STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ALBERT C. HANSEN, dba SANSEN FARMS, Respondent,	)	Case, No. 76-CE-3-M
	)	4 ALRB No. 41
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

On October 6, 1977, Administrative Law Officer (ALO) Michael H. Weiss issued the attached Decision in this case, in which he granted, in part, General Counsel's motion for summary judgment.[1/] Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in response to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to

[1/]The ALO dismissed an allegation in the complaint that Respondent violated Labor Code Section 1154.6 by hiring persons for the primary purpose of voting in an election. No exceptions thereto having been filed by either the General Counsel or the Charging Party, the Board, in accordance with Section 20282(d) of the ALRB Regulations, adopts the ALO's dismissal of this allegation.

the extent consistent herewith.

The complaint alleges that Respondent violated Section 1153(a) and (b) of the Act by making promises of benefits and threats to employees in order to induce them to vote against the union. [2/]

In ruling on the General Counsel's motion for summary judgment, the ALO cited as controlling NLRB Rules and Regulations, Section 102.67(f), prohibiting relitigation "in any related subsequent unfair labor practice proceedings, of any issue which was, or could have been raised in the representation proceeding." The ALO invoked the regulation barring relitigation after noting that the courts have applied the regulation in various contexts, including refusal-to-bargain cases, jurisdictional disputes, and questions concerning supervisory status.[3/]

Aside from the cases that apply the prohibition against relitigation in NLRA Section 10(k) jurisdictional disputes, Local 3, ISEW (Manifold Contracting Corp.), 206 NLRB 423, 84 LRRM 1371 (1973); Bricklayers Onion v. NLRB, 475 F.2d 1316, 82 LRRM 2746 (D.C. Cir., 1973), a majority of the courts, as the ALO observes, have limited application of the prohibition to refusal-to-bargain cases. Amalgamatad Clothing Workers (Sagamore Shirt Co.) v. NLRB, 365.f.2d 898,

[2/] The allegations refer to the same events that were investigated in a prior representation proceeding, Hansen Farms, 2 ALRB No. 61 (1976), and served as the basis for the Board's setting the election aside.

[3/] The ALO cites Security Guard Service, Inc., 384 F.2d 143, 66 LRRM 2247 C5th Cir., 1967) for the proposition that the regulation precludes relitigation of supervisory status. We note, however, that in that case, which involved organizational rights, the court did permit relitigation of the supervisory issue.

62 LRRM 2431 (C.A.D.C. 1966); Heights Funeral Home, Inc. v. KLRB, 385 F.2d 879, 67 LRRM 2247 (5th Cir., 1967). However, the case before us is not a refusal-to-bargain case. Rather, the same acts and conduct which formed the basis for the earlier objections to the election have bean alleged herein as constituting unfair labor practices. Resolution of the issues now pending requires the application of different legal, procedural, and evidentiary standards. Due process requires that Respondent be entitled to present evidence on its behalf.

Evidence taken at the representation case hearing may of course, subject to the provisions of the California Evidence Code, be incorporated into the record herein. Absent new or additional evidence, the ALO may base findings upon evidence taken at the prior hearing and/or on the Board's findings in Hansen Farms, 2 ALRB No. 61 (1976). Teamsters Onion Local 865, 3 ALRB No. 60 (1977).

ORDER

It is hereby ordered that the record in this proceeding be reopened and that a further hearing be held before Administrative Law Officer Michael Weiss to take testimony and receive evidence from all of the parties consistent with our determination herein.

IT IS A1SO ORDERED that this proceeding be remanded to the Salinas Regional Director for the purpose of arranging such further hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that, after such further hearing is closed, the Administrative Law Officer shall prepare a decision

containing findings of facts upon the evidence received pursuant to this Order, and such resolutions of credibility, conclusions of law and recommendations as he may deem appropriate; and that, following the service of such decision on the parties, the provision of Section 20282 of the Board's Rules and Regulations, shall be applicable.

DATED: June 23, 1978

ROBERT B. BUTCHINSON, Member

RONALD L. RUIZ, Member HERBERT

A. PERRY, Member

CASE SUMMARY

Albert C. Hansen, dba Hansen Farms (UFW)	4 ALRB No. 41 Case No. 76-CE-3-M

ALO DECISION

The complaint alleged that Respondent violated: (1) Section 1153 (a) and (b) of the Act by making promises of benefits and threats of reprisals to employees in order to induce them to vote against the union; and (2) Section 1154.6 of the Act by hiring persons for the primary purpose of voting in an election. [These same events were investigated in a prior representation proceeding. Hansen Farms, 2 ALRB No. 61 (1976)].

The ALO granted, in part, General Counsel's motion for summary judgment, citing NLRB Rules and Regulations, Section 102.67(f), and NLRB case law precedent which prohibits relitigation, in a subsequent unfair labor practice proceeding, of issues which were, or could have been raised in a prior representation proceeding.

The ALO dismissed the charge of hiring persons for the primary purpose of voting in an election.

BOARD DECISION

The Board reversed the ALO's ruling on the General Counsel's motion for summary judgment, noting that the NLRB rule against relitigation of representation matters has generally been limited to refusal-to-bargain cases.

The Board adopted the ALO's dismissal of the Section 1154.6 charges as no exceptions thereto were filed by any party.

REMEDIAL ORDER

The Board remanded the case for further hearing in which evidence taken from the prior hearing and/or the Board's findings in Hansen Farms, supra, may be incorporated into the record.

This summary is furnished for information only and is not an official statement of the case or of the Board.

STATE OF CALIFORNIA
THE AGRICULTURAL LABOR RELATIONS BOARD

IN THE MATTER OF: ALBERT C. KANSEN dba HANSEN FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	CASE NO. 76-CE-3-M

APPEARANCES:

Ruth M. Friedman
21 West Laurel Drive
Salinas, California
for General Counsel

Arnold Myers
Abramson, Church & Stave 3rd Floor,
Crocker Bank Building Salinas,
California for Respondent

Allyce Kimmerling
P.O. Box 1049
Salinas, California
for Intervenor and Charging Party United Farm Workers of America, AFL-CIO.

DECISION

I. Statement of the Case

MICHAEL H. WEISS, Administrative Law Officer:

This proceeding arises from unfair labor practices charged by the United Farm Workers of America, AFL-CIO (UFW)

against Albert C. Hansen, dba Hansen Farms (Respondent), arising out of the two elections held in September, 1975. There have been three other proceedings involving respondent before the Agricultural Labor Relations Board (Board) which the parties have referred to in the course of this proceeding. For clarity, a brief chronology follows:

DATE	EVENT	CASE NO.
Sept. 10, 1975	Initial Election held at Hansen Farms	
Sept. 25, 1975	Run off election at Hansen Farms	
Oct. 1, 1975	UFW files Petition to Set Aside Election	75-RC-17-M
Nov. 24, 25; Dec. 8, 9, 1975	Investigative hearing on Objections to Election	75-RC-17-M
Dec. 22, 1976	ALRB issues decision setting aside election (2 ALRB No. 61)	75-RC-17-M
Nov. 13, 1975	Charge filed alleging violations of Labor Code Sec. 1153 (.a) & (.c) and 1140.4 (.a) [Regarding the alleged discriminatory discharge of Jose Garcia on Nov. 10, 1975)	75-CE-238-M
Dec. 17, 1975	Complaint issued (Garcia Case)	75-CE-238-M
Jan. 5, 6, 1976	Administrative Hearing held (Garcia Case)	
Feb. 8, 1977	Administrative Law Officer issues decision recommending dismissing complaint.	75-CE-238-M
May 24, 1977	ALRB issues decision adopting ALO's recommendation and dismisses complaint. (3 ALRB No. 43)	75-CE-228-M

DATE	EVENT	CASE NO.
Nov. 26, 1976	Charge filed alleging violations of Labor Code Sec. 1153 (a) & (c) (Regarding the alleged discriminatory discharge of Amador Casiamiro on September 4, 1976).	76-CE-40-M
Jan. 4, 1977	Complaint issued (Casiamiro Case)	76-CE-40-M
May 9, 10, 11, 12, 1977	Administrative Hearing held (Casiamiro Case)	76-CE-40-M
June 20, 1977	Administrative Law Officer issues decision recommending dismissing complaint. (Casiamiro Case)	76-CE-40-M
July 25, 1977	No Exceptions being filed, the Board issued its order adopting ALO's decision and dismisses complaint.	76-CE-40-M
Feb. 13, 1976	Charge filed alleging violations of Labor Code Sec 1153 (a), (b); 1154.6 (Same conduct alleged as improper in Election case also alleged as unfair labor practice in this proceeding.)	76-CE-3-M
June 15, 1977	Instant Complaint issued alleging Unfair Labor Practice acts occurred proceeding elections held in September of 1975 - Hearing set for August 9, 10, 11 & 12, 1977	76-CE-3-M
July 25, 1977	General Counsel files its Motion for Summary Judgment	76-CE-3-M
August 3, 1977	Respondent files its opposition to Motion for Summary Judgment	76-CE-3-M 1/

1/ The funding hiatus, between approximately mid-to mid-November, 1976, delayed the proceedings of at least 3 of these hearings and/or decisions, including the instant one.

