Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CORRALITOS FARMS, LLC, Employer, and UNITED FARM WORKERS OF AMERICA, Petitioner.	)	Case No. 2012-RC-004-SAL
CORRALITOS FARMS, LLC, Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case Nos. 2012-CE-061-SAL 2012-CE-062-SAL 2012-CE-066-SAL (38 ALRB No. 10) 39 ALRB No. 8 (June 10, 2013)

DECISION AND ORDER

On March 1, 2013, Administrative Law Judge (ALJ) Douglas Gallop issued the attached recommended decision and order. This is a case in which related election objections and unfair labor practice allegations were consolidated for hearing. The United Farm Workers of America (UFW or Petitioner) filed an election objections petition with the Agricultural Labor Relations Board (Board or ALRB) pursuant to

Agricultural Labor Relations Act (ALRA) section 1156.3(e).[1] The UFW's objections alleged that Corralitos Farms, LLC (Employer or Respondent) engaged in misconduct that affected the results of the election; therefore, the UFW requested that the Board refuse to certify the results of the election. In addition, the UFW asserted that the Employer's misconduct rendered slight the chances of a new election reflecting the free and fair choice of employees. Therefore, the UFW requested that the Board certify the UFW as the collective bargaining representative pursuant to ALRA section 1156.3(f).[2]

The UFW also filed three unfair labor practice charges related to the organizing campaign, upon which the ALRB's General Counsel issued a complaint. The complaint alleged that Employer violated section 1153(a) of the ALRA by interrogating an employee concerning his union activity, by interfering with the UFW's access rights, and by coercing employees to sign a petition supporting the Employer's defense to the election objections.

The ALJ dismissed the UFW's objection petition in its entirety and denied the UFW's request for certification pursuant to section 1156.3(f) of the ALRA. The ALJ also dismissed the complaint in its entirety.

The ALJ noted at the outset of his decision that in his opinion "[a]lthough there were innumerable conflicts even between aligned witnesses, the diametrically opposed scenarios portrayed by opposing witnesses demonstrates that, irrespective of

[1] The ALRA is codified at California Labor Code section 1140, et seq.

[2] This is the first such request under Labor Code section 1156.3(f), which took effect on January 1, 2012.

poor communication skills or interpretations, there was a distressing amount of outright lying, deception and gross exaggeration" among witnesses for the Employer, General Counsel and the UFW who testified at the hearing. In addition, the ALJ observed that many of the witnesses appeared to be delivering scripted testimony. As part of making his credibility determinations, the ALJ isolated incidents in which he was sure of what did or did not take place and extrapolated from there, viewing with suspicion the testimony of witnesses who testified to the contrary about those incidents. Witnesses whose testimony was viewed with suspicion included witnesses who testified on behalf of the UFW, the General Counsel, and the Employer.

The ALJ held that the credible evidence established that Employer did not make unlawful threats during a strike conducted by the UFW on August 4, 2012.

The ALJ found Employer's consultant, Martin Montelongo, to be a very credible witness and credited his descriptions of meetings held among the crews prior to the election. The ALJ found that Montelongo did not threaten workers with job loss if the UFW won the election, nor did Montelongo make any material misrepresentations of facts.

The ALJ found that Employer did not confer an unlawful benefit on workers by eliminating the requirement that they pick strawberries in wet or muddy rows immediately following the August 4, 2012 strike, because the change in practice was not unlawfully motivated. The ALJ reasoned that even if the change had been unlawfully

motivated, it occurred too remotely in time to have reasonably prevented employees from exercising free choice in the election.[3]

The allegations of misconduct in both the General Counsel's complaint and the UFW's objections were primarily attributed to employees who were alleged to have been acting as agents of Employer. In addition, the UFW argued that the punchers in each harvesting crew were statutory supervisors.

The ALJ found that the record failed to establish that the punchers were supervisors under section 1140(j) of the ALRA. There was no evidence that the punchers performed any of the functions listed in Labor Code section 1140(j) as interpreted by the National Labor Relations Board (NLRB)[4] and the ALRB.

With respect to agency, the ALJ found that the evidence failed to establish that Employer held the punchers out to other workers as speaking on behalf of management, or that employees would reasonably perceive this. He cited *Omnix International Corporation d/b/a Waterbed World* (1987) 286 NLRB 425 as authority for his finding. Because the ALJ found that the record did not support finding that the

[3] While we agree with the ALJ that, under the particular circumstances presented in this case that the change made by the Employer, even had it been unlawfully motivated, was too remote in time to have prevented free choice in the election, we do not mean to suggest that there is any particular time frame prior to an election before which unlawfully motivated changes will be considered too remote in all cases. That determination depends on the applicable facts and circumstances.

[4] Labor Code section 1140(j) mirrors the definition of "supervisor" in 29 United States Code section 152(11) of the National Labor Relations Act (NLRA).

employees in question were supervisors and/or agents, the ALJ found that the alleged misconduct of these individuals was not attributable to Employer.

Finally, the ALJ dismissed an allegation in the General Counsel's complaint that Employer violated section 1153(a) of the ALRB by coercing employees to sign a post-election petition denying that Employer engaged in the conduct alleged in the UFW's election objections petition. The ALJ found that the evidence failed to establish that workers would have reasonably been coerced into signing the petition, and that there was no evidence that Employer was involved in the drafting and circulation of the petition.

The UFW filed forty-three exceptions to the ALJ's recommended decision and order, and the General Counsel filed seven exceptions.[5] After conducting a de novo review of the record, we affirm the ALJ's factual findings and legal conclusions in full except as modified below.

[5] Respondent filed its reply to the exceptions on April 25, 2013. On the same day, it filed a motion to strike portions of the General Counsel's and UFW's exceptions briefs because they exceeded the authorized page limit. Both the General Counsel and UFW incorporated by reference arguments made in their respective post-hearing briefs, and under Section 20307(j)(2) of the Board's regulations these pages count toward the page limit in the exceptions brief. The General Counsel's brief therefore exceeds the page limit by 17 pages and the UFW's brief exceeds the limit by 4 pages. Although we caution parties to follow page limits carefully, it cannot be said that Respondent was prejudiced by the excess. Indeed, Respondent was granted permission to file a 100 page reply brief. Therefore, the Respondent's April 25, 2013 motion is denied.

The ALJ's Credibility Determinations

Given the nature of the allegations and the evidence offered at the hearing in this matter, the ALJ's factual findings are highly dependent upon credibility determinations. Many of the UFW's exceptions take issue with the ALJ's factual findings and his credibility determinations. General Counsel's exceptions also contain arguments that urge the Board to overturn the ALJ's credibility determinations and factual findings.

The 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. Evid. (3d ed. 1986) § 1770, pp. 1723-1724.)

The ALJ decided that because of the diametrically opposed scenarios portrayed by opposing witnesses, he would determine who was telling the truth by isolating issues where he was certain of what did or did not take place and extrapolate from there. His certainty about what did or did not happen was not based on his

subjective belief, as the UFW implies, but was based on witness demeanor, consistency of testimony and reasonable inferences. Moreover, the ALJ did not unevenly apply his finding that the testimony of witnesses who testified falsely as to the incidents the ALJ was certain about would be viewed with suspicion when they testified about other issues. He found a number of both UFW and Employer witnesses to be unreliable.

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 on implicit and explicit judgments based on demeanor, but also on the plausibility of testimony. Our de novo 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.

Supervisory Status of Punchers

UFW Exception 41 argues that the ALJ erred in finding the punchers were not statutory supervisors. The UFW argues that the ALJ found that the punchers were not supervisors because they did not have the authority to discipline workers. The UFW asserts that it never argued that the punchers were supervisors based on their ability to discipline. The UFW maintains that the punchers are supervisors because they responsibly direct workers as to the quality of fruit picked and based on their ability to "reward" workers by crediting their boxes. The ALJ's analysis of the alleged supervisory status of the punchers is somewhat truncated, and we find that a detailed discussion is warranted.

Section 1140.4 (j) of the ALRA provides:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In 2006, the NLRB issued a series of decisions expanding upon, and modifying its interpretations of the terms, "assign," "responsibly to direct," and "independent judgment" under their governing legislation. The lead cases are *Oakwood Healthcare, Inc*. (2006) 348 NLRB 686 and *Croft Metals, Inc*. (2006) 348 NLRB 717. The Board followed and applied *Oakwood Healthcare, Inc*., and *Croft Metals, Inc*. in *Kawahara Nurseries, Inc*. (2011) 37 ALRB No. 4, *Artesia Dairy* (2007) 33 ALRB No. 3, mod. (2008) 168 Cal.App.4th 598, and *South Lakes Dairy Farm* (2010) 36 ALRB No. 5. The guidelines provided by these and related cases are appropriate when evaluating the status of individuals who do not have the authority to hire, fire, promote, discipline, etc., and who often work side-by-side with other crew members, but who may still nonetheless perform some other functions within the statutory definition of "supervisor" and do so with independent judgment. (See *Croft Metals, Inc., supra*, 348 NLRB 717, which applied the *Oakwood Healthcare* test to lead persons in an industrial setting.) Ultimately the issue turns on whether there is evidence that the individual in question has the authority to exercise at least one of the statutory (primary) criteria using independent judgment.

Finally, as a general principle, the NLRB has exercised caution "not to construe supervisory status too broadly[,] because the employee who is deemed a supervisor is denied the rights which the Act is intended to protect." (*Oakwood Healthcare, supra*, 348 NLRB 686 at p. 688, citing *Chevron Shipping Co*. (1995) 317 NLRB 379, 381.) The ALRB has also acknowledged the necessity of proceeding cautiously in finding supervisory status. (*Milky Way Dairy* (2003) 29 ALRB No. 4 at p. 49.)

a. The Punchers Do Not Responsibly Direct Work

The authority "responsibly to direct" work applies to those individuals who exercise basic supervisory duties but who lack the authority to carry out other supervisory functions such as hiring, firing and disciplining. For the direction to be responsible, the person directing must be accountable for the performance of the task with the possibility of adverse consequences if the task is not completed. (*Oakwood Healthcare, Inc., supra*, 348 NLRB 686 at pp. 690-691.) "To establish accountability for the purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct work and the authority to take corrective action, if necessary." (*Oakwood Healthcare, Inc., supra*, 348 NLRB 686, at p. 692.) In addition, accountability means that "some adverse consequence must befall the one providing the oversight if the task performed by the employee is not performed properly." (*Id*.)

The NLRB requires evidence of actual accountability; in other words, the prospect of adverse consequences must be more than merely speculative, and must have an effect on that person's terms and conditions of employment. (*Beverly Enterprises-*

Minnesota, Inc. d/b/a/Golden Crest Healthcare Center (2006) 348 NLRB 727 at p. 731.) Such an effect may be positive (merit increase, bonus, promotion), or negative (some form of discipline) (*Id.* at fn. 13.) The NLRB has also stated that "the concept of accountability creates a clear distinction between those employees whose interests, in directing other employees' tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task." (*Loyalhanna Healthcare Associates* (2008) 352 NLRB 863, ALJD at p. 869.)

In the instant case, there was no evidence presented to support a finding that the punchers had actual accountability for their tasks. While the punchers' task was to inspect the boxes of strawberries to make sure they complied with quality standards, there was no evidence presented as to whether there were any adverse consequences for the punchers if the boxes were not full or contained unripe berries. Even if the UFW had met its burden to prove this element of supervisory status, the record does not support a finding that the punchers acted with independent judgment.

b. <u>The Punchers Do Not Use Independent Judgment</u>

The authority to assign or responsibly direct other employees does not confer supervisory status unless its exercise requires the use of independent judgment. (*Sam's Club, a Division of Wal-Mart Stores, Inc*. (2007) 349 NLRB 1007 at p. 1014.) Both the NLRA and ALRA require that assignments or directions involve the exercise of independent judgment, as opposed to routine decision-making. (See *Kawahara Nurseries, Inc., supra,* 37 ALRB No. 4, pp. 12-16; 21-23 and 27; *Artesia Dairy, supra,* 33 ALRB No. 33, IHED at p. 22; *Bright's Nursery* (1984) 10 ALRB No. 18, at ALJD p. 31.)

The Supreme Court held in *NLRB v. Kentucky River Community Care, Inc*. (2001) 532 U.S. 706, at p. 714, that it is the degree of discretion involved in making the decision, not the kind of discretion exercised, that determines the existence of independent judgment.

In *Oakwood Healthcare*, the NLRB clarified that "independent judgment" means that "an individual must at a minimum act, or effectively recommend action free of the control of others and form an opinion or evaluation by discerning and comparing data provided that the act is not of a merely routine or clerical nature. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies [or] the verbal instructions of a higher authority." (*Oakwood Healthcare Inc., supra*, 348 NLRB 686 at p. 693.) The NLRB has found that jobsite leads who oversaw routine functions and followed established prescribed practices and whose projects involved tasks that were recurrent, predictable and carried out in conformance with supervisors' specifications did not exercise independent judgment. (*Shaw, Inc*. (2007) 350 NLRB 354 at pp. 354-355.)

In *Kawahara Nurseries Inc*., the Board found an employee did not exercise independent judgment when there was no evidence presented to show that he did so with a degree of discretion that rose above the merely routine or clerical. Rather, the evidence tended to support the conclusion that his decisions were simply based on the need to get work done. (*Id.* at p. 15.)

Similarly, the Board found that another employee at Kawahara Nurseries who was a "lead puller" of a crew that pulled plants to fill nursery orders did not exercise independent judgment because her duties could be described as overseeing routine,

recurrent, predictable tasks. Moreover, the Board found that there was no evidence that there was a significant degree of discretion involved when she decided whether a plant was acceptable. (*Kawahara Nurseries, Inc., supra*, 37 ALRB No. 4, at pp. 22-23.)

The punchers' tasks are routine, recurrent, and predictable. Moreover, there is no evidence that the punchers exercised any significant degree of discretion in deciding when berries in the boxes were too green, rotten, or too small or if a box was not adequately filled. Punchers simply inspected boxes to ensure they complied with quality standards set forth by Employer.

c. The Punchers Do Not Have the Authority to Reward Employees

The UFW argues that the punchers have supervisory authority because they can affect the harvesters' wages by giving credit for boxes quickly or by delaying credit for boxes, thereby affecting the workers' ability to maximize their piece rate earnings. In support of its argument, the UFW cites *Bayou Manor Health* (1993) 311 NLRB 955; *Big John Superstores, Inc*. (1977) 232 NLRB 134; and *Scolers, Inc*. (1971) 192 NLRB 248, cases in which the NLRB found that an employee's ability to affect the earnings of another employee confers supervisory status.

As discussed above, the record does not support the conclusion that the punchers' decision to punch or not to punch a box is exercised with independent judgment. In contrast, the individuals in the cases cited by the UFW all used independent judgment in making the decisions that affected employees' earnings.

In *Bayou Manor Health*, licensed practical nurses conducted performance evaluations of certified nursing assistants which directly impacted the certified nursing

assistants' wage increases and bonuses. The NLRB found that the licensed practical nurses used independent judgment in completing the evaluations. It was the nurses' independent judgment combined with the effect of the evaluation on wages that led the NLRB to conclude they were supervisors.

In *Big John Superstores, Inc*., the employee found to be a supervisor was the meat market manager, and his actions affected earnings because he had the authority to schedule and assign overtime. However, this was not the sole reason he was found to be a supervisor. The NLRB was also persuaded that he was a supervisor because he had authority to make recommendations on new hires, and if he were not deemed to be a supervisor, the seven workers in the meat department would have been operating essentially without any direct supervision. (*Id.* at p.135.)

Finally in *Scolers, Inc*., the NLRB found a hostess/head waitress to be a supervisor, and therefore excluded from the bargaining unit. The fact that she had the authority to assign tables to the other waitresses (affecting their earnings) was just one of several factors the NLRB considered. In addition, she did not wear a uniform as the employees did, and she was often in sole charge of the establishment. Also, unlike the other employees, she was paid a salary, rather than on an hourly basis, and she worked substantially shorter hours. (*Id.* at p. 249.)

Apart from the fact that the UFW did not establish that the punchers exercise discretion and independent judgment, we find, in agreement with the ALJ, that it was not established that punchers gave away boxes of strawberries except in isolated cases. Furthermore, to the extent that some boxes were given away, it was not established that the

Employer authorized punchers to do this or was generally even aware of such incidents.[6] It was also not established that punchers "rewarded" workers by punching their boxes more or less quickly, or that the Employer authorized such rewards.

Standard for Determining Agency Status of the Punchers and Other Non-Supervisory Employees

UFW Exception 42 and General Counsel's Exceptions 2, 3 and 6 essentially assert that the ALJ erred in not completely applying the test for agency in *Vista Verde Farms v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 307 (*Vista Verde Farms)* and finding that the punchers and other non-supervisory employees acted as Employer's agents because of the illicit benefit the Employer allegedly gained from their actions, the repetition of which could have been prevented or the deleterious effects of which could have been mitigated. In rejecting the UFW's and the General Counsel's agency arguments, the ALJ cited *Omnix International Corporation d/b/a/ Waterbed World*, *supra*, 286 NLRB 425 (*Omnix*) as authority for finding there was no agency because the employees could not have reasonably believed the individuals at issue were acting on behalf of Employer. As discussed below, under either *Vista Verde Farms* or *Omnix*, the UFW's and General Counsel's argument fails and we uphold the ALJ's finding that the employees in question were not agents of the of the employer.

