez and Gonzales' Involvement in Circulating the Petition

1. Perez

Gallo does not appear to contest the ALJ's conclusion that, if just before the petition was circulated Perez told the crew that he would give them a paper to be signed

⁶ The ALJ also found suspect Duran's testimony that he got the petition from Parra at a gas station. She noted that Duran could not remember Parra's name when he gave an earlier declaration, and found incredible Duran's testimony that they met at the gas station because he was not familiar with Santa Rosa and did not know where Parra lived. The ALJ further noted that Duran testified that he went to various locations in Santa Rosa to gather signatures, so he must have had some familiarity with the area.

to remove the Union as certified representative, that would constitute unlawful assistance in the decertification solicitation of the decertification petition. Rather, the focus of the exceptions is on the factual finding itself.⁷

One of the main issues raised is the ALJ's reliance on Morales' declaration. As discussed above, it was proper for the ALJ to admit the declaration for the truth of the matter asserted. Her discrediting of Morales' testimony at the hearing was based largely on his demeanor, as well as on inconsistencies in his testimony. This, along with the discrediting of the testimony of Javier Duran Farias (who claimed that he circulated the petition and Perez was not nearby at the time), of Aquilino Perez Juarez (who mirrored Farias' testimony), and Perez (who denied having anything to do with the petition), were central to the ALJ's conclusion that Perez promoted the decertification petition by sanctioning its circulation of the petition immediately after presenting it to the crew and was present while the petition was circulated. In all three cases, the ALJ weighed the consistency of their testimony, along with their demeanor and interest in the outcome of the matter in finding them not credible. These credibility determinations seem well reasoned and substantial and not subject to being disturbed.⁸

⁷ Many of the numerous exceptions filed by Gallo to the factual findings regarding Perez pertain to matters that would be non-prejudicial even if the ALJ had erred. We do not address these exceptions.

⁸ It is well established that the Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) Where credibility determinations are based on considerations other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or
(Footnote continued----)

2. Gonzales

Gallo's exceptions regarding Gonzales focus on the ALJ's decision to credit Ramirez over Gonzales in concluding that Gonzales gave him the petition to circulate among the crew. The ALJ relied largely on Ramirez' demeanor, as well as the straightforward nature of his testimony and his relative lack of interest in the matter. The ALJ found Gonzales' manner less convincing. It is plausible, as Gallo asserts, that Gonzales' manner may have been due in part to the fact that the hearing room was very hot, he testified over three days, and he had a leg injury that caused him discomfort. However, the ALJ specifically found Gonzales to be an evasive witness who changed his testimony in several instances and in other instances found his testimony to be simply implausible. There is nothing in the record that would suggest that these credibility determinations should be disturbed.

Gallo also asserts that the evidence shows that even if Gonzales gave Ramirez the petition, the others in the crew would not have known of this because they were too far away. Eriverto Ramirez testified that he was given the decertification petition by his foreman Gonzales, and asked to circulate it to the crew in order to get rid of the union. Ramirez said that he circulated the petition at approximately 1:00 p.m., for

(Footnote continued----)

absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole.

30-40 minutes, as the crew was working, after being given the papers by Gonzales.⁹ He said that he told his co-workers what Gonzales had told him: They needed to sign, that it was so that there would no longer be a union and that 2 percent would no longer be taken. According to Ramirez, when Gonzales handed him the papers and told him what to do, approximately 10 other workers were near by; the closest worker was about 25 meters away. The entire crew was working to the end of the rows and therefore closer to Gonzales and himself. Moreover, Ramirez testified that several people poked fun at him when he was called over by Gonzales. These facts indicate that at least some of the crew was well aware that Gonzales handed Ramirez some papers just before Ramirez circulated the petition. Since the grapevines at that time had no leaves, it is likely that most of the crew could see the exchange of the papers. Ramirez returned the petition to supervisor Gonzales, also in sight of crew members.

Gallo argues that several cases cited by the ALJ are distinguishable because they involved more extensive assistance by supervisors. Indeed, if Gonzales had simply acted as a conduit for any otherwise legitimate decertification effort, providing the petition to a member of his crew outside the knowledge of others in the crew, this might have been properly characterized as merely ministerial aid. And it is true that he did not

⁹ Respondent argues that the crew could not hear what Gonzales and Ramirez said to each other, so that the workers would not know that Gonzales gave Ramirez the petition to circulate. (Respondent's brief, p. 33) However, the crew could hear Gonzales call Ramirez out of the rows and observe Gonzales give him papers and then see that Ramirez, who had been working alongside them, then had papers regarding the 2 percent and getting rid of the union, which he was permitted to circulate during work time. Under such circumstances, it was reasonable for the crew to assume that respondent was circulating the papers at Gonzales' behest.

take as active a part as Perez, who is found to have announced the circulation to his crew just before it took place, leaving a clear impression that the employer was the motivating force behind the decertification petition. However, since other crew members witnessed the exchange just before Ramirez circulated the petition, they too would have been left with the impression that the petition was circulated at their employer's direction, which is recognized as coercive.

D. The Union's Exceptions to the ALJ's Finding that Respondent's Trial Preparation Conversations with Eriverto Ramirez Did Not Establish Violations of Section 1153(a)

The ALJ found that Respondent made statements tending to coerce Eriverto Ramirez to induce him not to testify that Gonzales directed Ramirez to solicit his crew. The ALJ essentially found that second-level supervisor Sergio Alva had called on Ramirez to withhold his testimony by telling him to say nothing and that Respondent's attorney sought to put pressure on Ramirez by pointing out to him that he would be testifying contrary to crew supervisor Gonzales and Duran.

Though the ALJ appeared to conclude that these conversations had a coercive effect on Ramirez, the ALJ nonetheless concluded that they could not be found to be violations of section 1153(a) because they had not been pleaded as violations in the complaint, were not fully litigated, and were not sufficiently intertwined with the violations that had been pleaded and litigated

We affirm the findings and conclusions of the ALJ, but only as to her analysis that the matter was not fully litigated and not sufficiently related to and intertwined with the allegations in the complaint. We do not adopt the ALJ's analysis of

whether the interrogations constituted a violation of the Act. By definition, a matter not fully litigated presents an incomplete record on which to make any legal conclusions as to potential violations.

VIOLATION AND REMEDY

A. ALJ's Analysis

Having found that Perez and Gonzales were supervisors and that they assisted in the solicitation of signatures in support of the decertification petition, the ALJ found that Gallo violated ALRA section 1153(a) (interference with protected rights).¹⁰ The ALJ concluded that the petition was circulated during work time, with the obvious approbation of the two foremen, giving employees the impression of open support by Gallo for the decertification effort. The ALJ cited the rule that an employer may not provide anything more than ministerial assistance in a decertification campaign. (*Placke Toyota, Inc.* (1974) 215 NLRB 395.) The ALJ recommended that, in addition to the standard cease and desist order and notice remedies, the election be set aside and the decertification petition dismissed.

B. Respondent's Contentions Respecting Remedy

Respondent's primary contention, joined by the employer amici, is that under NLRB precedent, a decertification petition is invalid only in cases where it is proven that the decertification effort was initiated by the employer, the employer engaged

¹⁰ The ALJ also found that even if the two men were not technically supervisors, they reasonably would have been viewed by the crews as acting on behalf of Gallo, given their job status and their conduct in aiding the circulation of the petition.

in a massive campaign of highly coercive unfair labor practices, or where the employer pervasively influenced the solicitation of employee signatures. Respondent contends that the ALRB has adopted such a rule and cites ALRB decisions.¹¹ For the reasons we explain below, this is not an accurate reflection of NLRB or ALRB election law and procedure.

Respondent contends that the cases cited by the ALJ are distinguishable and do not meet what Respondent contends is the rule for dismissal of decertification petitions, i.e., that the whole petition effort must be tainted. Respondent also contends that the unfair labor practices were de minimis and that there is insufficient basis to support a finding of dissemination under *Triple E Produce* (1981) 35 Cal.3d 42.

Respondent argues that the supervisors' conduct was not sufficiently coercive to warrant dismissing the petition (citing, inter alia, *Bright's Nursery* (1984) 10 ALRB No. 18, at p. 40, *Frudden Enterprises* (1981) 7 ALRB No. 22, and *Oceanview Produce* (1994) 20 ALRB No. 16). We find these cases to be inapposite because they deal with misconduct in the context of election objections, not with whether an election petition was valid when filed, the issue before us.

Finally, Respondent cites *Laflin and Laflin v. ALRB* (1983) 147 Cal.App.3d 1039 in support of its contention that the remedy of dismissing the petition is punitive. We find that the remedy is not punitive for the reasons set forth below in our discussion of *Laflin*.

¹¹ *Cattle Valley Farms* (1983) 9 ALRB No. 65; *Abatti Farms* (1981) 7 ALRB No. 36; and *Nick Canata* (1983) 9 ALRB No. 8.

C. Analysis

To the extent that the ALJ's decision may be read as implying that any assistance greater than ministerial aid requires that a decertification petition be set aside, we would disagree. It is correct that any employer assistance greater than ministerial in the solicitation of signatures for a decertification petition is a violation of the Labor Code section 1153(a).¹² We conclude that the employer's exercise of its authority and influence in the procurement of signatures in support of a decertification petition under the Agricultural Labor Relations Act must be examined for its potential to cause disaffection with the certified union and for its "detrimental effect" on the election process the ALRA created.

We do not adopt a per se rule that any employer assistance beyond a de minimis level requires the dismissal of a decertification petition. As the ALJ recognized, the violations in this case are far more than de minimis, citing *Metz Metallurgical Corp.* (1985) 275 NLRB 1045 (only one employee in a unit of 136 directly contacted, disseminated to only one other). We recognize that a rule dismissing decertifications triggered by mere ministerial or de minimis employer assistance could unreasonably restrict employee access to the decertification procedure, the only avenue available to exercise a choice to reject a certified union. Where employer intervention in

¹² After the petition is filed, the employer has the right to campaign as extensively as it wants to as long as it refrains from "threats of force or promises of benefits." (Labor Code § 1155(c); *S & J Ranch* (1992) 18 ALRB No. 2.).

the decertification process is found to be significant as we do in this case and which potentially puts the employer in a position of substantial influence or indirect control over that process, we find that we are required by the policy of the Agricultural Labor Relations Act (Labor Code 1140 et seq.) to dismiss a decertification petition affected by such conduct.

1. Background

The core policy of the National Labor Relations (29 U.S.C. § 151, et seq., NLRA) and Agricultural Labor Relations Acts is employee free choice of collective bargaining representative. The main barrier to employee free choice in collective bargaining representation is the employer's ability to preemptively impose its choice, usually for no union representation, over employee choice of a union. This was the basis for the adoption of both the National Labor Relations Act and Agricultural Labor Relations Act (ALRA). The NLRA's Preamble, Findings and Declaration of Policy (29 U.S.C. §151), opens with the words: "[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . ." The second paragraph opens with a reference to the inequality of bargaining power between employers and employees "who do not have full freedom of association." The Findings and Declaration's concluding paragraph states that the policy of the United States is "encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association . . ." Labor Code section 1140.2 declares the same policies for the ALRA.

The ALRA recognized that the work force it covered was, of all the workforces covered by a statutory scheme, the most vulnerable to the employer's power to preempt the choice of employee union representation. Employee resistance to the imposition of employer choice was the main cause of conflict in the streets and fields that the NLRA and the ALRA were meant to avoid.

The ALRA not only gave California agricultural employees an election and certification process to make their choice and to compel their employer to accept their choice as had the NLRA, but adopted protections beyond those provided in the NLRA to preclude employer control and influence over that choice.

The implications of these provisions were most authoritatively addressed in *F & P Growers Association v. ALRB* (1983) 168 Cal.App.3d 667. The court pointed to the ALRA's prohibition on employers granting recognition without a statutory election (Labor Code § 1156(a)(6)) and the omission of the NLRA's provision for an employer filed (RM) election petition, thus precluding employers from petitioning for elections, as expressing policy against employer influence in the union selection process. It also upheld the Board's conclusion that employers could not unilaterally withdraw recognition from a certified union without a proper decertification election; a union certified under the ALRA to represent a unit of employees could only be removed through a proper decertification election. That court decision is worth quoting at length:

The Board argues that since only employees and unions may file certification and decertification petitions under the ALRA, it follows that the Legislature intended that the agricultural employers have no control or influence over the selection or deselection of a union. From this the Board reasoned that an employer remains obligated to bargain with a certified

union until the employees decertified the union or elect a rival union, regardless of the employer's good faith belief.

We agree that these differences in the NLRA and the ALRA, with respect to employer participation in the certification and decertification petitions, *show a purpose on the part of the Legislature to prohibit the employer from being an active participant in determining which union it shall bargain with* in cases arising under the ALRA.

We therefore agree with the Board and the Union that the NLRA precedent is inapplicable here because of California's legislative purpose and because of the differences in the two acts. While it does not follow inexorably that the agricultural employer's good faith belief is not a defense for refusal to bargain just because the Legislature prevented an agricultural employer from electing a union or from filing a decertification petition, nor is such a conclusion demanded by pure syllogistic reasoning, *it does appear that the Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union.* Therefore, to permit an agricultural employer to be able to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union, indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence. This court will not permit the agricultural employer to do indirectly, by relying on the NLRA loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly.

Further, we agree with the Board that the California agricultural scene differs greatly from other seasonal industries which come under the jurisdiction of the NLRB. Although some industries under the NLRB are also seasonal and have a rapid turnover of employees, the turnover in the agricultural industry is more extreme. Where there is such a rapid turnover of agricultural employees and many of these temporary employees are also alien workers, who do not speak the English language, the workers may be especially unable to bargain with the employer, without the assistance of a union, and there is all the more reason for the Legislature *to decide to remove the employer from any peripheral participation in deciding whether to bargain with a particular union.*

Even though section 1153, subdivision (f) was adopted in part for the purpose of prohibiting an employer from entering into a "sweetheart" arrangement (*Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859 [176 Cal.Rptr. 753, 633 P.2d 949]), this purpose is

consistent with, and in harmony with, the Legislature's other purpose related to *keeping employers out of the process of choosing a union*. Both purposes relate to the legislative policy that the unions be chosen solely by the employees and not by the employers. Therefore, our holding rejecting the loss of majority defense is in harmony with the Legislature's purpose concerning "sweetheart" contracts. F & P argues that, because the employees are seasonal employees and are often illiterate, they may not effectively be able to decertify a union, and the loss-of-majority defense actually protects the employees from being represented by a union not of the present employees' choice. *The clear purpose of the Legislature is to preclude the employer from active participation in choosing or decertifying a union*, and this certainly overrides any paternalistic interest of the employer that the employees be represented by a union of the present employees' own choice. (Emphases added, notes omitted.)

2. Effect of Supervisory Solicitation of Employees in This Case

The credited evidence shows in soliciting the two crews the supervisors invoked many aspects of their supervisory authority in the procuring of decertification signatures from their crews.

In the crew supervised by Gonzales, the crew's supervisor, in sight of the crew, conferred with Sergio Alva, his immediate superior, a member of the next higher level of Respondent's supervisory hierarchy, up until just before Gonzales called out to Eriverito Ramirez to come over to Gonzales to receive the petition. Ramirez stated in his testimony that Alva was still in the process of leaving in his truck as Ramirez approached Gonzales.

When Ramirez reached Gonzales, Gonzales told him that Gonzales wanted Ramirez to circulate the petition. Ramirez could reasonably understand that he had been ordered to do so. Ramirez was directed to conduct the solicitation on his own working time and the working time of the employees being solicited. Ramirez asked if he could

get in trouble for circulating the petition. Supervisor Gonzales told Ramirez that he could not, in effect assuring Ramirez that Ramirez would be protected from any repercussions from Respondent or any other source. Gonzales said that he could not circulate the petition himself. By assuring employee-solicitor Ramirez that Ramirez would not get in trouble for conducting the solicitation as directed further confirmed Respondent's authorization of the solicitation.

Even though faced with vocal opposition from some members of the crew, Ramirez was able to get half the crew to sign the petition. Supervisor Gonzales further directed Ramirez to return the petition to the Gonzales' car; Ramirez instead returned it directly to Gonzales in sight of at least a large part of the crew.