On June 15, 1977 a complaint [2/] was filed and served by the Regional Office of the General Counsel in Salinas. The complaint alleged that the respondent engaged in 14 unfair labor practices between September 6-25, 1975 preceding either the initial or run-off elections at respondent's ranches.

Essentially, the allegations charge a pattern of conduct by the respondent and its agents in which promises of benefits were made to almost all of the workers in "captive audience" speeches immediately prior to the initial and run-off elections. The complaint alleges these acts did then and continue to interfere with, restrain and coerce agricultural employees in the exercise of the rights guaranteed in Section 1152 of the Act and thereby constituted and continues to be unfair labor practices within the meaning of Section 1153(a) of the Act.[3/] The complaint further alleges that some of the acts and promises by respondent and its agents dominated or interfered with the formation of a labor union and respondent thereby engaged in and is engaging in unfair labor practices within the meaning of Sections 1153(a) & (b) of the Act.

Finally, the complaint alleges that respondent and its agents wilfully arranged for persons to become employees for the primary purpose of voting in the election and thereby did

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[2/] An amended complaint was filed and served by the General Counsel on July 22, 1977. However, the amendments were to clarify by deleting names and dates in four of the charges in the original complaint and replacing other names or dates in their place. The amendments did not effect the substance of the charges.

[3/] The Act refers to the Agricultural Labor Relations Act. All statutory citations are to the Labor Code, unless otherwise indicated. All dates refer to 1975 unless otherwise specified.

engage in and is engaging in unfair labor practices within the meaning of Sections 1153 (a) and 1154.6 of the Act.

An evidentiary hearing was scheduled for August 9-12, 1977 in Salinas, California. However, on July 25, 1977, the General Counsel filed and served by mail a motion for summary judgment. The ground for the summary judgment motion is that no material issue remains to be determined, all such issues having been previously determined in the Board's decision in the representation case Hansen Farms, 2 ALRB No. 61 (1976), the transcript of the sworn testimony at the prior hearing or admitted, and there being no defense. On August 3, 1977 respondent filed and served its opposition to the motion for summary judgment. The grounds for the opposition were that (1) the summary judgment is procedurally inappropriate and defective under ALRB, California Code of Civil Procedure and NLRB precedent; and (2) that there are material issues of fact and law as reflected in the decision in Hansen Farms, 2 ALRB No. 61 and in the transcript of the sworn testimony at the prior hearing. The parties submitted the matter upon their briefs for determination at the hearing set for August 9

On September 10, 1975 a representative election was held at the Hansen Farms in which votes were cast as follows: "no union" - 224; UFW - 221; Western Conference of Teamsters (hereinafter "Teamsters") - 36; challenged ballots - 48; and void ballots - 2. Since no party received a majority of votes, a run-off election was held on September 25, 1975, the results of which were, "no union" - 300; UFW - 247; challenged ballots - 28; and void ballots - 5.

On October 1, 1975, the UFW filed a petition to set aside the run-off election. That petition alleged 30 instances of misconduct affecting the outcome of the election on the part of Hansen Farms, 13 of which are re-alleged in this proceeding as constituting unfair labor practices as well. After a four-day hearing during which testimony and other documentary evidence were taken, the Board refused to certify the results of the election. Hansen Farms 2ALRB No. 61, (Docket Mo. 75-RC-17-M), decided December 26, 1976. The Board's decision overturning the election is based upon a finding that "substantial evidence that misconduct which effected the results of the election occurred."[4/] Moreover, although "the testimony presented by the petitioner and the employees is in considerable conflict in many details, considering the entire record, a clear picture of the conduct and its effect upon the election emerges."[5/] The Board then found that the record reflects promises by the employer of benefits and higher wages if the workers voted "no union"[6/] In addition, the Board found, after reviewing the record as a whole, that two of Hansen's supervisors, Fidel Rodriguez and Francisco Palmerio, made threats of job loss if the union won the election.[7/]

The record herein consists of the Board's prior decision in the election challenge and the full transcript in 4 volumes of the election challenge proceeding. The General Counsel also

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[4/] 2 ALRB No. 61, p. 1.

[5/] 2 ALRB No. 61, p. 4.

[6/] 2 ALRB NO. 61, p. 6-7.

[7/] 2 ALRB No. 61, p. 8-9, 17.

submitted the unfair labor practice complaint with amendment, its Motion for Summary Judgment and supporting memorandum and exhibits and respondent's answer and opposition to summary judgment. Finally, the employer filed a motion to strike the entire transcript of the election hearing in this proceeding, or if denied, to strike those parts it deems inadmissible as set forth in its motion.

Upon the entire record, including reviewing the complete transcript of the prior election challenge proceeding, the briefs filed by the parties and utilizing applicable NLRB precedent, I propose granting this summary judgment.

However, the analysis of the appropriatness of granting summary judgment here limits the effective utilization of the usual format in unfair labor practice decisions. Accordingly, I shall first address myself to the reasons for utilizing the summary judgment procedure here, followed by a discussion of the facts, conclusions of law and reasons therefor and recommendations for an order.

II. Utilization of Summary Judgment Procedures Herein

A. Introduction

Preliminarily, two matters bear noting regarding employment of the summary judgment procedure here. First, several factors prevented the election challenge and unfair practice charges arising out of the same conduct herein from being consolidated in a joint proceeding as would be the usual practice and policy

in the ALRB.[8/] This was, in part, the result of the charged, and at times chaotic atmosphere surrounding the initial elections and charges growing out of them,[9/] compounded by the funding hiatus. Moreover, two intervening, unrelated, alleged discriminatory discharge complaints involving respondent were required to be given priority by the general counsel pursuant to Section 1160.7 of the Act.

Second, although the parties have labeled this a summary judgment motion, it is critical to this case to distinguish the procedure and purpose of summary judgment as utilized by the NLRB and as set forth in California Code of Civil Procedure Section 437c. In its moving papers, the general counsel refers to and relies on both NLRB and CCP Section 437c as precedent for utilizing summary judgment herein. However, as will be discussed in more detail hereinafter, it is the rationale underlying the NLRB's summary judgment procedure[10/] rather than that underlying CCP Section 437c [11/] which I find controlling here. Moreover, the proposed granting of the summary judgment here has been premised on my finding that the same conduct that, was previously fully litigated and resulted in the hearing officer and Board's finding of conduct adversely affecting the outcome of an

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[8/] See 8 Cal. Admin. Code Sections 20335 (c), 20370 (j), Teasmsters Union Local 865, 3 ALRB No. 60, p. 2, fn. 3. 97

[9/] 2 ALRB NO. 61, p. 17.

[10/]See NLRB's Rule Section 102.67(fl [29 c, F.R. Section 102. 67 (f)] prohibiting relitigation of issues which were or could have been litigated in representation proceedings.

