STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROS. CO. OF CALIFORNIA, A California Corporation, Employer, and ALVARO SANTOS, Petitioner, and UNITED FARM WORKERS OF AMERICA, Certified Bargaining Representative.	)	Case No. 2010-RD-004-SAL
D'ARRIGO BROS. CO. OF CALIFORNIA, A California Corporation, Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case No. 2010-CE-050-SAL 39 ALRB No. 4 (April 10, 2013)

DECISION AND ORDER

On June 15, 2012, Administrative Law Judge (ALJ) Mark R. Soble issued the attached decision in which he held that the employer, D'Arrigo Bros. of California (D'Arrigo or employer), violated section 1153, subdivision (a) of the Agricultural Labor

Relations Act (ALRA or Act) by instigating a decertification petition and supporting and assisting the gathering of signatures for the petition. In addition, the ALJ held that D'Arrigo's delay in providing an address list for a group of laid off workers interfered with their right to receive adequate notice of the election. The ALJ further concluded that D'Arrigo's unlawful or objectionable conduct tainted the entire decertification process, thus warranting the setting aside of the decertification election and dismissal of the decertification petition. This is a case in which related election objections and unfair labor practice allegations were consolidated for hearing. The unfair labor practice complaint alleges that the employer allowed and assisted the signature gathering in support of the decertification petition. The election objections allege that the employer: 1) Initiated, aided or participated in the decertification campaign; 2) failed to properly disclose the existence of two cauliflower labor contractor crews when submitting its written response to the decertification petition; and 3) prevented laid-off workers from receiving timely and adequate notice of the election.

D'Arrigo timely filed exceptions to the ALJ's decision. D'Arrigo's exceptions are largely focused on challenging the ALJ's credibility determinations that are critical to his conclusions regarding instigation of the petition and unlawful assistance in the gathering of signatures. The United Farm Workers of America (UFW) filed one exception, arguing that the ALJ erred in ruling that the UFW's request for mandatory mediation and conciliation (MMC) is not yet ripe.

As explained below, we find that the record does not support the ALJ's findings that: 1) The actions of John Snell constituted unlawful instigation of the

decertification petition; 2) the delay in providing an address list for the workers laid off the week of November 13, 2010, had any effect on their right to vote; or 3) the actions of Florentino Guillen in soliciting signatures during lunch time could be imputed to D'Arrigo due to his periodic status as a temporary foreman in other crews or that he reasonably would have been viewed as acting on behalf of management. In addition, we find that the ALJ erred in his ruling on the application of the attorney-client privilege to communications in meetings between UFW counsel and union member witnesses, though we also find that D'Arrigo failed to demonstrate how it was prejudiced by the ruling. We do, however, find that the remaining misconduct on the part of D'Arrigo is sufficient to warrant setting aside the election. Lastly, we conclude that referral to MMC is not an available remedy in an unfair labor practice case.

Allegation that D'Arrigo Instigated the Decertification Campaign

The testimony of worker Rene Salas was offered in support of the allegation that D'Arrigo labor relations manager John Snell instigated the decertification campaign by suggesting the idea of a decertification campaign to Salas. In 2009, Salas became the UFW representative for his rappini crew as well as for five other rappini crews. Salas testified that he went to talk to Snell on many occasions beginning in 2009. In one instance, Salas was unhappy with a contract provision indicating that overtime pay began after ten hours of work rather than after eight hours. Salas testified that Snell told him that if he was unhappy with the current contract, Salas could try to decertify the

union, as was being attempted at Gallo. According to Salas, Snell told him that he could find more information about what had happened at Gallo on the internet.

Salas had another meeting with Snell about six months later, at which time he asked Snell whether the company and union could change the overtime provisions of the contract. After Snell answered that the overtime clause could not be changed during the term of the contract, Salas told Snell that he had been unable to find information about Gallo on the internet. Snell then wrote out web-page information for Salas and told him to use that to find information on the Gallo decertification effort. According to Salas, Snell told him that the Gallo workers got rid of the union and negotiated a contract directly with the company. Though Snell recalled Salas coming to his office several times, Snell denied that there was any mention of decertification.

Salas testified that two or three months prior to the expiration of the contract in October 2010 he spoke to his co-workers in the six rappini crews at a lunchtime meeting at ranch number seven. At that meeting, the workers discussed and rejected pursuing a decertification effort, opting instead to try to get contractual changes through the existing bargaining representative, the UFW. However, Salas testified that he never told his co-workers of his conversations with Snell about decertification. Salas also testified that prior to his conversations with Snell he knew about the Agricultural Labor Relations Board (ALRB or Board) and the decertification process because he had attended various government agency workshops at which the ALRB was present. After his first conversation with Snell, he called the ALRB to verify that he and his co-workers could not be retaliated against for trying to change the contract.

The ALJ found the testimony of Salas to be credible and persuasive and, accordingly, did not credit Snell's denials of the conversations concerning decertification. He noted that Salas did not appear to rigidly tailor his testimony to favor one side or the other and appeared to have misgivings about both the company and the UFW. The ALJ therefore concluded that Snell suggested decertification to Salas and that he provided Salas with internet addresses to assist Salas in locating information about the Gallo decertification effort.

A review of the testimony provides no basis for disturbing the ALJ's crediting of Salas.[1] Salas' testimony appears to be straightforward and consistent, without any suggestion of exaggeration or reaching to establish any particular facts. In light of the character of Salas' testimony, it is difficult to give any credence to Snell's flat denial of any discussion of decertification, for that would require the unlikely conclusion that Salas simply made up the entirety of his testimony on that subject. Therefore, we affirm the ALJ's factual findings regarding the instigation allegation.

[1] The Agricultural Labor Relations Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or 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. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7.) In addition, it is both permissible and not unusual to credit some but not all of a witness's testimony. (*Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, citing 3 Witkin, Cal. Evidence (3d ed. 1986) §1770, pp. 1723-1724.)

Where it is found that an employer has instigated or initiated a decertification effort, the petition itself is tainted and the election must be set aside.[2] (*Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co*. (1983) 9 ALRB No. 65.) However, in order to find instigation or initiation of decertification, the evidence must show that the employer implanted the idea of decertification in the minds of employees who later pursued decertification. *(Ibid.; Abatti Farms, Inc. and Abatti Produce, Inc.* (1981) 7 ALRB No. 36; *Sperry Gyroscope Co., a Division of Sperry Rand Corp.* (1962) 136 NLRB 294.) Where the evidence falls short of establishing that the employer initiated or implanted the idea of decertification, there is no violation. (*Abatti Farms, Inc. and Abatti Produce, Inc.*, *supra*, 7 ALRB No. 36; *Southeast Ohio Egg Producers* (1956) 116 NLRB 1076.)

Based on his factual findings, the ALJ concluded that D'Arrigo unlawfully instigated the decertification petition. He noted that though Salas admitted that he did not tell his fellow workers about his conversations with Snell, he did later discuss decertification with the rappini crews. The ALJ then stated that, because events during an election campaign are likely to be disseminated, it was "possible" that the discussions with the rappini crews about decertification became known to other crews. D'Arrigo argues that it cannot be held to have suggested the idea of decertification when Salas previously was aware of that option, and that, in any event, there is no basis for

[2] Though the ALJ found instigation, his discussion of the appropriate remedy does not describe what weight he gave this finding in recommending that the election be set aside.

presuming that the idea of decertification spread beyond the rappini crews as a result of Snell's or Salas' actions.

On the facts established in this case, we are unable to conclude that Snell's conduct tainted the petition or otherwise had any effect on the outcome of the election. Salas did not discuss with his fellow employees the content of his conversations with Snell. There is no evidence in the record of any connection between the meeting with the rappini crews and the decertification effort that occurred two or three months later. Therefore, while Snell's conduct would have been unlawful and objectionable had it been shown to have implanted the idea of decertification in the minds of employees who later pursued a decertification effort, the facts in the record preclude finding Snell's conduct had any effect on the validity of the decertification petition.[3] Therefore, we overrule the ALJ's finding of instigation.

Employer Assistance in the Circulation of the Petition

1. Crews 120A, 120C, 120E, 120K, and 120Q

The ALJ found that in five crews, 120A, 120C, 120E, 120K, and 120Q, supervisors allowed employees to solicit signatures in support of the decertification

[3] Salas' prior knowledge of the decertification process itself does not preclude a finding of instigation. (*Abatti Farms*, *supra*, 7 ALRB No. 36.) Had the record reflected that Salas took actions leading to the later decertification effort, then Snell's comments could have been a proximate cause of Salas' involvement in that effort. Because of the lack of proven connection between Snell's comments and the decertification effort that did take place, we need not address whether Snell's comments, while not constituting instigation, technically constitute an additional instance of improper employer assistance. However, it should be noted that any employer who engages in such behavior runs the risk of unlawfully instigating any subsequent decertification petition.

petition during work time, though the evidence with regard to Crew 120A was admitted only as background because it was not alleged in either the unfair labor practice (ULP) complaint or the election objections. In one crew, 120E, the ALJ found that, in addition to allowing the solicitation, a supervisor helped gather the crew for that purpose. Given the nature of the allegations and the evidence offered at hearing, the ALJ's factual findings by necessity are highly dependent upon credibility determinations.

Generally, D'Arrigo argues that the ALJ ignored conflicts in the testimony of the witnesses called by the General Counsel and the UFW that undermine their credibility. Specifically, D'Arrigo cites the fact that the witnesses differed somewhat on the exact dates, times, and duration of the signature gathering, as well as the relative locations of the supervisors vis-á-vis the people soliciting signatures in support of decertification. Further, D'Arrigo claims that the ALJ simply made conclusory findings that are insufficient to warrant any deference under the principle set forth in *S. Kuramura, Inc.* (1977) 3 ALRB No. 49.

It is not surprising that many months after the events witnesses would not remember exact dates and times and would recall different and sometimes conflicting details about the same event.[4] If anything, this indicates that their testimony was not programmed or rehearsed. If the ALJ otherwise found them to be credible, this is no reason to discount their testimony, particularly since they were consistent on the key component of the event, which was that signature gathering took place during work time.

[4] The signature gathering occurred in late October of 2010 and the hearing took place in June, July, and August of 2011.

In *S. Kuramura, Inc.*, the ALJ made no factual findings, but instead simply listed the allegations in the complaint and stated that they had not been proven. The only analysis for those conclusions was the following:

> The testimonial evidence introduced by the complainant and the respondent was diametrically opposed. In determining the credibility of the witnesses, the administrative law officer has carefully reviewed the entire record and has given particular consideration to the demeanor of the various witnesses, their manner of testifying, and the character of their testimony. Having done so, it concluded that the testimony of the General Counsel's witnesses was not credible.
> (*Id*., at p. 3, fn. 2.)

In this case, the ALJ discussed the testimony in great detail and noted which portions of the testimony, and which witnesses generally, he found credible. This was based not only in implicit and explicit judgments based on demeanor, but also on the plausibility of testimony. It is true that in a few instances the ALJ could have been more explicit in his rationale for crediting certain witnesses; however, there is no comparison to the pro forma conclusions offered by the ALJ in *S. Kuramura, Inc.* Our review of the record, particularly in light of the applicable standard of review noted above, provides no basis for disturbing the ALJ's credibility determinations. Therefore, except as noted below, we affirm the ALJ's factual findings regarding employer assistance in gathering signatures for the decertification petition.

2. Crew 115C

The ALJ found that the actions of Florentino Guillen in soliciting signatures during lunch time in Crew 115C could be imputed to D'Arrigo because Guillen had been working as a temporary foreman in other crews in the time period

surrounding the solicitation of signatures, if not also on the day he solicited signatures in Crew 115C. Because the solicitation occurred during lunch time, it could be imputed to D'Arrigo, and thus be objectionable, only if Guillen could be viewed as acting on behalf of D'Arrigo. While the ALJ reasonably concluded that temporary foremen are supervisors while serving in that role, they do not have supervisorial status when they are not serving in that role.[5] Nevertheless, those who serve periodically in the capacity of temporary foremen are more likely to be viewed as acting as agents of the employer.[6]

Company employment records introduced into evidence indicate that Guillen acted as a temporary foreman from November 1-4, 2010 and on 15 of 22 days from October 21 to November 4, 2010. Further, they indicate that Guillen acted as a machine operator in his regular crew, Crew 120O, on November 5. The ALJ concluded that Guillen most likely visited Crew 115C on November 3, 2010. Further, he observed

[5] The ALJ credited testimony that the temporary forepersons had all the duties and responsibilities as regular forepersons, except for hiring and firing. He credited testimony that they met many of the other statutory indicia of supervisors, such as directing work, imposing discipline, enforcing company rules, ensuring work quality, granting permission to leave work, etc.

[6] Under the ALRA, an employer may be held responsible for the actions of employees, even if they are not supervisors or managers if: (1) The workers could reasonably believe that the coercing individual was acting on behalf of the employer; or (2) the employer has gained an illicit benefit from the misconduct and realistically has the ability either to prevent the repetition of such misconduct in the future or to alleviate the deleterious effect of such misconduct on the employees' statutory rights. (*Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307.)

that, even if Guillen did not visit Crew 115C until November 5, he would have received the petition from Alvaro Santos on a day that he was working as a temporary foreman.[7]

Only one witness, Pastor Espinoza, specifically testified that Guillen visited the crew on November 3. All other witnesses fixed the time during the first week of November or agreed with the questioner when he or she suggested that date was on or about November 3. Company records showing that Guillen left work at 11:00 a.m. on November 5 dovetail with Guillen's testimony that he left work at that time of day on the day he visited Crew 115C, claiming he had to go to the doctor.[8] As noted above, company records show that Guillen worked as a machine operator that day. Based on the record as a whole, we find it more likely than not that Guillen visited Crew 115C on November 5, not November 3.

Because Guillen was not serving as a temporary foreman for Crew 115C on the day he solicited signatures, his actions cannot be imputed automatically to D'Arrigo. However, Guillen acted as a temporary foreman from November 1-4 and on 15 of 22

[7] Supervisor Gerardo Cendejas testified that he knew Guillen and that Guillen told him why he was there, so to the extent it has any pertinence, management knowledge of Guillen's activities may be imputed based on Cendejas' knowledge. While D'Arrigo contests the ALJ's finding that Guillen showed the certification petition to Cendejas, this is of little import. All who testified on this point agreed that the interaction between Cendejas and Guillen took place before Guillen began soliciting signatures. Cendejas already had been told why Guillen was there, so a brief glance at the blank petition would have provided no more information, nor would it have revealed to Cendejas the identity of any signatories. In addition, it should be noted that Crew 115C was not receptive to Guillen, as he could obtain only one signature.

[8] Guillen testified that it took him 35 minutes to drive from the location of Crew 120O to that of Crew 115C.

days from October 21 to November 4, which was during the critical period when the decertification campaign began. Therefore, those who worked in the crews where he served as a temporary foreman or those who were aware that he frequently served in that capacity might reasonably have viewed him as acting on behalf of management even if he solicited signatures on a day when he acted as a machine operator. However, since both the allegation and the record evidence specifically pertains only to Crew 115C, the more significant question is whether those in Crew 115C would have viewed his solicitation of signatures in support of decertification as the act of a temporary foreman.

There is no evidence that Guillen ever served as a temporary foreman in Crew 115C. In addition, Guillen testified that he introduced himself to the crew as a machine operator from another crew. Espinoza testified that he knew Guillen to be a machine operator or helper, but when asked what other jobs Guillen had at D'Arrigo, he answered "foreman." There is no other evidence in the record indicating if others in Crew 115C were aware that Guillen was serving or had served as a temporary foreman in another crew. We conclude that this evidence is insufficient to establish that the members of Crew 115C reasonably would have viewed Guillen as a temporary foreman or otherwise would have been seen as him acting on behalf of D'Arrigo while soliciting signatures in that crew. We therefore reverse the ALJ's finding that unlawful assistance may be attributed to D'Arrigo from Guillen's solicitation of signatures in Crew 115C.

3. Legal Import of Allowing Solicitation of Signatures on Company Time

Merely permitting the circulation of the petition on company time or allowing employees to discuss, during working hours, decertifying a union has been held

insufficient to support a finding of active employer instigation of, or participation and assistance in, a decertification campaign. However, it is objectionable if the employer discriminates in favor of anti-union activity. (*Nash De Camp Company* (1999) 25 ALRB No. 7, *TNH Farms, Inc.* (1984) 10 ALRB No. 37, *Jack or Marion Radovich* (1983) 9 ALRB No. 45, ALJ dec. pp. 53-57; *Interstate Mechanical Laboratories, Inc.* (1943) 48 NLRB 551, 554; *Curtiss Way Corporation* (1953) 105 NLRB 642.) Therefore, the solicitation of signatures on company time in Crews 120C, 120E, 120K, and 120Q may be found to constitute unlawful assistance by D'Arrigo only if it is found that by doing so D'Arrigo discriminated in favor of decertification activity.

Efrain Fraida, Marcial Lopez, and Carlos Bermudez testified that they made requests to supervisors to be able to solicit signatures on a pro-union petition during working hours but were denied that opportunity. They were told that such activity was permitted only before or after work hours or during lunch time. Fraida, accompanied by two other crew representatives, made his request of Assistant Supervisor Dionicio Munoz. Marcial Lopez, accompanied by one other crew representative, made his request of Supervisor Juan Manuel Carrillo Orozco. Bermudez, accompanied by two co-workers, made his request of Foreman Alfredo Gamma. The supervisors and foremen confirmed that they received and denied the requests. The testimony established that the requests were made on November 15, 2010, two days before the election. Fraida, Lopez, and Bermudez, along with other UFW crew representatives, collectively planned to make these requests after hearing that employees in other crews had been allowed to solicit signatures for the decertification petition during work time. Because the crew

representatives expected each of the forepersons to deny their request, they had a template declaration drafted in advance ready for them to complete. They did not attempt to get signatures at other times.

The record indicates that this effort was motivated in large part by a desire to prove that the company would treat pro-union workers differently than those who supported the decertification effort. As the ALJ observed, the fact that the plan was hatched in the hopes of catching company supervisors treating their side differently does not change the fact that it reflects disparate treatment of decertification and pro-UFW activity in the application of company policy.

There is ample testimony in the record from management and supervisorial employees that company policy prohibited solicitation of any kind during work time. John Snell acknowledged that an employee could be subject to discipline for leaving and going to another crew during work time without the permission of his or her foreman. In addition, he stated that normally an employee who leaves during the day for personal reasons such as a medical appointment is not allowed to return to the worksite that day. Several foremen and supervisors confirmed these as well-established company policies. Moreover, these policies are reflected in written company work rules introduced into evidence. Several of the machine operators who solicited signatures violated these policies with the knowledge of supervisors, without repercussion.

Therefore, we find that UFW supporters were denied the opportunity to circulate a pro-union petition during work time and, thus, received disparate treatment. Moreover, the evidence indicates that D'Arrigo had a well-known company policy

against solicitation of any kind during work time that otherwise was enforced strictly. In these circumstances, it is reasonable to conclude that allowing decertification supporters to violate that policy would have created the impression that the company was sponsoring or at least supporting the solicitation of signatures in favor of decertification. As noted above, an employer may be held responsible for the actions of employees, even if they are not supervisors or managers, if the workers could reasonably believe that the individuals were acting on behalf of the employer. (*Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307.) Therefore, D'Arrigo may be held responsible for assisting the circulation of the decertification petition in those instances where supervisors allowed the circulation on work time.[9]

Presentations Made to Employees by John D'Arrigo During the Two Days Preceding the Election

During the two days preceding the election, company president John D'Arrigo, with foreman Willie Camacho translating, gathered crews and gave a presentation urging support for the decertification of the UFW. The text of the presentation is recited at pages 68-70 of the ALJ's decision. The ALJ correctly found that these presentations were mandatory[10] and occurred during compensated work time. The election objections originally included an allegation that these presentations constituted an unlawful promise of benefits, but at the prehearing conference the UFW

[9] An employer may not provide anything more than ministerial assistance in a decertification campaign. (*Placke Toyota, Inc.* (1974) 215 NLRB 395.)

[10] Though D'Arrigo contests this finding, John Snell, a high-ranking manager who witnessed the presentations, agreed when asked if the attendance at the presentations could be characterized as mandatory.

indicated that pursuant to a stipulation it was no longer pursuing that allegation. At hearing, the General Counsel sought to resurrect this allegation. The ALJ denied the General Counsel's attempt to amend the complaint to add this allegation, but allowed evidence to be taken on the subject as background relevant to the allegations already contained in the election objections and unfair labor practice complaint.[11] The ALJ also allowed evidence of alleged UFW misrepresentations that D'Arrigo asserted its presentations were intended to refute.

In his decision, the ALJ stated that he was not finding a violation or objectionable conduct based on the presentations themselves, but instead found that it would have reinforced the employees' view of objectionable conduct that did occur. (ALJ Dec., at pp. 88-89.) In its exceptions, D'Arrigo ignores the limited nature of the ALJ's findings and argues as if the ALJ found the presentations unlawful or objectionable. We find that it is clear from his recommended decision that the ALJ considered the presentations not as objectionable in and of themselves, but only as background evidence helping to establish a context making it more likely that the employees would have tended to view the work time solicitation as sponsored or supported by the company. It is well-established that evidence of conduct that is time-barred or is otherwise not subject to adjudication on the merits may be admissible as

[11] D'Arrigo sought an interim appeal of this ruling, but the Board denied the appeal, pointing out that nothing in the transcript indicated that the ALJ would entertain evidence on this issue to establish an independent unfair labor practice not alleged in the complaint or to establish an independent basis for setting aside the election. (Admin. Order No. 2011-14.)

background to shed light on the character of the events that properly are being litigated. (*ALRB v. Ruline Nursery Co.* (1981) 115 Cal.App.3d 1005, 1014; *Nash de Camp Co.* *(*1999) 25 ALRB No. 7.)

Notice of Election to Workers Who Were Laid Off the Week of November 13, 2010

On Sunday, November 14, 2010, at the pre-election conference, ALRB field examiner Sylvia Bueno requested from D'Arrigo's attorney a list of the 326 workers laid off during the week of November 13, 2010, to be used for mailing a notice of the election to those workers. The attorney indicated he would provide the list as soon as possible. At 11:11 a.m. on November 15, when Bueno had not received the list, she sent an e-mail message indicating that she needed the information by no later than noon. The list was provided at 2:34 p.m. Bueno indicated that at that point staff did not have enough time to send out a mailing by the post office time cut-off for that day, which was just two days before the election. As a result, it was decided not to mail a notice to this group of laid-off workers.

The ALJ concluded that D'Arrigo interfered with free choice in the election by failing to timely provide the list of workers laid off during the week of November 13, 2010. Pursuant to Regulation section 20350, subdivision (a), the Regional Director is given reasonable discretion to decide the manner in which to notify employees of the election and, pursuant to subdivision (c), the employer is required to fully cooperate in the dissemination of notices. In the ALJ's view, the ALRB staff gave D'Arrigo a narrow time frame within which to provide a list of addresses for the 326 workers laid-off during the week of November 13, 2010, though D'Arrigo could reasonably have anticipated that

this request might be forthcoming. The ALJ concluded that he would not second guess the judgment of the Regional Director and regional office staff that the mailing of notices was appropriate to ensure the employees' right to participate in the election.

A party seeking to overturn an election bears the burden of demonstrating that misconduct occurred and that the misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election. (*Oceanview Produce Co.* (1994) 20 ALRB No. 16; *Bright's Nursery* (1984) 10 ALRB No. 18; *TMY Farms* (1976) 2 ALRB No. 58.) The Regional Director is required to give as much notice of an election as is reasonably possible under the circumstances of each case. (*J. Oberti, Inc.* (1984) 10 ALRB No. 50.) The Board does not require that election notices be given individually to each potential voter. (*Sun World Packing Corporation* (1978) 4 ALRB No. 23.) The very short time constraints of the ALRA, which requires an election to be held within seven days of the filing of a petition, as well as the other matters such as peak employment and showing of interest that the Board agents have to determine, all make the giving of notice of the time and place of the election difficult. (*Gilroy Foods, Inc.* (1997) 23 ALRB No. 10.) Thus, an objection based on inadequate notice will generally be dismissed unless the objecting party can show that an outcome-determinative number of voters were disenfranchised. (*Ibid.*, citing *R.T. Englund Company* (1976) 2 ALRB No. 23.) D'Arrigo argues that there is no evidence that the timing of the provision of the address list had any effect on employee free choice. A review of the testimony in the record supports D'Arrigo's contention.

On November 15, 2010, the ALRB regional staff were working on completing the mailing of notices to the employees laid off during the week of November 6. Bueno testified that she could not recall what time that mailing was completed, other than it was before 5:00 p.m. More importantly, Bueno testified that when the November 13 list was received at 2:34 p.m., staff was still working on the mailing of the election notice to those on the November 6 list. Further, when asked if the staff could have completed a mailing to the November 13 list employees had the list been received by noon as requested, the most Bueno could say was that there was a possibility that it could have been done, but she could not say for sure because they had so many things to do to prepare for the election.[12]

By definition, election preparation takes place in a rushed time frame that requires prompt provision of vital information in the control of employers. The ALJ was right to observe that deference should be given to the judgment of regional staff in determining the proper ways to provide notice of the election. However, based on Field Examiner Bueno's testimony, it is unknown whether the mailing would have happened even if the address list had been provided by noon as requested, or even if it had been provided earlier that day. All Bueno could say with any assurance was that it might have

[12] As the ALJ noted, many of the workers laid off during the week of November 13, 2010, would have been present when ALRB staff visited workers in the fields that week to provide notice of the election. Also, other noticing efforts made included outreach by the UFW and by D'Arrigo, contacts by co-workers, and public radio announcements arranged by the ALRB.

been possible to do the mailing that day because, as she testified, the November 6 lay off mailing was not completed until sometime after the November 13 list was received at 2:34 p.m. and the staff also had many other things to do to prepare for the election just two days later on November 17. In our view, this evidence is insufficient to conclude that the delay in providing the November 13 layoff list had an effect on the right of these employees to participate in the election.