In the other crew, which was supervised by Perez, the effect of supervisory participation in the solicitation was more direct. Immediately before the solicitation was conducted, crew supervisor Perez addressed the crew, explaining that he was going to give them a sheet so the Union wouldn't take the two percent. Significantly, all employees in the crew signed the petition in the crew where the supervisor announced to the entire crew that the petition was about to be presented to them and was present when they signed it.

The evidence in this case shows the effect of the invocation of supervisory authority in support of the decertification. Within a short time after the expressly or impliedly endorsed the petition, the decertification petition had received a substantial part of the number of signatures required for it to be filed.

The capacity demonstrated here of direct involvement by supervisors to, within a short part of a workday to deliver significant support for the decertification petition stands in sharp contrast with the ability of rank and file employee solicitors asking for employee signatures one by one to procure sufficient signatures to file a petition.

3. Analysis

The ALJ found that the conduct was both coercive and far more than de minimis. For the reasons discussed below, we agree.

The ALJ found that word of the supervisors' conduct could be presumed to have been disseminated throughout the workforce, citing *Triple E Produce* (1980) 35 Cal.3d 42. The Court said "[w]e have long held that statements made during an election can reasonably be expected to have been discussed, repeated, or disseminated among the employees, and, therefore, the impact of such statements will carry beyond the person to whom they are directed." The supervisors' requests to employees to sign the decertification petition and presenting them the papers for signature in the supervisors' presence at a time when such requests are legally prohibited, is a statement of significant interest to employees, unless other crews were already aware of such conduct elsewhere. We find that it is reasonable to presume that such important news would spread beyond the two crews as to which direct evidence was available.

Respondent argues that the statement was not a threat as was the case in *Triple E* and that therefore *Triple E* is inapposite. We do not agree. *Triple E* assumed the applicability of the principle of dissemination to conduct other than threats. Respondent

also points out that there is no direct evidence that other employees became aware of the supervisors' solicitation of decertification signatures. Because the threats in *Triple E* were of a kind that were almost inherently improbable for the union to have been able to carry out (identifying, in a secret ballot election, employees who voted against it and getting them fired); the impact only became credible when it was shown that the statements were in fact widely discussed among the employees.

Here, the employees were not confronted with a claim that the union would carry out an inherently implausible threat; rather, the supervisory solicitation was an accomplished fact. That other employees might soon be facing or had already faced the same choice of complying with Respondent's request or becoming identified as a known defier of Respondent's direct or indirect request to sign a decertification petition. Such a significant request was of intense interest not only to the employees in these crews and but also to employees in other crews.

Further, the statements and actions were those of supervisors and clear agents, another consideration given weight by the *Triple E* court. We have found dissemination to be more appropriately presumed where, as here and in *Triple E*, the sources of the statements that may have been disseminated were agents of the party charged with such dissemination.

We therefore disagree with Respondent's argument that no dissemination can be presumed. In view of the reluctance of any employees other than Ramirez to testify, we do not believe that the absence of direct evidence of dissemination requires us to resolve this question. We agree with the ALJ's conclusion that the entire petition was

tainted because there is no way to determine whether the petition reflects the employees' uncoerced and unrestrained free expression of views toward the Union.

The demonstrated capacity of supervisory solicitation in this case to deliver significant support "on command" seen in this case put the party who controls it in the position to have major influence on the staging of the electoral process as much as an employer who uses less direct means, including threats and acts of discrimination. (*Ron Tirapelli Ford* (7th Cir., 1993) 987 F.2d 433.) The supervisory solicitation of employees as seen in this case was much more effective in procuring decertification signatures than the heavy handed tactics some employers such as Tirapelli have felt were necessary to get a workforce to sign.

Further, it is contended by Respondent and before the Board by the General Counsel and some of the amici that under both NLRB and ALRB precedent, a decertification petition can only be dismissed if the employer initiated it or if the employer's assistance was pervasive or egregious, and that, otherwise, that the remedy of voiding the petition is not warranted,¹³ and that the result of the election must stand unless an outcome determinative number of voters were shown to have been affected by the unfair labor practices.

¹³ The only exception they would recognize is if the showing of interest falls below 30 percent of the number of employees in the bargaining unit because of assistance. Because the showing of interest is merely a procedure to avoid unnecessary expenditure of Board resources on elections with no support, that it can incidentally be used to disqualify petitions is insufficient reason for us to recognize it as a principal bulwark against employer intervention in the showing of interest.

Invalidating the petition only if the number of employees proven to have been directly affected by the assistance exceeds any margin in the number of ballots favoring decertification over retaining the certified union would create an incentive to employers to sponsor decertification efforts. The employer stands only to gain if the assistance proven does not exceed the petition's margin of victory; if not, the worst result the employer can face is maintenance of the status quo. The complete extent of Employer assistance is likely to go unproven or even undetected because the parties given the burden of proving a violation, General Counsel and the incumbent union have the least access to the evidence of the violation. Adopting such a rule would expose the most fundamental policy of the Act to all the risks present in this situation.

The conduct of the solicitation in this case went directly to the vulnerabilities of a heavily alien, non-English speaking workforce in an industry dominated by casual employment relationships. These are exactly the vulnerabilities to employer influence and involvement in the selection and removal of a union as its employees' representative that the *F & P Growers* court explained the ALRA sought to prevent.

D. Additional Contentions Concerning the Remedy

We also reject the contention that the remedy we order in this case is “punitive.”

The courts have found remedies to be punitive where they are mechanical in that no attempt is made to specifically balance the need for the remedy against the unfair labor practices found. The case cited by Respondent, *Laflin and Laflin v. ALRB*

(1983) 147 Cal.App.3d 1039, is clearly distinguishable. The court found that the imposition of a massive increase of the access requirement (a year of daily meetings for union agents on employer property during paid time) based on a single instance in which the employer unlawfully denied access was mechanical and therefore punitive. We have assessed the need for the remedy in this case based on the violations' character and probable scope of their impact.

The fact that this remedy may have a deterrent effect does not make it punitive or otherwise invalid. The courts have held that deterrence is a permissible consideration in unfair labor practice remedies if it is proportionate to the seriousness of the misconduct and if alternative, lesser remedies are insufficient to deter employers from pursuing the same course. (*Tirapelli Ford v. NLRB, supra*, 987 F.2d 433 [NLRB entitled to consider necessity to deter unlawful conduct found].) An employer willing to violate the Act through supervisory solicitation to eliminate a certified union may be happy to be found guilty if it can just get the ballots counted, because the rest of the remedy, primarily an order to cease and desist from again using unlawful means to oust the certified union, is a meaningless (“pitiful”)¹⁴ remedy because there is no longer a certified union to be ousted.¹⁵

¹⁴ *Bishop v. NLRB* (5th Cir. 1974) 502 F.2d 1024.

¹⁵ Employer participation in the solicitation of a decertification petition, especially where, as here, employees can see that their position will become known to the employer, both helps procure the filing of an election petition and affects the casting of ballots in the election itself. It is inherently unlikely that unfair labor practice investigations, which under present circumstances often take months to conclude, can be
(Footnote continued----)

A remedy that would allow the employer to benefit from interjecting itself into the union selection and deselection process unless the General Counsel and union can provide proof that the misconduct reached a number of employees precluding a majority vote against a union minimizes the protection against employer preemption of the choice of union representation, and at the same time maximizes the incentive for employer assistance.

The pressure on employers to assist decertification movements is more powerful under the ALRA because employers are precluded from filing employer petitions for elections or withdrawing recognition. Further, assistance to decertification efforts is tempting not only because employee discontent with a union may be insufficient without assistance to reach a critical mass but because employees are unlikely to understand the statutory constraints of collecting a showing of interest and filing the petition within a peak period. Sponsorship of even a minority of the decertification showing of interest, as was proven in this case, like the control of a minority of a corporation's stock, can give an employer indirect control over the timing and momentum of a decertification petition.

An argument that employer participation in the union selection process should be allowed was made and expressly rejected in *F & P Growers*:

F & P argues that, because the employees are seasonal employees and are often illiterate, they may not effectively be able to decertify a union, and the

(Footnote continued----)
completed in the seven days between the filing of a petition and the conduct of an election.

loss-of-majority defense actually protects the employees from being represented by a union not of the present employees' choice. The clear purpose of the Legislature is to preclude the employer from active participation in choosing or decertifying a union, and this certainly overrides any paternalistic interest of the employer that the employees be represented by a union of the present employees' own choice.

We can only agree with the *F & P* court that the disadvantages common to agricultural employees require more, not less, protection from employer intervention in their choice of union representative.

We believe that this level of employer participation enters the zone of influence recognized by *F & P Growers*, particularly in view of the fact that all greater degrees of employer influence are directly prohibited or have been found to be impliedly prohibited by the ALRA.

Holding that assistance is not grounds for invalidating a petition unless it is all-pervasive enables the employer to exercise management and control of the decertification process before the petition is even filed, a time when it is an unfair labor practice for the employer to even advocate decertification. This comes close to putting the employer in the position of being able to trigger the election process by filing an RM petition in its own name under the NLRA, a right specifically excluded from the ALRA.

MOTIONS FILED BY THE UNION AND RESPONDENT

MOTION TO DISQUALIFY ALJ

Prior to the pre-hearing conference, the Employer filed a motion to disqualify the ALJ on the grounds that she had a financial interest in Gallo, or because she could not be impartial, due to the fact that her husband, David Rockwell, is a partner

in a law firm that handles workers' compensation cases involving Gallo. The ALJ denied the motion at the pre-hearing conference and Gallo filed a request for permission to file an interim appeal with the Board. On June 18, 2003, the Board denied the request, and on June 20, 2003 denied Respondent's request to reconsider its June 18 order. In its exceptions, Gallo reiterates its earlier arguments that the ALJ should have disqualified herself, additionally argues that the ALJ exhibited actual bias throughout the hearing, and asserts that the Board erred in not allowing an interim appeal of the ALJ's refusal to disqualify herself. For the reasons that follow, we find that these exceptions to be without merit.

A. Code of Civil Procedure Section 170.1

Board Regulation 20263 governs the disqualification of administrative law judges, providing for disqualification where, by reason of bias or prejudice it appears probable that a fair and impartial hearing cannot be held. While Gallo acknowledges that statutes governing the disqualification of judges do not expressly apply to ALJ's, it suggests they are useful guides in determining whether an ALJ should be disqualified. Assuming this to be true, the statutes do not support Gallo's position.

Gallo first claims that the ALJ has a financial conflict of interest. Code of Civil Procedure (CCP) section 170.1, subdivision (a)(3) requires disqualification when a "judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding." Subdivision (a)(3)(A) provides that a judge shall be deemed to have a financial interest if "a spouse or minor child living in the household has a financial interest." CCP section 170.5 defines "financial interest" as "ownership of more than a 1

percent legal or equitable interest in a party, or . . . an interest . . . in excess of one thousand five hundred dollars . . . or a relationship as director, advisor or other active participant in the affairs of the party . . ."

Gallo asserts that the fact that the ALJ's spouse receives income through his law firm, on a regular basis, from the payment of attorneys' fees¹⁶ amounts to active participation in the affairs of Gallo. We find that this is unpersuasive under the statute. Income from attorneys' fees in unrelated legal disputes in which Gallo is a party logically does not fall within the definition of "active participation in the affairs of the party," and Gallo cites no authority to the contrary. The receipt of attorneys' fees in unrelated matters provided neither any kind of ownership interest in Gallo nor any opportunity to participate in any capacity in conducting Gallo's business affairs.

Gallo next asserts that the ALJ should be disqualified under CCP section 170.1, subdivision (a)(6)(C), which requires disqualification where "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." In support of this assertion, Gallo also relies on a letter sent to Gallo's attorney in a workers' compensation matter by a member of Rockwell's firm, who apparently disapproved of a defense proffered by Gallo and stated that "we will be watching Gallo very closely." As a preliminary matter, Gallo's claim that this letter translates into actual bias against Gallo by the ALJ is also unpersuasive. This argument first must depend on the assumption that the letter establishes that the attorney who wrote it holds a personal

¹⁶ Gallo asserts that the law firm was paid over \$60,000 in fees during the two-year period preceding the hearing.

bias against Gallo. It then depends on an attenuated link to actual bias on the part of other attorneys in the law firm, and finally to their spouses. Moreover, such a notion depends on the assumption that an attorney would necessarily form a personal bias against any party with whom he or she has been involved in litigation. We do not presume such a lack of professionalism. Moreover, even if it is assumed that her husband harbors ill will toward Gallo, there is no reason to believe that the ALJ would parrot that animosity. This argument borders on the unfounded notion that the ALJ would be unable to form her own opinions.

Putting aside the issue of actual bias, these facts also are insufficient to create a reasonable doubt in an ALJ's ability to be impartial. While Gallo correctly points out that one of the cases cited by the ALJ was decided before subdivision (a)(6)(C) was added in 1985 (*Andrews v. ALRB* (1981) 28 Cal.3d 781), that has no effect on the failure of Gallo's argument to pass the reasonable person test. No reasonable person would doubt the ability of the ALJ to be impartial based solely on her husband's law firm's involvement in unrelated legal disputes with Gallo. In sum, particularly with the absence of even the appearance of any financial interest in Gallo, the inclusion of one arguably harsh passage in a letter written by a member of her husband's law firm is patently insufficient to establish either actual bias or the appearance of bias on the part of the ALJ.¹⁷

¹⁷ Indeed, in the context of typical correspondence among opposing counsel, the passage is insufficient to establish animosity toward Gallo on the part of the attorney
(Footnote continued----)

B. Actual Bias

Gallo claims that the ALJ exhibited actual bias throughout the hearing by resolving all credibility and factual determinations against Gallo and its witnesses. It is true that the ALJ resolved all of the major issues in the case against Gallo. However that in itself proves nothing. Her credibility determinations, while generally favoring the General Counsel, were thoroughly explained with a combination of demeanor-based observations and logical inferences based on record evidence. While she did not credit some of Gallo's witnesses in major respects, there is no indication of any wholesale rejection of testimony offered by Gallo. As indicated in the discussion that follows, the ALJ's critical factual findings all appear to be substantiated by the record. Therefore, there is no indication of bias.

C. Denial of Interim Appeal

Gallo excepts to the Board's order denying its request for special permission to file an interim appeal of the ALJ's refusal to disqualify herself, and to the order denying its request for reconsideration. As Gallo's exceptions to the ALJ's refusal to disqualify herself are properly entertained only at this juncture, the Board's earlier orders regarding the denial of an interim appeal are moot and need not be addressed here.

(Footnote continued----)
writing the letter, let alone anyone else farther down the chain relied on in Gallo's argument.

D. Respondent's Motion for Judicial Notice

Respondent on February 19, 2004, moved that the Board take judicial notice of an unfair labor practice complaint issued against the Union on February 9, 2004, alleging that the Union solicited false declarations in support of allegations of employer involvement in the decertification campaign. At the hearing, Gallo sought to introduce the testimony regarding these allegations. After allowing Gallo to make an offer of proof, the ALJ ruled the testimony irrelevant and disallowed it. At hearing, Gallo's counsel admitted that the proffered testimony did not relate specifically to anyone in Perez' or Gonzales' crews, or to their involvement in gathering signatures on the petition. We agree with the ALJ's ruling, as such testimony would be relevant only if it related to the evidence of Perez and Gonzales' involvement, as that was the only unlawful assistance alleged in the complaint. Even if UFW agents had solicited false declarations from other witnesses about the conduct of other Gallo agents, it would not affect the veracity of any of the evidence in the present case. Therefore, it was irrelevant and properly excluded. For the same reasons, Gallo's request that the Board take judicial notice of the General Counsel's filing of a complaint involving the allegations of soliciting false declarations must be denied. The request for judicial notice is cumulative of the offer of proof made at hearing. Even if the issuance of the complaint arguably would have an impact on the veracity of the proffered testimony, it would be no less irrelevant.

E. Respondent’s Motion to Reopen Hearing to Supplement Record

On September 8, 2004, Respondent filed a motion to reopen the record to receive its counsel’s declaration describing a conversation with the Regional Director concerning the number of signatures on the decertification petition. It is well established under both the NLRA and the ALRA that the showing of interest is not litigable and cannot be considered once the polls open. (*Gaylord Bag* (1993) 313 NLRB 316.) Even assuming it would be appropriate to re-examine the adequacy of the showing of interest at this juncture, in light of the discussion above, it is unnecessary to do so in order to establish an appropriate remedy. We therefore deny Respondent’s motion.