[11/]Section 437c in pertinent part states that "Such [summary judgment] motion shall be granted if all the papers submitted show there is no triable issue as to any material fact."

election is the same conduct also claimed to be an unfair labor practice. The principal difference is, of course, that a separate legal standard and analysis is applicable to determine whether an unfair labor practice was also committed.

B. Summary Judgment is Appropriate Where, as Here, an Unfair Labor Practice Complaint la Based Upon Issues Already Determined in an Election Rearing, in the Absence of Newly Discovered or Previously Unavailable Evidence.

Both the moving papers of the general counsel and the opposing papers of respondent argued extensively regarding the availability of summary judgment motions before the ALRB. However, the intervening decision of the Board in Teamsters Local 865, 3 ALRB No. 60, decided July 28, 1977, considerably eases my task regarding that issue. The decision holds, in effect, that a summary judgment motion is available procedurally in appropriate circumstances by administrative law officers (ALO) in unfair labor practice hearings.[12/] Accordingly, the discussion turns then to whether appropriate circumstances are present here to warrant utilization of the summary judgment procedure.

In the Teamsters case, supra, respondent Teamsters did not present any evidence at either the representation hearing or subsequent unfair labor practice hearing contradicting the evidence proffered by the charging party and/or general counsel. Accordingly,

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[12/]The Board's decision in the Teamsters case did not, however, indicate whether it was relying upon rationale of NLRB summary judgment oases or CCP $437c precedents, nor what it considered appropriate circumstances in deciding that summary judgment procedures may be utilized before it.

the hearing officer and Board were able to make appropriate findings at both hearings from the record made, without conflict, at the representation proceeding. By contrast in this case, respondent presented conflicting testimony at the representation hearing that was ultimately resolved against it by both the hearing officer and the Board. Three possible options are available under these circumstances. First, respondent, as it claims, should be entitled to relitigate in its entirety here the evidence and testimony presented at the representation hearing because the record reflects that there were material issues of fact in dispute; second, respondent should be entirely foreclosed from relitigating the factual matters previously litigated at the representation hearing, since the factual disputes have been resolved by the hearing officer and the Board; or third, the evidence at the earlier hearing need not be reheard but could be incorporated into the second hearing subject to the consideration by the ALO of newly discovered or previously unavailable evidence. [13/]

The question of under what circumstances relitigation of facts or issues should be permitted has been the subject of NLRB precedent applicable here.[14/] NLRB Reg. 102.67 (f) has provided the basis for barring relitigation of issues decided in representation proceedings and raised in any related subsequent unfair labor

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[13/] This was basically the "administrative comity" procedure followed in Amalgamated Clothing Worker v. NLRB, 365 F.2d 879, 62 LRRM 2431, 2431, LDC dr., 1966), utilizing, however, a broader standard of "any additional evidence that the examiner finds material and helpful to a proper resolution to this issue."

[14/] See Labor Code Section 1148.

practice proceeding. [15/] Generally, in interpreting the regulation, a majority of the courts have limited the prohibition against relitigation to refusal to bargain unfair labor practice charges. Amalgamated Clothing Workers v. NLRB, 365 F.2d 879, 62 LRRM 2431 (DC Cir., 1976); Heights Funaral Home, Inc. v. NLRB, 385 F.2d 879, 67 LRRM 2247 (.5th Cir., 1967). However, the application of the regulation has been upheld in other contexts: NLRB v. Security Guard Serves, Inc., 384 F.2d 143, 150, 66 LRRM 2247, 2251 (5th Cir., 1967)(supervisory status not relitigable); Local 3, IBEW (Mansfield Contracting Corp.); 206 NLRB #84, 84 LRRM 1371 (1973) [Section 10 (k) jurisdictional dispute]. Brieklayers Union v. NLRB, 475 F.2d 1316, 82 LRRM 2746, 2749-50 (DC Cir., 1973)[Section 10(k) jurisdictional dispute]. Moreover, as the court in Amalgamated Clothing Workers conceded, trial examiners have ruled both ways--i.e., barring relitigation or permitting the prior determination to be given "persuasive relevance" only, with the NLRB affirming both set of examiner decisions. 62 LRRM at 2434, fns. 12, 13, 14.

Other principles of administrative practice under the NLRB are relevant here as well. The NLRB is not required to conduct a de novo hearing in every unfair labor practice case. Pittsburgh Plate Glass Co. V. NLRB, 313 U.S. 146, 161, 8 LRRM 425 (.1941), NLRB v. Union Bros., Inc., 403 F.2d 883, 69 LRRM 2650 (4th Cir.,

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[15/] 29 C.F.R. 102.67(f) in pertinent part states: "Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

1968). However, in the absence of a de novo hearing, the NLRB must thoroughly review the record and make its own decision. Papal-Cola Buffalo Bottling Corp. v. NLRB, 409 F.2d 676, 681, 70 LRRM 3185 C2d Cir., 1969). Finally, the NLRB is required, when granting a motion for summary judgment, to explain why the facts found at the representation hearing sustain the complaint of an unfair labor practice. NLRB v. Clement-Blythe Companies, 415 F.2d 78, 72 LRRM 2138, 2140 (4th Cir., 1969).

Nevertheless, respondent contends it is entitled to a separate, de novo hearing regarding the unfair labor practice charges here because: CD the representation hearing was conducted pursuant to Section 20370(c) of the ALRB's regulations under less stringent evidentiary standards than permissible in unfair labor practice hearings pursuant to Section 20272 of the regulations; (21 the facts as litigated in the representation hearing were in considerable dispute; and (3) the legal issue in the representation hearing is different than the one in the unfair labor practice case.

Each of these contentions of the respondent can be succinctly responded to. As indicated above, due process does not compel separate, de novo hearings in each unfair labor practice case. Pittaburgh Plata Glass Co. v. NLRB, supra. Indeed, due process standards have been complied with if the respondent has had an opportunity (1) to be heard; (2) to call and cross-examine witnesses who provide evidence against respondent; and (3) to present pertinent evidence and testimony in its own behalf. NLRB v. Bata

Shoe Co., 377 F.2d 821, 65 LRRM 2318, 2321-22 (4th Cir., 1967), cart den. 389 U.S. 917. Thus, courts have ruled that a respondent is not necessarily entitled to a separate hearing where it had previous opportunity to litigate which comports with due process. NLRB V. Union Bros., Inc., 403 F.2d 883, 69 LRRM 2650, 2652 (4th Cir., 1968). In addition, respondent's objections to the adverse impact of the "lesser" standard of admissibility in the record of the representation hearing lacks any substance. Respondent was entitled to and received a full and complete hearing at which the facts at issue here were fully litigated. See NLRB v. Bata Shoe Co., supra. Respondent was represented by competent and experienced counsel who called and examined his own witnesses and zealously cross-examined the witnesses of the charging party. Moreover, contrary to respondent's claim that the representation proceedings contain testimony that would not otherwise be admissible at the unfair labor practice hearing, a review of its various objections reveals that the overwhelming majority would have been overruled.[16/]

[16/]At the close of the hearing held on August 9, 1977, respondent filed its motion to strike the transcript of the election proceeding from being admitted in the unfair labor practice hearing in total, or at least those portions set forth in its 120 objections set forth in its motion. I have reviewed the entire transcript of the election proceeding (consisting of four volumes totaling 648 pages) and have determined that of the 120 objections claimed, I would have overruled 102 and sustained but 15 (most were either leading question* or non-responsive answers), with 3 questions objected to being withdrawn. The great bulk of respondent's objections fell into two categories: (1) objections to UFW's counsel asking "leading questions", in that counsel would utilize a "key" word in the question or ask a leading question in order to refresh the witness' recollection after the witness was unable to recall; and (2) objections as to hearsay to testimony by

(cont'd.)

Also, the separate determination whether the conduct alleged in the complaint here constituted an unfair labor practice (as well as affecting the outcome of an election) is a legal conclusion to be made after reviewing the entire record in this proceeding, including the transcript from the representation hearing. It does not require relitigating the same facts which were litigated in the prior hearing.