Though we reverse the ALJ's finding in this instance that the delay in providing information for use in providing notice of the election to eligible voters interfered with free choice in the election, this should not be taken as a license to be less than vigilant in providing requested information to the regional offices prior to an election. It remains the case that any delay in providing address lists or other information necessary to conducting a fair election creates a risk that the election will be overturned.

Attorney-Client Privilege

During the course of the hearing, D'Arrigo sought on several occasions to question worker-witnesses about their private meetings with UFW counsel in preparation for testifying at the hearing. Some of these workers also served as UFW crew representatives. During the hearing, the ALJ gave all of the parties an opportunity to file a brief and make oral arguments on whether the conversations of these witnesses with the UFW attorney were protected by the attorney-client privilege by virtue of the witnesses' status as union members or crew representatives. The ALJ found this to be an unsettled area of law without clear-cut authority and concluded that he should err in favor of

finding that the privilege did attach.[13] As a result, he did not allow questions relating to the content of those conversations.[14] D'Arrigo excepts to this ruling and argues that it was prejudiced by being precluded from questioning the witnesses about their meetings with the counsel for the UFW.[15]

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[13] The ALJ concluded that the attorney-client privilege extended to UFW organizers who, unlike mere members, publicly speak on behalf of the UFW. D'Arrigo did not except to that finding.

[14] The ALJ did allow the company's counsel to ask questions of testifying worker-witnesses as to their communications with the General Counsel where no UFW counsel was present and participating in the conversation.

[15] Though D'Arrigo also argues that the presence of an Assistant General Counsel at some of the meetings waived any attorney-client privilege, this claim is contrary to the provisions of Evidence Code section 952, which states:

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

This is consistent with the "common interest doctrine," under which the privilege is not waived by disclosure to an attorney for a separate client where (1) the disclosure relates to a common interest of the attorneys' respective clients; (2) the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality; and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted. (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 891.) The Assistant General Counsel in this instance was supporting the legal claims of the UFW and was present in furtherance of establishing those claims. Therefore, if the privilege otherwise attached to the communications between the worker-witnesses and the UFW's attorney, the privilege would not be waived by the presence of the Assistant General Counsel.

D'Arrigo relies primarily on authorities that hold that the union, not an individual member, is the client of counsel retained by the union. D'Arrigo also relies, by analogy, on cases that hold that the privilege generally does not apply to communications between a corporate employee and the corporate employer's attorney where the employee is merely a witness to matters that require communication to the employer's attorney and is not the natural person to be speaking for the corporation. The UFW and the General Counsel dispute the import of the authorities cited by D'Arrigo. The General Counsel also argues that this exception should be disregarded because D'Arrigo failed to identify the witnesses it was denied permission to examine or identify the questions it would have asked and the relevance thereof.

The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. (*D. I. Chadbourne, Inc. v. Superior Court of San Francisco* (1964) 60 Cal. 2d 723, 729; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123.) Once that party establishes facts necessary to support a *prima facie* claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that for other reasons the privilege does not apply. (Evid. Code, § 917, subd. (a); *Wellpoint Health Networks, Inc*., at pp. 123–124.)

Pursuant to Evidence Code section 954, the attorney-client privilege applies to "a confidential communication between client and lawyer." Evidence Code section 951 defines "client" as follows:

> As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

The attorney need not be retained, formally or informally, in order for the requisite attorney-client relationship to be formed. "[W]here a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1208, citing *People v. Canfield* (1974) 12 Cal.3d 699, 705.)

As D'Arrigo correctly points out, existing authority establishes that the union, not its individual members, is the client of a union-retained attorney. (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345; *Peterson v. Kennedy* (9th Cir. 1985) 771 F.2d 1244, 1258 .) This is true even as to individuals who are the subject of a grievance being litigated by an attorney retained by the union. (See, e.g., *Peterson v. Kennedy*, *supra*, 771 F.2d 1244, at p. 1258.) Communications between a union-retained lawyer and union members may be privileged in some circumstances, such as where the lawyer was providing legal advice to the union members in a closed union meeting even if they did not later employee the attorney. (*Benge v. Superior Court*, *supra*, 131 Cal.App.3d 336, at p. 347.) The key fact in such circumstances is the seeking or imparting of legal advice. (*Ibid.*) The attorney-client privilege does not apply whenever issues touching upon legal matters are discussed with an attorney. A communication is

not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client. (*People v. Gionis*, *supra*, 9 Cal.4th 1196, at p. 1210, citing *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 79-80.)

The import of the above authorities is that meetings between union members or crew representatives in preparation for an evidentiary hearing do not create an attorney-client relationship without evidence, at minimum, that the meeting involved the securing of legal advice. No such evidence was introduced at the hearing in this case. Rather, the ALJ's ruling was based solely on the inherent relationship between the union and its members. Therefore, we must conclude that the factual predicates for the attorney-client privilege under existing law have not been established.[16]

[16] The parties included extensive discussion in their exceptions and responses regarding the analogy to communications between a corporation's attorney and a corporate employee. The leading case in California *is D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723. The court laid out numerous principles to guide the analysis, the most pertinent of which provides:

> When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege.
> (*Id*., at pp. 736-738.)

Other circumstances where the privilege would attach are where the witness is a natural person to speak for the corporation or where the statement is required in the ordinary course of business. Neither applies here. Therefore, assuming the analogy to a corporate employee is a sound one, it also would not support finding an inherent attorney-client relationship between a union member and a union-retained attorney.

Having found that the ALJ erred in finding that conversations between the UFW's attorney and the union member or crew representative witnesses were covered by the attorney-client privilege, we must determine if D'Arrigo has established that it was prejudiced by this ruling. D'Arrigo offers the blanket assertion that it was denied due process and that the barred questioning was critical to its case. As a result, D'Arrigo demands that the allegations be set aside and/or the hearing be reconvened to allow it to fully cross-examine the General Counsel/UFW witnesses.

The General Counsel points out in response that D'Arrigo failed to explain the types of questions it would have asked, the relevance of those questions, and the utility of those questions in light of the record as a whole. The UFW also claims that D'Arrigo has failed to demonstrate any prejudice. The UFW also argues that there was no advantage as a result of the ALJ's ruling, as there is no indication that the ALJ relied on any evidence that was revealed by questioning of D'Arrigo's worker witnesses about their conversations with counsel.

Though D'Arrigo has failed to indicate the type of questions it would have asked if allowed to do so, typically what counsel attempt to do with such questioning is attempt to ascertain if opposing counsel in some manner told the witnesses what to say, rather than simply urging them to tell the truth to the best of their recollection. Our review of the record does not indicate that the worker-witnesses called by the General Counsel or UFW testified in a manner which reflected improper preparation. Examples showing such improper preparation might be rote adherence to apparent talking points or suspiciously similar testimony by several witnesses. Instead, all of the witnesses,

whether fully credited or not, testified in a manner that reflected their individual perspective on events that they claimed to witness. In short, there is nothing about the manner or content of the testimony that indicates that additional cross-examination about the witnesses' meetings with counsel would have uncovered anything of use in challenging their credibility. This, coupled with D'Arrigo's failure to explain its claim of prejudice, provides no basis for concluding that the ALJ's error caused any prejudice.

Proper Remedy for the Violations and Objectionable Conduct Found

In its exceptions, D'Arrigo disputes the appropriateness of the ALJ's recommendation to set aside the election, claiming that his findings of unlawful or objectionable conduct should not be sustained. As discussed above, we find that the record does not support the ALJ's findings that: 1) The actions of John Snell constituted unlawful instigation of the decertification petition; 2) the delay in providing an address list for the workers laid off the week of November 13, 2010 had any effect on their right to vote; and 3) the actions of Florentino Guillen in soliciting signatures during lunch time could be imputed to D'Arrigo due to his periodic status as a temporary foreman in other crews or that he reasonably would have been viewed as acting on behalf of management. In addition, we find that the ALJ erred in his ruling on the application of the attorney-client privilege to communications by union member witnesses to union-retained attorneys, though D'Arrigo failed to demonstrate how it was prejudiced by the ruling.

However, we have affirmed the ALJ's conclusion that D'Arrigo unlawfully assisted the solicitation of signatures for the decertification petition in four crews, 120C, 120E, 120K, and 120Q. In addition, we have found that the ALJ properly admitted, for

background purposes, evidence of assistance in Crew 120A and of the presentations to employees made by D'Arrigo during the two days preceding the election. We agree with the ALJ that the strong anti-union message in the presentations to employees, while not unlawful,[17] would have bolstered any impressions that D'Arrigo was behind the decertification effort. While in his discussion of the appropriate remedy the ALJ cited the failure to provide a mailed election notice to the 326 workers laid off the week of November 13, 2010, he stated that he would have found the decertification election to be tainted even if the employer had timely provided the names and addresses for these laid-off workers. Though the ALJ also cited his finding of instigation, it is not clear what weight he gave to that finding, as he appeared to simply include it among his findings of unlawful employer assistance.

The ALJ concluded that the employer assistance with the decertification effort was pervasive, citing the work-time signature gathering in multiple crews, and that this activity surely caused many workers to conclude that the company was backing the decertification campaign. The ALJ further suggested that it is highly likely that there was widespread discussion among the non-supervisory employees regarding the work-time

[17] During the 24 hours prior to an election, the National Labor Relations Board (NLRB) prohibits employers from making election speeches to employees on company time where attendance is mandatory (so-called "captive audience" speeches). (*Peerless Plywood Co.* (1953) 107 NLRB 427.) The ALRB has not adopted the *Peerless Plywood* rule, but has not definitively rejected it. (*San Clemente Ranch* (1999) 25 ALRB No. 5, pp. 7-8; *Yamada Bros.* (1975) 1 ALRB No. 13, p. 2.) Similarly, we need not reach that issue in the present case, as the speeches were admitted only as background evidence and not as objectionable conduct. Therefore, consideration of the propriety of "captive audience" speeches under the ALRA will have to await a future case in which the issue is placed squarely before the Board.

signature-gathering, and the strong opinions expressed by company owners further enhanced the probability that workers would conclude that supervisors permitting such signature-gathering activities were acting under the direction of top management. In addition, the ALJ stated that workers had reason to believe that supervisors might see the signature list and thus know whether they signed it or not. As a result, he observed that the workers may have felt compelled to sign the petition regardless of their personal feelings on the issue.

While we have reversed some of the ALJ's findings of objectionable conduct, those that remain are analogous to those upon which the Board set aside the decertification election in *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2 (*Gallo*).[18] The Board in *Gallo* did not adopt a per se rule that any employer assistance beyond a de minimis level requires the dismissal of a decertification petition. However, the Board did find that significant employer involvement in the solicitation of signatures unlawfully puts the employer in a position of substantial influence or indirect control over the decertification process. In *Gallo,* the Board found that supervisors were involved in the circulation of the decertification petition in two crews. Relative to the number of eligible voters, the number of employees in the directly affected crews in *Gallo* represented about

[18] In his concurring and dissenting opinion, Member Mason argues that *Gallo* was wrongly decided and should be overruled. The reasons underlying the *Gallo* decision are fully set forth in that decision and there is no need to repeat them here. Petitions for review challenging the *Gallo* decision were summarily denied by the Third District Court of Appeal (Dec. 9, 2005, No. C048387) and by the California Supreme Court (Jan. 25, 2006, No. S139715 [2006 Cal. LEXIS 1788]).

10 percent. The same approximate percentage is reflected in this case, with unlawful assistance found in four crews in a proportionately larger electorate.

The Board in *Gallo* found such influence to be contrary to the established principle under the ALRA that employers are prohibited "from being an active participant in determining which union it shall bargain with in cases arising under the ALRA." (Citing *F & P Growers Association v. ALRB* (1983) 168 Cal.App.3d 667, 676.) Citing *Triple E Produce Corporation* v. *ALRB* (1980) 35 Cal.3d 42, the Board in *Gallo* also found that employer assistance in circulating a decertification petition would be an act of significant interest that can be presumed to have been disseminated to other employees. Based on this analysis, the Board concluded that the petition itself was tainted, and therefore, had to be dismissed. To be consistent with the *Gallo* decision, the decertification petition in the present case also must be dismissed and the election set aside.

UFW's Request for Mandatory Mediation and Conciliation

The UFW requested that the ALJ order that the parties be referred to MMC as a remedy for the unfair labor practice violations found. The ALJ denied that request as not yet ripe, citing the requirement in ALRA section 1164, subdivision (a)(4), that a party may seek mandatory mediation only after sixty days have passed following a Board decision dismissing a decertification petition due to unlawful employer initiation, support, sponsorship, or assistance in the filing of a decertification petition. The UFW excepts to this ruling, arguing that its request was not for MMC pursuant to ALRA section 1164, but pursuant to the Board's "broad remedial powers." The UFW cites

several cases holding that the Board has broad discretion in fashioning remedies. (*Jasmine Vineyards v. ALRB* (1980) 113 Cal.App.3d 968, 982-983; *Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726; *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209.)

While the Board does have broad discretion in fashioning remedies, that authority is not unlimited. The Board's discretion is constrained by the parameters of its statutory authority. The operative remedial language of section 1160.3 of the ALRA is identical to that of the analogous provision of the National Labor Relations Act (NLRA), 29 United States Code section 160(c). Both provisions state, in pertinent part, that the Board shall: "take affirmative action, including reinstatement of employees with or without backpay, . . .as will effectuate the policies of this part [or Act]." It has long been a fundamental principle under collective bargaining laws that labor boards such as the NLRB do not have the authority to compel a party to make a bargaining concession or to agree to a proposal. "The Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*NLRB v. American Ins. Co.* (1952) 343 U.S. 395, 404.) As further summarized by the court in *H.K. Porter Co. v. NLRB* (1970) 397 U.S. 99, 108:

> The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based -- private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. (Fns. omitted.)

In addition, the definition of the duty to bargain under both acts includes the admonition that the duty "does not compel either party to agree to a proposal or require the making of a concession." (ALRA § 1155.2, subd. (a); NLRA § 8, subd. (d).) The ALRB consistently has recognized this limitation on its authority. (See, e.g., *Tex-Cal Land Management, Inc.* (1985) 11 ALRB No. 31, at p. 22; *Vessey & Company, Inc., et al.* (1987) 13 ALRB No. 17, at p. 14; *Holtville Farms v. Agricultural Labor Relations Board* (1985) 168 Cal.App.3d 388, 396-397.)

With the amendment of the Agricultural Labor Relations Act (ALRA) to include the MMC process, the Legislature carved out an exception to the general rule that the Board may not compel parties to agree to terms of a contract. But in creating the MMC process, the Legislature did not alter the Board's remedial authority in unfair labor practice or election objection cases. Rather, a discrete process was created, subject to the circumstances set forth in the MMC provisions (Lab. Code, § 1164-1164.13) and available only upon a request for MMC filed under those provisions.

It must be presumed that the Legislature was aware of the existing limitations on the Board's remedial authority. If it wished to expand that authority it would have done so by amending section 1160.3, which sets forth the Board's remedial authority in unfair labor practice cases. This is further evidenced by the amendments to the MMC provisions contained in Senate Bill No. 126, enacted in 2011. As noted above, under new subdivision (a)(4) of ALRA section 1164, a union may request referral to mandatory mediation sixty days after a Board decision dismissing a decertification petition due to unlawful employer assistance in the filing of a decertification petition.

Thus, addressing the very circumstance at issue here, unlawful employer assistance with a decertification petition, the Legislature chose to provide for MMC in that circumstance by expanding the MMC provisions, rather than by expanding the Board's remedial authority. Therefore, if the Board sets aside an election due to unlawful employer assistance, the MMC process may be invoked only upon a formal request filed pursuant to Labor Code section 1164 and subject to the limitations therein.

ORDER

The Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent, D'Arrigo Brothers Company of California, a California Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Aiding, assisting, participating in or encouraging any decertification campaign; and,

(b) In any similar or related manner interfering with, restraining, or coercing, any agricultural employees in the exercise of their rights guaranteed by California Labor Code section 1152.

2. Take the following affirmative actions which are found necessary to effectuate the purposes of the Agricultural Labor Relations 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) Prepare copies of the attached Notice, in all appropriate languages, by placing a copy of such Notice in a plain, stamped or metered envelope, with ALRB's return address, addressed individually to each and every agricultural worker employed by Respondent during the time period of October 27, 2010 to June 15, 2012, and submit such addressed, stamped envelopes directly to the Salinas ALRB Regional Director for mailing within thirty (30) days after the Board's Order becomes final;

(c) Post copies of the Notice, in all appropriate languages, in conspicuous places on its property for a sixty-day period, the specific dates and location of posting to be determined by the Salinas ALRB Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed;

(d) Provide a copy of the attached Notice, in all appropriate languages, to each agricultural employee hired by Respondent during the twelve-month period following the date that the Order becomes final;

(e) Upon request of the Salinas ALRB Regional Director, provide the Regional Director with the dates of the present and next peak season. Should the peak season already have begun at the time the Regional Director requests peak season dates, Respondent shall 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 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 Salinas ALRB Regional Director. Following the reading, Board agents shall be given the opportunity, outside the presence of management and supervisors, to answer any questions that the employees may have regarding the Notice of their rights under the Act. The Salinas ALRB Regional Director shall determine a reasonable rate 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; and,

(g) Within thirty (30) days after the date that this Order becomes final, Respondent shall notify the Salinas ALRB Regional Director in writing of the steps that 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 this Order.

DATED: April 10, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

MEMBER MASON, concurring and dissenting:

I concur with the entirety of the majority's findings with the exception of the majority's conclusion that the record supports invalidating the decertification petition and setting aside the election. I find that, while unlawful, D'Arrigo's assistance in gathering signatures for the decertification petition in four crews does not void the entire petition. Therefore, it does not warrant setting aside the election unless it can be shown, under the proper outcome-determinative standard, that the unlawful assistance affected free choice in the election itself. As discussed below, in this case that evaluation cannot be undertaken without first opening and counting the ballots that have been impounded. The majority's conclusion as to the remedy in this matter is wholly dependent on *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2 (*Gallo*). For the reasons outlined below, I believe that *Gallo* was wrongly decided and should be overruled.

1) Showing of Interest Is A Non-Jurisdictional, Non-Reviewable Administrative Matter

The showing of interest serves the same purposes under the ALRA as it does under the NLRA; it permits the agency to devote its time and resources to those

cases where there is some reasonable expectation that a bargaining agent will be selected. (*Nishikawa Farms, Inc. v. Mahoney, et al.* (1977) 66 Cal.App.3d 781, 793; *Thomas S. Castle Farms, Inc. v. ALRB* (1983) 140 Cal.App.3d 668, 675-676.) As such, it serves a purely administrative function. In fact, since it is non-jurisdictional, there is no statutory bar against directing an election in the absence of a majority showing of interest. (*Nishikawa Farms, Inc. v. Mahoney, et al., supra,* 66 Cal.App.3d 781, 793.) Moreover, a regional director's determination as to whether or not the showing of interest is adequate is not subject to review. (See Board Regulation 20300, subdivision (j)(5) which states: "The regional director's determination of the adequacy of the showing of interest to warrant the conduct of an election shall not be reviewable.") As explained below, despite the limited legal significance of the showing of interest, the Board in *Gallo* illogically adopted a stricter standard for evaluating the effect of unlawful employer assistance in obtaining the showing of interest than that utilized for evaluating misconduct directly affecting free choice in an election.

2) Comparison To Outcome-Determinative Standard Used To Evaluate Election Misconduct

The Board's established approach to evaluating misconduct affecting free choice in an election, whether the misconduct has been found to be an unfair labor practice (ULP) or is alleged solely as an election objection, is to utilize an outcome-determinative standard, i.e., if the misconduct would have affected only an identifiable number of voters, that number is compared with the tally of ballots to determine if the misconduct could have affected the outcome of the election. The party seeking to

overturn an election bears a heavy burden of proof requiring specific evidence that misconduct occurred and that this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the election.[19] *(Oceanview Produce Co.* (1994) 20 ALRB No. 16, p. 6; *Nightingale Oil Co. v. NLRB* (1st Cir. 1990) 905 F.2d 528; *Bright's Nursery* (1984) 10 ALRB No. 18, p. 6-7, citing *TMY Farms* (1976) 2 ALRB No. 58.) The burden is not met merely by proving that misconduct did in fact occur, but rather by specific evidence demonstrating that it interfered with the employees' exercise of their free choice to such an extent that the conduct changed the results of the election. (*Kux Manufacturing Co. v. NLRB* (6th Cir. 1989) 890 F.2d 804.) In *L.E. Cooke Company* (2009) 35 ALRB No. 1, page 13 and *Gallo Vineyards, Inc.* (2009) 35 ALRB No. 6, pages 7-8, decisions issuing after the *Gallo* decision at issue here, the Board reiterated that an outcome-determinative standard is to be applied in evaluating whether to set aside an election.

In *Gallo*, the Board held that in evaluating the effect of employer assistance on the validity of a decertification petition, "significant" assistance would render the petition void, without regard to whether the number of directly affected employees was sufficient to negate the requisite showing of interest. Thus, a more stringent standard was applied to the sufficiency of the showing of interest, a non-reviewable administrative matter, than the outcome-determinative standard applied to conduct affecting free choice

[19] Where the misconduct is alleged as a ULP, the General Counsel has the burden of proving the outcome-determinative standard is met if the remedy sought is the setting aside of the election.

in the election itself.[20] This is both unsupported by any authority and fundamentally illogical. All other types of employer misconduct potentially affecting free choice in a decertification election, including the most serious types such as threats or promises of benefits, remain subject to an outcome-determinative standard. The carving out of a stricter standard for conduct affecting a non-reviewable administrative matter simply makes no sense.

3) *Gallo* Is An Anomaly and Does Not Reflect Board Precedent

All previous cases in which a decertification petition has been found to be void have involved either employer instigation or initiation or pervasive assistance in procuring signatures on the petition. For example, in *Abatti Farms* (1981) 7 ALRB No. 36, the Board found that the entire decertification petition was tainted because there was ample evidence in the record of the employer's pervasive assistance with the decertification effort where: 1) proponents of the petition were granted leaves of absence and other benefits (such as large bonuses) to facilitate circulation of the petition; 2) the employer sponsored a holiday party where the petition was circulated in the presence of supervisors; and 3) the employer brought the decertification petitioner together with legal

[20] That the Board in *Gallo* adopted a per se rule that any significant employer assistance would void a decertification petition is illustrated by several passages in which the Board explained that it would not require proof that the misconduct affected the results of the election and would presume that the misconduct was more extensive than reflected in the record. For example, on page 25, the Board stated "[T]he 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." (See similar passages on pp. 23 and 27.)

counsel chosen by the employer so the petitioner could consult with him. (Other examples include *S & J Ranch, Inc*. (1992) 18 ALRB 2 (employer agents instigated and supported petition; *Peter D. Solomon et al. dba Cattle Valley Farms* (1983) 9 ALRB No. 65 (instigation and assistance); *M. Caratan, Inc.* (1983) 9 ALRB No. 33 (petition filed by agent of the employer).)[21]

It is important to point out that employer assistance, even if insufficient to find the petition itself void, may nonetheless have an effect on free choice in the ensuing election. But that evaluation must be undertaken by applying the normative outcome-determinative standard. In all but perhaps the most egregious circumstances, that evaluation cannot be undertaken without reference to the ballot count.

4) The Finding of Dissemination In *Gallo* Was Not Supported By The Record

The Board in *Gallo* also found that it was proper to infer widespread dissemination of the assistance by supervisors in the two crews, despite the complete absence of evidence from which to reasonably infer dissemination. In the instant case, the Board has committed the same error. In both cases, the Board has relied upon a

[21] Decisions of the National Labor Relations Board (NLRB) follow a similar pattern in setting aside an election only where the facts show instigation or pervasive assistance. (See, e.g., *Sperry Gyroscope Co.* (1962) 136 NLRB 294; *Consolidated Blenders, Inc.* (1957) 118 NLRB 545.) To the extent the decision in *Gallo* relies on NLRB cases involving employer-initiated election petitions (denoted by the NLRB as "RM" petitions) or withdrawal of recognition, those cases are inapposite. The NLRB has a distinct standard it applies in withdrawal of recognition and RM cases that does not apply in cases involving only decertification petitions. Because they are initiated by the employer, rather than by employees, neither withdrawal of recognition nor an RM petition has been viewed as a favored mechanism and they have been allowed only where they occur in an atmosphere completely free of unlawful conduct causing disaffection with the union. (See, e.g., *Ron Tirapelli Ford, Inc.* (1991) 304 NLRB 576.)

passage from *Triple E Produce Corporation v. ALRB* (1980) 35 Cal.3d 42, 51-52, in which the court noted that the NLRB has stated "[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." (Citing *United Broadcasting Company of New York* (1980) 248 NLRB 403, 404.) This quotation must be placed in its proper context.

The NLRB cases cited by the court in *Triple E Produce Corporation* represent variations of the "small plant doctrine," wherein the NLRB has presumed dissemination where the circumstances of the workplace made dissemination highly likely due to size, employee interaction, etc. In *United Broadcasting Co. of New York*, the NLRB emphasized that the unit consisted of only six employees. In another case cited by the court, *Standard Knitting Mills, Inc.* (1968) 172 NLRB 1122, the NLRB emphasized that the margin of victory in the election was only 17 votes and that there was some evidence that the threats were discussed. It must also be noted that in *Triple E Produce Corporation*, itself the court emphasized that the threats were pervasive and that there was evidence of dissemination. With the exception of *Gallo*, since *Triple E Produce Corporation* this Board has continued to require some reasonable basis on which to presume dissemination, i.e. the nature and pervasiveness of the misconduct at issue, whether there was the opportunity for dissemination in light of the configuration or geographic scope of the worksites, employee living arrangements, etc. (See *Ace Tomato, Inc.* (1992) 18 ALRB No. 9, fn. 13; *Ace Tomato, Inc.* (1994) 20 ALRB No. 7, pp. 11-13.)

