Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUPERIOR FARMING COMPANY, INC., Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos .	77-CE-6-D 77-CE-6-1-D 77-CE-7-D 77-CE-3-D 77-CE-8-1-D 77-CE-33-D 77-CE-52-1-D	77-CE-81-D 77-CE-89-D 77-CE-109-D 77-CE-133-D 77-CE-133-1-D 77-CE-214-D
	5 ALRB No. 6		

DECISION AND ORDER

On March 11, 1978, Administrative Law Officer (ALO) David Nevins issued the attached Decision in this proceeding. Thereafter, Respondent, the General Counsel and the Charging Party each timely filed exceptions and a supporting brief.

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.

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, conclusions and recommended Order of the ALO, as amplified and modified herein.

Anti - Union Animus

Respondent excepts to the ALO's reliance on its open opposition to Proposition 14 during the 1976 general election as evidence of anti-union animus. We agree that an employer's opposition to Proposition 14, in and of itself, cannot be

considered as evidence of anti-union animus. J. G. Boswell Company, 4 ALRB No. 13 (1978). However, after a careful review of the record as a whole, we find sufficient instances of Employer opposition and hostility to the union to establish anti-union animus without regard to the Employer's anti-Proposition 14 stance. Our conclusions that Respondent illegally discharged Samuel De La Rosa and Arnold Garza and illegally refused to rehire Leocadia Felix are made without specific reliance on Respondent's anti-Proposition 14 campaign as an element of the violation.

Domination of Union

The ALO concluded that the Superior Employees Progress Committee (SEPC) was a labor organization within the meaning of the Act and that Respondent dominated, interfered with, supported, recognized, and bargained with the SEPC in violation of Labor Code Section 1153 (b), (f), and (a). We affirm this conclusion, with the following clarifications.

Respondent excepts to the finding of a Section 1153(b) violation based on the language of the statute. Labor Code Section 1153 (b) provides:

> It shall be an unfair labor practice for an agricultural employer to do any of the following:
>
> ....
>
> (b) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. However, subject to such rules and regulations as may be made and published by the board pursuant to Section 1144, an agricultural employer shall not be prohibited from permitting agricultural employees to confer with him during working hours without loss of time or pay.

Respondent argues that the Legislature intended the last sentence in this code section to protect the right of an agricultural employer to confer with an employee or a group of employees at any time concerning any topic.

Section 1153(b) is identical to Section 8(a)(2) of the National Labor Relations Act. The purpose of Section 8(a)(2) is to insure that an organization purporting to represent employees in collective bargaining not be subject to control by an employer, or be so dependent on the employer's favor that it would be unable to give wholehearted support to the employees it represents. Hot Point Div. G.E. Co., 128 NLRB 788, 46 LRRM 1421 (1960).

An examination of the history of the Section 8(a)(2) provision reveals that it was enacted during 1935, at a time when employers, confronted with the challenge of unionization, frequently took the initiative in organizing company unions, and generally were successful in dominating and maintaining them.[1/] Congress thought that such employer domination and support interfered with the freedom of employees to select their bargaining representatives and substituted the voice of the employer for the voices of the employees at the bargaining table. By enactment of the then Section 8(2) of the Wagner Act, it

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[1/]A survey of 530,820 workers in company unions was taken by the Department of Labor in 1935. Using as criteria the payment of dues, regular membership meetings, written agreements and absence of any actual veto power in the employer, only 1.2% of the workers were in "independent" company unions. "Legislation, The Wagner Labor Disputes Act", 35 Columbia Law Review 1098, p. 1101, footnote 27.

became an unfair labor practice for an employer to dominate or interfere with the formation of any labor organization. However, the concept of a company union, when defined as a union of employees at a single company, was not prohibited. Nor was it prohibited for an employer and its employees to have conferences during working time without loss of pay.

We apply to the last sentence of Section 1153 (b) a similar interpretation. It does not prohibit single-employer unions, nor does it prohibit discussions between employees and their employer during working hours. The latter portion of the code section, however, does not diminish the primary prohibition of employer-dominated labor organizations. The right of employees to have effective representation at the bargaining table free from employer control is paramount. In the present case, the record establishes that the SEPC was not free from employer control.

The Employer contends that the SEPC was not in fact a "labor organization" within the meaning of Section 1153(b) of the Act. We reject this contention. Section 1140.4(f) of the ALRA is a definition of "labor organization" almost identical to the definition found in Section 2(5) of the National Labor Relations Act.

Section 1140.4(f) states:

> The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work for agricultural employees.

The U. S. Supreme Court has upheld the NLRB's view that

an employee committee is a "labor organization" within the meaning of the National Labor Relations Act if it discusses grievances or wages or working conditions with management. NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959), 44 LRRM 2204. In the present case, the record establishes that employee representatives dealt with management representatives with regard to wage rates, physical working conditions in the mechanics' shops, establishment of a credit union, layoffs, transfers, show-up time, rotational shifts, safety conditions, hours of employment and difficulties with foremen. Moreover, Respondent set forth the purpose of the SEPC in a company newsletter as being to "... work with management toward improving working conditions, safety, health, morale, efficiency and production." We conclude that the SEPC is a statutory labor organization. Cabot Carbon Co., supra.

Respondent also excepts to the ALO's finding of a violation of Section 1153 (b) on the ground that a union organizing drive was not being conducted at the time the SEPC was formed and that, therefore, no finding can be made of anti-union animus. In cases involving company-dominated unions under the NLRA, organizational activities are often carried on by a bona fide union at the time the company-dominated union is established; frequently the avowed purpose of the employer is to forestall recognition of the outside union. See "Characteristics of Company Unions", David J. Saposs, 5 LRRM 1090, p. 1091. The purpose of the statutory proscription, however, is to prevent employer interference with the employees' bargaining rights.

An employer, in forming a company-dominated organization,

may have the best of intentions, such as improving employee-management relations or, on the contrary, it may have the intent of preventing union organizing. Regardless of the motive, the guaranteed employee right of effective representation is frustrated. NLRB v. Clapper Mfg., Inc., 458 F, 2d 414 (3rd Cir. 1972). Thus, we find the absence of union organizational activity at the time a company-dominated labor organization was established by Respondent, although arguably indicating lack of anti-union animus on the part of Respondent, is not a defense to a Section 1153 (b) charge. The Remedy

We amplify the recommended Order of the ALO by ordering that Respondent take the affirmative actions of withdrawing and withholding all recognition from, and completely disestablishing, the SEPC as the representative of any of its agricultural employees for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of work, or any other terms or conditions of employment.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent, Superior Farming Company, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Interrogating its employees concerning their support or sympathies for the UFW or any other labor organization,

b. Dominating, supporting, or interfering with the formation of or administration of the Superior Employees Progress

Committee or any other labor organization.

c. Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging or refusing to hire or rehire, or in any other manner discriminating against, employees 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.

d. Recognizing, bargaining, or entering into a labor agreement with any labor organization which has not been certified pursuant to the provisions of the Act.

e. In any manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to support, join, or assist the UFW or any other labor organization, 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 or 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.

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

a. Withdraw and withhold all recognition from, and completely disestablish, the Superior Employees Progress Committee, or any successor thereto, as the representative of any of its agricultural employees for the purposes of dealing with Respondent concerning grievances, labor disputes, wages, rates

of pay, hours of work, or any other terms or conditions of employment.

b. Offer to employees Leocadia Felix, Arnold Garza, and Samuel De La Rosa immediate and full reinstatement to, or reemployment in, their former or equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay and other economic losses they may have suffered as a result of their termination or failure to obtain reemployment, from the dates of their respective discharges or failure to obtain reemployment to the dates on which they are each offered reinstatement, together with interest thereon at the rate of 7 percent per annum, such back pay to be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

c. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records, and other records necessary to determine the amount of back pay due and the rights of reinstatement under the terms of this Order.

d. Sign the Notice to Employees attached hereto which, after translation by the Regional Director into Spanish and other appropriate languages, shall be provided by Respondent in sufficient numbers in each language for the purposes set forth hereinafter,

e. Within 31 days after issuance of this Order, mail a copy of the attached Notice in appropriate languages to

each of the employees who were on its payroll at any time during the period from December 1, 1976 to the date of mailing.

f. Post copies of the attached Notice in all appropriate languages for 90 days in conspicuous places on its property, the timing and placement to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

g. Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in all appropriate languages to its employees assembled on company property, at times and places to be determined by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

h. Furnish such proof as may be requested by the Regional Director that the Notice has been mailed and distributed in the manner described above.

i. Give to the UFW the names and addresses of all past and present employees who, as set forth above, are to receive the Notice, and make available to the UFW, for a period of six months, access to a conveniently-located bulletin board

so as to allow the UFW to post notices and communications to employees.

j. Notify the Regional Director of the Fresno Regional Office, within 30 days after the date of issuance of this Order, of what steps Respondent has taken to comply herewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: January 26, 1979

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we violated the rights of our workers by forming, dominating, and interfering with, a labor organization known as the Superior Employees Progress Committee (SEPC), recognizing and bargaining with SEPC, interfering with and restraining workers by asking them if they wanted to be contacted by union organizers at their home when we passed out information cards, and discriminating against three employees, Leocadia Felix, Arnold Garza, and Samuel De La Rosa by refusing them employment or discharging them because of their support for the United Farm Workers of America or because they engaged in other concerted activity protected by the Agricultural Labor Relations Act. The ALRB has ordered us to mail, post, distribute, and allow this Notice to be read to our employees.

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.

WE WILL offer to rehire Leocadia Felix, Arnold Garza, and Samuel De La Rosa and reimburse them for any losses of pay and other economic losses they suffered because we violated their rights. WE WILL also disband the Superior Employees Progress Committee and have no more dealings with it. WE WILL also provide the United Farm Workers Union with space on our bulletin boards to post their notices for a period of six months.

WE WILL NOT in the future do anything that violates your rights. WE WILL NOT discriminate against employees, interrogate them, or form, dominate, assist, recognize, or bargain with any labor organization not certified by the Agricultural Labor Relations Board.

Dated: SUPERIOR FARMING COMPANY, INC.

By: _____

(Representative) (Title)

By:

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Superior Farming Co., Inc. (UFW)
Case Nos. 77-CE-6-D, 77-GE-6-1-D, 77-CE-7-D, 77-CE-8-D, 77-CE-8-1-D, 77-CE-33-D, 77-CE-52-1-D, 77-CE-81-D, 77-CE-89-D, 77-CE-109-D, 77-CE-133-D, 77-CE-133-1-D, and 77-CE-214-D
5 ALRB No. 6

ALO DECISION

Superior Fanning Company, Inc., was charged with the following violations of the Act:

1. Unlawful interrogation of employees (Section 1153 (a)).
2. Creating, dominating, assisting, interfering with and bargaining with a labor organization (Section 1153 (a) (b) (f)).
3. Discharging or refusing to rehire 12 employees because of their union or concerted activity (Section 1153 (c) and (a)).

The ALO found for the General Counsel on all three counts, but dismissed the allegations of illegal discharge of or refusal to rehire, nine of the 12 alleged discriminatees. The discharge findings to which exceptions were taken involved Donato Torres, Rafael Reyes, Arnold Garza and Samuel De La Rosa.

Donato Torres was allegedly discharged for repeated tardiness. The General Counsel contended that Torres was discharged by the Employer's labor coordinator because Torres refused to cooperate by testifying against the UFW in a 1975 election-objections hearing. The ALO concluded that the discharge was legal.

Rafael Reyes was allegedly discharged approximately eight days after he was employed because on his first day he drove a car which bore a "Yes on 14" bumper sticker. The Employer argued that Reyes was discharged because of a five-day unexcused absence. Insufficient evidence of illegal motive on the part of the Employer in discharging Reyes led the ALO to conclude that the discharge was legal. The ALO held that an anti-Proposition 14 campaign can be construed as evidencing hostility toward the UFW, but pointed out that more than an anti-union campaign is necessary to show unlawful motive.

Arnold Garza was elected as an employee representative and at various times he voiced complaints to management on behalf of himself and his co-workers. About a month before his discharge, he became associated with the UFW. The Employer contended that Garza was fired for insubordination and threats made to a supervisor, which occurred when Garza was denied a wage increase to which he thought he was entitled. The ALO found that the Employer's reason for the firing was pretextual.

Samuel De La Rosa, who had always been considered an excellent employee, was a known supporter of the UFW. The Employer contended that De La Rosa was fired because he came to work drunk and damaged vines. The ALO found the discharge to be illegal and that the Employer's justification was pretextual.

Shortly after the ALRA went into effect in 1975, the Employer formed an employee organization called the Superior Employees Progress Committee. The Employer contended that the SEPC was not a "labor organization" within the meaning of Section 1153(b) of the Act. The ALO found that based on the cases of NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959) and NLRB v. Ampex Corp., 442 P. 2d 82, the definition for "labor organization" should be broadly construed and that the existence of any of the purposes mentioned in the Act's definition [i.e., dealing with grievances or conditions of work, as the SEPC did] is sufficient to establish that an employee organization is a labor organization. The ALO also found that the Employer's motive, or lack thereof, in creating a company-dominated union cannot serve as a defense. NLRB v. Clapper Mfg. Inc., 458 F. 2d 414. Finally, the ALO found that the Employer violated Section 1153(f) of the Act which states that it is an unfair labor practice for an employer to "recognize, bargain with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the provisions of this part".

BOARD DECISION

Regarding the Employer's exception to the use of opposition to Proposition 14 as evidence of anti-union animus, the Board agreed that such opposition cannot, in and of itself, be considered as evidence of anti-union animus. However, the Board found sufficient indicia of anti-union animus without regard to the Employer's anti-Proposition 14 stance.

The Board affirmed the ALO's findings as to the SEPC, and rejected the Employer's arguments that (1) it was being prevented from exercising its right to confer with an employee or group of employees at any time with respect to any topic; (2) the SEPC was not in fact a "labor organization" within the meaning of Section 1153 (b) of the Act; and (3) anti-union animus necessary to establish a violation of Section 1153(b) cannot be found since a union organizing drive was not being conducted at the time the SEPC was formed.

REMEDY

The Board required the Employer to cease and desist from dominating, supporting or interfering with the formation or administration of any labor organization, and to take the affirmative action of disestablishing the SEPC as the representative of any of its agricultural employees.

The Employer was also ordered to grant discriminatees Felix, Garza and De La Rosa reinstatement with back pay.

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

SUPERIOR FARMING COMPANY, INC. Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	)	Case Nos. 77-CE-6-D 77-CE-6-1-D 77-CE-7-D 77-CE-8-D 77-CE-8-1-D 77-33-D 77-CE-52-1-D 77-CE-81-D 77-CE-89-D 77-CE-109-D 77-CE-133-D 77-E-133-1-D 77-CE-214-D

Nancy Kirk, appearing for the General Counsel;

David E. Smith, of Indio, California, and Bert C. Hoffman, Jr., of Doty, Quinlan, Kershaw & Fanucchi, of Fresno, California, appearing for the Respondent;

Deborah Miller, of Delano, California, appearing for the Charging Party.

DECISION

STATEMENT OF THE CASE

David C. Nevins, Administrative Law Officer: This case was heard by me between September 26 and October 18, 1977, in Delano, California.[1/] The original Consolidated Complaint was issued on July 27 and the First Amended Consolidated Complaint was then issued on September 12. Further amendments to the complaint were added at the hearing.

1/Unless otherwise stated, all dates hereinafter refer to 1977.

The complaint, as amended, is based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW"), against the Respondent, Superior Farming Company, Inc. Respondent admitted at the hearing that the written charges referenced in the First Amended Complaint were duly served upon it on various dates between March and September. The complaint, as amended, alleges that Respondent violated the Agricultural Labor Relations Act (hereafter the "Act") in numerous respects, alleging violations of Sections 1153(a), (b) , (c) , (e) , and (f).2/

All the parties were represented at and given a full opportunity to participate in the proceedings. In addition, the General Counsel and Respondent filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses and my consideration of the parties' respective briefs, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction.

The complaint, as amended, alleges that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act. The Respondent's answer admits these allegations. Accordingly, I find the instant dispute falls within the jurisdiction of the Act.

II. Background Facts.

The Respondent is a large agricultural employer in Kern County, California. Currently, it grows some thirty to

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2/ On April 26, 1977, the Board issued a decision certifying the UFW as bargaining representative of the Respondent's agricultural employees, based on the results of an election held September 11, 1975. 3 ALRB No. 35. The First Complaint charged that Respondent unlawfully refused to honor the UFW's certification and to bargain with the UFW following its certification. That charge was captioned as 77-CE-33-1-D. This refusal to bargain charge was dropped in the First Amended Complaint, but at the pre-hearing conference held on September 19, the Respondent and General Counsel stipulated that the refusal to bargain allegations of the First Complaint be amended into the First Amended Complaint. During the subsequent course of this proceeding, how ever, the parties stipulated that the allegations concerning Charge No. 77-CE-33-1-D should be severed from the remaining charges against Respondent and dealt with on the basis of the parties' stipulation without a hearing. Accordingly, Charge 77-CE-33-1-D became the basis of a separate Decision and Order by me, dated December 3, 1977. In that Decision and Order the Respondent was found to have violated Sections 1153(e) and (a) by refusing to bargain with the UFW.

thirty-five crops, including citrus fruits, table and wine grapes, almonds, and stone fruit. Respondent is a wholly-owned subsidiary of Superior Oil Company and is a corporation organized under the laws of Nevada.

The Respondent began its agricultural operations in 1968; by 1970 it had some seven thousand acres. Its acreage approximately doubled by 1973, and its purchase of Poso Ranch brought its present size to some thirty-seven thousand acres.

Poso Ranch was purchased from Roberts Farm, which at that time was under contract with the UFW. After the purchase of Poso the UFW demanded recognition from the Respondent as the employees' collective bargaining agent and picketed the Respondent to attain that recognition. The Respondent refused to recognize or deal with the UFW. But, in purchasing Poso Ranch the Respondent hired a number of supervisors and employees who had previously worked for Roberta Farm. Respondent's current work force varies between approximately eight hundred to one thousand full-time employees and two thousand employees during its peak season.

After the Act was passed by the State Legislature, in June of 1975, the Respondent began engaging in a campaign to discourage its employees from supporting the UFW. During the months of July and August anti-Union buttons were distributed by Respondent to supervisors and employees, and supervisors spoke with and distributed literature to employees likewise seeking them to vote against the UFW.

Shortly after the Act became effective, a representation election was conducted among Respondent's employees. As noted, in that election a majority of those eligible voters who [17] voted selected the UFW, and in April of 1977 the UFW was certified as the employees' bargaining representative. By the end of May the Respondent advised the UFW that it would not recognize or bargain with it; the Respondent admittedly does not accept the validity of the UFW's certification. (See Note 2, supra.)

So far as the record demonstrates, virtually no UFW activity took place on Respondent's premises between the 1975 election and certain events occurring in the spring of 1977, events described below. The Respondent did, however, engage in 22 another campaign in latter 1976, this one aimed at the defeat of California State Proposition 14. Proposition 14, of course, was a ballot proposition seeking to ensure certain collective bargaining and other rights in behalf of unions and employees. The Respondent opposed that proposition.

The Respondent's Proposition 14 campaign consisted of systematically placing "No on 14" stickers on its many Company vehicles, posting similar signs on its property, and distributing anti-Proposition 14 literature to employees. Some supervisors may also have worn the same anti-Union buttons as were distributed during the UFW's 1975 election campaign, white buttons with a black line angling down (buttons representing the international symbol for no), although the Respondent did not

distribute such buttons in 1976 to its supervisors.

At the hearing Respondent's president, Fred W. Andrew, acknowledged that Respondent's position was that its employees had no need for a union and that Respondent opposed the UFW' s representation of its employees. The Respondent's position is as true now as it was in 1975.

III. The Unfair Labor Practices Alleged.

The complaint, as amended, charges that Respondent violated Section 1153(a) of the Act by unlawfully interrogating employees regarding their support for the UFW; Sections 1153(a),(b), and (f) by creating, dominating, assisting, interfering with, and bargaining with a labor organization known as the Superior Employees Progress Committee; and Sections 1153(a) and
(c) by discharging or refusing to rehire the following employees: Juan and Manuela Medina, Irma Mendoza, John Castro, Arnold Garza, Leocadia Felix, Leonardo Serbin, Ruben Chavez, Donato Torres, Samuel De La Rosa, Charles Vroman, and Rafael Reyes. 3/

The Respondent denies it violated the Act.

In dealing with the various allegations contained in the complaint, as amended, consideration will be given separately to each allegation, first as to its facts and next the conclusions reached on the basis of those facts. Most of the allegations present disparate factual considerations, although to the extent possible those allegations (particularly the discharge allegations) will be presented in chronological order.

IV. The Superior Employees Progress Committee.

A. The Origin, Operation, And Functioning Of The Committee

Only days after the Act was enacted the Respondent promulgated what it termed as a "Problem Solving Plan For Employees." The motive behind the genesis of this "Plan" is a matter of conjecture. Respondent's president, Fred Andrew, claimed that with the ever-increasing size of Respondent's operations and the consequent depersonalization in its employer-employee relations, he thought it necessary to devise a method to improve communication between employees and management representatives. On the other hand, the "Plan" was promulgated

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3/The allegations concerning Juan and Manuela Medina and Irma Mendoza (Paragraphs 8(c) and (h) of the First Amended Complaint) were dismissed at the conclusion of the General Counsel's case in chief, following the motion made by Respondent. The discharge allegations concerning Charles Vroman and Rafael Reyes were offered as amendments to the complaint while the hearing was in progress. The amendment concerning Charles Vroman was permitted, but a ruling was reserved as to the propriety of amending the complaint in respect to Rafael Reyes, as discussed infra.

coincidentally with the passage of the Act and had, as one of its admitted purposes, the intent to establish a meaningful method for employees to air their grievances and thus create an environment where unionization was not felt necessary.

In several memoranda issued by Respondent supervisors and employees were advised that henceforth employees could discuss their problems, with impunity, with supervisors and management personnel in order to correct problems that might otherwise grow and breed discontent. In a memorandum dated June 18, 1975, supervisors were told, "No matter what the problem (business or personal) the immediate supervisor and other management personnel in the Company shall work with the employee in an effort to find the proper solution." In a separate memorandum dated the same day, employees were informed,

> Problems both personal and in connection with your job are almost certain to arise from time to time, and it is the sincere desire of the Company to work with you in finding fair and just solutions Only through working together can we build a happy and enthusiastic team on which everyone will be proud to be a member.

The Problem Solving Plan essentially called for employees to discuss their problems with immediate supervisors, whether crew boss, foreman, or supervisor, and if the resulting solution was unsatisfactory to the employee involved, he could seek another solution from either the employee relations supervisor, Bill Keever, or someone else of the employee's choosing in management. Problems were to be treated confidentially by management. The "Plan" was re-emphasized in a subsequent memorandum to employees, dated August 20, 1976.

