Coachella, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HARRY CARIAN SALES, Employer and Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner and Charging Party.	Case Nos. 76-CE-37-R, 77-1CE-41-C, 77-CE-34-C, 77-CE-54-C Case Nos. 77-RC-15-C, 77-CE-123-C, 77-RC-16-C, 77-CE-128-C, 77-RC-16-1-C, 77-CE-142-C, 77-CE-92-C, 77-CE-183-C, 77-CE-99-C, 77-CE-185-C, 77-CE-103-C, 77-CE-187-C, 77-CE-108-C, 77-CE-188-C, 77-CE-120-C, 77-CE-127-D 6 ALRB No. 55

DECISION AND ORDER, DECISION ON OBJECTIONS TO ELECTION, AND CERTIFICATION OF REPRESENTATIVE

On September 29, 1977,[1/] Administrative Law Officer (ALO) Stuart Wein issued the first attached Decision (ALOD I) in this matter, based upon the record made at hearings in May and June. Thereafter, General Counsel and Respondent each filed exceptions to ALOD I and a supporting brief. Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW), on June 20, a representation election was conducted on June 27 among the Employer's agricultural employees. The official Tally of Ballots showed the following results

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[1/] Unless otherwise noted, all dates herein refer to 1977.

UFW	80
No Union	88
Challenged Ballots	142
Total	310

Both the OFW and the Employer, Harry Carian Sales (HCS or Employer), filed objections to the election, and many of those objections were set for hearing.

As the number of challenged ballots was sufficient to determine the outcome of the election, the Regional Director conducted an investigation and issued his Report on Challenged Ballots on August 29. The DFW filed timely exceptions to portions of that report. Several of the election objections, some of the challenged ballots, and unfair labor practice allegations were thereafter consolidated for hearing. This second hearing was held before ALO Arie Schoorl from March through May 1978.

On December 21, 1978, ALO Schoorl issued the second attached Decision (ALOD II) in this matter. Thereafter, all parties filed exceptions thereto. On February 16, 1979, ALO Schoorl filed an amendment to ALOD II.

The Board has considered the record and the attached ALO Decisions in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[2/] and conclusions of the ALO's and to

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[2/]The parties except to certain credibility resolutions made by the ALO's. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect.

[fn. 2 cont. on pg. 3]

adopt their recommendations, as modified herein.[3/]

INTRODUCTION

Our Decision and Order herein involve consolidated cases which were heard at two separate administrative hearings. We here decide numerous unfair labor practice allegations and objections to the election.

Most of the incidents which form the basis of this case took place at ranches owned by HCS, a grower and shipper of table grapes in the Coachella Valley. The alleged unfair labor practices which were considered in ALOD I occurred during the thinning season, from about mid-March through early April. The UFW conducted an organizing drive among the HCS employees at that time, but the election was not held until late June. The alleged unfair labor practices considered in ALOD II occurred during the harvest season, generally throughout the month of June.

APPROPRIATE BARGAINING UNIT

The UFW' petitioned for a statewide unit of the agricultural employees of HCS, including loaders who work for HCS

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[fn. 2 cont.]

Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24, review den. by Ct. App., 2nd Dist., Div. 3, March 17,1980; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531]. We have reviewed the record and find both ALO's credibility resolutions to be supported by the record as a whole.

[3/]We note that ALO Schoorl made no specific recommendations as to some of the objections to the election. Where such findings are necessary, we have made them based upon the record evidence.

through labor contractors[4/]. The testimony showed that HCS, a sole proprietorship owned by Harry Carian, operated only in the Coachella Valley. Harry Carian is also a partner in Carian and Gilfenbain, which produces table grapes in the San Joaquin Valley.

At the pre-election conference on June 23, the Employer refused to provide information on employee lists for the San Joaguin Valley operation, claiming that the Coachella employees constituted a separate appropriate bargaining unit. It also opposed the decision to set up a polling site at the Woodville Labor Camp in the San Joaquin Valley, claiming that there were no employees there who were eligible to vote.