To summarize, the recent ALRB decision in Teamsters Local 865 makes a summary motion procedure available before the Board and applicable NLRB precedent under analagous circumstances supports the application of the summary judgment here. Furthermore, there does not appear to be any considerations set forth in these NLRB precedents[17/] that would make it inappropriate to establish a broad policy before the Board limiting relitigation of issues that were or should have been litigated in the previous hearing. First, relitigation would lead to unwarranted and unnecessary prolongation of the administrative process, contrary to the underlying purposes of the Act. Second, due process will have been satisfied if the parties at the previous hearing have been given the opportunity to be heard, to call witnesses in its behalf, and to cross-examine witnesses testifying against it. Third, the possible difference in

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16/(Cont'd.)
UFW witnesses of statements made by Hansen or Hansen's interpreters or foremen. In the former instance, the comment to California Evidence Code Section 767 makes it clear that such questioning is proper; in the latter instance, Evidence Code Sections 1220-1222 set forth three exception? to the hearsay rule applicable here—admission, adoptive admission, and authorized admission of a party.

[17/]See cases cited on pp. 11-12, supra.

the evidentiary standard at the two hearings might affect the weight to be given to evidence admitted, but not as to whether due process has been accorded the parties. Fourth, there are few circumstances where the parties are not going to fully litigate an issue at the representation hearing. Obviously, it is in both the employer or union's best interest to bring forth whatever evidence is available in support of its position overturning or sustaining an election (which may also be unfair labor practice as well). Finally, the complete record from the prior hearing is available to the Board for its review and independent evaluation.

C. Respondent's Claim of Newly Discovered or Previously Unavailable Evidence.

After indicating to the parties at the hearing on August 9 that I propose granting the motion for summary judgment,[18/] respondent's counsel indicated that he had additional witnesses he wished to call that did/not testify at the election hearing. Respondent's counsel asserted that he would call as witnesses at least

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[18/]I made the ruling subject to respondent presenting its motion to strike what it claimed to be inadmissible testimony from the representation hearing. As set forth in footnote 15, supra, the overwhelming number of respondent's objections would have been overruled. Respondent's counsel also claimed that the decisions by the two ALO's in the Garcia and Casiamiro discharge cases cast serious doubts on the credibility of one of the UFW witnesses, Geraldo Flores, at the representation hearing. The claim is totally without merit. First, the issues and testimony in the two discharge cases were totally unrelated to these proceedings. Second, the ALO in the Garcia case made an explicit finding that it was unnecessary for him to nor was he resolving the credibility between Flores and one of Hansen's supervisors, Rodriguez. (See p. 5 AID decision in 75-CE-238-M) Third, the issues in the Casiamiro case and the testimony of Flores regarding it involved an incident that occurred one year after the events that occurred in this proceeding. Moreover, there is nothing in the ALO's decision in Casiamiro (See No. 76-CE-40-M) that adversely reflects in any regard on Flores credibility as a witness.

one person from each of the crews before whom Mr. Hansen spoke (there were 10-12 crews in 1975) who would support Mr. Hansen's version of what he said to the crews contrary to the testimony of the 15 witnesses who were called by the UFW at the election hearing. Respondent's counsel claimed that these crew members were either too frightened to testify or unfamiliar with the ALRB and hearing procedure to come forward or just didn't want to "stick their neck out" to testify on behalf of their employer at the prior hearing. Respondent's counsel declined to provide either the general counsel or the ALO with the names and addresses of these persons or to provide an offer of proof or affidavit of what each would say, other than they would "corroborate" Mr. Hansen. For the reasons set forth hereinafter, I ruled against respondent's motion to call these additional witnesses.

In determining that this is an appropriate case to propose granting the summary judgment I also propose ruling that respondent has not properly met the requirement of showing there is previously unavailable or newly discovered evidence since the prior hearing under the standards set forth in applicable NLRB precedents. See Amalgamated Clothing Workers v. NLRB, supra, 62 LRRM at 2435. Skaggs Pay Less Drug Stores, 77 LRRM 1267 (19711, affirmed, 81 LRRM 2161 (9th Cir. 1972); NLRB v. West Coast Casket Co., 81 LRRM 2857 (9th Cir. 1972).

There have been numerous decisions by the NLRB and the Courts, which have affirmed the broad discretionary power of the hearing officer to determine whether to permit reopening of the record or relitigating an issue. In each of these cases it was either

explicitly stated or implicitly part of the decision that the respondent carried the burden of demonstrating that evidence it wishes to present was actually unavailable or newly discovered since the prior hearing. See e.g., Spiegel Trucking Co., 92 LRRM 1604 (1976) (explicitly stated by NLRB); Big G Corporation, 92 LRRM 1127 (1976) (explicitly stated by NLRB); Prieser Scientific,. Inc., 62 LRRM 1267 (1966) (implicit in decision by NLRB); NLRB v. Otlans Roofing Co., 77 LRRM 2893 (9th Cir, 1971). (explicitly stated by Court).

In imposing this burden on the moving party (respondent here) the courts and the NLRB have articulated several standards as to how the burden is to be applied. Thus, in Brooklawn Nursing Home, 92 LRRM 1107 (1976) the NLRB refused to permit the reopening of the record or relitigating the reasons for the discharges in that case. It ruled that respondent was required to exercise due diligence in obtaining and presenting its evidence at the prior hearing and respondent had failed to show that the additional evidence was unavailable or newly discovered under that standard. In Spiegel Trucking Co., 92 LRRM 1604 (1976) the NLRB refused to reopen or grant a de novo hearing to the employer in an unfair labor practice case because the employer failed to justify why he could not have presented testimony at the hearing (affidavits had been executed by the employer's witnesses subsequent to the close of the hearing). See also Skaggs Pay Less Drug Stores, 77 LRRM 1267 (1971), affirmed 81 LRRM 2168 (9th Cir. 1972) ("Extraordinary circumstances" required to compel reopening the record); NLRB v. otlans Roofing Co., 77 LRRM 2893 (9th Cir. 1971);

Spector Freight System, Inc., 52 LRRM 1456 (1963) (NLRB upholds ALO's decision denying reopening of the hearing where the charging party failed to particularize the evidence which it expected to adduce at the new hearing). Finally, there are a series of decisions which utilize a "reasonableness" standard for determining whether a record should be reopened or an issue relitigated. See e.g., Amalgamated Clothing Workers v. NLRB, supra; NLRB v. West Coast Casket Co., 81 LRRM 2857 (9th Cir. 1972); Ironworkers, Local 568, 83 LRRM 1489 (1973); NLRB v. Seafarers Union, 86 LRRM 2881 (5th Cir. 1974). However, in applying a "reasonableness" standard the courts look to whether the evidence or testimony sought to be proffered was unavailable at the time of the original hearing. The critical consideration in evaluating if the evidence was unavailable is whether the party was apprised of specific-enough charges in the complaint or petition so as to have sufficient information and time to investigate and prepare its case. See e.g., NLRB v. West Coast Casket Co., supra, 81 LRRM at 2859. Applying these standards to the facts in this case compels the conclusion that respondent has not met its burden of showing the testimony proffered was unavailable at the prior hearing. On October 1, 1975, Hansen Farms was served with the UFW's petition to set aside the election in which 30 specific instances of misconduct on the part of respondent was alleged. Thirteen of these specific instances of misconduct were subsequently realleged in the complaint in this case as unfair labor practices as well. The hearing regarding these charges was held initially on November 24 and 25, 1975 when the UFW presented its case.