CONCLUSION

We affirm the ALJ’s Decision and adopt her recommended remedy dismissing the petition filed in Case No. 03-RD-02-SAL.

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ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Gallo Vineyards, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Assisting, supporting, or encouraging any agricultural employee(s) in an effort to decertify their certified bargaining representative

(b) In any like or related matter interfering with, restraining, or coercing any agricultural employee(s) in the exercise of rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Sign the attached Notice to Agricultural Employees, and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(b) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by Respondent during the period February 1, 2003 – January 31, 2004.

(c) Post copies of the attached Notice for 60 days at conspicuous locations on its premises, the places of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or

removed. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of copies of the attached Notice.

(d) Provide a copy of the attached Notice, in all appropriate languages, to each agricultural employee hired by Respondent during the 12-month period following the date this order becomes final.

(e) Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

(f) Arrange for a representative of Respondent or Board agents to read the attached Notice, in all appropriate languages, to the assembled agricultural employees of Respondent on company time, at times and places to be determined by the Regional Director. Following the reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and during the question and answer period.

(g) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing as to what further steps it has taken in compliance with the order.

Dated: November 5, 2004

GENEVIEVE A. SHIROMA, Chair

DANIEL ZINGALE, Member

MICHAEL BUSTAMANTE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we, Gallo Vineyards, Inc. had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the Agricultural Labor Relations Act (Act) by assisting, supporting, and encouraging the decertification campaign.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following rights:

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

Because you have these rights, we promise that:

WE WILL NOT assist, support, or encourage any decertification campaign.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the Act.

DATED: _____ GALLO VINEYARDS, INC.,

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 342 Pajaro Street, Salinas, CA 93901. The telephone number is: (831) 769-8031.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Gallo Vineyards, Inc.
(United Farm Workers of America, AFL-CIO)

30 ALRB No. 2
Case Nos. 03-CE-9-SAL
03-CE-9-1-SAL

ALJ Decision

The Administrative Law Judge (Judge) found that two crew supervisors asked the members of their crews to sign papers in support of a decertification petition. One told his crew that a paper was about to be brought to them to get rid of the two percent union dues requirement. A few minutes after the supervisor's statement, all employees in the crew signed the petition. The supervisor was present while the petition was circulated. The circulation took place on working time. The Judge also found that in the other crew, in sight of the crew, the supervisor called an employee from the row where he was working, gave him papers to ask the employees to sign and told him that they were to get rid of the Union and the two percent dues requirement, and that he wanted the employee to circulate the paper to the crew. The employee approached each member of the crew while they were working and asked them to sign the papers. The supervisor was present when the employee circulated the papers to the crew members. Half the crew members signed the petitions. After circulating the papers, the employee returned the papers to the supervisor in sight of the crew members.

The Judge found that this conduct violated the Act and that word of this conduct was likely to have been disseminated and that it was impossible to determine how far the dissemination had gone. The Judge therefore found that the decertification petition was tainted and should be dismissed and the election set aside. The Judge also denied the Union's request that she find a violation as to Respondent's pre-trial questioning of a witness that had not been pled in the complaint. She held it was not sufficiently litigated to allow a separate violation to be found.

Board Decision

The Board noted that the ALRA requires that the Board protect employee free choice. The Board found that the conduct in this case gave the employer control and influence over the process of employee union selection, and that the conduct in this case gave the employer potential control that amounted to illegal influence. The Board rejected Employer's argument that the conduct was not proven, or if it was, that it was de minimis. The Board held that more than ministerial or de minimis employer involvement in the solicitation of the decertification petition had to be proven to dismiss a petition, and that the conduct in this case far exceeded de minimis employer involvement in the solicitation. The Board found that the Judge's presumption of dissemination was valid and that the petition was tainted. The Board affirmed the Judge's decision not to find the

alleged misconduct in Respondent's pretrial questioning of a witness a separate violation. The Board denied Respondent's motion to disqualify the Judge.

* * *

This Case Summary is furnished for information only, and is not the Official Statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
 GALLO VINEYARDS, INC.,)
)
 Respondent,)
)
and)
)
 UNITED FARM WORKERS OF)
 AMERICA, AFL-CIO,)
)
 Charging Party.)

Case Nos. 03-CE-9-SAL
 03-CE-9-1-SAL

DECISION OF THE ADMINISTRATIVE LAW JUDGE

NANCY C. SMITH: I heard this unfair labor practice case at Santa Rosa, California, on June 23-26, June 30, and July 1-3, 2003.

I. **Procedural History**

On March 3, 2003, the United Farm Workers of America, AFL-CIO (UFW or Union) filed unfair labor practice charge No. 03-9-SAL, with the Salinas office of the Agricultural Labor Relations Board (ALRB or Board). In that charge, filed against employer Gallo of Sonoma, the UFW alleged that on or about January 2003 and continuing to the date of the charge, Gallo of Sonoma had illegally solicited, encouraged, promoted and/or provided assistance in the initiation, signing, and/or filing of a decertification petition against the UFW. Alleging that the filing of a decertification petition was imminent, the UFW requested immediate injunctive relief “to prevent further violations of the Act.” On March 13, 2003, the United Farm Workers of America, AFL-CIO filed Charge No. 03-CE-9-1-SAL, with the Salinas office of the ALRB, which amended the earlier charge, reiterating the allegations of 03-CE-9-SAL, but naming as the employer, Gallo Vineyards, Inc., rather than Gallo of Sonoma.

On April 14, 2003, the Regional Director of the Salinas ALRB office issued a complaint, alleging that on or about February 26, 2003, Mario Crispin Perez, a foreman of respondent Gallo Vineyards, Inc. (Gallo or GVI), assisted, supported, approved, and encouraged the employees in his crew to sign a document which would lead to the filing of a petition to decertify the UFW, thereby interfering with, restraining and coercing

Gallo's agricultural employees in the exercise of the rights guaranteed in Section 1152 of the Agricultural Labor Relations Act (ALRA or Act).¹

On April 28, 2003, respondent filed an answer to the complaint, admitting that the ALRB certified the UFW as the exclusive bargaining representative of respondent's agricultural employees on or about July 26, 1995, and that since that date, the UFW has been the exclusive bargaining representative of respondent's agricultural employees. Respondent denied that Mario Crispin Perez is or was an agent or supervisor and denied all allegations relating to the alleged assistance and support to employees in the effort to decertify the UFW. Respondent raised a number of affirmative defenses: failure to state a claim, uncertainty, lack of supervisory status on Perez' part, estoppel, waiver, unclean hands, and insufficient pleading. The affirmative defenses are alleged in conclusory fashion and were abandoned by respondent at the prehearing conference, with the exception of its Second Affirmative Defense, based on uncertainty, due to the lack of information in the complaint.²

On May 8, 2003, the UFW intervened.

An amended complaint was served by mail and fax on June 13, 2003. In that amended complaint, in addition to the allegations included in the original complaint, the Regional Director alleged that on or about February 22, 2003, Gallo, through foreman Jose Luis Gonzales, assisted, supported, approved, and encouraged the agricultural

¹ The Agricultural Labor Relations Act is found at Labor Code sections 1140 et seq.

² Respondent did not abandon its Third Affirmative Defense, which consisted of a denial of Perez' supervisory status, but this defense is also encompassed in respondent's denial of the allegations of Paragraph 5 of the complaint and thus did not plead new matter which would form the basis of an affirmative defense. (See Prehearing Conference Order, p. 8)

employees in his crew to sign a document which would lead to the filing of a petition to decertify the UFW, thereby restraining, coercing, and interfering with its agricultural employees in the exercise of their rights guaranteed in Section 1152 of the ALRA. That amended complaint was filed with the Board on June 13, 2003.

The hearing in this matter commenced on June 23, 2003. The time for respondent to file an answer to the amended complaint had not yet run. On the first day of the hearing, respondent indicated that it did not have any objection to proceeding on the basis of the amended complaint and agreed that its answer to the original complaint would be deemed to be the answer to the amended complaint, with the additional allegations regarding the February 22, 2003 incident and the supervisory status of Jose Luis Gonzales denied as well. (RT 8-9)³

II. **Respondent's Motion To Disqualify ALJ**

Prior to the Prehearing Conference, on June 5, 2003, Respondent filed a request that I disqualify myself from hearing this matter. GVI contended that because my spouse, David N. Rockwell, is a partner in the firm of Frailing, Rockwell, and Kelly and that firm handles workers' compensation cases involving E & J Gallo Winery, Rockwell has a financial interest in Gallo Vineyards, Inc. and is an active participant in Gallo's affairs. Based on the rationale underlying Code of Civil Procedure section 170.1(a)(3), respondent argued that I should be disqualified. Respondent also contended that the firm of Frailing, Rockwell & Kelly has a bias or animus against Gallo Winery and that there is a probability or likelihood of the existence of

³ All references to the Reporter's Transcript of the hearing will be as follows: RT page: line(s). The Reporter's Transcript includes an incorrect spelling of the UFW representative at the hearing; the record is corrected to show that all references to the UFW representative are to Sergio Guzman. (See e.g. RT 377: 3; 378, 381)

actual bias on my part as well. The allegation of a bias against Gallo is based solely on a letter written to Gallo's attorney for workers' compensation matters, Thomas Harbinson, by Sharon Kelly of the firm of Frailing, Rockwell and Kelly, on April 16, 2003, regarding a workers' compensation matter.

When I took up the disqualification matter at the Prehearing Conference, I swore in Charley Stoll, respondent's counsel, as a witness and under oath, he requested my disqualification based on his letter of June 5, 2003. The Charging Party opposed the request for disqualification, as did the General Counsel.⁴

I declined to disqualify myself. With respect to the question of a financial interest in Gallo or the active participation in the financial affairs of Gallo, I found that neither my spouse nor I had a financial interest in Gallo as contemplated by CCP section 170.1(a)(3).

Absent a financial interest in a party to a proceeding, an ALJ can be disqualified if he/she had a direct, substantial, and personal financial interest in the subject matter of a pending action. In this case, other than the alleged interest in the E & J Gallo Winery,

⁴ The General Counsel cited two cases in opposition to respondent's request, *UFW v. Superior Court* (1985) 170 Cal.App.3d 97 and *DCH Health Services v. Waite* (2002) 95 Cal.App.4th 829. In the UFW case, the court found that the trial judge did not err in refusing to disqualify himself in the course of a trial involving a suit by Maggio, Inc. for damages against the UFW, incurred during the lettuce strike of 1979. The judge's spouse had worked for Maggio for two days during the strike. The UFW argued that because of Maggio's employment of the judge's spouse, it was more likely that the judge would favor Maggio or be biased against the union. The Court of Appeal noted, "We will not belabor the tenuousness of the proffered inference." (Id. 106) The court pointed out that "Whatever may have been true in years past, it is now simply impossible and unwarranted to treat women as mere shadows of their husband's identities." (Ibid, 105)

In *DCH Health Services v. Waite, supra*, the Court of Appeal reversed the trial court's conclusion that the lawyer for one of the individual defendants was disqualified because he was married to a former member of plaintiff's Board of Directors. The trial court granted the motion to avoid an appearance of impropriety. The Court of Appeal ruled that the individual plaintiffs lacked standing to bring the disqualification motion and that the appearance of impropriety does not by itself support a lawyer's disqualification.

based on receipt of income from the workers' compensation cases, Respondent does not contend that I have any financial interest in the case before me, In the Matter of Gallo Vineyards Inc. and United Farm Workers of America, AFL-CIO, 03-CE-9-SAL and 03-CE-9-1-SAL, so there is no basis for disqualification on that ground.

With respect to respondent's claim that I have a personal bias against Gallo, I denied my disqualification on that basis as well. The only basis for that claim was a letter written by my spouse's law partner, which respondent claims shows animus toward E & J Gallo Winery. In that letter, Kelly says that "Pleased be advised that I will be watching Gallo very carefully as will my partners. Based upon that information [i.e. Gallo's contention that Kelly's client can no longer perform his work of the last 20 years], the cases from Gallo will be needing extra attention."

I do not find that Kelly's letter demonstrates any animus against E & J Gallo Winery, much less that it shows a bias or animus against Gallo Vineyards, Inc. on my part. The declaration of Thomas Harbinson, to which the Kelly letter is attached, makes no mention of any conduct or speech by Kelly, much less by Rockwell or Frailing, that demonstrates any hostility toward or animus against the Gallo Winery. Nothing in the Harbinson declaration suggests, much less actually states, that the firm's partners have conducted themselves in anything but a professional manner in their handling of cases involving E & J Gallo Winery. Also, as I pointed out at the prehearing conference, a letter by my spouse's partner relating to one pending matter cannot establish a personal bias on my part against Gallo. Nor does Kelly's letter demonstrate even a probability or likelihood of the existence of actual bias on my part.

In denying Respondent's request for disqualification based on a personal bias against Gallo, I relied on the court's reasoning in *Gai v. City of Selma* (1998) 68 Cal.App.4th 213. There, the Fifth District Court of Appeal upheld the trial court's determination that there was insufficient evidence of actual bias to disqualify a member of the city's personnel commission. The *Gai* court cited *Andrews v. ALRB* (1981) 28 Cal.3d 781 in setting forth the standard for disqualification of administrative adjudicators: a party seeking to show bias or prejudice must prove the same with concrete facts. Respondent failed to introduce any evidence demonstrating actual bias on my part against Gallo.

Following my denial of the request to disqualify myself from hearing this case, on June 13, 2003, GVI filed with the Board an Application for Special Permission for an Interim Appeal of Administrative Law Judge's Decision Not to Disqualify Herself. The ALRB denied that request in an order dated June 18, 2003, finding that section 20263 of the Board's regulations does not contemplate an interim appeal of an ALJ's decision to decline a request for disqualification. On June 18, 2003, GVI filed a request for reconsideration of that order. That request for reconsideration was denied on June 19, 2003.

Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, the parties' post-hearing briefs and other

arguments made by counsel, I make the following findings of fact and conclusions of law.⁵

III. **Jurisdiction**

The parties stipulated:⁶

1. Charge No. 03-CE-9-SAL was served and filed as alleged in the amended complaint.
2. Charge No. 03-CE-9-1-SAL was served and filed as alleged in the amended complaint. (RT 9: 14-25; 10: 1-2)
3. Respondent Gallo Vineyards, Inc. is a corporation duly organized under and existing under the laws of the State of California, with its principal place of business located in Stanislaus County California.
4. At all relevant times, respondent Gallo Vineyards, Inc. has been and is an agricultural employer within the meaning of Labor Code section 1140.4 (a) and (c).
5. At all relevant times, the United Farm Workers of America, AFL-CIO has been and is a labor organization within the meaning of Labor Code section 1140.4 (f).
6. On or about July 26, 1995, the Executive Secretary of the ALRB certified the UFW as the exclusive bargaining representative of all of the agricultural employees of respondent in Sonoma County, in Case No. 94-RC-5-SAL.

⁵ In replying to respondent's supplemental brief, the UFW again requested that I strike that brief. I again deny that request. Although respondent initially filed the brief without permission, GVI subsequently filed a motion requesting leave to file the letter brief, which I granted, and I gave the UFW and the General Counsel an opportunity to respond.

Respondent moved to strike the exhibit attached to the UFW's reply brief; I will grant that motion. Although had there been compliance with Evidence Code section 452, I might have been inclined to take judicial notice of the exhibit, or if the exhibit were properly authenticated admit it as an official record; there is no basis at this time for its admission. Moreover, I believe that the record establishes that the foremen voted separately and voted challenged ballots, so I believe that the exhibit is unnecessary. (See RT 959: 4-5, 960: 3-6; 961: 16-23)

⁶ See Prehearing Conference Order, p. 6.

IV. Background

As noted *ante*, the United Farm Workers was certified as the exclusive bargaining representative of the agricultural employees of Gallo Vineyards Inc. on July 26, 1995. The UFW requested that I take judicial notice of the ALRB's decision in *Gallo Vineyards, Inc.* (1997) 23 ALRB No. 7, in which the Board found that GVI refused to bargain with the UFW in order to "delay its obligation to bargain with its employees chosen representative." In that case, the Board required Gallo to make its employees whole for the losses that they had suffered as a result of Gallo's unlawful refusal to bargain.⁷ At the time of the hearing in this matter, make whole checks were still being distributed to Gallo employees. (RT 927: 4-22) Subsequent to the Board's decision in 23 ALRB No. 7, Gallo and the UFW entered into a collective bargaining agreement effective August 31, 2000-August 31, 2003. (See CPX # 3)

The parties stipulated that Roberto Parra filed a petition for decertification of the UFW on March 6, 2003, and a decertification election was held on March 13, 2003. (RT 142: 8-25; 434-436; 1228: 23-25) The ballots were impounded and have not yet been counted.