In the present case, the Board once again has taken the above quoted passage from *Triple E Produce Corporation* out of context and overruled sub silentio the two *Ace Tomato, Inc.* cases cited above. As in *Gallo*, in the present case there is no evidence in the record from which it may be inferred that dissemination was likely or widespread. Indeed, the scant evidence in the record is that D'Arrigo's various ranches are quite spread out, as they include numerous ranches in Monterey and Imperial Counties.[22] The record indicates that only approximately 10 percent of the workforce were directly affected by D'Arrigo's unlawful assistance with the signature gathering process, assuming that all of the members of each affected crew were in a position to observe the process and that it was reasonable for them to interpret the activity as coercive. There is no evidence upon which to infer dissemination of this conduct among the larger workforce.

5) The *Gallo* Decision Improperly Relied On *F & P Growers Association v. ALRB* (1983) 168 Cal.App.3d 667 For The Proposition That Anything More Than De Minimis Employer Assistance In Gathering Signatures Voids The Decertification Petition

Under the ALRA, under no circumstances may an employer file for an election, nor may it withdraw recognition from a certified union based on a good faith belief that the union has lost majority support. (*F & P Growers Association v. ALRB* (1983) 168 Cal.App.3d 667.) Rather, except in very limited circumstances where a union disclaims interest or is defunct, a union can be decertified only through an election

[22] The election sites were in Spreckels and Gonzales, both in Monterey County, and in Calipatria, which is in Imperial County.

initiated by employees. (*Dole Fresh Fruit Company* (1996) 22 ALRB No. 4; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3.)

The court in *F & P Growers Association* approved of the Board's rejection under the ALRA of the availability of withdrawal of recognition, relying largely on the statutory prohibition on voluntary recognition of unions and the lack of any provision for employer-initiated election petitions (RM petitions). In that context, the court concluded that those differences from the NLRA reflect a policy against employers being active participants in determining with which union it shall bargain. (*F & P Growers Association v. ALRB, supra*, 168 Cal.App.3d 667, at pp. 676-677.) Relying on this language, the Board in *Gallo* adopted the sweeping proposition that anything more than de minimis employer assistance in gathering signatures for decertification petition provides the employer with improper control over the decertification process similar to withdrawal of recognition or the filing of an RM petition. The analogy is a faulty one for several reasons.

The proper principle to be derived from *F & P Growers Association* is that under the ALRA only employees may initiate the process to select or remove a union, without exception. Setting aside an election based on anything more than a de minimis amount of employer assistance runs the risk of undermining that principle by disenfranchising employees. This is because under the *Gallo* standard a decertification election will be set aside even where there is a distinct possibility that the assistance had no effect on the validity of the showing of interest, let alone any significant effect on free choice in the election itself. Such an approach thus runs the risk of penalizing the

genuine supporters of the petitioner who seek to exercise their statutory right to a decertification election.

Restricting the remedy of voiding the petition to those instances where it is found that the entire process was infected, either by instigation or pervasive assistance, the only circumstances recognized prior to the *Gallo* decision, does not insulate an employer from sanction for lesser misconduct. The Regional Director, if aware of the conduct when investigating the decertification petition, has the authority to disregard tainted signatures in determining whether the petitioner has met the requisite showing of interest. More importantly, since employer assistance may affect free choice in the election itself, there is a significant risk that employer assistance could be the basis for setting aside the election under the proper outcome-determinative standard applied to election misconduct. This approach simply acknowledges the relative importance of the showing of interest and properly places the emphasis on the free choice in the election itself.

Conclusion

For the reasons discussed above, I would overrule *Gallo Vineyards, Inc.*, *supra*, 30 ALRB No. 2 as wrongly decided. Without reliance on *Gallo*, the record in the present case does not support invalidating the decertification petition. Applying the proper analysis, I would order that the ballots be counted and, in light of the tally of

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ballots, the effect of the unlawful assistance in the four crews on free choice in the election be evaluated under the established outcome-determinative standard.

DATED: April 10, 2013

Herbert O. Mason, 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, D'Arrigo Brothers Company of California, a California Corporation, 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 interfere with employees exercising their rights under the Act in any similar or related matter, nor coerce or restrain employees from exercising such rights.

DATED: _____ D'Arrigo Brothers Company of California,
a California Corporation

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 for the Salinas ALRB Regional Office 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

D'ARRIGO BROS. CO. of CALIFORNIA (UFW)

39 ALRB No. 4
Case Nos. 2010-RD-004-SAL
2010-CE-050-SAL

Background

In a case in which related election objections and unfair labor practice allegations were consolidated for hearing, an administrative law judge (ALJ) held D'Arrigo Bros. of California (D'Arrigo) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA) by instigating a decertification petition and supporting and assisting the gathering of signatures for the petition in five crews. In addition, the ALJ found that D'Arrigo's delay in providing an address list for a group of laid off workers interfered with their right to receive adequate notice of the election. The ALJ further concluded that D'Arrigo's unlawful or objectionable conduct tainted the entire decertification process, thus warranting the setting aside of the decertification election and dismissal of the decertification petition. D'Arrigo timely filed exceptions to the ALJ's decision. The United Farm Workers (UFW) filed one exception, arguing that the ALJ erred in ruling that the UFW's request for mandatory mediation and conciliation (MMC) was not yet ripe.

Board Decision

The Board reversed the ALJ's decision with regard to four issues: 1) Because the record reflected no connection between the actions of John Snell in suggesting decertification to one employee and the eventual decertification effort, the Board found that no unlawful instigation was proven; 2) The Board found that there was no unlawful delay in providing an address list for the workers laid off the week of November 13, 2010, because it was not shown that the brief delay prevented the mailing of an election notice to those employees; 3) The Board found that the actions of Florentino Guillen in soliciting signatures during lunch time could not be imputed to D'Arrigo because the evidence did not establish that he reasonably would have been viewed as acting on behalf of management; and 4) The Board found that the ALJ erred in ruling that the attorney-client privilege applied to meetings between UFW counsel and union member witnesses. However, the Board also found that D'Arrigo failed to demonstrate how it was prejudiced by the ruling. Finding this case analogous to *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2, the Board found that its affirmance of unlawful assistance in four crews, about 10 percent of eligible voters, was sufficient to warrant dismissing the decertification petition and setting aside the election. Lastly, the Board rejected the UFW's contention that referral to MMC is an available remedy in an unfair labor practice case.

Concurrence and Dissent

Member Mason concurred with the majority in all respects with the exception of the conclusion that the record supports invalidating the decertification petition and setting aside the election. Member Mason would overrule *Gallo Vineyards, Inc.* (2004)

30 ALRB No. 2 and find that the unlawful assistance proven in this case was insufficient to invalidate the decertification petition. He would instead order that the ballots be counted and, in light of the tally of ballots, evaluate the effect of the unlawful assistance on free choice in the election itself under the outcome-determinative standard normally applied to election misconduct.

***

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROS. CO. OF CALIFORNIA, A California Corporation, Employer, and ALVARO SANTOS, Petitioner, and UNITED FARM WORKERS OF AMERICA, Certified Bargaining Representative.	)	Case Nos. 2010-RD-004-SAL and 2010-CE-050-SAL (consolidated)
D'ARRIGO BROS. CO. OF CALIFORNIA, A California Corporation, Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	)	

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Appearances:

For the General Counsel

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Salinas ALRB Regional Office
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Salinas, CA 93901-3423

For D'Arrigo Brothers Company of California

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For United Farm Workers of America

Mario G. Martinez
Thomas P. Lynch
United Farm Workers Legal Department
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Bakersfield, CA 93307

This matter was heard by Mark R. Soble, Administrative Law Judge (ALJ), State of California Agricultural Labor Relations Board (ALRB), at the Salinas ALRB Regional Office, 342 Pajaro Street, Salinas, CA 93901-3423, on forty-eight (48) hearing days starting on June 13, 2011, and ending on September 7, 2011.

ISSUES

The overall question in this matter is whether the employer, D'Arrigo Brothers of California ("D'Arrigo"), committed unfair labor practices or other objectionable conduct with respect to the decertification election that was held on November 17, 2010.

Specifically, this case raises the following issues:

1.) Did the employer instigate the decertification campaign, or unlawfully aid or participate in it?

2.) Did the employer allow and assist work-time solicitation and signature-gathering in support of the decertification campaign despite having a company "no solicitation" policy?

3.) In submitting its written response to the decertification petition, did the employer fail to properly disclose the existence of two cauliflower labor contractor crews?

4.) Did laid-off workers eligible to vote in the decertification election fail to receive timely and adequate notice of the election?

5.) If one or more of the above factors occurred, did they interfere with employee free choice in this matter?

FINDINGS OF FACT

A. Jurisdiction, Procedural History and Background

1. Jurisdiction

During all relevant times, D'Arrigo was an employer within the meaning of California Labor Code section 1140.4, subdivision (c), and the United Farm Workers of America ("UFW") was a labor organization as defined by California Labor Code section 1140.4, subdivision (f). (Prehearing Conference Order dated May 31, 2011, at page 2.)

2. Procedural History

On Wednesday, November 10, 2010, petitioner Alvaro Santos filed a petition for decertification.[1] A decertification election was held on Wednesday, November 17, 2010. There were 1,665 agricultural workers who were eligible to vote in this election. (28 RT 4403:13-4405:10) On November 24, 2010, the UFW filed nine election objections in this matter. On February 24, 2011, the General Counsel filed the unfair labor practices complaint in this matter. On March 8, 2011, D'Arrigo filed an answer to the complaint. On March 15, 2011, the Executive Secretary consolidated the unfair labor practices complaint with the election objections. On April 7, 2011, the Executive Secretary issued an amended notice setting seven of the UFW's nine election objections for hearing and re-organizing them into four broader categories. On May 11, 2011, the Executive Secretary set this matter for hearing with a starting date of June 13, 2011. A prehearing conference was held on May 26, 2011, and on May 31, 2011, the ALJ issued a prehearing conference order in this matter.

3. The Unfair Labor Practices Complaint

The unfair labor practices complaint alleges that the company allowed and assisted soliciting and signature-gathering in support of the decertification campaign.

[1] On November 4, 2010, Alvaro Santos withdrew a previously-filed petition for decertification. Due to the extremely close time proximity between the withdrawn petition and the ultimately-submitted petition, any company aiding or assisting of the withdrawn petition, if found, would have the same impact on workers' free choice as if it was connected to the ultimately-submitted petition.

4. The Amended Election Objections

The amended election objections are comprised of four issues. The first issue is whether or not the employer initiated, aided or participated in the decertification campaign. The second issue is whether or not, in submitting its written response to the decertification petition, the employer failed to properly disclose the existence of two cauliflower labor contractor crews. The third issue is whether the employer made an unlawful promise of benefits during the decertification campaign.[2] The fourth issue is whether laid-off workers received timely and adequate notice of the election.

5. Background

D'Arrigo is a large company with numerous ranches in Monterey and Imperial Counties. D'Arrigo has approximately seventeen hundred agricultural workers. The company grows romaine hearts, mixed lettuce, iceberg lettuce, broccoli rabe, fennel, pears and cauliflower.

With respect to romaine hearts, the time periods in question all occurred during the harvesting season. There are approximately thirty-six workers in a romaine hearts harvesting crew. The bulk of these workers are cutters and packers, with approximately thirteen to fourteen workers in each of those two classifications. The cutters cut the lettuce, the packers pack it. There are also sealers, box makers, a loader, a crew "helper", a machine

[2] At the prehearing conference, the UFW indicated that it was no longer pursuing the third amended election objection. See the discussion of this issue, *infra*.

operator and foreperson.[3] The harvesting crew works with a large harvesting machine. The harvesting machine does not actually remove the romaine hearts from the ground, the cutters do that task. Rather, the harvesting machine enables the workers to complete all of the tasks in the field, items such as cleaning the romaine hearts, sealing them in a bag, and placing them in a box, etc. The configuration is such so that the crew foreperson or supervisor can typically, with a little bit of movement, see all of the subordinate workers at their stations.

B. Admissions Regarding Supervisor Status at Prehearing Conference

Employer admits that John Snell, Jose Martinez, Martin Fletes, Gerardo Cendejas, Santiaga Quinteros and Jose Luis Berumen are all either managers or supervisors and held such a position at all pertinent times. (Prehearing Conference Order dated May 31, 2011, at page 2.)

C. Testimony, Credibility and Demeanor

There were approximately eighty-seven different witnesses who testified during the forty-eight days of hearing. Many of these witnesses appeared to have spent a great deal of time with counsel preparing for hearing. On almost every issue, the General Counsel and UFW's witnesses presented a unified front as to describing the events that transpired and the Employer's witnesses provided testimony that was drastically different. The administrative law judge must assess the relative credibility of each witness using various factors including

[3] Some of the forepersons are "temporary forepersons". The forepersons and temporary forepersons seem to have highly similar responsibilities and duties as discussed *infra*. Two distinguishing characteristics are that only permanent forepersons can hire crew members and also that permanent forepersons must have a license to drive a bus. (Court Reporter's Transcript, volume two, at page 290, lines 2-18, hereafter abbreviated as 2 RT 290:2-18)

the witness' demeanor. (California Evidence Code section 780, subdivision (a).) A single persuasive witness can be afforded more weight than a multitude of unpersuasive testimony.

1. Allegation That D'Arrigo Upper-Level Management Encouraged Workers to Launch a Decertification Campaign[4]

The General Counsel and UFW presented the testimony of worker Rene Salas in an attempt to show that D'Arrigo labor relations manager John Snell suggested the idea of a decertification campaign to Salas. Rene Salas has worked for D'Arrigo for approximately ten years. (13 RT 2020:18-21) He works in a rappini crew number one, also known as crew 138. (13 RT 2030:22-2031:4) Rappini is also known as broccoli rabe and its leaves are similar to turnip greens. In 2009, Salas became the UFW representative for his crew, as well as for five other rappini crews. (13 RT 2052:2-23 and 13 RT 2054:18-20)

Salas went to talk to Snell on many occasions. (13 RT 2054:24-2055:2) More specifically, Salas testified that he and a co-worker went to talk to Snell in 2009 about the existing signed contract. (13 RT 2037:3-22) The co-worker was his nephew Ricardo Salas. (13 RT 2039:3-23) Salas was unhappy with a provision which indicated that overtime pay began after ten hours rather than after eight hours. (13 RT 2057:19-24) Salas indicated that Snell told him that if he (Salas) was unhappy with the current contract overtime provisions, Salas could do what workers were doing at Gallo, initiating a decertification effort to get the union out. (13 RT 2037:12-2038:3) Snell told Salas that he could find more information about what had happened at Gallo on the internet. (13 RT 2038:9-16)

[4] This allegation is part of the Executive Secretary's April 7, 2011 amended election objection number one.

Salas then had another meeting with Snell about six months later. (13 RT 2039:25-2040:3) Salas asked Snell about one of the contract provisions as to whether that provision might allow the company and union to get together to change the overtime clause. (13 RT 2040:4-12) After Snell indicated that the provision did not allow for changing the overtime clause, Salas asked Snell about Gallo, indicating that he (Salas) had been unable to find information on the internet. (13 RT 2040:13-15) Snell then wrote out web-page information on a piece of paper for Salas and told him that using that language he would find information on the Gallo decertification on the internet. (13 RT 2040:15-18 and 13 RT 2068:18-25) Snell told Salas that at Gallo, the workers had gotten rid of the union and negotiated a contract directly with the company. (13 RT 2043:1-6) Salas stated that Snell also told him that he could talk to a person who worked in the D'Arrigo shop named "Toto" to get more information because the shop workers had a contract directly with the company. (13 RT 2041:9-17 and 13 RT 2044:12-23)

Later, sometime between May and November 2010, Salas spoke to his co-workers in the six rappini crews at a lunchtime meeting at ranch number seven. (13 RT 2047:1-9, 13 RT 2078:18-23 and 13 RT 2083:23-2084:1) The workers discussed whether to pursue a decertification effort, or to stick with the union and try to get contractual changes within that framework, ultimately deciding on the latter. (13 RT 2046:2-25)

John Snell started with D'Arrigo as a harvesting supervisor in 1977. (4 RT 560:16-561:3) Snell has served as the company's labor relations manager since 1988. (4 RT 560:4-12) Snell had a different recollection of events than Salas. Snell, who speaks Spanish, did remember Salas coming to his office a couple of times. (35 RT 5576:3-5579:24) In these

conversations, Snell contends that there was no discussion of the topics of decertification, Gallo, and a person employed in the company shop. (35 RT 5579:3-20 and 35 RT 5581:19-22)

As to this allegation, I found the testimony of Rene Salas to be credible and persuasive. Salas did not appear to rigidly tailor his testimony to favor one side or the other and, indeed, appeared to have misgivings with both the company and the union. By finding Salas' testimony to be credible, it is axiomatic that I find Snell's testimony on this subject to have been inaccurate. As a result, I conclude that labor relations manager Snell did suggest the decertification process as an option to Salas and that he did provide Salas with web browser information to assist Salas in locating information about the Gallo decertification effort. Based on Salas' testimony, however, I also find that Salas was already familiar with the concept of decertification prior to his meeting with Snell, and that Salas did not tell the other rappini crew members about Snell's suggestion. (13 RT 2069:6-10 and 13 RT 2074:16-19)

2. Allegation That Company Aided or Assisted Decertification Petition Signature Gathering in Crew 120C[5]

Three agricultural workers, Nidia Soto[6], Juan Lopez and Jose Reyes Manjebar, testified that machine operator Ernesto Mariscal solicited decertification petition signatures during work hours in the presence of foreperson Alma Cordova.[7]

[5] This allegation is found in paragraphs seven, eight and nine of the General Counsel's complaint, dated February 24, 2011. Crew 120C is also known as crew three. (1 RT 80:16-18) This is because "C" is the third letter of the alphabet. The first digit of the number "120" (e.g., the "1") refers to crews in Salinas, California, whereas the first digit in the number 620 (e.g., the "6") refers to crews in Yuma, Arizona. (1 RT 127:1-5 and 1 RT 129:23-130:2)

Nidia Soto was a packer who started with D'Arrigo in 2001. (5 RT 640:9-16) In October 2010, Soto was a packer in romaine hearts crew number three. (5 RT 640:17-641:1). As part of her job, Soto worked at a waist-high table and washed and packed the romaine hearts. (5 RT 708:6-709:14) At this time, Soto served as her crew's UFW representative. (5 RT 667:11-14) Soto's foreperson was Alma Cordova and the crew's machine operator was Ernesto Mariscal. (5 RT 640:2-11) In October 2010, Soto saw Mariscal gathering signatures on a single day during work time. (5 RT 641:12-642:6 and 5 RT 686:18-21) Foreperson Cordova was only five feet away from Mariscal and was observing the crew, including Mariscal. (5 RT 642:14-24) Mariscal told the workers that by signing the list in his hand, they could get rid of the union. (5 RT 642:8-13) Mariscal asked workers to sign the petition. Mariscal gave the list to the workers to sign and performed the work of one of the cutters while the cutter was signing. (5 RT 642:25-643:4, 5 RT 664:23-665:1 and 5 RT 753:3-20) Soto did not hear foreperson Cordova say anything to Mariscal about his signature gathering. (5 RT 644:18-20) Soto estimated that Mariscal was in the field gathering signatures for approximately thirty to forty minutes of work time. (5 RT 657:17-19, 5 RT 718:2-7 and 5 RT 749:8-15) As Soto was doing her work, she was only watching Mariscal during part of this

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(Footnote continued)

[6] During the time periods covered by her testimony, Nidia Soto was an agricultural worker at D'Arrigo. However, on approximately May 25, 2011, Soto took a leave of absence from her work at D'Arrigo to work directly as an organizer for the UFW. (5 RT 638:15-23 and 5 RT 770:10-22)

[7] Company rules prohibit workers from collecting signatures to get rid of the union during working hours. (34 RT 5406:19-23) More generally, company rules prohibit workers from distributing or signing documents during work time. (34 RT 5405:16-20 and exhibit GC-1, at page 2)

time. (5 RT 750:2-5) During that time, Soto estimates that Mariscal obtained signatures from approximately eight workers. (5 RT 665:4-22) Cordova was present all of this time. (5 RT 754:14-17) Supervisor Jose Martinez was present for one minute of the time that Mariscal was obtaining signatures. (5 RT 754:23-25)

Soto also saw the petition being passed around by crew sealer Nayeli Panuco during their lunch break. (5 RT 695:1-4) She then saw Nayeli return the petition to Mariscal. (5 RT 696:14-17) Following the lunch break, Soto saw Mariscal give the petition to machine operator Rosendo Rodriguez. (6 RT 864:6-865:23) Soto indicates that she then saw machine operator Rosendo Rodriguez having a five to ten minutes-long conversation with Cordova and Martinez and showing them a paper that she believed to be the decertification petition. (6 RT 848:18-25, 6 RT 850:6-12 and 6 RT 859:7-21) Soto was unable to hear the content of that conversation. (6 RT 852:19-21)

Juan Lopez Mendoza is a cutter in crew three. (6 RT 933:13-21 and 6 RT 946:2-5) He gave similar testimony to Nidia Soto. Lopez knew Mariscal as his crew's machine operator. (6 RT 935:15-18 and 6 RT 941:22-23) Lopez saw Mariscal with a piece of paper and a pad, asking workers if they wanted to sign to get rid of the union. (6 RT 935:24-936:2 and 6 RT 937:24-938:3) This was taking place during work hours for approximately ten to fifteen minutes. (6 RT 938:17-19 and 6 RT 942:15-17) However, Lopez did not see Mariscal do any other employee's work while obtaining their signatures. (6 RT 980:23-981:9) During this entire time, foreperson Cordova was nearby, facing Mariscal, who was in her line of vision. (6 RT 939:10-23 and 6 RT 962:3-5) Lopez did not see Jose Martinez during the time that Mariscal was soliciting signatures during work time. (6 RT 963:19-25)

Jose Reyes Menjebar worked as a cutter for D'Arrigo during 2005 to April 2011, working in crew three. (9 RT 1449:24-1450:6, 9 RT 1488:21-23) During working hours, Reyes saw machine operator Mariscal arrive with a list and solicit signatures to get rid of the union. (9 RT 1450:23-19, 9 RT 1452:22-25 and 9 RT 1456:5-13) Reyes heard Mariscal allege that the company sent him. (9 RT 1451:7-14 and 9 RT 1505:14-18) Reyes estimated that Mariscal was collecting signatures from cutters and packers for approximately fifteen minutes. (9 RT 1452:16-18 and 9 RT 1457:23-1458:5)

Reyes testified that Mariscal cut lettuce for him (Reyes) while he removed his gloves and signed the petition. (9 RT 1458:17-1459:4) Reyes also saw Mariscal cut lettuce for other cutters while they signed the list. (9 RT 1459:5-6) While foreperson Alma Cordova was further away when Mariscal made his initial announcement, she then returned and asked Mariscal what he was doing. (9 RT 1451:20-24) Reyes states that he heard Mariscal respond that the company sent him. (9 RT 1450:25-1451:2) Reyes indicates that he saw Cordova look at the list and tell Mariscal that the workers in his crew were not signing properly. (9 RT 1452:3-6, 9 RT 1460:4-9 and 9 RT 1494:5-7) At this juncture, Cordova and Mariscal were standing only five feet away from him. (9 RT 1494:21-23) Reyes then saw Mariscal re-gather some signatures. (9 RT 1551:20-25) Reyes did not see Jose Martinez during any of this time. (9 RT 1513:20-23)

Three other workers testified they did not see Mariscal gather signatures during work-hours. The first of these workers was Nayeli Panuco. Panuco worked at D'Arrigo as a sealer from 2007 to the present. (23 RT 3812:25-3813:11) Panuco recalls that the machine operator typically took lunch half an hour before the rest of the crew. (23 RT 3856:23-3857-5)

Panuco states that Mariscal took the petition to the crew during his lunchtime.[8] (23 RT 3857:19-21) Panuco states that she saw Mariscal give the petition to another worker who then passed it around. (23 RT 3816:3-9) She later saw her co-workers passing the form around at lunchtime. (23 RT 3816:20-22)

Sara Espinosa also testified that she did not see Ernesto Mariscal solicit signatures during work-hours. (25 RT 4116:7-14) In 2010, Espinosa was usually a packer in D'Arrigo crew three. (25 RT 4104:8-22) She did see signature-gathering at some point during lunchtime. (25 RT 4105:18-22 and 25 RT 4107:10-22) Espinosa did not see the form until someone handed it to her and she did not see where the form ultimately went. (25 RT 4115:7-24)

Jose Carrillo was a box maker with six years of experience in his crew. (32 RT 5029:25-5030:3 and 32 RT 5067:22-5068:2) Carrillo understood it to be against company policy to ask for petition signatures during work time. (32 RT 5061:16-18) He saw someone other than Mariscal starting to pass the petition starting around approximately two minutes into the lunch break. (32 RT 5031:4-5032:1)

Machine operator Ernesto Mariscal stated that he did not gather any signatures during lunch time. (47 RT 7255:23-25) Mariscal also stated that he did not show the petition to foreperson Cordova. (47 RT 7255:17-19) Rather, Mariscal described a James Bond-like clandestine process where he snuck the petition into a worker's backpack in the morning and

[8] By definition, if it was Mariscal's lunchtime then it was not the lunchtime for the rest of the crew.

later retrieved it from the worker's backpack in the afternoon.[9] (47 RT 7256:9-11 and 47 RT 7279:2-6) Mariscal stated that he put it in her backpack while he was passing by for work rather than during one of his breaks. (47 RT 7281:15-19) Mariscal stated that he saw the crew start to pass the form around at the beginning of their lunch break.[10] (47 RT 7251:21-24) But Mariscal later stated he was sent there to close the machine only shortly before the crew's lunch was over and did not remember his prior activities. (47 RT 7252:3-8 and 47 RT 7278:16-19)

I did not find Mariscal's testimony to be credible. First, I did not find him to be candid when responding to the reason for the alleged method to pass the petition. Mariscal said that the only reason for that approach was because it was the method upon which he and the other worker agreed. Second, Mariscal initially called the backpack a lunchbox which causes me to suspect that he was having trouble keeping his facts straight. Third, the overall story simply sounds implausible. As Mariscal describes it, he went to the area where the remainder of the crew left their bags and opened a backpack belonging to another worker. Based on these factors and as well as his demeanor, I found his testimony to be untruthful.