This provided respondent with approximately 8 weeks in which to investigate and prepare its case, including interviewing the workers that were witnesses to the speeches by Hansen. Moreover, an additional two week continuance was mutually agreed upon before respondent was required to go forward with its case. Respondent's claim that the witnesses it now wishes to call would not come forward to testify is simply answered by Sections 1151(a) and 1151.2 of the Act providing broad subpoena power to the Board or its duly authorized agents. Respondent further contends that it necessarily was hampered in interviewing workers who witnessed the speeches for fear interviewing would be construed as "interrogating" workers, itself an unfair labor practice. However, there is a substantial difference between interrogation of workers regarding their union activities and "limited investigation for preparing a defense."[19/] Moreover, applicable NLRB precedent imposes a "due diligence" obligation on a party in obtaining evidence to present at a hearing. Brooklawn Nursing Some, supra. Accordingly, respondent had been duly apprised of the charges against it, had ample opportunity to investigate and prepare for the prior hearing in which the same factual issues were litigated and was represented by competent counsel who, in fact, zealously presented respondent's defense. Moreover, respondent has made no showing that any of the witnesses it now wants to call were either unavailable to testify at the prior hearing or not subject to subpoena process (because, for instance, they were out of the

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[19/]See Anderson Farms Co., 3 ALRB No. 67 (August 17, 1977), p. 19-20.

state or country). Thus, respondent has failed to meet its burden of showing that the testimony it now seeks to offer was, in fact, previously unavailable. NLRB v. West Coast Casket Co., supra. Finally, under the circumstances of this case as a policy matter it would be contrary to the primary objectives of the Act to permit relitigation of issues that would lead to undue and unwarranted prolongation of the administrative process.

III. Determination and Discussion of Facts.

A. Jurisdiction

The General Counsel's Complaint alleges and respondent so admits in its answer that at all relevant times the UFW is and had been a labor organization and respondent is and was an agricultural employer within the meaning of Section 1140.4 of the Act, and I so find.

B. The Specific Allegations of Unfair Labor Practices

Paragraph seven of the general counsel's complaint lists 14 allegations of unfair labor practices of acts and conduct by respondent during UFW's organizational campaign immediately prior to the elections held in September, 1975, of the following nature:

1. Seven "captive audience" speeches to employees in the field in which respondent made promises of wage and other benefits if the workers voted "no union". See subparagraphs (a) - (g).

2. Three incidents in which respondent's agents or foremen made threats to employees of loss of work if the UFW

won the election. See subparagraphs (h), (k), and (1).

3. Two incidents in which respondent's agents or foremen made promises to employees of benefits if they voted "no union". See subparagraphs (i) and (j).

4. A "captive audience" speech by respondent in which he promised to negotiate and sign a contract with the employees if "no union" won the run-off election on September 25, 1975. See subparagraph (m).

5. Finally, respondent by its agent, wilfully hired four individuals in the celery crew for the primary purpose of voting in the run-off election on September 25, 1975. See sub-paragraph (n).

The entire record amply supports the Board's findings in its previous decision regarding the allegations set forth in subparagraphs (a) - (m). However, for reasons discussed more fully hereinafter, neither the Board's previous decision nor record supports the allegation in subparagraph (n).

The Board's previous decision sets forth and discusses the credible testimony regarding Hansen's "captive audience" speeches.[20/]

> Within a three to six day period between the filing of the petition and the election, employer Hansen and his personnel manager, Tony Vasquez, made a set of speeches before 10 to 12 crews in the fields. Mr. Hansen testified that he made substantially the same speech to each crew . . .

[20/]Hansen testified that the letter dated September 3, 1975 he gave to all his employees (which is in the record of the prior hearing as Employers Exhibit #15) was the basis for and extent of his speeches. The Board ruled however, that respondent went beyond the content of the written material. 2 ALRB No. 61, p. 15 and p. 5, note 7.

He was quoted as having told the workers that if "no union" won, they would have "better wages, better benefits," "better wages or the same wages that other companies with the union would have," "best wages in the Valley," "better benefits than the union," "well, everything." Several workers testified that he said when "no union" was certified, he would negotiate a contract with representatives from each crew. Workers testified that many of these statements were prefaced with the employer's remark that he couldn't promise anything because it was against the law.

After the first election and before the second, Hansen and Vasquez made a second set of speeches to the workers. At each of these speeches Mr. Hansen carried a blackboard showing the tally of votes from the first election and explained that there would be a run-off election. Again, he asked for the workers' help. He was quoted as saying he "expected, insisted" on the workers' help, "so he could give better wages." Workers heard him reiterate his plan to negotiate with representatives from each crew if "no union" won.

A worker from the crew of Jesus Lopez quoted Hansen as saying that in case of a UFW victory "if it was convenient for him he would negotiate, and if not there would be a strike." If "no union" won, he would pay them "higher than other companies, and the best benefits." A member of Crew 2 quoted Mr. Hansen as saying that if "no union" won he would give them "the best wages in this Valley." He said further that if Chavez won and "he [Hansen] couldn't come to an agreement with the negotiators, he wasn't going to sign . . . there would probably be a strike." He said he could not promise them anything in writing, but if the election came out "no union," he would give the workers a list of all that he was going to guarantee them.

Another worker testified that Mr. Hansen told Crew 3 "he could promise to give [them] all the benefits that any union would promise" and that "he would pay . . . one cent more a carton than what the union would ask." In front of Crew 4 he was heard to say that in one year he would "give the workers more than any union." In response to a request from the workers to

> see a contract, Hansen replied "he would pay . . . more than any union did and to please take his word for it, but that he could not show . . . the contract at the time." If the workers voted "no union", he said he would "plant some more and hire more crews." In the second set of speeches, many of the employer's comments were again prefaced with the remark that he could not promise them anything.
>
> 2 ALRB No. 61 p. 6-8
> (footnotes omitted)

These allegations were amply testified to by respondent's workers in the proceedings of the prior hearing. The allegations found in subparagraphs (a) - (g) are supported by the sworn testimony of:

1. Juana Lopez (Vol I, p. 25, Lines 20-25
   Vol I, p. 27, lines 21-22).
2. Valdemar Espinoaa (Vol I, p. 56, lines 9-14).
3. Maria Martinez (Vol I, p. 100, lines 14-20
   Vol I, p. 105, lines 5-25).
4. Gerardo Flores (Vol I, p. 154, lines 21-24).
5. Fernando Orozco (Vol 2, p. 117, lines 20-25).
6. Juvenal Nava (Vol 2, p. 91, lines 11-25
   Vol 2, p. 95, lines 19-21).
7. Samuel Rangel (Vol 4, p. 191, lines 16-19).

The Board's decision continues on to discuss the acts and conduct that make up the allegations of threats or promises set forth in paragraphs 7 (h) - (1) as follows:

> We turn now to the objections based on threats made by Hansen supervisors. While this testimony is also in substantial conflict, we have reviewed the record as a whole and find the facts substantially as follows.
>
> The alleged threats were made by two of the employer's supervisors, Fidel Rodriguez and Francisco Palmeno. Each of these men supervised four crews and in this capacity they were clearly agents of the employer and known to the workers as such. There was testimony that before the first election,

> Fidel Rodriguez addressed Crew 2, saying that if Chavez won "they would not plant any more lettuce; they would plant alfalfa ...[and] barley, because they had a lot of cattle." A member of Crew 4 testified that a week to 10 days before the first election, Rodriguez told them that "if no union won, Mr. Hansen would plant 800 acres more of lettuce and hire two more crews." At the same time, Rodriguez was also quoted as saying that if the Chavez union was to win, Mr. Hansen "wasn't going to plant anything else anymore; that he didn't have to, he had a lot of money anyway."
>
> In interpreting the effect these remarks had on the employees, we note that alfalfa and barley require little if any work by farmworkers. Thus, the result of planting these crops, instead of lettuce, would be to put the lettuce crews out of work.
>
> Another worker quoted Palmeno as making similar remarks threatening the jobs of the lettuce crews. She testified that he told her Mr. Hansen owned "all those mountains that you see behind...[t]hat house that you see over there...and he used to have a landing field or airport...[h]is specialty is cattle raising...he is extremely rich, one of the richest men in the world...As you see, he had no need of selling or farming the land...If Chavez wins in this Company, they will transfer the lands to other companies."
>
> There was also testimony as to threatened layoffs. One worker related a conversation with Rodriguez in which he was told that people in the lettuce cutting crew would be laid off "because of the Chavez movement." This conversation was overheard by a fellow worker who they relayed it to a group of 10 to 15 other workers. The worker testified further that Rodriguez made veiled offers of a promotion to a "truckdriver" if he would "get out of that movement."
>
> 2 ALRB No. 61, p. 8-9
> (footnotes omitted)

The specific allegations of paragraph 7 (a) are supported by the sworn testimony of:

1. Samuel Rangel (Vol 4, p. 189 lines 11-25
Vol 4, p. 190, lines 1-11
Lines 18-25
Vol 4, p. 191, lines 1-10
lines 17-19
Vol 4, p. 192, lines 11-25
Vol 4, p. 193, lines 11-14
lines 18-23)

2. Geraldo Flores (Vol I, p. 152 lines 10-25
Vol I, p. 153, lines 1-4
lines 7-12
Vol I, p. 154, lines 20-24
Vol I, p. 168, lines 1-5
lines 9-12
Vol I, p. 181, lines 1-6
Vol I, p. 182, lines 1-2).