[6] The ALJ found that, on one occasion, a puncher credited a worker for a box picked by an hourly worker, but only after the puncher received permission from a foreman. That a puncher believed that she needed express permission before she could credit a worker for an extra box only further demonstrates that they were not vested with authority to do so on their own.

In *Vista Verde Farms*, the California Supreme Court held that even when an employer has not directed, authorized or ratified improperly coercive actions directed against its employees, under the ALRA an employer may be held responsible for unfair labor practices if (1) the workers could reasonably believe that the coercing individual was acting on behalf of the employer; or (2) the employer gained an illicit benefit from the misconduct and realistically has the ability to either prevent a repetition of such misconduct in the future or to alleviate the deleterious effects of such misconduct on the employees' statutory rights. (*Vista Verde Farms*, *supra*, 29 Cal.3d 307 at p. 322.)[7]

In applying *Omnix*, the ALJ, found that the evidence failed to establish that the Employer held the punchers out to other workers as speaking on behalf of management, or that employees would reasonably perceive this. We find that the ALJ's application of the standard in *Omnix International Corp. d/b/a Waterbed World (supra) 286 NLRB 425* is consistent with ALRB case law applying *Vista Verde Farms*. The test articulated for finding agency is essentially the same as the first prong of *Vista Verde Farms*, i.e., whether, under all the circumstances, the employees would reasonably believe that the employee alleged to be an agent was reflecting company policy and acting for management. (*Omnix*, *supra*, 286 NLRB 425 at pp. 426-427.) The ALJ found that, under *Omnix*, the employees would not have reasonably perceived the individuals in question to have been acting on Employer's behalf. We agree.

[7] At issue in *Vista Verde Farms* was whether the employer was liable for the coercive conduct of a farm labor contractor. The California Supreme Court held that the employer in that case was liable under the ALRA for acts committed by the farm labor contractor hired by the employer. (*Vista Verde Farms supra*, 29 Cal.3d 307.)

The General Counsel argues that the ALJ failed to analyze the facts in this case under the second prong of *Vista Verde* and argues that Employer should be found liable for the actions of the punchers because Employer gained an illicit benefit from their interruptions of the access meetings and Employer had the ability to alleviate its deleterious effects but did nothing. Similarly, the UFW argues that when the punchers circulated the post-election petition, Employer gained the illicit benefit of employees being dissuaded "from supporting the Union's objections, thereby causing employees to fear testifying on behalf of the UFW."

We note that a review of other ALRB cases applying *Vista Verde Farms* indicates that, as of the present date, the Board and courts have not found agency strictly under the second prong of the *Vista Verde Farms* test, despite the disjunctive phrasing of the *Vista Verde Farms* test. We decline to depart from this line of authority, and even were we so inclined, as discussed below, the facts in this instant matter do not establish agency under either *Vista Verde Farms* or *Omnix*.

a. Agency Status of Mechanic Juan Carlos Ramirez on Day of Strike

The UFW argues that the facts established that on the day of the strike, Juan Carlos Ramirez was reasonably viewed as acting on behalf of Employer. The ALJ did not credit the witnesses who claimed Ramirez said he was acting on the boss' orders. (ALJ Decision p. 17, fn. 15.) As discussed above, we find no reason to disturb the ALJ's credibility determinations, and we uphold the ALJ's finding that the record does not support finding that Ramirez could have reasonably been perceived as acting on behalf of Employer.

b. Agency Status of the Punchers and other Non-Supervisory Employees: Interruption of Access Meetings

Both the UFW and the General Counsel maintain that the alleged agents had a "special status" in Employer's operation. Also, they argue that because the alleged agents were seen meeting with Employer's supervisors and its consultant, Martin Montelongo, in the fields, employees could reasonably believe they were acting on Employer's behalf.[8]

As discussed above in the section on supervisory status, the punchers' tasks were routine, recurrent, and predictable. Punchers simply inspected boxes to ensure they complied with quality standards set forth by Employer. Punchers were not excluded from the access meetings like the foremen were. There is no credible evidence that supports a finding that they had a special status which would make it reasonable for employees to perceive the punchers as acting on behalf of the Employer during the access meetings. As the ALJ points out, at a meeting conducted by ALRB agents, workers asked about puncher Juana Maya's right to question and disagree with the UFW organizers during access meetings and was told by a Board agent that while Maya should be courteous when she spoke, she had a right to do so like any other worker (ALJ Decision at p. 47).

The General Counsel also argues that Employer gained an illicit benefit when the access meetings were disrupted because Employer's anti-union position was

[8] The ALJ found that the testimony by General Counsel and UFW witnesses about the number of times punchers were seen speaking to Montelongo was highly exaggerated, and credited Montelongo's version of these events.

strengthened. Thus, the punchers should have been found to have been agents under the second prong of the *Vista Verde* test.

Assuming *arguendo,* that the second prong of the *Vista Verde Farms* test applies, it cannot be said that the mere articulation of the desire not to have a union confers an illicit benefit on the employer.[9] Even if it could be said that the Employer gained an illicit benefit from the access meeting disruptions, the Employer realistically had a limited ability to prevent the anti-union workers from voicing their opinions about the union, as they were exercising protected rights. Nevertheless, the record does support the conclusion that the Employer made reasonable efforts to prevent serious misconduct because both ALRB agents and Martin Montelongo met with employees to tell employees that they must treat each other with respect even if they had differences of opinion.

We conclude that the record fails to establish that the punchers were agents under either prong of the *Vista Verde Farms* test.

c. Agency Status of the Punchers and other Non-Supervisory Employees: Circulation of Post-Election Petition

The General Counsel argues that the special status of these individuals and their familial relationships supports a finding that employees would have reasonably believed they were acting as Employer's agents when they circulated the post-election petition in support of Armando Ramirez.

[9] In *Nish Noroian Farms* (1982) 8 ALRB No. 25 at p. 10, the Board held that mere anti-union animus was not sufficient to identify a decertification petitioner as an agent of an employer.

As discussed above, there is no credible evidence that supports a finding that the individuals who created and circulated the petition had special status. While many of the punchers accused of misconduct are married to the supervisors of their crews, the ALJ is correct that family connections with supervisory personnel do not by themselves establish agency. (*Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co.* (1983) 9 ALRB No. 65.) Further, there was no credible evidence presented that any of the punchers who created or circulated the petition received any direction from the foremen regarding the petition.

We affirm the ALJ's determination that under all the circumstances, there was no evidence showing that employees would have reasonably perceived any of the employees alleged as agents to be acting on behalf of management when they circulated the post-election petition.

We reject the UFW's argument that the punchers should be found to be agents under the second prong of the *Vista Verde Farms* test. The UFW's claim that employees were dissuaded from supporting the Union's objections to the conduct of the election and feared testifying on behalf of the UFW is purely speculative. It cannot be said that Employer gained any benefit, illicit or otherwise from the circulation of the petition.

"Captive Audience" Meetings During the Pre-Election Period

Prior to the election, the Employer held a number of meetings for massed audiences of employees at the Employer's various ranches during which Armando Ramirez and Martin Montelongo spoke to the employees concerning the election.

Attendance at these meetings was compulsory, and employees were credited with boxes of strawberries in order to compensate them for the lost picking time. The Board has never held that these types of "captive audience" speeches violate the ALRA. The UFW, however, argues that such meetings are inherently destructive of employee rights and urges a total ban on employers conducting group captive audience meetings during election campaigns. The UFW urges the Board to find that under the circumstances of this case, the requirement that employees attend the meetings conducted by Martin Montelongo coupled with the crediting of boxes of strawberries for the time spent during the meetings was misconduct requiring that the election be set aside.

Credited testimony supports the finding that, under existing law, nothing occurred at the meetings which would amount to objectionable conduct that would have reasonably prevented employees from exercising free choice in the election. With respect to the meetings held on the day before the election, the ALJ found that although the meetings were mandatory, the credited evidence failed to show that any campaigning took place. Rather, workers were simply advised that the election was going to be held the next day, and were told it was important to vote.

Additionally, we are constrained to reject the argument that captive audience speeches should be banned in general. Under section 1146 of the ALRA, we are required to "follow applicable precedents" of the NLRA. (Lab. Code § 1146; *Triple E Produce Corp. v. ALRB* (1983) 35 Cal.3d 42, 48.) The NLRB has, for over 60 years, held that employer captive audience speeches are lawful. (*See Babcock & Wilcox Co.* (1948) 77 NLRB 577, 578; *Livingston Shirt Corp*. (1953) 107 NLRB 400, 405-406.) The

basis of the NLRB's rule allowing captive audience speeches is the NLRA's statutory protection of non-coercive employer speech. (*Babcock & Wilcox, supra,* 77 NLRB 577, at p. 578; 29 U.S.C. § 158(c).) The ALRA similarly protects non-coercive employer speech. (Lab. Code § 1155.) Furthermore, the NLRB rule applies to many industries whose employees, like those in the agricultural industry, tend to have little economic power. Accordingly, we are compelled to follow NLRB precedent in this area preventing the Board at this time from adopting a total ban on captive audience speeches during organizing campaigns.[10]

The NLRB has carved out an exception to the above rule and prohibits both employers and unions from making election speeches to massed assemblies of employees within 24 hours before the scheduled time for holding an election. (*Peerless Plywood Co*. (1953) 107 NLRB 427.) The ALRB has not adopted the *Peerless Plywood* rule, but has not definitively rejected it. In *Yamada Bros.* (1975) 1 ALRB No. 13, the Board expressed doubt about the applicability of *Peerless Plywood*, stating that "it may be that this…rule is not appropriate under our Act, where unions are not required to intervene until 24 hours prior to the election and the time and place of an election may not be announced with more than 24 hours' notice." (*Yamada Bros., supra*, 1 ALRB No. 13 at p. 2.) The Board did not need to definitively rule on the applicability of *Peerless*

[10] We point out, however, that the Board has the authority to "diverge from federal precedents if the particular problems of labor relations within the agricultural context justify such treatment." (*Triple E Produce Corp. v. ALRB, supra,* 35 Cal.3d 42, 48.) While we decline to do so in this case, we do not foreclose the possibility of doing so in a future case should we conclude that the unique nature of agricultural labor relations justifies such a divergence.

Plywood in *Yamada Bros*. because the employer had spoken to workers during lunch time, not during company time. In cases since *Yamada Bros*., there was no need to rule on the applicability of *Peerless Plywood* in the agricultural setting, because this issue was never placed squarely before the Board. (See *D'Arrigo Bros. Co. of California* (2013) 39 ALRB No. 4 p. 28; *San Clemente Ranch* (1999) 25 ALRB No. 5; *Dunlap Nursery* (1978) 4 ALRB No.9; *California Coastal Farms* (1976) 2 ALRB No. 26.)

We affirm the ALJ's finding that no campaigning took place during the meetings on the day before the election. However, since these are the type of meetings prohibited within 24 hours of an election by *Peerless Plywood,* we feel compelled to directly rule on this issue. After careful consideration, we conclude that the *Peerless Plywood* rule does not apply under the ALRA. We distinguish this rule because of the short period of time within which an election must be held and the unique circumstances surrounding ALRB elections raised in *Yamada Bros., supra*, 1 ALRB No. 13, which require us to diverge from NLRB precedent. Moreover, applying *Peerless Plywood* would impinge on the current access unions are afforded under the ALRA, including within 24 hours of the election.

Although we have concluded that we are required to apply the NLRB's general rule on captive audience speeches, we have grave misgivings regarding the power that employers possess to compel on pain of discipline employees to assemble and hear those employers' views on upcoming elections and unions participating in them, particularly where, as here, employees are paid for attending those meetings. We believe that an almost inevitable atmosphere of coercion is created where an employer exercises

its authority in such a manner. We also note that labor unions have no similar power to direct compulsory meetings, much less to pay employees for attending such meetings. While there is no question that employers and unions alike enjoy the right to non-coercively express their views, as the United States Supreme Court stated in another context, "once [an employer] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment." (*Thomas v. Collins* (1976) 323 U.S. 516, 543-544 (Douglas, J. concurring).)

Ultimately, this Board is bound under the ALRA to follow the NLRB rule permitting captive audience speeches, absent the NLRB changing its precedent in this area or amendment of the ALRA itself.

The UFW's Argument that ALJ Failed to take Judicial Notice of Appropriate ALRB Documents and Public Records

The UFW asks the Board to take judicial notice of documents related to Labor Code section 1156.3(f) and the Board's adoption of regulations implementing that provision. The UFW argues that "these documents will assist the Board in resolving issues presented in this case with respect to certifying the UFW as an exclusive representative as a remedy for alleged election misconduct." However, because we have decided to uphold the ALJ's finding that there was no employer misconduct that would have reasonably affected the outcome of the election, it follows that there was no misconduct that would render slight the chances of a new election reflecting free and fair choice of employees.

ORDER

The United Farm Workers of America's (UFW) request that the Agricultural Labor Relations Board certify the UFW as the exclusive bargaining representative of the agricultural employees of Corralitos Farms, LLC, pursuant to Labor Code section 1156.3(f) is DENIED. A certification of the results of the election shall issue. Unfair Labor Practice Case Nos. 2012-CE-061-SAL, et seq. are DISMISSED.

DATED: June 10, 2013

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

CORRALITOS FARMS, LLC,
(United Farm Workers of America)

Case Nos. 2012-RC-004-SAL
2012-CE-061-SAL et al.
(38 ALRB No. 10)
39 ALRB No. 8

Background

On September 14, 2012, the United Farmworkers of America (UFW or Petitioner) filed a petition for representation seeking an election among the agricultural employees of Corralitos Farms, LLC (Employer) in Watsonville, California.

On September 19, 2012, an election was held with the following results:

United Farm Workers	154
No Union	187
Unresolved Challenged Ballots	19
TOTAL	360

On September 26, 2012, the UFW filed an objection petition with the Board pursuant to Labor Code section 1156.3(e). The UFW asserted that the employer's misconduct rendered slight the chances of a new election reflecting the free and fair choice of employees, and requested that the Board certify the UFW as the collective bargaining representative pursuant to section 1156.3(f).

The Board Decision (2012) 38 ALRB No. 10

On October 16, 2012, The Board set the UFW's objections for an investigative hearing. The hearing on objections was consolidated with a hearing on a related unfair labor practice (ULP) complaint issued by the General Counsel.

ALJ Decision

On March 1, 2013, the ALJ issued a decision dismissing the UFW's objection petition in its entirety, denying the UFW's request for certification pursuant to 1156.3 (f) of the ALRA, and dismissing the ULP complaint. Given the nature of the allegations and the evidence offered at the hearing, the ALJ's factual findings were highly dependent upon his credibility determinations. He concluded that many of the UFW's objections should be dismissed because there was a lack of credible evidence establishing that alleged misconduct occurred. The ALJ held that the credible evidence established that Employer did not make unlawful threats during a strike conducted by the UFW on August 4, 2012. The ALJ found that the Employer did not confer an unlawful benefit on workers by eliminating the requirement that they pick berries in wet rows immediately following the August 4, 2012 strike, because the change in practice was not unlawfully motivated. The ALJ found that Employer's consultant, Martin Montelongo did not

threaten workers with job loss, nor did he make any material misrepresentations of facts. The ALJ dismissed an objection by the UFW which urged a total ban on employers conducting group "captive audience" meetings during election campaigns. The ALJ pointed out that if the Board chose to adopt the NLRB's ban on meetings conducted within 24-hours of an election (*Peerless Plywood Co*. (1953) 107 NLRB 427), such a change should be implemented prospectively and not in the instant case.

The allegations of misconduct in both the General Counsel's complaint and the UFW's objections, such as the interference with Union access, were primarily attributed to employees who were alleged to be acting as agents of the Employer. In addition, the UFW argued that the punchers in each harvesting crew were statutory supervisors. The ALJ found that the record failed to establish that the punchers were supervisors under section 1140(j) of the Act. With respect to agency, the ALJ found that the evidence failed to establish that Employer held the punchers to other workers as speaking on behalf of management, or that employees would reasonably perceive this. He cited *Omnix International Corporation d/b/a Waterbed World* (1987) 286 NLRB 425 as authority for his finding. Finally, the ALJ dismissed an allegation in the General Counsel's complaint that Employer coerced employees into signing a post-election petition denying that Employer engaged election misconduct. The ALJ found that there was no evidence that workers would have reasonably been coerced into signing the petition, and there was no evidence that Employer was involved in the drafting and circulation of the petition.