Gallo Vineyards, Inc. grows grapes in the Sonoma area. Gallo employs agricultural laborers, directly and through labor contractors, who work on seven ranches

⁷ The Board's decision at 23 ALRB No. 7 is an appropriate subject for judicial notice pursuant to Evidence Code section 452(c) and the UFW gave notice to respondent and the General Counsel during the course of the unfair labor practice hearing that it was requesting that I take judicial notice of the decision. (RT 928-929) I find that the Board's 1997 decision, dealing with Respondent's conduct in 1995 and 1996 is of limited relevance to this proceeding. By December 20, 1996, Gallo had notified the UFW that it was willing to bargain to reach a collective bargaining agreement. Given the lack of any other record evidence of anti-union hostility or conduct since that time, the decision does not establish anti-union animus in this proceeding.

throughout the area. (RT 1123: 18-24; 1124: 2-16; 1125: 2-23) This unfair labor practice matter involves two labor contractor crews. One crew was headed by Mario Crispin Perez and employed by labor contractor Israel Gonzales. The other crew was that of Jose Luis Gonzales, employed by labor contractor Romulo Amaro.

Eriverto Ramirez Andrade, a worker in Jose Luis Gonzales' crew, testified that, on February 22, 2003, Sergio Alva, a supervisor for Romulo Amaro, came to the block where the crew of Jose Luis Gonzalez were pruning, spoke with Gonzales, and then left. Gonzales then called Ramirez over to him in front of the crew. He gave Ramirez two sheets of paper and told him to get the crew to sign the papers to get rid of the two percent and to get rid of the Union. (RT 357: 3-7) This occurred at about 1:00 p.m., while Ramirez and the crew were working.⁸ When Gonzales called Ramirez out of his row, Ramirez was approximately 25 meters from Gonzales. (RT 340: 25; 341: 1) When Gonzales gave Ramirez the papers, the closest worker was about 20-25 meters from Ramirez and Gonzales, and the rest of that part of the crew was in the same area, also about 20-25 meters away. (RT 283: 17-20; 337: 19-21; 338- 9-11; 341: 23-25; 342:1) Members of the crew called out and poked fun at Ramirez when Gonzales called him out of the rows. (RT 429: 7-20)

Ramirez signed the paper, which was part of the showing of interest for a decertification petition, and then circulated it to the rest of the crew. (RT 360: 15-16 and see GCX # 4)⁹ Ramirez testified that he went from row to row asking his co-workers to

⁸ Gonzales testified that his crew took a one-half hour lunch at 12:00 p.m. (RT: 777:17-18)

⁹ The actual document circulated by Ramirez was a subject of much discussion. At the prehearing conference, I ruled that the showing of interest was not discoverable by respondent, relying on *Nishikawa Farms Inc. v. Mahoney*

sign the paper. While he was circulating it, Jose Luis Gonzales was present at the worksite. According to Ramirez, some of the workers told him to go away and some signed it. In all, he gathered nine signatures, including his own. He gave the papers back to Gonzales at approximately 1:30 p.m. Gonzales told him to put them in Gonzales' truck, under some of the papers in the truck. (RT 281: 14-24; 362: 5-6, 12-13, 19-20) Ramirez told Gonzales to take the papers or he would throw them away. (RT 362: 232; 363: 4-11) When Ramirez gave the papers back to Gonzales, the crew was close to the end of their rows, closer than their 25-meter distance when Ramirez received the papers from Gonzales. (RT 363: 13-15, 21)

Apparently, prior to circulating the petition, Ramirez had some misgivings, as he asked Gonzales whether it would harm him to present the petition to the crew. (RT 358: 17-23) Gonzales told Ramirez that he (Gonzales) could not do it, but Ramirez could. (RT 269: 20; 357: 7-8) Ramirez said that he spent 30-40 minutes circulating the petition and that he was paid for that time. (RT 429: 21-34)

Jose Luis Gonzales denied that he gave any papers to Ramirez. He also denied that he ever saw Ramirez circulating anything. (RT 587: 24-25; 588: 8) He testified that he would notice any worker who was out of his assigned row and would also notice

(1977) 66 Cal.App.3d 781 and 8 Cal. Code of Regulations, section 20300(j)(3). At the hearing, after continued objection by Respondent, (see e.g. 272: 6-9), I ruled that the document itself, without the signatures would be disclosed to respondent. I therefore copied the showing of interest, but without the signatures, and it was marked GCX #4. (RT 275: 7-15, 19-25; 276: 1-6) Respondent still objected, insisting that it was entitled to review the showing of interest with the signatures. (RT 277: 19-25; 278: 1-2) In order to provide still more information to respondent, the General Counsel informed respondent that there were nine signatures on the showing of interest and that the date of the signatures was February 22, 2003; and I confirmed those facts. (RT 280: 19-21; 281: 1-2; 359: 8-14) I inquired of respondent's counsel how his client was prejudiced by the signatures being omitted, but he was unable to articulate any prejudice, other than to say that he believed that the names were critical so that he could understand what occurred. (See RT 292: 3-8)

immediately if a worker was walking into the rows of other workers. (RT 688: 12-24) Gonzales said that on February 22, 2003, at approximately 1:30 p.m., he went with supervisor Sergio Alva to two different blocks of vines, so that Alva could show him how the pruning was to be done on the following day and also so that he and Alva could actually do some pruning in order to test at what rate the workers would prune, because the workers would be getting paid piece rate in one of the new blocks. (RT 791: 1-5; 794: 3-5)¹⁰

Sergio Alva testified, but he could not remember anything that he might have done while at work on February 22, 2003. (RT 1080: 21-24) He generally confirmed that he would work with the foremen to demonstrate the kind of pruning the foremen and their crews would do when they started work at a new block. (RT 1063: 9-13) He also confirmed that if a crew was going to be paid piece rate, he and the foreman would test different spots of the block to set the rate for the workers in the crew. (RT 1066: 1-22)

¹⁰ The General Counsel moved to strike all of Gonzales testimony, which related to the timesheets for February 24, 2003, because the timesheets had not been disclosed to the General Counsel in response to the General Counsel's Notice in Lieu of Subpoena, Item #3. In Item #3, the General Counsel requested "all attendance sheets and/or notes, memoranda and reports showing Jose Luis Gonzales attending Respondent's managerial meetings, instruction sessions, meetings held for supervisory personnel and/or meetings in which unit employees were excluded during 2002 and 2003. (RT 797: 23-24; 798, 799: 1-9) Respondent argued that the documents were only used to refresh Gonzales' recollection about the block to which the crew moved after completing their block on February 22, 2003. In its Posthearing Brief, the UFW also moved to strike Gonzales' testimony regarding his absence from the crew. (UFW Brief, p. 34, n. 18). I denied the General Counsel's motion. I do not think that the February 24, 2003 timesheet falls within Item #3, since it does not on its face reflect Gonzales' presence at any instruction session. The February 22, 2003 timesheet would perhaps have reflected the alleged testing by Alva and Gonzales if the timesheets were accurately kept, but they do not seem to have been. (See Gonzales' testimony at 787: 6-25; 788-789: 1-3; 808: 6-16; 828: 14-17; 830: 2-7; 831: 19-232; 836: 10-11 and Alva's testimony at 1073: 18-24; 1074: 10: 1077: 11-15) Essentially, the General Counsel complained that counsel were surprised by Gonzales' testimony that he left the block where his crew was working to visit another block with Alva. However, the General Counsel chose to go forward with the amended complaint without a further prehearing conference, during which Respondent would have been required to disclose all defenses. Nor did the charging party request a further prehearing. And, although, as the UFW states, respondent was aware of the allegations regarding Gonzales, the complaint was not amended until June 13, 2003, and there was no specific discussion of the factual basis for the allegations regarding Gonzales at the prehearing conference.

Alva stated that he and the foremen could spend as much as one and one-half hours testing the new block to determine the piece rate, while Gonzales suggested that such testing was limited to 15 minutes. (RT 838: 13-14; 1066: 7-22).

Near the end of February 2003, Javier Duran Farias circulated a petition to get rid of the Union to the members of the crew of foreman Mario Crispin Perez. (RT 1223: 18-20; 1227: 15-22) Duran said that he circulated the petition at lunch, when Perez was not present. (RT 1235: 11-17; 136: 1-5; 1235: 5-9; 1233: 4-11) He said that he had received the petition from Roberto Parra when they met at a gas station. (RT 1228: 2-7) Duran said that all of the members of his crew signed the petition on the one day that he circulated it. He testified that he gave the completed paper to Parra. (RT 1233: 20-22) Duran testified that Cecilio Morales, a member of the Perez crew, signed the petition. (RT 1240: 22-24)

Morales also testified; during his testimony, he contradicted a declaration that he had earlier provided to the General Counsel, which confirmed that he had signed the list that Duran had circulated. In his declaration, Morales stated that “Mario, the manager of our crew, had told us a moment before that he was going to give us a sheet to sign so that the union would not take away 2 percent.” (GCX #6) At the hearing, Morales testified that the quoted statement was not true, although the rest of the declaration was true. (RT 491: 16-22; 492: 11-12) In his testimony, Morales also said that the petition was circulated over various days at work, and he signed it during work hours, during the last hour of work. (RT 486: 23-25; 523: 14-15; 524: 15-20; 526: 1-20)

A field examiner from the ALRB's Salinas office, Octavio Galarza, took the Morales declaration. (RT 879: 13-19; 881: 17-19) Galarza stated that he was not referred to Morales by the UFW. (RT 883: 7-9) Galarza testified that he personally spoke with Cecilio Morales and questioned him about the circumstances surrounding his signing of the showing of interest for the decertification election. Galarza stated that (1) he prepared the declaration based on what Morales told him; (2) he then asked Morales to read the declaration; and (3) Morales initialed each page and then signed the declaration. (RT 885: 13-19; 886: 10-22; 887: 23-25; 888: 1-7, 22-25; 889: 1-10, 13-25; 890: 1-15)

Allegations of employer assistance, support, and encouragement of the effort to decertify the UFW at Gallo Vineyards are based on the activities of Jose Luis Gonzales, as testified to by Eriverto Ramirez Andrade, and the activities of Mario Crispin Perez, as set forth in the declaration of Cecilio Morales.

V. Analysis and Conclusions

A. The Supervisory Status of Perez and Gonzales

1. Mario Crispin Perez

Mario Crispin Perez worked for labor contractor Israel Gonzales for two years, working for Gallo Vineyards, Inc., before being made a foreman in January 2003.¹¹ (RT 15: 10-13; 18: 21-23) His immediate supervisor was Felipe Reyes. (RT 21: 20-22) Perez was foreman for a crew of 18 persons in February 2003. As foreman, he was responsible for completing the daily paperwork for the crew, indicating how many hours the

¹¹ The parties stipulated that Perez was a foreman from January 29, 2003 through March 21, 2003. (RT 100: 2-4; 130: 3-17)

crewmembers worked, how many plants were tied, when the crew worked piece rate, the location of the job, and the type of vine on which the crew was working. (RT 20: 12-22; 21: 8-21; 22: 4-9) His day started earlier than the other workers; he arrived about one-half hour before the starting time and moved the bathrooms and brought water out to where the crew would be working.

In February 2003, the Perez crew was tying the vines. Perez indicated that it was his responsibility to explain to his crew how to do the work and to see that the work was going well. He explained that the tying process was different depending on whether the vines were new or old. He said that the Gallo ranch supervisor would tell him what to do and that he would then show the crew. (RT 24: 11-22; 25: 23-25; 26: 24-25; 27: 1-19; 33: 1-4) Perez did not do the work to which the crew was assigned; he showed the crew how to do the work and then spent the day walking through the vines, checking their work. (RT 93: 7-10; 96: 23-25; 97: 1)

He testified that he gave tickets to two workers because they were not doing the work well. (RT 34: 21-25) One of those workers was Cecilio Morales. (RT 35: 4) Perez said that Morales was not paying attention to how he should tie the branches to the guides and consequently was not doing the tying properly. (RT 40: 7-11; 42: 22-25; 43: 11-13) Perez said that he talked to Morales three or four times over several days to try to get Morales to correct his work. Finally, Perez gave him a ticket. (GCX # 1) Even after the ticket, Perez gave Morales instructions on how to improve his work, and his work eventually improved. (RT 43: 14-25; 44: 1-7) The other worker who received a ticket was Silvestre Andrade. (GCX # 2) According to Perez, Andrade had various days of bad

work and Perez had tried to get him to improve. After Perez gave him a ticket, his work improved. (RT 46: 8-9; 19-25; 47: 1-8)

The following day, when questioned by counsel for GVI, Perez said that the ranch supervisor, whom he knew as Macario, had pointed out to him that two workers were not doing the job well. (RT 162: 3-5) Perez said that he told his supervisor, Felipe Reyes, about the two workers. Perez said that Reyes told him to show the workers three or four times and if they still did not pay attention, to call him. According to Perez, after his showing them how to do the work, the two workers were still not doing their work properly, so he reported this to Felipe, and Felipe told him to give the two workers a ticket. (RT 165: 9-25)

As a foreman, Perez received \$12.00 per hour, while the rest of the crew were paid \$8.18, if paid hourly, or by piece rate. (RT 50: 6-17) Perez reviewed safety training with the crew every first and fifteenth of the month; after the training, the workers signed a paper saying that they received the training from Perez, and Perez later turned those papers in to Felipe Reyes. Perez also distributed the paychecks and a weekly housing allowance of \$10.00, which the workers received from Israel Gonzalez, to the members of his crew. Perez additionally explained disciplinary procedures to the crew, showing them a blank warning notice and responding to their questions. (RT 113: 19-25; 114: 1-9) Perez was responsible for distributing dues check off authorization cards and responsible for informing workers that if they did not sign the form, they could not work at GVI. (RT 72: 13-23) Unlike other workers in the crew, Perez received a cellular telephone from Israel Gonzales, the labor contractor. (RT 54: 1-17)

Perez said that the crewmembers did not ask him for days off or to leave early. (RT 53: 9-24) He also said that the ranch supervisor set the hours of work, and Felipe told him the times for lunch and breaks. (RT 152: 12-14; 153: 15-20; 159: 22-23) Perez said that he had never recommended anyone for hire. (RT 65: 17-19; 207: 6-11) He also said that he did not assign work or make particular assignments to his crewmembers. (RT 69: 2-4) Apparently if workers were needed for projects such as trellis repair or vineyard removal, Perez asked for volunteers and fortuitously, the precise number of workers needed volunteered. (RT 187: 23-25; 188) When members of his crew were assigned to making trellis repairs or to vineyard removal, Perez was in charge of seeing that they did the work correctly. (RT 96: 19-20; 97: 6-15)

Mario Crispin Perez will be found to be a supervisor and his actions attributable to GVI if he meets any one of the criteria enumerated in section 1140.4(j) of the ALRA.

Section 1140.4(j) provides that a supervisor is:

[A]ny individual having the authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them or to adjust their grievances or effectively to recommend such action, if...the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is not necessary that an individual engage in all of the 12 supervisory functions listed in the statute in order to be considered a statutory supervisor; it is sufficient that he/she engages in any one of those functions. (*NLRB v. Kentucky River Community Care Inc.* (2001) 532 U.S. 706, 711; 121 S. Ct. 1861; *Tsukiji Farms* (1998) 24 ALRB No. 3, ALJD, p. 3)

According to NLRB precedent, the “decisive factor is whether the employee possesses the authority to use independent judgment with respect to the exercise of one or more of the specific authorities listed in Section 2 (11).”¹² (*Carlisle Engineered Products, Inc.* (2000) 330 NLRB 1359, 1361) Supervision of work that is not complex may still require the use of independent judgment. (*American Diversified Food, Inc. v. NLRB, supra*, 640 F2d 893, 897) As the NLRB pointed out in *Dunkirk Motor Inn, Inc.* (1974) 211 NLRB 461, 462, en f’d den. 524 F2d 663, “The test of responsible direction does not depend on the complexity and difficulty of the ...work or of the corrective measures invoked....Adoption of that test would unrealistically rule out a finding of responsible direction in all situations where the work involved does not require a high degree of skill and technical competence. The proper test...is that [the supervisor] exercises independent judgment without consultation...in ascertaining deficiencies in the work, however prosaic and uncomplicated, and in utilizing the authority to order that the work be done correctly.”