The specific allegation of paragraph 7 (b) is supported by The sworn testimony of:

2. Juvenal Nava (Vol 2, p. 89, lines 7-25
Vol 2, p. 90, lines 1-7
Vol 2, p. 91, lines 11-25
Vol 2, p. 92, lines 1
Vol 2, p. 93, lines 3-9
Vol 2, p. 95, lines 4-5).

2. Albert C. Hansen Vol 4, p. 3, lines 13-25
Vol 4, p. 115, lines 9-14).

The specific allegation of paragraph 7 (c) is supported by The sworn testimony of:

1. Fernando Orozco (Vol 2, p. 116, lines 1-17
Vol 2, p. 117, lines 3-25
Vol 2, p. 118, lines 17-19
Vol 2, p. 120, lines 9-20
Vol 2, p. 121, lines 7-14
lines 19-24
Vol 2, p. 122, lines 14-18
Vol 2, p. 125, lines 13-18).

The specific allegation of paragraph 7 (d) is supported by The sworn testimony of:

1. Juana Lopez (Vol I, p. 22, lines 19-22
Vol I, p. 24, lines 11-25
Vol I, p. 25, lines 1-5, 18-19,
lines 22-25
Vol I, p. 27, lines 18-22).

2. Francisco Palmeno (Vol I, p. 95, lines 21-24
Vol I, p. 92, lines 8-11
lines 17-19
lines 23-24
Vol I, p, 93, lines 14-15
Vol I, p, 94, lines 1-7
Vol I, p, 97, lines 18-24)

The specific allegations of paragraph 7 (e) are supported by the sworn testimony of:

1. Valdemar Espinosa (Vol I, p. 52, lines 11-22
Vol I, p. 53, lines 4-21
Vol I, p. 56, lines 6-14
Vol I, p. 59, lines 24-25
Vol I, p. 60, lines 1-2, 8-17
Vol I, p. 66, lines 1-2, 24-25
Vol I, p. 67, lines 1-4
Vol I, p. 71, lines 16-19
Vol I, p. 72, lines 16-25
Vol I, p. 73, lines 1-4, 11-12
lines 17-22
Vol I, p. 74, lines 20-25
Vol I, p. 75, lines 1-2).

2. Maria Martinez (Vol I, p. 99, lines 10-25
Vol I, p. 100, lines 1-5
lines 14-20
Vol I, p. 104, lines 10-12
lines 15-17
Vol I, p. 105, lines 1-13
lines 17-18
Vol I, p. 110, lines 9-16
Vol I, p. 113, lines 13-22).

3. Albert C. Hansen (Vol 4, p. 3, lines 13-25
Vol 4, p. 95, lines 19-25
Vol 4, p. 96, lines 1-16
Vol 4, p. 97, lines 3-5, 17-25
Vol 4, p. 98, lines 1-2).

The specific allegations of paragraph 7 (f) are supported by the sworn testimony of:

1. Valdemar Esoinosa (Vol I, p. 52, lines 11-22
Vol I, p. 59, lines 24-25
Vol I, p. 60, lines 1-2, 8-17
Vol I, p. 62, lines 16-21
Vol I, p. 74, lines 9-19).

2. Albert C. Hansen (Vol 4, p. 3, lines 13-25
Vol 4, p. 7, lines 4-9
Vol 4, p. 82, lines 6-12).

The specific allegations of paragraph 7 (g) are supported by the sworn testimony of:

1. Valdamar Espinosa (Vol 1, p. 52, lines 11-22
Vol I, p. 59, lines 24-25
Vol I, p. 60, lines 1-2, 8-17
Vol I, p. 62, lines 3-6, 9-11
Vol I, p. 73, lines 24-25
Vol I, p. 74, lines 1-4).

2. Maria Martinez (Vol I, p. 99, lines 10-19
Vol I, P. 104, lines 10-12
lines 15-17
Vol I, P. 113, lines 20-25
Vol I, P. 114, lines 1-3).

The specific allegations of paragraph 7 (h) are supported by the sworn testimony of:

1. Juana Lopez (Vol I, p. 22, lines 19-22
Vol I, p. 33, lines 12-23
Vol I, p. 37, lines 2-5, 13
lines 17-25
Vol I, p. 41, lines 19-23
Vol I, p. 42, lines 22-25
Vol I, p. 43,lines 1-9).

The specific allegations of paragraph 7 (i) are supported by the sworn testimony of:

1. Fernando Orozco (Vol 2, p. 116, lines 2-13
Vol 2, p. 121, lines 19-24
Vol 2, p. 122, lines 20-25
Vol 2, p. 123, lines 1-7
Vol 2, p. 125, lines 13-20
Vol 2, p. 127, lines 5-9).

The specific allegations of paragraph 7 (j) are supported by the sworn testimony of:

1. Jose Garcia (Vol I, p.123, lines 20-23
Vol I, p. 138, lines 1-5
Vol I, p. 139, lines 13-25
Vol I, p. 140, lines 1-13
Vol I, p. 141, lines 12-23
Vol I, p. 142, lines 7-13
Vol 4, p. 186, lines 23-25
Vol 4, p. 187, lines 1-7).

2. Fidel Rodriguez (Vol 3, p. 100, lines 4-7
Vol 3, p. 107, lines 406, 10-11).

The specific allegations of paragraph 7 (k) are supported by the sworn testimony of:

1. Jose Garcia	(Vol I, p. 123, lines 20-23 Vol I, p. 135, lines 13-17 Vol I, p. 136, lines 4-13 Vol I, p. 137, lines 2-17).
2. Fidel Rodriguez	(Vol 3, p. 100, lines 4-7 Vol 3, p. 101, lines 8-17 Vol 3, p. 105, lines 22-25).
3. Roberto Madrid	(Vol 2, p. 38, lines 2-11, 21-23 Vol 2, p. 39, lines 19-22 Vol 2, p. 40, lines 1-2, 12-17 Vol 2, p. 41, lines 3-7, 18-25 Vol 2, p. 42, lines 1-8, 12-14 Vol 2, p. 43, lines 6-20).

The specific allegations of paragraph 7 (l) are supported by the sworn testimony of:

1. Jose Garica	(Vol 4, p. 183, lines 23-25 Vol 4, p. 184, lines 14-25 Vol 4, p. 185, lines 1-17 Vol 4, p. 188, lines 11-15).
2. Eugenio ELernandez	(Vol 4, p. 194, lines 3-25 Vol 4, p. 195, lines 1-11).
3. Fernando Orozco	(Vol 2, p. 116, lines 2-13 Vol 2, p. 122, lines 20-25).

The specific allegations of paragraph 7 (m) are supported by the sworn testimony of:

1. Gerardo Flores	(Vol I, p. 152, lines 1-25 Vol I, p. 175, lines 16-23 Vol I, p. 181, lines 17-19).
2. Juvenal Nava	(Vol 2, p. 89, lines 7-25 Vol 2, p. 90, lines 1-5 Vol 2, p. 92, lines 11-14 Vol 2, p. 93, lines 3-9 Vol 2, p. 96, lines 1-9).
3. Fernando Orozco	(Vol 2, p. 116, lines 2-25 Vol 2, p. 117, lines 3-19 Vol 2, p. 118, lines 6-19)
4. Juana Lopez	(Vol I, p. 22, lines 19-22 Vol I, p. 23, lines 3-11 Vol I, p. 24, lines 11-25

	Vol I, p. 25, lines 1-5 Vol I, p. 30, lines 19-25 Vol I, p. 31, lines 1-6).
5. Francisco Palmeno	(Vol I, p. 91, lines 21-24 Vol I, p. 92, lines 8-16 Vol I, p. 98, lines 5-23).
6. Valdemar Espinosa	(Vol I, p. 52, lines 11-22 Vol I, p. 59, lines 24-25 Vol I, p. 60, lines 1-2, 8-17 Vol I, p. 61, lines 15-19 Vol I, p. 74, lines 20-23).
7. Albert C. Hansen	(Vol 4, p. 3, lines 13-25 Vol 4, p. 11, lines 13-17 Vol 4, p. 59, lines 23-25 Vol 4, p. 90, lines 1-8).