On June 26, Harry Carian contacted his son Blaine, an employee of Carian and Gilfenbain, and asked him to make arrangements for employees in that area to vote. Blaine Carian contacted Mario Macias, a labor contractor for Carian and Gilfenbain, and also chartered two buses to transport voters from Lament to the polling site north of Delano. The Employer paid the voters the equivalent of one day's wages.

Two of Macias[1] employees testified that they requested work for June 27, the day of the election, and were told there was no work that day. These two employees, who were union activists, were not told of the election. Of 55 employees on the Macias

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[4/] ALO Schoorl found that Isidro Torres and Elias Sierra, both named in the petitions, supplied the Employer with loaders as a labor contractor. As there was no exception taken to his findings, we affirm the ALO's conclusion that the loaders who worked during the eligibility period were eligible to vote, and were properly included as agricultural employees within the bargaining unit.

payroll, only 25 voted. Another 16 voters, also transported to the polls in the buses, were not listed on the Macias payroll.

There was almost no evidence in the record concerning the relationship between the Employer and Carian and Gilfenbain, or the number or source of the San Joaquin Valley employees. While the Employer's general foreman Jose Castro testified that HCS employees follow him north to work at Carian and Gilfenbain, it may be inferred that the San Joaquin entity employed many workers in addition to those from HCS. Harry Carian testified that while HCS annually produces approximately 3.2 to 3.3 million boxes of grapes, Carian and Gilfenbain produces 26 million boxes. There is also more than one month between harvest in Coachella and San Joaquin.

While neither party specifically objected to a statewide unit, in light of the unanswered questions concerning the relationship of the companies, the requested unit, the ALO's exclusion of the San Joaquin voters for purposes of determining the number of eligible employees,[5/] and the manner in which persons were included or excluded from the voting process, we conclude that the appropriate collective bargaining unit herein comprises all agricultural employees of HCS in the Coachella Valley.

OBJECTIONS TO THE ELECTION

We agree with the conclusion in ALOD II that evidence in support of the UFW's post-election objections is sufficient to require us to set the election aside. We base this conclusion upon our findings of objectionable conduct and unfair labor practices

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[5/] No exception was taken to this finding by ALO Schoorl.

committed by the Employer, infra. We therefore order that the election be set aside.

The Employer has also filed post-election objections. We find no merit in its objections. First, the Employer claims that the appropriate payroll period for determination of eligibility was the period ending June 20, rather than the period ending June 13. The crux of the Employer's argument is that the Petitioner filed its Petition for Certification on the last day of the latter payroll period, after the payroll had closed. Thus, the Employer's argument goes, the "payroll immediately preceding the filing of the petition," Labor Code Section 1157, was that ending June 20.

Labor Code Section 1157 provides, in relevant part:

> All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote.

The Employer would have the Board interpret the language of Section 1157 so that even the difference of a few minutes in the timing of the filing of a petition could result in different groups of employees being eligible to vote. We find that such an interpretation might lead to arbitrary results, and would encourage varying claims as to the exact time at which the payroll closed or the petition was filed. Rather, we interpret the language in Section 1157 to mean that the appropriate payroll period is that which immediately precedes the day on which the petition is filed. With this criterion, there will be a definitive and easily-determined period, not susceptible to the open questions and manipulations inherent in the approach proposed by the Employer.

We therefore dismiss the Employer's objection based on the payroll period.

The Employer also objected to the Board's invocation of the presumption contained in 8 Cal. Admin. Code Section 20310 (e) (1) (C), claiming that it was thereby improperly precluded from challenging votes. Section 20310(e)(1)(C), in the form it took at the time of the election, provided that where an employer did not comply with the Board's pre-election requirements, including providing a list of employees, the Regional Director may invoke the presumption, "that all persons who appear to vote, who are not challenged by any other party, and who provide adequate identification, are eligible voters."

Prior to the election, the Employer refused to provide a list of employees for the appropriate payroll period. The Board agents therefore invoked the presumption concerning eligibility. We find that the Employer did not comply with the regulations regarding submission of a list of its employees for the appropriate payroll period, and that the presumption was properly invoked. Accordingly, this objection of the Employer is also dismissed.