The Board Decision

The Board affirmed the ALJ's credibility determinations, factual findings and legal conclusions in full with the following modifications: 1) The Board found the ALJ's analysis of whether certain workers were statutory supervisors to be truncated, and provided a full discussion of that issue; 2) The Board found that the test for agency applied by the ALJ and the test found in *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307 were essentially the same, and the facts in the instant matter did not establish agency under either test; and 3) The Board rejected the UFW's argument urging a total ban on all "captive audience" speeches made by an employer during an election campaign as doing so would be contrary to established NLRB precedent. The Board held that the *Peerless Plywood* rule prohibiting captive audience speeches within 24 hours of an election did not apply under the ALRA. The Board distinguished this rule because of the unique circumstances surrounding ALRB elections. The Board also stated that applying this rule would impinge on the current access unions are afforded under the ALRA, including within 24 hours of the election.

***

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 2012-RC-004-SAL
	)	
CORRALITOS FARMS, LLC,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Petitioner.	)	
_____	)	
In the Matter of:	)	Case Nos. 2012-CE-061-SAL
	)	2012-CE-062-SAL
CORRALITOS FARMS, LLC,	)	2012-CE-066-SAL
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
Charging Party.	)	
_____	)	

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Appearances:

Anne Frassetto Olsen and Ana C. Toledo
Ottone, Leach, Olsen & Ray
Salinas, California
For the Employer and Respondent

Sarah Martinez and Jessica Arciniega
Salinas ALRB Regional Office
For General Counsel

Mario Martinez
United Farm Workers Legal Department
Bakersfield, California
For the Petitioner and Charging Party

DOUGLAS GALLOP: I heard this combined Objections to Conduct of Election and Unfair Labor Practice case on 17 hearing dates, commencing on November 15, 2012, and ending on December 11, 2012. The objections case was conducted pursuant to the decision of the Agricultural Labor Relations Board (ALRB or Board) in *Corralitos Farms, LLC* (2012) 38 ALRB No. 10, setting 17 Objections to Conduct of Election filed by United Farm Workers of America (Petitioner or Union) for hearing.[1] The unfair labor practice case was conducted pursuant to a Complaint and Amended Complaint (hereinafter complaint) issued by the Board's General Counsel, after investigation of three charges filed by the Union. The complaint alleges that Corralitos Farms, LLC (Petitioner or Respondent) violated section 1153(a) of the Act by interrogating an agricultural employee concerning his Union activities, interfering with the Union's access rights and coercing employees to sign a petition supporting

[1] A hearing on two of the objections was contingent on General Counsel issuing a complaint on two parallel unfair labor practice charges, which subsequently took place.

Respondent's defense to the objections. The first two charges are also contained in the Union's objections. Respondent filed an answer to complaint, denying the unfair labor practice allegations, and asserting affirmative defenses. The Union has intervened in the unfair labor practice proceeding. After the hearing, the parties filed briefs, which have been duly considered.[2] Based on the entire record, including the testimony of the witnesses, documentary evidence submitted at the hearing, and the oral and written arguments made by counsel, the undersigned issues the following findings of fact and conclusions of law.

JURISDICTION

The charges were filed and served in a timely manner.[3] The Employer/Respondent[4] produces strawberries, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. It is undisputed that at all times material to this case, the Employer/Respondent's owner, Robert Fritz Koontz (Fritz Koontz); general manager, Armando Ramirez; supervisor, Juan Ibarra; and all of its fulltime foremen were and are supervisors and/or agents within the meaning of section 1140.4(j). It is undisputed that the Petitioner/Union is a statutory labor organization as defined by section 1140.4(f).

[2] Petitioner's brief does not address the allegations in Objections 3, 14, 15 and 17. Inasmuch as these objections have not been withdrawn, they will be discussed herein.
[3] The complaint alleges that the charges were "properly" filed and served, but does not set forth the dates of filing and service. Respondent, however, admits that the charges were filed and served in a timely manner.
[4] When both the objections and unfair labor practices are being referred to, the designations are Employer/Respondent, and Petitioner/Union. If only objections are involved, the designations are Employer and Petitioner, and if only unfair labor practices are involved, the designations are Respondent and Union. The Petitioner/Union's motions to correct the transcript are granted.

THE EMPLOYER/RESPONDENT'S 2012 OPERATIONS

In 2012,[5] the Employer/Respondent cultivated strawberries on four ranches: Salinas Road, a.k.a. Wilder and Trafton, in Watsonville, California; Moss Landing, a.k.a. Elkhorn, in Moss Landing; and Airport, in Salinas. The Airport ranch is the southernmost, about a 30 minute drive from Moss Landing. There were initially 12, and then 11 harvesting crews, four at Salinas Road, two at Trafton, three at Moss Landing and three at Airport, two of which were merged in early August. The harvesting crews generally numbered 25-30 workers. The Employer/Respondent also operated two weeding crews, and employed irrigators; truck, tractor and Caterpillar drivers; box loaders; and two mechanics.

Each harvesting crew was assigned a foreman and puncher.[6] The strawberries were placed into baskets, which in turn were packed in boxes. At the outset of the harvest, the harvesters were generally paid at an hourly rate, because there were fewer berries to pick. As the berries increased, the compensation changed to a lower hourly rate, plus a piecerate paid per box.

During the 2012 season, the Employer/Respondent employed at least 360 agricultural employees, if punchers are included, most of them working as harvesters. This was a larger workforce than in prior years, due to improved cultivating techniques and increased acreage. Because of this, and employee turnover, about 150 new workers were hired, many of them speaking Mixteco as their native language. The initial

[5] All dates hereinafter refer to 2012 unless otherwise specified.
[6] Apparently the punchers at Airport Ranch continued in that capacity when the two crews merged.

representation petition and Employer response estimated that about 200 eligible voters spoke Mixteco. Most of these workers also spoke and understood at least some Spanish, the predominant language of the other workers.

OVERVIEW OF THE UNION CAMPAIGN

The initial representation petition (Case No. 2012-RC-002-SAL) was filed on August 4, along with a notice of intent to take access and notice of intent to organize. The Petitioner/Union also conducted a one-day strike on that date, seeking an election within 24 hours. The petition was amended and then withdrawn when the majority of the Employer/Respondent's employees did not join the strike, as required by Board regulations section 20377.

The Petitioner/Union filed the herein petition for representation on September 14. On September 19, an election was conducted, with a Tally of Ballots showing the following results:

Petitioner	154
No Union	187
Unresolved Challenged Ballots	19
Total	360

The Petitioner/Union continued taking access after the election, pursuant to a second notice, and filed its objections to the conduct thereof.

CREDIBILITY

Numerous witnesses testified in this proceeding. Many of them appeared scripted to deliver specified case-building or case-defending lines, frequently with unimpressive effectiveness. Although there were innumerable conflicts even between aligned witnesses, the diametrically opposed scenarios portrayed by opposing witnesses demonstrates that, irrespective of poor communication skills or interpretations, there was a distressing amount of outright lying, deception and gross exaggeration.

In determining who was telling the truth, the undersigned has isolated issues in which he is certain of what did or did not take place, and extrapolated from there. In this regard, as will be discussed below, the undersigned is convinced that the Employer/Respondent's consultant, Martin Montelongo, did not threaten employees with job loss. The Petitioner/Union put on 15 witnesses[7] who claimed that this took place, and having determined that their testimony on this issue was false, their testimony on other issues is viewed with suspicion. As will be further discussed below, the undersigned is also convinced that the Petitioner/Union's representatives and supporters blocked some of the entrances to the fields being cultivated by employees during the one-day strike, and that all of the testimony of those denying this took place is also suspect.[8] On the other hand, as will be discussed below, it is apparent that some workers were required to pick strawberries in flooded areas of the harvesting rows

[7]These include Oracio Ramirez, Constantino Vargas Gonzalez, Maria Cruz Camacho, Felipe Adolfo Rivera, Ana Maria Barajas, Osvaldo Nestor Sanchez, Bernardino Martinez Ortiz, Gloria Sanchez, Daniel Cayetano Zavedra, Jose Luis Arevado, Gerardo Lopez, Israel Hernandez, Francisco Vasquez, Alicia Vega and Cipriano Lopez Rodriguez.

[8] These include Edgar Urias, Francisco Cerritos Ortiz, Efrain Trujillo, Jesus Corona and Jose Guadalupe (Lupe) Corona.

before the strike, but were prohibited from doing this thereafter. A number of the Employer/Respondent's witnesses testified that there was no change in the practice, which is clearly untrue. Therefore, their other testimony is also viewed with suspicion.[9]

SUPERVISORY AND AGENCY ISSUES

General Counsel contends that several of the Employer/Respondent's punchers acted as its agents during the course of the events described herein, but does not contend that they were statutory supervisors. The Petitioner/Union contends that the punchers were also supervisors, and challenged their ballots as such.

The evidence shows that the punchers clock employees in and out of work, and for their lunch breaks. The foremen determine when the starting, break and ending times take place, other than on those unusual occasions where they are not present. The main function of the punchers is to inspect the strawberries brought to them by the harvesters. If the baskets and boxes are acceptable, the puncher counts the box, by applying an electronic probe to the worker's tag, for piecerate credit. If the baskets are not full, or contain under- or over-ripe berries, the puncher requires they be filled, and/or the unacceptable berries be replaced.

Supervisors are not considered part of an agricultural employee collective bargaining unit and, therefore, are not eligible to vote in Board elections. Section 1140.4(j) of the Act provides:

[9] These include Simon Lazaro Enciso, Juana Maya, Karina Garcia Gonzalez, Ruben Merino Ayala, Gonzolo Efren Cruz Salvador, Alberto Guevara Vasquez, Jose Luis Rangel Guzman, Noe Merino Orozco, Benjamin Cruz Salvador, Armando Lopez, Bernardino Mendez Melo, Jose Roque Rosa and Maria Del Socorra Arrevalo. Armando Ramirez initially testified that Respondent's policy was not to require workers to pick in the wet areas, but admitted, on cross examination that before the strike, they had to pick in those areas, but were prohibited from doing so thereafter.

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in the connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The evidence fails to establish that the punchers exercise any of the above functions, as interpreted by the National Labor Relations Board (NLRB) and the ALRB. *Kawahara Nurseries, Inc.* (2011) 37 ALRB No. 4, applying *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686 [180 LRRM 1257] and *Croft Metals, Inc.* (2006) 348 NLRB 717 [180 LRRM 1293]. Jose Luis Arevado testified that puncher, Juana Maya, five to seven times per day, recommended that foreman, Simon Lazaro Enciso (Lazaro) discipline employees for not filling the baskets in the boxes they turned in, and he would do this. Lazaro testified that Maya would report to him when the boxes were seriously defective, and he would speak with the harvester about this. There is no evidence that any of these verbal warnings led to further discipline.

Correcting the work of other employees does not constitute discipline, within the meaning of section 1140.4(j). *Kawahara Nurseries, Inc.*, supra. The mere authority to issue verbal reprimands is too minor a disciplinary function to constitute statutory authority, in the absence of evidence that such warnings lead to any other discipline. *The Ohio Masonic Home, Inc.* (1989) 295 NLRB 390, at pages 393-394 [131 LRRM 1503]; *Passavant Health Center* (1987) 284 NLRB 887 [125 LRRM 1274].

The Petitioner/Union further contends that because punchers "gave away" boxes of strawberries, they satisfied the statutory definition of "rewarding" employees. As will be discussed below, the testimony concerning this conduct was exaggerated and, for the most part, given without adequate foundation. In the one undisputed incident where a puncher credited the worker for a box picked by an hourly worker, she testified that she first consulted with the crew foreman. Other than the disputed testimony of a few witnesses, that they complained about three of the 12 punchers to their foremen, there is no evidence that the foremen, generally, were aware of this conduct, or ratified it. Furthermore, many of the boxes were given away, both before and after the strike, by hourly workers, such as irrigators and weeders, but the Petitioner/Union does not contend they are supervisors.[10] Accordingly, it is concluded that the punchers did not "reward" employees, as statutorily defined, and that none of the punchers was a statutory supervisor.

General Counsel and the Petitioner/Union contend that the punchers acted as agents of the Employer/Respondent. In addition to the foregoing evidence, General Counsel contends this was shown when Martin Montelongo met with them on several occasions during the Union campaign, in the presence of the crews. General Manager, Armando Ramirez, and consultant Montelongo credibly testified that they decided to

[10] The Petitioner/Union cites three NLRB cases, all issued prior to *Oakwood Healthcare, Inc.* and *Croft Metals, Inc.*, to support its argument. In *Bayou Manor Health Center, Inc.* (1993) 311 NLRB 955 [145 LRRM 1044], licensed practical nurses were found to be supervisors because they issued job performance evaluations to certified nursing assistants that directly affected their merit wage increases and bonuses. In *Big John Super Store, Inc.* (1977) 232 NLRB 134 [96 LRRM 1485], a meat market manager was found to be a supervisor on three grounds, one of which was that his authority over work schedules affected the incomes of other employees. In *Scolers Incorporated* (1971) 192 NLRB 248 [77 LRRM 1858], a hostess/head waitress was found to be a supervisor for a number of reasons, including her authority over work assignments. These cases, at best, are minimally instructive in deciding the supervisory status of the punchers.

visit the crews, because the Petitioner/Union was regularly taking access, and they wanted to establish a presence with the workers, to answer any questions they had.[11] Montelongo further credibly testified that for the most part, he stood behind the punchers, greeting the workers as they turned in their boxes, so that he would not get in the way of the harvesters as they picked in the rows.

Bernardino Martinez Ortiz (Martinez) testified that he observed Montelongo and Juana Maya meet on three or four occasions, for 15-20 minutes at a time, during which, Simon Lazaro would assume Maya's punching duties. Martinez is one of the witnesses who falsely accused Montelongo of threatening employees with job loss. Montelongo and Juana Maya credibly testified that they met on one occasion, for five or six minutes, because Maya felt ill due to the friction between herself and the Petitioner/Union's organizers, and was considering seeking medical attention.

Ana Maria Barajas testified that on about three occasions, Montelongo met with puncher, Maria Cruz, for 10-15 minutes at a time, during which, the foreman would assume her punching duties. Oracio Ramirez testified that Montelongo met with his crew about 15 times, and alone, or accompanied by Armando Ramirez, conferred with Cruz more than five times. Cruz testified that, on one occasion, she asked to speak with Armando Ramirez and Martin Montelongo because Barajas had called her a prostitute and shoved her. Barajas and Oracio Ramirez also falsely accused Montelongo of

[11] Montelongo was a very credible witness. His testimony was refreshingly unscripted. Although Montelongo had difficulty placing events with dates, and had to have his memory refreshed before he could proceed with certainty, once he understood what was being asked of him, he was straightforward and convincing. Armando Ramirez was also a credible witness, although he initially slanted his testimony concerning the issue of the flooded areas in the rows of crops. Otherwise, the detail of his testimony, and the confidence with which he delivered it, were impressive.

threatening employees with the loss of their jobs. As discussed below, Cruz candidly admitted that she credited Barajas with a box that had been picked by an irrigator. Therefore, Cruz is credited as to the number of times she met with Montelongo and Ramirez, and the reason therefore.

Constantino Vargas Gonzalez (Vargas) testified that Montelongo met with puncher Marta Cortez Barriga (Cortez) on about three occasions, after the strike, for about ten minutes each time. During these visits, the foreman, Alberto Zavala, would allegedly take over Cortez's punching duties. Vargas testified that Ramirez, who had hardly ever visited his crew prior to the strike, met with Cortez about five times thereafter. Vargas was another witness who falsely accused Montelongo of threatening employees with the loss of their employment, and it is highly unlikely that Montelongo and Ramirez would have seen the need to visit with this one employee on some eight occasions.

Gloria Sanchez testified that Montelongo met with puncher, Karina Garcia Gonzalez (Garcia) five or six times during the Union campaign. Garcia denied ever meeting alone with Montelongo. Montelongo did not name Garcia as one of the workers he met with. Sanchez is another one of the workers who gave false testimony concerning threats of job loss by Montelongo. Therefore, her testimony is viewed with suspicion and, absent corroboration, is not credited.

The Petitioner/Union and General Counsel further contend that the punchers, along with several irrigators, drivers and a mechanic, should be considered agents of the Employer/Respondent, because employees reasonably saw them as acting on behalf

of management when they disrupted access meetings, and were assisted by foremen and the supervisor in the circulation of a petition denying the allegations in one of the Union's unfair labor practice charges. As will be discussed below, there is minimal credible evidence showing that supervisory personnel supported the disruptions or played any more than a minimal role in the circulation of the petition.

Finally, General Counsel contends that these employees should be found to be agents, due to their family relationships with supervisory employees. In this regard, most of the punchers accused of improper conduct were married to, or were living with, the foremen of their crews, and one of the mechanics is a second-cousin to Armando Ramirez. While this may be a relevant factor to consider, family connections with supervisory personnel, in themselves, do not establish agency status. *Peter D. Solomon and Joseph R. Solomon, dba Cattle Valley Farms/Transco Land and Cattle Co.* (1983) 9 ALRB No. 65.