The burden of proof is on the party claiming supervisory status (*NLRB v. Kentucky River Community Care Inc.* (2001) 532 U.S. 706, 710-711; 121 S. Ct. 1861; *King Broadcasting Co. d/b/a KGW-TV* (1999) 329 NLRB 378, 381), in this case, the General Counsel and the UFW. The Board, like the NLRB, deems it necessary to proceed cautiously in finding supervisory status because supervisors are excluded from the protections of Section 1152 of the ALRA (the analog of section 7 of the NLRA). (*Arie De Jong, dba Milky Way Dairy* (2003) 29 ALRB No. 4, p. 49; see also *Energy Gulf*

¹² Section 2(11) of the NLRA is the analog of Section 1140.4(j) of the ALRA.

States, Inc. v. NLRB (5th Cir. 2001) 253 F3d 203, 208; *East Village Nursing & Rehabilitation Center v. NLRB* (D.C. Cir. 1999) 165 F3d 960, 962)

Based on Perez' testimony, I find that he is a statutory supervisor. He seems clearly to have the responsibility to direct workers in the performance of their assigned work. He testified that with respect to his duties when the crew was tying vines, he was to "[e]xplain to them how to do the work, and see that it was going well." (RT 33: 3-4) He said that he gave directions to his crew on a daily basis. (RT 25; 23-25) He also testified that during the day, the workers in his crew would talk to him about how to do the work and he would explain it to them. (RT 58; 8-11) Although the work of the crew may not have been complex, Perez was nonetheless responsible for monitoring the crew's performance, correcting work improperly done, and responding to the crew's inquiries. I find that Perez used independent judgment in checking the crew's work and in correcting work not properly done.

I also find that he has the responsibility to assign workers to perform work, such as the repair of trellises and the task of vineyard removal. Although Perez denied that he assigned workers to such tasks, he did say that the ranch supervisor would tell him how many workers he would need for these types of tasks, and then Perez would ask for volunteers from his crew. Perez then assigned the volunteers to the additional work. Implicit in Perez' testimony was that, if there were not enough volunteers, Perez would have to assign someone from the crew to do the work. Perez also testified that he had the responsibility to ensure that these additional tasks were properly done. (RT 96: 19-20; 97: 6-15) Certainly nothing in Perez' testimony suggests that the ranch supervisor or

Reyes assigned crew members to these additional tasks. In fact, Perez testified that when Anastacio, the Gallo ranch supervisor, told him that he needed four workers to do trellis repair, Anastacio talked to Perez only; it was not a general announcement to the crew that he needed volunteers. (RT 202: 24-25; 203:1)

I also find that Perez as foreman had the responsibility to discipline employees, as he did with Morales and Andrade. Perez' testimony on the first day of the hearing centered on his observing their work and finding it deficient. He was specific that the two workers were not paying attention about how to tie, and he had tried to correct their work over several days, three or four times, yet their work was not getting better. (RT 43: 11-25; 44: 1-7; 46: 8-9) Perez testified that he filled out the ticket or disciplinary notice and showed it to Morales, who signed it. He also said that after he gave Morales and Andrade their tickets, he explained to them that they could be fired if they got three tickets. (RT 47: 9-14) His responsibility to discipline the crew for inadequate work is also reflected in his explaining to the crew the disciplinary procedure, showing them the blank warning form, and then answering their questions about this important topic. (RT 62:4-8; 63: 10-12; 113: 19-25; 114: 1-9)

It was on the following day of the unfair labor practice hearing, when questioned by Respondent's counsel, that Perez first mentioned that it was the ranch supervisor who told him that the two workers were not doing the work properly and that Felipe Reyes told him to give the two workers a ticket if their work did not improve. While I have doubts about the credibility of that testimony, I do not think that it changes the analysis, since it was still Perez who continued to monitor the workers and who then reported to

Reyes that their work had not improved. Thus, even assuming *arguendo* that Reyes told Perez to give the two workers the tickets, Perez effectively recommended that they be disciplined by reporting that their work did not improve. And, it was Perez who actually filled out the tickets, showed them to the workers, and told them that if they got three tickets, they could be fired.¹³

During his examination by Respondent's counsel, Perez stated that Reyes was present when he gave the tickets to the workers, but he indicated that Reyes told the workers to pay attention because "I (Perez) had spoken with him three or four times and that I was going to give them a notice, so that they should pay attention." (RT 166: 3-6) Thus, based on what Reyes told the workers, the discipline came about based on what Perez told him and it was Perez who gave the tickets. Based on Perez' testimony, the disciplinary action was left to him. Also, even crediting Perez' testimony that Macario told him in the first instance of the workers' poor performance,¹⁴ Perez' testimony is clear that he then watched the workers' performance over several days, and despite his instructions to them, their work did not improve. The discipline, in the form of the ticket, flowed from his observations and his report to Reyes.

¹³ Perez only testified about showing the ticket to Morales, but he did testify that he gave them to the workers at the same time and told them both that they could be fired if they received three tickets. Also, Andrade signed his ticket, so Perez must have shown his ticket to him as well. (See GCX #2)

¹⁴ I find that Perez' testimony that Macario told him of the workers' poor performance not particularly credible. When questioned by the General Counsel, Perez made no mention of Macario's talking to him about the workers. Additionally, I find his testimony, when questioned by respondent's counsel, that it was Felipe Reyes' decision to give the notices suspect and not particularly credible. If it were Reyes' decision, why did Perez fill out the form and sign it and then give it to the workers for their signature. If Reyes was indeed present when Perez gave the warning notices to the two workers, a more likely explanation for his presence would be to shore up Perez' authority as foreman, as this was the first crew that Perez had supervised. Although Perez stated that he did not discuss his testimony with GVI's attorney, he testified that he discussed this particular issue with respondent's counsel that morning. Generally, Perez was evasive in discussing his contacts with GVI's attorney. (RT 233: 20-22) I also note that respondent did not call either Macario or Reyes to corroborate Perez' latter version of the disciplinary notices, and presumably, both of these supervisors were under respondent's control.

Respondent argues that the ticket did not result from Perez' use of independent judgment, because Reyes told him to issue the ticket. Yet Perez' testimony is that Felipe told him "If I had spoken with them three or four times and they didn't understand and/or pay attention, to give them the notice." (RT 165: 11-16) Thus, it seems that Perez was to use his own independent judgment as to the quality of work that Morales and Andrade were doing and whether they were responding to his instructions.¹⁵

Given Perez's authority to direct the daily work, assign work, and to discipline (or effectively to recommend the discipline of) members of his crew, he meets the statutory definition of a supervisor. But even if this were a close case, an examination of secondary indicia also supports a finding that Perez is a supervisor. (*Monotech of Mississippi v. NLRB* (5th Cir. 1989) 876 F2d 514, 517) He is paid \$12.00 per hour, while the members of his crew are paid an hourly rate of \$8.18, a considerable differential. He is designated as foreman, and by the terms of the contract, he is prohibited from doing bargaining unit work, other than for a maximum of 200 hours for the year.¹⁶ In addition to supervising Perez, it appears that Reyes also supervised other crews, working over large areas, possibly even on different ranches. Perez indicated that if Reyes were not at the ranch where his crew was working, then the Gallo ranch supervisor would instruct him as to how he wanted the job done. It therefore seems likely that the various crew foremen had the responsibility to direct the work of their crews, assign tasks, and even

¹⁵ Interestingly, the disciplinary notices themselves require a "foreman's" signature, rather than a "supervisor's," which seems to support Perez' first description of the process by which he gave Morales and Andrade tickets for poor work performance. The notices thus acknowledge the foreman's responsibility to mete out discipline. This may be why Reyes had Perez sign and present the disciplinary notices, rather than his doing it, assuming *arguendo* that he was involved at all with giving the notices to Morales and Andrade.

¹⁶ See CPX # 3, p. 11.

discipline crewmembers.

Respondent argues that Perez' duties are routine and that he does not exercise independent judgment in the supervision of his crew. Respondent relies on *Bright's Nursery* (1984) 10 ALRB No. 18 to argue that Perez cannot be a supervisor because his duties are merely instructional in nature. *Bright's Nursery* differs from the situation here. The Board did not find supervisory status because the three workers who were allegedly supervisors spent the entire day with the crews, performing the same type work as the crewmembers, and did not spend a substantial part of their time exclusively supervising the work of the other employees. Moreover, the nursery supervisor directed the work of the crews on a daily basis and inspected the work of the crews two to three times each day. The three men were paid \$4.00 per hour, while the crewmembers were paid \$3.50. Additionally, the three workers had no authority to hire, fire or discipline; they primarily acted as conduits for the supervisor's orders, because the majority of the workers spoke Spanish, and the supervisor did not. Given the particular facts of that case, the Board found that the men did not exercise independent judgment in directing the crew.

Bright's Nursery and the other cases relied on by respondent, i.e. *Taylor Farms* (1994) 20 ALRB No. 8 and *Tsukiji Farms* (1998) 24 ALRB No. 3, are dependent on the Board's analysis of the specific factual situation presented by each of those cases. As the national board has observed on more than one occasion, questions involving supervisor status are deeply fact intensive. (*Brusco Tug & Barge Co. v. NLRB* (DC Cir. 2001) 247

F3d 273, 276)¹⁷ As noted *ante*, my review of the record leads me to find that that Perez exercised authority over the members of his crew that was not routine or clerical in nature. Unlike any of the employees in the case relied upon by respondent, Perez could assign work; he could discipline or effectively recommend the discipline of workers; he conducted safety meetings; he did not do the same work as his crew, but directed their work and had additional duties before and after work; he distributed paychecks and the housing allowance; he explained disciplinary procedures to the crew and responded to their questions; and he kept track of the work done and the hours worked by members of his crew. If my finding of Perez's supervisory status were based solely on his giving directions to the crew, perhaps the case would be a closer one, as he directs the work of his crew in accordance with the directions of Reyes or the ranch supervisor. However, he does meet other criteria of a statutory supervisor, and secondary indicia also support a finding of supervisory status.

Based on the foregoing, I find that Perez is a statutory supervisor within the meaning of section 1140.4(j) of the Act.

2. Jose Luis Gonzales

Jose Luis Gonzales is employed by labor contractor Romulo Amaro and has been

¹⁷ In *Red Oaks Nursing Home, Inc. v. NLRB* (7th Cir. 1980), relied upon by respondent, the employer argued that the assistant food supervisor was a statutory supervisor. However, the employer had originally stipulated that she was a member of the bargaining unit and she voted without challenge. The NLRB found that she had limited supervisory powers and no substantial power in areas in which independent judgment was required, finding that she was a lead person, rather than a statutory supervisor. The board did find the personnel director to be a supervisor even though her duties were clerical in nature and some employees regarded her as a personnel clerk. However, she did participate in two management meetings and she made contact with employees regarding pay, insurance, and discipline matters, even though she herself had no authority to hire, fire, or discipline. In *VIP Health Services, Inc. v. NLRB* (DC Cir. 1999) 164 F3d 644, the court agreed with the RD's finding that the company's field nurses were not supervisors as they did not exercise independent judgment, but merely had a reporting responsibility to management. Neither case is factually similar to Perez' and Gonzales' situation.

for the last five years. (RT 441:1-3) Like Perez, he is a foreman of an 18-person crew. (RT 557: 20) His supervisor is Sergio Alva. Gonzales testified that he receives the orders regarding how the work is to be done from the supervisor and then gives the workers in his crew a class or lesson, showing them how to do the work. He said that it is his responsibility to ensure that the work is being done in accordance with what he teaches in the class. (RT 566: 21-22) He testified that after the crew starts working, he observes their work to make sure that it is done correctly. If it is not being done correctly, then he corrects the work and shows the worker how the job is to be done. (RT 621: 14-24; 647: 14-22)

Gonzales said that, as a foreman, he sometimes participates in meetings with the supervisor, Alva, and other foremen. At these meetings, Alva and the foremen discuss GVI's rules of conduct and issues relating to safety. (RT 612: 9-25; 613: 1-17)

Workers notify Gonzales when they are going to miss work, and Gonzales passes the information on to Alva by means of the workers' timesheets. If the worker provides a reason for the absence to Gonzales, then it appears that Alva takes no further action. If the worker has no reason for missing work, then Alva meets with the worker to determine the reason for the absence. (RT 721: 10-25; 723: 1-19) Workers also notify Gonzales if they are injured on the job, and Gonzales reports the injury to Alva. (RT 746: 7-13) Like Perez, Gonzales is responsible for moving the bathrooms and for taking water to where the crew will be working. He also keeps the daily time records,¹⁸ and he distributes the

¹⁸ Alva testified that the foremen sit down with him for 2-3 hours so that he can instruct them on how to fill out the time sheets. (RT 1072: 13-18)

paychecks to the members of his crew. (RT 610: 7-9; 637: 1-14; 638: 17-22; 757: 6-8)
He and the other foremen have walkie-talkies to communicate with Alva. (RT 659: 2-9)
When he is a foreman, union dues are not deducted from his paycheck. (RT 446: 18-22)
When not working as a foreman, the dues are deducted. Gonzales said that as far as he
knew, the dues deduction was automatic during those times when he was not a foreman.
(RT 558: 10-11)

In his capacity as foreman, he instructs the crew about company rules and
procedures. He also conducts safety meetings with the crew, usually just before the start
of work. Sometimes Alva attends these meetings. Gonzales chooses the topics for the
safety meetings, which usually relate to the job on which the crew is working. (RT 615:
14-19; 670: 8-25; 671: 1-2, 15-25; 672: 1-3; 778: 7-8; 779: 4-5) When workers have
comments or questions on safety issues, Gonzales responds. (RT 672: 11-16) Gonzales
said that it was part of his duty as a foreman to keep the workers in his crew safe. (RT
671: 5-10) To that end, he keeps track of areas that are sprayed with chemical to insure
that workers do not reenter the vineyards too early. (RT 742)

Gonzales is paid \$12.50 per hour. (RT 656:4-5) He does not do the work that the
workers do; for example, if the crew is pruning, he does not prune. Instead, it is his
responsibility to make sure that the pruning is properly done. (RT 682: 22-25; see also
682: 22-25; 683: 1-8) Also as a foreman, it appears from Gonzales' testimony that he
assigns work. Gonzales testified that when workers are assigned to jobs away from the
crew, "...it is my responsibility to check on the people that are working far away and
under my responsibility." (RT 835: 8-9)

Gonzales said that if a repair is needed, he informs Alva, who tells Gonzales to send someone to do it. (RT 673: 2-4) Gonzales testified:

“As a foreman, one would know who has the qualities and/or capabilities of doing a certain type of job. For example, fixing a pipe. And one would say, ‘Jose, go fix the pipe that has broken.’ “ (RT 673: 12-15)

However, after making this statement, Gonzales retreated, claiming:

“Since we all have the same type of job and we all have the same capabilities and qualifications, we’re all able to do the work, right.” (RT 673: 18-20)

In order to follow up, the General Counsel then asked:

“Now, are there any tasks in which some of your workers are more capable than others?”

Gonzales replied:

“ Some have more, say, ability and/or capability but they all have the same type of quality and/or qualifications.” (RT 673: 16-25) and finally, “I’ll tell the person that’s most closest to me to, like Pepe, let’s go repair a pipe. And he’ll do the work that is needed.” (RT 675: 2-4)

In his testimony Gonzales tried to minimize any responsibility that he had and to deny the exercise of the most basic supervisory functions. He was evasive in answering questions from the General Counsel and counsel for the UFW. Gonzales stated without qualification, that he had never given an employee any verbal warning about bad work or an infraction of the rules. (RT624: 17-20) Gonzales also testified that in two and one-half years as a foreman, there had never been a worker who was absent without giving notice to the company. (RT 629; 4-8) When confronted with documentary evidence that contradicted his testimony, Gonzales changed his testimony.¹⁹

¹⁹ See Gonzales’ testimony regarding absences without notice at RT 633: 21-25; 634: 1-4.