UNFAIR LABOR PRACTICES - ALOD I

We shall first consider the unfair labor practice allegations which were the subject matter of the first hearing, and are discussed in ALOD I.

Surveillance

We affirm the ALO's findings that Supervisor Robles engaged in unlawful surveillance on March 31 in Campo de Oro, one of the HCS labor camps. However, we reject the ALO's finding that

Robles violated the Act on April 1 by standing near organizer Sullivan as she spoke with employee Carmelo. The record shows only that the supervisor was nearby, and there is no evidence that his conduct constituted surveillance.

Interrogation

We affirm the ALO's conclusion that Respondent's circulation of employee information cards violated the Act. Under the circumstances of their distribution, such acts and conduct constituted unlawful interrogation. Laflin & Laflin (May 19, 1978) 4 ALRB No. 28. Although the cards may appear innocuous when separately considered, their potential impact on organizing activities is apparent since they were distributed during the UFW's organizing campaign. We also rely on the extensive unfair labor practices committed by Respondent throughout the campaign.

Promises of Benefits

We affirm the ALO's conclusion that Respondent violated the Act when it granted a wage increase to its employees on March 29. Respondent clearly linked the increase to the union's organizing campaign. Coming only two days after a UFW-sponsored march through the Coachella Valley, the employees were not likely to miss the inference that such benefits were tied to rejection of the union. Royal Packing Company (May 3, 1979) 5 ALRB No. 31, enf'd in pertinent part, Royal Packing Co. v. Agricultural Labor Relations Bd. (1980) 101 Cal. App. 3d 826. Threats

We reject the ALO's conclusion that general foreman Castro did not unlawfully threaten employees at Campo de Oro when

he picked up a union leaflet and said, "They're going to fire us all."

The ALO found that Liz Sullivan, who testified about this event, was a credible and accurate witness. Castro only generally denied threatening employees with discharge for organizing. As we find that Castro's statement constituted an implied threat of discharge, we conclude that Respondent thereby violated Section 1153(a).

We further find that Filiberto Robles' threat, on April 6, to have the INS deport workers who supported the union violated Section 1153(a). The ALO credited the employee witness[1] testimony regarding the incident, and Robles did not specifically deny making the threat. It is not always necessary for the employees who were the specific target of the threat to testify, and the widespread illegal conduct by Respondent's agents require us to conclude that such a threat could not have been considered as a "joke".

Termination of the Mayo Crew

General Counsel excepts to the ALO's conclusion that Respondent lawfully terminated the thinning crew of Vitaliano Mayo on March 28. We find merit in this exception.

The ALO found that General Counsel had presented a strong prima facie case of discrimination, but concluded that Respondent had come forward with a legitimate business justification for the discharge—that the Mayo crew worked too slowly—and therefore did not violate the Act. We find that the evidence presented by Respondent does not overcome General Counsel's showing of a discriminatory motive.

Several factors lead us to conclude that Respondent would not have discharged the crew but for its anti-union motive. The timing of the discharge is an indication that Respondent's motive was illegal. The Mayo crew were highly visible UFW supporters during the union's organizational drive among Respondent's employees. The organizational activities reached a peak around the time Respondent discharged the crew. The discharge occurred one day after a large DFW march in which Mayo crew members prominently participated and one day before Respondent illegally granted a wage increase and promised further increases if the employees rejected unionization.

Imposing disciplinary measures on an employee at the time of a union organizing drive may be evidence of an employer's discriminatory motive. Holly Farms Poultry Industries, Inc. (1972) 194 NLRB 952 [79 LRRM 1127], enf'd in relevant part, (4th Cir. 1972) 470 P.2d 983 [82 LRRM 2110]; NLRB v. Montgomery Ward S Co. (10th Cir. 1977) 554 P.2d 996 [95 LRRM 2433]; NLRB v. Kaase Co. (6th Cir. 1965) 346 F..2d 24 [59 LRRM 2290]. The discharge of the Mayo crew, which coincided with a peak in union activity and the intensification of Respondent's anti-union campaign., leads to an inference that Respondent's motive was discriminatory.