In cases where a nonsupervisory employee is alleged to be acting on behalf of the employer, the test is whether, under all the circumstances, other employees would reasonably believe that the employee was reflecting company policy, and acting for management. This requires that the employer held out the worker as being someone privy to management's voice about the matters in question, or that the other employees reasonably perceived such a role. *Omnix International Corporation d/b/a Waterbed World* (1987) 286 NLRB 425 [126 LRRM 1248]. The facts that an employee shares his or her employer's anti-union views and is seen talking with a manager do not, in

themselves, establish the employee as an agent. *St. Paul's Church Home, Inc.* (1985) 275 NLRB 1242 [120 LRRM 1030].

The evidence fails to establish that the Employer/Respondent held out the punchers to other workers as speaking on behalf of management, or that employees would reasonably perceive this. They were not excluded from the access meetings, as were the foremen, and attended meetings conducted by the ALRB, at which supervisors were excluded. At one of those meetings, one or more workers asked about Juana Maya's right to question and oppose the Petitioner/Union's representatives during access periods. A Board agent responded that Maya, like any other worker, was entitled to speak, but should exercise courtesy in doing so.

During the Montelongo meetings, he repeatedly urged pro-and anti-union employees to respect each other, hardly an endorsement for abusive behavior. Indeed, while the Employer/Respondent hoped that the Petitioner/Union would lose the election, that sentiment was not communicated to the workers by Montelongo, Koontz, Ramirez or Ibarra. It is concluded that the credible evidence presented shows that none of these nonsupervisory employees acted as the Employer/Respondent's agents.

General Counsel and the Petitioner/Union contend that Rigoberto Lazaro Enciso (Lazaro) was a statutory supervisor, because he supervised the drivers, acted as a substitute foreman during the harvest season, and was the foreman of a crew the previous winter. Constantino Vargas testified that during the 2012 harvest, Lazaro substituted as foreman for Alberto Zavala on five or six occasions. Refugio Vasquez

and Cipriano Lopez, however, testified that Lazaro only substituted for Zavala on two occasions, and Marta Cortez testified that this only happened once.

Vargas further testified that during the previous winter, Lazaro was the foreman of a crew setting up the irrigation system, for most of four months, and chose the members on his crew. Vasquez also testified that four years ago, Lazaro was the foreman of a crew placing plastic sheets over the strawberry plants. Martin Lopez Aguilar (Lopez) testified he "believes" Lazaro was his father's foreman, and was in charge of all the drivers. He did not testify as to how he knew this, since Lopez worked as a harvester and weeder. No other witness corroborated this assertion.

Rigoberto Lazaro testified that he worked as a driver, irrigator and loader during the 2012 harvest season. During that season, he substituted as foreman on one occasion for Alberto Zavala, for two or three hours; on one occasion for foreman Juan Carlos Perez, for the entire day; and two or three times for foreman Jose Luis Rangel Guzman (Luis Rangel), for two or three hours at a time. Lazaro and supervisor Juan Ibarra further testified that when Lazaro substitutes as a foreman, he acts in a caretaker capacity, making sure the truck is moved as the rows are completed, that all the berries are picked and that the boxes are stacked for transport. Lazaro does not hire, fire or discipline employees as a fill-in for the foremen.

Ibarra and Lazaro testified that Ibarra is the supervisor of the truck, tractor and Caterpillar drivers. They further testified that Vargas worked as a weeder and laid down plastic last winter, and rarely, if ever, worked with Lazaro, who primarily was a driver and set up the irrigation system, with a few other workers. Lazaro and Ibarra

testified that Ibarra chooses who will work on the winter crews, and that either Alberto Zavala or Simon Lazaro was Vargas's foreman.

Based on the foregoing it is concluded that Lazaro was not a statutory supervisor. He did not exercise any of the functions set forth in section 1140.4(j) of the Act when he substituted for the foremen, which was on a sporadic and usually brief basis. Even assuming his job functions during the winter season would establish Lazaro as a supervisor the following summer, Lazaro and Ibarra are credited over Vargas, who clearly gave exaggerated testimony concerning Lazaro's substitution for Zavala, and false testimony concerning alleged threats of job loss by Montelongo.

OBJECTIONS 1, 2 AND 3

OBJECTION 1

THE EMPLOYER THREATENED TO DISCHARGE WORKERS WHO PARTICIPATED IN A UFW STRIKE IN EARLY AUGUST, 2012.

OBJECTION 2

THE EMPLOYER THREATENED TO CALL THE POLICE AND DID CALL THE POLICE IN RETALIATION FOR WORKERS ENGAGING IN A STRIKE.

OBJECTION 3

THE EMPLOYER'S SUPERVISORS OR AGENTS THREATENED WORKERS WITH JOB LOSS IF THEY CONTINUED TO SUPPORT THE UFW.

As noted above, Petitioner engaged in a strike against the Employer on August 4, with an object of obtaining an election within 24 hours. Petitioner's organizers and striking employees began arriving at the four ranches at about 6:00 a.m., and the starting time for work was 7:00 a.m. The credible evidence establishes that some of the

organizers and striking employees blocked the entrances to all four ranches, with picketers, vehicles and/or irrigation pipes. In this regard, the vivid and compelling testimony of Armando Ramirez, Juan Ibarra, Simon Lazaro, Juana Maya,[12] Marta Cortez, Gonzolo Efren Cruz Salvador (Gonzolo Cruz), Ana Maria Martinez Molina, Benjamin Cruz Salvador, Jesus Manuel Cervantes Ixta and Armando Lopez are credited over the pious, yet false testimony of the representatives and supporters, denying such conduct. In addition to being impressed with the demeanor of Respondent's witnesses on this issue, Petitioner was strongly motivated to prevent employees from entering, in order to obtain a 24-hour election, and the timesheets for the Moss Landing ranch show that employees were delayed from starting work for at least one hour.[13]

Armando Ramirez credibly testified that he received a report from Juan Ibarra, on his way to work, that strikers were blocking the entrances to the Moss Landing ranch. When he arrived at Moss Landing, picketers were blocking the entrance. They permitted him to pass, but he saw them blocking the entrance of employees who wanted to work, a contention corroborated by employee witnesses. Vehicles were parking along the side of a busy highway, creating a safety hazard. Ramirez approached the strikers, and told organizer Edgar Urias to let those who wanted to work in. Urias said no, this was a strike, and shoved Ramirez, who then called 911. After sheriff's department officers arrived and told the picketers to stop blocking the entrances, Urias

[12] Maya testified that the workers entered the fields at her punching table, harassing her and attempting to grab her probe. Osvaldo Nestor Sanchez (Nestor) and Oracio Ramirez denied that anyone attempted to take Maya's probe. Nestor testified that the strikers were 25 feet away from Maya when they entered the field, while Ramirez stated they passed within five feet of her. Maya's testimony concerning this incident was compelling and believable.

[13] At Trafton and Airport, employees were able to enter by moving the irrigation pipes and using another entrance.

began blocking the entrance again, but ceased doing this when Ramirez protested.[14] Ramirez called for law enforcement assistance two more times, when he received reports that entrances to other ranches were being blocked, and that strikers had entered the fields at Trafton ranch, to harass non-striking employees.

After blocking the entrances to the ranches, those strikers and representatives went to the Salinas Road ranch, where the main strike demonstration was taking place. Petitioner's worker witnesses, called during its case in chief, and Jesus Corona, one of its organizers, called during rebuttal, gave significantly different versions of what took place. The worker witnesses testified that they asked Carlos Ramirez if they could enter the ranch to talk to the non-striking workers. Ramirez replied that if they did, he would call the police. Corona testified that, in fact, a large group of strikers did enter the ranch, along a dirt road on ranch property, and began shouting at the non-striking employees to join them. Ramirez, observing this, told the foreman to move the non-strikers away from the road. Ramirez then became embroiled in a shouting match with the strikers, over why he had told the foreman to move the workers. This enraged the strikers, many of whom entered the fields to approach the workers. Ramirez then told them he was going to call the police.[15] Ramirez testified that when the strikers told him they were going to enter the fields, he told them they could be arrested if they forcibly removed the workers from their jobs.

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[14] Even when the sheriffs arrived in a marked patrol car, some of the picketers were still partially blocking the entrance to a ranch. It is no surprise that others, apparently seeing the patrol car, had moved away.

[15] Some of the witnesses, including Corona, claimed Ramirez said he was acting on the boss's orders. Inasmuch as Armando Ramirez credibly testified he did not even speak with Carlos Ramirez that morning, the undersigned considers such testimony an untrue embellishment, designed to establish Carlos Ramirez as an agent.

At about 9:00 a.m., a group of 20-30 strikers, and at least one of Petitioner's organizers travelled from Salinas Road to the Trafton ranch, with the intention of convincing the non-striking workers to leave work and join them. The strikers and an organizer entered the Trafton ranch property, and approached Simon Lazaro's crew, screaming at them to leave the fields. The credible evidence established that some of the workers then entered the fields, interfering with the puncher's work and screaming at the non-striking employees at close range. Some of the non-striking employees left work, at that point.

Petitioner's witnesses testified that Simon Lazaro told them that he was going to call the police, and that the troublemakers would be fired. Lazaro testified he said nothing to the strikers. For the purposes of this decision, it will be assumed Lazaro made the statements attributed to him. The strikers remained in the fields and on the ranch road until the county sheriff's deputies, called by Armando Ramirez, arrived and told them to leave the property.

The credible evidence establishes that Armando Ramirez called law enforcement authorities, Carlos Ramirez may have threatened to call the police, and Simon Lazaro may have threatened to call the police and stated that the troublemakers would be fired, not in response to the lawful strike activities of the workers, but because they blocked the entrances to the fields, threatened to enter the fields and, at Trafton, did enter the ranch property and the fields. It is further found that employees would have reasonably understood that these actions and statements were not directed toward lawful strike activities. In addition, these incidents took place some six weeks before the election.

Finally, since the credible evidence shows that Carlos Ramirez was not an agent of the Employer, his statements cannot be attributed to it.[16]

Osvaldo Nestor testified that on an unspecified date after the strike, Petitioner's representatives were taking lunch time access to his crew, and the puncher, Karina Garcia, told them to leave. Nestor testified that he asked Garcia why she said that, and she replied, "You can't speak – the boss can fire you." Garcia denied telling Nestor that he could be fired if he continued supporting Petitioner. The undersigned does not trust the testimony of either of these witnesses, because both gave false testimony on other issues. Inasmuch as it is Petitioner's burden to establish objectionable conduct, the contested testimony of an unreliable witness fails to meet that burden. Furthermore, even if Garcia did make the statement attributed to her, she was not acting as an agent of the Employer.

Fausto Ramos Juarez (Ramos) testified that after the strike, he had a conversation with the puncher on his crew, who he only knows as Rosa. The parties stipulated that Ramos was referring to Rosa Fernandez. Fernandez, in essence, told Ramos that Petitioner was only interested in collecting the workers' dues. Ramos told her that he agreed, but he had to support his co-workers. Fernandez told Ramos that he

[16] Petitioner cites several cases, including *Holland Rantos Company, Inc.* (1978) 234 NLRB 726 [97 LRRM 1376], enfd. (CA 3, 1978) 583 F.2d 100 [99 LRRM 2543], asserting that the strikers were privileged to demonstrate on the dirt roads. Unlike that case, it has not been established that the strikers could not effectively communicate with the workers from the ranch entrances, or that the health and safety of the strikers would be endangered at those locations. With deference to the strike misconduct cases cited by Petitioner, the undersigned has reservations with the proposition that, having made their appeal to join the strike as the workers entered the ranch properties, it was also permissible for the strikers to shout at them, at close range and apparently without limitation, as they tried to work. It appears the only reason the strikers ceased doing this was because the sheriff's officers told them to leave. Irrespective of whether the cases cited would otherwise apply, the threats to call law enforcement officials, and actually summoning them were in response to unlawful activities, including blocking the entrances, threatening to enter the rows and then doing so.

should really think about it, because he had to do what was right for him and his job. Ramos interpreted this as a threat to his job. Fernandez did not testify at the hearing, so it will be assumed that she made the statements attributed to her.

Irrespective of Ramos' subjective interpretation as to what Fernandez told him, the undersigned does not believe that on an objective basis, her statements would reasonably be construed as a threat of job loss, rather than an encouragement for him to stop supporting Petitioner, so he would not have to pay dues. In any event, the evidence shows that the punchers, including Fernandez, were not supervisors, and employees would not reasonably view them as agents of the Employer.

Based on the foregoing, it will be recommended that Objections 1, 2 and 3 be dismissed.

OBJECTIONS 4, 5, 6 AND 7

OBJECTION 4

THE EMPLOYER ILLEGALLY THREATENED WORKERS WITH JOB LOSS IF THE UNION WON THE ELECTION.

OBJECTION 5

THE EMPLOYER VIOLATED THE ALRA BY REQUIRING WORKERS TO ATTEND CAPTIVE AUDIENCE MEETINGS PRIOR TO THE ELECTION.

OBJECTION 6

THE EMPLOYER VIOLATED THE ACT BY PAYING WORKERS MORE MONEY THAN THEY WOULD HAVE EARNED WHILE PICKING, TO ATTEND ANTI-UNION CAPTIVE AUDIENCE MEETINGS PRIOR TO THE ELECTION.

OBJECTION 7

THE EMPLOYER VIOLATED THE ACT BY MAKING MISREPRESENTATIONS TO THE WORKFORCE THAT AFFECTED THE INTEGRITY OF THE ELECTION IN A MANNER THAT DEPRIVED THE UFW OF ANY OPPORTUNITY TO RESPOND TO THOSE MISREPRESENTATIONS.

Martin Montelongo is self-employed, primarily as a loss control consultant. He advises employers on safety matters, and conducts meetings for workers to improve safety, thus reducing workers compensation and personal injury litigation costs. Montelongo has some labor law knowledge and, prior to being engaged by the Employer, had been involved in two agricultural worker organizing campaigns.

Fritz Koontz contacted Montelongo on the day of the strike, and Montelongo reported to the Employer's office the following day. Over the next few days, he conducted several meetings with Juan Ibarra and the foremen, instructing them as to what they could and could not lawfully do during a union campaign. Montelongo distributed a packet of documents to them, which included a list of anti-union statements they could lawfully make. Montelongo, however, credibly testified that he told the supervisor and foremen that since they had no experience in these matters, they should not discuss union-related issues at all with the employees. After he conducted these training sessions, Armando Ramirez requested that Montelongo be retained to advise him as to what he could lawfully say and do, and Koontz agreed. Thereafter, Montelongo accompanied Ramirez in the fields, when they visited the crews.

Montelongo conducted four group meetings with the harvest crews at all of the ranches, except Airport ranch. He sometimes spoke with combined crews while, on

other occasions, he met with them individually. The meetings were conducted during working time, and the employees were called to the meetings by their foremen. They understood attendance was required, because the foreman told them to do so, and two witnesses testified that their foremen refused their requests to continue picking.

Ramirez testified that in prior years, the Employer had only paid workers their hourly rate for attending meetings. At a meeting with the Trafton ranch crews shortly prior to the strike, a worker complained that he was losing money by attending, because he was not earning the piecerate bonus. Ramirez testified he told an office worker, after the meeting, to credit the Trafton crews with three boxes, for attending the meetings, in most cases equal to $3.30 or $3.45 per employee. Oracio Ramirez testified that Ramirez told the workers they would be paid, but he never was.

Armando Ramirez testified he decided to credit workers for three boxes for the Montelongo meetings based on their length, usually 15-20 minutes, plus the time it took to gather the workers, and for them to return to their rows and perform stretching exercises, prior to resuming work. Petitioner's witnesses testified they could not pick three boxes in the time it took to conduct the meetings, but some of them conceded that harvesting rates vary widely. For example, Felipe Adolfo Rivera testified that he picks three boxes of strawberries in 10 minutes.

As noted above, Petitioner put on many witnesses who claimed Montelongo threatened them with job loss at these meetings. For the most part, these witnesses claimed to recall nothing, or virtually nothing else that Montelongo, or anyone else said during any of the meetings they attended, and denied, or did not claim, that Montelongo

linked the threats of job loss with the non-payment of union dues. The witnesses' testimony wildly differs as to what Montelongo said, and when he made the statements.

Constantino Vargas testified that on the day before the election, Armando Ramirez told the harvesters at Moss Landing that Petitioner would always have work for them. Montelongo, apparently contradicting Ramirez, then told the crews that if there was a contract with Petitioner, "they" were going to fire the workers. Cipriano Lopez testified that it was Montelongo who told the workers at Moss Landing, on the day before the election, that they now had work, but if Petitioner "got in" they *could* fire them.

Daniel Cayetano Zavedra (Cayetano), contradicting Vargas and Lopez, testified that Montelongo did not make any job-related statements during the meeting with Luis Rangel's Moss Landing crew on the day before the election. Cayetano, however, did contend that at an unspecified earlier meeting, Montelongo stated that if they voted for Petitioner, the *Employer* would fire them.

Gerardo Lopez testified that on the day before the election, Montelongo told Alberto Zavala's crew at Moss Landing that Petitioner should not be on that ranch, and if it won the election, *everyone* would be fired. Refugio Vasquez, called as a witness by Petitioner, was also on Zavala's crew at Moss Landing. He was not asked what Montelongo told the crew during any of the meetings on direct examination. On cross examination, Vasquez testified about the meetings in more detail than any of Petitioner's other witnesses on the subject, and did not contend that Montelongo made any statements regarding employees losing their jobs.