In a memorandum dated November 9, 1976, however, President Andrew indicated to Respondent's supervisors that due to a continuing "reluctance on the part of our hourly and non-supervisory salaried employees [] to express or discuss their true feelings and concerns" that Respondent's management was forming the Superior Employees Progress Committee (hereafter referred to as the "SEPC"). The general purpose of the SEPC was characterized in literature distributed by Respondent to employees. Thus, in a memorandum dated November 10, 1976, employees were informed that

> [t]he Committee will be made up of non-supervisory permanent employees whose purpose will be to provide an effective way for hourly and non-supervisory salaried employees to bring to management's attention suggestions, complaints and problems connected with their day to day well-being. This action by management expands our "Employee Problem

> Solving Program" and hopefully will also improve employee communications.

In December, 1976, and February, 1977, issues of "Sprouting Off," Respondent's "newspaper" for employees, Respondent indicated that

> [t]he main purpose of the Committee is to provide an effective way for employees to exchange information, bring suggestions, complaints and job-connected problems to the attention of Management and also to work with Management toward improving working conditions, safety, health, morale, efficiency and production.

Several of Respondent's management officials, particularly Bill Keever, the employee relations supervisor, were responsible for approving the by-laws which governed the SEPC. The SEPC's by-laws set forth its purpose, employee eligibility to sit on the Committee, the units of representation which would elect representatives, the timing for and nature of electing representatives, the SEPC's officer structure, the schedule of meetings, and the SEPC's procedure for handling suggestions and complaints. In drafting the SEP'C's by-laws Mr. Keever reviewed and incorporated portions of other employee grievance plans, including plans from companies whose employees were represented by unions. Representatives for the SEPC were elected in November,1976, in an election conducted and tabulated by Respondent's management

Commencing in December, 1976, the SEPC began to hold its meetings. Thereafter, two meetings per month took place through April, one meeting on the first Friday of each month and a second meeting on the next Friday; management officials frequently attended the second meeting each month, as planned, to consider the problems, complaints, or suggestions arising at the first meeting. Bill Keever, however, sat in on the first four meetings held by the SEPC, helping and instructing the committee members on how to conduct their business. Keever's own secretary, Rosalie Saco, was the recording secretary for the SEPC and drafted minutes of the meetings, supplying such minutes (in English only) to committee members and management officials. The elected representatives met on Respondent's premises during work-time and were paid for their attendance.

Minutes from the eleven SEPC meetings that were held indicate that many topics were discussed. Some of those topics included employee transfers, wage discrepancies between employees, low wage rates, pay for "show-up" time, the establishment of a credit union, insecticide spraying hazards, difficulties with foremen, time card problems, and a complaint regarding the discharge of an employee. Thus, despite Mr. Keever's admonition to committee members that the SEPC was not a forum for considering wage problems, the meetings' minutes reflect that in

one fashion or another wage complaints or wage adjustments were frequently brought up at the meetings.4/

The SEPC was eventually disbanded after its first meeting in May (May 6). By that time the UFW had filed an unfair labor practice charge attacking the SEPC. Subsequent to that charge, Bill Keever informed SEPC members that the charge was made and that until further examination of it SEPC meetings were discontinued. Apparently, the SEPC has not met again since May 6.

B. Analysis And Conclusions

1. Domination, Interference, and Support

Section 1153(b) of the Act provides that it is an unfair labor practice for an employer

> [t]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. However, subject to such rules and regulations as may be made and published by the board pursuant to Section 1144, an agricultural employer shall not be prohibited from permitting agricultural employees to confer with him during working hours without loss of time or pay.

The General Counsel contends that Respondent violated Section H53(b) in creating and dealing with the SEPC.

Of course, the first prerequisite to a finding that Respondent violated Section 1153(b) is to determine whether the SEPC was a labor organization within the meaning of the Act Although Respondent argues that the SEPC cannot be described as a labor organization, characterizing the SEPC instead as merely a communication vehicle between employees and management, little doubt can exist that the SEPC was a labor organization as that term is defined in the Act.

The term labor organization is defined in Section 1140.4(f) and includes within that definition any organization or "employee representation committee or plan" which exists "in whole or in part [] for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours: of employment, or conditions of work. ..." That definition is identical to the one set forth in the National Labor Relations

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4/Arnold Garza was one of the twelve elected representatives and Samuel De La Rosa was one of the twelve elected alternate representatives. As will be noted later, Garza was a frequent speaker at the SEPC meetings, often complaining about the wage structure affecting the employee group he represented.

Act, as amended (29 U.S.C. §151, et. seq., hereafter referred to as the "NLRA"). As precedent under the NLRA compels, the definition of a labor organization must be broadly construed; the existence of any of the purposes enumerated in the Act (e.g., dealing with grievances or conditions of work) is sufficient to establish an employee organization or committee as a statutory labor organization. N.L.R.B. y. Cabot Carbon Co., 360 U.S. 203 (1959); N.L.R.B. v. Ampex Corp., 442 F.2d 82 (C.A. 7, 1971), cert. denied, 78 LRRM 2704.

Without doubt, the SEPC, composed of employee representatives, existed for dealing with most, if not all, of the purposes that would establish it as a labor organization. The SEPC's minutes are replete with instances where matters such as wage problems, discharges, employee transfers, show-up pay, restroom facilities, hours worked, distinctions between full-time and part-time employees, and time card problems were discussed. At the very least such problems as were raised by members of the SEPC can be characterized as employee grievances or discussions regarding conditions of work. Indeed, two of the central purposes of the SEPC, as stated by its own by-laws, were "to bring suggestions, complaints and job-connected problems ... to the attention of Management" and to "work with Management toward improving working conditions, safety, health, morale, efficiency and production for all concerned. ' One might ask if those stated purposes do not encompass nearly all conceivable goals of any labor organization.

Nor can any doubt exist that the SEPC was "dealing with" the Respondent concerning grievances and employee working conditions. Thus, the SEPC minutes reflect that as a result of SEPC members' suggestions or complaints a special meeting was arranged to discuss shop employees' wages, supervisors responded to the SEPC regarding its complaints, several problems were corrected (e.g., restroom facilities and at least one wage complaint) , and even the formation of a credit union was pursued by Respondent's management at the SEPC's suggestion.

Furthermore, management representatives not only attended regular SEPC meetings, but they also met regularly with the SEPC at the second of its two monthly meetings to respond to employee complaints and suggestions. And, as indicated by the Respondent's employee relations supervisor, Bill Keever, he regularly reviewed SEPC minutes and sought to resolve various problems that had been raised at the meetings. Employee committees having no more dealings with their employers than did the SEPC have been repeatedly held to be labor organizations "dealing with" their employers within the meaning of NLRA provisions similar to Sections 1140.4(f) and 1153(b). N.L.R.B. v. Clapper's Mfg. , Inc. , 458 F.2d 414 (C.A. 3, 1972); N.L.R.B. v. Thompson" Ramo Wooldridge, Inc., 305 F.2d 807 (C.A. 7, 1962); STR Inc., 221 NLRB 496 (1975); Fremont Mfg. Co., 224 NLRB 597 (1976), affirmed, 96 LRRM 3095 (C.A. 8, 1977).

As the cases cited in preceding paragraphs also clearly establish, doubt cannot reasonably exist that Respondent

interfered with, dominated, and supported the SEPC in contravention of Section 1153(b) . The very inception of the SEPC was the Respondent's idea. The Respondent, not the employees, devised, set forth the conditions of, and conducted the election of representatives, promulgated the by-laws and purposes of the SEPC, scheduled and notified the representatives when meetings were to be held, provided working time and facilities for SEPC meetings, and even had a high management representative (Keever) present during several SEPC meetings to assist in conducting the meetings. And, when SEPC members attempted to raise certain problems such as racial discrimination or broadly-based wage complaints , it was Respondent's management that sought to limit and control such topics. In addition, Respondent had Mr. Keever 's own secretary implanted as the recording secretary for the SEPC and Respondent's officials received SEPC minutes (typed only in English) to review what that committee was doing. In fact, Respondent not only was the originator of the SEPC, but it encouraged the employees to participate in the SEPC plan, and it was Respondent which disbanded the SEPC after May 6. It is fair to say, as one court remarked under similar circumstances, " [e] verything necessary for its functioning was done by management except for the attendance of employees selected for each meeting. . . [and] [t]here is nothing ... to suggest that the procedure would continue if it were left up to the employees." Amp ex, supra, 442 F.2d at 85.

Although the Respondent points out salient purposes for the SEPC, both for the Respondent and its employees, and argues that the SEPC was not established during a union organizational campaign in order to defeat another union, these factors are largely irrelevant to the statutory considerations . An employer' s good faith and salutory purposes in creating, interfering with or dominating a labor organization are not considerations that bear on whether that employer violated Section 1153 (b) See Clapper's Mfg. , supra, 458 F.2d 414. Nor can it be said that in barring Respondent from supporting, interfering with, or dominating the SEPC that the Respondent is thereby prevented from complying with that portion of Section 115 3(b) which assures its employees the right to confer during work time with Respondent. The Respondent's employees are certainly free to meet with Respondent and confer with it regarding their working conditions, but the Respondent may not--as it has attempted to do—create, interfere with, and dominate a labor organization for employees to serve as their vehicle of communication with management. Cabot Carbon Co . , supra, 360 U.S. at 218. 5/

5/Nor do I view Respondent's motive in creating the SEPC to be as innocent as it asserts it was. The progenitor of the SEPC, the Problem Solving Plan, was created by Respondent proximate to the UFW's organizing campaign in 1975, established soon after it became clear that a statute (the Act) would henceforth provide collective bargaining rights for employees, and had—as one of its admitted purposes--to add an important employee benefit in the hope that employees would see less need for an outside union to represent them. The evidence strongly suggests that these same features continued to exist -- [cont.]

2. Bargaining with the SEPC:

The General Counsel also contends that when dealing with the SEPC the Respondent violated Section 1153(f) of the Act. That section provides it to be an unfair labor practice for an employer "[t]o recognize, bargain with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the provisions of this part."

Section 1155.2(a) of the Act sheds light on the General Counsel's allegation:

> For purposes of this part, to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Two considerations exist, however, when employing the foregoing provision to the unlawful bargaining charge levied here by the General Counsel: first, Section 1155.2(a) purports only to define the ingredients of "good faith" bargaining, not bargaining in general; second, Section 1153(f) makes it unlawful to recognize or bargain with an uncertified labor organization. Finally, it should be kept in mind that bargaining is an act of narrower compass than "dealing with" a labor organization, the focus of a Section 1153(b) violation. See Cabot Carbon, supra, 360 U.S. at 6/

Our starting point should be a careful review of the SEPC meetings, as revealed through their minutes. They show 22 the following, inter alia:

5/[continued] --through creation of the SEPC--namely, that the SEPC would serve to encourage employees to reject the UFW in the event the UFW returned again to organize Respondent's employees

6/The National Labor Relations Act does not contain a provision comparable to Section 1153(f) of our Act, for bargaining with an uncertified labor organization under the federal statute is not prohibited. Thus, controlling precedent will not be found under the federal act when testing Respondent's conduct vis-a-vis the SEPC.

(a) During the first SEPC meeting, on December 3, 1976, a complaint was raised by Arnold Garza regarding the wages of shop employees. Following that complaint a separate meeting was held with Bill Branch, Bill Keever, Mr. Garza, and the shop employees wherein wages were discussed. Although nothing evolved directly from that meeting, it was only months later that Mr. Branch instituted a wage reclassification which systematically affected the shop employees' wage structure.

(b) At the next SEPC meeting, on December 10, a request was raised by a representative regarding the rotation of irrigators on the night shift so that night work would be more evenly spread among the irrigators. At the following meeting, on January 7, the supervisor of the irrigators submitted his promise to devise a means for such a rotation.

(c) Similarly, at those two meetings a complaint was raised and settled with respect to the heating and cooling equipment in the office area at Ranch 75, a complaint that was satisfied when a repairman corrected the situation.

(d) At the January 7 meeting a complaint was raised with respect to the timely increase of wages for employees who were transferred into higher wage classifications. At the next meeting it was announced by a management representative that a new method was being used to correct the situation.

(e) At the January 14 meeting an SEPC representative complained about the lack of restroom facilities in his work area; at the next meeting it was announced by him that the problem had been corrected by adding more facilities.

(f) Likewise, at those two meetings a problem was raised and settled regarding delays in getting parts from the warehouse.

(g) At the January 7 meeting one of the SEPC representatives raised the idea of bringing in a credit union for employees. Mr. Keever looked into the matter and, at the March 11 meeting, he reported back that if Respondent's employees demonstrated their support for a credit union he would arrange a meeting with a credit union representative.

(h) At the March 11 meeting one of the representatives requested an increase in work hours for the irrigators in his area. Although the hours were not generally increased, the representative was informed that his irrigators could transfer into other areas where more work was available.

(i) At the March 4 meeting a representative complained that employees in his area were being forced to spray insecticides or chemicals when it was windy. At the next meeting Mr. Keever announced that the problem would be corrected.

(j) During the two meetings in April a

problem was raised with respect to employees signing their time cards or time sheets early in the morning, rather than at the completion of their work; and by the May 6 meeting it was announced that the complaint had been adjusted.

(k) At the April 8 meeting management officials, at the urging of SEPC representatives, indicated that time would be provided for them to meet with employees from the areas they represented in order for the representatives to become familiar with their constituents and their problems.

Although the eleven SEPC meetings dealt with myriad complaints regarding individual employee problems as well, the foregoing review demonstrates that group problems and suggestions also provided an important focus of attention between the SEPC and Respondent's management. While one might characterize some of the group problems or complaints described as grievances, most are equally or more akin to subjects commonly dealt with in collective bargaining. For example, the institution of a credit union, the availability of time for the SEPC representatives to meet with their constituents, the regulation of heating problems, the availability of increased work hours, the adequate provision of restroom facilities, the safety of chemical spraying techniques, and insuring the accuracy of time sheets are all subjects relating to working conditions that an employer and labor organization may bargain about.

Were the term "bargaining" to exclude the types of discussions (and agreements) as witnessed in the SEPC minutes an unduly narrow construction of that term would emerge and the policy inherent in Section 1153(f) would be frustrated. Although no formal, written agreements were reached between the SEPC and Respondent, the existence of such agreements is not a condition precedent to finding that the parties bargained. Nor can it be controlling that the Respondent may have reserved to itself the right to agree with the suggestions made by the SEPC, for that reservation is not unlike most bargaining between employers and labor organizations.

It is my conclusion that the term "bargaining" as employed in Section 1153(f) includes the type of activity and dealings that existed between the SEPC and Respondent during the SEPC's short life. See Arkay Packaging Corp., 221 NLRB 99 (1975). And, in any event,it is my conclusion that Respondent recognized the SEPC as a labor organization representing its employees during the first half of 1977. Accordingly, I find that Respondent violated Section 1153(f) of the Act by both recognizeing and bargaining with the SEPC.

V. The Respondent's Purported Interrogation.

A. Aurelio Menchaca's Effort To Gain Information From Employees

During March and April of 1977, the Respondent

began passing out five-by-eight inch cards to employees. Aurelio Menchaca, the Respondent's labor coordinator, was given the responsibility to pass them out. 7/ The cards requested employee names, addresses, social security numbers, and birth dates. According to the card, the information was requested "under the law of the State of California" and could be supplied to the Agricultural Labor Relations Board and union organizers. On the card, the statement appears at the bottom: "I AM NOT WILLING TO SUPPLY ANY INFORMATION THAT I HAVE NOT WRITTEN ON THIS CARD." An employee could simply sign his or her name at the bottom, thereby indicating an unwillingness to supply the additional information.

At least two witnesses who testified at the hearing recalled receiving cards from Menchaca. Menchaca, significantly, had been the Respondent's chief spokesman against the UFW during the 1975 campaign. Irma Mendoza, who worked in the crew of Andres Arrendondo, remembered that Menchaca came to her crew and distributed the cards to her entire crew, telling them to look at the cards and sign them if they wished the Company to give the Union their addresses and be visited at home by the Union. After the employees signed and/or filled out the cards they returned them to Menchaca. Similarly, Donato Torres remembered Menchaca coming to his crew, passing out the cards, and asking employees to sign and put their addresses on the cards if they wished Union organizers to come to their homes or to the fields to speak with them. 8/

B. Analysis And Conclusions

The General Counsel asserts that Respondent violated Section 1153(a) of the Act when it distributed to and collected from employees the cards seeking certain information from them. It was uncontradicted that employees were told to provide the information requested if they desired a union to

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7/As labor coordinator, Mr. Menchaca was basically involved in the hiring process. Generally, crew bosses, foremen, or supervisors (as such positions are known in Respondent's operations) were responsible for hiring those needed to perform the particular tasks at hand. Menchaca would coordinate their hiring, either informing them of their needs at the time, or hiring the employees directly if the other persons were unable to fill their employment needs. In any event, Menchaca was responsible for insuring that new employees filled out the proper Company application forms.

8/According to Bill Keever, a search of all the cards filled out or signed by employees, about two hundred to three hundred in all, turned up only two from all those who testified at the proceeding, Samuel De La Rosa and Irma Mendoza. Neither of these persons filled out the information requested, but only signed the cards. From the face of the card, one would conclude that an employee who merely signed it without providing the other information declined to provide such other information.

visit them at their homes, and the cards themselves indicated that the information asked for on the cards, if provided by the employee, could be turned over to the Board and Union organizers. The employees were given the option to only sign the cards if they did not wish to provide the Board and Union organizers the information.

The General Counsel claims that distribution of the cards amounted to unlawful interrogation of employees regarding their Union sympathies. I agree

Although years ago the National Labor Relations Board indicated that employer interrogation of employees would be measured "under all the circumstances [as to whether] the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act," 9/ that agency subsequently set down clear and firm standards to determine whether an employer's questioning of employees (at least in instances of systematic questioning, as here) tends to restrain, coerce, or interfere with employees' statutory rights. Thus, in Strucksnes Construction Co.. Inc., 165 NLRB 1062, 1063 (1967), the federal agency stated:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(l) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Of course, by Section 1148 of our Act our Board is to follow applicable precedent of the NLRA.

It is clear that Respondent's distribution of cards to employees failed to meet the standards set forth in Strucksnes. First, no assurances against reprisal were given to the employees when they were asked to fill in the cards. Second, the cards obviously identified by name those employees who returned them to Respondent, thus eliminating any secrecy to the sentiments their responses suggested. Third, the cards were distributed by an employer whose policy against the UFW and unions had been made repeatedly clear to employees and were distributed by an agent of Respondent (Mr. Menchaca) who had been instrumental during 1975 in explaining Respondent's opposition to unions.

Nor can much doubt exist that the cards sought

9/ Blue Flash Express, Inc., 109 NLRB 591, 594 (1954).

information that an employer under our Act is barred from seeking.; It sought from employees their designation as to whether they wished to provide personal information to unions so that such unions could contact and organize the employees at home. Those providing the requested information would thereby tend to believe they had indicated a preference for unions or shown their sympathies for unions, while those refusing to provide such information would tend to believe they had indicated their opposition to unions. The Respondent thus imposed on employees the need to reflect whether they wished to be contacted at home by union organizers or not. As was said in N.L.R.B. v. Harry F. Berggren & Sons, Inc.. 406 F.2d 239, 244-245 (C.A. 8, 1969), cert. denied, 396 U.S. 823 (quoting with approval from the dissent in Blue Flash Express, supra) :

> When an employer inquires into organizational activity ... he invades the privacy in which employees are entitled to exercise the rights given them by the Act. When he questions an employee about Union organization or any concerted activities he forces the employee to take a stand on such issues whether or not the employee desires to Moreover, employer interrogation tends to implant in the mind of the employee the apprehension that the employer is seeking information in order to affect his job security and the fear that economic reprisal, will follow the questioning. * * * * Interrogation thus serves as an implied threat or a warning to employees of the adverse consequences of organization and dissuades them from participating in concerted activity.

The Respondent counters the foregoing approach to the problem of interrogation by claiming a legitimate purpose 20 for its questioning. It asserts that it was difficult to collect employee names and addresses, which information is required under Board rules and regulations, 10/ but conceded its desire to demonstrate how many employees did not wish their names and addresses to be turned over to union organizers. The Respondent's contentions, however, are unpersuasive.

Most important, Respondent's motive in distributing the cards to or questioning employees is not relevant to

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10/Under the Board's Emergency Regulations, Sections 20310(a)(2) and 20910(c), employers must turn over to the Board, for union use, the names, addresses, and job classifications of employees when a union files either a notice of intent to organize an employer or a petition for certification.

consideration under 1153(a). The adverse effects of employee questioning "can follow interrogation regardless of an employer's motive." Harry F. Berggren, supra, 406 F.2d at 245. In addition, the Board s regulation requiring employee names and addresses does not allow for the selective granting of such information, particularly when that selection is instigated by the employer. Furthermore, as Mr. Keever admitted, many of Respondent's employees' names and their addresses are recorded on the Respondent's computer, indicating that Respondent not only had easy access to such information but sought primarily by its card collection to oppose giving up those names and addresses if, and when, a union came to organize its employees in the future. By hoping to have as many workers as possible refuse to provide the information, the Respondent intended to show cause why it would not provide that information.

Under the clear weight of federal precedent it must be concluded that Respondent's distribution and collection of cards from employees during 1977 violated 1153(a) of the Act. The Respondent unlawfully sought information from its employees which could openly reveal to their employer their sympathies toward unions or union organizing and did so without insuring the proper safeguards. Thus, the Respondent interrogated employees in a fashion that would reasonably tend to restrain, coerce, or interfere with their protected activities.

VI. The Discharges.

A. Rafael Reyes

1. Statement of Facts:

On December 1, 1976, Rafael Reyes began his em-ployrnent with Respondent, pruning grape vines. He was hired by Cliofas Flores, boss of the crew, who had known Reyes for some twenty years and who lived in the same city as Reyes, Delano. Flores's crew records indicate that Reyes worked regular crew hours from December 1 through December 7.

On Reyes's first day of work he drove his own vehicle, on which he had a bumper sticker urging a yes vote on Proposition 14. Reyes recalled that Foreman Flores approached him during the first day and told Reyes that his bumper sticker had gotten him in trouble, that the foreman was told by his supervisor that he had strikers in his crew. Flores reputedly told Reyes that he should remove the sticker, and Reyes agreed. Flores, himself, then removed the bumper sticker, and only a "stain" remained on the bumper. Flores admitted he removed Reyes's bumper sticker, claiming not that he had done so because some other supervisor had complained about it, as Reyes claims Flores told him, but because Reyes was an old friend and he thought Reyes would have a better chance of getting employment on other ranches without the Yes on 14 sticker.

In any event, the sticker was removed on the first day, with Reyes's agreement. For almost all of his employment

with Respondent Reyes did not again drive his vehicle, riding instead with Manuel Wiser.

On December 8 Reyes is listed on the crew records as absent due to sickness, as he is for December 9 and 10 as well. Reyes claimed that on December 7 he informed Flores that he was ill and would return to work when he could, leaving his job at noon. Flores claimed, on the basis of his crew records, that Reyes worked a full day on December 7 and recalled that Reyes was thereafter listed as sick because Manuel Wiser subsequently told Flores that Reyes was absent because of illness. Reyes apparently drove his own vehicle that last day, with the bumper stain.

The record becomes murkier in connection with Reyes's next encounter with Flores. According to Reyes, he went to Flores's home on a Saturday, presumably December 11, seeking his paycheck. Reyes claims that Flores did not have his check, told Reyes to pick it up at the ranch, and informed Reyes that he , was no longer employed, saying, "because in the time that had been put in that I didn't have any time therein and that they had told him that that was all." "Well, he told me that I didn't ' have any time put in because I was ill," Reyes testified.