Furthermore, Respondent deviated from its normal procedure in evaluating the work of the Mayo crew and in imposing discipline. Respondent made no efforts to determine which employees in the Mayo

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crew worked too slowly.[6/] This was contrary to Respondent's usual procedure, wherein Respondent posted a productivity chart at the end of each row which measured individual employee work performance. Respondent used this procedure with other crews during the 1977 thinning season but, without explanation, failed to do so with the Mayo crew. In addition, Respondent discharged the crew en masse. Respondent had not imposed such a disciplinary measure, firing an entire crew, during the preceding 19 years. Deviation from normal discipline policy is an indication of a respondent's anti-union motive. Keller Manufacturing Company (1978) 237 NLRB No. 94 [99 LRRM 1083]. Respondent's deviations from its standard practices evidenced its discriminatory motive. In addition, Respondent's blatant hostility toward the UFW reveals its anti-union motive for the discharge. Respondent discharged the crew in the middle of a very bitter, sometimes violent and largely unlawful anti-union campaign. Respondent laid off, threatened, and interrogated employees, violently attacked union organizers and promised benefits to employees if they rejected unionization. An employer's anti-union animus, demonstrated by the commission of other unfair labor practices, constitutes evidence of employer motive for disciplinary action. Belcher Towing Company (1978) 238 NLRB No. 63 [99 LRRM 1566];

[6/] Potomat Corporation (1973) 202 NLRB 59 [82 LRRM 1475], enf'd (2nd Cir. 1974) 489 F.2d 752 [85 LRRM 2768], the National Labor Relations Board found that an employer's failure to investigate which employees violated its work rule was evidence of an anti-union motivation for discharging a group of employees, some of whom may not have breached the employer's policies. That reasoning is applicable here.

Houston Shell and Concrete Co. (1971) 193 NLRB 1123 [78 LRRM 1538]. The overwhelming evidence of Respondent's anti-union animus during the UFW's organizational campaign strongly supports the inference that its motive was unlawful.

We find that the business justification proffered by Respondent does not overcome the conclusion that Respondent entertained an anti-union motive in discharging the Mayo crew. Respondent presented evidence to show that the Mayo crew worked slowly during the thinning operations and that Supervisor Mayo was informed of this problem. The General Counsel is correct in pointing out that the records presented by Respondent, purporting to compare the pace of the Mayo crew with that of another crew, are suspect. There are mistakes contained in the records, and there is actually little basis for comparison of the crews in the records. We also note that the records were apparently prepared for this litigation, Thermo Electric Co. (1976) 222 NLRB 358, 368 [91 LRRM 1310], enf'd (3rd. Cir. 1977) 547 P.2d 1162, and were not received by Respondent until after the termination, and therefore could not have been relied upon by Respondent in making its decision to terminate the crew.

Respondent presented oral evidence of the crew's work performance. Harry Carian testified that he spoke to supervisor Mayo on March 22 and 23, after he had noticed that the crew was working slowly. He expressed his concern over the slowness of the work, but did not warn Mayo of any impending disciplinary action. On March 28, Carian discharged the crew.

The fact that Respondent presented evidence of a business

justification does not preclude a finding that the discharge was discriminatory. Our ultimate inquiry is not whether the Mayo crew worked too slowly and whether that fact, in the abstract, justified a discharge, but whether Respondent would have discharged the crew members but for their union activities. "Where a discharge is motivated by an employer's anti-union purposes it violates Labor Code Section 1153 (c) and (a) even though additional reasons, of a legitimate nature may exist for the discharge." Abatti Farms, Inc. (May 9, 1979) 5 ALRB No. 34, p. 27, enf'd in part Abatti Farms v. ALRB (1980) 107 Cal. App. 3d 317 (emphasis added). See also, As-H-Ne Farms (July 5, 1977) 3 ALRB No. 53; NLRB v. Ayer Lab Sanatarium (9th Cir. 1971) 436 F.2d 45 [76 LRRM 2224]; Royal Packing Co. v. ALRB (1980) 101 Cal. App. 3d 826. As Judge Goldberg wrote in NLRB v. Whitfield Pickle Co. (5th Cir. 1967) 374 F.2d 576