For example, Gonzales was asked if any members of his crew ever drove too fast on the company roads. Gonzales responded that he had mentioned this to the workers in general conversations about safety. He denied ever telling any individual workers that they were driving too fast. (RT 733: 5-15) When he was shown an entry in one of the tablets or notebooks that he kept, he then remembered that he told Hugo Leon and Jeronimo Hernandez that they were driving too fast on the ranch roads. He said that he told them to slow down and that this admonition corrected the problem. (RT 734: 14-25; 735) Gonzales also admitted that he had talked to Jorge Remos four times regarding Remos' poor work performance. (RT 748: 10-25; 749: 11-25; 750-755)²⁰

Applying the foregoing legal analysis to Gonzales' situation, I also find that he is a statutory supervisor pursuant to Labor Code 1140.4(j). I find that Gonzales had the authority to assign work and the responsibility to direct the members of his crew in their work. I also believe that he could effectively recommend discipline should a worker's performance be deficient, since he is the supervisor in direct contact with the crew on a daily basis, and there does not seem to be anyone else in a position to observe the crew's work on a regular basis. However, according to Gonzales, none of the members of his crew ever needed such discipline, and the record does not reflect that he recommended discipline for any workers, although he admonished members of his crew about rule violations and poor performance and worked with them to improve their work.

Like Perez, Gonzales' position reflects secondary indicia of a supervisor. He is

²⁰ A further example is Gonzales' testimony that he heard that workers were circulating a paper or petition to get rid of the 2% (i.e. union dues) and/or the union. (RT 448:2-4, 22-25; 449: 1; 563: 7-15) He testified to this over the course of two days. Then on the second day of his testimony, he suddenly denied that he ever heard that the workers were circulating a petition or paper to get rid of the 2%. (RT 574: 10-13, 25; 574: 1-2)

foreman of the crew; during the pruning, he is paid \$12.50 per hour, while the rest of the crew is paid \$8.43 per hour. He attends meetings run by Segio Alva with other foremen employed by Romulo Amaro. Again, looking at Alva's responsibilities supervising various crews working at different locations, it is more probable that Gonzales directed the work of his crew.²¹ Interestingly, when Alva was questioned about how the foremen recorded their time on the timesheets, he referred to the foremen as supervisors: "A supervisor can be busy on one block four hours and on another for four hours. And that is normal." (RT 1198: 15-17)²²

²¹ According to Gonzales, Alva supervised 4-5 crews in February 2003, or 72-90 persons, maybe even more. (RT 557: 13-20) Alva testified that in July 2003, Amaro had 7 crews working at Gallo, and in February 2003, there might have been four crews, maybe more. (RT 1054: 2-8; 16-19) Alva is the only supervisor for Romulo Amaro, even when the contractor has eight crews. (RT 1207: 25; 1208: 1-7) Looking at the ratio of supervisors to workers, it appears likely then that the foremen were indeed statutory supervisors. (See *Colorflo Decorating Products* (1977) 228 NLRB 408, 410; enf'd (9th Cir. 1978) 582 F2d 1289)

²² Jose Luis Gonzales voted a challenged ballot at the March 13, 2003 decertification election. Octavio Galarza was the field examiner who took Gonzales' declaration regarding his supervisor status. (See GC #5) In that challenge declaration, Gonzales stated that he had the authority to assign, transfer, and the responsibility to direct employees. Respondent objected to the admission of the Challenge Declaration because it was not previously disclosed in conformity with the prehearing conference order and because it is a hearsay statement and contains legal conclusions which Gonzales was not capable of making. As noted *ante*, at the time of the prehearing conference, the Gonzales allegations had not yet been added to the complaint. I admitted the document as an official record pursuant to Evidence Code section 1280. Pursuant to the official record exception to the hearsay rule, the document is admissible if it is a record made by a public employee, within the scope of that employee's duty, at or near the time of the event, and the sources of information and method of preparation were such as to indicate trustworthiness. Respondent questions the trustworthiness of the method of preparation, claiming that Galarza was merely writing down his conclusions, not specifically what Gonzales told him. Although Gonzales denied making statements to Galarza that Galarza incorporated into the declaration, I do not credit his denial. As noted *ante*, I did not find Gonzales to be a credible witness. It was Galarza's responsibility to question Gonzales regarding his duties and then to record the information that he received from Gonzales on the declaration form. It was also Galarza's responsibility to then translate the declaration and obtain Gonzales' signature under penalty of perjury. Pursuant to Evidence Code section 664, there is a presumption of trustworthiness for public records based on the public employee's duty to ensure a reasonable level of accuracy and reliability in their reports. I don't find that Respondent rebutted that presumption by Gonzales' testimony. Moreover, Gonzales did testify that Galarza asked him what his duties were and he told him. (RT 470: 13-14) Gonzales also said that Galarza read the form to him before he signed it. (RT 468: 15-16, 19)

I have determined that Gonzales is a supervisor, and thus his statements are admissible. The statements in the Challenge Declaration support my finding that Gonzales is indeed a supervisor. Even if the Challenge Declaration were not admissible pursuant to Evidence Code section 1280, Gonzales' statement that he can assign work could also be admitted as a prior inconsistent statement. I also find that his statement to Galarza that he can direct the work of the employees in his crew is actually consistent with his testimony at the hearing. With respect to respondent's point that Gonzales' statement contains legal conclusions, I note that respondent's counsel posed very similar questions to foreman Mario Perez. (See RT 190: 10-25; 191: 22-25; 195: 12-15; and 197: 5-6) At that time,

Based on the foregoing, I find that Gonzales is a statutory supervisor.

B. Even If Not Statutory Supervisors, Perez and Gonzales Would Have Been Perceived as Acting on Behalf of Respondent

Gallo may be held responsible for Perez' and Gonzales' conduct even if Gallo did not direct, authorize, or ratify that conduct if Perez and/or Gonzales had apparent authority to speak for GVI. (*Vista Verde v. ALRB* (1981) 29 Cal.3d 307; *Nick Canata* (1983) 9 ALRB No. 8; *I.A. of M. v. Labor Board* (1940) 311 U.S. 72,80; 61 S. Ct. 83; *Frank Foundries Corporation* (1974) 213 NLRB 391) Such liability can attach if Gallo employees could reasonably believe that either Perez and/or Gonzales were acting on behalf of respondent. (*Vista Verde v. ALRB, supra*, 29 Cal.3d at 322) The test for employer responsibility/liability is from the viewpoint of the affected employees. An employer may be responsible even if it is "utterly unaware of the unlawful coercive actions of a subordinate" if the affected employees reasonably believed that the "offending individual was acting on behalf of management." (*Superior Farming v. Agricultural Labor Relations Board* (1981) 151 Cap.App.3d 100, 122) Thus, even if Perez and Gonzales were not statutory supervisors, Gallo may be responsible for their conduct.

As noted above, in determining whether an employer may be held responsible for the conduct of a nonstatutory supervisor, the Board and the courts look to whether the employees could have reasonably believed that the employee in question was acting on

respondent did not believe that such questions called for legal conclusions on the part of Perez. I also note that respondent's claim that Galarza checked boxes on the declaration before talking to Gonzales is not true. Galarza said that he checked the box that Gonzales was a supervisor after talking to Gonzales, but before reading him the form to sign. (RT 989: 21-25, 990: 1-6)

behalf of management. Here, Perez and Gonzales exercised general authority over the workers in their crews and thus “were in a strategic position to translate to their subordinates the policies and desires of management.” (*I.A. of M. v. Labor Board, supra*, 311 U.S. 72, 80) In the *I.A. of M.* decision, the Supreme Court held that the employer was responsible for the actions of lead men who could not hire and fire, but exercised general authority over their subordinates.

Perez and Gonzales conveyed the instructions of the ranch supervisors and/or the orders and instructions of the labor contractor supervisors; they assigned work; they kept time and distributed paychecks; and they monitored and corrected the work of the crew. Perez clearly had authority to effectively recommend discipline, if not to discipline. Perez sent the crew home early when necessary²³ and carried a cellular telephone, allowing Perez and Reyes to communicate during the workday and allowing the crew to notify Perez of any absence. Workers reported to Gonzales when they would be absent or if injured on the job, and he communicated with Sergio Alva with a walkie-talkie. Both men got paid at a much higher rate than the rest of their crews. Both conducted the safety training for their crews. From the workers’ standpoint, the fact that neither Perez nor Gonzales did the actual work that the rest of the crew did would set the foremen apart from the crew. All of these attributes would suggest to their crews that Perez and Gonzales were part of management and acting on behalf of GVI in their involvement in the circulation of the decertification petition in their crews.

²³ Although this may have just been at the directions of Felipe Reyes (RT 157: 18-25; 158: 1-4), the crewmembers would not necessarily know this.

Indeed, Ramirez testified that Jose Luis Gonzales is “the supervisor of us, the workers. He is told how they want the work done, he shows us how. And he’s in charge of making sure the work is as such as has been requested of him.” (RT 260: 14-17) Ramirez also testified that Gonzales’ “job is to check and see if we’re doing the job correctly or well, like in the pruning, take the bathrooms, the water, and to see that everything is going well or is fine. (RT 262: 14-17)²⁴

Respondent cites *S&J Ranch* (1992) 18 ALRB No. 2, in arguing that because no employee witnesses were called to testify that he/she believed that Perez had authority over him/her, then the General Counsel and the Charging Party cannot establish that any worker perceived Perez as acting with apparent authority on behalf of management. (Respondent’s Brief, p. 15) However, Perez’ own testimony establishes that, like the foreman in *S&J Ranch*, he had the authority to direct the work of the crew and make the workers correct their work when it was not done to his satisfaction. Additionally, as discussed above, Perez had other responsibilities from which the crew would likely assume Perez to be acting for management.

With respect to whether the Gonzales crew would perceive Jose Luis Gonzales as acting on behalf of management, respondent relies on the testimony of Ramirez and argues that Ramirez’ testimony clearly established that he viewed Gonzales as a lead man and not a supervisor. As I indicated above, Andrade did indeed view Gonzales as a supervisor. But even if Andrade viewed Ramirez as a foreman and not a supervisor, that

²⁴ Cecilio Morales referred to Perez as his foreman and Reyes as the supervisor. However, Morales’ comment does not indicate that he viewed Perez as a fellow worker, rather than as a part of management. Given that Perez signed Morales’ disciplinary notice and Perez’ duties *vis a vis* the crew outlined above, I think it is likely that Morales would see Perez as a part of the management team.

distinction would not be determinative, since even as foreman, Gonzales could be---and would have been---perceived as acting on behalf of management, given his various responsibilities and duties.

The Board's decisions in cases such as *S&J Ranch, supra*, and *Tsukiji Farms* (1998) 24 ALRB No. 3, see ALJD, pp. 15-16, support a finding that both the Perez and Gonzales crews could reasonably believe that the two foremen had the authority to act on behalf of GVI. I thus find that Perez and Gonzales were agents of GVI and respondent is responsible for their actions.

C. Respondent Assisted, Supported, and Encouraged the Decertification Campaign

It is an unfair labor practice for an employer to involve itself in the circulation of and solicitation of signatures for a decertification petition. (*Placke Toyota Inc.* (1974) 215 NLRB 395, 395-396; *D & H Manufacturing Co.* (1978) 239 NLRB 393) The national board has found that an employer's participation in such a petition violates section 8(a)(1) because it tends to be coercive or tends to interfere with the employees exercise of their section 7 rights. In *Placke Toyota*, the NLRB found that, although the employer did not initiate or urge its employees to sign the decertification petition, it did lend more than minimal support and approval to the securing of signatures on the petition, thus violating section 8(a)(1). (See also *Indiana Cal-Pro, Inc. v. NLRB* (6th Cir. 1988) 863 F2d 1292, 1299, in which the court observed that the fact that the idea for the petition originated with an employee, rather than with the company, is not conclusive as to whether the company's participation in circulating the petition is coercive.)

The ALRB has likewise found employer assistance to a decertification effort unlawful and violative of section 1153(a) because the employer's involvement taints the petition. In such cases, the Board has invalidated the election as a measure of the employees' free choice. (*S&J Ranch Inc.* (1992) 18 ALRB No. 2, ALJD, p. 89; *Peter D. Solomon et al. dba Cattle Valley Farms* (1983) 9 ALRB No. 65, 3-10; *Nick Canata* (1983) 9 ALRB No. 8, pp. 5-13; *Abatti Farms* (1981) 7 ALRB No. 36, pp. 3-7)

In this case, I credit the original statement made by Cecilio Morales to Octavio Galarza and included in his declaration, signed under penalty of perjury, that he had signed the decertification petition after Mario, the manager of his crew, told the crew that he was going to give the crew a sheet to sign so that the union would not take away 2 percent. Morales also said that Mario did not tell the crew that the signatures were to decertify the union; rather, he understood that the purpose of the sheet he signed was to stop the union from taking away 2%. (GCX # 6)

Respondent objected to the admission of the Morales declaration as hearsay. Although the declaration is a hearsay statement, I find that Morales' statement regarding what Perez said to the crew is admissible as a prior inconsistent statement. It is clearly inconsistent with his testimony at the hearing. Pursuant to Evidence Code section 1235, Morales' prior inconsistent statements are admissible for the truth of the matter stated,²⁵

²⁵ See also *Dole Farming Inc.* (1996) 22 ALRB No. 8, ALJD p. 5, fn. 8; *Fun Connection & Juice Time et al.* (1991) 302 NLRB 740, 748) One of purposes of the hearsay rule is to limit or proscribe the use of an out of court statement when the other party has no opportunity to cross-examine the declarant about the statement. In this case, respondent had such an opportunity, as Morales testified and was available for cross-examination. Section 1235 allows the statement of a witness to be used as substantive evidence because the dangers against which the hearsay rule is designed to protect are largely nonexistent. (Law Review Comm. Comments to Evidence Code section 1325)

as long as there has been compliance with Evidence Code section 770. In this case, Morales was given an opportunity to explain or deny his prior statements to Galarza. He was questioned about his declaration, about whether he read it, and whether the statements in it were true. Morales testified that the statements in the declaration regarding what Perez said were not true. Essentially, Morales denied making the statements to Galarza, but as I explain below, I do not credit that denial²⁶, and Morales' statement in his declaration demonstrates Perez's involvement in the circulation of the petition/showing of interest.

Although Morales testified at the hearing that his March 9, 2003 statement was not true in that Mario did not make that statement (RT 493: 22-25), I do not credit that testimony. Morales stated that, prior to testifying, he had met on two occasions with Charley Stoll, Respondent's counsel, and Guadalupe Leon, Senior Human Resources Manager for Gallo of Sonoma. Although it occurred only a week before his testimony, Morales could not remember what was discussed at the first meeting despite its one-hour duration, could not remember where the meeting took place, or how he even heard about the meeting. He denied knowing who Stoll and Leon were. Regarding the second meeting, he indicated that the only thing he could remember that they discussed was

²⁶ I credit Galarza's account of his taking of Morales' statement: Galarza testified that he asked Morales to read the statement, that Morales initialed each page and then asked Galarza to add a further statement regarding Morales' desire for an election. Although respondent attempts to discredit the declaration, arguing that the circumstances under which it was taken argue against its reliability, I do not believe that Galarza, an experienced ALRB field agent, would make an error of such magnitude in taking Morales' declaration or that Morales would not have noticed that Galarza had made an error in setting down the information that he provided. Morales initialed each page of the declaration, signaling that he reviewed and approved it. In responding to a question as to whether Morales had told him that he read the declaration, Galarza said that "...in essence, yes," Morales had told him that he read it. Morales' statement, either verbal or non-verbal, that he read the declaration is also a hearsay statement, but admissible as a prior inconsistent statement, since he denied reading it when he testified at the hearing. (RT 459: 15-16)

Salvador Mendoza's wanting Morales to testify.²⁷ Morales stated that he never discussed his declaration or his testimony with Stoll and Leon. He said that he did not want to come and testify because he did not want to miss time from work. (RT 500-511)

Morales is eighteen years old. (RT 509: 10-11) He was extremely nervous while testifying. I find it hard to credit his testimony that he remembered nothing of the meetings with Stoll and Leon. Rather his failure of memory seemed to me to indicate that he was afraid that he would say the wrong thing about these meetings. Indeed, he testified that he was afraid to say something wrong. (RT 518: 19-22) His demeanor conveyed an extreme reluctance to be present and nervousness about what would be the outcome of his appearance. In response to a question by counsel for the UFW, Morales admitted that he told UFW organizer Salvador Mendoza that he did not want to lose his job by coming to testify. (RT 539: 2-13) At the hearing, he also testified that he did not want to lose his job for being at the hearing. (RT 519: 2-3, 9)

Octavio Galarza, the ALRB field examiner who took Morales' declaration testified credibly that he questioned Morales about how he happened to sign the showing of interest in support of the decertification petition, and Morales said that the foreman, Mario Crispin Perez, had directed the workers to sign a sheet so that the union would not take out 2% from their checks. (RT 894: 10-25; 895: 1-3) Although Morales' statement to Galarza is hearsay, I find that it is admissible as a prior inconsistent statement and pursuant to section 1235, admissible also for the truth of the matter stated. I also find that Perez' statement to the crew is admissible since I have found him to be a supervisor.