Oracio Ramirez testified that on the day before the election, Montelongo told two crews at the Salinas Road ranch, at about 5:15 p.m., that they should not vote for Petitioner, and if Petitioner won the election it would tell the Employer to fire the workers. Ramirez was purportedly so concerned about these statements, that he asked foreman "Juan Garcia" (who is actually Juan Cruz Santiago) permission to speak with other employees about it. Felipe Adolfo Rivera was allegedly with him when he made the request. Santiago allegedly refused, because the work day had not ended. Rivera, in his testimony, did not corroborate Ramirez. Santiago, in his testimony, denied that Ramirez made such a request. The undersigned considers Ramirez to be an unreliable witness, because he gave false testimony on the Montelongo meetings. Accordingly Santiago's testimony is credited over Ramirez's uncorroborated allegations.

Felipe Rivera testified that Montelongo told the crews at Salinas Road, on the day before the election, that if they voted for Petitioner, they would be fired. Rivera's native language is Mixteco, but he contended that he understood "some" of what Montelongo allegedly said. Ana Maria Barajas and Israel Hernandez testified that Montelongo told these crews that they could vote for or against Petitioner, but to think about it really hard, because if they voted for Petitioner, it would fire them. Hernandez further testified that when a worker said that those in favor of Petitioner should go work for another company, Montelongo voiced his agreement. Hernandez claimed that at other meetings, Montelongo told the workers Petitioner was lying to them, and they should not pay any attention to it. Hernandez also claimed Montelongo told the

employees that Petitioner had forced employees to sign authorization cards. No other witness corroborated this testimony.

Bernardino Martinez testified that on the day before the election, Armando Ramirez first told the crews at Trafton ranch that he could not say anything, and then told them to think very well about how they were going to vote, because it could affect their employment. No other witness attributed any employment-related statements to Ramirez. Martinez further alleged that Montelongo told the Trafton crews that Petitioner only made promises, and that everything was decided by the Employer. According to Martinez, Montelongo then stated that Petitioner could tell the Employer to fire them, totally contradicting his earlier statement.

Jose Luis Arevado testified that on the day before the election, Montelongo told the Trafton crews that Petitioner was "no good," and all it did was steal from workers. Arevado claimed Montelongo told these crews that if there was a union contract, Petitioner could fire the workers. Arevado testified that Montelongo conducted about ten meetings with his crew, more than double the number identified by any other witness.[17]

Maria Cruz Camacho (Cruz) testified that *a week* before the election, Montelongo told the crews at the Airport ranch not to vote for Petitioner, and if they did, they would be fired. Osvaldo Nestor testified that *two weeks* before the election,

[17] In its brief, the Petitioner contends that Montelongo conducted a "countless number" of captive audience meetings. The evidence shows that he conducted four rounds of meetings, one of which took two days to accomplish.

Montelongo told the Airport ranch crews that if there were a union contract, the workers would be fired.

Alicia Vega testified that on the day before the election, Montelongo told employees on Gregorio Vazquez's crew, at the Airport ranch, that if the workers had a union contract, they would be fired. On cross examination, Vega claimed that Montelongo said the same thing at the first meeting he conducted with her crew, shortly after the August 4 strike. Francisco Vasquez testified that on the day before the election, Montelongo told workers in Noe Merino Orozco's (Merino) crew, at the Airport ranch, that if Petitioner were elected "*the boss*" was going to fire them. Gloria Sanchez testified that on the day before the election, Montelongo told Merino's crew that if Petitioner "went in," *Petitioner* was going to fire them.

In addition to the glaring inconsistencies noted above, it seems very strange that Montelongo, who had spent hours training the Employer's management employees to avoid violating the law, would so brazenly and frequently have done so himself, with many of Petitioner's supporters present, some of them recording him.[18] It is also very strange that Montelongo would tell the workers, as some of the witnesses contended, that Petitioner would reward them for electing it by having them all fired.

Petitioner's witnesses testified that none of Montelongo's threats was reported until the Saturday after the election, thus supporting Petitioner's claim that it had no

[18]Petitioner contends that, on its face, it is incredible that Montelongo would not have urged workers to vote against it. The undersigned does not accept, as a given, that all employers voice anti-union sentiments to their workers. The expression of such sentiments may well be misunderstood, or distorted, leading to the filing of unfair labor practice charges and objections. This is why some employers limit their comments to reading and/or distributing prepared written statements, to establish what was actually said. The credible facts herein are very different than those established in *Vincent B. Zaninovich & Sons* (2008) 34 ALRB No. 3, cited by Petitioner.

opportunity to respond to alleged misrepresentations made by Montelongo. Of course, this does not explain why the threats he allegedly made as early as the first meetings were not reported. Organizer Lupe Corona testified that all but one of the harvesting crews had a crew leader, whose duties included reporting what transpired at the Montelongo meetings. In the undersigned's opinion, it is inconceivable that none of Petitioner's supporters, such as Oracio Ramirez and Bernardino Martinez, would have reported flagrantly unlawful conduct to its representatives, either immediately by cell phone, or as soon as they got off work, had such statements been made.

With respect to the alleged threats made the day before the election, the evidence shows that Petitioner's representatives took access to all of the ranches after work that day, passing out flyers, and conducted a meeting at the Salinas Road ranch, attended by 30 to 40 workers from all of the ranches.[19] In addition, Petitioner's representatives conducted home visits on the night before the election, and Bernardino Martinez was one of the employees joining them.[20] Petitioner's representatives also contacted employees, to inform them of the Saturday meeting, giving those employees ample opportunity to report the misconduct, had it actually taken place.

Montelongo and Armando Ramirez convincingly established that they did not even visit the Airport ranch on the day prior to the election. Ramirez attended the pre-

[19] It came as no surprise when, after the undersigned expressed some incredulity that none of the workers immediately reported Montelongo's conduct to Petitioner's representatives, Petitioner called some of them as rebuttal witness, who claimed they were only able to speak with a few employees after work the evening prior to the election. One of these representatives even testified that the Salinas Road meeting was cancelled, contrary to the testimony of all other witnesses on the subject.

[20] In this regard, Gonzolo Cruz credibly testified that Martinez and a representative visited his home the night before the election. They referred to Montelongo as, "the brainwasher," but did not say anything about his threats, allegedly made in Martinez's presence, just a few hours earlier.

election conference that morning, and then contacted Montelongo, asking to meet with him for lunch at a restaurant in Moss Landing. They decided to meet with the crews, but Ramirez was not feeling well, and took a nap after lunch. By the time they left for the Moss Landing ranch, it was already about 2:00 to 2:30 p.m., and by the time they were finished at Salinas Road, it was the end of the working day.[21]

As noted above, Montelongo was a very credible witness,[22] as was Ramirez, other than some of his testimony concerning the flooded areas in the fields. Montelongo, corroborated by several other witnesses, denied that he made any negative comments about Petitioner, told employees to vote against Petitioner[23] or made any references to their employment, should Petitioner win the election. He recalled that during the first meeting, at the Salinas Road ranch, which took place shortly after the August 4 strike, he told the workers that Petitioner's dues were 3% of their wages. An employee asked what would happen if the dues were not paid. Montelongo responded that most union contracts have a security clause stating that workers have to pay dues in order to remain members in good standing. Employees do not have to consent to dues being deducted from their paychecks, but if they do not pay the dues, the union gives them a certain amount of time to pay. The union constitutions set forth what is done if

[21]The Union contends that because Montelongo billed the Employer 9.5 hours for that day, with the notation, "Visited crews," this shows he visited all the ranches. None of Petitioner's witnesses claimed that Montelongo conducted meetings before noon on September 18, and Montelongo's notation was clearly not all-inclusive. Montelongo had to travel a considerable distance to meet with Ramirez in Moss Landing, and spent time with him prior to the meetings.

[22] Petitioner contends that Montelongo "blatantly lied," when he testified he never read from or held a piece of paper while speaking with the workers. Petitioner entered into evidence photographs of Montelongo holding an unidentified paper in his hands while meeting with employees. In fact, Montelongo testified that he did not, *to his recollection*, hold a paper in his hands during such meetings.

[23] Montelongo did recall telling workers, at the last meetings, to vote for or against Petitioner as they chose, but to vote with their heads, and not with their hearts.

someone is not a member in good standing. One of the workers stated that they should listen to what Montelongo was saying, provoking an angry outburst from supporters of Petitioner. Montelongo told the workers they should respect each other, whether they were for or against Petitioner, a statement he repeated during other confrontations between workers at the meetings.[24]

Based on the foregoing, it is concluded that Montelongo did not make any unlawful threats to employees, and it will be recommended that Objection 4 be overruled. It is further concluded that Montelongo's general comments about dues and union security clauses did not constitute material representations of fact, and that Objection 7 should be overruled. It is also concluded that by having employees credited with three boxes, Ramirez did not materially over-compensate workers for their attendance at the Montelongo meetings and, therefore, Objection 6 should be overruled. See *Comet Electric, Inc.* (1994) 314 NLRB 1215 [147 LRRM 1137].

With respect to Objection 5, Petitioner urges a total ban on employers conducting group "captive audience" meetings during election campaigns. The position of the NLRB is that such meetings fall within the free speech rights granted to employers under the National Labor Relations Act (NLRA), other than meetings conducted within 24 hours of an election. *Peerless Plywood Co.* (1953) 107 NLRB 427 [33 LRRM 1151]. The free speech provisions of section 8(c) of the NLRA are repeated in section 1155 of our Act.

[24] Juana Maya recalled asking Montelongo to calculate what her dues would be at one of the Trafton ranch meetings. Montelongo could not do this with precision, because Maya did not have her paystubs with her.

The NLRB has reconsidered its position on captive audience speeches from time to time, but still finds them lawful, other than the 24-hour rule. One factor leading to such adherence was the imposition of the requirement that employers provide unions with the names and addresses of their workers, so their representatives may contact them. *Excelsior Underwear* (1966) 156 NLRB 1236 [61 LRRM 1217]. The ALRB affords labor organizations far more access to workers than does the National Board.

The undersigned has no conceptual dispute with finding that when an employer requires employees to attend captive audience campaign meetings, it interferes with their right not to hear such information. The case law, however, is to the contrary. If the conduct of all meetings were to become a violation of the Act, it would only be fair to prohibit unions from requiring such attendance or for this agency to require employees to attend its meetings, to give declarations (other than charging parties) or otherwise cooperate in Board investigations.

Absent the adoption of a total ban on such meetings, the Board could adopt the *Peerless Plywood* ban on meetings within 24 hours of elections, as following the National Board's precedent, or it could distinguish the rule, on the basis that unions are afforded greater access under the ALRA, including access within 24 hours of elections. As this relates to the instant case, it is clear that employees reasonably understood that attendance at the Montelongo meetings was mandatory,[25] and some of the witnesses claimed they affirmatively asked not to attend, but were required to anyway. It is also

[25] In *Comet Electric, Inc.*, supra, the NLRB did not require employees to affirmatively object to attending the meetings.

clear that the Employer conducted group meetings at three of the ranches to discuss the election within 24 hours thereof. The credited evidence, however, fails to show that any campaigning, as commonly is defined, took place at those, or for that matter, any of the meetings. Rather, on September 18, the Employer's representatives advised the workers that the election would be conducted the following day, and urged them to vote.

If the Board does implement either a total ban on such meetings, or a *Peerless Plywood* limitation, it will be changing the rules, which have been permitted this type of campaigning under the ALRA since its inception. The undersigned believes that it would be unfair to impose such new rules retroactively, and find objectionable conduct in this case.[26] For this reason, even if a ban or limitations are established for the conduct of these meetings, and found applicable to the facts herein, they should be implemented prospectively, and it will be recommended that Objection 5 be dismissed.

OBJECTION 8

OBJECTION 8

THE EMPLOYER GRANTED A BENEFIT TO WORKERS AFTER THE STRIKE BY ELIMINATING THE REQUIREMENT THAT THEY PICK IN MUDDY OR WET STRAWBERRY ROWS.

The evidence establishes that portions of the strawberry rows became flooded during the 2012 season, and that many workers objected to working in such areas, because it made the work slower and presented the danger of injury from slipping and

[26] In *Peerless Plywood*, the NLRB set aside the election, because the employer's meeting would have been objectionable under then-existing case law, even without the 24-hour rule.

falling. The areas became flooded due to poor drainage after rain and irrigation, and punctures in the plastic irrigation pipes caused by various animals, and even insects chewing on them. The extent of the problem, and the Employer's response thereto, are in dispute.

A number of workers testified they were required to harvest in flooded areas at all four ranches, although the problem was most acute at the Trafton and Moss Landing ranches. The Employer's witnesses, with a few notable exceptions, such as supervisor Juan Ibarra, downplayed the extent of the problem, and a few of them testified that they liked to work in the flooded areas, because the fruit was larger.

As noted above, many of the Employer's harvesters in 2012 were new. Whatever the attitude of the harvesters toward working in the mud might have been in the past, it was opposed by many of these new workers. It is undisputed that a group of workers from Luis Rangel's Moss Landing crew met with Juan Ibarra, apparently in late May or early June. They protested having to work in the flooded areas. Ibarra told them they were new, and did not know how things were done when working for the Employer. Ibarra contended he told the workers that harvesting in the flooded areas was voluntary, which the workers, in their testimony, denied. Ibarra told Ramirez about the meeting, and said he would take care of the flooding problem.

It is also undisputed that harvester Antonio Cayetano and Luis Rangel had a confrontation regarding working in the flooded areas, apparently in mid-June. According to Cayetano, Rangel ordered the entire crew to put on boots, and work in the flooded areas. Most of the workers protested, but Rangel persisted in his demands,

telling them that if they did not want to perform the work, to leave and return the next day. Cayetano told Rangel that they were going to have to bring in the union. Rangel told Cayetano that no union was coming in, and asked which union he was talking about. Cayetano identified Petitioner. Rangel, although having a somewhat different recollection of the incident, acknowledged that Cayetano protested working in the flooded areas, and threatened to call in a union, in front of the entire crew.

Ibarra was off work for medical reasons in early July. One or both of the Moss Landing foremen spoke to Ramirez, and told him the plants were drying out, causing the strawberries to fall off the plants prematurely. Ramirez spoke with the Moss Landing crews and told them that they would have to increase the irrigation, and to expect more water in the rows.

It is further undisputed that harvester Pedro De Los Santos Calixco (De Los Santos) had a confrontation with Rangel about working in the flooded areas, apparently in late July.[27] De Los Santos testified that he spoke with Rangel about all of the water in the rows, telling him he could not pick there. When Rangel ordered him to pick in the rows, De los Santos walked off the job. He called one of Petitioner's organizers, and told him to go ahead with the strike. The organizer told him that the strike could not proceed at that time, and to return to work. Rangel permitted De Los Santos to return, after making him wait for 15 minutes. Again, Rangel had a different version of the incident, but did not dispute that it took place.

[27] Rangel testified that this took place after the strike, which is clearly wrong, since the credible evidence shows that workers were told not to work in the flooded areas after the strike ended.

It is clear to the undersigned that at least some of the foremen either explicitly required the workers to pick in the flooded areas, or did so tacitly, by not giving them the option of leaving them unpicked. Testimony that foremen had harvested in such areas prior to the strike does not establish they were the only ones who did this. Armando Ramirez eventually admitted as much in his testimony, and the denials by some of the foremen and other workers are not credited.

Workers do not generally seek union representation and go on strike for generalized reasons- normally there are specific causes for this. The record amply demonstrates that the requirement that harvesters work in flooded areas was a major reason for their seeking union representation and going on strike. Had they been informed that such work was voluntary, or prohibited, there would have been no reason for them to complain, as they did to Respondent's supervisors and Petitioner's representatives.

It is also undisputed that on the Monday following the strike, the striking Moss Landing employees asked to speak with Armando Ramirez, as they prepared to return to work. They told him they did not want to harvest in the flooded areas, and wanted the Employer's flag system discontinued. Petitioner's witnesses testified that Ramirez told them he would fix everything, while Ramirez testified he made no promises. Irrespective of what Ramirez said at the time, he and Juan Ibarra testified that on the following day, Ramirez told Ibarra to inform the foremen that harvesters were not to pick in the flooded areas, and Ibarra said this to the foremen. Thereafter, the flooded areas were harvested by the foremen, irrigators (who wore boots) and other personnel.

It is well established that an employer's bestowal of benefits at a time closely preceding an election, when made with the intention of inducing employees to vote against the union, is a coercive exercise of the employer's economic leverage, violative of protected employee rights. As such, it may constitute grounds for setting aside the results of an election. *Anderson Farms Company* (1977) 3 ALRB No. 67, at pages 17-18, citing *NLRB v. Exchange Parts Co.* (U.S. Supreme Ct., 1963) 375 U.S. 405 [55 LRRM 2098]. The charges and complaint do not allege the elimination of required harvesting in flooded areas as an unfair labor practice. Even if they did, the commission of an unfair labor practice does not, in itself, require that an election be set aside.