[64 LRRM 2656]:

> A company can have dominant motives, mixed motives, equal motives, concurrent motives, and bewildering combinations of these, but "It must be remembered that the statute prohibits discrimination, and that the focus on dominant
> [or any other like adjective] motivation is only a test to reveal whether discrimination had occurred."
> [citation omitted] To invoke Section 8(a)(3), the anti-union motive need not be dominant (i.e., larger in size than other motives), in some cases it may be so small as the last straw which breaks the camel's back. We reiterate that all that need be shown by the Board is that the employee would not have been fired but for the anti-union animus of the employer. 374 F.2d at 582.

We find that, in view of the numerous other unfair labor practices committed by Respondent during this same time and the suspicious circumstances surrounding the discharge, Respondent would not have discharged the Mayo crew but for its anti-union animus. We therefore conclude that Respondent violated Section

1153(c) and (a) by this act.

Having found that the Mayo crew was discriminatorily discharged, we affirm the ALO's conclusion that Respondent discriminatorily discharged Francisco Mateo and Willie Garcia, the cook and the record keeper for the Mayo crew. Layoffs of April 6 and 7

We affirm the ALO's conclusion that Respondent violated the Act by its layoff of 35 employees on April 6 and 7. The ALO found, and we agree, that the General Counsel established a prima facie case that Respondent was motivated by anti-union animus in the layoff of these employees. Respondent's anti-union animus was amply established, and the layoff resulted in the termination of a recognized group of union activists. The timing of the layoff—after a thinning season in which there had been a great deal of organizing and immediately before the peak harvest season—provides further evidence of an illegal motive.

Respondent attempted to justify its action by explaining the layoff as a typical reduction in the work force, necessitated by the end of the thinning season. This justification was destroyed by Respondent's admitted intention and practice of retaining employees through the harvest, and by its records which show that many new employees were hired soon after the Mayo crew termination and that full crews were employed within two weeks after the layoffs, still one month before harvest.

We reject Respondent's argument that each discriminatee must appear and testify before we may conclude that he or she was unlawfully terminated. There was sufficient testimony presented as

to each of the discriminatees. Our duty to enforce public rights, rather than individual rights, requires that we find violations where the evidence shows they have occurred, regardless of the absence of testimony by the discriminatee. See, e.g., Valiant Moving and Storage (1973) 204 NLRB 1058, 1063 [83 LRRM 1717]; American Grinding & Machine Co. (1965) 150 NLRB 1357 [58 LRRM 1300], We disagree with Respondent that the migratory nature of the agricultural labor force requires us to reach a different result than that reached by the NLRB. Labor Code Section 1148. There was sufficient testimony concerning the union activities of each of the 35 employees who were laid off, and we therefore affirm the ALO's conclusion that Respondent thereby violated Section 1153 (c) and (a).

UNFAIR LABOR PRACTICES - ALOD II

We turn now to the unfair labor practice allegations which were considered in the second hearing, and which are discussed in ALOD II.

In the consolidated complaint before the ALO, there were 25 separate allegations of violations of the Act. In addition to deciding those allegations, the ALO found that certain other conduct of Respondent constituted unfair labor practices. Respondent has excepted to these findings, arguing that the requirements of Labor Code Section 1160.2 have not been met.[7/] We find merit in Respondent's exception, except as to two incidents

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[7/] Section 1160.2 provides, in relevant part: "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made ...."

which we find were fully litigated by all parties to the hearing.

The ALO found that all of the conduct which he concluded was violative of the Act, even where not specifically alleged in the complaint, was "fully litigated" at the hearing. The NLRB has stated:

> ... it is well established that a violation not alleged in the complaint may nevertheless be found where, as here, the unlawful activity was related to and intertwined with the allegations in the complaint, and the matter fully litigated .... Doral Hotel and Country Club (1979) 240 NLRB No. 150 [100 LRRM 1392j, citing Sheet Metal Workers International Association, Local No. 71, AFL-CIO (H. J. Otter Co., Inc.) (1971) 193 NLRB 23, 27 [85 LRRM 1481].