Flores, on the other hand, claimed that Reyes came to his home on Friday, presumably December 10, seeking his paycheck. Flores had brought the check to his house in case Reyes wanted it and gave the employee his check. Flores recalled that, at the time, he believed Reyes had been absent due to illness, but that nothing was said about the employee's absence. Flores claimed he thought Reyes did not look ill and expected him to return to work on the next Monday.

On the next Monday, December 13, Flores's crew re-cords list Reyes absent (no reason is assigned). The absence is also noted on December 14, 15 and 16 as well, but on the 16th Reyes is listed as terminated because he was absent without excuse for five days. 11/

Rather than having returned to work on December 13, Reyes apparently began employment with a labor contractor that day, as is indicated on records produced from one of Respondent's labor contractors. His immediate employment with that contractor ' can be explained if one accepts the claim of Reyes that he was notified by Flores of his discharge on the previous Saturday, although Reyes, himself, recalled that he did not begin employment with the contractor for some four days or so after learning of

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11/Flores claimed that an unexcused absence of three days calls for discharge under Respondent's policies. He asserted he gave Reyes extra leeway because he had known Reyes for a long time. Actually, if one includes those days that Reyes is listed as sick, Reyes's total absence was six or seven days, depending on whether or not the day on which Reyes was discharged is included.

his discharge. On the other hand, it is difficult to explain Flores's notations on his crew records regarding Reyes's absence after December 10 if Flores had--in fact--notified Reyes he was discharged on December 10 or 11, unless the records are inaccurate.

Although Reyes left his employment in December, 1976, a charge was not filed in his behalf until late September, 1977, during the course of the instant proceeding. The Reyes charge sought to amend an April, 1977, charge relating to the February, 1977, employment termination of Juan and Manuela Medina (whose claims I subsequently dismissed from the complaint due to a want of proof). The General Counsel moved to amend the existing complaint (prior' to my dismissal of the Medina claims) to include the charge relating to Reyes, on October 3, a motion I took under submission despite the Respondent's objection that the amendment was barred as untimely by Section 1160.2 of the Act.

2. Analysis and Conclusions:

(a) The Reyes Amendment

The discharge allegation regarding Mr. Reyes--namely, that he was discharged "because of his support and activities on behalf of the UFW, specifically regarding the Proposition 14 campaign"--was added to the complaint by way of an amendment dated October 3, during the course of the hearing. Although a ruling by me was initially reserved as to the appropriateness of the proposed amendment (and evidence taken subject to an eventual ruling) , I have concluded that the amendment relating to Reyes is appropriate (despite Respondent's objection).

While the Reyes matter was originally submitted in the form of an amended unfair labor practice charge relating to the subsequently dismissed Medina discharges (originally filed on April 4 and relating to employment terminations on February 17), it is unnecessary to consider whether the Reyes matter constituted a proper amendment of the Medina charge. Rather, under the NLRA's similar procedural provisions the General Counsel may amend his complaint to include matter not specifically cited in the original charge so long as the amendment is closely related to the charge originally filed by a private party and involves matter occurring within six months preceding that original charge. See N.L.R.B. v. Braswell Motor Freight Lines, 486 F.2d 743 (C.A. 7, 1973); N.L.R.B. v. Pinion Coil Co., 201 F.2d 484 (C.A. 2, 1952). The amendment must be sufficiently close to the original charge to insure that the General Counsel is not proceeding on his own initiative but upon the original charge. N.L.R.B. v. Rex Disposables, 494 F.2d 588 (C.A. 5, 1974).

Here, the Reyes matter naturally flowed from the Medina discharge allegations that were set forth in the original and timely charge. Reyes was employed on the same crew as

the Medinas, his termination involved the same crew foreman, and his departure from employment occurred about two months before the Medinas (and within six months of their original charge). More important, however, when Mr. Reyes first appeared at the hearing as a witness, prior to any amendment involving him, he appeared only as a witness in behalf of the Medinas, citing certain events concerning their common foreman that allegedly shed light on the motive behind the Medinas' termination. Clearly, the Reyes matter arose from investigation and prosecution of the Medinas' charge and, thus, was closely related to the charge involving the Medinas. See N.L.R.B. v. Kohler Co., 220 F.2d 3 (C. A. 7, 1955); Pinion Coil Co.. supra, 201 F.2d at 484. Accordingly, I find that a sufficient connection existed between the Medinas' original charge and the proposed amendment with respect to Reyes to permit the General Counsel to amend the complaint regarding Mr. Reyes.

(b) Mr. Reyes's Discharge

As noted, the facts immediately surrounding Mr. Reyes's employment termination are confused. 12/ Mr. Reyes contended he was informed of his discharge by his foreman, Cliofas Flores, on December 11, when he went to Flores's home to collect his paycheck. Flores, on the other hand, claimed he did not then advise Reyes of any discharge, expected him at work the following Monday, and discharged him only days later when Reyes inexplicably failed to return to work.

It is difficult, if not impossible, to make a finding with respect to the events immediately preceding Reyes's employment termination. Supporting the view that Reyes was informed of his discharge on December 11 is the fact that on December 13, the following Monday, he had already secured other employment with a labor contractor. No reason would have existed to secure such employment unless Reyes believed he had been discharged (unless, of course, he wished to quit work with Respondent). Conversely, if Reyes had been discharged on December 10 or. 11, no reason would have existed for Flores to maintain Reyes's name on his crew's records and to mark him absent for the next several days, unless Flores attempted to cover up his discharge of Reyes in subtle fashion (a subtlety I do not quite believe Flores inclined to plan). Nor can I conclude that the testimonial quality or demeanor of either Reyes or Flores was

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12/It should be noted that during his testimony, Mr. Reyes indicated he returned to Respondent's property after his termination, under the employment of a labor contractor. He worked with that contractor for a brief time and, according to him, was then discharged again. This brief employment occurred sometime in December, 1976, or January, 1977. I advised Respondent at the hearing that I did not consider the testimony surrounding Reyes's employment with and discharge from the labor contractor to be sufficient to establish a prima facie case that that subsequent employment discharge violated the Act.

sufficiently impressive to credit one of their versions over the other's. Under the circumstances, I believe the most probable is that Reyes may have thought he was discharged due to his conversation with Flores regarding his paycheck, but that Flores had not then discharged him, thinking Reyes would return to work.

Nonetheless, facts relating to the Reyes termination do exist which lead me to conclude that he was not unlawfully discharged. First, the only basis upon which the General Counsel challenges Reyes's termination is that when Mr. Reyes initially appeared for work with Flores, on December 1, 1976, his car bore a bumper sticker favoring Proposition 14, which Flores admittedly removed. 13/ But, that incident occurred on Reyes's first day of employment and he continued working for some five additional days without further incident, until Reyes absented himself on December due to illness. Nothing further was said during those five days regarding Reyes's bumper sticker, which had been removed by Foreman Flores. 14/

Second, at the time of Reyes's termination virtually no active union issue existed on Respondent's property. The Proposition 14 campaign had been over for a month. No UFW activity was taking place with respect to Respondent's employees. Thus, it is difficult to find that any festering UFW issue existed at the time which might have provided some reason for discharging Mr. Reyes.

Finally, Mr. Reyes was not a permanent employee of Respondent, but hired only to perform the seasonal pruning at the time. It is not apparent to me why Respondent, or one of its supervisors, would have felt it necessary to discharge Reyes, who was not only inactive in his support for the UFW (and Proposition 14 by that time) but who would likely leave Respondent's employment when the season ended, all because he had once had a bumper sticker on his car.

Normally when measuring an alleged discharge under Section 1153(c) of the Act, as is cited by the General Counsel, the employer's motive is in issue. Colonial Lincoln Mercury Sales, Inc., 197 NLRB 54, 58, enforced, 485 F.2d 455 (C. A. 5, (1973) . I am unpersuaded by the evidence that the Respondent's motive surrounding Mr. Reyes's employment termination is sufficiently suspect to find a violation of the Act. While it is

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13/Although Mr. Reyes testified he supported the UFW, no activity of any kind relating to his support was brought forward to show that Respondent had any reason to discharge him for manifesting such support. Indeed, it does not appear that Reyes had previously worked for Respondent or actively manifested support for the UFW.

14/It should be remembered that Reyes and Flores had known one another for many years and, consequently, Flores's explanation for removing Reyes's bumper sticker was not wholly unconvincing.

true that Respondent waged an active, vigorous campaign against Proposition 14 in the fall of 1976, and while one may construe that campaign as evidencing hostility toward the UFW, the evidence shows no general or individual expression of hostility toward a rank-and-file worker, like Mr. Reyes. More than a mere anti-union campaign is necessary to show unlawful motive (see Howard Rose Co., 3 ALRB No. 86 (1977), and I do not believe that extra ingredient is found in this instance.

In short, I am not persuaded that Respondent discharged Mr. Reyes because his car had borne a bumper sticker favoring Proposition 14 on one day of his employment, a sticker that was removed and thereafter never spoken about again. Reyes was, after all, only one of over a thousand employees then working for Respondent, and he hardly qualified as an open, avid UFW supporter.

B. Leocadia Felix

1. Statement of Facts:

Leocadia Felix's employment with Respondent began in December, 1975. She worked in irrigation, weeding, and pruning.

Soon after she began work, Mrs. Felix learned she was pregnant, being diagnosed as such in late December, 1975, or in January, 1976. Sometime in February or March of 1976 she informed the Respondent of her pregnancy; she told a person named Fernando, whose position with the Respondent involved him in the medical insurance program. (Fernando's identity is not clear, but he may have been Fred Madriaga, who worked in the office, assisted in labor relations matters, and helped Menchaca in campaigning against the UFW in 1975.) Due to Fernando's request, Mrs. Felix presented the Respondent with a doctor's confirmation of her pregnancy, dated April 28, 1976. The medical documentation was signed by a Dr. Murphy and bore the identification of the National Farm Workers Health Group, a clinic affiliated with the UFW.

Although her child was not born until August 24, 1976, Mrs. Felix stopped working for the Respondent in mid-May, 1976. She claims to have informed Mr. Menchaca of her leaving the Respondent and that he agreed to give her future work if it was available; Menchaca denied having any such conversation with Felix at the time of her quitting.

The pertinent facts surrounding Felix's dealings with Respondent do not emerge with great clarity. First, Mrs. Felix testified that she presented Respondent, either through Fernando or a secretary, with a series of medical bills from the UFW medical clinic for her pregnancy, bringing forth six such claims as evidence. Although Mrs. Felix insisted she gave all six forms to the Respondent, she indicated that Respondent re-turned the claims either at the time of or shortly after mid-May when she left her employment. If, indeed, she turned into

Respondent any of the forms she identified in the record, it is not reasonable to believe that she turned in all of them, for two of them bear dates in July of 1976, substantially after her departure. And, two more of the six bear dates in mid-June and late-May, also after her departure. 15/ Thus, only two of the six forms cited by Felix were claims she possessed before her employment departure or that could have been submitted to Respondent while she was still employed.

The second grouping of hazy facts involves Mrs. Felix's effort to be reinstated with the Respondent after the birth of her child. She claimed that between September, 1976, and late-May, 1977, she called Aurelio Menchaca between ten and twelve times seeking further employment with Respondent. Menchaca claimed that during that time he spoke with Felix only two or three times about employment, although he could not remember when; he admitted he did not rehire her. 16/

Several conclusions reasonably emerge in connection with Felix's reinstatement efforts. For one thing, a careful reading of the telephone bills introduced by Felix to support her proposition of numerous telephone calls to Menchaca do not wholly support her testimony. Her bills indicate that she made eight calls in September, 1976, six of which fell within the first half of the month and none of which was for any extended

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15/Mrs. Felix's contention is essentially that by giving the Respondent medical forms from the UFW clinic the Respondent identified her as a supporter of the UFW. No other evidence concerning her affiliation with the UFW was presented. The medical forms presented in the record, however, were drawn from the original forms still possessed by Felix at the time of the hearing, forms she asserts were returned to her by the Respondent at or about the time of her quitting. Her assertion is that she was given back the forms when she received the papers from Respondent so that she could privately continue the medical insurance program. After May Mrs. Felix continued the medical insurance privately and made her own payments directly to the insurance company.

16/As was noted, supra, Footnote 7, Menchaca is involved in Respondent's hiring process by notifying crew bosses of their needs and filling such needs if the crew bosses are unable to find a sufficient number of employees. But, Menchaca asserted he only hires employees directly when crew bosses advise him that he should help them to fill their crew limits. Thus, according to Menchaca nearly all employees hired, at least for seasonal-type work, are hired by the crew bosses and not by him. He admitted, however, that he made no effort to refer Felix to any crew boss who may have been hiring between September, 1976, and May, 1977, and conceded that the Respondent may well have hired over four hundred employees during that period of time, though Menchaca did claim he suggested to Felix that she contact one of Respondent's labor contractors.

time (indeed, six of the calls seem to be for the minimum time charge or slightly more, three of which were on the same day); one call during November, 1976, of the briefest duration; and three calls in January, 1977, only two of which were for any extended time. 17/

For another thing, since some eight of the twelve calls cited on the bills occurred in September, 1976, I am led to doubt that most of these calls involved any reinstatement effort on Mrs. Felix's part, inasmuch as her baby by that time was only days old. Finally, the calls listed on the bills are frequently grouped together and for insignificant time periods, either occurring on the same day or within days of one another, making it reasonable to conclude that many of them involved an unsuccessful effort to contact someone at the Respondent and not an overly repetitive effort to get further employment. 18/

2. Analysis and Conclusions:

The General Counsel complains that after Mrs. Felix left her employment with Respondent in mid-May, 1976, the Respondent repeatedly rejected her efforts at re-employment between December, 1976, and July, 1977, because in its eyes she was a supporter of the UFW. Of course, the General Counsel must support that claim by a preponderance of credible evidence.

Several facts surrounding Felix's employment relations with Respondent are clear. She worked for approximately six months, after which she quit due to her pregnancy. Her baby was born in late August, 1976. She thereafter sought further employment from the Respondent.

As the Respondent notes, however, Felix's connection with the UFW was barely perceptible. While working for Respondent she engaged in no activity in behalf of the UFW or in other protected activities. Her only manifested connection with the UFW was the fact that she visited the UFW's medical clinic on several occasions during her pregnancy.

Serious doubts, thus, readily emerge on one's way to concluding that Respondent refused to re-employ Felix

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17/The telephone bills introduced by Felix were not a complete set of bills for the period in-question. Furthermore, the bills only reflect the numbers called, and the telephone number at which she attempted to reach Mr. Menchaca was the same as that for Respondent's general' office, where the employee medical program is administered.

18/A suggestion exists in the record that Mrs. Felix's numerous calls to Respondent may have been associated with problems she had regarding medical insurance payments for her pregnancy, although she denied this. On the other hand, Mrs. Felix admitted she made no personal visit to Respondent regarding employment.

"because of her activity and support of the UFW," as alleged in the complaint. For one thing, even assuming the Respondent's supervisors knew of the UFW medical clinic bills Felix allegedly submitted to Respondent's office, that low-cost medical ass is-tance hardly demonstrates her active support for the UFW; nor do those bills form an overly strong basis for suspecting Felix of supporting the UFW. For another thing, because of the relationship in time between her visits to the clinic and her discharge, it is not clear just how many medical clinic bills were actually submitted by Felix to the Respondent's office, although I am con-vinced some were submitted. Also with respect to Felix's medical bills, the evidence leaves open to some question the exact iden-tity of Fernando, to whom she gave the bills, and whether any supervisor or high-ranking official from Respondent would have occasion to learn of those bills.

Ambiguity also surrounds Mrs. Felix's re-employment efforts. The telephone bills she identified as demonstrating her ten to twelve calls for re-employment do not fully substantiate those calls, since the timing and duration of those calls do not convincingly establish that they were for the purpose of rehire.

Having cited the doubts that can arise over Felix's medical bills and attempts at re-employment, other persuasive facts or inferences exist to support her claim. First, I credit her testimony that when she was given back the originals of her UFW medical bills Mr. Menchaca was present. Second, I credit her testimony that when she left her employment Mr. Menchaca told her she would be rehired if a position was available. 19/

Third, I think it fair to infer that Fernando, to whom Mrs. Felix gave her UFW medical bills and .pregnancy certifi-cate, and as he was known to her, was in reality Fred Madriaga, who admittedly was Respondent's liaison with employees on insurance matters. Significantly, it was Madriaga who assisted Menchaca in labor relations matters and assisted him with respect to the 1975 employee election. Thus, it is fair to infer that Menchaca was aware of Felix's UFW bills, particularly as he and Madriaga were both present when they were returned.

Fourth, it is significant that in response to the

19/Although Menchaca denied being present when Felix was returned her medical bills or that he assured her of future employment, I do not credit his denials. As will become clear in later sections, Mr. Menchaca's testimony is subject to serious j doubt, contradicted as it was by several credible witnesses (see | the discussion infra, pp. 55, 69). Felix' s demeanor as a witness was impressive; she exhibited no effort to exaggerate or prevari-cate, while Menchaca in comparison seemed to be purposely vague in Felix's case. Although some of the documentary evidence sub-mitted in behalf of Felix did not necessarily fully prove her assertions, that evidence was clearly corroborative and gave sup-port to her claims.

General Counsel's subpoena the Respondent was able to produce only five medical bills or statements submitted by employees that bear the UFW emblem, as did Felix's. Thus, one can see how rare it was for employees to turn in such billings with the Respondent. And, the attempted explanation by Mr. Keever of those bills, as he was responsible for producing the medical bills from Respondent's records, appeared unusually vague and ambiguous concerning such records, contrary to his other testimony.

Fifth, the testimony establishes, one, that Respendent's policy was to rehire workers who had experience with Respondent if possible, and, two, that Respondent's policy was that supervisors who commit themselves to rehiring employees should keep their word. Yet, in Felix's case these policies were not followed.

Sixth, irrespective of the number of her attempts at re-employment, it is clear that her efforts were more than three and that Menchaca made no effort to see that Felix was re-hired. Not only did he personally make no effort to place her with a crew, but he never even suggested any crew bosses to her who might have been hiring. 20/ Although the evidence does not directly show that Menchaca personally hired employees during the period in question, the inference that either he did or was instrumental in such hiring glaringly emerges from the testimony. Admittedly, Menchaca is a man known in the area to be a source of employment for workers. He had an overall responsibility for coordinating Respondent's labor needs, was familiar on a day-to-day basis with the hirings and vacancies, and was considered within the Respondent as one who could arrange employee transfers. One cannot conclude from the overall testimony that out of the hundreds hired while Felix persistently searched for employment with Respondent that Menchaca was never personally involved. 21/

In addition, I should note that unlike his other testimony, Menchaca's testimony with respect to Mrs. Felix seemed purposely vague. The image seemed to be unnaturally put forward of a man who could remember none of the details

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20/From September, 1976, through June, 1977, the Respondent hired hundreds of employees, over four hundred at least Indeed, Felix's efforts at re-employment occurred during the start of the pruning season, work that she was experienced in.

21/The General Counsel points also to the fact that several days after Felix filed her unfair labor practice charge on June 24, Menchaca called her for employment. The testimony, however, reflects that she quit the job after one day because the work was on a piece-rate basis. One cannot conclude, however, that Felix conditioned her re-employment efforts with Menchaca on non-piece-rate work; Menchaca himself made no such claim. Nor do I think that Menchaca's post-charge offer of employment can be used to shed light on his pre-charge conduct or motive. See California Evidence Code Section 1151.

surrounding Felix's employment and her efforts at re-employment. While such vagueness fits neatly with Respondent's litigation posture in respect to Felix, it did not fit so well with Menchaca's overall testimony that demonstrated little reluctance to recall, with specificity, details of even greater antiquity.

While the evidence might well support the inference that Respondent did not violate the Act in failing to rehire Mrs. Felix, I believe the more compelling inference, based on the record as a whole, supports the view that Respondent violated Section 1153(c) in its refusal to re-employ Felix.. It is worth noting that Mr. Menchaca was personally involved in rejecting Felix's effort for further employment, and Menchaca was the same person charged with the responsibility of convincing employees to reject the UFW. It is, thus, more than reasonable to infer that Menchaca, a key employee relations figure with Respondent, would refuse to rehire an employee who had demonstrated some affiliation with the UFW, albeit not a very strong affiliation. It would be to Menchaca's advantage to keep out employees who were more than likely to support the UFW and aid in defeating the very no-union policy he helped to foster.

C. John Castro

1. Statement of Facts:

John Castro was initially employed by Respondent in 1973, and in December of 1974 he was reclassified as a harvest foreman. During his early months as a foreman Mr. Castro worked in a variety of crops, such as oranges, nectarines, and grapes. In August, 1975, he began working in the almond crop, harvesting it, under the supervision of Herb Hanna, which crop he remained with until his discharge on March 25, 1977.

Mr. Castro's most recent work duties can be briefly summarized. Between August and November, 1975, he worked as a harvest foreman during the almond harvest, overseeing the operation of almond shakers. The shakers are machines which fasten onto almond trees and shake the nuts free. When the harvest was over, Castro took charge (still under Hanna) of the harvest equipment shop at Ranch 95, where he and some other workers prepared and repaired the almond and grape harvesting equipment. He was responsible for the paper work concerning the shop, materials requisitions, and passing along work assignments. From the time Castro was classified as a harvest foreman until his discharge, he was paid a monthly salary and assigned a Company truck as his vehicle, and in February, 1976, he was given a Company house as were other foremen.

Castro again supervised the shakers during the almond harvest of 1976, which began on August 5 and ended on October 28. It was during this harvest that events began unfolding which led to his eventual discharge. 22/

22/During the harvest, Castro was responsible -- [cont]

Prior to the 1976 almond harvest, Mr. Castro had been considered by his immediate supervisors, Herb Hanna and Dave Nelson, as a good foreman. As his evaluation review form, dated November 20, 1975, indicates, Castro was considered by Hanna as above average in nearly every category, including his paper work, planning ability, dependability, initiative, loyalty, and judgment. And, at that time, Castro was given a raise in pay of $35.00 per month.

Prior to Castro's annual review in December, 1976, he actively assisted his brother-in-law in the campaign regarding Proposition 14. According to Castro, during September of 1976 he and his brother-in-law put up some thirty posters around Respondent's property, urging people to vote yes on Proposition 14, and also attached "Yes on 14" bumper stickers on various vehicles around the property. According to Castro, one of Respondent's area superintendents, Doyle Maddox, saw him putting up the posters.23/

Mr. Castro also asserted he refused to display the "No on 14" bumper stickers on his Company vehicle that were passed out to all personnel who drove Company vehicles. Castro claimed he was given two stickers by Herb Hanna, after Hanna asked him why he had not already displayed the stickers, but that Castro continued to ignore affixing the stickers to his bumpers. Although Castro's claim is supported by one of the harvest mechanics, Reggie Reyes, who claimed he never saw Castro display a No sticker, John Ortiz, another mechanic, and Herb Hanna both claimed they were present when Castro mounted a "No on 14" sticker to his Company vehicle.