[9] Actually, Mariscal first stated that he put the petition in the worker's lunch box, but later stated that it was a backpack rather than a lunch box. (47 RT 7251:2-10 and 47 RT 7279:2-6)

[10] On this day, Mariscal took his lunch at an earlier time than the rest of the crew. (47 RT 7248:22-25 and 47 RT 7278:23-7279:1) Mariscal and the other machine operators typically took their lunch prior to the rest of the crew. Thus, if a machine operator was in fact passing the petition around, by definition, it was either working time for the machine operator or for his non-machine operator colleagues.

Alma Cordova started working for D'Arrigo in 2003, working full-time for the company from 2005 to the present. (1 RT 139:11-24) At the time of the decertification signature-gathering, she was a temporary foreperson for crew 120C. (1 RT 79:16-18 and 1 RT 80:11-13) She became a permanent, salaried foreperson in December 2010. (1 RT 76:20-24 and 1 RT 151:19-21) Back in 2010, Cordova states that she was unaware that a decertification election occurred at her own workplace. (1 RT 173:22-24) No one from D'Arrigo has ever told her that workers cannot solicit signatures for a decertification petition during work hours. (1 RT 163:22-164:8)

Cordova states that see did not see Ernesto Mariscal gathering any signatures. (1 RT 102:12-14) Nor did she see Mariscal passing any sort of paper around. (1 RT 103:21-25) However, Cordova does remember that day being at a distance of approximately ten feet from Mariscal and seeing him talking to a group of possibly five or more workers. (1 RT 104:19-105:3 and 1 RT 110:15-111:17) Cordova then told Mariscal that he needed to get back to work. (1 RT 105:4-7) She does not remember if Mariscal had a piece of paper with him or not. (1 RT 105:17-19)

I did not find Cordova's testimony to be particularly persuasive. It is hard to believe that Cordova was unaware of the decertification election and the events which led up to it. Having found credible the worker testimony that Mariscal was soliciting signatures, I find it doubtful that foreperson Cordova, being attentive to her duties, would not have noticed that nature of Mariscal's efforts. Cordova would have only told Mariscal to go back to work if she knew Mariscal's conversation with the other crew members was non-work related. Yet, Cordova claims she does not know what the conversation involved. Based on Cordova's

proximity, I conclude that it is more likely than not that she saw Mariscal collecting the signatures during work time.

As to this allegation, I find the testimony of Soto, Lopez and Reyes to be credible and persuasive. Accordingly, I find that Mariscal did solicit and obtain decertification petition signatures during the crew's work-time and that Cordova did observe Mariscal's activities. However, Soto's singular testimony on Jose Martinez's location was not specific enough for me to conclude that he observed any of these activities.

3. Allegation That Company Aided or Assisted Decertification Petition Signature Gathering in Crew 120E[11]

Three agricultural workers, Magdalena Politran, Robert Bedolla, and Erik Garcia, testified that crew machine operator Demetrio Garcia[12]solicited decertification petition signatures during work hours in the presence of foreperson Santiaga Quinteros.

Magdalena Politran started working at D'Arrigo in April 2010. (12 RT 1862:24-1863:1) It October 2010, Politran worked in romaine hearts crew five and her foreperson was Santiaga Quinteros.[13] (12 RT 1855:20-1856:3 and 12 RT 1892:22-1893:1) Politran states that, at the end of a lettuce-run during work-time, Quinteros told the workers to gather because

[11] This allegation is found in paragraphs ten and thirteen of the General Counsel's complaint, dated February 24, 2011. Crew 120E is also known as crew five. (24 RT 3964:24-3965:4)

[12] Hereafter I will typically refer to Demetrio Garcia by his first name "Demetrio", as there are multiple persons mentioned during this hearing having the last name of "Garcia".

[13] Santiaga Quinteros is also known to some of the workers by the name Lydia Quinteros. (2 RT 265:2-11, 11 RT 1687:4-8 and 47 RT 7220:17-22)

Demetrio had something to say. (12 RT 1856:12-18, 12 RT 18:57:9-15 and 12 RT 1870:6-12) Demetrio told the workers that he had something for them to sign. (12 RT 1856:18-20) While Demetrio spoke, Quinteros was standing at a distance from him of approximately six feet. (12 RT 1858:18-1859:4) Politran asked some of the workers what the papers were for and they responded that the papers were to get rid of the union. (12 RT 1856:20-24) Politran stated that the signing occurred for five minutes while she was present and that she then left that area. (12 RT 1857:25-1858:7)

After the machine began its next run, Politran states that Demetrio specifically asked her if she was going to sign the petition. (12 RT 1860:5-19 and 12 RT 1884:24-1885:1) At the time, Politran was packing. (12 RT 1860:20-22) Politran does not know where Quinteros was located when Demetrio made the specific inquiries to Politran. (12 RT 1861:12-15) During the course of that week, Politran did not recall hearing crew helper Faustino Sanchez making any announcements to the crew about getting rid of the Union. (12 RT 1887:15-21)

Roberto Bedolla[14] also worked in crew five. (11 RT 1670:6-7 and 11 RT 1686:24-1687:3) He worked mostly as a cutter, but also as a boxer. (11 RT 1717:9-11) Bedolla was a UFW crew representative near the end of 2010, but quit serving as the UFW crew representative a couple days after the decertification petition signatures were collected as he decided that the UFW meetings were taking up too much of his time. (11 RT 1690:13-1691:18 and 11 RT 1694:7-13) Bedolla recalled helper Faustino Sanchez yell to the other

[14] Roberto Bedolla is also known as Roberto Bedeya. (11 RT 1777:6-18)

crew members inquiring which of them would like to sign a document to try to get rid of the union. (11 RT 1671:17-1672:5) At the time, foreperson Quinteros was at a distance of approximately fifteen to twenty feet. (11 RT 11672:17-21)

Later in the day, Bedolla heard Sanchez make another similar comment. (11 RT 1673:22-1674:9) This time, machine operator Demetrio Garcia was standing near Sanchez. (11 RT 1673:15-21 and 11 RT 1740:7-9) Immediately thereafter, Bedolla saw foreperson Quinteros approach Sanchez and Demetrio. (11 RT 1674:10-14 and 11 RT 1741:19-1742:5) Bedolla indicates that, from a distance of approximately twenty-five feet, he heard foreperson Quinteros tell the pair in a loud voice to agree on who would go to pick up the documents and she would give that person the day off. (11 RT 1674:15-1675:5 and 11 RT 1742:10-21) However, Bedolla concedes that he was unable to hear all of this conversation. (11 RT 1747:19-1748:10)

On the next day, Bedolla saw workers signing the list. (11 RT 1677:21-1678) Bedolla saw machine operator Demetrio with the documents in his hand. (11 RT 1680:21-1681:7) Bedolla remembered that the signing occurred during work time, but he did not remember the precise time of day that it occurred. (11 RT 1678:22-1679:7) Bedolla recalled that the signature gathering definitely took place for longer than five minutes and possibly took place for longer than fifteen minutes. (11 RT 1682:10-17) Bedolla testified that Demetrio approached cutters both before and after the machine was turned. (11 RT 1754:2-6) Bedolla saw Demetrio, holding papers and a pen, approach three or four of the cutters for signatures. (11 RT 1752:7-24) With respect to while the machine was operating, Bedolla saw Demetrio do the work of some of the cutters while they signed the papers. (11 RT 1682:20-1683:3, 11

RT 1687:23-1688:3 and 11 RT 1760:21-25) Bedolla could see machine operator Demetrio while he was collecting signatures but could not hear his conversations with the other workers. (11 RT 1685:9-22) Bedolla states that Demetrio personally asked him to sign the forms as well. (11 RT 1685:13-16 and 11 RT 1751:14-22) Bedolla also saw Demetrio solicit signatures from boxers "Efren" and "Julio".[15] During some of the time that Demetrio was collecting signatures, Bedolla could see foreperson Quinteros watching Demetrio. (11 RT 1761:21-23)

Erik Garcia[16] first started working for D'Arrigo in 2006. (9 RT 1358:14-15) During all pertinent time periods, Erik served as a cutter in crew five. (9 RT 1358:20-1359:5) Erik is the UFW representative for his crew. (9 RT 1374:3-6 and 9 RT 1380:7-9) Erik knows Faustino Sanchez as his crew's helper. (9 RT 1359:14-1360:4) The "helper" assists the trucker in taking boxes out and fixes the sealers when they get hot. (9 RT 1364:7-9) Erik recalls a day when, during work hours, Sanchez shouted to crew five the refrain, "whether we wanted to get rid of the union". (9 RT 1360:5-25) Erik believes that Sanchez shouted loud enough for the entire crew to hear the comment. (9 RT 1386:9-12) Sanchez also made a comment that if the workers wanted to get rid of the union, they should get the forms. (9 RT 1386:13-16) Erik saw foreperson Quinteros tell a group of four workers, including Sanchez

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[15] Per exhibits U-k and U-o, the only "Efren" in crew five on October 27 or 28, 2010 was Efren Ruelas. Per those same two exhibits, the only Julio on the crew was Julio Cruz.

[16] Mr. Garcia's first name is spelled "Erik" in exhibits U-k and U-o. At the hearing, Mr. Garcia was asked if his first name was spelled "Eric" and he answered "yes". (9 RT 1358:2-5) The administrative law judge does not find any discrepancy in the spelling of Mr. Garcia's first name to hold any significance to the substantive allegations. Since there are multiple persons in this matter with the last name of "Garcia", in this decision I will hereafter typically refer to Erik Garcia as "Erik".

and Demetrio, to sort out among themselves who was going to get the decertification forms. (9 RT 1428:11-18 and 9 RT 1434:6-23) Erik saw Sanchez talk to a few of the workers on the machine, but Erik did not see Sanchez collect any petition signatures that day. (9 RT 1363:12-1371:22) Erik recalls that he was off the next day.[17] (13 RT 1440:5-11)

Three other workers in crew five testified that they did not see work-time signature gathering or remarks. Sandra Delgadillo has worked for D'Arrigo for nine years. (24 RT 3882:19-20) During all pertinent time periods, Delgadillo worked as a sealer. (24 RT 3882:21-22) Delgadillo did not remember the specific day that the signature gathering took place in her crew, but she did recall that it was on a single day toward the end of October 2010. (24 RT 3883:5-16) Delgadillo saw the machine operator, Demetrio, bring the signature form to her crew. (24 RT 3883:20-3884:2) Delgadillo states that Demetrio brought the form during

[17] Exhibit U-o shows that Erik Garcia was off on October 27, 2010 and exhibit U-k shows that Garcia worked on October 28, 2010. I note that Erik Garcia did not provide any testimony as to having seen Demetrio soliciting signatures. So, assuming the accuracy of the daily crew time sheets, Erik's testimony would be consistent if Sanchez made his remarks on October 26, 2010 and Demetrio solicited signatures on October 27, 2010. These dates are consistent with the testimony of crew five worker-witness Sandra Delgadillo, *infra*, who states that she saw lunch-time signature gathering in her crew on a single day. (24 RT 3883:5-16) Exhibit U-o shows that Delgadillo worked on October 27, 2010 and was off on October 28, 2010. Delgadillo's testimony would thus suggest that the single day of signature gathering occurred on October 27, 2010, not October 28, 2010. Bedolla's testimony is also consistent in that he indicated that Sanchez' work-time comments to crew five occurred the day prior to day when Demetrio solicited signatures. After considering the remarks of counsel, the administrative law judge concluded that it would set a bad precedent for him to conduct an *in camera* review of the decertification petition signatures that the regional office keeps confidentially stored within a locked safe. While the petition might or might reveal crew five signature dates useful in order to make credibility determinations, the review of the petition signatures, even if done *in camera*, would likely reduce the general confidence of workers in the strict confidentiality of such lists.

her lunch-time.[18] (24 RT 3883:17-19) But Delgadillo concedes that she was still working at the time she saw Demetrio pass the form to another worker. (24 RT 3884:21-24) From a distance of approximately seven feet away, Delgadillo heard Demetrio tell her co-workers that the form was to get rid of the union. (24 RT 3886:14-21) Delgadillo estimated that the workers spent about ten minutes signing the documents. (24 RT 3888:24-3889:1) She recalls that after Demetrio described the form, and gave it to the first crew member, Demetrio then left to resume his work. (24 RT 3885:16-18) Delgadillo estimates that Demetrio only took three or four minutes away from his work time to ask members of the crew to sign the forms. (24 RT 3946:8-11) Delgadillo did not see Sanchez make a statement to the crew on the preceding day. (24 RT 3895:1-4)

Laura Contreras has worked for D'Arrigo for three years. (24 RT 3964:22-3965:6) During all pertinent time periods, Contreras was a packer for crew five. (24 RT 3964:24-3965:10) At the time, Contreras heard from her colleagues that machine operator Demetrio brought the signature form to her crew. (24 RT 3967:2-9 and 24 RT 3968:3-9) Contreras states that that the signature gathering took place during lunch time and that she was not there the whole time. (24 RT 3966:16-19 and 24 RT 3973:20-3974:7) At the time of the signature gathering, foreperson Santiaga Quinteros was still working, either taking off freight or getting the ticket. (24 RT 4025:18-4026:24) After workers in her crew signed the petition,

[18] As discussed *supra*, the machine operators typically took their lunch prior to the rest of the crew. Thus, if a machine operator brought the petition during the middle of the day to the other crew members, then this activity, by definition, was either during the working time for the machine operator or instead during the working time for his non-machine operator colleagues. (23 RT 3856:23-3857:8)

Contreras recalls union organizers in the parking lot circulating a flyer referring to eight of the machine operators and helpers as "Judases" who sold out the workers.[19] (24 RT 3992:13-3996:11)

Julio Cruz is a loader with crew five. (47 RT 7184:2-3) The machine operator for his crew is Demetrio Garcia. (47 RT 7224:23-7225:2) Julio Cruz has worked for D'Arrigo for a period of between six and ten years. (47 RT 7219:2-10) Cruz has worked both as a loader and as a box-maker for D'Arrigo in Salinas. (47 RT 7219:14-16) Cruz has also worked as a "helper" for D'Arrigo in Yuma, Arizona.[20] (47 RT 7219:17-7220:8) Initially, Cruz remembered signature gathering in his crew in August. (47 RT 7184:24-7185:1) Thereafter, Cruz indicated that the signature gathering occurred approximately four to six weeks before the decertification election. (47 RT 7185:5-8) Cruz recalls machine operator Demetrio as the person who brought the form to his crew during lunch time. (47 RT 7185:15-7186:9) Cruz saw Demetrio step in front of the machine and read the form to all of the workers. (47 RT

[19] Contreras identified exhibit E-q as a true copy of the flyer that she was given by the union organizers. The flyer specifically calls out Alvaro Santos, Faustino Sanchez, Rosendo Rodriguez, Ernesto Mariscal, "Florentino - Flor", Gabino Llanes, Juan Guerra and Carlos Badajos. While some may find the use of the term "Judas" in such a flyer to be highly offensive, the flyer is also indicative that the union had become aware prior to the time of the flyer's dissemination of the role of the named individuals in the decertification effort. Later in the hearing, Efren Barajas, who serves as the second vice president of the United Farm Workers, acknowledged that he personally approved this flyer's content. (19 RT 3088:2-6 and 48 RT 7354:16-18)

[20] On exhibits U-k and U-o, the daily crew time sheets for October 28, 2010 and October 27, 2010, respectively, there is a column to the left of each worker's name and employee number with the title "job description". To the left of Julio Cruz's name the word "helper" is typed in the job description column, but the initials "CP" are handwritten over it.

7186:13-24) He also heard Demetrio explain that the form was a petition to get rid of the union. (47 RT 7188:22-7189:1) Cruz states that he was up on the machine loading boxes when Demetrio read the form. (47 RT 7187:20-7188:18) At this point, the machine was still running. (47 RT 7201:14-21) Cruz states that the signature gathering then continued for approximately eight to ten minutes. (47 RT 7192:23-7193:1) Cruz remembers that Erik Garcia did work on the day prior to the signature gathering. (47 RT 7198:15-7199:7) However, Cruz does not recall Faustino Sanchez making any comments about getting rid of the union on the day prior to the signature gathering. (47 RT 7194:24-7195:2)

During all pertinent time periods, Santiaga Quinteros was the foreperson of crew five. (2 RT 249:17-23) When the machine is operating, she is generally in close proximity to the cutters and packers. (2 RT 266:22-24) She does not recall Faustino Sanchez making a statement to the crew about getting forms to get rid of the union. (2 RT 251:25-252:2) Quinteros states that she is sure that she did not offer any crew member time off to retrieve decertification forms from the Agricultural Labor Relations Board. (2 RT 252:3-22) Quinteros denies ever giving Demetrio Garcia permission to leave during work time, but she "[does not] remember" as to whether as she ever permitted Faustino Sanchez to leave during work-time. (2 RT 267:20-268:2) Quinteros states that she did not recall any efforts by members of her crew to get rid of the union. (2 RT 258:9-11) More particularly, Quinteros states that she did not see Demetrio solicit any petition signatures. (2 RT 261:17-19) Quinteros also states that she did not know that the workers had an election in 2010, and that she did not know what the election was about. (2 RT 270:16-24) Quinteros states that it

would violate company rules for a worker to go to another crew to talk to workers about non-work matters during work-time. (2 RT 276:16-277:2)

Neither machine operator Demetrio Garcia nor crew helper Faustino Sanchez testified at the hearing.

I found credible the comments by Bedolla and Erik Garcia that they heard Faustino Sanchez make comments regarding the decertification effort on the first of these two days. Thus, I find that Faustino Sanchez did address the crew with respect to seeking the forms and getting rid of the union. I further find that foreperson Quinteros heard Sanchez make those remarks. This latter conclusion is based both on the act that Quinteros watched workers during work time and also that she immediately went over to Sanchez after the comments were made.

However, I strongly doubt that Bedolla could hear, from a distance of twenty-five feet and with the machine running, all of the specifics of Quinteros' comments to Sanchez, Demetrio, and the two others. It makes sense that if Faustino Sanchez was trying to address the whole crew that he would speak loudly, but it makes no sense that Quinteros would try to project her voice as much when addressing the smaller group of four. On the other hand, it did catch my attention that Quinteros did not remember whether or not she gave Sanchez permission to leave during work time. Nonetheless, based upon a preponderance of the evidence, I find that foreperson Quinteros did not state that whoever gets the petition will get the day off.

As to crew five on the next day, four workers, Politran, Bedolla, Delgadillo and Cruz, all acknowledge seeing Demetrio Garcia making a brief anti-union presentation to a

group of crew members and saw Demetrio provide the petition. Since the machine operator and other crew members took different lunch times, by definition, this activity took place either during Demetrio's work time or during the work time of the other crew members.

Workers Politran and Bedolla indicated that Demetrio's signature-gathering efforts occurred during their work time. Delgadillo and Cruz both testified that they themselves were still working when Demetrio made his remarks regarding eliminating the union, although they claimed that they were working a little bit into their break and that this was common for them. Ultimately, I found the testimony of Politran and Bedolla on this subject to be most persuasive version of the events. I also found credible Politran's testimony that Demetrio later individually solicited her signature for the petition and that this was after the machine began its next run. I also credit Bedolla's testimony that he saw Demetrio soliciting signatures from cutters both before and after the machine was turned and that he saw Demetrio do the work of at least one of the cutters.

With respect to the proximity of foreperson Quinteros, I found credible Politran's testimony that Quinteros was only six feet away from Demetrio when he made his remarks to crew members. I also credit Bedolla's testimony that he saw Quinteros seemingly watching Demetrio during a portion of the time that Demetrio was collecting signatures. Given that I have concluded that this signature-gathering took place during crew work hours, it is logical that Quinteros would have seen Demetrio's activities as Quinteros herself testified that she closely watches the workers during work time. Thus, I conclude that it is more likely than not that Quinteros saw this signature-gathering activity and took no action to stop it.

4. Allegation That Company Aided or Assisted Decertification Petition Signature Gathering in Crew 120K[21]

Jose Luis Berumen has worked for D'Arrigo since 2000. (3 RT 345:18-20) During all pertinent time periods, Berumen was the foreperson of crew eleven. (3 RT 344:13-22) Diego Rangel served as the machine operator for his crew. (3 RT 345:23-246:6) Foreperson Berumen remembers a time when Rangel arrived at the crew's location along with Alvaro Santos, a machine operator from crew seventeen.[22] Rangel was waving some papers in the air. (3 RT 329:4-6) At the time, Rangel was standing around eight to ten feet away from Rangel. (3 RT 349:4-11) Berumen then heard Rangel shouting to the crew that the papers were for people to sign who wanted to get rid of the union. (3 RT 354:10-25) This occurred during work time. (3 RT 357:3-6) At the time, Berumen did not say anything to Rangel or to the rest of the crew. (3 RT 355:4-13)

Diego Rangel did not testify at the hearing.

Veronica Arambulo Chavez started working for D'Arrigo in March 2005. (11 RT 1787:19-20) During all of this time, she has worked as a packer. (11 RT 1787:21-25) For

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[21] This allegation is found in paragraph eleven of the General Counsel's complaint, dated February 24, 2011. Crew 120K is also known as crew eleven. This is because "K" is the eleventh letter of the alphabet.

[22] Foreperson Berumen did not know Alvaro Santos' name. However, Berumen knows that the person presently serves as the machine operator for crew seventeen. (3 RT 356:8-10 and 3 RT 360:6-8) Alvaro Santos, the petitioner in this matter, has been working in crew 120Q, also known as crew seventeen, for the past ten years and serves as that crew's machine operator. (8 RT 1149:19-24) There is a company rule that workers may not leave work during work time to talk to other crews. (34 RT 5404:19-23) There is also a company rule that workers may not distribute or sign documents during work time. (34 RT 5405:16-20)

the past two years, she has served as a crew representative for crew eleven. (11 RT 1826:13-19) During Fall 2010, she worked in crew eleven, her foreperson was Jose Luis Berumen, and the crew's machine operator was Diego Rangel. (11 RT 1788:1-1789:1) Similar to Berumen, Arambulo recalls Rangel arriving with another person during work time. (11 RT 1789:2-8) She recalls Rangel raising his hand and the paper and asking to turn down the volume on the radio. (11 RT 1789:8-10) Rangel then told the entire crew of workers that he had a petition for workers to sign for those who wanted to get rid of the union. (11 RT 1789:10-18 and 11 RT 1793:4-11) Rangel's comments were made during work time about fifteen minutes before lunch time. (11 RT 1793:23-1794:1, 11 RT 1804:13-22 and 11 RT 1806:4-6) During the time that Rangel made his remarks, foreperson Berumen was standing only fifteen feet away. (11 RT 1789:19-21 and 11 RT 1793:12-22) After Rangel made his presentation, which lasted approximately three to five minutes, he then gave the papers to the person who had accompanied him and the workers resumed their work. (11 RT 1790:16-19 and 11 RT 1791:14-16) Rangel and the other person then asked everyone in the crew for their signatures. (11 RT 1792:1-5) Berumen did not say anything. (11 RT 1792:11-21) Thereafter, at her lunch time, Arambulo saw the person who accompanied Rangel collecting signatures.[23] (11 RT 1799:16-20 and 11 RT 1804:17-25)

[23] Based upon foreperson Berumen's testimony, the administrative law judge finds that this other worker was Alvaro Santos. (See footnote number twenty-two *supra*) If any of the crew eleven workers recognized Alvaro Santos as a machine operator, they would have likely assumed that Santos was soliciting signatures during his work time, as the machine operators typically take lunch at a different time than the rest of the workers. (23 RT 3856:23-3857:8)

Arambulo also recalled an occasion on November 3, 2010 a supervisor named Gustavo Hernandez came to talk to the whole crew. (11 RT 1794:4-1795:8) Hernandez asked the crew if they had any questions and a crew member asked if the company would take away workers' benefits if the union left. (11 RT 1795:10-17) Hernandez responded "no", that the company would not take the benefits away, and that the workers had held the benefits for decades. (11 RT 1795:22-1796:20) Arambulo understood Hernandez's remarks to mean that the workers would get to keep their benefits under all circumstances, both if the union was kicked out and also if the union remained. (11 RT 1849:11-21)

I found the testimony of both Berumen and Arambulo to be credible.