We find that the standards set forth in Doral Hotel were met as to the violations which occurred when Robert Carian turned his pickup in front of organizer Acuna's car on June 8, causing Acuna to veer toward a pole, and when Robert Carian addressed vulgar insults to organizer Lucy Crespin. Both of those incidents are closely related to allegations in the. consolidated complaints,[8/] and were fully litigated by all parties, including the General Counsel. As both of these incidents occurred within the six-month period preceding the filing of the charges herein, and are closely related to the allegations in the charges, the limitation period of Section 1160.2 does not foreclose our consideration of the two incidents as violations of the Act.

We are of a different opinion, however, as to the four

[8/] Paragraph 7(a) of the second consolidated complaint alleges that on June 3, Robert Carian and Bobby Castro harassed organizers by damaging one car with a tractor and pushing other cars with a pickup truck. Paragraph 7(m) alleges that Respondent distributed a leaflet which was an insulting and vulgar portrayal of a female organizer.

remaining violations found by the ALO which were not specifically alleged in any charge or complaint. These latter incidents were litigated at the hearing as objections to the election.[9/] The General Counsel declined to take any role in the litigation of these incidents, and the record reflects specific demarcation of the representation case issues from the unfair labor practice case issues.

We agree with Respondent that as to these incidents it has effectively asserted its defense that the requirements of Section 1160.2 were not met. As the General Counsel took no part in litigating these incidents during the hearing and did not allege them as violations in the complaint Respondent was not on notice, until ALOD II issued, that the conduct involved might be held to be in violation of the Act. By asserting its defense in its exceptions, Respondent acted at the first time reasonably possible. We therefore find that Respondent asserted its defense in a timely fashion.

We note that this segregation of representation and unfair labor practice issues is not always necessary, and suggest that the approach may sometimes be detrimental to a full exploration of the circumstances surrounding the election. The result was to lead Respondent to believe that these incidents could only be found to be the basis for setting aside the election, rather than violations of the Act. The finding of violations of

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[9/] The incidents included surveillance of organizer Martinez on June 21, harassment of organizer Mario Vargas on June 10, assaults on organizer Ross on the day of the election, and arranging for 40 people to vote at the Woodville site.

the Act may involve strong remedies, Labor Code Section 1160.3, while the result of finding that conduct occurred which affected the results of an election is generally limited to setting aside the election. Labor Code Section 1156.3(c). We therefore conclude that these incidents were not "fully litigated" and we decline to find that they constituted violations of the Act.

Surveillance and Interference

Respondent excepts to the ALO's conclusion that it violated Section 1153(a) when supervisors Wayne Mayfield and Roberto Rodriguez engaged in surveillance of organizer Hasbrouck on May 31. We find merit in Respondent's exception. Hasbrouck's testimony was confusing, and was inconsistent with organizer Crespin's testimony and with her own testimony. On the state of the record, we find no violation in this regard. Throughout the record are recurring questions concerning the practice of union organizers taking access between 9:30 and 10:30 a.m. to speak with Respondent's employees, and interference with such access by Respondent's supervisors. Respondent claims that the organizers were interrupting work, and that its supervisors took appropriate steps to prevent such interruption. We find that access taken by the organizers from 9:30 to 10:30 a.m. was proper, pursuant either to a voluntary agreement between Respondent and the UPW or to the terms of our regulation, 8 Cal. Admin. Code Section 20900.

Respondent's employees worked on a piece-rate system throughout the harvest season. While the employees returned to the labor camps for lunch during the thinning season, they remained in

the fields throughout the work day during the harvest season. There was no official lunch break, and some workers took no lengthy break during the day. Harry Carian testified, however, that the employees were permitted to stop when they wished, and that no one was ever prevented from taking a break. The UFW established a policy of visiting the crews from 9:30 until 10:30 each morning. Respondent's agents were sent to check on the organizers, recording their names and asking them to leave at 10:30. Harry Carian also testified, in apparent contradiction with his earlier testimony, that he considered all hours of the work day, from 5:30 a.m. until 11:30 or 12:00, to be work hours, and that he instructed the supervisors to tell employees to return to work if they stopped to talk to organizers.