Mr. Castro's next evaluation form, filled out by Mr. Hanna and dated November 10, 1976, reflects a drastic change regarding Castro's performance as a foreman. Not one category of the evaluation form is indicative of above-average ability,

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22/ [continued] --for seeing that the appropriate work was done by his ten almond shakers, insuring they were in proper working order, that they had sufficient fuel, that the machines were in the right area, that the drivers worked as they should. Mr. Castro had the authority to recommend the hiring and firing of his workers and could personally discipline them. He was also responsible for all of the paper work concerning the shaking operations, such as keeping employee work hours and machine operating hours.

23/Other than Mr. Castro's simple assertion that Maddox observed him with the posters, his testimony does not reflect in any detail the circumstances of or surrounding that alleged observation by Maddox. Maddox denied ever seeing Castro place any poster or stickers regarding Proposition 14. And, although Maddox admitted he saw at least two "Yes on 14" bumper stickers stuck on signs or posts at two entrances of Ranch 75, neither Maddox nor any other witness corroborated Castro that numerous posters were displayed on Respondent's properties.

and, contrary to the flattering remarks of a year earlier, Hanna's 1976 statements reflectserious criticism of Castro's responsiveness, responsibility, and initiative.

Once more, however, a conflict in testimony exists as to whether Castro was apprised of his claimed weaknesses as a foreman. Mr. Castro initially claimed that Hanna never complained to him during the 1976 almond harvest. But, on cross-examination, under direct questioning, Castro allowed that Hanna at least had asked him why one (or perhaps more) of his sweepers had run out of fuel, why Castro was absent from his duty area, why some of his shaker drivers were not working, and conceded that he had difficulty in getting to work on time that October. Castro also acknowledged that a. relatively serious "barking" problem existed at one of the ranches he worked on. 24/

When Mr. Hanna testified, he presented a laundry list of complaints he purportedly had regarding Castro's harvest work, mainly centering on Castro's long and frequent absences from his crew, fuel problems which shut down Castro's shakers, Castro's refusal to perform minor repairs on the shakers, Castro's refusal to plan ahead for his workers, his sloppy paper work, and a serious barking problem that developed because Castro's shakers were not using the correct pressure. On the other hand, two workers who came into contact with Castro, Reggie Reyes and Francisco Gonzales, denied that they were aware of such problems affecting Castro's work. The testimony of Reyes and Gonzales was essentially credible, owing to their de-meaner and essential lack of interest in the subject of this proceeding, although their ability to observe Castro's work was not exactly such as to conclusively establish that Hanna's complaints regarding Castro were fabricated or excessively exaggerated.

In any case, it is undisputed that when Castro's work performance was reviewed with him by Hanna and Nelson, on December 1, 1976, Castro was informed that his work performance was lacking. He was informed by Hanna of the various complaints that Hanna had regarding Castro's supervision of his crew. And, it is undisputed that Mr. Castro was then informed he was being given a trial or probationary period of some ninety days in order to demonstrate his competence as a foreman. The testimony of Nelson and Hanna stands unrebutted that in response to their criticism of Castro during his evaluation, he said virtually nothing in his own defense.

At the time of his review and until mid-January,

24/ "Barking," as it is referred to, indicates that a shaker is debarking one or more of the trees when in the process of shaking. Usually, the problem is corrected when the shaker's pressure is decreased or when grease is added to its contact with the tree. Mr. Castro indicated he made no personal effort to cure the reputed barking problem, though he claimed that his shaker drivers themselves quickly solved the problem.

Castro worked in the harvesting shop at Ranch 95, helping to repair the equipment. As he was the year before, he was in charge of the shop's paper work and requisitions, as well as for making I work assignments. From mid-January to the end of that month, however, Castro was assigned with a crew of shakers for "dormant I shaking," the harvest of almonds that had previously remained on the trees. According to Hanna, Castro continued during the dormant shaking to demonstrate the same problems as before, spending much of his time around the shop rather than with the shakers and being inattentive to his responsibilities.

In January and February the harvest shop at Ranch 95 was disassembled and transferred to Ranch 75, where it was made into a more complete repair shop. Shortly after it became functional, in early February, Mr. Hanna announced to those working in the shop that Jerry Golden would be foreman of the shop. It was then Golden, rather than Castro, who was responsible for the shop's paper work, work assignments, and shop requisitions. 25/

It was in March that Mr. Castro became associated again with activity connected with the UFW. Castro was given UFW authorization cards by Arnold Garza, a mechanic in the Fleet Shop. Castro conceded he was given the cards on March 22; he claimed he signed a card and returned it to Garza on March 24. In between those two days, Mr. Castro had a conversation with John Ortiz, a mechanic, and Jerry Golden, in which Castro inquired as to what they thought about the UFW; they told Castro of their dislike for the UFW. In addition, presumably after March 24, Castro attempted to get other employees in the shop area to sign authorization cards, although he could not recall who those persons were. Also, sometime around March 18 or 19 Mr. Castro claims he began reading a book about Caesar Chavez, which he kept in a box inside his Company truck. The only other person who used that truck, while the book was there, was John Ortiz.

By the time Mr. Castro received the authorization cards from Mr. Garza, the decision to discharge Castro had been made. On a personnel action form, dated March 17, Mr. Hanna proposed that Castro be discharged. Mr. Nelson, who also signed the form, wrote on the back of it:

> John lacks the motivation and doesn't have the leadership ability to handle people under his supervision. He has been informed of his weakness on

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25/It might be noted that in addition to Castro and two mechanics, Mr. Hanna also worked in the shop, as did Brad Meyers, a foreman trainee who had been in charge of one of the almond harvest crews.

several occasions by Herb, and by me on a recent review. 26/

The effective date of the discharge was to be March 25, the actual date Castro was informed of his discharge and given his final paycheck. The personnel form also indicates on its face, and corroborated by testimony, that it was routed from Ranch 75 to Respondent's payroll and administrative departments, offices in Bakers field, by March 22 or 23.

2. Analysis and Conclusions:

(a) Castro's Status as a Foreman

The Respondent affirmatively argues that Castro was a supervisor at the time of his discharge, on March 25, and thus his discharge could not violate the Act. Although statutorily defined supervisors are not expressly excluded from protection under the Act, the Board has noted that supervisors are not to be included in the same bargaining units with employees and has barred them from voting in employee elections. See Yoder Bros., Inc., 2 ALRB No. 4; ALRB Regulation 20352(b) (1). It would similarly appear that supervisors, as defined in the Act, are not extended the same protection from unfair labor practices as are agricultural employees under Sections 1152 and 1153 of the Act. Indeed, the General Counsel's contentions with respect to John Castro run not to his status as supervisor but because it is claimed he was an employee when discharged.

There is little doubt that Mr. Castro was a supervisor within the meaning of Section 1140.4(j) of our Act at least up to early February, 1977. When he worked in the harvests he directed employees, oversaw their work, kept their work records, had the authority to discipline or reprimand them, and could recommend their discharge. Similarly, when he worked in the harvest equipment shop, in early 1976, he oversaw the work of others, kept time records for them, had authority to direct their work and reprimand them, and had the authority to requisition materials. His supervisory stature continued at least through the almond harvest of late 1976 and in January, 1977, when he directed the dormant shaking operation.

Nonetheless, in early February, two months before his discharge, a noticeable change took place regarding

26/After Nelson signed the personnel form, and before Castro's discharge became effective, Nelson left the Bakersfield-Delano area on business. Although initially he indicated that his departure was on March 18, records introduced by Respondent and Nelson's change in recollection persuasively show that Nelson departed the Bakers field area on March 22, very early in the morning. Nelson was gone for about a week, and when he returned Castro was no longer employed.

Castro's supervisory position. Although he continued to be classified by Respondent as a harvest foreman and continued to possess the accoutrements of a foreman's position, such as his pay, housing, and vehicle, when the remodeled harvest equipment shop was opened on Ranch 75, in the first few days of February, Castro's supervisor, Herb Hanna, announced to those working in the shop that Jerry Golden would henceforth be the foreman of the shop. Thereafter, until his discharge, Castro worked in the shop, but did not possess the authority to direct the work of others, to reprimand them, or to keep any records concerning their work or performance. As far as Castro knew, and so far as the evidence demonstrates, he was no longer a supervisor with the Respondent while working in the shop.

Respondent's counsel argue that Castro's status continued as a foreman and supervisor while in the harvest shop albeit that his shop duty was a temporary hiatus to his actual exercise of supervisory authority. Respondent argues that such a temporary hiatus in possessing or exercising supervisory authority did not change Castro's supervisory status under the Act, citing World Oil Co., 211 NLRB 1024 (1974); Massachusetts Mohair Plush Co., 113 NLRB 1516 (1956).277

Under the circumstances of Castro's employment, however, I do not believe that the cases cited by Respondent are controlling. It is difficult to describe Castro's loss of supervisory authority, in February, as merely "temporary." Unlike his shop work in 1976, Castro no longer was the foreman in 1977 in charge of the harvest equipment shop, working instead under another foreman, Golden. Yet, in 1976 Castro only performed two chief functions: either as foreman of the shop or foreman of an almond shaking crew. Thus, the testimony at most shows that in 1977 Castro was to continue working in the shop under another foreman, preparing for the next almond harvest, and would only again supervise an almond crew when the August harvest began, making his supervisory position one of perhaps a regular but short-lived duration—namely, from August through October.

What happened to Castro's supervisory status is that he became what is known as a "seasonal supervisor," supervising employees during a particular season (in his case the almond harvest), and during the remainder of the year (by far the bulk of the year's work) he would work in the shop. At

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27/Of course, the fact that Castro continued to possess the title 37 harvest foreman and Company housing and a vehicle, as well as his pay status is not controlling as to whether he was statutorily a supervisor. Those features of his employment position are only secondary features of supervisory status under the Act and are outweighed by the actual possession or lack of possession of supervisory authority. N.L.R.B. v. Southern Bleachery & Print Works Inc., 257 F.2d 235, 239 (C.A. 4, 1958); International Union, 208 NLRB 736 (1974); National Dairy Products Corp. , 121 NLRB 1277 (1958) .

least that is how I understand the facts surrounding Castro's employment habits. Accordingly, Mr. Castro was sometimes a supervisor and sometimes not, but only during well demarcated seasons. And, for the major portion of the year, when he would exercise no supervisory authority, he was not a supervisor within the meaning of the Act. Great Western Sugar Co., 137 NLRB 551 (1962); see also Westinghouse Electric Corp. v. N.L.R.B., 424 F.2d1151 (C.A. 7, 1970), cert, denied, 400 U.S. 831. As the NLRB has noted, when a seasonal supervisor works only as a rank-and-file employee, he has the right to engage in self-organization and bargaining and the right "to be free from unfair labor practices by employers or by unions." Great Western Sugar, supra, 137 NLRB at 554.

I conclude that 'Mr. Castro was not a supervisor within the meaning of the Act after February; nor did he again assume a supervisory status before his discharge on March 25. Accordingly, I find that Mr. Castro was no longer a supervisor at the time of his discharge, acting instead as a rank-and-file employee while in the equipment shop.

(b) John Castro's Discharge

As recognized under the NLRA's similar provision, under Section 1153(c) of our Act

> ... an employer is prohibited from discharging an employee because of the employee's union activities or sympathies. The determination which the Board must make is one of fact--what was the actual motive of the discharge? A tendered cause for the discharge will be rejected if it is found to be a mere pretext for the actual anti-union motive. The determination of actual motive is, of course, a difficult task; it depends principally upon inferences drawn from the entire web of circumstances presented by the evidence. [Santa Fe Drilling Co. v. N.L.R.B., 4T5 F.2d 725, 729 (C.A. 9, 1969).]

And, as the Board itself has noted, in Lu-Ette Farms, Inc., 3 ALRB No. 38, p. 11 (1977):

> The Act does not insulate an employee from discharge (or layoff). It is only when anti-unionism is the motive for the discharge that the Act is violated. The burden of proof is carried only when substantial evidence pointing toward the

unlawful motive appears from the record taken as a whole.

In respect to John Castro's discharge, on March 25, the General Counsel contends, first, that the discharge resulted from Castro's activity in support of the UFW that was demonstrated proximate to his discharge, and, second, that if such was not the basis for discharge then it can be laid to Castro's earlier activity surrounding the 1976 Proposition 14 campaign. Although reversed in their chronology, these two propositions will be treated in the same, foregoing order.

Given the timing and extent of Mr. Castro's pro-UFW activity in March, I am unpersuaded that this activity was a motivating reason behind his discharge. Mr. Castro, by his own contemporaneous declaration, affirmed at trial, admitted that he did not commence any activity in behalf of the UFW until he received UFW authorization cards on March 22. His activity after that consisted of his allegedly soliciting fellow employees to sign cards, signing one himself, and engaging in a brief conversation with a fellow employee, Ortiz, and Foreman Golden regarding the UFW. Serious doubt about the significance of these events after March 22 exists, however: Mr. Castro could not name one employee with whom he talked about the cards; his conversation with Ortiz and Golden was unrevealing as to his own sympathies toward the UFW; and it is doubtful that Castro even returned a signed authorization card, since Arnold Garza testified that Castro was discharged before he returned any cards. 28/

Of more controlling significance is the timing of the decision to discharge Mr. Castro. I am persuaded on the basis of the personnel form leading to his discharge and on the basis of the testimony of Herb Hanna and Dave Nelson that Mr. Castro's discharge was decided upon on March 17 or 18, before he engaged in activity supporting the UFW. Without serious doubt, Mr. Nelson had effectuated the discharge decision prior to his leaving the country, on March 22, most probably on March 17 or 18. Although Nelson's testimony initially confused his date of departure, the remainder of his testimony consistently pegged his discharge decision to March 17 or 18. I believe that testimony.

Thus, the decision to discharge Mr. Castro

28/The General Counsel also points to a book about Caesar Chavez that Castro allegedly carried in his truck before his discharge. No claim is put forward that a supervisor ever saw the book and, at most, we are asked to believe that Ortiz saw the book (despite his denial) and then passed the information on to a supervisor. Direct evidence, however, does not support such a claim. And, indeed, Respondent persuasively questions the significance of having the book to begin with, by asking whether possession of the book could reasonably lead to the belief he supported the UFW, as opposed to merely pursuing his own taste or interest in literature.

pre-dated his Union activity. That Union activity, accordingly, could not have led to his discharge. Furthermore, the Respondent's witnesses credibly testified as to the basis for Mr. Castro's discharge: that he was not considered to have improved in his supervisors' eyes as a harvest foreman during the probationary period that was extended to him.

Nor am I persuaded that Mr. Castro's alleged support for the Proposition 14 campaign, in September of 1976, was a moving force in his supervisors' disenchantment with his work. First, sufficient evidence, does not demonstrate that Castro's alleged support for Proposition 14, even assuming he actually distributed posters as he claimed, was known by Respondent's supervisors. 'Not only did Doyle Maddox, the only supervisor claimed to have seen Castro's activity, deny observing Castro, but I think it highly unlikely if Castro was known to be posting Proposition 14 signs all over Respondent's ranches, that he would not have been directly confronted by management over that activity. After all, Mr. Castro was believed to be, and was, at the time a supervisor, and I think it seriously unlikely, given Respondent's clear campaign against the proposition, that one of its supervisors would be totally ignored in openly opposing his employer's campaign by posting signs all over that employer's property.

I think if Castro was a known supporter of Proposition 14, that a more likely result would have been an immediate response from his supervisors, not the delayed reaction of an eventual job evaluation in December, a ninety-day probationary period after that, and then a subsequent discharge some six months after Castro's posting his signs. On the contrary, I think the credible evidence warrants the conclusion that Herb Hanna, rightly or wrongly, became disenchanted with Castro's work as a foreman during the almond harvest, confronted him on occasion about his deficiencies, and believed Castro never improved in his work habits. Not only does Castro admit that Hanna at least questioned him about some features of his work during the almond harvest, but I think it somewhat incredible that Castro first learned of Hanna's complaints during the December 1 evaluation, as Castro claimed, and yet remained silent during the evaluation, not once questioning such sudden, serious criticism of his work. Indeed, even when he was discharged Mr. Castro made no effort to discuss the matter with Hanna, though he was afforded an opportunity.

After a careful review of the testimony, I conclude that the evidence does not support a. finding that Mr. Castro was discharged because of either his support for the UFW or his support for Proposition 14. I do not believe the evidence convincingly establishes that Respondent knew of Castro's activities in that regard or, if it did know, that it knew prior to the determination to discharge him. While it may appear that Castro's supervisors suddenly, inexplicably began finding fault with his work during the 1976 almond harvest (when compared to his previously accepted work, the importance of which comparison

the General Counsel stresses), that view is not sufficiently established to persuade me that Respondent unlawfully discharged Castro. Nor am I persuaded that Respondent's animus toward Proposition 14 or the UFW is pertinent enough to the Castro discharge to supply the discharge motive. 29/ In short, I do not find that Respondent violated the Act when discharging John Castro.

D. Arnold Garza

1. Statement of Facts:

Of all the alleged discriminatees in this proceeding, Arnold Garza was both the most senior employee and the most active in behalf of the UFW. He was hired in 1970 and, but for a brief absence for military service, he worked for the Respondent until April 2, 1977, when he was discharged. During his employment Mr. Garza progressed through various positions, beginning as a farm laborer, then becoming an irrigator, truck driver, and eventually a mechanic. Although Mr. Garza worked under a number of different supervisors and on a number of different ranches for the Respondent, during his last year of employment he was employed in the engine room of the Fleet Shop, on Ranch 75. In that shop Garza worked under Steve Catlin, a foreman, and under William Branch, the overall superintendent of the Respondent's repair shops. 30/

In latter 1976, Mr. Garza was elected as the SEPC representative of the shop employees, and was thereafter elected as vice-chairman of the SEPC. As earlier noted, the first

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29/Although it is true that an employer's union animus "need not itself rise to the level of conduct chargeable as an unfair labor practice" to be considered when evaluating his motive for a discharge [Valhi, Inc.. , 4 ALRB No. 1, p. 1, n. 1; see also, Hendrix Mfg. Co. v. N.L.R.B.. 321 F.2d 100, 103-104 (C.A. 5, 1963)], that animus alone--particularly when accompanied by either a lack of or by relatively minor chargeable unfair labor practice conduct--does not establish the unlawfulness of a discharge. See Howard Rose Co., 3 ALRB No. 86, p. 5(1977).

30/The record reflects that during the years leading up to 1977, various changes and additions were made to the Respondent's shop facilities. Suffice it to say that since early 1977 the following distinct shops were located on Respondent's Ranch 75: the Fleet Shop (including the engine room), where general mechanical repair and engine work were performed; the Welding Shop, where welding was performed; the Heavy Equipment Shop, where work on heavy equipment, such as tractors and diesel engines, was performed; and the Fabrication and Construction Shop. And, as noted supra, in February, 1977, the Harvest Equipment Shop was relocated onto Ranch 75, although that shop was more of a seasonal-type operation and was under a different supervisory structure.

meeting of the SEPC was held on December 3, 1976, and its meetings continued until May 6, 1977.

From the very beginning of his status as SEPC representative, Mr. Garza began raising complaints about the mechanics' wages and the shops' wage structure. 31/ The record reflects that throughout the SEPC meetings Mr. Garza registered complaints regarding the shop, with respect to wages, treatment by foremen, and favoritism. Because of his initial complaints in December, 1976, a meeting was arranged between Mr. Garza, Mr. Keever, Mr. Branch, and Roy Thomas, a newly hired shop superintendent. Again, Mr. Garza complained about the shops' wage structure. In subsequent weeks Mr. Garza approached Henry Chavez, the vice-president of operations, and later Fred Andrew, the Respondent's president, about 'the low wages of himself and other mechanics (as well as other work problems affecting mechanics).

Although in each instance Mr. Garza's complaints received an open airing before high-ranking Company officials, no apparent change or improvement was brought about by his confrontations. The exact chronology of Mr. Garza's various meetings with supervisors and officials is not clear, but apparently his private meetings with them regarding his complaints took place during January and February. It was during this period of time that Bill Branch began developing a plan to restructure job classifications in the shops at Ranch 75, aiming to consolidate and simplify the many job classifications and to reassign certain mechanics to higher classifications. Although Branch's reclassification plans were discussed among Company officials and supervisors at the time, Mr. Garza was not informed that such plans were being considered. About the only hope held forth to him regarding a wage improvement, at least by Mr. Chavez, was for Garza to wait and see what Roy Thomas, the newly hired superintendent, would decide in respect to appropriate wage adjustments. Nonetheless, according to Steve Catlin, Garza's foreman, a recommendation to increase Garza's individual wages was submitted sometime around January, as Garza was informed, but that the recommendation was subsequently rejected by Superintendent Thomas, of which Garza was not directly informed.

31/Mr. Garza's displeasure with his own wages even predates his election as shops' representative. When he was initially transferred into the Fleet Shop, after spending some six months in the Respondent's shop in Fresno, Garza began complaining to Bill Branch about his low pay, claiming that his ability as mechanic warranted a higher wage. In addition, Mr. Garza made complaints regarding his wages to Henry Chavez, the Respondent's vice-president of operations, who Garza had come to know personally in 1974 and 1975. It might be noted that Mr. Garza's last two wage increases occurred in March and June, 1976, when he received raises as part of a general wage increase, and that since May, 1975, he had been classified as a Mechanic II (with several higher classifications above his).

Mr. Garza eventually became disenchanted with his supervisors' responses and turned to the UFW for assistance. Garza's initial meetings with UFW representatives occurred sometime around March, the same month he failed to attend the two SEPC meetings; he received authorization cards from the UFW to distribute. Sometime during early March, Mr. Garza began soliciting his fellow employees to sign UFW authorization cards, covertly at first. 32/

Whatever the extent of Mr. Garza's UFW solicitations might have been prior to March 31, no direct proof was adduced that the Respondent had reason to know about them. But on March 31, Garza's activity dramatically changed.

On the last two days of March, Bill Branch, Roy Thomas, and various foremen conducted individual meetings with shop mechanics to explain the new reclassification plan and how each mechanic fit into it. Garza's meeting with Branch, Thomas, and Catlin occurred during the morning of March 31. As Mr. Branch began to explain to Garza what the reclassification plan was, Garza interrupted and asked Branch it meant that he was not going to get a raise. Branch indicated that Garza would not be getting a raise in pay and Garza got up, said that was all he wanted to know, and left the meeting. Little doubt exists that

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32/Mr. Garza asserted that he began passing out authorization cards a month or more before his discharge, on April 2. As to his description of the timing of his solicitations and his eventual confrontations with Bill Branch that led to his discharge, however, I do not wholly credit Mr. Garza's recollection. As for his testimony regarding his UFW activity, Mr.Garza's own April 2 declaration provides sufficient contradiction to cast serious doubt on his recollection of its timing. As for his description of confrontations with Branch, Garza's testimony is at odds with his declaration and is without any corroboration, which is surprising in view of the rather public confrontation he had on April 1. His testimony also is directly rebutted by both Branch and Catlin, two participants in most of the pertinent events and two witnesses whose demeanor was essentially credible. Additionally, the testimony of Branch and Catlin is made more credible by its logic, consistency with what I viewed as the temperament of these two men, their openness as to facts which could only favor Mr. Garza, and, finally, due to the fact that Catlin was no longer employed by Respondent and had no apparent interest in testifying as he did. Furthermore, without going into the complicated details surrounding Garza's earlier employment in the Respondent's shop at Ranch 29, its closing, his temporary transfer to Fresno, his schooling in Fresno, and what he understood as the reason for his temporary transfer, suffice it to say that Garza's testimony concerning those events raises serious doubts as to his credibility when his testimony is compared to Henry Chavez's more rationale and credible account of those events.