The General Counsel's sole evidence in support of the allegations contained in paragraph 7 (n) is an anonymous declaration by an, employee of Hansen Farms dated April 19, 1977. The declaration can be found as Exhibit 6 of the General Counsel's Exhibits in Support of its Motion for Summary Judgment.

However, at the hearing on August 9, 1977, I granted the respondent's motion to strike the declaration from the record for two reasons. First, the declaration contained double hearsay; and second, it denied any opportunity for the respondent to exercise his right to confrontation and cross-examination of the witness. Accordingly, without any additional evidence in support of the allegation, I will recommend that the allegation be dismissed.

C. The Allegations That Specific Paraona Ara Aganta of Respondent Acting on ita Behalf

The General Counsel alleged in paragraphs 5 and 6 of its Complaint that the following persons are and have been supervisors or agents of respondent acting on its behalf:

Albert C. Hansen	Fidel Rodriguez
Tony Vasquez	Raymundo Carreal
Alvaro Piedra	Francisco Palmerio
Jesus Lopez	Antonio Rodriguez
Bruno Espino	Conrado Perez

Does One through Four[21/]

The respondent in its answer denied that each of these persons was a supervisor or agent within the meaning of Section 1140.4 of the Act. However, there is ample support in the record that each of these persons was at all times relevant herein an agent acting on behalf of the respondent herein.

During his testimony at the prior hearing, Mr. Hansen testified that he was the sole owner of Hansen Farms[22/] and identified the following persons as foremen of his: Fidel Rodriguez, Bruno Espino, Antonio Rodriguez, and Jesus Lopez.[23/] Moreover, Tony Vasquez testified that he was respondent's personnel manager.[24/] Fidel Rodriguez testified that he was a supervisor [25/] and the following persons were foremen of crews 2, 3, and 4, respectively: Antonio Rodriguez,

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[21/]The allegations regarding Does One through Four apparently refer to the charges set forth in paragraph 7 (n). I am recommending that these allegations of paragraph 7 (n), including reference to Does One through Four, be dismissed.

[22/]Vol 4, p. 54, lines 3-6, of Transcript of 75-RC-17-M.

[23/]Vol 4, p. 27, lines 22-25, p. 28, line 1, of Transcript of 75-RC-17-M.

[24/]Vol 4, p. 167, lines 6-7, of Transcript of 75-RC-17-M.

[25/]Vol 2, p. 30, lines 20-22, of Transcript of 75-RC-17-M.

Alvaro Piedra, and Conrado Perez.[26/] Finally, the Board in its decision ruled that Raymundo Correal, who acted as an interpreter for the employer and as such "was acting as the employer's agent with his apparent consent."[27/]

IV. Conclusion of Law.

A. Summary Judgement is Appropriate Under the Circumstances of This Case

As more fully discussed hereinabove at pp. 9-20, I have concluded that this would be an appropriate case to invoke summary judgment procedures and deny respondent's motion to relitigate the factual issues previously litigated in the representation proceedings.

B. The Pravious Findings of the Board and the Transcript of the Previous Proceedings Sustain a Determination That Respondent Committed the Unfair Labor Practices Charged in Paragraphs 7 (a) - (m).

As respondently correctly points out in its opposing brief, the legal issue or conclusion to be drawn in an unfair labor practice case is different than the legal issue at the representation proceeding. The issue at the prior hearing was twofold: whether the conduct occurred and was objectionable, and if so, whether it affected the results of the election, in that it interfered with

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[26/]Vol 3, p. 102, lines 7-14, of Transcript of 75-RC-17-M.

[27/]2 ALRB No. 61, p. 7, footnote 10.

[28/]See Brief in Opposition to General Counsel's Motion for Summary Judgment, p. 11-13.

the free choice of a significant number of voters. See Section 1156.3 (c) of the Act. The Board's decision in 2 ALRB No. 61 necessarily answered both questions affirmatively. The issue in the present case is also twofold: whether the same misconduct occurred, and if so, whether it restrained or coerced agricultural employees, in that there were threats of reprisal or promises of benefit, in the exercise of their right to organize, guaranteed in Section 1152 of the Act.[29/]

The conclusion that the conduct which occurred as alleged in paragraphs 7 (a) - (m) of the amended Complaint constitutes violation of Sections 1153 (a) and (b) of the Act is inescapable.

> The record here indicates no basis for the campaign promises other than to influence the outcome of the election. The employer could not know what benefits or wages a union would ask for, nor could he unilaterally predict the outcome of negotiations. By making flat promises to do better for the workers than any union could do, the employer misrepresented the bargaining process and undercut the basis on which a union could campaign. Workers are especially susceptible to such statement in situations, as here, where they are deciding for the first time whether or not they want to be represented by a union.
>
> The danger of benefits "which may dry up if not obliged," as pointed out in Exchange Part, is certainly present here. The employer explicitly tied the promised benefits to the outcome of the election. After voting non-union, however, the employees would have no means to enforce the promises which swayed their vote.
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> Hansen Farms, 2 ALRB No. 61, p. 16 (footnote omitted, emphasis added)

[29/] Section 1152 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153." Section 1153 (a) makes such restraint or coercion by an agricultural employer an unfair labor practice.

The Board continued in its decision regarding the effect of respondent's promises to bargain with worker representatives directly if "non-union" won:

> While saying [respondent] would do better than the unions, the employer was proposing to bargain with representatives elected by the workers, thus underscoring the futility of a union vote.
>
> Hansen Farms, 2 ALRB No. 61, p. 17

The Board concluded its decision finding the threats by respondent's supervisors having a detrimental effect on the workers:

> Credible and consistent testimony of employees indicated a pattern of threats of job losses if the union won the election. Whether these threats were expressed or implied is irrelevent when a clear meaning was perceived by the employees. The statements about planting alfalfa or barley instead of lettuce, the equivalent of threats of shutdowns or plant closing in the industrial setting, would be coercive conduct. Likewise, the alleged threats of layoffs in the case of a Chavez victory would have a coercive effect on the employee's vote. We are not swayed by employer's argument that no actual layoffs were made and that it was company policy to go overboard in not laying off or firing known supporters of the (JFW. Coercive conduct is not limited to threats made good. In the charged atmosphere of the earliest elections under the ALBA, these threats would most certainly have an ominous effect. The threats of job losses in the case of & union victory intermingled with promises of benefits if "no union" won presented a contorted picture to employees which substantially interfered with their free choice.
>
> Hansen Farms, 2 ALRB No. 61, p. 17 (emphasis added)

A thorough review of the testimony in the representation hearing and the Board's decision in Hansen Farms, 2 ALRB No. 61, leaves no doubt that respondent and its agents made actual and implied promises and threats prior to the initial and run-off elections during the organizational campaign by the UFW and substantially

interfered with the workers' free exercise of employee rights to organize. Section 1153 (a) of the Act is patterned after Section 8 (a)(l) of the NLRA. The well established test of the NLRB regarding violations of Section 8 (a)(l) has been that:

> Interference, restraint, and coercion under Section (a)(l) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act.[30/]

The ALRB has consistently ruled in similar circumstances involving statements threatening loss of employment or promising wage or other benefits that such are not protected by the free speech provision, Section 1155 of the Act, and constitutes a clear violation of Section 1153 (a). See Anderson Farms Co., 3 ALRB No. 67, p. 5; Sunnyside Nurseries, 3 ALRB No. 42 (1977); see also, NLRB v. Gissel Packing Co., 395 U.S. S75 (1968).