²⁷ Salvador Mendoza, also known as Chava, is a UFW employee. (RT 372: 4; 379: 11-14)

Based on the foregoing reasons, I find that Morales' original statement is more trustworthy than his testimony at the hearing, and I do not credit his later denial that Mario Perez never told the crew that he would be giving them a paper to sign so that the union would not take away 2%.

Although the witnesses' testimony establishes that Javier Duran Farias, rather than Perez circulated the petition, under the circumstances, i.e., in light of Perez' comment to the crew, the workers would understand that Duran was circulating the petition in Perez' stead. This is the pattern followed by Gonzales in his crew as well, suggesting that the foremen knew that they could not be involved directly soliciting signatures. Perez told his crew that he would be giving them a paper to sign, but he then left it to a rank and file worker to do so.

Duran said that he got the petition from Roberto Parra at a gas station. The location of the handoff of the petition seems to me to be suspect; I note also that Duran could not remember Parra's name when he provided a declaration regarding his solicitation of signatures on March 11, 2003. (RT 1256: 8-20) Duran said that he met Parra at a gas station because he (Duran) was not familiar with Santa Rosa and could not tell Parra where he lived. (RT 1276: 17-25) However, Duran went to various locations in Santa Rosa to gather signatures for the decertification petition, indicating that he had at least some familiarity with the area. (RT 1231: 20-23; 1232: 1-7)

Moreover, there were discrepancies in the testimony of the Perez crewmembers that testified. All three denied that Perez made the statement attributed to him by Morales in his declaration. But otherwise, their testimony differs. Morales stated that the

decertification petition was circulated at the end of the day, but during work time. (RT 524: 15-20; 525: 20-23; 526: 1-2, 9-10) Morales also testified that the petition was circulated on various days. (RT 486: 21-25)

Duran first stated that he spoke to the crew for 2-3 days regarding the petition. (RT 1231: 3-10). But he then said that he circulated the petition to the crew on only one day. (RT 1234: 25; 1235: 1-3) Duran testified that Perez was not anywhere that he could be seen when Duran circulated the petition. (RT 1236: 1-7) Duran also said that he did not know where Mario was when he was circulating the petition. (RT 1236: 4-5) When confronted with his prior declaration, in which he apparently said that Mario was having lunch apart from the crew, Duran changed his testimony, saying that Mario was having lunch, but far away from the crew. (RT 1237: 18-24) Duran was obviously flustered by the questions about Perez' whereabouts when he circulated the petition. (RT 1238-1239)

Duran testified that he ate his lunch, spoke to the crew as a group, and then spent 20 minutes circulating the petition to the entire crew of 17 persons. He also said that each person read the petition when he presented it to the crew individually. This puts his signature gathering during work time. (RT 1263: 15-22; 1276: 1-6; 1277: 2-4, 12-19)

Fellow crewmember Aquilino Perez Juarez said that Duran circulated the petition on only one day. (RT 1280: 18-25) Perez Juarez also stated that Mario Perez was not present when the paper was passed around. (RT 1281: 18-19) But then Perez Juarez said that foreman Perez was "around there, but far away from us." (RT 1287: 1-4) Perez Juarez testified that at approximately 12:20 p.m., after lunch was finished, Duran spoke to the crew for five minutes and then circulated the petition to the crew and each one read

the petition. (RT 1284: 12-19; 1314: 7-20)²⁸

Thus, even according to respondent's witnesses, Duran was circulating the petition to get rid of the union during work time, something that Perez would have observed, but Perez denied even knowing or hearing that any paper was circulating to get rid of the 2% and/or to get rid of the UFW. (RT 80: 18-23) I do not credit his denial that he told the workers in his crew to sign a paper to get rid of the union and the 2%. (RT 81: 2-9; 83: 8-11; 84: 9-12)²⁹ Based on the foregoing, I find that Mario Perez assisted in the solicitation of signatures on the showing of interest petition.

I credit the testimony of Eriverto Ramirez that he was given the decertification petition by his foreman, Jose Luis Gonzales, and asked to circulate it to the crew in order to get rid of the union.³⁰ Ramirez testified in an open and forthright manner. He indicated that he would have preferred not to testify, but that when called upon, he did so. Ramirez said that someone else in the crew had told Salvador Mendoza about Ramirez' passing the decertification petition around at work, and Mendoza contacted him to testify. As Ramirez put it: "Because if it was up to me, I wouldn't have said anything. They involved me in this thing." (RT 376: 19-21)

²⁸ Both Duran and Perez Juarez were opposed to the UFW (see RT 1269: 17-18 and 1306: 24-25; 1307: 1) and showed their opposition by attending a demonstration outside the building where the unfair labor practice hearing was taking place. They received permission, with others from their crew, to leave work early to demonstrate. In the course of the demonstration, Duran, among others, shouted that the UFW representatives were thieves. (RT 1271: 7-8; 1272: 9-11, 16-24; 1273: 1-12; 1305: 24-25; 1307: 16-24; 1308: 1-11)

²⁹ Apart from the conflict between the testimony of Duran and Perez Juarez, I also discredit Perez' denial because I have doubts as to Perez' credibility with respect to his testimony regarding his giving the notices to Morales and Andrade, specifically his testimony about the involvement of Macario and Reyes. Faced with the conflict between the Morales original statement and Perez' denial, I credit Morales' statement in his declaration.

³⁰ I do not find it necessary to decide whether Alva brought the petitions to Gonzales. Circumstantial evidence supports such a finding since Ramirez testified that Gonzales gave him the papers just after Alva visited the crew and spoke to Gonzales, but I don't find Ramirez's testimony on this point sufficient to support a finding that Alva was also involved in the decertification campaign.

Ramirez said that he circulated the petition at approximately 1:00 p.m., for 30-40 minutes, as the crew was working, after being given the papers by Jose Luis Gonzales, also known as Pepe.³¹ He said that he told his co-workers what Pepe had told him: They needed to sign, that it was so that there would no longer be a union and that 2% would no longer be taken. According to Ramirez, when Pepe handed him the papers and told him what to do, approximately 10 other workers were near by; the closest worker was about 25 meters away. He said that there were no leaves on the vines and the workers were all moving toward the end of their rows, all exiting their rows at about the same horizontal level. (RT 341-342) Once Ramirez finished circulating the petition, he returned it to Gonzales, rather than to Roberto Parra, the decertification petitioner.

I credit Ramirez' testimony about this incident, rather than Gonzales' denial, because Ramirez testified in a detailed, straightforward, and sincere manner. He did not embellish his testimony and responded in the same fashion both on direct and cross-examination. Ramirez did not seem to have particular ties to the UFW.³² As a current employee of Gallo, testifying adversely to his employer's interests, his testimony is particularly compelling. (*ShopRite Supermarket Inc.* (1977) 231 NLRB 500, fn. 22)³³

³¹ Respondent argues that the crew could not hear what Gonzales and Ramirez said to each other, so that the workers would not know that Gonzales gave Ramirez the petition to circulate. (Respondent's brief, p. 33) However, the crew could hear Gonzales call Ramirez out of the rows and observe Gonzales give him papers and then see that Ramirez, who had been working alongside them, then had papers regarding the 2% and getting rid of the union, which he was permitted to circulate during work time. Under such circumstances, it was reasonable for the crew to assume that respondent was circulating the papers at Gonzales' behest.

³² Ramirez testified that he had never met with UFW employee Salvador Mendoza by himself and that he had been to the UFW office 2-3 times in 2003, and it appears from his testimony that these visits were related to this matter. (RT 365: 22-24; 366: 21-23; 367: 2-4; 368: 3-13; 383: 6-13; 385: 18-23; 386: 4-20; 389: 6-8)

³³ This case is distinguishable from *Metz Metallurgical Corp.* (1984) 270 NLRB 889, a case involving alleged election misconduct, where the alleged interrogation and threat of lost benefits occurred during a conversation between a low-level supervisor and one employee. The unit was 136 employees. No other objectionable conduct occurred. Here, Gonzales gave the petition to Ramirez in front of the crew, permitted Ramirez to circulate it during

Respondent argues that Ramirez' memory regarding his circulating the petition was inconsistent and therefore suspect, claiming that Ramirez testified that the petition was circulated 15 days after the election. (Respondent's brief, p. 29) However, Ramirez' testimony was instead that he circulated the petition and 15 days after he did so, the election was held. (RT 332: 3-4)

In addition to Gonzales' denial that he ever gave the papers to Ramirez, he stated that on the day that Ramirez circulated the petition, he had gone with Alva to the block where the crew would be working the following day. Even if I credited that testimony, Gonzales said that he left for the other block at approximately 1:30 p.m., which would still have given him time to give the papers to Ramirez and give Ramirez 30 minutes to circulate the petition and return it to Gonzales.³⁴

Generally, I found Gonzales to be an evasive witness. I have already noted how he changed his testimony regarding assigning jobs by taking into account the workers' strengths. He also changed his testimony regarding workers' absences, workers' violations of company rules, and regarding what he knew about the decertification petition. First, he testified that he heard about people signing something, but did not see any papers being signed. (RT 448-449) He also said that he heard the workers talking about how they were going to make a petition to get rid of the 2%. (RT 567: 2-3) Later,

work time, and Ramirez then returned the petition to Gonzales in front of the crew. Moreover, there is also Perez' conduct to consider. As discussed *infra*, employer involvement in the solicitation of signatures for a decertification petition taints the entire solicitation of signatures.

³⁴ Gonzales' testimony that he was gone for 3 1/2-to-4 hours from the crew is not supported by his timesheet, although Gonzales and Alva testified that, with respect to their own time, the foremen could fill out the daily time sheets "any way he wants." (RT 836: 23-25; 837: 1-3; 1074: 10), which leads one to wonder why the foremen record their time at all. I noted *ante*, p. 12, Alva could not confirm Gonzales' testimony.

he testified that he did not hear anything about their wanting to circulate a paper to get rid of the 2% and he never heard that they were going to circulate any paper or document. (RT 574-575.) When denying that the workers in his crew ever notified him when they would be absent, Gonzales testified that he had never had a telephone during the entire time he has been a supervisor at GVI. (RT 660: 15-18) However, in his challenged ballot declaration, Gonzales gave a telephone number to the Board agent. When I asked if the telephone number in his challenged ballot were accurate, Gonzales then explained that it had been disconnected because he did not pay the bill, apparently some time after the decertification election. (RT 852:5-8)³⁵

Prior to the hearing, Gonzales met with an ALRB agent, Octavio Galarza, and Stoll and Leon. He testified that Sergio Alva came to his home and told him that he (Gonzales) needed to attend an interview. According to Gonzales, Alva did not tell him what the interview was about or who would be present. Nor did Gonzales ask. (RT 597-599) I find this testimony incredible.³⁶

Additionally, Gonzales' manner when responding to questions by the General Counsel and the UFW was at times argumentative and hostile. He attempted to avoid answering direct questions and answered only parts of others.

Based on the foregoing, I do not find Gonzales a credible witness. I expressly

³⁵ Gonzales kept notebooks regarding his workday, which were a sort of day-by-day listing of crewmembers, work done, problems encountered in the course of the day. Gonzales described the notebooks as 99% work related. Upon learning of these notebooks, the UFW and the General Counsel requested that he bring them to the hearing the following day. Gonzales had only five of his notebooks, none at all for February 2003. He was unable to explain why he still notebooks he brought to the hearing or why he had thrown away the notebooks for February 2003.

³⁶ I note at the time of the unfair labor practice hearing, Gonzales was still working for Amaro, but may have been on some kind of disability leave from GVI. (RT 440: 25; 441: 1)

discredit his denial that he gave the petition to Ramirez to circulate to his crew.³⁷

Thus, I find that Gonzales, like Perez, assisted, supported, and encouraged the decertification effort at GVI. As either statutory supervisors and/or agents of respondent, their conduct is attributable to respondent GVI, and GVI, therefore, gave unlawful assistance to the decertification effort, thereby violating section 1153(a) of the ALRA.

D. Respondent's Interrogation of Eriberto Ramirez

The UFW contends that respondent GVI, through supervisor Sergio Alva,³⁸ and its counsel, Charley Stoll, unlawfully interrogated Eriberto Ramirez and attempted to dissuade Ramirez from testifying at the unfair labor practice hearing in this matter. The UFW argues that although the alleged interrogations and attempts to dissuade Ramirez from testifying were not pled in the complaint, the allegations are closely related to the issues in the complaint and were fully litigated at the hearing. The UFW is the only party to brief this issue.

1. Factual Background

Eriberto Ramirez testified that two weeks before the hearing, Sergio Alva approached him and asked him for the names of everyone in his crew at the time the petition was signed. (RT 295: 5-19; 296: 15-16; 394: 21-24; 395: 10-16) Ramirez said that Alva told him that the Company wanted to interview the crew. (RT 396: 4-7)

³⁷ The UFW in its brief asked that I correct the record of Gonzales' testimony at page 79, line 7. (UFW Brief, p. 27, fn.13) After reviewing the testimony, I agree that the sense of Gonzales' testimony is "No, I do not remember." However, without reviewing the tape of Gonzales' testimony, which is not available to me at this time, I am not going to change/correct the testimony since it would not make sense for Gonzales to have said "Yes, I do not remember."

³⁸ The parties stipulated that Sergio Alva is a supervisor within the meaning of section 1140.4(j). (RT 1100:21-15; 1101: 1-4)

Ramirez said that he gave Alva the names that he remembered and when Ramirez told Alva that he was going back to work, Alva told him to stay and sent the other worker who was present during this conversation back to work. (RT 296: 21-25) Although the testimony was not entirely clear as to the sequence of the conversation, Ramirez said that Alva asked him what he had said and asked about the showing of interest petition. (RT 398: 25, 399: 1-4) Ramirez testified that Alva said, "Don't say anything. Help the people." and then patted Ramirez on the back. Ramirez said that he told Alva that he had signed a statement for the Union and that he was going to tell the people what the truth is. In response, according to Ramirez, Alva said, "That's fine." (RT 297: 1-12; 399: 2-3) Ramirez said that he made the statements regarding his signing the statement "voluntarily."

Ramirez also stated that, about four days prior to the hearing, GVI's attorney, who was accompanied by Gallo's personnel manager, Guadalupe Leon, interviewed him. Leon translated for Stoll. Although it is not clear from Ramirez' testimony whether the interview concerned his conversation with Sergio Alva, as well as the circulation of the petition, it appears to have concerned both topics. (RT 297: 13-15) Ramirez said that Gallo's attorney asked him the same things as the ALRB. (RT 297: 18-19) Ramirez also said that when he spoke with Stoll and Leon, they treated him well. Apparently Stoll told Ramirez that Roberto Parra said that he (Parra) gave the petition to get rid of the union to Ramirez. He also told Ramirez that Alva and Gonzales were witnesses. Stoll additionally asked Ramirez if Ramirez knew the consequences of his testifying. Ramirez stated that he told Stoll that he didn't know and that he wasn't interested. (RT 299: 1-4)

Ramirez testified that Stoll told him that the meeting with him and Leon was voluntary and there would be no reprisals for his participation or nonparticipation in the meeting. (RT 315: 9-15)

Alva also testified about his conversation with Ramirez. He said that he asked Ramirez and others for the names of those in Pepe's crew in January and February 2003. According to Alva, Ramirez asked him why he wanted the names, and Alva told him that he did not know why they wanted the names. (RT 1095: 8-24) At the hearing, Alva testified that Romulo Amaro, the labor contractor for whom he worked, was gone and that he did not have access to the crew timesheets and one of the Gallo managers had asked for the information about the crewmembers. (RT 1091: 17-23) Alva said that he got some names from Ramirez, and then Ramirez told him that he had signed something for the union saying that he got the petition from Gonzales, and Ramirez asked Alva what was going to happen. Alva said that he told Ramirez if he signed something that said that and it was found to be true, then the election would be thrown out. (RT 1096: 2-11)

Alva testified that he had known Ramirez for four years and that they had lived together for a time. (RT 1086: 20-21; 1206: 7-16)

2. Analysis and Conclusions

Based on the testimony of Ramirez and Alva, it appears that Alva asked Ramirez for the names of his fellow crewmembers in order to assist respondent in preparing for the unfair labor practice proceeding. Although the Union suggests that the reason for the conversation between Alva and Ramirez was pretextual, it does appear that Gallo had notified the General Counsel and the UFW that Amaro was in Mexico prior to the time of

the hearing, although respondent had apparently said it would produce him if needed for an interview by the General Counsel. (RT 412: 16-22) Alva testified that he talked to various workers, as well as Jose Luis Gonzales, in order to get the names of the crewmembers. Although it does seem a little odd that Alva could not get the names of the crewmembers from Gonzales, who apparently kept a considerable information in his notebooks, there is not sufficient evidence to conclude that Alva's approach to Ramirez was a pretext. Based on the testimony of Alva and Ramirez, Alva did not need a reason to start up a conversation with Ramirez.