Mr. Garza was upset and angry as a result of the meeting.33/

Subsequent to the meeting that day, Garza began to openly distribute UFW authorization cards to employees, even giving one to Foreman Catlin, and affixing such cards openly to his tool chest in the engine room. Catlin's knowledge of Garza's open display of UFW cards was made known to Branch that same afternoon through a telephone call. Then, again on the next day, Friday, April 1, Branch acknowledged being advised by another shop foreman, Mr. Bolin, that Garza was in the shop openly soliciting support for the UFW.

On April 1, Branch held a meeting with his mechanics at the close of the work day. Such staff meetings were rather frequent and regular. ' Garza took the. opportunity to post a UFW authorization card in that part of the meeting room used by Branch when he spoke to employees; and, when Branch entered the room, Garza loudly announced, "Here comes the leader of the queers."

Subsequent to the meeting, as they were leaving, Mr. Branch asked Garza if he would talk with him. The two men left the shop and stood outside. According to Branch's testimony, in part corroborated by Catlin who observed from a distance, 'Garza was upset, accusing the Company of discriminating against him and treating him unfairly by not giving him a wage increase, and when Branch raised his arm to point at the shop area Garza responded, thinking Branch's gesture was menacing, by saying "for two cents I'd knock your block off." In addition, Garza told Branch to fire him but if he did Garza would kill Branch. But, Garza claimed he taunted Branch about discharging him only when Branch told Garza he should quit; Branch acknowledged he may have told Garza he should quit. According to both Branch and Catlin, Garza made menacing gestures during the conversation, opening and closing his fists. The conversation, lasting some fifteen to twenty minutes, ended when Garza left.

The following day, April 2, was a work day, the shops normally being opened for half-days on Saturdays. Sometime around 9:30 a.m. Branch, who was with Roy Thomas, saw Garza outside the Fleet Shop, in the yard. Branch approached Garza and asked him if he still felt as he had the day before, whether he had cooled off or changed his mind. Garza testified that he told

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33/Garza claimed that his open solicitation of employees began about three or four days before his meeting with Branch. Garza's declaration contradicts that assertion and is, ironically, consistent with the contrary testimony of Branch and Catlin. Garza also asserted that during the meeting Branch swore! at Garza, called him a profane name, and told Garza he should quit. Not only does Garza's declaration make no mention of such conduct on Branch's part, but after close observation of Branch I have concluded that he is not likely to have made such remarks, remarks that not only he but Catlin denied.

Branch he had not changed his opinion and Branch then told him he was discharged.

Branch's version of the discussion on April 2, the one which I basically credit, was at odds with Garza's. Branch recalled that Garza indicated he had not changed his mind from the day before and began discussing the same things as before regarding discrimination and his unfair treatment, saying also that he wanted to be fired so that he could sue the company and . . . that if I fired him, I would be signing my death warrant." According to Branch, they talked for several minutes, Garza saying the same things as the day before and Branch told Garza "we couldn't continue that way, that he was interfering with the operation of the shop and that he was fired . . . ." Thomas was next to Branch during the entire conversation on April 2. A dispute then occurred as to whether Garza would get his paycheck before leaving, and Branch insisted that Garza leave, warning him that he would call the security guards if he did not. 34/

Mr. Garza then left the shop area. Branch closed the shops early that day, claiming he was concerned with what Garza might do. When Branch made out the personnel form concerning Garza's termination, he indicated that the employee was discharged as a "disruptive influence in the shop." Branch acknowledged that he might not have discharged Garza had their last encounters not been so open to observation by other employees. 35/

2. Analysis and Conclusions:

Of key importance in placing Mr. Garza's discharge,

34/Garza. claimed Branch said he would call the security guards who would "beat the hell out of" Garza. I just simply do not believe that Branch employed the derogatory remarks and threats of beatings during either the April 1 or 2 confrontation, as Garza alleged.

35/Inasmuch as I credit the version of the Branch-Garza confrontations largely as described by Mr. Branch, I have not set forth the contrary version given by Mr. Garza. Several features of Garza's testimony, however, should be noted. First, between his initial and second appearance as a witness, Mr. Garza's view of his relationship with Branch seemed to change, initially it appearing that Branch began treating him differently early in March after Garza's initial UFW activity and later it appearing that Branch treated him consistently until suddenly March 31. Second, during his second witness appearance Garza claimed that the strongest language he used toward Branch was "for two cents I'd knock your block off," but when he first testified Garza claimed he and Branch swore or cussed at one another on April 1. Third, although Garza denied taunting Branch to fire him, he did acknowledge that on the day before his discharge he had announced in an SEPC meeting that he was waiting for the Company to fire him and was prepared to sue it if he was fired.

on April 2, in its proper context is the need to resolve testimonial conflicts between him and Bill Branch, and to a lesser extent between Garza and Steve Catlin and Henry Chavez. As suggested earlier, I have essentially credited the testimony of Mr. Garza's supervisors where conflicts exist, although 1 have not accepted the exact testimony given by those supervisors.

Mr. Garza's discharge followed several events cited by the Respondent as having led to the discharge. On March 31 was the meeting between Branch, Catlin, and Garza during which Garza abruptly left after learning he would not receive any promotion in classification. I do not believe Garza's testimony that Branch swore at him during the meeting or taunted Garza to quit. Garza's testimony is not only contrary to his own declaration, but Catlin credibly corroborated Branch's denial of any swearing exchange.

On April 1, the next day, two events occurred. First, during a shop staff meeting Garza referred openly to Branch as the "leader of the queers." Second, Branch and Garza then argued outside the shop area over whether Respondent was discriminating against Garza and treating him unfairly in denying him a wage increase. 36/ During this confrontation Garza made menacing gestures with his hands, dared Branch to fire him, and warned Branch that if he were fired he would kill or otherwise harm Branch. Branch responded that Garza would not gain anything by that. On the other hand, I believe that Garza's discharge challenge and threat to knock Branch's block off followed, respectively, Branch's suggestion that Garza quit and Garza's belief that Branch was about to strike him. Branch acknowledged that one of his gestures led to Garza thinking Branch was going to strike the employee and he acknowledged the possibility of telling Garza he should quit. Inasmuch as the Branch-Garza exchange was rather a heated one, I think it more likely than not that Branch was not as calm and cool as he claimed toward Garza.

On April 2 Branch again confronted Garza, who again complained to Branch that he still believed he was being treated unfairly and discriminated against. Likewise, I believe Branch that Garza warned if Branch fired him he would be signing his death warrant. On the other hand, no profanity or other threats were exchanged on April 2, and Garza made no menacing gestures. The only other participant to the exchange was Roy Thomas, another supervisor under Branch's control.

Branch claimed he discharged Garza because Garza

36/Garza' s complaints to Branch on April 1 (as well as on the next day) were similar to his previous complaints, Garza having claimed that Mexicans and other minorities were being discriminated against and treated unfairly in the shop and that their wage rates were unreasonably low, albeit Garza's complaints on April 1 and 2 were essentially directed to his own plight as a Mexican.

left him no choice, that Garza was forcing him to discharge him, and that the confrontations with Garza took place in front of other employees. In approaching Branch's explanation for the discharge, one must keep in mind that

> . . . an employer violates the Act if he discharges an employee because of the employee's union membership or activities, even if another contempora neous reason for discharge exists. It matters not that the employee may have been incompetent or otherwise may have deserved discharge; if the efficient, proximate reason for the employee's discharge is his union membership or activities the discharge is unlawful.

Colonial Lincoln Mercury, supra, 197 NLRB at 58. Accord: N.L.R.B. v. Linda Jo Shoe Co., 307 F.2d 355, 357 (C.A. 5, 1962). Whether or not the credited testimony shows that Mr. Garza threatened his supervisor or otherwise acted in an insubordinate manner, the responsibility of the trier of fact is to determine whether such conduct was the precipitating cause for discharge or whether that conduct was used as a pretext for discharge, where a moving reason for discharge was instead Garza's known support and activity for the UFW. Texas Rockwool, 218 NLRB 577 (1975); Coronet Casuals, Inc., 190 NLRB 685, 687-688 (1971).

Although determination of the motive behind Garza's discharge is by no means a clear or easy one, I am persuaded from the preponderance of the evidence that his open support and activity in behalf of the UFW was a moving reason for his discharge. Numerous considerations lead me to that conclusion.

To begin with, no question exists that Mr. Branch, as well as other shop supervisors, was fully aware of Garza's open support for the UFW. Branch was immediately informed by Foreman Catlin of Garza's open solicitation for the UFW and his posting UFW authorization cards in the shop area. Branch was similarly informed by Foreman Bolin of that activity. And, in turn, Branch immediately consulted with Bill Keever, the Respondent's chief labor relations official, about Garza's union acti- vity. These activities on the part of shop foremen, the shops superintendent, and a labor relations official all evince a deep concern on the part of them and Respondent over one employee's open support for the UFW.

Second, the facts surrounding Garza's failure to receive a wage increase on March 31, just three days before his discharge, create substantial doubt concerning Branch's motives regarding Mr. Garza. Garza was denied a wage increase despite the fact he had been in the same wage classification for two years, historically considered a valuable employee, recommended

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for a wage promotion just two months before by Foreman Catlin,37/ came within the qualifications and experience level of higher classifications, and was surely known by Branch to be one of the employees most interested in a wage increase. The fact that Garza was denied a wage increase, his supervisors knowing of his expectations, leads me to strongly suspect that Branch was aware of Garza's UFW activity prior to March 31 and denied him an increase because of it. This suspicion is bolstered by the fact that Garza was very active in soliciting UFW support from fellow employees within a small area of Respondent's operations heavily supervised by foremen.

Third, there is strong reason to question just seriously Branch viewed Garza's outbursts on April 1 and 2, out bursts allegedly leading to his discharge. Garza's only open, blatant affront to Branch's authority as a supervisor occurred on April 1 during the staff meeting, when Garza called Branch the leader of the queers. Yet, nothing in Branch's testimony indicates he was troubled by that remark. Branch responded to Garza at the time by saying hello. Indeed, when Branch met with Garza following the meeting, the supervisor did not raise Garza's previous remark with him but merely asked him what was wrong. In short, Branch did not complain to even Garza about the remark.

Nor am I convinced that Garza's unwarranted and inappropriate remarks to Branch during their conversations on April 1 and 2 actually precipitated his discharge. From Branch's own testimony it emerges that he was not frightened by Garza's so-called death threats or threat to knock Branch's block off. Indeed, during the conversation on April 2 Branch was accompanied by an ally, Roy Thomas, while Garza stood alone. At the most, Branch indicated he thought Garza might swing at him on April 1, but he expected Garza would miss.

The testimony does not establish that Garza's confrontations with Branch were observed by other employees. Although Catlin observed the April 1 discussion, he could not hear it. It is unclear as to whether anyone else even observed it. The missing fact that other employees either overheard or observed the Branch-Garza disputes takes on significance in view of Mr. Branch's claim that he was concerned that Garza's antagonism toward him was manifested openly, in front of other employees .

It is also significant that when discharging Garza, Branch cited as the reason that Garza was a "disruptive influence

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37/Branch testified that in placing employees within his new classification system he relied on his foremen's advice as to individual employees. The testimony, nonetheless, leaves open to question why either Catlin's earlier recommendation to promote Garza to Mechanic I was still not active, why Catlin had changed his opinion, or why Branch did not follow a recommendation from Catlin for an increase for Garza.

in the shop." Other than his inappropriate remarks to Branch during the staff meeting, however, the only shop disruption shown by the evidence is Garza's active, open support for the UFW on March 31 and April 1. Direct evidence does not establish just how else Branch may have concluded that Garza disrupted the shop.

A claim cannot be made that Respondent's unlawful motive in discharging Garza arises clearly from the evidence. Nonetheless, I am drawn to conclude the existence of that unlawful motive and that Respondent violated Section 1153(c) of the Act when discharging Garza based on the circumstantial evidence cited above, particularly in view of Respondent's consistent policy of opposition toward the UFW, its demonstrated concern over Garza's personal efforts on behalf of the UFW, and the coincidence in time between denying Garza a wage increase, his discharge, and his support for the UFW. Mr. Garza, after all, was the leading proponent for the UFW at the time of his discharge and the Respondent was well aware of it.

There is, in addition, a separate basis for concluding that Respondent violated the Act when discharging Mr. Garza. For months before his discharge Garza had been championing the cause of his fellow workers, complaining about the wages, working conditions, and treatment from their foremen. He had taken his complaints before the SEPC, to Branch, to Vice-President Chavez, and even to President Andrew. Garza's dispute with Branch during his last three days of employment cannot be separated from that previous activity, albeit Garza was more personally concerned and involved after March 31. Yet, Garza's previous protests concerned the shops' wage system and its inequitable application to employees, particularly to Mexican employees like himself, and Garza was informed by other shop employees of their disappointment with the new wage system.

Thus, Garza's protests on April 1 and 2 were extensions of his previous protests and a continuation of his protected, concerted activity in challenging the shops' wage system. See Bob Henry Dodge, Inc., 203 NLRB 78 (1973) . The question then arises as to whether he was "guilty of misconduct so outrageous as to justify his discharge in spite of his protected activities." N.L.R.B. v. Cement Transport. Inc., 490 F.2d 1024, 85 LRRM 2292, 2295 (C.A. 6, 1974), cert, denied, 419 U.S. 828. For, when an employee is engaged in protected activity (e.g., disputing wage rates or wage classifications), that employee cannot lose his protection by way of discharge unless his conduct is so egregious or opprobrious as to remove the protection. Bob Henry, supra, 203 NLRB at 79; Monark Boat Co., 179 NLRB 872 (1969); Crown Central Petroleum Corp., 177 NLRB 322 (1969). See also, N.L.R.B. y. Local 1229, IBEW (Jefferson Standard), 346 U.S. 464 (1953).

While one could characterize Garza's conduct on April 1 and 2 as outrageous, I do not believe it was so outrageous as to remove him from the protection of the Act. It must

be remembered that it was Branch who initiated the two confrontations with Garza and who refused Garza, the shop employees' SEPC representative, a long-sought-after wage increase (somewhat inexplicably, I might add). Also, the dispute between Garza and Branch did not occur in front of other employees so far as the record indicates. And, the language used during their dispute, while not fitting within "polite" society, was language perhaps not unknown in the mechanic shops with which they were both associated, particularly if we give weight to Vice-President Chavez's description of mechanics at the Respondent as being of a temperamental nature. Branch does not appear to have taken Garza's threats seriously. Indeed, Branch did not discharge Garza on April 1, when Garza's remarks were of a stronger, more adamant nature, when Branch might have spontaneously reacted to them by discharging Garza--that is, if it was Garza's language that formed the separable basis for his discharge. Nor is there any indication that despite his confrontations with Branch, Garza either insubordinately refused work directions or was not ably performing his work.

Thus, under the existing circumstances I do not conclude that Garza's private remarks to Branch were sufficient to remove Garza from the protected nature of his wage complaints. See Texas Rockwool, supra, 218 NLRB 557; Houston Shell and Concrete Co., 193 NLRB 1123 (1971) . Accordingly, I find that Respondent violated Section 1153(a) of the Act in discharging Mr. Garza, as well as violating Section 1153(c).

E. Leonardo Serb in And Rub in Chavez

1. Statement of Facts:

Both Leonardo Serb in and Rubin Chavez were employed by a labor contractor named Andy Kouklis, who supplied trucks and men for the swamping operations for Respondent's table grape harvest in July. As swampers these two persons were responsible for delivering empty grape boxes to the harvest crews in the field and for transporting loaded grape boxes from the field to the Respondent's drop-off point. Serbin and Chavez worked as a team on one of the ten to twelve trucks supplied by Kouklis. They worked on Respondent's Ranch No. 16, but their pick-up and delivery point was an area known as the "squeeze" on Ranch No. 96.

Both men were hired by Rayburn (Ray) Walker, Kouklis's field foreman, who was in charge of the swampers. Neither swamper, however, was new to Respondent's operations. During the preceding two years, Serbin worked directly for the Respondent on different occasions, driving a tractor and placing grape stakes. He had also worked on Respondent's property for a labor contractor (not Kouklis), pruning and staking grapes. 38/

38/The last time or so that Serbin worked in the staking operation, his foreman was Guadalupe (Joe) Rivera and his "supervisor" was Richard Jimenez, both employees -- [cont.]

Mr. Chavez had swamped grapes in 1975 and 1976 on Respondent's property, through employment with a labor contractor (not Kouklis). Also, Chavez worked for the labor contractor in Respondent's staking operations from about January to April of 1977. Neither Serbin nor Chavez claimed to have been discharged previously when working in Respondent's field operations.

Mr. Chavez also had worked on Poso Ranch for Roberts Farms, acquired by Respondent in 1973. When at Roberts, Chavez was an active supporter of the UFW and a steward for his crew. He also took part in the strike that surrounded Respondent's purchase of property from Roberts. Chavez testified that on his first day of swamping for Kouklis in July he had a discussion with Petra Sandoval, a worker he had known at Roberts and who now worked for Respondent. Sandoval called to him and asked if he and his cousin were still strikers. Chavez responded by saying he still did not have a ranch of his own but that his cousin now concerned herself more with her family than with striking. Between Chavez and Sandoval when they had their encounter stood Chavella Garcia, the forewoman of Sandoval's crew, who was the sister of Richard Jimenez.

According to both Serbin and Chavez, they encountered almost immediate difficulty with Joe Rivera when they appeared at the squeeze area. Working on a piece-rate basis, Chavez and Serbin were anxious to move through the squeeze as quickly as possible in order to return to the fields to load the harvested grapes. On one of their early transits through the squeeze, they expressed displeasure to Rivera at the slowness in which their truck was unloaded. The two swampers recalled that Rivera responded by asserting that he was boss of the squeeze and, essentially, that they would have to wait until he decided it was right to load or unload their truck.

The testimony of Serbin and Chavez is not clear as to whether they had one or more confrontations with Rivera over the loading and unloading of their truck. Serbin, unlike Chavez, recalled that during one exchange with Rivera, Rivera used a colorful, if not profane expression, in telling them to wait for unloading. In what appears to have been a separate encounter with Rivera a discussion regarding the UFW occurred. On either the first or second day of their swamping, Serbin and Chavez were waiting' for empty boxes to be loaded on their truck. Chavez complained about the delay, and Rivera responded by saying that this was not forty acres (a reference to UFW headquarters in the Delano area) and that they were not there to run things or change the rules, that the work would be directed by Rivera and

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38/[continued]--of the Respondent. According to Rivera, who was in charge of the squeeze area during the July swamping, he assisted Serbin in getting his job with Andy Kouklis by putting Serbin in touch with Ray Walker. Both Serbin and Rivera acknowledged being friends outside of work since the beginning of 1977.

not by them. Chavez answered by saying that the UFW would soon come in at all the ranches, but Rivera answered that he did not care since he had nothing to do with the strikers. Chavez then responded that Rivera was also a worker and would benefit from the UFW, but Rivera said he would not have any trouble because he was a Company man. 39/

Mr. Serbin and Mr. Chavez began their swamping in mid-July, around July 19, but remained working only three days due to their discharges. During those three days various other incidents involving the two swampers occurred.

On their very first day of swamping, they had two brief confrontations with Respondent's grape harvest supervisor, Richard Jimenez. Jimenez was in overall charge of the harvest operations, supervising two ranches and approximately four hundred employees, as well as the squeeze operation and material trucks. In the morning of the first day, Jimenez observed Serbin and Chavez driving into the field without bringing a supply of empty boxes. He stopped them and asked why they were not carrying empty boxes to the crews, and they informed him that they had difficulty getting the boxes from Joe Rivera at the squeeze. Jimenez said nothing more to them and proceeded on his way, although Jimenez claimed he subsequently cautioned Mr. Rivera (who denied it) that no horseplay should exist at the squeeze. 40/

39/Rivera denied he had any difficulty with Serbin and Chavez over loading or unloading their truck, or that they ever spoke about the UFW. As to whether the events occurred as described above in the text, I credit the composite testimony of Serbin and Chavez. Their demeanor was more impressive than Rivera's, Rivera appearing as a more hesitant and argumentative witness. Moreover, it is difficult to accept, as Rivera claimed, that he had no knowledge of Chavez's UFW support even though the two had known one another for five or six years. Rivera appeared to me too concerned with trying to exonerate himself of all wrongdoing toward Serbin and Chavez than in admitting any facts which might possibly raise questions concerning his work performance. Indeed, his testimony was even contrary to that of his superior, Richard Jimenez.

40/Where a conflict in testimony exists , I have credited the version given by Mr. Jimenez. He appeared as a most honest witness, possessing intelligent recall, and gave his testimony in a forthright and unhesitant manner. Moreover, genera] agreement exists among those involved that at one point during their first day, Serbin and Chavez refused to wait at the squeeze and left without carrying a load of empty boxes as they were instructed to. Serbin's testimony tends to corroborate Jimenez's since he admitted that Jimenez spoke to them about no-carrying the empties, and even Chavez admitted that he complained to Jimenez about their treatment by Rivera, although Chavez asserted that it was Walker, not Jimenez, who questioned them about not carrying empty boxes.

At the end of the first day, another incident took place involving Jimenez. After the harvest crews had left the field, Jimenez was making his rounds to see that all the remaining grapes that had been boxed were removed from the field. He drove up to the area where Serbin and Chavez were loading their truck, where Foreman Walker was also standing. Jimenez told Walker there were grapes in the next avenue that needed loading, after which Chavez called over that they would not pick up the boxes because they were not going to pick up the scraps left by other swampers. According to Jimenez, who overheard Chavez, he told Walker that he did not have to accept such behavior from the swampers.

Walker's version of the above event was slightly different from Jimenez's. Walker remembered actually asking Chavez and Serbin to go pick up the boxes left in the next a venue while Jimenez was still present, and that Chavez refused. Walker acknowledged he did not contest the matter with Chavez because the need for loading the leftovers evaporated when another swamping truck arrived and picked up the remaining boxes. Chavez and Serbin denied they had any conversation with either Walker or Jimenez about picking up the leftover boxes, but I do not credit their denial. On balance, the contrary testimony of Jimenez and Walker was more credible both because of the two supervisors' demeanor and because their recollection was less confused, less uncertain, and less vague than was the swampers'.