5. Allegation That Company Aided or Assisted Decertification Petition Signature Gathering in Crew 120Q[24]

Alvaro Santos has worked for D'Arrigo Brothers for nine to ten years. (8 RT 1149:17-18) He is a machine operator. (8 RT 1149:22-23) During the pertinent time periods, Gabino Llanes served as his foreperson. (8 RT 1150:25-1151:2) The supervisor above Llanes was Salvador Monge. (8 RT 1151:11-17) As a machine operator, Santos usually had a different time slot for lunch than the other crew workers. (8 RT 1151:23-1152:11 and 8 RT 1251:25-1252:2)

Santos came to the ALRB offices on multiple occasions, maybe as many as five times. (8 RT 1154:3-16) On the first occasion, Santos alleges that he lied to his

[24] This allegation is found in paragraph twelve of the General Counsel's complaint, dated February 24, 2011. Crew 120Q is also known as crew seventeen. I have also included in this sub-section other pertinent testimony by petitioner Alvaro Santos, who at all pertinent times served as the machine operator of crew seventeen.

supervisor and told him that he was sick so that he could leave mid-day.[25] (8 RT 1158:23-1159:25) Later that day, Santos went to five different ranches to disseminate the decertification forms to the other machinists. (8 RT 1161:5-12) When Santos handed out the forms, the work day for these machinists was still ongoing. (8 RT 1162:16-21, 8 RT 1164:22-1166:19 and 8 RT 1223:3-11) Santos coordinated the meetings with those machinists over the telephone earlier in the day, also during work hours. (8 RT 1237:25-1238:18) These ranches were located in different cities including Salinas, Gonzalez, Soledad and King City. (8 1165:25-1170-23) Santos stated that he was not worried about any of the forepersons seeing him handing out the decertification paperwork. (8 RT 1172:15-22)

Specifically in crew seventeen, Santos collected signatures during work hours. (8 RT 1198:2-7) Santos indicated that foreperson Gabino Llanes did not see him while he was talking to the cutters because Llanes had his back toward him. (8 RT 1176:18-1177:11) Alvaro Santos admits that he did the work of cutters while they signed the decertification petition. While collecting signatures from the cutters, Santos did their cutting while they signed the decertification petition. (8 RT 1184:10-23) Santos also obtained signatures from the sealers and closers while they were working, but did not complete their tasks while they signed. (8 RT 1185:2-1186:3) Santos also went on top of the machine to try to get signatures from the boxers and loader. (8 RT 1187:11-25)

[25] At all pertinent times, D'Arrigo company policy was that workers who leave during the middle of the day are not allowed to return back to work later that same day. (2 RT 274:14-274:3 and 2 RT 328:21-329:7)

After collecting signatures at Ranch 21, foreperson Gabino Llanes told him that he could not be there when he was not working. (8 RT 1174:7-22) At first, Santos stated that he did not get paid for that day, but he later clarified that he was paid for "six hours" that day. (8 RT 1175:5-11) The face of Exhibit U-e shows the hours for Alvaro Santos having been "whited-out", and then the numbers six and a half hours are written over the white out. Santos did not receive a warning from the company. (8 RT 1181:4-9)

Later in the hearing, Santos admitted that he had left work on at least five different occasions to work on the decertification campaign. These occasions included November 1, 2010 (42 RT 6585:1-25), November 4, 2010 (42 RT 6586:19-6588:21), November 5, 2010 (42 RT 6615:14-6616:7) and November 10, 2010 (42 RT 6616:14-6617:11) On each of these five occasions, Santos states that he lied to his foreperson about the reason for him to be absent. (42 RT 1158:23-1159:25 and 42 RT 6613:7-6616:1) Santos testified that he was never asked for any sort of verification for his absences, nor was he disciplined for missing so much work. (42 RT 6617:8-21) On four of these days, Santos left early and on the fifth day he took the whole day off. (42 RT 6625:12-6626:7)

Martin Villalobos typically worked as a sealer in romaine hearts crew seventeen, first having worked for D'Arrigo in 2005. (6 RT 891:20-892:12) For the past two years, Villalobos has also served as the UFW representative for his crew. (6 RT 917:6-9) On the day in question, Villalobos was working as a box-maker rather than as a sealer. (6 RT 897:4-8) Villalobos saw Alvaro Santos during work time collecting signatures from his crew for approximately twenty to thirty minutes. (6 RT 902:4-7 and

6 RT 914:2-9) Villalobos saw and heard Santos solicit signatures to get rid of the union from the other box-maker and the loader. (6 RT 897:25-898:12) Then Villalobos saw Santos approach all of the cutters and packers. (6 RT 898:25-899:5 and 902:21-23) Villalobos also saw Santos doing the work of the cutters. (6 RT 903:8-903:24) Villalobos did not actually see the foreperson watching Santos, but based upon his experience with the crew, he believes that the foreperson very likely would have noticed Santos' activities sometime during a period of approximately thirty minutes. (6 RT 913:1-16) While there seemed to be some inconsistency in the exact number of cutters for which Villalobos saw Santos perform work, I found the remainder of his testimony to be credible.

Francisco Sebastian works as a cutter in crew seventeen. (8 RT 1296:13-18) He has worked for D'Arrigo for seven to eight years. (8 RT 1296:7-12) After Santos left his crew during the middle of the day, Sebastion recalls Santos returning during work time with a piece of paper and a pen to collect signatures. (8 RT 1299:22-25 and 8 RT 1303:4-5) Sebastian saw Santos for approximately fifteen minutes go to each of the cutters and ask them if they wanted a union or not. (8 RT 1300:1-15) Sebastian saw Santos go to the majority of the cutters and packers. (8 RT 1302:3-6) Sebastian saw Santos do the work of some of the cutters while they signed the paper. (8 RT 1303:6-25) Sebastian is confident that the foreperson saw this activity because he was standing approximately eight meters in front of the cutters and facing them. (8 RT 1304:11-25 and 8 RT 1306:2-4) Sebastian recalls that Santos was wearing his distinctive-colored

machinist vest and that the foreperson Gabino Llanes did not make any comments. (8 RT 1305:2-14) I found Sebastian to be a credible witness.

Luis Antonio Sanchez[26] has worked for three years as a box-maker with crew seventeen. (31 RT 4953:2-11) Sanchez recalls Santos soliciting signatures on a single day and that it occurred during lunch time.[27] (31 RT 4955:13-4956:3) Sanchez recalls leaving work that day in the same car with Santos. (31 RT 4957:11-20) Sanchez says he left that day at 6:00 p.m. as he was paid to help Santos close the crew's machine. (31 RT 4957:13-4958:13) Sanchez states that he stays late approximately once or twice a week to assist Santos in that manner on those occasions Santos often gives him a ride home. (31 RT 4998:13-4999:5) At the time of the hearing, I did not find Sanchez to be a credible witness based both on his demeanor and seemingly "canned" answers, and also because Sanchez alleges that he did not see any of the work-time solicitation activities that even Alvaro Santos readily concedes. Moreover, while drafting this decision, I re-reviewed exhibit U-e[28] and observed that it shows that, on October 27, 2010, Luis Antonio Sanchez only worked until 1:45 p.m. A note on the top of the time sheet states that, per Gabino, Luis Antonio Sanchez had health problems that day and left at 1:45

[26] In their post-hearing brief, the employer sometimes refers to Luis Antonio Sanchez as "Chavez". The administrative law judge believes that this is just an inadvertent typographical error.

[27] Sanchez alleges that it was the crew's lunch time, but not the lunch time for Santos. (31 RT 4973:18-22)

[28] In the testimony of Gabino Llanes, *infra,* foreperson Llanes references an inquiry from an office secretary about Luis Antonio Sanchez only working part of the day. (2 RT 324:15-22)

p.m., working five and three-quarter hours. This would seemingly corroborate my initial impression that Sanchez' testimony should not be credited.

Gabino Llanes[29] has worked for D'Arrigo since 2001. (2 RT 280:14-16) During all pertinent time periods, Llanes was the temporary foreperson of crew seventeen. (2 RT 279:4-11) Llanes had been serving as a temporary foreperson on and off during 2008 through 2010. (2 RT 280:1-13) In the past, Llanes has also worked as machine operator. (2 RT 286:18-23)

Llanes recalls an occasion when Alvaro Santos arrived at his crew with the decertification petition. (2 RT 290:25-291:11) Santos was asking the crew members to sign the petition. (2 RT 291:12-14) Llanes stated that it was his understanding from his "co-workers" that company policy prohibited soliciting signatures during work hours, although he was unable to recall the name of a specific person who had ever so indicated. (2 RT 292:2-293:3) Llanes states that, at the time, he did not know whether Santos was pro-union or anti-union. (2 RT 294:10-13) Llanes states that Santos asked him if he could collect signatures and that Llanes responded that it was not permitted during work hours. (2 RT 291:17-292:1) Llanes states that he did not see Santos circulate the petition during work hours. (2 RT 297:1-4) Llanes states that he did see Santos and his co-workers circulate the petition during the afternoon break. (2 RT 298:2-16)

Llanes confirms that Santos was missing during part of the day in question. (2 RT 322:16-25) Llanes claims that the day in question he marked Santos down for working the

[29] Gabino Llanes is also known as Gabino Valdez on some company records.

full day and then only on the next day remembered to reduce the hours while having a telephone conversation with a secretary in the office.[30] (2 RT 323:19-324:22) Llanes states that Santos told him that he needed to leave due to a car and health problem. (2 RT 329:13-20, 2 RT 333:10-334:1 and 2 RT 335:18-20)

I found Llanes to be unbelievable. Based upon the persuasive testimony of Villalobos and Sebastian, I find it implausible that Santos spent fifteen to thirty minutes of work-time soliciting signatures from the crew without Llanes having seen the activity. Also, Llanes turned in the time sheet that day giving Santos full hours for the day which undercuts the plausibility of the testimony that Santos allegedly had a car and health problem. Nor did Llanes express any surprise when Santos returned that day from his "car and health" problems to allegedly try to solicit signatures for the decertification petition.

As to this allegation, I find based upon a preponderance of the evidence that Santos solicited signatures from all of his crew during work-time and that Llanes saw this activity. I further find that Santos performed the work of all of the cutters while they signed the petition and that Llanes saw that aspect of the activity as well.

[30] This telephone conversation was apparently about the reduced hours for Luis Antonio Sanchez, making even more evident that Sanchez' testimony should not be credited.

6. Allegation That Company Supervisor Martin Fletes Inappropriately Looked at the Decertification Petition[31]

Martin Fletes has worked at D'Arrigo for eight and a half years. (4 RT 523:20-21) He started with the company as a foreperson and thereafter was promoted to become a supervisor. (4 RT 523:22-25) Fletes recalls a day at lunch time when he saw crew helper Juan Guerra with sheets of paper gathering signatures.[32] (4 RT 524:-25-525:2, 4 RT 528:5-7 and 4 RT 533:8-19) Fletes has known Guerra for approximately twenty years. (4 RT 534:18-22) Fletes asked Guerra what he was doing and Guerra explained that it was because he did not want the union. (4 RT 525:6-10) Fletes then asked him what the signatures were about and Guerra held up the paper for Fletes to see it. (4 RT 525:11-18) This interaction took approximately two to three minutes. (4 RT 537:3-6) Fletes says that he asked Guerra about the papers because he was curious. (4 RT 538:10-12) When Guerra showed Fletes the paper, he was able to see signatures, but he otherwise did not read anything. (4 RT 526:3-12)

UFW organizer Eulogio Donato has worked for the UFW since 2008. (8 RT 1260:5-11) During the pertinent time periods, as part of his job, he often took lunch-time access at D'Arrigo to talk with workers. On one of those occasions, a worker told him that a list had been passed around to get rid of the union. (8 RT 1262:8-13) The worker then told him who had the list. (8 RT 1262:14-17) Donato then approached the worker with the list and asked him about the list. (8 RT 1264:19-1266:7) Donato further indicates that the worker told

[31] This allegation is part of amended election objection number one.

[32] Alvaro Santos confirmed that he had given signature forms to worker Juan Guerra. (42 RT 6581:1-25)

him that he had obtained the list from "Florentino". (8 RT 1267:11-19) Donato indicates that he then saw the worker go over to supervisor Martin Fletes. (8 RT 1268:18-1269:6) Donato states that, from a distance of seventy to one hundred feet, he saw Fletes looking at the petition. (8 RT 1269:7-24)

Three other workers from iceberg lettuce crews testified that they did not see a conversation between Martin Fletes and Juan Guerra on the day in question. Aida Puga Jimenez has worked for D'Arrigo for thirteen years, including seven years with crew 125C. (29 RT 4688:14-18) She recalls signature gathering on a single day. (29 RT 4666:10-12) The signature gathering occurred at 6:40 a.m. prior to the start of the work day but after the company bus had taken the workers to the fields. (29 RT 4666:13-20 and 29 RT 4694:4-12) She saw Juan Guerra solicit signatures from her colleagues. (29 RT 4674:18-4675:11) However, she did not see Guerra show the form to Fletes at any time that day. (29 RT 4678:9-11) Bulmaro Cruz Martinez is a loader for crew 125B. (29 RT 4716:1-6) Juan Guerra told him what the signature form was about. (29 RT 4719:17-19) On the day of the signature gathering, he did not see Guerra show the signature form to supervisor Martin Fletes. (29 RT 4723:1-4) Lucia Delara Hernandez is a packer for crew 125A. (34 RT 5333:6-14) On the day of the signature gathering, she did not see Juan Guerra show any papers to supervisor Marin Fletes. (34 RT 5346:20-25)

Crew helper Juan Guerra did not testify at the hearing.

The fact that the three workers did not see the conversation between supervisor Martin Fletes and helper Juan Guerra does not cause me to question the existence of the conversation. Fletes admits that he was curious about the petition and made inquiries to

Guerra. Donato corroborates that he saw Guerra showing the paperwork to Fletes. Accordingly, I find that Fletes did ask Guerra about the petition, that Guerra did show it to Fletes, and that Fletes did briefly look at the signatures that were on it.

Based upon a preponderance of the evidence, I find that none of the parties established the source from whom Guerra obtained the petition paperwork. Donato stated that Guerra told him that he had obtained the list from Florentino, but I do not find this portion of his testimony to be credible. Guerra likely knew Donato to be a UFW organizer and there is no logical reason why he would have volunteered Florentino's name to Donato. On the other hand, based upon the totality of his testimony, I did not find Alvaro Santos to be a credible witness. So I am finding that none of the parties established who initially gave the paperwork to Guerra.

7. Allegation That Company Supervisor Gerardo Cendejas Inappropriately Looked at the Decertification Petition[33]

Pastor Espinoza has worked for D'Arrigo for approximately eleven to twelve years. (7 RT 1036:11-12) He works as a "loader" in mixed lettuce crew three, which is also known as crew 115C, where Espinoza lifts boxes by hand and ties them down. (7 RT 1036:18-20, 7 RT 1050:10-1051:3 and 7:1062:15-18) He is a union crew representative. (7 RT 1203:8-14) Espinoza is the spouse of witness Nidia Soto, who now works directly for the UFW. (7 RT 1111:12-16) Pastor Espinoza states that he saw Florentino Guillen arrive at lunch time

[33] This allegation is part of amended election objection number one.

carrying a piece of paper. (7 RT 1039:19-1040:3) Espinoza testified that this incident occurred on November 3, 2010. (7 RT 1038:13-16)[34]

Espinoza states that he was at the truck getting a drink of water when he saw Guillen collecting signatures. (7 RT 1039:23-1040:75) Espinoza saw Guillen showing the paper to supervisor Gerardo Cendejas. (7 RT 1051:11-15 and 7 RT 1053:15-1054:21) Espinoza states that he then saw and heard Guillen talking with Cendejas, with the two gentlemen being approximately five feet away from him. (7 RT 1041:13-1042:8) Espinoza testified that Cendejas told Guillen that John Snell had told him that a person would be arriving to collect signatures. (7 RT 1042:10-13) He added that Guillen responded that Snell had given him permission to go to the crew. (7 RT 1042:14-15) Espinoza states that Cendejas offered to gather the crew for Guillen to speak to them as a group, but Guillen recommended against it due to the presence of union representative Francisco Cerritos. (7 RT 1045:12-1046:13 and 7 RT 1-11)

Florentino Guillen gave confusing and misleading testimony as to his position status both on the day in question and more generally. For example, Guillen stated that he worked as a helper in October 2010. (3 RT 398:6-8) When asked by employer's counsel if he had worked as temporary foreperson that day, Guillen responded "I don't remember". (3 RT 465:1-6) Guillen was also evasive in answering how often he served as a foreperson. (3 RT 401:5-404:14)

[34] Florentino Guillen similarly stated that this activity took place on November 3, 2010. (3 RT 421:3-5) Supervisor Gerardo Cendejas, discussed *infra*, also confirmed that this incident occurred on November 3, 2010. (4 RT 488:22-25)

Company records, however, show that Guillen worked as a temporary foreperson on each of the four days from November 1-4, 2010[35], and during fifteen of the twenty-two days that he worked from October 21, 2010 to November 4, 2010.[36] (Exhibits U-f and U-g) Those same records show Guillen working as a machine operator on the days in October and November 2010 when he did not serve as a temporary foreperson. (Exhibits U-f and U-g)

Similar to the testimony of Alvaro Santos, Florentino Guillen testified that he told his foreperson that he wanted to leave early for a doctor's appointment, but then went to solicit petition signatures.[37] (3 RT 406:16-407:17 and 3 RT 409:18-25) Guillen also stated that when soliciting signatures, he told workers that he was a machine operator in crew 120-O. (3 RT 411:19-23) There is a crew time sheet that shows Guillen as working as a machine operator and leaving early on Friday, November 5, 2010.[38] (Exhibit U-L) But based upon a preponderance of the evidence, this is not the day that Guillen went to crew 115C, but rather two days later. Moreover, in the alternative event that Guillen did actually go to crew 115C

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[35] If Florentino Guillen was working as a temporary foreperson for crew 196B that day, this might explain why he did not solicit any signatures from his own crew. (3 RT 418:1-10) Per supervisor Martin Fletes, this crew was a ball lettuce crew with a labor contractor. (4 RT 531:23-532:6)

[36] Company records further show that Guillen worked as a temporary foreperson approximately one hundred and thirty-eight times during calendar year 2010. (Exhibits U-f and U-g) Guillen discussed his supervisorial duties at 3 RT 450:14-458:11.

[37] Guillen stated that he did not remember the date that he went to the doctor. (3 RT 410:9-14)

[38] This time sheet also shows Juan Diego Rojo Castro as working as crew's machine operator that day. Guillen's name appears to be initially crossed out and showing zero hours to be worked and a "zero" by his job description. Guillen's name, job description and number of hours worked are then handwritten over the earlier entries. (Exhibit U-L)

on Friday, November 5, 2010, rather than on November 3, 2010, then it is pertinent that Guillen also states that he obtained the petition from Alvaro Santos on a previous evening, but that he did not remember the specific date. (3 RT 427:16-21) If Guillen had obtained the decertification petition from Santos on any of the evenings between November 1st and 4th, then Guillen would have obtained the petition on a day that he worked as a temporary foreperson.

As to the incident itself, Guillen testified that he went to mixed lettuce crew 115C.[39] (3 RT 464:2-25) Guillen told the crew that he was there to get signatures to get rid of the union. (3 RT 411:19-23) When confronted by a union representative, Guillen declined to give his name. (3 RT 424:25-425:3) Guillen acknowledged passing Gerardo Cendejas with the petitions visible in Guillen's hand. (3 RT 429:5-9) But Guillen could not remember whether or not Cendejas said anything to him or not. (3 RT 465:11-25)

Florentino Guillen claims that he did not know whether or not someone else might have solicited signatures from this crew (3 RT 419:1-4) Guillen claims that that no one suggested that he go to this crew and only picked it because it was near to his location. (3 RT 417:19-418:25) Guillen also indicated that he did not tell anyone else that he was going to go to this crew to solicit signatures. (3 RT 419:1-3) Like the rest of Guillen's testimony, this is not credible.

Agapito Gerardo Cendejas is an assistant supervisor who supervises three crews. (4 RT 482:10-20) He has worked for D'Arrigo for twenty-two years, including eighteen years

[39] Guillen also solicited signatures from a rapini crew. (3 RT 418:14-22) Guillen additionally admitted that he had obtained thirty-five or thirty-six signatures for the decertification petition outside of work-time and off-site. (3 RT 466:14-20)

as a foreperson. (4 RT 482:6-9 and 4 RT 482:24-483:2) Cendejas' supervisor was Rafael Alcala. (4 RT 486:12-15) As of November 2010, Cendejas was familiar with Florentino Guillen, having known him for about six years. (4 RT 488:14-21) Guillen was not a member of any of the crews that Cendejas supervised. (4 RT 488:10-13)

Cendejas recalls Florentino Guillen arriving at one of his crews on November 3, 2010. (4 RT 488:22-25) Initially, Cendejas agreed that stated that it was unusual for Guillen to arrive at his crew. (4 RT 489:5-7) Later, Cendejas elaborated that he had never seen Guillen there with any of his crews. (4 RT 490:10-13) Cendejas asked Guillen why he was present. (4 RT 490:8-9 and 4 RT 494:19-20) Guillen responded that he had come to the crew to gather signatures to decertify the union. (4 RT 489:1-4 and 4 RT 490:5-9) When they spoke, Guillen had a pad of papers in his hand. (4 RT 491:25- 492:2) Cendejas then called his supervisor and inquired if Guillen was allowed to solicit signatures. (4 RT 492:6-12) Alcala told Cendejas that Guillen could solicit signatures both during lunch time and before the crew starts to work. (4 RT 492:6-15) After Cendejas spoke with Alcala, he told Guillen that he could proceed to solicit signatures. (4 RT 494:25-495:2)

Cendejas states that he did not know the contents of the papers that Guillen was holding. (4 RT 493:18-25) But Cendejas states that he did overhear part of Guillen's conversation with four workers. (4 RT 496:16-24) Cendejas heard Guillen tell the four workers that if they signed the decertification petition that they would only have to work eight hours. (4 RT 496:23-497:3) Cendejas denies having offered to gather the crew for Guillen and denies a conversation in which labor relations manager John Snell's name was mentioned. (4 RT 499:9-500:14) Guillen gathered signatures during the crew's lunch hour. (4 RT 504:19-

20) Cendejas did not ask Guillen whether or not he was working or on company time. (4 RT 504:23-25)

Rafael Alcala has worked for D'Arrigo for nineteen years. (25 RT 4161:21-25) During all pertinent time periods, he served as the company's assistant superintendent. (25 RT 4162:1-2) He recalls working in Yuma, Arizona, when he received a telephone call from Gereardo Cendejas. (25 RT 4164:17-25) Alcala states that Cendejas told him that an unnamed person wanted to talk to the crews. (25 RT 4165:16-25) Not only did Cendejas not tell him the name of the person, but he did not state the reason why the person wanted to talk with the crews. (25 RT 4166:13-15) Alcala told Cendejas to wait while he called John Snell. (4 RT 4166:16-19) Alcala immediately reached Snell who told him that the person could talk to the crew either before work, during lunch, or after work. (4 RT 4167:3-22) Alcala states that Snell did not ask him regarding the speaker's name or subject matter. (4 RT 4169:18-4170:1 and 4 RT 4171:2-6) Alcala then immediately called Cendejas and relayed that information. (4 RT 4167:25-4169:6)

John Snell has worked for D'Arrigo for thirty-four years. (35 RT 5509:22-24) He serves as the company's labor relations manager and has held that specific position for twenty-three years. (35 RT 5509:25-5510:4) Snell speaks both English and Spanish. (35 RT 5579:25-5580:2) Snell testified that when a worker leaves for the day, he normally is not permitted to return to the work site. (4 RT 563:1-6) Snell also indicated that it could potentially be a disciplinary issue if a worker left his crew to visit another crew without permission. (4 RT 562:20-25)

John Snell indicates that on November 3, 2010, he did not have any conversations with Gerardo Cendejas about Florentino Guillen. (4 RT 571:1-6) Snell did recall during the first week of November 2010 having received a telephone call from Rafael Alcala regarding "access". (35 RT 5544:2-5) Snell states that Alcala asked him about the access rules and Snell responded before work, during lunch, and after work. (35 RT 5544:9-18) Snell testified that he is unaware as to what prompted Alcala's call to him. (35 RT 5545:8-10)

As to this allegation, none of the witnesses gave testimony that rang completely true. First, Florentino Guillen was not a credible witness. He states that he went out of his way to visit another crew without any reason to know whether or not another person had already solicited signatures from that crew or not. It seems implausible that the various signature-gatherers did not coordinate in some manner to successfully gather a large number of signatures in such a short period of time. This is even more implausible when you consider that under Guillen's purported version of the events, he had to tell a lie about his health in order to leave his work duties and solicit the signatures.

Similarly, the testimony of Gerardo Cendejas and Rafael Alcala come across as implausible. Cendejas states that he telephoned his out-of-state supervisor and inquired about a person who wanted to speak to his crews without mentioning the person's name or the subject matter involved. Alcala then spoke with John Snell, who also did not inquire as to the name of the person or the subject matter. The alleged sanitized content of these conversations is not plausible.

Yet Pastor Espinoza's testimony rings credible only in part. Espinoza was certainly credible stating that he saw Florentino Guillen gathering signatures during the lunch hour and also credible describing that he saw Guillen having a conversation with Gerardo Cendejas and showing him the decertification papers. But Pastor Espinoza's testimony loses traction when he recalls Cendejas telling Guillen that Snell had told him to expect someone to collect signatures and with Guillen then responding that Snell had given him permission. The totality of that exchange sounds too stilted to represent everyday conversation and seems too convenient for someone to overhear by a busy water-cooler on the truck. Perhaps Espinoza truthfully heard Snell's name mentioned during the conversation, but I do not credit Espinoza's testimony as to hearing Guillen state words specifically to the effect of that "Snell gave him permission" to solicit the signatures. I find it plausible that Espinoza misheard part of the conversation between Cendejas and Guillen.

8. Allegation That Company Supervisors Refused to Allow Pro-UFW Workers to Spend Work Time Soliciting Pro-Union Signatures[40]

Three broccoli crew workers and one irrigation crew worker testified as to their requests to supervisors to be able to solicit pro-union signatures or support during working hours.