The question then arises as to whether Alva's further remarks to Ramirez were coercive. I credit the testimony of Eriberto Ramirez that Alva told him not to say anything and to help the people, after asking Ramirez about the showing of interest petition. As noted *ante*, Ramirez testified in a straightforward and sincere manner. He did not embellish his testimony. He was, for the most part, very precise in his responses to all counsel and answered all questions unhesitatingly. In response to Alva's statement, Ramirez told Alva that he had already signed something for the union. Ramirez also told Alva that he would testify truthfully about what had occurred. To which Alva replied, according to Ramirez, "Fine."

Despite Alva's last comment, I believe that his remarks to Ramirez would tend to coerce a reasonable employee. Alva is the second in command of the Amaro operations at GVI. He basically told Ramirez not to testify at the hearing—"to say nothing." Although Ramirez has sufficient strength of character or purpose to have ignored Alva's request, the test for an unlawful interrogation is an objective one: Can the challenged

conduct reasonably be said to interfere with an employee's free exercise of rights under the Act. (*Karahadian Ranches Inc. v. ALRB* (1985) 38 Cal.3d 1) In this case, I believe that Alva's remarks could reasonably be said to interfere with Ramirez' exercise of his rights under section 1152 of the Act.

With respect to the questioning by respondent's attorney, I find that Stoll satisfied some, but not all, of the requirements imposed by the NLRB for interviews in preparation for an unfair labor practice proceeding in *Johnnie's Poultry* (1964) 146 NLRB 770, enf'd. den. on other grounds (8th Cir. 1965) 344 F2d 617. (See also *Freeman Decorating Co.* (2001) 336 NLRB No. 1, p. 14.) I believe that Stoll communicated the purpose for the interview, obtained Ramirez' participation on a voluntary basis, and gave assurances of no reprisals should Ramirez chose not to participate in the interview. However, it is certainly not clear whether the questioning occurred in a context free from hostility to a continued Union presence at GVI, given my finding that Gallo assisted in the decertification effort. Moreover, pursuant to the NLRB's ruling in *Johnnie's Poultry*, the questioning must not be coercive in nature. Stoll's remark that both Gonzales and Alva would be testifying, suggested that their testimony would be different from that of Ramirez, and could be viewed as an attempt to compel Ramirez to consider how his testimony would differ from that of these supervisors, which might in turn cause Ramirez to fear adverse consequences.

The NLRB has held that the requirements of *Johnnie's Poultry* set a minimum standard for a finding that employer questioning of employees for preparation of an unfair labor practice case is privileged. (*Roadway Express* (1978) 239 NLRB 653, 666)

Absent compliance with those requirements, there is a potential for coercion in such conversations. Since I find that there was not compliance with *Johnnie's Poultry* by respondent's attorney, I would find that Stoll's interrogation was a violation of section 1153(a).

Given that the complaint contains no allegation of unlawful interrogation by either Gonzales or Stoll, further questions remain: Were the unlawful interrogations fully litigated and are the allegations related to the unlawful interrogations sufficiently intertwined with the allegations in the complaint. (*Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 252; *Nish Noian Farms v. ALRB* (1984) 35 Cal #d 726, 735)

I find that the facts relating to the alleged unlawful interrogations were not fully litigated. Because the complaint was not amended and there was no discussion at the hearing of the General Counsel's proceeding with separate unfair labor practices based on the testimony of Ramirez and Alva, or indeed of the UFW seeking a remedy based on the conduct of Alva and Stoll, the parties, other than the UFW, did not have an opportunity to prepare legal argument as to whether the conduct I have discussed *supra*, constituted a separate violation of the ALRA.³⁹

Moreover, had respondent been on notice that the above described conduct would be considered as separate unfair labor practices, Respondent may have chosen to call additional witnesses. For example, Ramirez testified that Francisco Guzman was present at the discussion between Ramirez and Alva. (RT 398: 20-21) Guzman is a Gallo

³⁹ When counsel for the UFW questioned Ramirez about his conversation with Alva, counsel for respondent objected. Counsel for the UFW argues that his questioning of Ramirez went "to other unlawful conduct which is relevant when making a finding of whether there's an unfair labor practice in this case." (RT 294: 14-16)

foreman and presumably someone who would have been available for an interview and possible testimony. (*Harry Carian Sales, supra*, 252; see also *Sunnyside Nurseries v. ALRB* (1979) 93 Cal.App.3d 922, 933-934 and discussion in *Superior Farming v. ALRB* (1981) 151 Cal.App.3d 100, 113-114)

Even assuming arguendo that the matters had been fully litigated, I do not find that the alleged unlawful interrogations were sufficiently intertwined with the allegations of the complaint, which related only to the unlawful assistance of GVI to the decertification effort. Although the unlawful interrogations related to the ALRB unfair labor practice proceeding convened to consider whether there was unlawful assistance, the interrogations were not a part of the decertification campaign, occurred after the campaign was completed, and although involving the same section of the ALRA, Section 1153(a), they involve a very different class of violations of the Act. (*Nish Noian, supra*, 35 Cal.3d 726, 735; *Rebbie Moving & Storage Company v. NLRB* (7th Cir. 1995) 44 F3d 605, 608; *Redd-I, Inc.* (1988) 290 NLRB 1115)

VI. **Remedy**

Although there is no evidence that Gallo engaged in any direct campaigning on behalf of the decertification of the UFW, GVI facilitated and encouraged the campaign by the actions of its agents Mario Crispin Perez and Jose Luis Gonzales. Perez and Gonzales actively supported the circulation of the decertification petition and encouraged workers to sign the petition. The petition was circulated during work time, with the obvious approbation of the two foremen, creating an impression of open support by the Company for the decertification effort. Since I find that the two men are statutory

supervisors, GVI is liable for their actions.

However, even if not statutory supervisors, then GVI is nonetheless liable for their actions because GVI workers would have reasonably believed that Perez and Gonzales were acting on behalf of respondent in permitting the petition to be circulated during work time and encouraging the members of their crew to either sign or circulate the petition. Perez endorsed Duran's efforts to obtain signatures on the petition, speaking to the whole crew about the paper Duran was going to pass around, while Gonzales actually gave the petition to Andrade and spoke with him about circulating it in front of at least a part of the crew. The message to those two crews seems clear: GVI supervisors, and by implication, GVI itself, supported the effort to get rid of the UFW.⁴⁰

It is impossible to measure the effect of the actions of Perez and Gonzales outside of their own crews. There were 36 GVI workers in the two affected crews.⁴¹ After Perez' statement to the crew, his entire crew signed the petition. The Gallo workers from various crews shared housing and/or rented in the same hotels or apartment. (RT 206: 16-25; 207: 1-20; 1232: 3-7; 1268: 9-10) Referencing NLRB precedent in *Triple E Produce Corp. v. ALRB* (1983) 35 Cal.3d 42, 51, the California Supreme Court observed: “[S]tatements made during an election can reasonably be expected to have been

⁴⁰ Respondent relies on the NLRB's decisions in *L.B. Woods* (1960) 127 NLRB 1462 and *Montgomery Ward & Co.* (1956) 115 NLRB 645 in arguing that GVI should not be held liable for the actions of Perez and Gonzales. However, in those cases, the national board refused to find the employers' liable for the actions of supervisors who were also part of the bargaining unit. In this case, I find that Perez and Gonzales are statutory supervisors and thus are excluded from the unit. Moreover, as I have discussed, I find GVI also liable for their conduct as agents of the company. Gonzales does not pay union dues when he is a foreman and the fact that Perez has continued to pay dues even while acting as a foreman appears to be an oversight or an error on Israel Gonzales' part. That error does not convert Perez into a member of the bargaining unit.

⁴¹ The number of Gallo employees at the time of the decertification election is not included in the record. Respondent asserts that Gallo had 327 employees at that time, but does not cite to the record.'

discussed, repeated or disseminated among the employees, and therefore, the import of such statements will carry beyond the person to whom they are directed.” Conduct by supervisors evincing support for a campaign to oust an incumbent union can likewise reasonably be expected to have been discussed and disseminated among GVI employees.

However, even if only the two crews were aware of the conduct of Perez and Gonzales, the employer’s involvement in the solicitation of signatures from those crews taints the entire showing of interest, since GVI provided more than ministerial support for the decertification campaign. The NLRB pointed out in *Wire Products Manufacturing Corp.* (1998) 326 NLRB 625, 627, n. 14 “We do not pass on the judge’s analysis concerning the numerical sufficiency of the signatures on the decertification petition and we rely solely on the petition taint in finding that respondent failed to establish good faith reasonable doubt prior to withdrawing recognition.” In *Davis Medical Center* (1991) 303 NLRB 195, ALJD, 207, enf’d (9th Cir. 1993) 991 F2d 803, the NLRB found that “respondent, through its supervisors and agents, assisted in obtaining signatures during worktime when there was a valid no-solicitation rule in place and thus interfered with its employees’ Section 7 rights....Respondent’s action in these circumstances were sufficient to taint the entire solicitation of signatures on the anti-union petition.”

In arguing that the actions of Perez and Gonzales were, if true, *de minimus*, isolated and “completely innocuous,” respondent notes that it “believes that a majority of employees signed the decertification petition.” (Respondent’s brief, p. 39) There is no record evidence for that “belief” and I will disregard that assertion. Moreover, even if it were true, as noted above, NLRB precedent compels the conclusion that an employer’s

assistance and encouragement to the decertification effort taints the entire effort, since there is no way to know whether the signatures on the decertification petition reflect the workers uncoerced and unrestrained free expression of views toward the union.⁴²

The NLRB takes the position that an employer-assisted decertification petition should be dismissed, and if an election is held, then the results of that election should be disregarded. The court in *Ron Tirapelli Ford, Inc. v. NLRB* (7th Cir. 1993) 987 F2d 433, 442 summarized the national board's position:

The Board has long taken the view that an employer-assisted decertification petition ought to be cancelled and the party returned to the status quo ante. The petition tainted by the employer's unfair labor practices, is a nullity. ... Here, however, the tainted decertification petition became the basis of an election before the employer's illegal conduct came to light. In the Board's view, the holding of the election ought not alter the result. The tainted petition is a nullity; the resulting election is a nullity."

(See *Hall Industries, Inc.* (1989) 293 NLRB 785, ALJD, p. 791, enf'd (3rd Cir. 1990) 914 F2d 244 ["Since the Respondent actively stimulated the decertification effort and did so in the context of serious unfair labor practices, its conduct in this regard is also a violation of Section 8(a)(1) of the Act and the decertification petition which resulted from its efforts is void *ab initio*"]; *Central Washington Health Services Assn.* (1987) 279 NLRB 60, enf'd (9th Cir. 1987) 815 F2d 1493 [Respondent's unfair labor practices, which included respondent's instigation, assistance, and encouragement to employees to circulate a decertification petition in violation of Section 8(a)(1), tainted the employer's petition.]; and the NLRB *Casehandling Manual on Representation Proceedings*, section

⁴² Respondent cites the provision of the NLRB's Casehandling Manual, Part II, Representation Proceedings, which relate to the NLRB's blocking charge policy. Respondent acknowledges as much when it says that pursuant to the NLRB's policy, "the election should proceed." (Respondent's Posthearing Brief, pp. 40-41. In this case, the election has been held and section 11028.4 indicates that the petition should be dismissed.

11028.4)⁴³

The ALRB has also taken this position; the Board has not examined the number of signatures or looked for subjective evidence of how many signers may have been affected by the employer's illegal conduct. (*S&J Ranch Inc.* (1992) 18 ALRB No. 2, ALJD, p. 89; *Peter D. Solomon et al. dba Cattle Valley Farms* (1983) 9 ALRB No. 65; *Nick Canata* (1983) 9 ALRB No. 8, pp. 5-13; *Abatti Farms* (1981) 7 ALRB No. 36, pp. 3-7)⁴⁴ In *Peter D. Solomon et al dba Cattle Valley Farms, supra* the Board observed: "It is not surprising that employees would not necessarily know of the influence of the [employer's] illegal conduct; nonetheless, the illegal influence is there and taints the validity of the election as a measure of employee free choice."

Thus, I find that respondent violated section 1153(a) of the ALRA based on the unlawful support and assistance of Perez and Gonzales to the decertification campaign. As a result of that unlawful support and assistance, the decertification election should be set aside, and the petition for decertification dismissed. (*Abatti Farms* (1981) 7 ALRB No. 36; *Nick Canata* (1983) 9 ALRB No. 8) I make that recommendation because respondent's unlawful conduct tainted the entire process, and it is not possible to say that the election results sufficiently reflect the uncoerced and unrestrained free expression of

⁴³ Section 11028.4 provides that "After an election has been held, the adequacy of the showing of interest is irrelevant [citation omitted]. Accordingly, challenges to the adequacy of the showing of interest may not be raised after an election has been held. On the other hand, when the petition itself was tainted by unfair labor practices and thus was void *ab initio*, the petition should be dismissed irrespective of the conduct of an election, which is considered a nullity. *Ron Tirapelli Ford* (1991) 304 NLRB 576.

⁴⁴ Respondent in its supplemental brief argued that because the General Counsel has not requested the dismissal of the petition in its brief, dismissal would be inappropriate and beyond my authority. Apart from the fact that the General Counsel did request the dismissal of the petition in the second amended complaint (see page 7), the Supreme Court's decision in *Harry Carian Sales v. ALRB* (1985) 39 Cal. 3d 209, 233 answers respondent's argument. The Court pointed out that it is up to the Board, not the General Counsel to fashion the appropriate remedy for unfair labor practices found to have been committed.

the bargaining unit members.

Dated:

Nancy C. Smith
Administrative Law Judge

ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Gallo Vineyards, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Assisting, supporting, or encouraging any agricultural employee(s) in an effort to decertify their certified bargaining representative

(b) In any like or related matter interfering with, restraining, or coercing any agricultural employee(s) in the exercise of rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Sign the attached Notice to Agricultural Employees, and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(b) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by Respondent during the period February 1, 2003 – January 31, 2004.

(c) Post copies of the attached Notice for 60 days at conspicuous locations on its premises, the places of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or

removed. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of copies of the attached Notice.

(d) Provide a copy of the attached Notice in all appropriate languages to each agricultural employee hired by Respondent during the 12-month period following the date this order becomes final.

(e) Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

(f) Arrange for a representative of Respondent or Board agents to read the attached Notice in all appropriate languages to the assembled agricultural employees of Respondent on company time, at times and places to be determined by the Regional Director. Following the reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and during the question and answer period.

(g) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing as to what further steps it has taken in compliance with the order.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we, Gallo Vineyards, Inc. had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the Agricultural Labor Relations Act (Act) by assisting, supporting, and encouraging the decertification campaign.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following rights:

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

Because you have these rights, we promise that:

WE WILL NOT assist, support, or encourage any decertification campaign.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the Act.

DATED: _____

GALLO VINEYARDS, INC.,

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 342 Pajaro Street, Salinas, CA 93901. The telephone number is: (831) 769-8031.

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

DO NOT REMOVE OR MUTILATE