Although the second day of Serbin's and Chavez's employment passed uneventfully, the third day brought more difficulty. According to Jimenez's credible testimony, he observed Serbin and Chavez driving their truck without a load of any sort. Needing empty boxes for Jorge Gomez's crew (the largest crew by far), which was about to move from one corner of a grape block to the opposite one, Jimenez stopped the swampers and asked them to get a load of empty boxes. Jimenez then turned off the road, into the avenue where Gomez's crew was working, and observed four pallets of empty boxes standing together where that crew was about to finish working. Jimenez checked to see if Serbin and Chavez were heading to the squeeze for empty boxes as he had requested, but observed them heading instead for another part of the same ranch where other crews were working. Jimenez learned from Gomez that the four pallets of empty boxes came from Serbin and Chavez, who had just dropped them, although Gomez told Jimenez he had asked them not to. 41/

Jimenez recalled that he was very upset because the empty boxes were dropped in the wrong place and that the two

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41/It was contrary to the swampers' instructions to leave four pallets of empty boxes in one place; rather, no more than two pallets of boxes are to be left in any one place. In favor of Serbin and Chavez, however, is the fact that swampers were directed not to take instructions from crew foremen, but were to listen only to Jimenez or Walker as to where to deliver empty boxes.

swampers had not told him when they spoke that they just dropped a load of empties. In order to get the boxes to where they were needed, Jimenez requested that one of his material trucks move the boxes to the other corner of the block. Jimenez then headed in the direction where Serbin and Chavez had gone to see what the swampers were up to; however, before getting very far Jimenez was delayed for about thirty minutes in order to give picking instructions to another crew. 42/

When Jimenez caught up with Serbin and Chavez they were in the middle of loading their truck with full boxes at the other side of the ranch. Jimenez said nothing to them at the time about dropping the four pallets of empties or their failure to get the load of empties he had earlier directed them to.

After he left the area where the two swampers were loading, Jimenez saw Foreman Walker. He told Walker the two swampers had dropped a load of empties in the wrong place and, according to Jimenez, Walker told him that he had instructed them to wait for instructions from Jimenez before dropping the empties. 43/ Jimenez then told Walker to dismiss the two men for he no longer wanted them on the ranch.

Mr. Walker next encountered Serbin and Chavez after their truck had once again broken down, this time with a full load of boxed grapes. Initially, according to Walker, he assisted them in getting a mechanic to look at the truck. Then, after about an hour passed without repair, Walker again approached the two men. Chavez inquired as to what they were

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42/On the morning of their third day, Serbin and Chavez had had a breakdown on their truck while loaded with empty boxes. According to Walker, the truck was fixed, after which he told the swampers to wait before dropping their empties until he spoke with Jimenez. Walker looked for Jimenez but could not find him. He then returned to the two swampers, who were waiting by Gomez's crew, and told them to wait for Jimenez's instructions before they dropped the boxes for the Gomez crew. Walker knew that the crew was about to move but did not know where to drop the boxes. It was apparently after Walker left them to wait for Jimenez that Serbin and Chavez dropped their load of empty boxes where they were, though direct proof of their dropping the boxes was not provided by Foreman Gomez.

43/Walker recalled that Jimenez informed him the two swampers told Jimenez it was Walker who had told them to drop the empties where they did. I do not credit Walker's recollection on this point, but think he believed himself somehow implicated in the swampers' mistake. Not only did Jimenez not claim that the swampers had told him that Walker was at fault, but neither Serbin nor Chavez assert that they claimed Walker responsible for the wrong instructions when talking to Jimenez. Furthermore, Jimenez had not spoken with the swampers regarding their misplacement of empties.

supposed to do the next day, and Walker then informed them that they were discharged, that Jimenez no longer wanted them on the ranch because they had dropped a load of empties in the wrong place. During that conversation, Walker told the two swampers that he had known earlier that day that they were discharged.

Chavez began to protest the discharge, and Walker told him he should talk to Jimenez, who was standing in the same area as their immobile truck. Chavez walked over to Jimenez and asked him why they were discharged; Jimenez said because they had dropped a load of empties in the wrong place. The swampers' third day of employment was their last.

The testimony of the four men involved, Chavez, Serbin, Walker, and Jimenez, unfortunately, does not produce as clear a picture of events as that set forth above. Largely, I have relied on the credible testimony of Jimenez, corroborated in important respect by Walker, in reconstructing the events of the third day of swamping. The testimony of Serbin and Chavez, regarding their unloading of empties, is confusing at best. Thus, it is not clear from their testimony as to whether they believed the incident cited for their discharge occurred on the second or third day, leading to my doubt as to whether they even knew which incident may have led to their discharge. As a related matter, the two swampers claimed they were told where to drop the empties by both the crew foreman and Walker, whose instructions they followed. This testimony contradicts the credible testimony of Walker. On the other hand, Mr. Serbin also conceded that he knew they dropped empty boxes in the wrong place because they knew the crew involved was about to move to another place, thus recognizing some culpability on their part. Finally, Chavez recalled talking to Walker at the foreman's home after the discharge, at which time Walker allegedly told him that Roy(last name unknown) was responsible for their discharges. But, nothing in the record indicates that anyone named Roy was the slightest bit involved in their employment or discharge, and Walker denied ever mentioning Roy as being involved in the two discharges. After serious consideration of the two swampers' testimony, I have concluded that they were either confused about what happened to them, could not accurately recall the details of the events in question, or were attempting to deny any wrongdoing on their part to make their discharges appear as wholly without reason.

2. Analysis and Conclusions:

The General Counsel contends that in dealing with the Serbin and Chavez discharges, resolution of the credibility conflicts is determinative. I do not agree, however.

As earlier noted, I have not credited the testimony of Serbin and Chavez insofar as it tries to establish the absence of work misconduct on their part during their three days of employment (between July 19 and 21). I will not repeat the reasons for crediting instead the testimony of Richard Jimenez,

the harvest superintendent, and Ray Walker, the foreman for Andy Kouklis, the labor contractor. Suffice it to say that I believe that both Jimenez and Walker encountered difficulty with the two swampers on the first and third days of their employment, difficulties largely acknowledged by at least the testimony of Leonardo Serbin.

Of greater importance, however, is my conclusion that nothing in the way of union or protected activities on the part of Serbin and Chavez led to their discharge. This conclusion is based on several considerations.

First, virtually no union activity existed on the part of Serbin and Chavez. For example, the record is essentially silent as to any overt support given the UFW by Mr. Serbin, at any time. Mr. Chavez's historic support for the UFW when he worked for Roberts Farms in 1973 is hardly sufficient to conclude that Respondent discharged him four years later because of it. Indeed, any significance to the pre-existing UFW support demonstrated by either Serbin or Chavez, prior to their July employment, is largely vitiated by the fact that on repeated occasions, in 1975, 1976, and 1977 both Serbin and Chavez worked on Respondent's property, both directly for Respondent and for labor contractors, without incident.

Second, the so-called discussions regarding the UFW that occurred during their three days of employment in July establish them neither as open advocates for the UFW nor as known supporters of the UFW. To be sure, Chavez might have had a discussion with Petra Sandoval over whether he and his cousin were still "strikers." But, that conversation appears as no more than a passing exchange between two workers who had not seen one another for some time, and nothing much revealing came out of it as to Chavez's UFW sentiments. Furthermore, to lay any significance on that conversation one would have to infer that the forewoman who overheard it, Chavela Garcia, thought it significant enough to pass on to her brother, Richard Jimenez. I do not find that inference justified, particularly because Jimenez credibly denied any such conversation with his sister (or with Sandoval) and because the conversation--at best--was innocuous.

Nor do I believe that Joe Rivera's conversation about the UFW with Serbin and Chavez establishes a fact going to the motive for their discharges. The conversation, occurring on the first or second day of the swampers' employment, was a jousting match between persons who had known one another for some time, and Rivera was obviously parading his "supervisory" prerogatives before the two men over who was going to direct the work in the squeeze area. No serious dispute over the UFW arose. Chavez said he thought the UFW would come in at the ranches and do some good; Rivera said he did not care for the UFW and that he was a Company man. That appears to have ended the matter.

Jimenez, on the other hand, struck me as a person who during that harvest was not the slightest bit concerned with

whether two employees may have expressed some support for the UFW, particularly two employees who were working for a labor contractor and who would not be there for more than a few weeks. On the contrary, I find the evidence amply supports the Respondent's contention that Jimenez became rapidly disenchanted with the work of Serbin and Chavez, who Jimenez encountered on one occasion not carrying empty boxes as they should have, believed they dropped empty boxes where they should not have, and thought they refused to either tell him that they dropped the boxes or follow his instructions to fetch a load of boxes.

In the short span of less than three days Jimenez encountered the two swampers not less than on three occasions where they performed in a manner found wanting by Jimenez. It does not appear that the supervisor's attitude about the two swampers was either inexplicable or pretextual. In view of Serbin's and Chavez's weak link with the UFW, the failure to convincingly show that Jimenez knew of even that weak link, the lack of any direct connection between Jimenez's discharge action and the swampers' link with the UFW, and the preponderance of evidence that demonstrates good cause (at least in Jimenez's mind) for discharging the two swampers, I conclude that Respondent did not violate the Act when discharging Leonardo Serbin and Ruben Chavez.

F. Donate Torres Guzman

1. Statement of Facts:

Donato Torres began working for Respondent in December, 1973. His annual work pattern was to assist in the almond harvest between August and October as a "sweeper" driver, operate a shredder for disking between November and March, and drive a tractor in spraying sulfur on grape vines between March and August. Mr. Torres was discharged while spraying sulfur, on July 31.

During his employment Mr. Torres had no active affiliation with the UFW; nor did he demonstrate any support for that Union. But, three incidents during his employment are referred to by the General Counsel in connection with his discharge.

The initial incident occurred after the representation election in 1975, when Torres was approached by representatives of the Respondent as a potential witness for the objections hearing that took place. According to Torres, Aurelio Menchaca approached him in December, 1975, and attempted to coerce him into lying about what he saw during the election by telling Torres that if he refused to testify in Respondent's favor at the hearing it would be on his record and conversely, that if he did testify he would be rewarded financially. I do not credit Torres's version of that encounter, however; rather, I find that Menchaca and Fred Madriaga, who assisted Menchaca, ; merely sought to learn what Torres had observed during the

voting and, when it appeared favorable to the Respondent's case, asked Torres to testify for the Respondent, which Torres refused to do. 44/

The other incidents involving Mr. Torres occurred when he served as a spokesman for some of his fellow employees. Once, in the summer of 1975, Torres spoke with the almond harvest supervisor, Herb Hanna, in connection with the difficulty in breathing that was caused by excessive dust. On another occasion, a year later, Torres again spoke for his fellow employees in protesting that employees whose equipment was defective were being sent home without pay instead of being given substitute work. During the presentation of that protest, Herb Hanna mentioned he knew Torres and if he wished to be a hero he should go to Caesar Chavez where there was a place for him. On the other hand, as Torres himself acknowledged, both problems which he discussed with Hanna were remedied immediately afterward.

The record', however, reflects a serious tardiness problem on Mr. Torres's part as a sulfur sprayer during the summer of 1977, immediately preceding his discharge. The foreman of the ranch on which Torres was working, Bobby Gonzales, was told by Torres's fellow worker, Remigio Perez, and by his own supervisor, Superintendent Roy Rowe, that Torres was getting to work late. Perez, who testified, asserted that Torres was almost always tardy on the job, arriving anywhere from thirty to one hundred and twenty minutes late. 45/

44/Despite serious reservations I have about the quality of Mr. Menchaca's testimony (as discussed infra), I credit his version of the 1975 encounter with Torres. For one thing, Menchaca admitted that during their conversation, Mr. Madriaga sought to pressure Torres to testify by telling him that as a permanent employee he should support the Respondent through his testimony, after which Menchaca purportedly cautioned Madriaga not to pressure Torres. For another thing, I think it somewhat unlikely that Menchaca would openly solicit a relatively unknown employee to falsely testify with what amounts to a bribe. Additionally, no corroboration exists from which to believe that Respondent sought to create false testimony in its behalf. And finally, Torres's testimony is at serious odds on other issues with the credible testimony of his foreman, Bobby Gonzales, and his co-workers. On balance, therefore, I accept Menchaca's more credible description of the conversation in 1975.

45/During July, in his work on Ranch 51, Mr. Torres was assigned to begin work at midnight and to finish at 9:00 or 9:30 a.m., the same as Perez. Although Perez claimed he consistently arrived prior to the midnight starting time, he had ample opportunity to observe Torres's late arrivals. Perez loaded his sulfur at the same place as Torres, observed the smaller amount of sulfur Torres used per work shift, and could observe Torres's tractor across the field by virtue of its sound and its headlamps. While Perez's testimony lacks some specificity -- [cont.]

About a week after he became foreman on the ranch, Gonzales found Torres sleeping in his pickup, at about 6:00 a.m. and woke him. Torres had not worked yet on that shift. 46/ Gonzales continued getting complaints from Perez about Torres's tardiness, apparently because Perez, on at least two occasions, had to help Torres finish his work during the shift. Reports also came to Gonzales's attention that Torres was not completing his assigned work; thus, at least two irrigators on the ranch, Perales and Gregorio Martinez (both of whom testified), as well as Gonzales himself, observed instances where Torres would act contrary to his instructions and skip a substantial number of vines in his spraying.

Finally, on a Saturday, July 23, Foreman Gonzales pointedly arrived at the ranch some three hours before his normal shift, coming at 3:00 a.m. He confronted Torres about his tardiness, which Torres essentially acknowledged at the time On that morning Torres claimed that family problems were causing his tardiness. Torres suggested that he should be transferred to another shift. 47/

On a Monday, presumably August 1, Gonzales tried to determine whether he could get Torres transferred. He discussed the matter with his supervisor, then Rosalio Quilantan, another foreman, and then spoke with Aurelio Menchaca, all regarding transferring Torres to other work. The upshot of his discussions was that Gonzales concluded that no one agreed to the transfer of

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45/[continued]--and exactness, I find it generally credible as establishing Torres's chronic tardiness that July Perez appeared forthright in his testimony, had no apparent interest at stake in testifying, and was corroborated by other testimony.

46/Torres claimed he did not work that morning because he could not start his tractor. Perez, however, saw Torres sleeping in his truck at the beginning of that shift, and an irrigator on the ranch, Frank Perales, observed Gonzales waking Torres and could recall no subsequent trouble that Torres had in starting his tractor. The circumstances surrounding that sleeping incident as revealed from the testimony of Gonzales, Perez, and Perales lead me to conclude that Torres's reason for sleeping during his work shift was not because of a defective tractor.

47/Some confusion surrounds the timing of Torres's request to be transferred and his eventual discharge. The testimony alone suggests that Torres was discharged the Tuesday following Gonzales's confrontation with Torres at 3:00 a.m., which would have been on July 26. But, the Company's personnel records indicate Torres was fired on Tuesday, August 2, over a week later. Thus, it is not clear whether Gonzales erred when claiming he confronted Torres on July 23 or whether Torres may have sought a transfer on a later date, during the next week.

Torres. In particular, Menchaca told Gonzales he had no place to transfer Torres to, suggesting that maybe Gonzales should fire him. The testimony shows, however, that a foreman in the almond harvest, Buck Gill, had requested from Menchaca that Torres again work for him in the upcoming harvest.

On August 2, Torres was informed of his discharge. He was told, as was written on a personnel form, that his discharge was for repeated uncorrected tardiness. 48/

2. Analysis and Conclusions:

As noted, nothing in the record reflects that Mr. Torres was at any time 'of his employment with Respondent an active supporter of the UFW. Thus, it is not claimed that he actively supported the UFW's 1975 election efforts or had any contact with the UFW since that time.

On the contrary, the claim focused upon by the General Counsel is that Torres was discharged on August 2, while working as a sulfer sprayer, because he had refused to cooperate with Respondent by testifying against the UFW in the 1975 election objections hearing. The General Counsel claims that Aurelio Menchaca, Respondent's labor coordinator, was responsible for Torres's discharge by refusing to go along with Bobby Gonzales, Torres's foreman, and his request to transfer Torres to another work assignment. The evidence establishes that Menchaca was involved in the 1975 effort to get Torres to testify in Respondent's behalf. 49/

There is some evidentiary support for the General

48/Testimony presented by Respondent's witnesses also related to another incident involving Mr. Torres, one involving the improper burning of sulfur bags. This incident, however, was not cited by Gonzales in his testimony or on his personnel report as a reason for discharging Torres, and it is not considered by me as a motivating consideration behind Torres's discharge, although Torres's denial of the incident does shed negative light on his credibility.

49/To a lesser extent the General Counsel claims that Torres's role as spokesman for fellow employees in two disputes, one in 1975 and the other in mid-1976, led to the discharge. Although it is true that Torres's role in those disputes involved him in activity protected by the Act, it must be remembered that his disputes were with Herb Hanna, while Torres worked in the almond harvest. No evidence links Hanna with Torres's discharge over a year later. Nor does the evidence establish that either Menchaca or Foreman Gonzales knew of Torres's past disputes with Hanna. Indeed, no aftermath of retribution or animosity resulted for Torres regarding those disputes, both of which were quickly settled in the employees'-favor. I am not persuaded that the 1975 and 1976 disputes had anything whatsoever to do with Torres's discharge on August 2, 1977.

Counsel's claim regarding Menchaca. Only a day or two before Torres was discharged, the employee's foreman, Bobby Gonzales, asked Menchaca if he could find another place for Torres to work. Gonzales conceded that he would not have discharged Torres if another work assignment could have been found for him. Menchaca told Gonzales that no other work was available and that it made little sense to transfer a problem employee like Torres to another foreman, suggesting that Torres should be fired. In connection with Menchaca's denial of a transfer for Torres, the General Counsel stresses that Buck Gill, an almond harvest foreman, admittedly requested Menchaca to assign Torres to the almond harvest in 1977 and, thus, a position was available for Torres to fill.

Several considerations, however, arise in connection with Menchaca's role and motives in the Torres matter. First, from the chronology of events it appears that Gill had requested Torres for the almond harvest approximately two weeks before Gonzales requested Menchaca to transfer Torres. Thus, when Menchaca denied Gill's request, Torres was still working for Gonzales and Menchaca had not been informed yet of Gonzales's desire to transfer the employee. 50/

Second, as the Respondent notes, if Menchaca had wanted Torres to leave his employment an opportunity was available in 1976, after the almond harvest. At that time Torres took a short leave from his employment and, although the circumstances of that leave are disputed among Menchaca and Torres, it is clear that Torres filed for unemployment compensation during that absence from employment. When Menchaca was contacted regarding Torres's employment status he described Torres as being a full-time employee with a job available; Torres shortly thereafter returned to work. While it may be that Menchaca did not want the Respondent to face any unemployment compensation liability at the time with respect to Torres, Respondent's counsel correctly notes that if Menchaca were really motivated to get rid of Torres', at least one previous opportunity was passed over by him to sever Torres's employment relationship at that time.

Third, it is difficult for me to accept the proposition that Menchaca harbored continuing ill-will toward Torres for nearly two years simply because Torres refused to testify in Respondent's behalf in 1975. Not only is that a substantial time over which to bear such ill-will, but whether one accepts Torres's or Menchaca's version of their 1975 encounter over Torres's testifying at the objections hearing, it can hardly be said that Torres's conduct in 1975 was of the type so offensive

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50/Menchaca denied that Gill had requested Torres for the 1977 almond harvest. I do not credit his denial. While I share the General Counsel's concern over Menchaca's conflict with Gill over Gill's work request for Torres, I do not believe that Menchaca's lapse in credibility provides the entire basis on which to rest an unfair labor practice finding.

or unique that it would have abided with Menchaca or established in his mind that Torres was a UFW supporter.

Nor am I sufficiently persuaded that Torres suffered in his work during the two years following 1975, as the Genera Counsel argues. While it is true that Torres held a succession of positions during that time, from the nature of Respondent's operations it does not readily appear that Torres's employment history was particularly exceptional. Except for brief periods, Torres essentially worked as a tractor driver, harvest operator, or irrigator. These were his basic duties since April, 1974, albeit that from April, 1975, when he was first classified as a tractor driver-irrigator, his work areas changed from time-to-time, unlike his previous two years that he was assigned to Poso Ranch. But, Torres's employment history is not unlike that for Samuel De La Rosa, who also operated tractors and equipment for Respondent. It was common for such machine operators not to be confined to one crew but shifted around from time-to-time, following the tractor work.

Most significant of all, of course, is the fault found with Torres's work immediately preceding his discharge, at a time during which he had no connection with the UFW. Little doubt can exist that shortly after Bobby Gonzales became foreman over Torres's work area, he became aware of Torres's chronic tardiness at work, both from complaints being made by Remigio Perez, Torres's fellow tractor driver, and from comments of the irrigators who noticed that Torres was skipping substantial portions of his work. 51/ To be sure, Gonzales did not rely on Torres's skipping rows in discharging him, but in Gonzales's mind I believe, and mine as well', Torres's skipping rows strongly indicated that Torres was not working a full work-shift.

Torres's effort to deny his tardiness is not convincing. Not only is it uncorroborated, but contrary to the testimony of fellow workers. Furthermore, the tardiness problem is consistent with the previous work habits of both Torres and Perez under the foreman who preceded Gonzales, when both men simply sprayed their assigned field and left as early as possible, being paid for a full work shift. 52/ To a large

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51/The General Counsel attacks the testimony of Perez because of his admitted dislike for the UFW and the inexactness of his testimony regarding Torres's tardiness. I have concluded, however, that Perez testified forthrightly, though he had difficulty expressing himself precisely, but he clearly had the opportunity to perceive Torres's tardiness. And, Perez's bias against the UFW was freely admitted by him; when compared with the fact that Torres himself was not an avid UFW supporter, Perez's sentiments do not seem significant.

52/Time records of Respondent indicate no problem at all with Torres being late to work during July. The circum-stances surrounding the make-up of those records, as well as Gonzales's explanation of their inaccuracy, convinces -- [cont.]

extent, Torres continued the practice under Gonzales, albeit Torres began arriving for work late rather than leaving early as was the earlier practice.

Gonzales patiently made efforts to get Torres to correct his tardiness. When no solution was in sight, and because of Torres's request, Gonzales tried to have Torres transferred. The record is sufficiently replete with Gonzales's good faith efforts to correct the tardiness problem and to transfer Torres as to obviate doubts as to Gonzales's motive toward Torres.

Menchaca, as noted, refused to assist Gonzales in transferring Torres out of the area. Menchaca told Gonzales he had no work for Torres in the almond harvest and that other foremen had complained about his work. In one way or another, Menchaca hinted that Torres be discharged. Buck Gill, an almond harvest foreman, corroborated the fact that he had previously complained to Menchaca about Torres's work.

The basic fact remains, and is relied on by the General Counsel, that Menchaca's refusal to transfer Torres eventually led to his discharge. I do not conclude from that refusal, however, that Menchaca was motivated by Torres's 1975 refusal to testify. Not only does that refusal provide a weak link to explain Menchaca's motives two years later, but I think an equally persuasive explanation is that Menchaca was not disposed to go out of his way to help Torres in view of some previous work complaints regarding Torres. Also, the fact that Gonzales discussed with Menchaca Torres's chronic tardiness as a sprayer added stronger reasons not to transfer Torres to another supervisor. Gonzales, it should be noted, was a new foreman and quite young, which perhaps explains his good faith efforts in behalf of Torres. But, Menchaca was not persuaded by those efforts. And, in the final analysis it was Gonzales, not Menchaca, in consultation with his superior, Roy Rowe, who discharged Mr. Torres. I do not conclude that that discharge violated the Act.

G. Charles (Chuck) Vroman

1. Statement of Facts:

Chuck Vroman, an experienced mechanic, was hired by Respondent in January, 1976. His entire employment with Respondent was spent repairing and overhauling tractors and other heavy-duty equipment, much of which was diesel powered; most of his employment was spent in the engine room in the Fleet Shop, alongside where Arnold Garza worked since May, 1976.