Efrain Fraida has worked for D'Arrigo for over thirty-one years. (12 RT 1951:7-22) He works in broccoli crew 3. (12 RT 1951:5-6) He is a packer and also the crew representative. (12 RT 2003:11-20 and 12 RT 1970:5-11) He had a conversation in October

[40] This allegation is part of amended election objection number one.

or November 2010 with supervisor Dionicio Munoz in which he sought to collect pro-union signatures. (12 RT 1968:24-1969:9) Munoz denied his request. (12 RT 1969:13-16) The request and denial occurred on November 15, 2010, which was two days before the decertification election. (12 RT 1987:19-22) Fraida stated that two other broccoli crew representatives were present, Everardo and Marcial. (12 RT 1969:21-1970:4) Fraida states that earlier that day he had first made the request to his foreperson, Alfredo Gomez, who sent him to Munoz, his supervisor. (12 RT 1972:12-1973:9) Fraida and the other crew representatives decided to make this request because they had heard that persons opposing the union had been allowed to collect signatures during work time. (12 RT 1981:20-1983:8) That same day, Fraida signed a declaration in the form of a template with a few blanks which discussed this topic. (12 RT 2005:14-2006:11)

During October and November 2010, Marcial Lopez worked for a broccoli crew. (16 RT 2659:1-7) Lopez was a UFW crew representative during the last two years that he worked at D'Arrigo. (16 RT 2679:9-14) Lopez sought permission from supervisor Juan Carrillo Orozco to solicit pro-union signatures during work hours. (16 RT 2668:11-14) Lopez was accompanied by another crew representative at the time that he made this request. (16 RT 2668:21-25) Lopez made his request to Orozco at approximately 6:59 a.m. (16 RT 2669:15-21) Orozco told Lopez that he was unable to approve that request, that only John Snell could approve such a request and that Snell would not arrive at work for another hour. (16 RT 2669:10-14 and 17 RT 2908:15-20)

Everardo Ureta Quinteros works in a broccoli crew. (15 RT 2383:25-2384:2) Ureta was present when Efren Fraida sought permission from supervisor Dionicio Munoz to

solicit pro-union signatures. (15 RT 2394:20-2396:16) Munoz denied the request. (15 RT 2398:4-10)

Carlos Bermudez drives a tractor and does watering for irrigation crew 145-O.[41] (15 RT 2485:8-19) Bermudez is also a UFW crew representative. (15 RT 2537:1-2 and 34 RT 5425:23-25) Alfredo Gamma served as the foreperson of crew 145-O. (15 RT 2485:23-2486:2) Two days before the election, in the morning, Bermudez asked his foreperson for permission to solicit pro-union signatures during working time. (15 RT 2516:10-2517:12) Bermudez was accompanied by two of his co-workers when he made the request. (15 RT 2516:15-21) Bermudez explained to Gamma that in other crews workers were allowed to obtain signatures to get rid of the union during working time. (15 RT 2518:16-19) Gamma denied the request. (15 RT 2518:20-25) Gamma then offered to confirm his decision with his supervisor. (15 RT 2530:17-2531:10)

Bermudez acknowledges that he and several others among the crew representatives collectively planned making this request. (15 RT 2540:19-2542:15) Because the crew representatives expected each of the forepersons to deny their request, they had a template declaration drafted in advance ready for them to complete. (15 RT 2542:17-24 and exhibit E-G) At lunch-time, Bermudez signed a declaration which covered the topic of his request to Gamma to solicit pro-union signatures. (15 RT 2539:14-23)

[41] The irrigation crews are sometimes referred to as “tape crews”. This is because some of the irrigating is done using drip tape.

Dionicio Munoz is an assistant supervisor[42] for the broccoli department and has worked for D'Arrigo for twenty-four years. (34 RT 5386:1-11) Munoz recalls a single telephone conversation with Efrain Fraida that took place during the week of the decertification election. (34 RT 5390:19-5391:25) Munoz recalls that Fraida requested to talk to other broccoli crews and to distribute documents during work time. (34 RT 5393:6-5394:3) Munoz told Fraida that he would check with his supervisor. (34 RT 5395:9-11) The reason that Munoz wanted to first check with his supervisor is because he wanted to be sure of the answer due to the upcoming union election. (34 RT 5395:12-15) Munoz then telephoned Juan Manual Orozco. (34 RT 5396:20-5397:8) Orozco told Munoz that he would respond to Fraida. (34 RT 5398:9-14) Later, Orozco told Munoz that he denied Fraida's request. (34 RT 5401:7-14)

Juan Manual Carrillo Orozco has worked for D'Arrigo for seventeen years. (33 RT 5190:22-25) He is an assistant supervisor in the broccoli crop and has held that position for approximately fifteen years. (33 RT 5191:4-11) Orozco and Munoz rotate as being the lead assistant supervisor and this determines which among the two are in charge at a given time. (33 RT 5225:17-25) Orozco recalls a single conversation with Efrain Fraida that took place during the week of the decertification election. (33 RT 5197:1-9) Fraida was accompanied by Marciel Lopez. (33 RT 5198:10-15) Orozco knew both Fraida and Lopez to be UFW crew representatives. (33 RT 5198:22-5199:8) Orozco recalls Fraida asking him for

[42] The administrative law judge concludes that, at all pertinent time periods, the terms "assistant to the supervisor" and "assistant supervisor" may correctly be used interchangeably. (35 RT 5550:14-21)

permission to talk to the other broccoli crews during work time and to distribute documents. (33 RT 5200:13-5201:3) Orozco denied the request, telling Fraida that he could only go to the other crews during lunch time or after work. (33 RT 5202:1-3) Orozco advised Munoz of his conversation with Fraida. (33 RT 5205:23-25) Orozco states that during his conversations with both Fraida and Munoz, it did not occur to him that the request might have something to do with the upcoming election regarding the union. (33 RT 5214:17-25) Orozco does not recall any conversations with foreperson Afredo Gomez on this subject. (33 RT 5213:2-5)

Jose Alfredo Gomez Munoz has worked for D'Arrigo for six years and is one of the broccoli forepersons. (32 RT 5094:5-25 and 32 RT 5102:14-16) At the time of the decertification election, Efrain Fraida was a packer in his crew, 105D. (32 RT 5094:23-25 and 32 RT 5096:19-25) With respect to the days preceding the decertification election, Gomez states that Fraida did not request his approval to visit other broccoli crews either to collect signatures or distribute documents. (32 RT 5110:7-15) Nor did anyone else make such a request to him in the week preceding the decertification election. (32 RT 5121:23-5122:1)

Alfredo Gamma has worked for D'Arrigo for approximately twenty-one years. (34 RT 5417:24-5418:2) He has been foreman of the crew dealing with irrigation and drip tape for approximately three and a half years. (34 RT 5417:12-21) During the week of the election, Gamma recalls three people making a request to him. (34 RT 5420:4-7) Carlos Bermudez asked Gamma if he and the other two workers could go and gather signatures. (34 RT 5423:20-5424:1 and 34 RT 5425:5-7) At the time, Bermudez was accompanied by workers Oscar Rayo and Fermin Horan. (34 RT 5423:5-7) Bermudez explained that their purposes for

gathering signatures related to the upcoming election.[43] (34 RT 5446:7-10) Gamma denied his request but offered to call his supervisor. (34 RT 5424:2-13) According to Gamma, Burmudez then responded that it was not necessary for Gamma to contact his supervisor and that everything was fine. (34 RT 5424:9-24)

I found mostly credible the testimony of workers Fraida, Lopez, Ureta and Bermudez. I found less credible the testimony by some of the supervisors that they were unable to tie the subject matter of the requests to the decertification election that was only two days away.

It is readily apparent that, following reports of anti-union signature gathering during work hours in other crews, some of the crew representatives got together and decided to request a similar opportunity from company supervisors. The workers likely expected their request to be denied as the union had template-style declarations ready for each of them to complete on or about the same day of the request. The request itself was probably motivated in large part with a desire to prove that the company would treat pro-union workers differently than those who supported the decertification effort. But the fact that the plan was hatched in the hopes of catching company supervisors treating their side differently does not change the fact that their requests were both made and denied.

[43] Gamma said that he did not know reason for the election, e.g., that it involved decertification, which was not credible. (34 RT 5448:13-5449:12)

9. Company involvement in the official election noticing to a single fennel crew[44]

Joel Carmona has worked for D'Arrigo for twenty-three years. (12 RT 2008:13-16) He is a packer in the company's one fennel crew. (12 RT 2008:17-2009:7) Carmona described a single day when supervisor Roberto Pizana asked his crew to gather so that he could distribute some forms from labor relations manager John Snell. (12 RT 2010:5-7) Pizana then gave each crew member a copy of the official election notice which is marked as exhibit U-p. (12 RT 2010:10-2012:8) One of the workers asked Pizana if he knew the identity of Alvaro Santos. (12 RT 2012:11-13) Pizana stated that he did not. (12 RT 2012:14-15)

Ruben Yanez has worked in the fennel crew for fourteen years. (13 RT 2146:25-2147:5) Yanez recalls Roberto Pizana arriving at his crew and stating that he had some forms that John Snell had sent regarding union decertification. (13 RT 2148:9-20) Yanez testified that Pizana then gave to each crew member a copy of the official election notice which is marked as exhibit U-p. (13 RT 2149:18-20)

Juan Manuel Hernandez is the foreperson for the D'Arrigo fennel crew. (35 RT 5460:14-21) Hernandez recalls a day when Roberto Pizana asked him to give papers to the crew, but he does not recall the content of the papers. (35 RT 5466:2-5468:7) Hernandez gave the papers to his crew and told the crew that the papers were important. (35 RT 5468:11-19)

I found Carmona, Yanez and Hernandez to all be credible witnesses in this matter.

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[44] This allegation is part of amended election objection number one.

Robert Pizana is an assistant supervisor for fennel and cauliflower. (38 RT 5964:5-12) Pizana received a telephone call from labor relations manager John Snell that the ALRB staff was not coming to his crew. (38 RT 5967:9-13) Snell also told him that he had some papers to distribute to the crew. (38 RT 5971:13-18) Snell then met Pizana and gave him the papers. (38 RT 5972:4-10) Pizana then gave the forms to foreperson Hernandez for him to distribute them to the crew. (38 RT 5977:11-13) Pizana then watched Hernandez distribute the forms. (38 RT 5978:4-6) Pizana also told the crew that the forms were from the ALRB and that John Snell had told him to distribute them.[45] (38 RT 5979:2-5) One worker asked Pizana if he was going to read the forms to them and Pizana responded that he could not do so. (38 RT 5979:23-5980:19)

Labor relations manager John Snell indicated that he was involved in assisting the ALRB agents in meeting with all of the crews to notice the decertification election. (35 RT 5521:1-19) One D'Arrigo employee was paired with each of the four teams[46] of ALRB agents. (35 RT 5521:20-24) Field examiner Octavio Galarza was in charge of the process for the ALRB. (35 RT 5522:13-23) On the day in question, Snell states that he arrived at 5:30 a.m. and the ALRB personnel arrived at 6:00 a.m. (35 RT 5522:9-12) Snell and Galarza were both on team one, along with another ALRB field examiner who Snell had not met before. (35 RT 5523:19-5524:2) With respect to "team one", they made all of their scheduled stops except the

[45] Pizana states that he referred to John Snell only by his first name "John". (38 RT 5979:6-8)

[46] The ALRB teams appear to have each been comprised of two ALRB staff field examiners. (35 RT 5521:20-24)

last one, a fennel crew. (35 RT 5534:12-24) Very late in the morning, Snell states that Galarza told him that he was "burned out" and inquired whether Snell could cover the last crew on his own. (35 RT 5536:4-24) Snell told Galarza that he could do so. (35 RT 5537:18-22) Snell recalls that the other ALRB field examiner was not near them when this conversation took place. (35 RT 5539:3-24) Snell then contacted supervisor Roberto Pizana to arrange for the distribution of the election notices to the last fennel crew. (35 RT 5540:16-23)

Octavio Galarza is a field examiner with the ALRB Salinas Regional Office and worked for that office for the eighteen years preceding his testimony. (30 RT 4776:12-19) Galarza was paired with Rey Val Verde when he did the noticing of the first petition. (30 RT 4782:2-6) On the day that Galarza and Val Verde were passing out the first notice to workers, they were accompanied by D'Arrigo labor relations director John Snell. (30 RT 4794:21-24) When initially asked whether he had asked Snell to distribute the notices to a single fennel crew that they did not reach that day[47], Galarza responded that he did not recall. (30 RT 4795:6-10) Upon further questioning, Galarza stated that the field examiners normally did all of the noticing of available employees themselves, and he could not recall a reason why he would have deviated from that approach in this matter. (30 RT 4795:10-20) I did not find Galarza's responses to these questions to be credible. Galarza did not find any indication in his notes that he visited that fennel crew on the day in question. (30 RT 4813:6-16)

[47] Upon reviewing exhibits E-u and E-v, ALRB field examiner Sylvia Bueno concluded that staff notes reflected the existence of a single fennel crew of twenty-four workers that was not noticed by regional staff. (27 RT 4321:21-4322:11) Bueno did not have a recollection of the circumstances surrounding that fennel crew, nor did she recall whether or not she had any contemporaneous conversations on that subject with field examiner Galarza.

I cannot think of any motivation for John Snell to have lied about the noticing of the single fennel crew. First of all, notes[48] from the ALRB files appear to show that the ALRB did not notice the single fennel crew on the day in question but no efforts were made to subsequently address that issue. Second, there was no worker testimony about the delivery of the election notices that suggests that it was done in a partisan manner (e.g., with fist-pumping, thumbs up, wicked grins, etc.). Finally, when field examiner Octavio Galarza was initially asked if he might have asked Snell to distribute the notices, Galarza stated that he did not recall rather than responding emphatically to the contrary.

Based upon a preponderance of the evidence, I conclude that field examiner Octavio Galarza did ask labor relations manager John Snell to distribute the election notices to the single fennel crew. While this surely was not an ideal arrangement, I do not find any specific evidence that this process was damaging, especially given that it was limited to a single crew of approximately twenty-four workers out of an electorate of approximately seventeen hundred workers.

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[48] One difficulty in assessing the ALRB staff notes in this matter is that some of the Salinas field examiners apparently maintained their own individual working files kept separately from the case master file. Moreover, when the notes were ultimately produced to the other parties, the notes did not have bates-numbers or connecting page numbers. The ALRB Regional Offices need to be sure to timely produce any pertinent non-privileged notes in response to discovery requests regardless of whether they are maintained in a case master file or in a separate field examiner working file. The physical location of the notes has no bearing on whether the notes are responsive or not to a discovery request. Also, when producing documents, I would strongly urge the Regional Office in the future to both bates-number their responses and to maintain a photocopy of what they produced. When a party fails to maintain a photocopy of the documents that it produced in response to a discovery request, it leaves itself highly vulnerable to a successful challenge from another party that some or all of the documents in question were not properly produced.

10. Company Failure to Disclose the Existence of Two Cauliflower Crews[49]

Cauliflower worker Maria Valdez Tejeda works for one of the cauliflower crews in question. (20 RT 3276:15-16) Her crew does almost all of its packing for Andy Boy.[50] (20 RT 3283:10-12) Tejada knows that the crew does its work on D'Arrigo ranches because she sees the signs which state that.[51] (20 RT 3288:10-22) More specifically, Tejada recalls her crew working on a D'Arrigo ranch during the first week of November 2010 and packing the Andy Boy label. (20 RT 3302:18-3303:4)

Maria Carmen Caballero also worked for a cauliflower crew in 2010. (20 RT 3325:20-22) She recalls her crew packing cauliflower under the Andy Boy label.[52] (20 RT 3328:13-15) Cabellero specifically recalls her crew packing under the Andy Boy label during the first week of November 2010. (20 RT 3346:17-3347:2) Cabellero also recalls people from the union coming to speak with her crew shortly before the election. (20 RT 3361:6-3362:4)

Armando Elenes is the UFW National Vice President and Regional Director for the San Joaquin Valley and Coachella Valley. (21 RT 3390:7-11) He visited the first of two

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[49] This allegation corresponds to amended election objection number two.

[50] Andy Boy is a D'Arrigo brand.

[51] Supervisor Roberto Pizana confirms that the cauliflower crews do over ninety percent of their work on D'Arrigo ranches. (38 RT 6003:19-6004:2)

[52] Caballero also mentions another label as either Pit Boy or Pep Boy. The administrative law judge finds that the second label that the witness was trying to recall was actually Page Boy, which is another D'Arrigo brand. (*See* testimony of Roberto Pizana, 38 RT 6004:8:6005:6005:10 and testimony of Stephen de Lorimier, 44 RT 6771:24-6772:5)

cauliflower crews approximately thirteen days before the decertification election. (21 RT 3391:16-20) Elenes saw both of the crews working.[53] (21 RT 3392:2-3393:3) Elenes visited workers in their homes and discussed when they were working for eligibility purposes. (21 RT 3398:19-3399:25) He also put together a list of the names and duties of some of the cauliflower workers.[54] (21 RT 3418:6-3421:12) Elenes then obtained a copy of the excelsior list from the Salinas Regional Office. (21 RT 3400:7-10) Elenes ascertained that these cauliflower-crew workers were not on the excelsior list.[55] (21 RT 3422:18-3424:17)

Frank Fudenna is one of the co-owners of Fanciful Company and serves as the company's general manager.[56] (46 RT 7054:11-13) Fudenna testifies that Fanciful has been a custom harvester of cauliflower for approximately twenty-seven years. (46 RT 7055:23-25) Fanciful does approximately eighty percent of the cauliflower harvesting in the Salinas Valley area. (46 RT 7108:6-12) Fudenna states that Fanciful and D'Arrigo have a joint venture contractual agreement in which during 2010 Fanciful owned twelve percent of the crop. (46 RT 7057:20-7058:3 and 46 RT 7070:24-7071:3) As part of this agreement, Fanciful advances money to cover a portion of certain growing costs and D'Arrigo then pays Fanciful certain

[53] Elenes' observations are corroborated by exhibit U-w, which was admitted as hearsay. The administrative law judge has considered that document solely to confirm, based upon a preponderance of the evidence, that the labor contractor cauliflower crews were working at the time triggering voter-eligibility for the election should the workers be otherwise eligible to participate.

[54] This list is exhibit U-y, which was admitted as hearsay.

[55] The excelsior list is exhibit U-z, and was admitted as evidence.

[56] Another co-owner is Leonard Fudenna. (44 RT 6772:10-20)

costs as harvesting is completed. (46 RT 7113:3-22) Also as part of that agreement, Fanciful decides which D'Arrigo fields to harvest. (46 RT 7109:23-7110:1)

With respect to the 2010 cauliflower crop, Fudenna contends that Fanciful was responsible for the harvesting and that Fanciful hired the labor for that purpose. (46 RT 7062:8-17) With respect to this crop, Fanciful provided the specialized equipment and also the bulk of the supervisory personnel. (46 RT 7063:15-7067:15) Fanciful decides when and where to do the harvesting. (46 RT 7062:21-7063:8 and 46 RT 7109:23-7110:1) Fanciful used a labor contractor called Quality Farm Labor for the non-supervisory workers and for some crew forepersons.[57] (46 RT 7076:10-20) Fanciful also does custom harvesting of cauliflower apart from its relationship with D'Arrigo and the precise assignment of non-supervisory labor may vary due to overall operational needs. (46 RT 7079:17-7081:6) During the week of November 5, 2010, Quality Farm Labor billed Fanciful for providing labor for non-D'Arrigo operations involving Coastline, Church Brothers, and Tanimura. (46 RT 7089:3-7091:17) Fanciful paid these invoices, not D'Arrigo.[58] (46 RT 7096:25-7097:15)

Stephen de Lorimier is the D'Arrigo vice president of the northern district. (44 RT 6748:19-21) Similar to Fudenna's testimony, de Lorimier states that D'Arrigo has an agreement with Fanciful Company, a custom harvester, to harvest the D'Arrigo cauliflower

[57] Fanciful Company is the entity that makes this decision, although Fudenna has told D'Arrigo personnel that Fanciful uses labor contractors on their properties. (46 RT 7120:24-7121:3)

[58] However, D'Arrigo does advance certain harvesting costs to Fanciful. (44 RT 6824:16-24)

crops.[59] (44 RT 6767:19-24) Stephen de Lorimier contends that Fanciful Company, which has a twelve percent equity stake in the crop's profits or losses, secures and pays for all of the cauliflower harvesting labor.[60] (44 RT 6767:19-22, 44 RT 6770:22-6771:1 and 44 RT 6777:5-19) Such an arrangement has existed between D'Arrigo and Fanciful for approximately twenty-five to thirty years. (44 RT 6779:5-21) Stephen de Lorimier states that D'Arrigo does not supervise the harvesting labor, although they do have a quality control person out in the field. (44 RT 6773:9-6774:7) Stephen de Lorimier acknowledges that he did not disclose the cauliflower labor contractor crews to the ALRB staff at the pre-election meeting held on Sunday, November 14, 2010. (44 RT 6839:16-6840:18)

I found all of the witness testimony on this allegation to be credible, with two exceptions. The first exception is that I conclude that Maria Carmen Cabellero did not understand the distinction between the D'Arrigo company and the labor contractor.[61] The second exception is that I am doubtful that company vice president Stephen de Lorimier would not know whether or not Roberto Pizana was a supervisor with D'Arrigo, given that Pizana reported directly to de Lorimier. (44 RT 6774:3-11) However, notwithstanding these exceptions, I found the remainder of the testimony from Cabellero and de Lorimier to be credible.

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[59] A redacted version of the agreement was admitted as exhibit E-eee.

[60] The amount of Fanciful Company's percentage stake has varied within the past few years. (44 RT 6812:19-6813:1)

[61] Cabellero testified that she believed that D'Arrigo and Quality Farm Labor are the same entity and that Linda Santiago was the owner. (20 RT 3350:5-23)

11. Failure to Timely Notice Workers Who Were Laid Off During the Weeks of November 6, 2010 and November 13, 2010[62]

D'Arrigo laid off 219 non-supervisory workers during the week ending on Saturday, November 6, 2010, and the company laid off an additional 326 non-supervisory workers during the week ending on Saturday, November 13, 2010.[63] (28 RT 4406:7-4407:1)

a. Noticing to Workers Who Were Laid Off on November 6, 2010

On Thursday, November 11, 2010, which was Veteran's Day, the employer provided ALRB staff with a list of the 219 non-supervisory workers who had been laid off during the week of November 6, 2010. (27 RT 4355:23-4356:2 and exhibit E-o) On Friday, November 12, 2010, ALRB staff then entered the data from exhibit E-o to create the list comprising exhibit U-bb. (27 RT 4361:14-19) Also on November 12, 2010, ALRB staff then sent via regular postal mail the notice of the decertification petition to the 219 non-supervisory workers who had been laid off on November 6, 2010. (27 RT 4356:14-23)

On Monday, November 15, 2010, ALRB staff sent via regular postal mail the Notice and Direction of Election to the same 219 non-supervisory workers who had been laid off during the week of November 6, 2010.[64] (28 RT 4457:23-4462:7) The notice of election

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[62] This allegation corresponds to amended election objection number four.

[63] Stephen de Lorimier notes that in each of his eleven years with D'Arrigo, there have always been some layoffs of the romaine hearts crews during the month of November. (44 RT 6843:24-6844:9) John Snell also indicated that it was common for that many workers to be laid off at that time of the year. (35 RT 5560:20-22)

[64] The record does not establish whether or not the mail sent on Monday, November 15, 2010 was actually delivered on the next day, Tuesday, November 16, 2010

(Footnote continued….)

included the addresses for the voting locations. (Exhibit E-x) Any worker who showed up at any of the voting locations was allowed to vote. (28 RT 4434:11-20)

For twenty-eight of these 219 workers, both of the ALRB mailings were eventually returned unopened by the post office to the ALRB. (31 RT 4882:1-4884:20) For another seven of the workers, one but not both of the ALRB mailings were returned unopened by the post office to the ALRB. (31 RT 4884:23-4885:8)

In addition to the mailings, various other efforts were made to notify the workers laid off during the week of November 6, 2010. These efforts included outreach by the UFW (21 RT 3469:2-3477:10), outreach by the employer (38 RT 5927:20-5930:23), contacts by co-workers, and public radio announcements arranged by the ALRB. (28 RT 4470:20-4475:22)

b. Noticing to Workers Who Were Laid Off on November 13, 2010

On Sunday, November 14, 2010, ALRB staff conducted the pre-election conference. (28 RT 4423:13-15) At that time, ALRB field examiner Sylvia Bueno requested from employer's attorney, Geoffrey Gega, a list of the workers laid off during the week of November 13, 2010. (28 RT 4424:9-14) Bueno indicated that she needed the information by no later than Monday, November 15, 2010, at noon, and that it was imperative that the ALRB receive the information as soon as possible. (28 RT 4453:16-4454:12 and Exhibit E-z[65])

(Footnote continued)
or if instead it might have in some instances taken an extra day, which would have been the date of the election, Wednesday, November 17, 2010.

[65] The bottom half of Exhibit E-z is an email sent from Sylvia Bueno to Geoff Gega on Monday, November 15, 2010, at 11:11 a.m., indicating that the ALRB had yet to receive the list of employees laid off during the week of November 13, 2010 that had been requested the previous day at the pre-election conference. (Exhibit E-z)

Bueno recalls Gega telling her that the company would provide the information as soon as possible. (28 RT 4424:18-4425:6) On Monday, November 15, 2010, at 2:34 p.m., Gega provided Bueno with a list of the 326 non-supervisory workers who had been laid off during the week of November 13, 2010. (Exhibit E-y) Bueno indicates that, at that juncture, staff did not have enough time to still send out a mailing by the post office time cut-off for that day, which was just two days before the election. (28 RT 4457:5-4458:17)

Many of the workers laid off during the week of November 13, 2010 would have been present when ALRB staff visited workers in the fields that week. Also, similar to the circumstances of the workers who were laid off during the week of November 6, 2010, various other efforts were made to attempt to notify the workers laid off during the week of November 13, 2010. These efforts included outreach by the UFW, outreach by the employer, contacts by co-workers, and public radio announcements arranged by the ALRB.

12. Contextual Information Regarding Any Company Aiding or Assisting of Decertification Petition Signature Gathering in Crew 120A[66]

Miguel Hernandez was a bag sealer, having worked for D'Arrigo since 2005. (10 RT 1567:13-25) He is in crew one.[67] (10 RT 1567:4-12) Rosendo Rodriguez was the

[66] The factual information involving crew one does not correspond to any of the specific unfair labor practices alleged in the complaint. Nor was this allegation among the amended election objections. Rather, this information is being considered as background and context to the unfair labor practices and election objections. It is appropriate to look at the total workplace environment in order to assess the full extent to which any objectionable conduct may have inhibited worker free-choice in this matter rather than examining any violations that may have occurred in complete isolation.

machine operator for his crew. (10 RT 1567:4-14) Hernandez saw Rosendo Rodriguez going to each crew member with a list to get the union out. (10 RT 1572:19-21) Foreman Sergio Flores[68] was standing about seven meters away and watching the workers. (10 RT 1573:1-5 and 10 RT 1626:15-18) Rosendo helped eight cutters while they signed the petition. (10 RT 1627:15-21) Rodriguez cut the lettuce while the cutters signed the decertification petition. (10 RT 1626:5-12) Rosendo spent ten to fifteen minutes trying to get signatures from the eight cutters. (10 RT 1628:15-18) During this time foreman Sergio Flores was standing to the side of the workers and moved closer to where Rosendo was gathering signatures, starting at a distance of seven meters, he later was only four meters from Rosendo. (10 RT 1628:10-14) During all of this time, Rosendo was within Sergio's line of vision. (10 RT 1629:12-15) Rosendo then went to the packers. (10 RT 1629:16-18) Rosendo gave the list to the packers and then started packing. (10 RT 1629:19-21) During this time, Sergio did not say anything to Rosendo. (10 RT 1631:20-22)

Hernandez states that Rosendo had briefly served as a foreperson earlier in 2010, for a week and a half. (10 RT 1640:15-1641:20) Hernandez also recalled that Gabino Llanes had served as a foreman. (10 RT 1639:16-1640:14) Hernandez saw Rosendo, Gabino Llanes

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(Footnote continued)

[67] Crew 120A is also known as crew one.