These and other cases involving the unlawful grant of benefits require a showing that the purpose of the action was to discourage workers from supporting the union. Under the facts herein, it is concluded that Ramirez, in changing the practice, was not motivated by anti-union considerations, but was acceding to a demand by the workers, supported by Petitioner, in order to assure their return to work. Although the strike was over, the continued protest by the workers presented a real possibility that another work stoppage would occur, and it is clear that Ramirez urgently wanted to avoid this during the critical harvest season. Furthermore, since Petitioner was not the certified bargaining representative of the workers, Ramirez did not act unlawfully in dealing directly with them.

Even if the changed practice had been unlawfully motivated, it was not implemented "closely preceding" the election, which took place about six weeks later.

In *Anderson Farms Company,* the promise of improved benefits took place within a week of the election. In *NLRB v. Exchange Parts Co.,* the announcement of improved benefits was made about two weeks before the election. In *Arrow Electric Corporation* (1977) 230 NLRB 110 [96 LRRM 1149], improved benefits were announced two days prior to the election.[28]

In *Royal Packing Company* (1978) 5 ALRB No. 31, the employer announced an improved medical plan substantially prior to the election. The Board found that employees were also informed that implementation was contingent on a no-vote, and the new plan, in fact, was implemented after the employees rejected union representation. Thus, the effects of the announcement of the change would not be sufficiently diminished through the passage of time, and the continuing union campaign. The change in this case is distinguishable, because it immediately became effective, well before the election.

The standard for setting aside ALRB elections is that objectionable conduct attributable to an employer reasonably prevents employees from exercising free choice. In this case, Petitioner campaigned for an additional six weeks, and obtained authorization cards signed by a majority of the bargaining unit employees. Given the passage of time, and the continuing organizing campaign, it is concluded that the Employer's conduct, even if improperly motivated, did not reasonably prevent workers

[28] In *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209 [216 Cal.Rptr. 688], the employer unlawfully granted a benefit far before the election, but also committed numerous other unfair labor practices and objectionable conduct proximate thereto.

from freely deciding how to vote. Accordingly, it will be recommended that this objection be dismissed.

Petitioner additionally contends that by eliminating the flag system for some of the crews, on the workers' demand, the Employer granted an additional benefit, constituting grounds to set aside the election. Section 20365(f) of the Board's regulations provides that, "The hearing shall be strictly limited to the issues set forth in the notice of hearing." The Board's decision in this case only sets forth the issue of the flooded rows for hearing, in conjunction with Objection 8. Furthermore, even if this action by the Employer were found properly raised, the same analysis would apply.

OBJECTIONS 9, 10 AND 11

OBJECTION 9

THE EMPLOYER UNLAWFULLY GRANTED A BENEFIT TO WORKERS THAT DID NOT SUPPORT THE UNION, BY CHANGING COMPANY PRACTICE AND CREDITING WORKERS THAT DID NOT SUPPORT THE UNION WITH BOXES THEY DID NOT PICK.

OBJECTION 10

THE EMPLOYER UNLAWFULLY GRANTED BENEFITS TO WORKERS THAT WERE ANTI-UNION OR DID NOT SUPPORT THE UNION, BY IMPLEMENTING A PRACTICE WHEREBY COMPANY SUPERVISOR(S) OR AGENTS WOULD GIVE BOX CREDIT TO THESE WORKERS WHEN THEY DID NOT ACTUALLY PICK BOXES OF BERRIES.

OBJECTION 11

AFTER THE AUGUST STRIKE, PUNCHERS BEGAN TO HARASS UNION SUPPORTERS BY EXCESSIVELY CHECKING THE QUALITY OF THEIR HARVEST WORK.

Petitioner presented 12 witnesses who testified concerning these allegations. All but two of them gave false testimony concerning alleged threats of job loss by Martin Montelongo. The Employer presented 22 witnesses, who denied almost all of the allegations made against them and/or their co-workers. The undersigned did not find Petitioner's witnesses, collectively, to be any more credible than the Employer's, and distrusts the testimony of those witnesses who made the accusations against Montelongo.

Petitioner's witnesses gave scant testimony concerning what the Employer's policy was before the strike, with regard to who received credit for berries picked in the flooded areas by the foremen, irrigators and other workers. This is not surprising, since these workers contended that, for the most part, they were the ones who performed that work. The Employer's witnesses testified that both before and after the strike, the foremen and irrigators who picked in the flooded areas either gave the strawberries to the harvester assigned to the row, or gave them away randomly.

Petitioner's witnesses testified that after the strike, foremen Noe and Ruben Merino, Luis Rangel, Gregorio Vasquez and Alberto Zavala, as well as irrigator, Jose Luis Zepeda and unidentified weeders and irrigators, who picked in the wet areas, only gave the strawberries they picked to those who did not support Petitioner.[29] These witnesses claimed that non-supporters were identifiable because they did not join the strike, and did not wear union buttons. It should be noted that in several crews, only a few employees wore buttons. Noe and Ruben Merino, Zepeda and irrigator Rosario

[29] The foremen, weeders and irrigators are only paid an hourly rate.

Romero Rosales denied only giving strawberries to those not wearing Petitioner's buttons. Gregorio Vasquez and Alberto Zavala did not testify.

Petitioner contends this was such a widespread practice, that it had to represent the Employer's policy, but the undersigned disagrees. In the first place, while Petitioner's witnesses testified as to specific instances where strawberries were "given away," the record totally fails to show how many baskets or boxes of strawberries were picked in the flooded areas after the strike, other than it represented an increase. Thus, it is impossible to determine whether the cited incidents reflected a widespread practice seriously impacting the workforce, or isolated incidents. In addition to questioning the credibility of most of Petitioner's witnesses to these events, it is statistically probable that more workers who were not open supporters of Petitioner would have randomly been given more boxes, because they far outnumbered those wearing the buttons. Also, it is apparent that the Petitioner's witnesses only had a limited opportunity to see who received berries picked in the flooded areas. Therefore, they could not, with any degree of certainty, testify that any open supporter of Petitioner, other than themselves, did not receive any of these boxes, after the strike. Thus, it is found that, to the extent that any preference was shown in the distribution of these strawberries, it was isolated and sporadic.

Petitioner's witnesses also testified that some of the punchers gave credit for boxes picked by other workers, or incomplete boxes. It is undisputed that puncher, Maria Cruz, gave Ana Maria Barajas, who was not wearing a union button, credit for a

box of strawberries picked by a weeder, at Barajas' request. Barajas testified that Cruz also credited her for one box that was not filled.

Felipe Rivera and Santiago Cruz Martinez testified that Maria Cruz gave a free punch to a worker named, "Socorro." Maria Cruz and Maria Del Socorra Arrevalo denied this took place. One witness testified that when he observed Cruz give a box away on the day before the election, he complained about this to the foreman. Since the established practice, before the strike, was that hourly workers gave their strawberries away, the undersigned fails to understand how the punchers would have been involved in this on more than a sporadic basis, either before or after the strike. Furthermore, none of Petitioner's witnesses claimed that any of these baskets or boxes should have been credited to them, because they had been assigned to the row where another worker harvested the flooded area.

Gloria Sanchez testified she observed puncher Karina Garcia give two boxes of strawberries away, and that she complained about this to the foreman, Noe Merino. Garcia denied giving any boxes of strawberries away. Noe Merino denied that Sanchez complained to him about this. The credibility of these three witnesses is suspect, because they gave false testimony on other issues. It is, however, Petitioner's burden to establish objectionable conduct, and the undersigned will not make such a finding based on the uncorroborated testimony of an unreliable witness. In any event, if the boxes were picked by hourly employees, they would have been given away, prior to the strike. Thus, Sanchez and the other workers were not required to ask the puncher for permission to receive credit for the boxes picked by the foremen or hourly workers,

before or after the strike, particularly if the berries were picked in the rows assigned to them.

Jose Luis Arevado testified that Juana Maya gave away three boxes of fruit to one anti-union worker, and free boxes to other non-supporters. Arevado claimed he complained about this to foreman, Simon Lazaro, who told him to mind his own business. Other workers from Arevado's crew testified for Petitioner, and did not corroborate this testimony. Maya denied giving away any strawberries, and Lazaro denied that Arevado, or anyone else voiced complaints about her to him, after the strike. Again, and for the same reason, the credibility of these three witnesses is suspect, but the burden of proof is Petitioner's. Absent corroboration, Arevado's testimony will not be credited. Again, even if credited, more information concerning the circumstances behind the giveaways would be required to conclude they were improper.

Petitioner's witnesses gave inconsistent testimony regarding alleged harassment by punchers Juana Maya, Maria Cruz, Marta Cortez, Karina Garcia and Regina Herrera, after the strike, by checking their boxes more closely. Petitioner contends that its supporters lost "a lot of money" because of this, but the undersigned considers this entirely speculative, in light of the evidence presented. The Employer called many witnesses, who testified that customarily, harvesters bring extra berries with them to the punching table, to replace rejected fruit, that the punchers also have extra berries with them and that berries are available to be picked in close proximity to the punchers, if

necessary. Thus, workers only occasionally have to return to their rows to pick extra berries, and little time is lost replacing defective or missing fruit.

With respect to Maria Cruz, Oracio Ramirez testified that she checked his boxes "a little" more closely after the strike, while Ana Maria Barajas claimed that Cruz checked her work, "box by box," until she stopped wearing a union button. Osvaldo Nestor claimed that Karina Garcia "sometimes" checked his boxes more closely, while Maria Cruz Camacho, called as a witness by Petitioner, testified that Garcia treated Cruz and her co-workers better after the strike. Garcia agreed with this assessment, testifying that she was intimidated by the striking employees, and did not closely check their work after they returned.

Bernardino Martinez and Jose Luis Arevado testified that Juana Maya checked their strawberries more closely after the strike. As discussed below, the evidence shows that during a fierce argument between Maya and Arevado during an access meeting, Arevado accused Maya of treating the workers badly *before* the union campaign, and stated that it had made her treat the workers with more respect. Cruz, Maya and Herrera denied they treated open supporters of Petitioner any differently than the other workers.

It is concluded that, to the extent that the conduct alleged in these objections actually took place, which is clearly far less than alleged by some of Petitioner's witnesses, it was insufficient to affect the outcome of the election. This is additionally true of the conduct attributed to the punchers, since the evidence fails to establish that they were agents of the Employer. In this regard, it is well established that the conduct

of third parties, not established as agents of an employer or union, will not be grounds for setting aside an election unless the misconduct was such that employee free choice was rendered impossible. *San Joaquin Tomato Growers, Inc./LCL Farms, Inc.* (1993) 19 ALRB No. 4; *Triple E Produce Corporation* (1993) 19 ALRB No. 2. Accordingly, it will be recommended that these objections be dismissed.

OBJECTIONS 12 AND 13
CASE NO. 2012-CE-061-SAL

OBJECTION 12

THE EMPLOYER PROVIDED ANTI-UNION SUPPORTERS WITH UNLAWFUL ASSISTANCE AND PREFERENTIAL ACCESS TO THE CREWS IN VIOLATION OF THE LAW.

OBJECTION 13

THE EMPLOYER INTERFERED WITH UFW'S ACCESS IN SUCH A WAY THAT IT PREVENTED UFW FROM EFFECTIVELY COMMUNICATING WITH THE WORKFORCE ABOUT THE BENEFITS OF UNION REPRESENTATION.

The charge in Case No. 2012-CE-061-SAL contains similar allegations to Objection 13, and General Counsel also alleges that the Employer/Respondent violated the Act by preventing the Petitioner/Union from taking access on the day of the strike.

As noted above, the Petitioner/Union filed a petition for representation, notice of intent to take access and notice of intent to organize on August 4, the day of the strike. Lupe Corona, the lead organizer, testified he served these papers on Juan Ibarra at about 9:30 a.m., and told Ibarra the Petitioner/Union was going to take access. Corona testified that Oracio Ramirez and Francisco Vasquez were present when he said this.

Neither Ramirez, nor Vasquez corroborated Corona's testimony. Corona's testimony is suspect, because he falsely denied that Petitioner/Union blocked the entrance to the Airport ranch.

Ibarra testified that Corona said nothing to him when serving these documents, and that, at the time, he did not know what access meant. Ibarra further testified he placed the papers in his pocket, and did not give them to anyone until that afternoon. Ibarra was more credible than Corona, and his denial of being told that the Petitioner/Union planned to take access is credited.

Corona testified that he served the petition on Fritz Koontz again, about 45 minutes later. This was because Petitioner had made a "mistake" in the petition, and he believes he served the amended petition on Koontz. Armando Ramirez, who was with Koontz allegedly replied, "Oh, it's not necessary. That's the petition to take access, right?" Petitioner and General Counsel did not produce the amended petition, and in particular, the proof of service, at the hearing. In the context of the other evidence herein, in particular the timing of the alleged second service, and Corona's unreliability as a witness, the undersigned considers this testimony incredible.

Assistant General Counsel Sarah Martinez testified that at 10:55 a.m., she told Koontz, at the Trafton ranch, that the Petitioner/Union had filed the petition and notices, and that the access rights took effect immediately. Martinez did not tell Koontz that union representatives were going to take access that day.

Ramirez testified that Koontz was with him at the Trafton ranch, when the workers entered the fields, between 9:00 and 9:10 a.m. At that point, Koontz told

Ramirez that the situation was unsafe, and to send the workers home. Koontz did not inform Martinez that he had decided to send the workers home for the day, but Ramirez, by cellphone, informed another Board agent of this, before the workers left. Ramirez drove to the office, obtained the paychecks and gave them to Ibarra, instructing him to go to the ranches, distribute the checks and send the workers home. This was accomplished between 11:00 a.m. and noon.

It is concluded that by sending the workers home early, the Employer/Respondent did not engage in objectionable conduct or violate the Act. Even assuming Koontz was aware that the Petitioner/Union was planning to take access that day, which has not been preponderantly established, he was entitled to send the workers home, due to the conduct of the Petitioner/Union and its supporters. At any rate, given the fact that organizers took access to the fields on numerous occasions thereafter, the loss of access on this one day, occasioned by the strikers' and organizers' misconduct, had a minimal effect on its ability to communicate with the workers.

The Petitioner/Union and General Counsel contend that the Employer/Respondent, acting through its agents, including punchers Juana Maya, Karina Garcia and Regina Herrera; mechanic Juan Carlos Ramirez; irrigators Jose Luis Zepeda, Osvaldo Ramirez and Rafael Jaruregui; weeder Brenda Martinez; and Rigoberto Lazaro interfered with access meetings to the point where the organizers were unable to communicate with workers. They further contend that the Employer/Respondent provided the mechanic and irrigators with vehicles and work time to disrupt the access meetings. At the same time, General Counsel, in her brief,

acknowledges the disruption was by agricultural employees, and not statutory supervisors:

> Emboldened by Corralitos' unlawful interference with access on the day of the strike, anti-union Corralitos employees began an intense and unlawful campaign that reflected Corralitos' anti-union policy.

Organizer Lauro Barajas testified that when he took lunchtime access at Trafton ranch on August 15, Juana Maya approached and started shouting at him. Maya followed him around as he took access, shouting anti-union epithets at him the entire 30 minutes permitted for access. Organizer Lisbet Valdez testified that she took access to the Trafton ranch 5 or 6 times. According to Valdez, Maya screamed at her for the entire 30 minutes, on each occasion. Organizer Rene Salas testified that he brought a Mixteco interpreter with him to Trafton ranch, but the puncher (Maya) and two unnamed loaders demanded that only Spanish be spoken. When Salas began his presentation in Spanish, the anti-union workers interrupted him.

Maya admitted that she became involved in a heated argument with Barajas and Jose Luis Arevado. Barajas told Maya that she was the owner, and she told Barajas he was the thief. Arevado told Maya that she had been abusing the crew before the union campaign, but now she treated them well. Maya apparently flew into a rage, and got up close to Arevado's face, loudly and angrily denying she had mistreated him.

Arevado testified that after the confrontation, he almost fainted in the fields, and had to be removed by ambulance. As noted above, Maya also became ill, apparently leading to her meeting with Montelongo, and an ALRB meeting, requested by the

Employer/Respondent, to discuss the friction between the opposing groups. As noted above, an ALRB agent told the workers that Maya was an employee, like them, and was entitled to express her opinion, although she should do so in a respectful manner. Maya gave examples of issues the organizers were able to discuss with workers during their access to her crew. At the same time, she admitted that she voiced her disagreement with them.

Several witnesses also testified that Karina Garcia loudly and frequently interrupted access takers. Lisbet Valdez testified that Noe Merino's crew became her permanent assignment during the election campaign. According to Valdez, every time she took access, Garcia, along with Osvaldo Ramirez and Rafael Jauregui, prevented her and the other representatives from disseminating any information at all. Garcia would scream insults at them, demanding they leave. Ramirez and Jauregui would also insult and interrupt them. Karina Garcia denied the conduct attributed to her. Garcia testified that the organizers sometimes stopped by the group she ate lunch with, and she sometimes asked them questions, but no more than anyone else. Garcia denied that Valdez ever complained about her conduct.