Since Vroman had worked in many union-organized

52/[continued]--me that they do not establish that Torres came to work on time, only that Gonzales made no effort to dock Torres for his short hours.

repair shops previously, he had been a member of several different unions. He testified that he generally supported unions. His support for unions was made known by him to various mechanic supervisors at Respondent. 53/

During the spring of 1977 several incidents occurred that relate to Vroman's departure from Respondent.

First, on March 31, during his evaluation with Mr. Branch, Vroman was informed he would be receiving no raise in pay that year. Branch also complained regarding Vroman's work. According to Vroman, Branch complained that he was not producing enough. According to Branch, Vroman was informed not only that he worked too slowly but that he was abusive to the clerks, too loud while at work, and was away too often from his work place. Branch claimed he spoke to Vroman on other occasions as well, complaining' mainly about the speed of Vroman's work.

Second, as earlier noted, on the day of employee evaluations, Branch was informed by one of his foremen that Garza was passing out UFW cards in the Fleet Shop, one of which Branch was informed was given to Vroman. Either later that day or the next day, Branch was informed by another foreman that some of the mechanics in the Fleet Shop were discussing the UFW and that Vroman had signed an authorization card while in the shop. Branch claimed these foremen were concerned because the union discussions were taking place in the shop and during work time, but Branch claimed that he told the foremen to ignore the situation.

Third, at one of his normal staff meetings with employees, Branch made an announcement concerning the UFW which engendered a reaction on the part of Mr. Vroman. Branch announced the "unfortunate" news that the UFW had just been certified as the bargaining representative of Respondent's employees. (Presumably, this meeting took place about a week after the Board had announced its certification decision concerning Respondent, a decision dated April 26.) One of the shops' mechanics openly lamented the UFW's advent and complained about the amount of dues employees would have to pay. Vroman was quick to argue the matter, disputing his fellow employee over the amount of dues and telling the employee that he did not know what he was talking about when it came to union dues. Branch conceded that he overheard Vroman's remarks concerning UFW dues, although he denied recalling that Vroman said all that he

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53/It is not clear from Vroman as to when and how often he engaged in conversations wherein his support for unions was made known; he dated such conversations variously, either from the beginning of his employment or from early 1977. Vroman's testimony is characterized by vagueness, generalities, and argumentativeness. His demeanor as a witness made it difficult to delineate fact from his general opinions and corroborated in vivid fashion much of what Respondent's supervisors had to say about his temperament.

claimed concerning unions.

Finally, sometime around June, Vroman was advised by Bill Branch that he would be transferred from the Fleet Shop to the Heavy Equipment Shop, where he would come under the supervision of Sydney Cimental, that shop's foreman. The repair of heavy equipment, such as tractors and diesel-powered equipment, was being moved from the Fleet Shop to the new Heavy Equipment Shop. Vroman was told he would continue working on his existing projects, but when they were finished he would be transferred. All other heavy equipment work had already been transferred to the new shop. 54/

As of the time of his transfer into the Heavy Equipment Shop, Mr. Vroman was classified as a master mechanic and earned $6.25 per hour. His was the highest job classification among the mechanics, shared only with some foremen. In the Heavy Equipment Shop Mr. Vroman was the highest classified and paid employee, the next highest being a senior mechanic who earned $5.75 per hour.

Vroman worked for about two weeks in the Heavy Equipment Shop. His new foreman, Sydney Cimental, was not pleased with his work, both as to the quality and quantity of it. 55/ Cimental claimed, without serious contradiction from Vroman, that he was displeased with two different projects worked on by Vroman. Bob Tatum, a higher supervisor, was likewise not pleased with some of Vroman's work.

Apart from the criticism of Vroman's work, however, the incident purportedly triggering Vroman's departure from his employment occurred on Monday, August 8.56/ When

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54/Shortly after being informed of the transfer, Vroman took a two-week leave from his employment. It is not clear why he took his leave, but the machines he was then working on were assigned to other mechanics. When he returned, about the third week of July, he began work in the Heavy Equipment Shop.

55/Vroman and Cimental had worked together once before, twenty years -ago, at Kern County Equipment Company. Vroman admittedly did not care for Cimental. Cimental claimed he was a foreman over Vroman at Kern County and asserted he was instrumental in Vroman's discharge from that company. The accuracy of Cimental's recollection as to his prior experience with Vroman is in doubt, since a long-time foreman from Kern County testified that Cimental was never a foreman and that Vroman was never discharged. While this ancient event may shed some light on Cimental's credibility, it is none too significant in respect to the pertinent issues in this proceeding.

56/The various dates surrounding Vroman's employment termination are deduced from the Respondent's personnel form, which stated August 9 as the last day worked by Vroman. -- [cont];

Vroman joined Cimental and three mechanics for lunch that day, the three mechanics got up and left. Later, Cimental claimed he tried to learn what was the matter, but only one of the mechanics, a Mr. Don Roberts, sought to explain. According to Cimental, Roberts told him that the rest of the mechanics were tired of Vroman's remarks, tired of his belittling them and claiming they were illiterates. Roberts told Cimental, according to the foreman, that he and the other mechanics were thinking of quitting because of Vroman. On one previous occasion, after Vroman began work in the Heavy Equipment Shop, Cimental had overheard Vroman belittling another mechanic, D. W. Atchley, about that mechanic's lack of knowledge. One or more of the heavy equipment mechanics were not able to read or write, apparently .

Cimental reported the next morning to his supervisor, Bob Tatum, what Roberts had said to him and expressed concern over Vroman's behavior. Cimental claimed he would just as soon have discharged Vroman then. Tatum then investigated the matter by talking to Roberts; Tatum claimed that Roberts essentially confirmed what Cimental had said—namely, that Roberts was thinking about quitting because of Vroman.

Tatum, in turn, reported the incident to his superior, Bill Branch, who almost immediately went to the shop area and spoke with Cimental. They discussed the difficulties with Vroman, mentioned the possibility of demoting Vroman, and pondered whether Vroman would quit if his salary was decreased.

Vroman was then requested to meet with the three supervisors. Branch did most, if not all, of the talking. He explained to Vroman he was not happy with the mechanic's work, mentioning the time he took to finish projects and some specific' instances where Vroman had made mistakes in his repair work. Branch also mentioned that Vroman was the highest paid mechanic in his shop and yet the others were performing as well as he was. Branch complained about Vroman's belittling other mechanics and criticized his manner of speaking to them.

Finally, Branch advised Vroman that he was demoting him to senior mechanic classification with an attendant decrease in wages to $5.75 per hour. Vroman objected, loudly, and said he would not accept' the demotion. Vroman informed the three that he was quitting and, true to his word, August 9 was his last day of work.

Admittedly, it came as no surprise to any of the three supervisors that Vroman quit rather than accept the demotion. Branch conceded he considered it possible that Vroman would quit.

56/[continued]--Vroman claimed July 9 was his last day, but he claimed it was a Tuesday. July 9 was not a Tuesday, but August 9 was.

Yet, the precise reasoning behind Vroman's demotion remains somewhat murky in the testimony. Branch described himself as exasperated at hearing from Tatum about Vroman's interaction with his fellow employees and finally determined to demote Vroman to senior mechanic, which Branch had long wanted to do in order to even off the job classifications. Although Branch denied the demotion was a punishment, he admitted essentially that it would not have occurred when it did except for the complaints he heard through Tatum. Cimental explained he did not think the demotion was appropriate as a means of punishment for Vroman's belittling other mechanics, but claimed he suggested that Vroman be classified the same as the others in order to eliminate any discrimination or distinction among his mechanics.

2. Analysis and Conclusions:

Chuck Vroman's employment termination, on August 9, presents a host of testimonial conflicts, similar to the other cases dealt with herein. 57/ Thus, conflicts exist as to whether Vroman was warned about the quality of his work by supervisors, whether his work demonstrated error or inattention, and whether he argued about the UFW in front of his last supervisor, Syd Cimental, only a week before he left the Respondent.

Similarly, the General Counsel attacks the reasoning behind the cut in pay instituted against Vroman on August 9 It is claimed that Cimental's desire was to discharge Vroman, that the cut in pay violated customary procedures employed by Bill Branch (the superintendent involved), that in cutting Vroman's pay his supervisors recognized Vroman would probably quit and—in fact — it was part of an ongoing effort to have him leave his job, and Vroman—in effect—was forced out of his job due to his open support for the UFW and his past support for Proposition 14.

While some of the General Counsel's contentions find support in the record, largely through a careful expose of portions of the testimony, I think the specific contentions, based on an accumulation of circumstantial facts and argument,

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57/ Paragraph 8(m) of the complaint, an amendment added while the hearing was in progress, charges that Respondent, in April, cut Vroman's pay and thereby discharged him "because of his support and activities on behalf of the UFW." As the Respondent correctly notes, no evidence was adduced regarding April, 1977. Contrary to Respondent's contention, however, I do not conclude that Paragraph 8(m) should be dismissed due to that lack of evidence, inasmuch as the only evidence relating to the charge concentrated on August 9, introduced without objection and fully tried by the parties. Clearly, the complaint's chronology is in error about April, but not the kind of error that should result in dismissal.

miss the point. Vroman's departure from the Respondent can be seen in broader, and I think more accurate, ways than the specific facts cited by the General Counsel would give rise to.

For example, from Vroman's own testimony one cannot discern any noticeable change in his attitude concerning the UFW or unions in general. Vroman had indicated since the beginning of his employment that he had been a union man and continued to voice support for unions. Despite apparently having voiced his opinion concerning unions on numerous occasions during his employment, not one instance is cited of a supervisor criticizing Vroman for his views, or taking him very seriously.

Nor is there evidence, except for that which shows that Vroman and Arnold Garza discussed the UFW on March 31 or April 1 (known to the supervisors), that Vroman made any active effort to support the UFW. To be sure, he defended the UFW's collection of dues during a shop staff meeting in about May, but that was the extent of his open support for the UFW in particular. Furthermore, even that defense appears to have been more an effort to argue with a fellow employee about his lack of knowledge about unions than to defend or support the UFW. From listening to Vroman's testimony, it would be difficult to describe him as either a serious UFW supporter or one who sought to gain support for it from his fellow employees.

The evidence is again in conflict over whether Vroman made any open showing of his support for Proposition 14, back in 1976. Contrary to his testimony, I credit that of Steve Catlin and Bob Tatum, who credibly testified that Vroman either never drove the vehicle on which he claimed to have a "Yes on 14" sticker or that he never had such a sticker on one of his several vehicles to begin with. No corroboration was offered to support Vroman's claim that he drove a car with such a sticker on it, and Catlin (whose testimonial demeanor was most impressive) credibly claimed that he often rode to work with Vroman and never saw a Proposition 14 sticker on his vehicle.

At most, Vroman's connection with the UFW was a weak one. In addition, there is a weak link in time between his August 9 "discharge" and any UFW support he manifested. Nor do I think that the evidence shows Vroman's supervisors perceived him to be either a UFW supporter or a threat to them as such.

The claim raised by Vroman's supervisor, Branch, was that Vroman was reduced in salary because of the quality of his work and the way he treated fellow employees. At the time, Vroman was the highest classified rank-and-file mechanic in the shops and the only one to share the same classification as the foremen. While Branch may have indeed been distressed over some of Vroman's work, the quality of which was credibly enough described by Cimental and Tatum, he wrote down on Vroman's termination report that Vroman was "slow, talks too much." It was Vroman's overall conduct and demeanor which undoubtedly led to Branch's decision to downgrade Vroman and make him an equal with

his fellow mechanics.

I believe the testimony of Branch, Tatum, and Cimental: that Cimental complained to Tatum about Vroman's treatment of other shop mechanics, that Tatum went to speak with one of the senior mechanics in Vroman's shop, that Tatum then reported to Branch that mechanics were complaining about the way Vroman acted and were thinking of quitting, and that Branch determined to lower Vroman's pay, either to bring him down to the level of other mechanics or to encourage him to leave his employment. As Branch indicated, when he heard of the mechanics' complaints he decided to take action against Vroman. No pro tected activity by Vroman preceded this sudden confrontation between Branch and Vroman. Nor does the credible evidence show that the other mechanics were distressed with Vroman because of his union views or his support for the UFW.

In hindsight one might question Branch's decision. it did break with his normal procedures and was an exceptional response to an employee. But, I believe Branch when he claimed to be legitimately exasperated with Vroman. The major obstacle to accepting Branch's testimony is that Don Roberts, the mechanic who complained about Vroman, was not called to testify; however, neither was he called to rebut Branch's testimony.

I do not believe, however, that Branch was motivated in the slightest by Vroman's past expressions of support for unions, past connection with Garza in signing an authorization card, or anything else to do with Vroman's protected activities. He was viewed as an argumentative, uncooperative employee, which impression was sufficiently corroborated by his brief appearance as a witness, and I think that view of him had nothing to do with the UFW or his union sentiments. Nor am I persuaded that Vroman's supervisors thought his objectionable conduct had anything to do with the UFW when his pay was cut and he quit in a huff. Frankly, from Vroman's own vague testimony nothing of precision comes out that would lead me to believe that a protected activity on his part was a basis in the minds of his supervisors when demoting him. Accordingly, I conclude that the evidence does not establish with the requisite degree of persuasion or precision that Respondent violated the Act when it lowered the pay of Chuck Vroman.

H. Samuel De La Rosa

1. Statement of Facts:

Samuel De La Rosa began his employment with Respondent in August, 1973. For four years he performed valuable service operating various machinery, such as tractors and grape harvesters, under various foremen. His employment records indicate he was considered an "excellent" employee, and, as Herb Hanna, one of his supervisors, indicated, Mr. De La Rosa was the

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best grape harvest operator who worked for him. 58/

Although he worked for different foremen, Mr. De La Rosa operated a grape harvester during the wine grape harvest each year from 1974 to 1977 in one of the several crews supervised by Herb Hanna. That harvest usually began as August passed into September and lasted until early November. With the exception of 1976, Mr. De La Rosa worked on the night shift; during the 1977 harvest his hours were from 9:00 p.m. to 9:00 a .m.

Mr. De La Rosa was an active supporter of the UFW. In 1975, before the election, he urged members of his crew to support the UFW. Several incidents involving him demonstrate that his support for the UFW was known among Respondent's officials .

Around the time of the 1975 election, most probably after it, Mr. De La Rosa served as spokesman for his fellow crew members in a dispute over wages. During the first few days of the wine grape harvest, De La Rosa, in behalf of his fellow employees, protested to the harvest superintendent, Herb Hanna, because those working on the night shift were not receiving a $.10 per hour differential for their night work. According to De La Rosa, a dispute with Hanna ensued, during which Hanna remarked that maybe the employees should bring in Caesar Chavez and his flags to fight for them. 59/ A conflict in testimony exists between De La Rosa and Hanna as to how the differential pay dispute was resolved, the resolution of which is not

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58/Mechanical grape harvesters, which De La Rosa operated, were used in harvesting wine grapes. The harvesters are large machines driven by a man who sits on top of the machine and which straddle grape vines, picking the grapes and dropping them by conveyor belt into a gondola. The gondola is pulled by a tractor, operated by another driver, steadily behind the harvester in order that the grapes fall into the gondola and not on the ground.

59/Hanna denied making any reference to Caesar Chavez or the UFW in his discussions with De La Rosa regarding the $.10 differential. I do not credit his denial and, instead, credit the version 'given by De La Rosa. Hanna' s testimony regarding statements about the UFW was, as will be noted infra, contradicted in significant respect by his own supervisor, Dave Nelson. In addition, I find credible the testimony of Donate Torres, concerning Hanna's 1976 reference about the UFW, which likewise expressed Hanna's opinion that those who protested working conditions were somehow identified in his mind with the UFW (see supra, p. 52). Finally, although in some respects Hanna's testimony appeared credible, where his testimony might particularly damage Respondent's defenses his testimony was invariably at odds with testimony given by other witnesses whose demeanor and/or lack of self-interest made their testimony at least as credible as Hanna's.

particularly material to the issues in this proceeding, but no doubt exists that the dispute was quickly settled in the employees favor and that De La Rosa, speaking English, played a predominant role in behalf of his work crew in that dispute.

At the outset of the 1977 wine harvest De La Rosa again served as spokesman for fellow employees in a dispute over working conditions with Mr. Hanna. According to De La Rosa, whom; I credit in regard to this portion of his testimony, the dispute evolved after the first night of harvesting, when Hanna had told ; the night crew that he expected them to work twelve hours without; stopping to eat or to take breaks. On the next night, with De La Rosa speaking for the employees, the night crew protested and demanded a half-hour lunch break and two rest breaks during their work shift. After some discussion between Hanna and De La Rosa, along with Aurelio Menchaca who confirmed to Hanna that De La Rosa was right about the employees' entitlement to a lunch hour and break time, Hanna agreed to give the night crew a half-hour lunch break and two ten-minute breaks, although the crew would either have to work an extra half-hour or be docked a half-hour in pay. De La Rosa also recalled that Hanna told the employees that they better not exceed the new break time and that they better run while at work, statements which De La Rosa then openly characterized as being akin to having a supervisor with a whip as in the days of slavery. The protest which took place that second night lasted about a half-hour, after which the crew went to work.

Hanna sought in his testimony to down-play the re-belliousness of the employee protest by claiming that he quickly gave into their demands for lunch and rest breaks and by claiming that in the past employees had voluntarily waived such formal breaks in order to work and be paid for twelve straight hours. Thus, according to Hanna, the protest was not so much over any announcement he had made, or change in policy, but because a sudden shift of employee sentiment contrary to past practice. While the workers' demands may have sought a change in the break-time practice that had previously existed, I doubt that the employees' protest, as seen through the credible testimony of Mr. De La Rosa, could be described as anything other than one stemming from what was believed to be a harsh authoritarian approach taken by Hanna as to break time. Mr. De La Rosa was not the type of employee to imagine affronts or look for trouble, as his employment records and past commendations re-fleet. Furthermore, even Hanna as much as conceded he initially opposed the break-time proposal put forward by De La Rosa.

Yet, another incident brought Hanna and De La Rosa into conflict. On the next evening, the third night of harvesting, De La Rosa approached Hanna to protest what he thought was a deduction in pay for the previous night's work shift. During the prior night's dispute, Hanna warned employees they had better start working (rather than continue their protest over breaks) or they would be docked a half-hour in pay. On the next night, believing that at least one of Hanna's two night foremen was to dock his crew that half-hour in pay, De La Rosa approached

Hanna to complain.

Participating in or observing the discussion between Hanna and De La Rosa were Mr. Menchaca and Fred Govea, one of the two night foremen. During that discussion, George (Dave) Nelson, Hanna's supervisor, pulled up in a vehicle and participated in the discussion.

During his discussion with Hanna over the half-hour deduction, a deduction that was never instituted by Hanna, De La Rosa turned to Nelson and mentioned that Hanna had referred to Caesar Chavez in the pay differential dispute they had had in 1975. According to Nelson, whose testimony basically corroborates that of De La Rosa, De La Rosa mentioned Hanna's 1975 remark regarding the UFW, pulled out a UFW button and gave it to Hanna, and began saying that the UFW would help things at the Company. 60/ The discussion then ended when Nelson suggested to De La Rosa that he begin working.

Later that same night, however, Herb Hanna approached De La Rosa regarding the latter's conduct earlier that evening. Hanna's and De La Rosa's testimony was in general agreement as to what was said in this second meeting of the night: Hanna, upset with De La Rosa, warned the employee that confrontations between them could not continue, that if they did continue one of them would be transferred elsewhere with the Respondent, that Hanna objected to having a large group of employees airing its grievances during work time rather than before or after work, and that Hanna complained he did not like De La Rosa speaking Spanish (which Hanna did not understand) when they were discussing problems in front of other employees. Hanna claimed he attempted to tell De La Rosa he could continue acting as spokesman for employees if they desired, but that more would be accomplished through individual rather than group meetings and that it would help if De La Rosa was more cooperative when working. Hanna claimed that after this confrontation no other employee problems arose and that De La Rosa returned to his usual exemplary conduct while working. 61/

60/Contrary to both De La Rosa's and Nelson's testimony, Hanna denied any mention that night of the 1975 dispute or Caesar Chavez. As noted earlier, I do not credit this portion of Hanna's testimony--namely, that such a remark was not made by De La Rosa in front of Nelson and Hanna in 1977 or that the comment regarding Caesar Chavez was not made by Hanna in 1975.

61/Mr. De La Rosa asserted that in early 1977 he solicited fellow employees to join the UFW by discussing with them UFW authorization cards. He also asserted that after the first few days of the 1977 wine harvest he wore a UFW button. His testimony, however, does not reflect any knowledge on Respondent's part regarding the solicitation of UFW cards or for whosecrew he was then working. His testimony, though initially unclear as to whether he openly displayed his UFW button during the wine harvest or merely wore or carried it in an unseen--[cont]

About a week or so after his various confrontations with Hanna and Nelson, Mr. De La Rosa was discharged. The last day he worked was on the morning of September 6, Labor Day.

While contradiction and ambiguity exists in the testimony concerning the events surrounding De La Rosa's discharge, the following summarizes the most credible version of those events. As Mr. De La Rosa admitted, prior to his night shift on September 5 he spent part of Labor Day drinking beer with a relative. He arrived at work for his 9:00 p.m. shift later than his fellow workers and was transported to his harvester by his foreman, Federico Alacron.

It is undisputed that at about midnight Foreman Alacron and Supervisor Hanna observed one of the harvester and gondola teams spilling grapes, the gondola not being in proper tandem with the harvester. Alacron went to investigate and, as he did, he observed the tractor hit two grape vines, pulling one out of the ground and knocking the other one over. Alacron mounted the harvester, which was then halted, to find out what was wrong, only to discover that De La Rosa was driving the tractor, not the harvester, and that the driver assigned to the tractor, Hipolito Lozano, was driving the harvester.

At the point where Alacron confronted De La Rosa, the testimony of those two men diverge. Alacron claimed he asked De La Rosa why he had hit the vines and that the employee said he had been drinking a little or was a little drunk. De La Rosa testified that Alacron asked him what was the matter, "Was I drunk?" According to De La Rosa he replied, "No, I am very ill, I feel drunk, but of sleep." As to this exchange between employee and foreman, I credit the version of De La Rosa. For one thing, it is difficult for me to believe that an employee, while working, would voluntarily tell his foreman that he hit two grape vines because he was drunk. Alacron's version somewhat strains credulity. For another thing, it is difficult to believe that De La Rosa told his foreman he was drunk and was then (according to Alacron) permitted to keep working on the harvester, to which De La Rosa purportedly switched. Finally, no testimony from De La Rosa's partner, Hipolito Lozano, indicates that he heard De La Rosa say openly he was drunk.