[68] During all pertinent time periods, Sergio Flores served as the foreperson of crew one. However, in or shortly after March 2011, the company promoted Flores to a higher supervisorial position. (28 RT 4531:5-25) Sergio Flores did not testify at the hearing. Machine operator Rosendo Rodriguez also did not testify at the hearing.

and Ernesto Mariscal meeting approximately five minutes before Rosendo began gathering signatures. (10 RT 1642:15-1644:3)

Fidensio Tobar was a cutter who started working for D'Arrigo in 2000. (14 RT 2164:9-20) During all pertinent time periods, Tobar worked in crew one and his supervisor was Sergio Flores. (14 RT 2164:14-18) The crew had fourteen cutters, twelve packers and six sealers. (14 RT 2164:21-2165:2) Rosendo was the machine operator. (14 RT 2165:3-8) Rosendo circulated the petition during work time and some people signed it. (14 RT 2168:7-2170:8) The workers took off their gloves to sign the papers. (14 RT 2170:17-20) Rosendo helped workers do their work with their knife while they signed the papers. (14 RT 2170:11-16) Fidensio could see Sergio about twenty feet away from him observing the activity. (14 RT 2170:21-24) At one juncture, Fidensio was six feet from Rosendo. (14 RT 2171:12-14) Rosendo collected signatures for approximately fifteen minutes. (14 RT 2171:19-21) Fidensio could see what was going on because he was looking forward. (14 RT 2172:6-10) There was only one day of signature gathering in the crew. (14 RT 2178:23-25) Rosendo would serve as the foreman when the regular foreman was on vacation. (14 RT 2179:23-25)

Oliverio Basilio was a cutter who started with D'Arrigo romaine hearts crew one in 2007. (14 RT 2284:7-18) He recalled Rosendo Rodriguez coming to the crew with a list to get rid of the union. (14 RT 2286:20-2287:1) Basilio stated that Rodriguez went during work time to each of the crew members and asked them to sign the list. (14 RT 2287:2-18, 14 RT 2302:1-11 and 14 RT 2356:18-21) This occurred on a single day. (14 RT 2352:18-21) Rosendo spent approximately twenty minutes collecting signatures. (14 RT 2301:20-22) Rosendo would cut while the cutters were signing. (14 RT 2288:5-8 and 14 RT 2357:1-

2358:7) During approximately three minutes of the time that Rosendo was gathering signatures, Sergio Flores was only fifteen feet away. (14 RT 2299:21-23 and 14 RT 2364:8-11) While having an unobstructed view of the activity, Sergio did not say anything to Rosendo. (14 RT 2301:4-6 and 14 RT 2301:23-25)

During all pertinent time periods, Abel Rios was a sealer in romaine hearts crew one. (23 RT 3707:5-17) Rios has worked for crew one for approximately three years. (23 RT 3707:10-11 and 23 RT 3800:8-10) Rios does not recall Rosendo Rodriguez ever serving as a foreperson or a temporary foreperson.[69] (23 RT 3717:15-3718:18) He recalls signature gathering occurring in his crew on a single day during lunch-time. (23 RT 3709:14-19) Rios did not see who brought the signature form to his crew.[70] (23 RT 3710:8-10) He did not see Rodriguez present during the lunch-time signature gathering. (23 RT 3720:1-3)

I did not find Rios to be a credible witness.[71]

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[69] Abel Rios did not seem familiar with the concept of a "temporary foreperson". (23 RT 3717:15-3719:22)

[70] Though it is only hearsay, Rios did hear from co-workers that it was Rodriguez who had brought the list to his crew. (23 RT 3784:2-6) I do not take this testimony into account as to my findings for this allegation. Rather, as discussed *infra*, I am persuaded by the credible testimony of Hernandez, Tobar and Basilio.

[71] My determination of Rios' credibility is solely based upon my finding more credible the testimony of Hernandez, Tobar and Basilio. I do also note, however, that Rios initially stated that he had only a single conversation with his supervisor about possibly testifying in this matter and then he had no other conversations with supervisors, D'Arrigo employees, or attorneys. (23 RT 3765:22-25 and 23 RT 3769:15-3770:5) However, Rios then later admitted that he had two conversations with his supervisor "Ricardo" and that one was three weeks back and the other was during the week of his testimony. (23 RT 3793:7-3794:25) Additionally, in Rios' testimony regarding the presentation by company owners, the general subject of which is discussed *infra*, Rios did not recall owner John D'Arrigo telling the workers that they should trust D'Arrigo's

(Footnote continued….)

Ascencion Marquez has worked for D'Arrigo for two years. (25 RT 4065:13-15) He works as a cutter in crew one. (25 RT 4058:5-12) Marquez recalls signature gathering occurring on a single day during lunch time. (25 RT 4058:22-4059:5) Marquez recalls Rosendo Rodriguez bringing the decertification petition to his crew, showing it to the workers, and the workers passing it among themselves. (25 RT 4059:17) Marquez loses all credibility, however, when he discusses how he came to meet with employer's counsel. (25 RT 4086:3-4089:5) Marquez alleges that, without an invitation or appointment, he went to the law office for the company attorney via taxi, having received an address from a long-time friend whose name he could not remember. (25 RT 4087:10-4089:5) I conclude that Marquez was not merely confused, but also purposefully evasive. I did not credit any of his testimony.

Hector Lopez works as a sealer in crew one. (28 RT 4509:7-12) He has been with the company for ten or eleven years. (28 RT 4540:11-18) In Fall 2010, Lopez worked as both a cutter and as a sealer. (28 RT 4517:8-10) Like Marquez, Lopez recalls signature gathering occurring on a single day during lunch time. (28 RT 4510:6-15) On the day of the signature gathering, Lopez was working as a cutter. (28 RT 4517:4517:3-5) Lopez recalls machine operator Rosendo Rodriguez bringing the decertification petition to his crew, (28 RT 4516:20-4517:2) Lopez initially testified that while he "was cutting", he saw Rodriguez give the petition to the first person who signed it. (28 RT 4517:3-7) He then changed his testimony

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(Footnote continued)
father, which is contrary to my ultimate finding on that subject. (23 RT 3805:25-3806:20)

to say that occurred maybe a minute or so after lunch had started.[72] (28 RT 4517:18-22) Lopez initially indicated that he had not had any communications about this matter with any forepersons. (28 RT 4528:18-4529:1) But he then conceded that his current foreperson told him that he had an appointment at the office on the matter. (28 RT 4529:20-4530:4)

Dora Rodriguez works as a packer for crew one. (38 RT 5860:5-8) She has worked for D'Arrigo for fourteen years, spending all of this time working in crew one. (38 RT 5860:19-5861:8) By the time Rodriguez took off her smock for the lunch break and sat down, the signature form was already at her crew, so she did not see how the form arrived.[73] (38 RT 5866:21-5867:3) Rodriguez first stated that her conversation with supervisor Ricardo Sanchez was her only conversation with a D'Arrigo employee about these events, responding "just him". (38 RT 5888:16-19) Rodriguez then later acknowledged that a supervisor named

[72] I found credible Lopez' explanation that he was cutting when the first crew member signed the petition that Rosendo Rodriguez gave him. I did not believe Lopez when he later changed his response when employer's counsel asked if it occurred during a lunch break. While no counsel objected at the time, the administrative law judge does note that the question which elicited the revised testimony was somewhat leading. I also note that Lopez confirmed that machine operator Rodriguez usually took lunch earlier than the rest of his crew. (28 RT 4520:17-19) So had I, in the alternative, concluded that it was lunch time for the remainder of the crew, then Rodriguez would have brought the petition to the crew during Rodriguez' work time.

[73] At differing times, Rodriguez refers to the process of taking off her smock, which is also described as gear or equipment. (38 RT 5880:8-15) Rodriguez states that she takes off her equipment during her lunch time, not during work time. (38 RT 5880:22-25) While Rodriguez states that she first saw the form perhaps five minutes into the lunch break, she also stated that it takes less than one minute for her to take off her equipment. (38 RT 5862:25-5863:2 and 38 RT 5881:13-18) Her colleagues also have to take off their equipment before starting lunch. (38 RT 5881:2-11)

Martin told her to go to the office.[74] (38 RT 5898:2-5899:2) Initially, Rodriguez stated that she met with employer's counsel on one occasion. (38 RT 5892:24-5893:2) When asked as to the length of the meeting, Rodriguez initially stated that she "did not measure the time". (38 RT 5892:3-4) Rodriguez later stated that the meeting was "more or less" fifteen minutes long.[75] (38 RT 5892:21-22) She later admitted that she had in fact met with employer's counsel a second time during the evening preceding her testimony. (38 RT 5896:2-14)

Neither machine operator Rosendo Rodriguez nor foreperson Sergio Flores testified at the hearing.

With respect to the circumstances of the signature-gathering in crew one, I found the most persuasive testimony to be that of Miguel Hernandez, Fidensio Tobar and Oliverio Basilio. Based upon that testimony, I conclude that foreperson Sergio Flores had a clear, unobstructed view of Rosendo Rodriguez while he collected signatures during the crew's work time. Based upon a preponderance of the evidence, it is reasonable to conclude that Flores, while performing his duties, saw at least part of this activity taking place and took no action to halt it.

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[74] The administrative law judge notes that Martin Fletes, who testified earlier in this hearing, is the supervisor who asked a worker about the decertification papers because he was curious. (4 RT 538:10-12) Although it is a reasonable conclusion to assume that Martin Fletes is the supervisor who spoke with Dora Rodriguez, the precise identity of the supervisor is unimportant. Rather, the administrative law judge describes the contacts with Dora Rodriguez to explain his impression that Rodriguez seemed highly reluctant to volunteer this information.

[75] I did not find this statement to be credible. However, my finding as to this allegation is more simply based on the relative persuasiveness of the testimony of Mssrs. Hernandez, Tobar and Basilio, as opposed to the testimony of Lopez and Rodriguez.

13. Fourteen Presentations Made by John D'Arrigo to Workers on the Two Days Immediately Preceding the Decertification Election[76]

For the past two decades, John D'Arrigo has served as the company's president. (41 RT 6380:21-6381:5) On the two days immediately before Wednesday, November 17, 2012, John D'Arrigo gave a series of fourteen presentations, each to multiple crews, reaching "one hundred percent" of the workers that were present at work. (35 RT 5554:23-5555:8, 35 RT 5557:22-5558:20 and 41 RT 6403:23-25) An equal number of presentations were done on each of the two days, but the groups were slightly larger on the day immediately prior to the election. (35 RT 5616:17-5617:6) The management staff present at all of these presentations included John D'Arrigo, his father Andrew D'Arrigo[77], foreman Willie Camacho and labor relations director John Snell. (35 RT 5555:23-5556:1, 41 RT 6383:2-5 and 41 RT 6401:12-19)

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[76] The factual information involving captive audience presentations does not correspond to any of the specific unfair labor practices alleged in the complaint. The concept of promise of benefits was contained in Amended Election Objection Number Three, but the UFW indicated at the prehearing conference that it was no longer pursuing that election objection. Nonetheless, this information is being considered as background and context to the unfair labor practice allegations and other election objections. The company challenged the undersigned's evidentiary ruling on this matter and the Board denied the company's appeal. (ALRB Administrative Order 2011-14, dated July 11, 2011)

In light of this ruling, I also allowed the employer to present evidence, and it did, to credibly demonstrate multiple examples of pro-union workers and organizers representing that the decertification of the union would result in the losses of benefits and/or bonuses and/or the use of labor contractors. In this instance, it is appropriate to look at the total workplace environment in order to assess the full extent to which any objectionable conduct may have inhibited worker free-choice in this matter rather than examining any violations that may have occurred in an artificially-created vacuum.

[77] Andrew D'Arrigo is sometimes referred to as "Andy Boy", as his childhood picture was sometimes on the exterior of produce boxes bearing that product name. (35 RT 5556:16-22)

Snell handled the logistics and Camacho translated John D'Arrigo's presentation from English to Spanish. (35 RT 5556:25-5557:2, 41 RT 6383:6-9 and 41 RT 6384:6-10) Making these presentations to the crews took up two full days. (35 RT 5561:9-15 and 35 RT 5558:18-20)

After lengthy witness testimony[78] on the subject matter of the presentation, employer's counsel acknowledged that they had a verbatim or near-verbatim[79] copy of the text of the speech. (41 RT 6386:2-6388:4) This text was admitted as exhibit E-ccc and is shown below, incorporating the revisions based on testimony noted in footnote number seventy-nine:

> As you know, employees have filed a petition with the ALRB for an election about the Union. I want to take this opportunity to tell you personally that I do not believe that we need the UFW at D'Arrigo Bros. I am asking you to trust my father and me, and vote "NO UNION".
>
> According to the law, I cannot make promises to get your vote. I am not making any promises to you about anything. I am asking you to look at our history together. The Company had a seniority practice long before

[78] To give just a handful of examples, worker Nayeli Panuco recalled D'Arrigo stating that "he wasn't going to take away benefits". (23 RT 3835:9-16) Sealer Sandra Delgadillo remembered D'Arrigo stating that the benefits would remain the same if the union was kicked out. (24 RT 3953:24-3954:3) Packer Laura Contreras remembered D'Arrigo stating if the union was kicked out, everything would be the same. (24 RT 4041:1-3) Worker Jose Carrillo recalled D'Arrigo stating that the company wasn't going to bring in contractors. (32 RT 5042:14-16) Carrillo also indicates that D'Arrigo stated that it was unfair that the workers had to pay union dues. (32 RT 5069:1-3) On the other hand, Roberto Arroyo, a packer in rappini crew 130A, stated that D'Arrigo did not say to vote "No union" and denied hearing D'Arrigo state that workers had paid $1.2 million in union dues. I did not credit the testimony of Roberto Arroyo. (36 RT 5718:12-19) At the same time, witness John Snell conceded that the company was at the bargaining table seeking greater flexibility to potentially use labor contractors and subcontractors. (35 RT 5574:10-16 and 35 RT 5613:10-20)

[79] The text had a blank with respect to the amount of union dues collected from workers over the past three years. D'Arrigo completed this blank with the words "$1.2 million". (35 RT 5564:24-5565:2) D'Arrigo also replaced the next sentence with the words, "That's a lot of money." (41 RT 6387:22-25)

there was a contract. The Company had a medical plan long before there was a contract. The Company had fair wages and other benefits long before there was a contract. The Company and my family have always treated people fairly and with respect long before there was a contract.

We are proud of the quality work that you - our employees - have given us. We appreciate your hard work and loyalty, and respect you for it. You deserve the pride you must feel for making Andy Boy the best. We are grateful that so many of you return to work for D'Arrigo Bros. year after year.

We have a long history of working with you and sometimes we make mistakes. Nobody is perfect. We have a great organization of people - that includes you and management.

I am not going to talk negatively about the Union. That is not my style.

I am concerned with some of the things that I have heard have been said about D'Arrigo Bros. and this election. For example, some people have said that, if you vote the Union out, then the Company will take away your anniversary bonus plan. Do not believe anybody that tells you this. We have never proposed to get rid of the anniversary bonus plan.
I have also heard that people have said that, if you vote the Union out, you will then lose your medical plan. Do not believe anybody that tells you this. We have never proposed to get rid of the medical plan.

I have also heard that people are saying that, if you vote the Union out, the Company will automatically replace you with labor contractors. Do not believe anybody that tells you this. We have employed our own crews for over 50 years and we have a great quality product.

We have never planned to replace you with labor contractors. The Company also told the Union that we do not intend to replace our crews with labor contractors. Anybody that tells you something different is not telling you the truth.

Over the past three years, the union has collected $1.2 million from your pockets for union dues. That's a lot of money. Remember, NO UNION also means NO MORE DUES.

It is very important that everybody votes on Wednesday. I want to emphasize that your vote is secret. Only you will know how you voted. Your vote is private. However, if you do not vote, you future will be

> determined by those who do vote, because a majority of those WHO VOTE will decide the election. If the union wins, the union will continue to represent ALL employees, whether some want it or not. So please pass the word to other employees, especially employees who were laid off the last two (2) weeks, to come out and vote on Wednesday. You have a right to vote. Please exercise that right.
>
> The choice is up to you. I do not think we need the UFW at D'Arrigo Bros. I recommend that you vote "NO UNION" on Wednesday."

(Exhibit E-ccc, 35 RT 5564:24-5565:2 and 41 RT 6387:22-25) I find that this is the language of the presentation made by company president John D'Arrigo during the two days preceding the decertification election to all of the crews that had not yet been laid off at that juncture. Based upon the witness testimony, I further find that the presentation occurred during compensated work time and that employee attendance was mandatory.

14. Testimony Regarding the Supervisorial Status of Foremen, "Temporary Foremen", Machine Operators and "Helpers"

The testimony involving the supervisorial status of foremen, "temporary foremen", and machine operators is important to this case. First, there is credible evidence that both regular and temporary foremen viewed and allowed decertification petition signature-gathering and soliciting to occur in their crews during work-time. One temporary foreperson even himself engaged in the signature-gathering efforts. Second, there is credible evidence that up to six machine operators and two helpers engaged in the work-time signature-gathering and soliciting efforts. Two of those machine operators themselves had past experience serving as temporary forepersons.

At the prehearing conference, the employer admitted that forepersons Santiaga Quinteros and Jose Luis Berumen were managers or supervisors and held such a position at all

pertinent times.[80] (Prehearing Conference Order dated May 31, 2011, at page 2.) Like Quinteros and Berumen, Sergio Flores held a salaried foreperson position with the company. At all pertinent time periods, Alma Cordova and Gabino Llanes served as temporary forepersons. Florentino Guillen and Rosendo Rodriguez served as both temporary forepersons and machine operators. Alvaro Santos, Ernesto Mariscal, Diego Rangel and Demetrio Garcia, all served as machine operators. At all pertinent time periods, Juan Guerra and Faustino Sanchez served as crew helpers.

a. The Duties and Authorities of Temporary and Salaried Forepersons

As noted *supra*, there are approximately thirty-six workers in a romaine hearts harvesting crew. (1 RT 136:21-24) The crew is run by a single foreperson that does not perform the same physical tasks as the workers. An employee receives special training on personnel, quality, first aid and operation of the machinery before becoming a temporary foreperson. (1 RT 151:2-9) Among the salaried and temporary foreperson's responsibilities are taking attendance (1 RT 95:21-22); directing work assignments within a crew (35 RT 5599:11-13); giving crew members instructions on duties (1 RT 141:15-16); watching workers to make sure they complete their tasks properly (17 RT 2852:14-19); enforcing company rules (1 RT 141:17-19); granting or denying permission to leave work (1 RT 90:1-4, 1 RT 141:20-22 and 32 RT 5066:17-19); handing out pay checks (1 RT 90:17-19 and 1 RT 142:7-9); telling employees where to report for duty the next day (1 RT 91:3-6, 1 RT 142:10-12 and 31 RT

[80] The Employer also admitted the supervisorial status of labor relations director John Snell and supervisors Jose Martinez, Martin Fletes, and Gerardo Cendejas. (Prehearing Conference Order dated May 31, 2011, at page 2.)

4993:25-4994:2); making sure the horns sound properly for break and meal periods (1 RT 91:7-25 and 1 RT 142:13-16); conducting safety meetings (1 RT 92:25-93:93:7, 1 RT 142:24-143:1 and 32 RT 5067:17-18); imposing discipline (12 RT 1899:7-1902:19 and 35 RT 5599:6-10); and giving written and verbal warnings to crew members for not doing their jobs properly (1 RT 140:3-141:13 and 32 RT 5066:12-16).

Forepersons Alma Cordova and Gabino Llanes credibly distinguished the different authority of the temporary forepersons from the salaried forepersons. Alma Cordova served as a temporary foreperson during every month of calendar year 2010 and became a salaried foreperson in December 2010. (1 RT 76:20-24 and 1 RT 136:12-14) Cordova indicated that as a temporary foreperson, she had all of the responsibilities and authority of a salaried foreperson, except that she could not hire new employees, fire existing employees or give a warning without authorization from a higher supervisor.[81] (1 RT 151:19-153:1) Temporary forepersons make more money than line workers. (1 RT 133:16-24) Gabino Llanes states that in October 2010, he was working full-time as a temporary foreperson. (2 RT 289:3-11) Llanes noted that as a temporary foreperson he essentially did the same work as the salaried foreperson that he was temporarily replacing. (2 RT 287:24-288:1)

b. The Duties and Authorities of Machine Operators and Helpers

Each crew has a single machine operator. The machine operators start an hour earlier than the regular crew members and also take their lunch one hour earlier than the rest of

[81] There was persuasive testimony that both salaried and temporary forepersons could impose discipline. For example, Cordova disciplined Nidia Soto for inappropriate cell phone use, and on separate occasions Llanes disciplined workers Oliverio Basilio and Juan Ramirez. (5 RT 656:16-657:11, 14 RT 2315:4-9 and 12 RT 1899:7-1902:19)

the crew. (8 RT 1152:4-12) In his testimony, harvesting superintendent Hector Rodriguez described the daily routine of the machine operator. (36 RT 5720:25-5721:2 and 40 RT 6225:4-6233:10) The machine operator starts in the morning by picking up the harvesting machine and using a checklist to perform a general maintenance check. (40 RT 6225:4-11 and 40 RT 6227:21-23) Next, the machine operator moves the machine to where the crew is going to begin working. (40 RT 6225:11-13) Then, along with a crew helper, the machine operator opens up the machine and gets it ready for use by the crew. (40 RT 6225:13-15 and 40 RT 6229:19-6231:15) The machine has various parts to untie, uncover, connect and assemble. (40 RT 6225:15-22)

During the course of the day, the machine operator keeps track of inventory items that the crew may need, and requesting and retrieving such items. (40 RT 6231:19-6232:2) The machine operator removes any vehicles or irrigation pipes that might be in the machine's way. (40 RT 6232:2-6) They also perform a variety of other miscellaneous tasks from helping to set up shades, to tying down loads or trailers, to picking up trash in the fields. (40 RT 6232:14-21) At the end of the day, the machine operators close up the machine and take them out to the yard. (40 RT 6233:4-10)

While working longer hours, the machine operators would typically make more money in a single day then the temporary forepersons. (2 RT 289:12-290:1) If a foreperson had to leave to use the restroom for ten or fifteen minutes, the company's general policy was that if a higher-level supervisor was not present, then the machine operator would fill in for the foreperson. (2 RT 228:10-229:24)

In his testimony, Florentino Guillen described the responsibilities of a crew helper. (3 RT 436:19-438:16) The helper opens the machine, fixes sealers, helps truck drivers move freight and tie down loads, moves among the crews in a tractor, and assists the machine operator.[82] (3 RT 437:10-438:16) Foreperson Santiaga Quinteros noted that there was typically one helper for two crews and also mentioned loading the trucks and fueling the presses as additional duties of the crew helper. (2 RT 246:21-247:12)

D. Other Procedural and Evidentiary Rulings Made During the Hearing

During the course of the hearing, there were two additional categories of rulings that merit discussion at this juncture. First, the company requested the administrative law judge to order the parties and counsel to refrain from communicating to the media during the hearing. Second, on many occasions, the issue arose as to whether attorney-client conversations between UFW members and union counsel are privileged and, additionally, whether that privilege is waived by the presence of an assistant General Counsel at such meetings.

1. Request by Employer for a "Gag Order" Order Precluding Parties and their Counsel from Talking to the Media

On the fourteenth day of this hearing, the employer requested the administrative law judge to impose a "gag order on the attorneys and their respective clients or persons who are under them from talking to the media about this matter." (14 RT 2276:10-13) On the sixteenth day of the hearing, and noting on the record that these are public hearings (16 RT

[82] *See also* 9 RT 1364:7-9.

2731:7-11), I advised the parties that I did not find a statutory or case law basis to issue any sort of media gag order to any of the parties. (16 RT 2732:24-2733:1)

2. Whether Attorney-Client Conversations of Union Counsel and UFW Worker-Members are Privileged

During the course of the hearing, the employer sought on many occasions to question worker-witnesses about their private meetings with UFW counsel. These non-supervisory workers were dues-paying members of the UFW who met with union counsel and, in the absence of established statutory or case law to the contrary, had a reasonable expectation that their conversations were privileged and confidential.[83] Some of these workers also served as crew representatives, which is arguably a form of office with the union. I note that non-supervisory agricultural workers are a uniquely vulnerable class of individuals. Many agricultural workers speak limited English, are new to this country, and have low incomes. Unlike a large agricultural corporation, worker-witnesses are rarely in a position to consult private counsel in connection with their potential testimony.

Having found no on-point California authority on this issue, during the course of the hearing, I gave all of the counsel an opportunity to file a brief and make oral arguments on this issue. (6 RT 784:17-806:14) During the hearing, the company timely filed a brief on this subject which was carefully considered by the undersigned.

[83] *See* California Evidence Code section 950 *et seq.* The existence of the attorney-client privilege recognizes that there are situations where the protection of confidentiality is more important than unfettered access to evidence. While the creation of a privilege is a purely legislative matter, determining the applicability of it to specific facts is a judicial one.

The company correctly points out that it is established law that subordinate, lower-level company employees do not have a lawyer-client privilege when communicating with corporate counsel. But that scenario is factually dissimilar from a UFW member meeting with union counsel.

In its post-hearing brief, the company also cites cases where a member has sued its union and where a court has then found that union attorney's client is the membership as a whole rather than the individual. Again, that scenario is factually dissimilar from the instant case. The company also cites authority that labor unions as entities can have an attorney-client privilege but that possibility does not preclude both the union and the worker from being clients.