Moreover, the testimony established at the prior hearing and the Board so found that respondent offered to negotiate with crew representatives regarding wages and working conditions if they agreed to vote "no union." This constituted a clear violation of Section 1153 (b) of the Act. See, Sunnyside Nurseries, 3 ALRB No. 42; see also, City Welding & Manufacturing Co., 77 LRRM 190, 192 (1971); NLRB v. Grand Foundaries, Inc., 62 LRRM 2444, 2449 (8th Cir., 1966); NLRB v. Miller, 341 F.2d 870, 58 LRRM 2507 (2d Cir., 1965).

Accordingly, I find that the evidence introduced at the prior

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[30/] Morris, The Developing Labor Law, (1971) p. 66, and cases cited in footnote 11.

representation hearing[31/] and the Board's findings based thereon sustain a determination that respondent committed the unfair labor practices alleged in paragraphs 7 (a) - (m). As to those allegations, I propose to recommend granting summary judgment. However, the General Counsel has not offered admissible evidence regarding the allegations contained in paragraph 7 (n), and I recommend that the allegation be dismissed.

V. The Remedy.

Having found that respondent has committed unfair labor practices within the meaning of Sections 1153 (a) and (b) of the Act, I recommend that respondent be ordered to cease and desist therefrom and to take certain affirmative actions as will effectuate the policies of the Act.

The General Counsel and UFW have requested that: (1) notice of the decision and order be communicated to present and former employees of respondent; (2) access be made available to respondent's bulletin boards near the labor camps; (3) expanded access to employee lists be made available; and (4) expanded access be given, for at least two hours per day for thirty days, including talks to the work crews on company time, as proposed by the General Counsel, and for 4 thirty-day periods as proposed by the UFW.

[31/]The hearing officer's report and recommendation in 75-RC-17-M provides a succinct but thorough evaluation of the demeanor and credibility of the witness' which was of assistance here. Respondent's demand that the entire testimony regarding these factual matters be relitigated here in order to permit observation again of the witness' demeanor and credibility borders on disingenuousness. The specter of ascertaining the witnesses' credibility and demeanor from their testimony of events which occurred two years ago after hearing their recollections refreshed or contradicted or impeached by their former testimony is not a telling prospect.

I have concluded that the policies of the Act would be effectuated under the circumstances of this case if an order incorporating proposals (1), (2), and (3) above, with a more tailored limited access, were adopted.

Accordingly, I recommend the following, pursuant to Section 1160.3 of the Act:

ORDER

Respondent, Albert C. Hansen, doing business as Hansen Farms, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement of the type authorized by Section 1153 (c) of the Act;

(b) Discouraging membership of any of its employees in the UFW, or any other labor organization, by any manner which discriminates against individuals in regard to their hire or tenure of employment, or any term or condition of employment, except as authorized by Section 1153 (c) of the Act;

(c) Dominating or interfering with the formation or administration of any labor organization except as authorized by Section 1153 (c) of the Act.

2. Take the following affirmative action:

(a) Immediately notify the regional director of the Salinas Regional Office of the expected time periods in 1977 in which it will be at 50 per cent (.50$) or more of peak employment, and of all the properties on which its employees will work in 1977. The regional director shall determine and designate the locations where the attached Notice to Workers shall be posted by the respondent. Copies of said Notice, on forms provided by the appropriate regional director, after being duly signed by the respondent, shall be posted by respondent for a period of ninety (90) consecutive days during the 1977 peak harvest period, in conspicuous places, including all places where notices to employees are customarily posted.

The respondent shall exercise due care to replace any notice which has been altered, defaced, or removed. Such notices shall be in English and Spanish and any other languages that the regional director may determine to be appropriate;

(b) A representative of the respondent or a Board agent shall read the attached Notice to Workers to the assembled employees in English, Spanish, and any other language(s) in which Notices are supplied. The reading shall be given on company time to each crew of respondent's employees employed at respondent's peak of employment during the 1977 season.

The regional director shall determine a reasonable rate of compensation to be paid by the respondent to all non-hourly wage employees, if any, to compensate them for time lost at this reading and question and answer period. The time, place, and manner for the

readings shall be designated by the regional director. The Board agent is to be accorded the opportunity to answer questions which employees might have regarding the Notice and their rights under the Act;

(c) Respondent shall hand out the attached Notice to Workers to all present employees and to all hired in 1977, and mail a copy of the Notice to all employees listed on its master payroll for the period immediately preceding the filing of the petition for certification on September 3, 1975;

(d) Respondent shall make available to the (JFW sufficient space on convenient bulletin boards located at or near its labor camp sites for posting of its notices for a period of six months from the date compliance with the mandates of this order commence;

(e) During any period during its next organizational campaign in which the OFW has filed a valid notice of intent to take access, the respondent shall allow OFW organizers to organize among its employees during the three one-hour time periods specified in Section 20900 (e)(3) of 8. Cal. Admin. Code, and during any established breaks, without restriction as to the number of organizers allowed entry onto the premises. If there are no established breaks, then the UFW organizers shall be allowed to organize among its employees during any time in which the employees are not working. Such right to access during the working day beyond that normally available under Section 20900 (e)(3), supra, can be terminated or modified if, in the view of the regional director, it is used in such a way that it becomes unduly disruptive. The mere presence of organizers on the respondent's property shall not be considered disruptive;

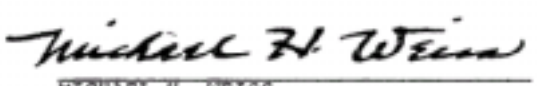
(f) The respondent shall, during the time that the UFW has on file a valid notice of intent to take access during its next organizational campaign, provide the UFW once every pay period or two weeks, whichever is shorter, with an updated employee list of its current employees and their addresses for each payroll period. Such lists shall be provided without requiring the UFW to make any showing of interest;

(g) The respondent shall provide its employees with one half-hour period for each crew during which to meet with union organizers, during regularly scheduled work hours and on the employer's premises, for one thirty-day period, during which time the UFW can disseminate information to and conduct organizational activities with the employees. The union shall present to the regional director its plans for utilizing this time. After conferring with both the union and the respondent concerning the union's plans, the regional director shall determine the most suitable times and manner for such contact between organizers and respondent's employees. During the time of such contact, no employee shall be allowed to engage in work-related activity. No employee shall be forced to be involved in the organizational activities. All employees will receive their regular pay for the half hour away from work. The regional director shall determine an equitable payment to be made to nonhourly wage earners, if any, for their lost productivity. Such meetings shall be provided during the union's next organizational campaign;

(h) Upon the filing of a petition for certification by the UFW, the Board shall direct a representation election without requiring a showing of majority interest;

(i) The respondent shall notify the regional director in writing, within twenty (20) days from the date of receipt of this order, what steps have been taken to comply herewith. Upon request of the regional director, the respondent shall notify him periodically thereafter in writing what further steps have been taken to comply herewith.

Dated: October 6, 1977.



MICHAEL S. WEISS
Administrative Law Officer

NOTICE TO WORKERS

After a hearing where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to post and send out this Notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

(1) To organize themselves;

(2) To form, join, or help unions;

(3) To bargain as a group and choose whom they want to speak for them;

(4) To act together with other workers to try to get a contract or to help or protect one another; and

(5) To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do or stops you from doing any of the things listed above.

Especially:

WE WILL NOT ask you whether or not you belong to any union, or do anything for any union, or how you feel about any union;

WE WILL NOT threaten you with being fired, laid off, or getting less work because of your feelings about, actions for, or membership in any union;

WE WILL NOT promise you benefits for not supporting a union;

WE WILL NOT fire you or do anything against you because of the union; and

WE WILL NOT start, support, assist, interfere with, or contribute money to any labor organization unless allowed to do so by law.

Dated: _____

ALBERT C. HANSEN, doing business as
HANSEN FARMS

By: _____
Representative

_____
Title

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

DO NOT REMOVE OR MUTILATE!!