Although some of De La Rosa's behavior on September 5 can lead one to the conclusion that he was inebriated, such as his striking the two vines and his son's delivery

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61/[continued]--place, convinces me that he wore a UFW button on his shirt for several days before his discharge. Furthermore, it is clear that De La Rosa's supervisors knew of his support for the UFW both through the discussions he had with them(as cited above), particularly where he pulled out and gave Hanna his UFW insignia, and by his filing an unfair labor practice charge sometime in August regarding his UFW solicitation or support, a charge not involved in the instant proceeding.

of his work shoes after work had begun, these factors alone do not establish De La Rosa's condition. Thus, his explanation for striking the vines--namely, that he had not yet mastered the speed control on the tractor (he struck the vines immediately after switching to the tractor)--and his explanation for driving the tractor—namely, that he was exhausted by lack of sleep and wanted to be refreshed by the tractor's air-conditioning — are reasonable in themselves. 62/

Confusion also surrounds Alacron's response to De La Rosa after the vines had been struck. The foreman claims that, at De La Rosa's urging, he allowed De La Rosa to continue working, removing him later only after conferring with another harvest driver, Jose Jimenez. Alacron claimed that Jimenez told him he would be responsible if De La Rosa did any damage while being drunk, and Alacron asserts he then replaced De La Rosa with Jimenez on De La Rosa's harvester. But, De La Rosa claimed he asked to leave work because he was not feeling well and that Alacron then took him to his vehicle. Also contrary to Alacron's testimony is that of Jimenez, who denied telling the foreman he would "be blamed if De La Rosa's drunkenness caused any damage or injury. 63/ Thus, there is cause for doubting the accuracy of Alacron's recollection of September 5.

After De La Rosa left for the night, Alacron told Hanna about his departure and explained that De La Rosa was a little drunk. According to Alacron, he did not again discuss De La Rosa's drunken condition with Hanna that night or the next morning, although he later told Hanna of the damaged vines. I believe that Alacron thought De La Rosa was at least a little drunk on September 5 for, although he smelled no alcohol on De La Rosa's breath, Alacron thought De La Rosa looked drunk in his face and eyes and that an experienced harvest operator would not damage vines unless he was drunk. According to Alacron, De La Rosa had told him as he was taking him away from the field that night that he (De La Rosa) had had a few beers, a conversation I think more likely to have occurred than not.

On the morning of September 6 a series of meetings and discussions ensued with respect to De La Rosa. Initially, a meeting was held between Hanna and Dave Nelson, then the two of

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62/Ignored in Respondent's claim that De La Rosa was drunk is the fact that no other problems were cited in respect to his work, despite his having worked three or four hours before his confrontation with Alacron. Indeed, both Alacron and Herb Hanna had seen De La Rosa earlier in his shift and noticednothing strange about his behavior. It is curious that De La Rosa would appear to be getting "drunker" as the night wore on rather than soberer, which one might not reasonably expect unless evidence showed that De La Rosa was drinking while at work.

63/The somewhat confusing testimony of Jimenez and Lozano is discussed infra.

them met in the field with Mr. Menchaca, investigating the vine damage and taking photographs of it. Then Bill Keever came out. Then, Keever and Menchaca questioned Jose Jimenez and Hipolito Lozano, at their homes, regarding De La Rosa's condition the night before. 64/

The quality of investigation by Keever and Menchaca is challenged by the General Counsel. Keever testified that on the basis of his conversations with Lozano and Jimenez that he reported back to Hanna and Dave Nelson that De La Rosa "was extremely drunk." Keever claimed that Jimenez had said De La Rosa was extremely drunk and that Lozano had said De La Rosa was drunk. Menchaca's testimony indicated he told Nelson that Jimenez said De La. Rosa was very drunk, was in no condition to work, and that he should be thankful he was not hurt; Menchaca claimed he told Nelson that Lozano said that De La Rosa was more than drunk--that he was out of hand.

The testimony of Jimenez and Lozano, though some what confusing, does not corroborate that of Menchaca or Keever. 65/ Jimenez testified he did not tell Keever or Menchaca that De La Rosa was very or extremely drunk, but did tell them he was a little drunk. According to Jimenez they asked him if De La Rosa was very drunk and he responded that he could not have been if he drove the harvester, and they asked him if he smelled alcohol on De La Rosa's breath and he said one could smell alcohol if someone has only a beer or two. Nonetheless, Jimenez admitted he smelled alcohol on De La Rosa's breath, that he told Keever and Menchaca that De La Rosa was a little drunk, and also that he told Alacron on the evening of September 5, after Alacron had mentioned he thought De La Rosa was drunk, that he (Jimenez) did not want to be blamed for De La Rosa's bad work that night.

Lozano claimed he did not know whether De La Rosa was drunk on September 5. But, he admits having told Keever and Menchaca that while he was not sure of De La Rosa's condition, he talked like he was drunk, though he did not smell like it. He claims he turned down Respondent's request to testify because

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64/As the Respondent's officials conceded, normally as full an investigation as was done with respect to De La Rosa would not take place. Indeed, not only was Mr. Keever and Mr. Chavez alerted of the De La Rosa matter, but calls were made to Respondent's labor counsel regarding the charge against De La Rosa that he was drunk. The purported reason for the extensive investigation concerning De La Rosa's condition on September 5 was the fact that shortly before he had filed an unfair labor practice charge against the Respondent.

65/Both of these employees were asked if they would testify in behalf of the Respondent. But both refused, although the reasons for their refusals are not so clear. They appeared as rebuttal witnesses for the General Counsel.

he was not sure of De La Rosa's condition.

The question naturally arises as to what accounts for the difference in testimony between Jimenez and Lozano and that of Keever and Menchaca. One explanation might be that Jimenez and Lozano sought to limit their accusations against De La Rosa, not wanting to be blamed for his discharge. Another explanation might be that Keever and Menchaca exaggerated their investigation with Lozano and Jimenez to make a more persuasive case against the long-time employee, De La Rosa.

I am inclined to conclude that Keever and Menchaca exaggerated what Jimenez and Lozano told them on September 6 during their investigation and inaccurately reported it to Nelson. First, while it is true that Jimenez and Lozano were undoubtedly reluctant to be cited as De La Rosa's accusers, the fact that these two workers, still employed by Respondent, appeared at the hearing to testify at variance with high-ranking supervisors is persuasive of their full effort to be credible in their testimony, particularly inasmuch as they had been interviewed again by Respondent's officials and counsel before the hearing. Second, at the time of their testimony Menchaca and Keever undoubtedly assumed that Lozano and Jimenez would not appear as witnesses, as each had declined when requested by Respondent. Third, Menchaca's testimony, as noted supra, was credibly challenged in the context of Donate Torres s discharge. Finally, not even Federico Alacron,. who had at least two conversations with De La Rosa on September 5, claimed that the employee was very or extremely drunk.

After Menchaca and Keever reported on their investigation to Nelson and Hanna, the latter two determined to discharge De La Rosa. That evening, on September 6 when De La Rosa appeared for work, Hanna informed him he was discharged. The personnel form written out concerning the discharge indicated that De La Rosa was "[u]nable to operating [sic] grape harv[esting] equipment safely due to being extremely drunk during working hours." 66/

2. Analysis and Conclusions:

The evidence establishes without serious dispute that De La Rosa's condition on September 5, the last day of his employment, was not up to his norm. Even De La Rosa admitted not only having a few beers the afternoon of September 5, but feeling ill and tired during his three to four hours of work that night. At about midnight De La Rosa admits he switched positions with his tractor driver, taking over the tractor to get some air-conditioned air and letting the other worker,

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66/The post-discharge conversations between De La Rosa and Alacron and Hanna are noted in the testimony. I do not believe that testimony sheds significant light on De La Rosa's actual condition on the night before, the exchanges being capable of various interpretations.

Lozano, take over driving the grape harvester. Likewise, De La Rosa admits hitting at least one grape vine during his brief control of the tractor. And, he admits needing to leave work early, some eight or nine hours before his shift ended. 67/

The fact that De La Rosa's work on September 5 was such as to cause concern from his supervisors, however, does not end the matter of his subsequent discharge. As noted earlier, "an employer violates the Act if he discharges an employee because of the employee's union membership or activities, even if another contemporaneous reason for discharge exists." Colonial Lincoln Mercury Sales, supra, 197 NLRB at 58. As is commonly known, an employer's discriminatory motive for discharging an employee can rarely be established by direct evidence, being "normally supportable only by the circumstances and circumstantial evidence." Amalgamated Clothing Workers v. N.L.R.B., 302 9 F.2d 186, 190 (C.A.D.C. 1962), citing N.L.R.B. v Link-Belt Co., 311 U.S. 584, 597, 602 (1941). In other words, "the conduct of a party is to be viewed in its total context. ..." Tex-Cal Land Management, Inc. v. A.L.R.B., 5 Civ. 3395 (1978) (Slip Opinion, p. 23).

As I earlier noted, serious doubt cannot arise that; Respondent was aware of several occurrences that established De La Rosa as a leading UFW supporter. For one thing, during the 1977 grape harvest, for several days prior to his discharge, Mr. De La Rosa openly displayed a UFW button. For another thing, during his confrontation with Herb Hanna shortly before his discharge De La Rosa handed to Hanna his UFW button and told Hanna that the UFW would help things at Respondent. Additionally, prior to his discharge De La Rosa had filed an unfair labor practice charge against the Respondent relating to his UFW support. And finally, even during De La Rosa's dispute with Hanna in 1975 over the $.10 differential 'there is reason to believe that Hanna may have suspected De La Rosa as a UFW supporter, since one of Hanna's responses to the employee was that he should' bring in the UFW to fight his battles. In any event, the admissions of Keever and Nelson establish that Respondent's high-level investigation in regard to De La Rosa's discharge was due to the unfair labor practice charge he had filed, inferentially indicating that he was known by them to be a supporter of the UFW.

Of course, that Respondent knew of De La Rosa's UFW affiliation and had a consistent policy of opposing the UFW does not end the inquiry. Rather, we must carefully measure the evidence to see whether the total circumstances warrant the inference that De La Rosa's discharge was for discriminatory reasons, or whether the discharge was based on nondiscriminatory

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67/It should be noted that the importance to De La Rosa in showing up for work on September 5 was to receive pay for the Labor Day holiday. The Respondent's rules provided that workers would not be paid for certain holidays unless they appeared for work the day before and day after the paid holiday.

reasons.

Numerous considerations come to mind in weighing the Respondent's motive for discharging Mr. De La Rosa. First, De La Rosa was a long-term employee, having worked since 1973. As a related matter, it is clear that De La Rosa rose above the ordinary in performing his duties: his employment records, as well as Herb Hanna himself, establish that De La Rosa was a valued employee.

Second, De La Rosa's discharge occurred within a week or ten days of his last work dispute with Hanna. In that dispute De La Rosa had not less than three encounters with Hanna. During the first De La Rosa protested the absence of break time. During the second De La Rosa protested docking employees a half-hour's pay and argued in support of the UFW, brandishing his UFW button. During the third Hanna, admittedly upset with De La Rosa, warned the employee that if he kept uphis activity he would be transferred and that he should not con front Hanna with a group of workers. Hanna was angered at De La Rosa's successful efforts in behalf of his fellow employees and his lack of fear in presenting his grievances, even arguing such matters before Hanna's superior, Dave Nelson.

Does the coincidence in time between De La Rosa's last display of UFW support and protected activity, on the one hand, and his discharge, on the other, support a finding of dis crimination? I think, added to other considerations, that it does. Two of those considerations are crucial.

Substantial doubt is cast by the General Counsel as to the Respondent's investigation of De La Rosa's alleged drunkenness on September 5, challenging the integrity of that investigation and its results. To begin with, I cannot conclude that Keever and Menchaca accurately reported back to Dave Nelson the findings of their investigation. They exaggerated the statements of De La Rosa's co-workers, making it sound that De La Rosa was extremely drunk. Yet, the co-workers, Jose Jimenez and Hipolito Lozano, made no such statements to the two investi-gators. Rather, I believe that Lozano had serious doubts that De La Rosa was drunk on September 5 and that Jimenez questioned his own ability to determine De La Rosa's condition. Thus, I believe that the results of the Keever-Menchaca investigation were not accurately reported. Furthermore, the exaggerated re-port given by them precluded any further investigation into the matter.

It is also noteworthy that the focus of the inves-tigation, Samuel De La Rosa, was not once asked about his condition on September 5. One might well question the motives behind the investigation conducted when 'the very employee involved was given no chance to explain himself, particularly in view of the valued work that De La Rosa had put in during five years and the esteem in which he was surely held.
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To a certain extent the explanation given by Dave Nelson concerning the Respondent's investigation is significant:

> Well, I had no--I--I was aware of the fact that Mr. De La Rosa had filed an unfair labor practice against our company with reference to--I believe it was not being able to promote Union activities while within our employment. * * * * The other reason was the fact that anytime [sic] that you are involved with the firing of an employee for being--being drunk under the influence of alcohol or being drunk, why, you need to know that this was in fact true. * * * *
>
> And so that is why we were very—we wanted to be sure that this was in fact the reason.

From the above comment, as well as Keever's and Menchaca's exaggerated investigative reports, it may well be inferred that the desire existed to ensure that drunkenness "was in fact the reason" cited for De La Rosa's discharge rather than another, unexpressed reason that also existed.

Additionally, evidence was presented by the General Counsel which tends to question the Respondent's drinking policy. Although it is clear that Respondent had a well-known rule that employees were not to drink while working or to be drunk at work, reason exists to question the consistent enforcement of the rule. Thus, in the instance of Arnold Gomez, a mechanic, the evidence indicates that after learning of his drinking problem, Herb Hanna confronted him and gave him his vacation time to attempt to solve his drinking problem. Only I when Gomez could not eliminate his drinking did Hanna discharge him. 68/ In another instance, evidence shows that Herb Hanna and two employees drank beer together in the shop area, although work may have ended or been near ending on that day. A third instance was cited in the case of Ray Oxford, who despite his purported drunkenness was not discharged by his supervisor, Bob Tatum.

I do not conclude from the above instances that

68/Hanna admitted that he had heard Gomez had a drinking problem before but was never able to prove it until the time that he confronted him. Even this explanation is not convincing with respect to De La Rosa's case, since once having learned that Gomez had a drinking problem (unlike De La Rosa who had no ongoing problem of the kind), surely Hanna must have concluded that Gomez probably indulged his problem at work, albeit sur-reptiously.

Respondent's enforcement of its drinking rule was an on-again, off-again matter. But I do think those instances are persuasive that exceptions were made to the rule, particularly where the employee involved was not clearly drunk.

Reasons now, as then, exist to question whether De La Rosa was actually drunk on September 5. From the known facts one could easily doubt his condition. After all, it is not explained how an employee who was "extremely drunk" could have operated a grape harvester for three to four hours without another mistake. 69/ Nor is it clear, at least to me, why De La Rosa would have suddenly demonstrated extreme drunkenness only after those three or four hours. Finally, inasmuch as not one person who came into contact with De La Rosa would personally commit himself under oath to the view that De La Rosa was clearly drunk, I am led to question just what condition he was in on September 5. I would think that Respondent's investigators might also have questioned that in connection with such a senior and valuable employee—that is, if the investigators were genuinely concerned with establishing the truth of what De La Rosa's condition was.

In view of the circumstances, I conclude that De La Rosa's discharge for extreme drunkenness was pretextual, that an equally compelling motive for the discharge was that De La Rosa, a respected employee, was a strong, open supporter of both the UFW and the rights of fellow employees. I believe that the strength, character, and timing of De La Rosa's manifested support for the UFW, the serious question raised about the Respondent's investigation of De La Rosa, the role that Keever and Menchaca played in that investigation (two persons responsible for carrying out Respondent's no-union policy), as well as Herb Hanna's own demonstrated antagonism against De La Rosa for engaging in protected activity lead to the inference of a discriminatory motive on the part of Respondent in discharging Mr. De La Rosa. See Metal Cutting Tools. 191 NLRB 536 (1971). Accordingly, I find that Respondent violated Section 1153 (c) and (a) of the Act by its discharge of Mr. De La Rosa.

I. Concluding Analysis

Although I have not dwelled on Respondent's anti-union or anti-UFW attitude when discussing the various discharges 25 in issue, those discharges cannot be viewed as occurring in a

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69/ It is interesting to note that Hanna claimed that in addition to hitting two vines, De La Rosa also "girdled" other grape vines, stripping them of their bark. But when Nelson was asked about other damage done by De La Rosa, and Nelson also investigated the field where De La Rosa had worked, he saw only the two grape vines that had been struck.

vacuum. To be sure, other than Arnold Garza's strenuous and open effort to organize employees to support the UFW, the remainder of UFW activity on Respondent's property during the first-half of 1977 was relatively modest. That modest degree of activity, however, is only one factor to consider.

Whenever the opportunity was at hand, Respondent's strong anti-union position emerged. Respondent's representatives campaigned against the UFW during the 1975 election. Respondent objected to the UFW's eventual election victory and refused to recognize and bargain with the UFW after its certification in 1977. The Respondent likewise and systematically opposed Proposition 14 during latter 1976, a Proposition almost universally associated with the UFW's sponsorship and support. And, Respondent even took the opportunity in early 1977 to again announce its opposition to unions when reporting to employees that the UFW had reached an agreement with the Teamsters Union regarding agricultural employees.

Thus, even though much of the testimony of Respondent's supervisors and officials has been credited by me, and even though many of them appeared to openly acknowledge facts adverse to their contentions, I have not concluded that innocent motives lay behind the discharges of Arnold Garza and Samuel De La Rosa or the refusal to rehire Leocadia Felix. In two of those cases (De La Rosa and Felix) a key figure was Aurelio Menchaca, an official of Respondent who was deeply involved in carrying out the anti-union policy. Bill Keever, another figure associated with that policy, was also involved in the De La Rosa discharge. And, in Arnold Garza's case one cannot ignore the fact that his outspoken support for the UFW and employee rights precipitated confrontations with his supervisors.

Significantly, the Respondent cannot be viewed in the innocent fashion in which it has sought to characterize itself. While creation of the SEPC can be put forward as an innocent tool to improve communications with employees, such a company-sponsored labor organization goes very far indeed to weaken and destroy any substantial interest among employees in an independent, outside labor organization. Furthermore, by notjust sponsoring it but—in effect— bargaining with the SEPC the Respondent has vitiated important employee rights underour Act. Similarly, the Respondent's inchoate effort to challenge Board rules calling for dissemination of employee namesand addresses for organizing purposes, by seeking to gain employee support for making that challenge, demonstrates a continuing effort to block the free organizational rights of its

employees. That these foregoing violations of the Act may seem subtle to some does not alter the seriousness of them in undercutting employee rights established by the Act.

The Respondent, accordingly, cannot be viewed as a merely innocent contestant against the UFW. Rather, the discharges in issue, particularly with respect to Arnold Garza and Samuel De La Rosa, must be viewed in the context of Respondent's consistent and sometimes unlawful opposition to the UFW.

REMEDY

Having found that Respondent engaged in certain unfair labor practices within the meaning of Sections 1153 (a), (b), (c), and (f) of the Act, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully created, dominated, interfered with, and bargained with the SEPC, I recommend that it abandon its support and henceforth not deal with or bargain with the SEPC or similar employee labor organization. Having also found that Respondent unlawfully discharged or refused to hire three employees, conduct which goes to the very essence of protection afforded by the Act, I also

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recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed to employees by Section 1152 of the Act.

In order to fully remedy Respondent's unlawful conduct, I also recommend that certain affirmative steps be taken. First, Respondent must post, publish, and make known to employees that it has violated the Act by publishing the attached Notice To Employees in the fashion set forth in the next succeeding section entitled Order.

Second, that Respondent disestablish and disband the employee organization known as the Superior Employees Progress Committee or similar employee labor organization. Third, that the Respondent maintain such records as are appropriate to ensure its compliance with the mandates of the Order.

Finally, that Respondent re-employ Leocadia Felix, Arnold Garza, and Samuel De La Rosa to their former or equivalent positions. I further recommend that Respondent make such employees whole by payment to them of a sum of money as stated in the Order.

ORDER

IT IS HEREBY ORDERED that Respondent, its officers, agents and representatives shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, or coercing employees in the exercise of their 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, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement the type of which is 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 unlawfully discharging or refusing to hire, or in any other manner discriminating 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) Interrogating its employees concerning their support or sympathies for the UFW or any other labor organization.

(d) Dominating, supporting, or interfering with the formation of or administration of any labor organization.

(e) Bargaining with any labor organization not

certified pursuant to the provisions of the Act.

2. Take the following affirmative action:

(a) Offer to the following employees immediate and full reinstatement or re-employment to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges, and to make them whole for losses they may have suffered as a result of their terminations or failure to get re-employed by payment to them of a sum of money equal to the wages they each would have earned from the dates of their respective discharges or failure to get re-employed to the dates on which they are each reinstated or offered reinstatement, less their respective net earnings, together with interest thereon at the rate of 7% per annum, such back pay to be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977): Leocadia Felix, Arnold Garza, and Samuel De La Rosa.

(b) Mail, post, and allow the reading of the attached Notice To Employees in the manner set forth below:

(1) Furnish the Regional Director for the Fresno Region, for his or her acceptance, copies of the notice accurately and appropriately translated.

(2) Mail the notice to all employees of the Respondent between December 1, 1976, and the date of mailing, who are no longer employed by Respondent. The notices are to be mailed to the employees' last known addresses, or more current addresses if made known to Respondent.

(3) Post the notice in one or more prominant places on Respondent's ranches, as determined by the Regional Director, in any area frequented by employees or where other notices are posted by Respondent, for a period of six months following Respondent's initial compliance with this order.

(4) Allow the Regional Director or his agent to read to all current employees, on Company time, the notice and afford him or her a reasonable time to answer employee questions concerning the Act, such questions and answers to be out-side the presence of supervisory personnel.

(5) Supply the Regional Director or his agent with sufficient copies of the notice, appropriately trans-lated, for distribution to employees when the notice is read to them.

(6) Furnish such proof as requested by the Regional Director, or agent, that the notice has been mailed and made known in the required manner.

(c) Give to the UFW the names and addresses of all past employees who, as set forth above, are to receive the

notice, as well as making available to the UFW for six months access to a conveniently located bulletin board so as to allow the UFW to post notices and the like.

(e) Notify the Regional Director of the Fresno Regional Office within twenty days from receipt of a copy of this decision and order of steps the Respondent has taken to comply therewith, and to continue reporting periodically thereafter until full compliance is achieved.

Dated: March 11, 1978.

AGRICULTURAL LABOR RELATIONS BOARD

By David C. Nevins
David C. Nevins
Administrative Law Officer

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we violated the rights of our workers by creating, dominating, and interfering with the committee known as the Superior Employees Progress Committee, bargaining with that committee, intefering with and restraining workers by asking them if they wanted to be contacted by union organizers at their home when we passed out information cards, and discriminated against three employees, Leocadia Felix, Arnold Garza, and Samuel De La Rosa by either refusing them employment or discharging them because of their support for the United Farm Workers of America or because they engaged in activity protected by the Agricultural Labor Relations Act. The Company must send out, post, and allow this Notice to be read to our employees.

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;

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

Since the Company has violated its workers' rights we must do the following: We must rehire Leocadia Felix, Arnold Garza, and Samuel De La Rosa and reimburse them for the losses they suffered because we violated their rights. We must also disband the Superior Employees Progress Committee and have no more dealings with it. We must also provide the United Farm Workers Union with space on our bulletin boards to post their notices.

We will not in the future do anything that violates your rights. We will not discriminate against employees, interrogate them, create, dominate, and bargain with a labor organization not certified by law.

Dated:

SUPERIOR FARMING COMPANY

By _____
(Representative)