While this is an area of unsettled law, in the absence of any such clear-cut authority, I find it appropriate to exercise a liberal construction in favor of the privilege.[84]

Having found conversations between UFW member-workers and union counsel to be privileged and confidential, the question arises whether the presence of an assistant general counsel at such a conversation results in a waiver of any such privilege.[85] There are two theories under which the privilege might survive notwithstanding the presence of the assistant general counsel. The first theory is some sort of joint prosecution privilege. The second theory is that the union counsel is using the assistant general counsel as an expert

[84] I also find it appropriate for an attorney-client privilege to exist between full-time UFW organizers, who publically speak on behalf of the UFW, and union counsel.

[85] At the hearing, I allowed the company's counsel to ask questions of testifying worker-witnesses as to their communications with the General Counsel where no union counsel was present and participating in the conversation.

consultant. Again, this is an area of law where there is no existing bright-line established rule. While this is an area of unsettled law, I find it appropriate at this juncture to protect what I believe is a reasonable expectation on the part of these worker-witnesses that their conversations with counsel were privileged and confidential.

E. Specific Factual Findings[86]

1. Labor relations manager John Snell suggested the idea of a decertification campaign to worker Rene Salas. At the time, Salas was already familiar with the concept of decertification. Salas did not mention Snell's comments to his colleagues. Salas also did not have any involvement with the decertification petition that was ultimately filed.

2. Temporary foreperson Alma Cordova observed and allowed machine operator Ernesto Mariscal to solicit decertification petition signatures for at least fifteen minutes during work time. Supervisor Jose Martinez did not see these activities.

3. Foreperson Santiaga Quinteros gathered her crew so that machine operator Demetrio Garcia could make remarks in support of the decertification effort. Foreperson Quinteros also observed and allowed Demetrio Garcia to solicit decertification petition signatures for between five and fifteen minutes during work time. The preceding day, foreperson Quinteros observed and allowed crew helper Faustino Sanchez to make brief remarks during work time in support of the decertification effort.

4. Foreperson Jose Luis Berumen observed and allowed machine operator Diego Rangel to make remarks during work time in support of the decertification effort.

[86] All findings of fact are made based upon a preponderance of the evidence. (ALRB Regulation section 20286, subdivision (b).)

Foreperson Berumen then allowed machine operator Alvaro Santos to solicit decertification petition signatures during the lunch-hour for non-machine operators.

5. Temporary foreperson Gabino Llanes observed and allowed machine operator Alvaro Santos to solicit decertification petition signatures for between fifteen and thirty minutes during work time. Llanes also allowed Santos to leave work early on four different days on which Santos engaged in decertification efforts. Santos states that he repeatedly lied about the reason that he needed to leave early. But on one of the days where Santos told Llanes that he needed to leave due to a car and health problem, Llanes later saw Santos soliciting decertification signatures during an afternoon break. Llanes initially gave Santos credit for working that full day, and then only on the next day reduced Santos' hours.

6. Supervisor Martin Fletes was curious about the signature gathering and asked crew helper Juan Guerra about his activities. Guerra showed Fletes the papers and Fletes was able to see some of the signatures.

7. Temporary foreperson Florentino Guillen showed the decertification papers to assistant supervisor Gerardo Cendejas. Cendejas allowed Guillen to solicit signatures during the crew's lunch time. Temporary foreperson Guillen also solicited signatures from a rappini crew and off-site during non-work hours.

8. Two days before the decertification election, several UFW crew representatives made requests to their supervisors to solicit pro-union signatures during work-time. The crew representatives made their request hoping to show that they would be treated differently than the anti-union advocates. The requests to solicit pro-union signatures during work time were denied.

9. Company supervisors directly gave the ALRB official election notice to a single fennel crew. This form was distributed at the request of ALRB staff.

10. D'Arrigo and Fanciful Company have a joint venture contractual agreement with respect to cauliflower harvesting. Fanciful decides when and where to harvest. Fanciful hires the harvesting labor, using a labor contractor called Quality Farm Labor. There were two Quality Farm Labor cauliflower crews that, during all pertinent time periods, worked full-time on D'Arrigo ranches doing one hundred percent of their work for the D'Arrigo-Fanciful joint venture.

11. The company timely provided ALRB staff with a list of the workers who were laid off during the week of November 6, 2010.

12. The company did not provide the ALRB staff with a list of the workers who were laid off during the week of November 13, 2010 within the time parameters requested by ALRB staff. The ALRB staff requested the information by Monday, November 15, 2010, at noon. The company provided the information on Monday, November 15, 2010, at 2:34 p.m. Since any timely mailing to those workers needed to go out that same day, the two and a half hours difference was critical to the endeavor.

13. Foreperson Sergio Flores observed and allowed machine operator Rosendo Rodriguez to solicit decertification petition signatures for at least fifteen minutes during work time.

14. On the two days before the decertification election, company management required one hundred percent of their employees to attend mandatory meetings during work-time at which the company president urged a "no union" vote. Many of the workers who had

previously seen supervisors allow decertification signature-gathering and soliciting during work hours were among those in attendance at these management presentations.

ANALYSIS AND CONCLUSIONS OF LAW

The decertification process gives workers an opportunity to reject union representation. (California Labor Code section 1152) It is an unfair labor practice for an agricultural employer to interfere with agricultural employees in the exercise of organizing, unionization or decertification. (California Labor Code sections 1152 and 1153, subdivision (a).) Interference and coercion does not turn on the employer or supervisor's motive or success, but rather whether it can be reasonably said that the misconduct tends to interfere with the free exercise of worker rights. (*Merrill Farms v. ALRB* (1980) 113 Cal.App.3d 176, 184; *M.B. Zaninovich* v. ALRB (1981) 114 Cal.App.3d 665, 679)

A. D'Arrigo Unlawfully Instigated Decertification by Suggesting the Idea to Worker Rene Salas

Worker Rene Salas came to labor relations manager John Snell seeking different overtime provisions. On multiple occasions, Snell used that opportunity to suggest the idea of decertification to Salas, providing him with an internet web browser address and the name of a shop-person that he could contact. This was not a scenario where Salas specifically requested information on decertification, but rather a situation that Snell took advantage of to suggest decertification.

Employers are not allowed to suggest decertification every time that a worker indicates his displeasure with the terms of an existing contract. The ALRB has noted that:

> The [National Labor Relations Board] has often stated that decertification is an exclusive remedy for employees, not to be interfered with by an employer. When the employer has unlawfully instigated or assisted the workers, it has interfered with its employees' free exercise of their rights and invalidated the election as a measure of the employees' free choice.

Peter D. Solomon and Joseph R. Soloman (1983) 9 ALRB No. 65, at page 8 (citing *Gold Bond, Inc.* (1954) 107 NLRB 1059; *Bond Stores, Inc.* (1956) 116 NLRB 1929). National Labor Relations Board ("NLRB") cases such as *Central Washington Health Services* have often looked at the total picture in finding instigation, so Snell's remarks to Salas need to be evaluated taking into account the unlawful signature-gathering and soliciting activities discussed *supra*. (*Central Washington Health Services* (1986) 279 NLRB 60)

As noted in my factual findings, Salas candidly admitted that he did not tell his crew-mates that Snell himself suggested the decertification route. However, Salas did proceed to talk to his crew-mates about whether or not to pursue decertification or to instead stick with the union. And while those crews decided to stick with the union, events occurring during an election campaign are likely to be discussed, repeated and disseminated, thus having an amplifying effect. (*Triple E Produce* (1980) 35 Cal.3d 42) So it is possible that non-rappini crews heard of the deliberations by the rappini crews and that knowledge of these discussions impacted them.

B. The Company Had a Pervasive Involvement in the Signature Gathering Process Which Interfered With Employee Free Will

Employer involvement in the decertification petition signature-gathering process is an unfair labor practice. (*Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2, at

ALJ Decision, page 33, citing *Placke Toyota* (1974) 215 NLRB 395 and *D&H Manufacturing* (1978) 239 NLRB 393) An employer may be responsible for a supervisor's misconduct even when top management is unaware of the misdeeds if the non-supervisory employees reasonably believed that the supervisor was acting on behalf of management. (*Superior Farming v. ALRB* (1981) 151 Cal.App.3d 100, 122) Accordingly, it is necessary to evaluate the supervisory status of the company employees who allowed work-time signature-gathering and soliciting in their crews, or solicited the signatures themselves, or who looked at the petitions and were able to see some of the names of workers who signed them.

1. Evaluating the Supervisory Status of Certain Employees

The burden of proof is on the parties claiming supervisory status, which in this instance are the General Counsel and the UFW. (*Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2)

In the instant matter, the employer has stipulated to the supervisorial status of supervisors Martin Fletes and Gerrado Cendejas as well as the supervisorial status of salaried forepersons Santiaga Quinteros and Jose Luis Berumen.[87]

It is also critical to evaluate the supervisorial status of salaried foreperson Sergio Flores and temporary forepersons Alma Cordova and Gabino Llanes.

[87] Although less critical to a resolution of this case, I find that the supervisors and forepersons involved in denying the request to solicit pro-union signatures were persons meeting the statutory definition of supervisor contained in California Labor Code section 1140.4, subdivision (j). These individuals include Dionicio Munoz, Juan Orozco, Alfredo Gomez and Alfredo Gamma. These individuals held similar positions to the individuals to which the company stipulated were supervisors.

Sergio Flores, similar to Quinteros and Berumen, was the salaried foreperson of a thirty-six member crew. Flores has the ability to hire, fire, discipline workers and assign them work. There can be no doubt that Flores meets many of the criteria enumerated in California Labor Code section 1140.4, subdivision (j).

Temporary forepersons Alma Cordova and Gabino Llanes held similar responsibilities to Flores except that they could not hire and fire employees. Cordova and Llanes were the supervisors of a thirty-six person crew.[88] Cordova held this position for most of 2010, including every month, and for all of October and November 2010. During October and November 2010, Llanes also served as a temporary foreperson all of the time. They could assign work, discipline crew members, keep track of their time, and grant or deny permission to leave work. As the Board noted in *Kawahara Nurseries, Inc.* (2011) 37 ALRB No. 4, "It is not necessary that an individual engage in all of the twelve supervisory functions listed in the statute in order to be considered a statutory supervisor; it is sufficient that he/she has the authority to engage in any one of those functions, so long as the authority is exercised with independent judgment. (*Kawahara Nurseries, Inc.* (2011) 37 ALRB No. 4, at pages 9-10, citing *NLRB v. Kentucky River Community Care, Inc.* (2001) 532 U.S. 706 at page 713; *Tsukiji Farms* (1998) 24 ALRB No. 3, ALJ

[88] As noted in the General Counsel's brief, the NLRB has indicated that a highly persuasive factor in examining supervisorial status is how the determination might impact the ratio of supervisors to rank-and-file employees. (See e.g. *Colorflo Decorator Products, Inc.* (1977) 228 NLRB 408, 410 (the alleged supervisor-to-worker ratio of fifty to one was too high to be persuasive)) If the temporary forepersons were not found to be supervisors, the next level higher of supervisor would potentially have multiple thirty-six person crews under their immediate direction and it would also mean that for the majority of the time, a thirty-six person crew would not have an in-person supervisor present.

Decision at pages 10-11 ("[Section 1140.4(j) of the ALRA] is worded in the disjunctive, so the presence of any one element is sufficient.))

I conclude that temporary forepersons Alma Cordova and Gabino Llanes were statutory supervisors pursuant to California Labor Code section 1140.4, subdivision (j).[89]

2. D'Arrigo Supervisors Allowed Anti-Union Workers to Conduct Work-Time Solicitation of Decertification Petition Signatures

Company rules prohibit workers from collecting signatures to get rid of the union during working hours. (34 RT 5406:19-23) More generally, company rules prohibit workers from distributing or signing documents during work time. (34 RT 5405:16-20 and exhibit GC-1, at page 2) As noted in Specific Findings of Facts Numbers Two through Five, D'Arrigo supervisors Cordova, Quinteros, Berumen, and Llanes all allowed work-time solicitation and signature-gathering in their respective crews. As noted in Specific Findings of Facts Numbers Six and Seven, D'Arrigo supervisors Martin Fletes and Gerardo Cendejas both looked at the petitions that were being circulated. Finally, as discussed *infra*, temporary foreperson Florentino Guillen himself gathered

[89] The supervisory status of temporary foreperson Florentino Guillen is discussed *infra*. Because I find that all of the machine operator work-time signature-gathering and soliciting was observed and allowed by statutory supervisors, it is unnecessary to incorporate a detailed analysis of whether or not the other machine operators might qualify as supervisors using the reasoning of *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686 and its progeny. Generally speaking, while the machine operators received greater pay, they only served traditional supervisory roles for a few minutes at a time when a foreperson went on a bathroom break and the higher-level supervisor or manager was unavailable to spell the foreperson.

signatures. On the other hand, D'Arrigo enforced the company's no work-time solicitation policy with respect to multiple last-minute requests by pro-union crew representatives.

3. One D'Arrigo Temporary Foreperson Personally Gathered Signatures on Behalf of the Decertification Petition

Florentino Guillen solicited decertification petition signatures from mixed lettuce crew 115C, from a rappini crew, and obtained another thirty-five or thirty-six signatures off-site.

The fact pattern for Florentino Guillen has some parallels to that of Hector Vera, the cow-inseminator discussed in *Artesia Dairy*. (*Artesia Daily* (2007) 33 ALRB No. 3, modified by 168 Cal.App.4th 598) In that case, Hector Vera was a supervisor 16.7% of the time and the Board found this to constitute "substantial" supervisor duties. In this instance, Florentino Guillen served as a temporary foreperson on four days during the week of his signature gathering efforts, during fifteen of the twenty-two days that he worked from October 21, 2010 to November 4, 2010, and during approximately one hundred and thirty-eight times during calendar year 2010. (Exhibits U-f and U-g) These higher figures strongly suggest that Guillen had both regular and substantial supervisorial duties. Guillen frequently served as a temporary foreperson for both regular crews and for labor contractor crews.

The employer cites an NLRB case for the proposition that even if Florentino Guillen was a statutory supervisor, since he was a member of the bargaining unit, he was permitted to engage in decertification activity so long as his conduct was not

employer encouraged and did not lead workers to reasonably believe that he was acting on behalf of management. (*Times-Herald, Inc.* (1980) 252 NLRB No. 66) The collective bargaining agreement states that the company may reassign bargaining unit employees to temporary foreperson positions and "upon reinstatement back into the bargaining unit" said employees shall be deemed to have maintained unbroken seniority. (Exhibit J-I, at page 11) This language would seem to suggest that during the days the employee served as a temporary foreperson, he or she was no longer a member of the bargaining unit. Since on Wednesday, November 3, 2010, Guillen worked as a temporary foreperson, he was not a member of the bargaining unit on that date. Therefore, this legal theory, even if accepted, would be inapplicable to Guillen's solicitation from head lettuce crew 115C.

However, the evidence with respect to Guillen's duties as a temporary foreperson was not as detailed as that involving Cordova and Llanes. I found Guillen's testimony was not credible and, moreover, his answers were often evasive. Guillen did concede that, as a temporary foreperson, he was "over" the crew when a higher-level supervisor was not present.[90] Even if not acting as a statutory supervisor, with his extensive service as a temporary foreperson of both regular and labor contractor crews, workers would have perceived Guillen to be a company agent acting on behalf of the

[90] The Board has held that when two employees have identical responsibilities, it is appropriate to conclude that they possess identical authority. (*M. Caratan, Inc.* (1979) 5 ALRB No. 16, ALJ Decision, at page 27)

employer.[91] (*S & J Ranch, Inc.* (1992) 18 ALRB No. 2, at page 7 and *Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2, at ALJ Decision, pages 30-33)

C. Other Company Activities Would Have Reinforced Worker Perceptions That D'Arrigo Top Management Supported the Decertification Campaign

As background, the administrative law judge permitted evidence regarding fourteen different mandatory-attendance management presentations during the two days before the election at which the company owners urged workers to cast a "No Union" vote. Also as background, the administrative law judge allowed evidence regarding work-time signature-gathering in crew 120A.

1. The Company Owners Held Mandatory-Attendance Work-Time Presentations Urging a "No Union" Vote

Company owners held fourteen mandatory-attendance work-time presentations effectively speaking to "100%" of their remaining work-force. Half of these presentations occurred two days before the election and half of them occurred on the day immediately prior the election. The groups on the second day were slightly larger than those on the first day.

Since the General Counsel's unfair labor practices complaint does not charge the employer under either the captive audience or promises of benefit theory, there

[91] Due to the substantial and pervasive impact of multiple company supervisors allowing work-time signature-gathering, I would have found the decertification election to be tainted even if temporary foreperson Florentino Guillen was found to be neither a supervisor nor company agent.

is no need for a detailed legal analysis of those concepts in this decision. But a brief mention of the concepts warrants mention.

The captive audience concept is essentially derived from the NLRB's 24-hours rule. This issue is mentioned by the Board in *Dunlop Nursery*. (*Dunlop Nursery* (1978) 4 ALRB 9) The *Dunlop* case discusses the NLRB case of *Peerless Plywood Company* which establishes a prohibition against employer work-time speeches to a massed assembly of company workers. (*Dunlop Nursery* (1978) 4 ALRB 9, at page 1, footnote 1, citing *Peerless Plywood Company* (1953) 107 NLRB 427) There is a compelling reason for this prohibition due to the risk that this form of last-minute employer-campaigning might chill employee free choice. On the other hand, our Act has a tightly compressed timetable for representation elections giving the Board potential misgivings about such a rule. (*Yamada Bros.* (1975) 1 ALRB 13, at page 2)

The promise of benefits concept is discussed in *San Clemente Ranch* (1999) 25 ALRB No. 5. The *San Clemente Ranch* case notes that, while an employer may promise to maintain existing benefits, the employer may not promise benefits that are better than the employer's position in any existing negotiations. (*San Clemente Ranch* (1999) 25 ALRB No. 5, at pages 5-6)

In this case, where the General Counsel did not charge an unfair labor practice based upon the captive audience or promise of benefits theory, the relevance of the fourteen mandatory-attendance work-time management presentations is that the emphatic statement of the owner's "No Union" position will have reinforced what the workers saw in terms of viewing decertification petition signature-gathering and

soliciting during work-time and in plain sight of company supervisors. As a consequence, the workers were even more likely to have concluded that company owners had a very strong opinion on this subject and that this explained why the supervisors were allowing the signature-gathering and soliciting during work-time. In tandem, the signature-gathering and a multitude of forceful presentations are much more likely to intimidate and chill employee free choice than either of the activities in isolation.

2. Crew 120A

Work-time signature gathering occurred for twenty or more minutes in Crew 120A. Workers that heard of machine operator Rosendo Rodriguez's work-time signature-gathering in plain sight of foreperson Sergio Flores would have found that information to corroborate reports that they heard of work-time solicitation and remarks occurring in crews 120C, 120E, 120K and 120Q.

D. The Two Cauliflower Crews Were Hired and Supervised by Fanciful Company, a Custom Harvester

The testimony of Fanciful co-owner Frank Fudenna persuasively illustrated that the company is a custom harvester of cauliflower. While D'Arrigo decides when and where to plant, Fanciful fits most of the other traits of a custom harvester listed by the Board in the *Tony Lomanto* case. (*Tony Lomanto* (1982) 8 ALRB No. 44, at pages 6 and 11) Fanciful provides expensive and specialized equipment. Fanciful decides when and where to harvest. Fanciful hires the labor and supervises it, along with supervision assistance by the labor contractor that it uses. The cauliflower workers do not handle

other work for D'Arrigo and Fanciful has a long history as a custom harvester not only with D'Arrigo, but also with other growers.

The employer did not disclose these two cauliflower crews at the pre-election conference.[92] But based upon Fanciful Company's status as a cauliflower custom harvester, I find that D'Arrigo was not the employer of these two labor contractor crews for purposes of its disclosure obligations under Regulation 20310.

E. Employees Laid-Off During the Week of November 13, 2010[93]

The Board has made it clear that, due to the short turn-around time in agricultural representation elections, the Regional Director has the discretion to decide whether or not to mail individual election notices to laid-off workers. (*Lu-Ette Farms* (1976) 2 ALRB No. 49, at page 6) In footnote five of that decision, the Board points out that even when an employer timely provides a list of list of addresses for laid-off or otherwise absent workers, the burden of mailing individual notices may be too great on a compressed timetable. (*Lu-Ette Farms* (1976) 2 ALRB No. 49, at page 6, footnote 5 (citing *Rohr Aircraft Corp.* (1962) 136 NLRB No. 122)

On the other hand, pursuant to Regulation section 20350, subdivision (a), the Regional Director is given reasonable discretion to decide the manner to notify the laid-off employees and, pursuant to Regulation section 20350, subdivision (c), the

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[92] The UFW was obviously aware of these workers at the time of the pre-election conference since UFW National Vice President Armando Elenes met with some of these workers earlier that month.

[93] With respect to the workers who were laid-off during the week of November 6, 2010, I find that they were provided adequate and timely notice of the election.

employer is required to fully cooperate in that endeavor. In the instant case, there is no doubt that the ALRB staff gave the employer a narrow timetable within which to provide address information for the 326 non-supervisory workers who were laid-off during the week ending on Saturday, November 13, 2010. However, the employer has experienced staff and counsel and could reasonably have anticipated that this request might be forthcoming. The Regional Director and his board agents determined that mailing individual election notices to these 326 laid-off workers was a reasonable effort to notify workers of their right to vote. As a result, while other efforts were made by the employer, UFW and colleagues, as well as the broadcast of some public service radio announcements, the administrative law judge is not going to second-guess the Regional Director and board agent's determination that such notices were appropriate to ensure employee participation rights and free choice.

F. Conclusion and Remedies

D'Arrigo management instigated decertification and D'Arrigo supervisors supported the soliciting and signature-gathering by openly viewing and allowing it during work-time despite a company no solicitation policy that was enforced upon pro-union workers. By supporting and assisting the signature-gathering and soliciting, the company committed an unfair labor practice in violation of California Labor Code section 1153, subdivision (a).

The work-time signature gathering occurred in multiple crews and this activity surely caused many workers to conclude that the company was backing the decertification campaign. This perception would have been reinforced by seeing a

temporary foreperson himself solicit and gather signatures. It is highly likely that there was widespread discussion among the non-supervisory employees regarding the work-time signature-gathering, and the strong opinions expressed by company owners further enhanced the probability that workers would conclude that supervisors permitting such signature-gathering activities were acting under the direction of top management.

Given the totality of these circumstances, there is no way to know if the signatures collected represent the workers' true sentiments. Workers had reason to believe that supervisors might see the signature list and thus know whether they signed it or not. If a worker thinks that his employer supports decertification, and that supervisors may see whether or not the worker signs the petition supporting it, he or she may feel compelled to sign the petition regarding of his or her personal feelings on the issue. Similarly, the employer misconduct created an environment which would have made it impossible for true employee free choice when it came time to vote.

Additionally, as a result of the company's delay, there were 326 laid-off workers who did not receive mailed copies of the election notice. The Regional Director had decided in his discretion that such notices were part of a reasonable effort to appropriately notify workers of their right to vote. However, due to the substantial and pervasive impact of company supervisors allowing work-time signature-gathering and soliciting, I would have found the decertification election to be tainted even if the employer had timely provided the names and addresses for these laid-off workers.

As a result of the employer's unlawful support and assistance, I am setting aside the decertification election and dismissing the decertification petition.[94] (*Abatti Farms* (1981) 7 ALRB No. 36, at page 15) Given that the company's unlawful conduct tainted the entire decertification process, any election results would not sufficiently reflect the unrestrained free expression of the bargaining unit members.

Dated: June 15, 2012.

Mark R. Soble
Administrative Law Judge, ALRB

[94] The UFW's request for mandatory mediation is not yet ripe. Per California Labor Code section 1164, subdivision (a)(4), the UFW may seek mandatory mediation only after sixty days have passed following a Board decision dismissing a decertification petition due to employer misconduct. Since the request for mandatory mediation is not yet ripe, the administrative law judge does not need to analyze whether or not the provisions of Senate Bill 126 apply to employer misconduct taking place prior to the bill's adoption.

ORDER

The Agricultural Labor Relations Board hereby orders that Respondent, D'Arrigo Brothers Company of California, a California Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

   (a) Initiating, aiding, assisting, participating or encouraging any decertification campaign; and,

   (b) In any similar or related manner interfering with, restraining, or coercing, any agricultural employees in the exercise of their rights guaranteed by California Labor Code section 1152.

2. Take the following affirmative actions which are found necessary to effectuate the purposes of the Agricultural Labor Relations 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) Prepare copies of the attached Notice, in all appropriate languages, by placing a copy of such Notice in a plain, stamped or metered envelope, with ALRB's return address, addressed individually to each and every agricultural worker employed by Respondent during the time period of October 27, 2010 to June 15, 2012, and submit such addressed, stamped envelopes directly to the Salinas ALRB Regional Director for him to mail within thirty (30) days after the Board's Order becomes final;

(c) Post copies of the Notice, in all appropriate languages, in conspicuous places on its property for a sixty-days period, the specific dates and location of posting to be determined by the Salinas ALRB Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed;

(d) Provide a copy of the attached Notice, in all appropriate languages, to each agricultural employee hired by Respondent during the twelve-months period following the date that the Order becomes final;

(e) Upon request of the Salinas ALRB Regional Director, provide the Regional Director with the dates of the present and next peak season. Should the peak season already have begun at the time the Regional Director requests peak season dates, Respondent shall 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 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 Salinas ALRB Regional Director. Following the reading, Board agents shall be given the opportunity, outside the presence of management and supervisors, to answer any questions that the employees may have regarding the Notice of their rights under the Act. The Salinas ALRB Regional Director shall determine a reasonable rate 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; and,

(g) Within thirty (30) days after the date that this Order becomes final, Respondent shall notify the Salinas ALRB Regional Director in writing of the steps that 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 this 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, D'Arrigo Brothers Company of California, a California Corporation, 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 interfere with employees exercising their rights under the Act in any similar or related matter, nor coerce or restrain employees from exercising such rights.

DATED: _____ D'Arrigo Brothers Company of California,
a California Corporation

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 for the Salinas ALRB Regional Office 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