Garcia testified that she ate lunch with Ramirez and Jauregui. On two occasions they asked why they had to pay union dues, and were told this was to pay the representatives to defend them. One or both of them took umbrage at this, and told the organizers they were not ignorant, and could defend themselves. Ramirez testified that once his wife began working in Noe Merino's crew, he started having lunch with her. Ramirez denied that he sought out the organizers, but admitted that when they

approached his group, he asked a lot of questions. On one occasion, organizer Lupe Corona told Ramirez not to interrupt him.

Valdez testified that the one time she took access to Gregorio Vasquez's crew, the puncher, Regina Herrera, interrupted her, along with Rafael Jaurequi. According to Valdez, Herrera was "screaming and talking" to her, to tell the truth about union dues and to leave them alone. Jauregui and Herrera purportedly prevented Valdez from speaking with the workers at all. Fidel Vazquez Lopez (Vazquez) primarily testified concerning the interruption of access takers by Rafael Jauregui and Osvaldo Ramirez. Vazquez volunteered that puncher Herrera also interrupted the organizers, but was not asked to give any details. Herrera did not testify.

Lupe Corona testified that on one occasion, he took access to a weeding crew at the Moss Landing ranch. Brenda Martinez prevented him from speaking to the crew, screaming at him that they were just a bunch of thieves and liars, out to take their money. Martinez did not testify.

Lauro Barajas testified that when he and organizer Rene Salas took access to the Salinas Road ranch in September, Juan Carlos Ramirez attempted to physically block him from speaking with the workers, positioning himself between them. Ramirez told the workers they could bring the boss, and he would act as the interpreter. The boss would give them anything they asked for.

Oracio Ramirez and Constantino Vargas gave similar testimony concerning this incident, and claimed Carlos Ramirez "always" interrupted all 30 minutes of the access meetings he attended with their crew. Jose Luis Arevado testified that Juan Carlos

Ramirez, sometimes accompanied by irrigator Trino Merino, would not permit the organizers to speak with his crew members on five to ten occasions, by loudly interrupting them for the entire 30 minutes.

Barajas testified that on another occasion, he brought a Mixteco interpreter. Ramirez told the interpreter to speak with him. Barajas said he would speak with Ramirez, but Ramirez started screaming at him. When Barajas asked why he was screaming, Ramirez screamed at the workers not to be misled.

Juan Carlos Ramirez testified that he attended over ten access meetings at different ranches. He admitted that sometimes, he asked a lot of questions, but claimed that the organizers generally spoke with the workers for about 20 minutes, and then asked if there were questions. Ramirez testified that he repeatedly asked about the payment of dues, but the organizers refused to discuss this.

Ramirez admitted that he became involved in a disagreement with organizer Rene Salas, concerning whether employees would lose their Medi-Cal benefits if the Petitioner/Union's medical plan was implemented, and asked if it was 100% certain that the workers would receive all the benefits being promised. Ramirez told Salas they would have to negotiate everything, and would probably just take their dues money. Salas appeared intimidated by this, and Ramirez claimed he tried to assure him they were just having a discussion.

According to Ramirez, Barajas then got in his face and, in essence, challenged him to a fight. Ramirez told Barajas that he was too old to be engaging in such conduct, and to stop trying to intimidate him. Barajas told Ramirez the company had

sent him, and to leave. The two continued arguing, but no blows were struck. Ramirez testified that he was subsequently served with a charge, by another organizer. Ramirez did not deny stating that the workers should have a meeting with the boss, with him acting as the interpreter, and they would get everything they wanted.

Esperanza Maya Martinez (Maya) testified that Carlos Ramirez only joined her crew on one occasion, and asked a few questions. Maya testified that organizer Jesus Corona was rude to her, calling her a liar, and accusing her of being paid to attend the meetings. Maya complained about this at one of the ALRB meetings at Trafton ranch. A Board representative told the workers they should not interrupt the representatives.

Gonzolo Cruz denied that anyone interfered with the Mixteco-speaking representative at the meetings he attended. He testified that Juana Maya did speak with the representatives, but they also had the opportunity to speak with the other workers. Cruz testified that Carlos Ramirez only attended one access meeting with his crew.

Barajas testified that on another access visit, Rigoberto Lazaro, Jose Luis Zepeda and about eight drivers were screaming throughout the access period. Rigoberto Lazaro testified that he attended two access meetings. At one of these meetings, Lazaro heard Rene Salas discussing health benefits with a worker. Lazaro told them that if the health plan was implemented, they would lose their Medi-Cal benefits. Salas told Lazaro he was a liar, and to stop bothering them. Lazaro told Salas he should listen to him.

Lazaro testified that after the meeting, Salas and other organizers followed him, in two vehicles, to another ranch, where he was, by himself, preparing the soil for planting. When they arrived, an organizer asked him where he planning to eat lunch,

and Lazaro told him he had just eaten. The organizer told Lazaro they wanted to speak with him and, Lazaro, who was frightened, went into a portable toilet and locked the door until the organizers left.

Lazaro testified that he said nothing at the other access meeting he attended, until Salas spoke to him. On that occasion, Salas and two other organizers visited Martin Equiza's crew, and some workers asked what the union dues paid for. An organizer responded that the State took some of the money, and the rest went to them. According to Lazaro, the organizers wanted to physically separate those who supported them and those who did not, prompting some of the workers to protest that the organizers should not attempt to divide them.

Salas told Lazaro he was not a worker, and was being paid to be there. Some of the workers agreed, and an employee started photographing him. Others told the organizers Lazaro had been employed for a long time, and Lazaro told them he was not being paid.

Oracio Ramirez and Constantino Vargas testified that Jose Luis Zepeda, along with Carlos Ramirez, always interrupted the entire 30 minute access period when he was present. Fausto Juarez testified that Zepeda always interrupted the representatives when taking access to his crew. At the most, they were able to speak with the workers for five minutes. Osvaldo Nestor and Gloria Sanchez testified that Zepeda, along with Karina Garcia, engaged in the same conduct when organizers visited their crew. Felipe Adolfo Rivera testified that Zepeda engaged in the same conduct with his crew, and prevented a Mixteco-speaking organizer from talking to the workers.

Zepeda testified that he attended three or four access meetings, with two crews. At one meeting, Zepeda told the organizers the workers should not support the Petitioner/Union, because it was an injustice for them to charge dues. On another occasion, Jesus Corona approached Zepeda, and told him he was a foreman, and to leave. Zepeda told Corona he was there that day, because he was going to replace the puncher, who had an appointment. Corona told Zepeda to stop meddling. Zepeda denied ever attending access meetings with Juan Carlos Ramirez.

Maria Cruz Camacho and Osvaldo Nestor testified that Osvaldo Ramirez repeatedly prevented organizers from speaking with their crew for the entire 30 minute access period. According to Nestor, Ramirez would tell the organizers to leave and called them liars. Gloria Sanchez testified that Osvaldo Ramirez would appear every time the organizers took access to her crew, and would not permit them to speak with the workers. As noted above, Lisbet Valdez testified that when she took access to this crew, Ramirez, along with Karina Garcia and Rafael Jauregui, immediately approached and began abusing her. Fidel Vazquez testified that Jauregui, along with Osvaldo Ramirez, disrupted the access meetings with his crew on about three occasions. Jauregui did not testify.

Several of the Petitioner/Union's witnesses testified that Juan Carlos Ramirez, Jose Luis Zepeda, Rigoberto Lazaro, Osvaldo Ramirez and Rafael Jauregui had never eaten lunch with their crews prior to the access meetings, almost always arrived in company vehicles ten minutes (or so) before the meetings, spoke with the foremen and/or the punchers until the meetings began and then remained for ten minutes (or so)

after the meetings, again speaking with the foremen and/or punchers, before leaving in the company vehicles. Irrigators, drivers and the mechanics are not assigned to specific crews, and are permitted to eat lunch where they choose. They are also assigned company vehicles or tractors. As noted above, Osvaldo Ramirez testified he began taking his lunch with his wife, after she was assigned to a crew on the ranch he worked at. Fidel Vazquez testified that Rafael Jauregui did eat with his crew before the access meetings began.

The Employer/Respondent's witnesses denied that these individuals regularly showed up early or stayed afterward, and when they did so, it was to discuss work-related matters with the foremen. On questioning by the undersigned, Lauro Barajas testified that on one occasion, Zepeda and Lazaro did not arrive until the access period began, and that on another occasion Juan Carlos Ramirez and Zepeda only briefly spoke with the foreman before leaving, after the access meeting. Lisbet Valdez testified that when she arrived to take access, Osvaldo Ramirez and Rafael Jauregui were in a pickup truck, not with the foreman. Rene Salas testified that Rigoberto Lazaro and Juan Carlos Ramirez did not arrive at an access meeting until after it began.

The undersigned considers the testimony attempting to link the foremen with the activities of these employees to be grossly exaggerated. The Employer/Respondent's witnesses uniformly denied that they instructed employees to disrupt access, or permitted them to use working time or company vehicles to accomplish this.

The ability of an employer to curtail disruptive activities during access meetings is limited. Discipline of such employees may well lead to charges of unlawful coercion

and discrimination. The charge only alleges that Juana and Esperanza Maya interfered with the access meetings. There is minimal evidence that the alleged conduct of the others alleged to have engaged in this conduct was reported to the Employer/Respondent. In this regard, the disputed complaints to foremen were isolated, and even if they did take place, it does not appear that they had the authority to reprimand workers for their conduct at the access meetings. It is also undisputed that the Employer/Respondent requested that the ALRB conduct a meeting of the Trafton workers, to resolve the problems arising during access meetings at that ranch. Thus, the evidence fails to establish that it ratified the conduct of these workers.

The undersigned believes that the testimony concerning the extent of the disruption is also exaggerated. It is hard to imagine how anyone could be physically capable of screaming nonstop for 30 minutes. It is also clear that the Petitioner/Union's witnesses did not tell the full story of what transpired during the meetings. Nevertheless, the evidence does preponderantly establish that Juana Maya, Karina Garcia, Juan Carlos Ramirez and Jose Luis Zepeda significantly disrupted a number of access meetings.

An election may be set aside where it is shown that the unlawful conduct of a party prevented employees from receiving information. *Comite 83, Sindicato de Trabajadores Campesinos Libres* (1998) 14 ALRB No. 13. Even where a party disrupts an organizing campaign, the Board will only overturn the election where the disruption makes employee free choice "improbable." *Sam Andrews' Sons* (1978) 4

ALRB No. 59. As noted above, an election will only be set aside if the conduct of third parties, including employees, renders free choice impossible.

It is doubtful that the conduct of these employees, in the context of the entire election campaign made free choice improbable, and it certainly did not render it impossible. The Petitioner/Union conducted numerous access meetings, called and met with workers at their homes, and conducted meetings after work and away from the fields. Therefore, it will be recommended that these objections be dismissed.

With respect to the related allegations in the complaint, the evidence shows that Respondent, even if it was aware that the Union wanted to take access on the first day of the strike, a contention not preponderantly established, was justified in sending the workers home early. The evidence fails to establish that Respondent was responsible for the conduct of the employees who disrupted the access meetings. Accordingly, these complaint allegations will be dismissed.

OBJECTION 14

OBJECTION 14

THE EMPLOYER UNLAWFULLY INTERROGATED A KEY UNION SUPPORTER, THREATENED THAT IF HE CONTINUED TO ORGANIZE HE WAS GOING TO "BREAK" THE COMPANY, GRANTED HIM A BENEFIT, PROMISED A BENEFIT FOR HIS FAMILY, AND GRANTED A BENEFIT FOR HIS SON.

Alfredo Lopez was one of Petitioner's strong supporters, playing a leadership role in the strike. Lopez was unable to testify at the hearing, because he was in

Mexico.[30] His sons, Martin Lopez and Gerardo Lopez, testified that his father drove a tractor prior to the strike.

Gerardo Lopez testified that his father had been waiting to "get" a Caterpillar. Lopez claimed Armando Ramirez told his father, on the day of the strike, that they were going to "give" a Caterpillar to him. According to Lopez, many other strikers witnessed this, but none of the other striking employees or organizers corroborated his testimony. Gerardo Lopez is one of the witnesses who gave false testimony concerning the Montelongo meetings. At some unknown point after the strike, Alfredo Lopez began driving a Caterpillar.

Armando Ramirez testified that Alfredo Lopez had asked to drive a Caterpillar in October 2011. Ramirez told him that one of the drivers was going on a leave, and might not return. If he did not, Ramirez would probably give the position to Lopez. Ramirez testified he told Lopez, in early July 2012, that he would be given the new position, once a Caterpillar became available, because the other driver had not returned. According to Ramirez, a Caterpillar did not become available for Lopez until September, before the election. At that time, he assigned Lopez to operate the vehicle, which he did until he left for Mexico, in October. Ramirez's testimony concerning these events is credited.

Gerardo Lopez, while working as a harvester, suffered a back injury. After missing a day or two of work, Lopez was still unable to work as a harvester, but could

[30] Petitioner requested that Lopez be permitted to testify by videoconferencing. The Employer opposed the request, and the undersigned denied it. Petitioner sought permission to file an interim appeal on the ruling, which was denied by the Board.

perform work that did not require bending. Ramirez offered Lopez the choice of watching the workers' vehicles, or driving a tractor. Lopez chose the tractor work, and did this for about two weeks, at which time he said he wanted to earn more money, and was ready to return to harvesting. Ramirez granted his request to return to the harvesting crew.

Armando Ramirez testified that there were about 20 work-related injuries during the harvest. About four of these involved back injuries, and Lopez was the only one offered work as a tractor driver. There is no other information in the record concerning the circumstances surrounding the other back-related injuries.

The assignment of Alfredo Lopez to Caterpillar work, having been planned prior to the union campaign, and implemented as the equipment became available, did not constitute an objectionable granting of a benefit. The accommodation Ramirez made for Gerardo's Lopez's injury was also not objectionable, even assuming driving the tractor constituted an improved working condition, which is questionable, since Lopez earned more money as a harvester. Therefore this objection will be dismissed.

OBJECTION 15

OBJECTION 15

ON THE DAY OF THE ELECTION, SUPERVISOR RIGOBERTO LAZARO CALLED A KEY UNION SUPPORTER, INTERROGATED HIM ABOUT WHO HE WAS GOING TO VOTE FOR, AND TOLD HIM THAT IF THE UNION WON THE ELECTION, HE WOULD HAVE TO REDUCE THE WORKER'S SALARY.

Petitioner contends that Rigoberto Lazaro engaged in this conduct when he spoke with Alfredo Lopez on the day of the election. As noted above, Lopez did not

testify at the hearing. Petitioner moved a declaration by Lopez into evidence, which was rejected as hearsay. Petitioner also presented hearsay evidence from Martin Lopez, that his father called the family, on the day of the election, and said that Rigoberto Lazaro had told him that if Petitioner won the election, everyone's salary would be reduced. On the Employer's motion, said testimony was stricken from the record as hearsay.

As discussed above, Lazaro was not a supervisor at the time he made the statements attributed to him in this objection. He testified that on the day of the election, he and Alfredo Lopez were driving Caterpillars to plow the soil, in preparation for planting. When Lazaro was ready to vote, he called Lopez, and invited Lopez to come with him. Lopez told Lazaro he was not sure if he was going to vote, so Lazaro left by himself. Lazaro denied saying anything else to Lopez.

Petitioner has failed to present any admissible evidence in support of this objection. It will be recommended that it be dismissed.

OBJECTION 16 AND CASE NO. 2012-CE-SAL

OBJECTION 16

THE COMPANY INTERROGATED A UNION SUPPORTER IN THE PRESENCE OF HIS COWORKERS.

Gustavo Corona Garcia (Corona) testified that on August 1, he spoke with three of his co-workers about the benefits of unionization. He told them that under the Petitioner/Union's contract where he used to work, the employees received fringe benefits, such as medical insurance and paid holidays. Corona also showed the workers

his union card. The workers told Corona that if he did not like working without benefits, he should leave.

Corona testified that on August 3, Juan Ibarra told him Armando Ramirez wanted to speak with him. He met with Ibarra and Ramirez some 300 feet away from the crew, but the workers would have been able to see that the meeting was taking place. According to Corona, Ramirez asked him if he was a union supporter. Corona replied that he was not, but had previously been a member, because the workers at a prior employer had been represented by the Petitioner/Union. Ramirez purportedly told him that was fine, and he would have work all year. Corona testified "that was all" that was said during the meeting. Corona returned to work, and asked foreman, Noe Merino, why he had told Ramirez about his union card. Merino apologized, telling Corona he thought he was the one who had brought the Petitioner/Union in.

On cross examination, Corona was asked if he had been at the ranch on August 2, his day off, and Corona testified that he had. When asked why he had gone to the ranch, Corona testified he went to bring a hamburger to a co-worker. On further examination, Corona admitted he had gone to the ranch with a friend, who wanted to photograph the workers. Corona then admitted that Noe Merino told him they could not photograph the workers, and that Ramirez repeated this to him when they met the following day. Corona also admitted he asked Ramirez if he could become an irrigator after the harvest, and Ramirez said he might be given such work.

Noe Merino testified that three days before the election, he observed Corona arrive at the ranch with someone he did not know, and believed they were going to

photograph him and/or the other workers. Merino told Corona they could not take photographs, and informed Juan Ibarra of the incident. Ibarra and Armando Ramirez testified that Ibarra informed Ramirez of the incident, and Ramirez told Ibarra he wanted to speak with Corona, and to meet him at the ranch on the following day.

Ibarra and Ramirez testified that the following morning, they met, and Ibarra summoned Gustavo Corona to meet with them. Ramirez told Corona that he was doing a great job, but he had to have permission to visit on his days off or take photographs. Corona said he understood, and there was no problem.

Ramirez considered the meeting over, and began walking away. Corona asked if he could speak with him, and Ramirez said that was okay. Corona told Ramirez he knew how to set irrigation sprinklers, and asked if Ramirez would give him that work. Ramirez told Corona it would be at least a month before such work would be available, and they could discuss it then.

Ramirez asked Corona where he had previously set sprinklers, and Corona mentioned two employers. Corona told Ramirez that the workers at one of these companies were represented by a union, and offered to show Ramirez his card. Ramirez told him this was not necessary, and the conversation ended.

Noe Merino testified he did not recall any conversation with Gustavo Corona about informing Ramirez that he had a union card, and Juan Ibarra, on cross examination by General Counsel, denied Merino said anything to him about Corona talking up the Petitioner/Union, or showing workers a union card. Ibarra and Ramirez denied that Ramirez asked Corona if he supported the Petitioner/Union.

Ramirez's and Ibarra's accounts of these incidents and their denial that Ramirez questioned Corona concerning his union activities, or promised him year-round work are credited. As noted above, Ramirez was, on most issues, a credible witness.[31] Ibarra was at least somewhat credible as a witness, given his admissions on the issue of the flooded areas. In addition, Ibarra's denial that Merino informed him of Corona's union activities, assuming Merino was even aware of this, is more likely to be credible, because it came on cross examination. The undersigned considers Corona's testimony to be deceptive, in that he initially only claimed he went to the ranch to bring the co-worker a hamburger, and made no reference to Ramirez telling him not to take photographs without permission, or that he requested to work as an irrigator.

Inasmuch as the credible evidence fails to establish that Ramirez engaged in the conduct attributed to him, it will be recommended that this objection, and the related complaint allegations, be dismissed.

OBJECTION 17

OBJECTION 17

IN THE PRESENCE OF OTHER WORKERS, SUPERVISOR NOE MERINO PROMISED A WORKER WITH WINTER EMPLOYMENT IF THE WORKER RENOUNCED HIS SUPPORT FOR THE UFW.

Maria Cruz Camacho testified that Gerardo Nestor was a harvester who worked with her at the Airport ranch. About two weeks before the election, she observed the foreman, Noe Merino, tell Nestor that if he voted against Petitioner, he would tell Juan

[31] General Counsel and the Petitioner/Union contend that Ramirez was obviously lying about the purpose of the meeting, since he would not have been involved in such a minor incident. At the same time, their own witness admitted, when pressed, that Ramirez did tell him he needed to obtain permission to photograph workers, and Ramirez testified he had already planned to be at the ranch that day, for other reasons.

Ibarra to assign him additional work in new sections. During the lunch break, Nestor went to his vehicle, removed Petitioner's flag from the top of his vehicle, and threw it on the ground. Employees opposed to Petitioner cheered when he did this.

Osvaldo Nestor, Gerardo Nestor's son, testified that about two weeks prior to the election, he observed Noe Merino speaking with his father, but did not hear what was said. After this, his father threw the flag on the ground, and the anti-union workers cheered. Osvaldo Nestor picked up the flag, and put it back on the vehicle. His father threw the flag down again, prompting further cheers from some of the employees. Gerardo Nestor did not testify at the hearing.

Noe Merino denied promising any additional work to Nestor. The undersigned has reason to doubt the credibility of Maria Cruz Camacho, based on her testimony concerning the Montelongo meetings. In addition, although Cruz testified that she understands Spanish, her native language is Mixteco. Furthermore, it is unlikely that Merino would have offered Gerardo Nestor additional work if he voted against Petitioner, since he would not know how Nestor voted, and it is highly unlikely that one vote would make any difference in such a large workforce.

Nevertheless, there is no reason to discredit Osvaldo Nestor, and the vivid testimony concerning throwing the flag on the ground, not denied by Merino, is certainly credible. Given the timing of this action, shortly after the conversation with Merino, it appears that Merino said something to Gerardo Nestor that caused him to visibly abandon his support for Petitioner. There is no evidence, however, that anyone other than Cruz overheard the conversation between Merino and Gerardo Nestor, or

that anyone other than Cruz and Osvaldo Nestor witnessed it. Therefore, the evidence fails to show that the other crew members who observed Gerardo Nestor removing the flag from his vehicle would have known the action was caused by an objectionable promise of benefits, assuming that is what took place.

The undersigned believes the evidence showing that Merino *might* have made an objectionable promise of benefits, to the knowledge of three workers, is insufficient to conclude that his conduct reasonably affected the outcome of the election. Therefore, this objection will be dismissed.

CASE NO. 2012-CE-066-SAL

The charge and complaint allege that Respondent violated section 1153(a) of the Act by coercing employees to sign a petition denying that Respondent engaged in the conduct alleged in the Union's objections. An article appeared in the *Santa Cruz Sentinel*, setting forth some of the allegations. The article was posted on the internet, on September 27.

Juana Maya testified that she found out about the article from her son, and then spoke with a loader, who suggested they draft and circulate a petition denying the allegations in the article. Maya agreed, but was not involved in drafting the petition. There is no evidence that anyone above the level of puncher was involved in creating the petition.

The evidence shows that a number of workers, including several punchers, were involved in circulating the petition to most, if not all of the crews, on September 28.

Fifteen copies of the petition were circulated, and a total of 239 workers signed them. Including challenged voters, 360 cast ballots in the election.

The only evidence that anyone above the level of puncher solicited workers to sign a petition was the testimony of Oracio Ramirez. On the morning of September 28, he allegedly observed Juan Ibarra drive up to where his crew was working, and met with puncher, Maria Cruz, for 15 minutes. The foreman, Juan Garcia, assumed Cruz's punching duties while she met with Ibarra. During this meeting, Ramirez observed Ibarra and Cruz exchanging some papers. Ramirez further testified that, from a distance, he observed foreman Martin Equiza hand what he believes was one of the petitions to a worker, who signed the paper. Ramirez testified that the following day, he observed Martin Montelongo meet with Juan Garcia and Maria Cruz, for about 15 minutes.

Ramirez further testified that on September 28, he observed foreman Martin Equiza give a paper to a worker in the parking area, and the worker signed it. Ramirez contended this must have been the petition, although he was too far away to positively identify the paper as such. Equiza did not testify.

Constantino Vargas testified that Rigoberto Lazaro circulated the petition in his crew. Vargas further testified that when Lazaro asked him to sign, he said he wanted to investigate it further. Lazaro allegedly told him it was not necessary for him to sign, because he already knew who was for and against the Union. Lazaro denied making that statement. As discussed above, Lazaro was not a supervisor or agent of Respondent when he circulated the petition.

Gloria Sanchez testified that Osvaldo Ramirez and another irrigator brought a petition to foreman Noe Merino, who then handed it to puncher Karina Garcia, about ten minutes before lunch. Osvaldo Nestor testified that he observed Ramirez bring the petition to the crew about one-half hour before lunch, and hand it to Garcia. Nestor did not contend that Merino handled the petition. Sanchez testified that Garcia told the crew they had to sign the petition, to help Armando Ramirez. Sanchez, in fact, did not sign the petition. Nestor testified that Garcia asked the crew to please sign the paper, as a favor to the company. Nestor testified that after the lunch break, Garcia put the petition in Respondent's truck, driven by Merino. Nestor did not contend Merino was aware of this.

Garcia testified that it was Rafael Jauregui who gave her a copy of the petition, before work. She showed the petition to her crew during lunch, and another worker read it aloud. She asked the workers to sign, and told them Armando Ramirez and Respondent did not know about it. Garcia testified she told the workers they were not obligated to sign, but it was to show that the election was fair. Garcia told the crew they were going to give the petitions to the State, to counter allegations that the election was unfair. Garcia put the signed petition in her daypack, and gave it to Jauregui, after work. Garcia, although herself a suspect witness, is credited over the conflicting accounts of Gloria Sanchez and Osvaldo Nestor, both of whom gave false testimony concerning the Montelongo meetings.

Jose Luis Arevado testified that on the morning the petition was circulated, he saw Juan Ibarra give some sheets of paper to foreman Simon Lazaro, who then gave

them to Juana Maya. Maya asked the crew members to sign during the lunch period, stating that the allegations defamed Armando Ramirez. When Maya asked Arevado to sign, he refused. Maya allegedly told him he had to sign, because everyone else was signing. Arevado did not sign the petition. According to Arevado, Maya discussed the petition with a box stacker, after lunch. He did not contend that they stopped working while the discussion took place, or that Simon Lazaro observed this.

Juana Maya vehemently denied that she, in any way, involved Lazaro in the petition. She testified she received it from one of Respondent's drivers, at 11:30 a.m., and put it in her vest until the lunch hour began. She told the workers about the newspaper article, and said if they thought it was untrue, to sign the petition, but if they thought the allegations were true, not to sign. Two workers, including Arevado, did not sign. Maya told the workers they were going to give the petitions to the ALRB's attorney. Maya gave the signed petition to her sister, Esperanza Maya Martinez (Maya), after work.

Pedro De Los Santos testified that a driver arrived at his crew in the company truck he drives at work, during the lunch break. De Los Santos initially testified that the driver "said that everybody needed to sign this paper, because the Union had filed a lawsuit." General Counsel then asked what tone of voice the loader used, and De Los Santos replied, "It was a higher tone." The next question: "Was he yelling?" The answer: "Yes."

The driver handed the petition to puncher Maria Rosario Ortiz (Rosario), who purportedly told the workers that they "needed" to sign, in order to defend Armando

Ramirez in the lawsuit. De Los Santos testified he signed the petition, because there was nothing else he could do. If he did not, "they" could fire him. De Los Santos also signed the petition for another worker, who did not know how to write his name. When she was done collecting the signatures, Rosario placed the petition in the truck used by the foreman. There is no evidence that the foreman, who was not present while the petition was being circulated, was aware of this.

Rosario testified she was unaware of the petition until the irrigator, Rafael Jauregui brought it to the crew during the lunch break. Jauregui read the petition, and then asked her to circulate it, which she did. Rosario read the petition to a group of workers who were not present when Jauregui read it. Rosario denied telling anyone that he or she had to sign the petition, and testified some workers did not sign it. Rosario placed the petition in the foreman's truck, so it would not be damaged, until weeder Brenda Martinez picked it up after work. The undersigned found Rosario to be a more credible witness than De Los Santos, and her version of the events is credited.

Elvia Garcia Calixto (Garcia) testified that puncher Maria Guadalupe Maya told her to sign the petition after work on September 28. Maya purportedly took the petition out of the truck driven by the crew's foreman. Granting Garcia the most coherent interpretation of her testimony, which was far less than coherent, Maya told her the Union had lost the election, and was contending the "boss" had paid the workers to win. Garcia claimed Maya further told her that the Union had placed her name on the internet, and the only way to get it off was to sign the petition. When Garcia declined to sign, Maya allegedly forced her to sit in a truck. Maya then told Garcia that if she

did not sign, her name would remain on the internet, and if she ever got stopped by the police, she would be taken to jail. Garcia then signed the petition, claiming Maya only allowed her to read the first line.

Guadalupe Maya testified she was only able to solicit signatures after work, and only four signed the petition. She found out about the petition from Esperanza Maya during lunch, and did not deny that she retrieved the petition from the foreman's truck. There is no evidence that the foreman was aware of the petition, or its location.

Maya told Garcia that false allegations had been made against Respondent in the newspaper and on the internet, and the purpose of the petition was to say the allegations were lies. Garcia agreed that the allegations were false, and signed. Maya denied making any of the coercive statements attributed to her. Maya's testimony is credited over the jumbled, incredible accusations made by Garcia. In any event, Maya was not acting as a supervisor or agent of Respondent.

It is, however, undisputed that puncher Marta Cortez Barriga (Cortez) jokingly told a Mixteco-speaking couple, who did not understand the explanation being given by Rigoberto Lazaro, that the petition was a raffle. When the workers asked if it really was a raffle, Cortez said no, and laughed.

It is also undisputed that puncher, Gabriela Vasquez, solicited workers to sign the petition on working time, while the harvesters were waiting to move to another block. The foreman, Martin Equiza, who was in a position to observe the solicitation, did not stop Vasquez from engaging in this activity. According to Fausto Ramos, Vasquez told the workers Respondent had sent the petition for them to sign, yelled at

them that they had to sign, and said they would know that those who did not sign were the ones suing Armando Ramirez. The Union contends this demonstrates that Respondent instigated the petition, that its real purpose was to find out who supported it and that employees were coerced into signing.

Gabriela Vasquez did not testify, but her mother, Gilberta, did. Gilberta Vasquez testified that her daughter asked the workers to sign, but did not yell at them, tell them they had to sign, or that those who did not were the ones suing Ramirez. The undersigned found Ramos's testimony to be exaggerated and distorted. In the context of the other evidence, it fails to establish anything more than the circulation of the petition during working time, albeit when the workers were not actually harvesting. In any event, Gabriela Vasquez was not acting as Respondent's agent when she made the solicitation.[32]

The originators of the petition decided to write, sign and circulate it, so that they could turn it in to the ALRB as evidence in the objections case. They did so, because Board representatives had told them, at meetings conducted at the ranches, they were there to help them, and to contact the ALRB if they had any questions or problems. On October 1, Gonzolo Cruz, Esperanza Maya and Victor Denyz Garcia went to the ALRB Salinas office, and submitted the 15 petitions. Rather than logging them in as evidence in the objections case, the petitions were logged in as evidence in the charge herein, also filed on October 1. Board agents proceeded to interrogate Cruz,

[32] In *Anderson Farms Company* (1977) 3 ALRB No. 67, cited by the Union, a petition denying the commission of unfair labor practices was directly circulated by the employer's labor relations consultant.

Maya and Garcia, collectively and individually, "for a good four hours," as part of their investigation of the charge.[33]

The evidence fails to establish that workers would have reasonably been coerced into signing the petition. It was conceived and created by nonsupervisory, non-agent workers, and all, or virtually all of the workers were solicited to sign by fellow employees. At the most, one worker was asked to sign by a foreman, and supervisory personnel may have transported the petitions to a few of the crews.

The evidence shows that the workers endeavored to circulate the petition during non-working time. With the exception of the solicitation by Gabriela Vasquez, there is no evidence that any supervisor was aware of working time solicitations, or that non-supervisors transported or stored the petitions in Respondent's vehicles. With respect to that solicitation, the Board has held that by permitting workers to circulate petitions during working time, an employer does not engage in objectionable conduct, no less does it commit an unfair labor practice. *TNH Farms, Inc.* (1984) 10 ALRB No. 37; *Nash De Camp Company* (1999) 25 ALRB No. 7. In any event, that incident, given the scope of Respondent's operations, was *de minimus.*

[33] The Union and General Counsel, in their briefs, accuse Respondent, by allegedly circulating the petition, of interrogation and witness tampering, In support, the Union cites *J.P. Stevens & Co., Inc.* (1979) 244 NLRB 407 [102 LRRM 1039]. In that case, the employer's plant managers met with small groups of workers and, in effect, advised them on how to obtain a finding, at an upcoming NLRB hearing, that their union authorization cards were invalid. The Union also contends that Respondent violated the NLRB's rules regarding employee interviews in preparation for trial, as set forth in *Johnnie's Poultry Co., et al.* (1964) 146 NLRB 770 [55 LRRM 1403]. The evidence fails to show that the petition constituted an "interrogation," or that the one signature possibly obtained by a foreman, violated those standards. Finally, the Union cites *Master Slack Corporation* (1984) 271 NLRB 78 [116 LRRM 1324], contending that the petition was coercive in the context of Respondent's "numerous hallmark unfair labor practices." Even assuming that case, which pertained to a withdrawal of recognition based on an employee petition, applied herein, the evidence fails to show that Respondent engaged in such egregious conduct.

The evidence concerning the alleged coercive tactics used by those circulating the petitions was, for the most part, exaggerated or false. In any event, said conduct, to the extent it did occur, is not attributable to Respondent. Based on the foregoing, these allegations will be dismissed.

RECOMMENDED ORDER

The objections are dismissed in their entirety, and a certification of results shall issue.

Petitioner's request for certification pursuant to section 1156.3(f) of the Act is denied.

The Amended Complaint is dismissed.

Dated: March 1, 2013

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Douglas Gallop
Administrative Law Judge, ALRB