First, it appears from the actions of the parties that Respondent and the UFW reached an informal and unspoken agreement that the, access hour would take place from 9:30 until 10:30 a.m. By the actions of, its agents in generally permitting organizers to take access from 9:30 until 10:30, and then requesting them to leave, we infer that Respondent accepted that period as the "de facto" lunch period. Such agreements are permissible under our regulations, 8 Cal. Admin. Code Section 20900(e)(2).

Even if there were no explicit or tacit agreement, the fact that there was no established lunch period cannot preclude Respondent's employees from exercising their right to communicate with organizers in the manner described in the regulation. The regulation is based upon the right under Labor Code Section 1152 to self-organization and to collective bargaining, and such an

important right may not be restricted simply because the method of payment, i.e., piece rate, renders unlikely the existence of an established lunch period.

In Coachella Imperial Distributors (Dec. 21, 1979) 5 ALRB No. 73, we held that where there is no regular time for finishing work, organizers may take access during the period when employees are leaving even though some may still be at work. Respondent claims that organizers often interrupted employees at work in order to speak with them, thereby disrupting work in violation of the regulations. We disagree with Respondent's characterization. Respondent has admitted that it permitted employees to take breaks whenever they wished, and it is also apparent from the record that employees generally did not take extended lunch breaks. When organizers came to the fields, employees were often at work, but stopped in order to speak to the union representatives. There is no evidence that organizers ever prevented employees who wished to continue working from doing so. Accordingly, we find that the periods during which organizers took access, between 9:30 and 10:30 in the mornings, were within our access regulation. We therefore affirm the ALO's findings of violations where supervisors interfered with such access.

We affirm the ALO's conclusion that Respondent violated Section 1153(a) when Jose Castro threatened the Martinez family that he would not rehire them because of their organizing on behalf of the OFW. We disagree with Respondent's contention that Lydia Martinez failed to corroborate Alberto Martinez' testimony. Lydia testified that Castro singled out the family as union supporters,

saying that he would know for next time. This testimony is essentially the same as Alberto's.

We also affirm the ALO's conclusion that Robert Carian unlawfully engaged in surveillance of organizer Munoz as he spoke with employees during the "de facto" lunch period on June 6. While employee Garza testified that the incident occurred at 7:30 or 8:00 a.m., rather than at 9:45, as related by Munoz, Garza wore no watch, and apparently thought the earlier hour was the usual time when organizers came. It is clear from the record that ordinary practice was to visit between 9:30 and 10:30. While Carian's duties may have involved checking grapes, the evidence is clear that in this case he did so as a pretext for watching the organizing activities.

Respondent excepts to the ALO's conclusion that it violated the Act when supervisor Beas told employees not to sign authorization cards distributed by organizer Federico Vargas. Respondent claims that the organizers violated the limitation on numbers allowed in the field. Respondent assumes that this incident occurred on June 8, the day on which Cesar Chavez, president of the UFW, visited Beas[1] crew. The record does not establish, however, that it was the same date. Respondent further argues that Beas' comments regarding his daughter are protected, and that he could prohibit the organizers from speaking to her. Respondent cites no authority for removing the protections of the Act from an employee simply because she is related to a supervisor and we find none. We conclude that Beas[1] comments constituted a violation of Section 1153(a).

The ALO concluded that on June 23 Robert Carian unlawfully photographed a group of organizers, including Cesar Chavez, prior to advising them that they were in violation of the access regulation by having too many organizers. The ALO further concluded that Carian lawfully took photographs after he issued such a warning. Respondent and General Counsel both except. We find that Carian did not engage in unlawful surveillance, because he took the photographs in order to document a clear violation of our access regulation.[10/] See Stark Ceramics, Inc. (1965) 155 NLRB 1258, 1269 [60 LRRM 1487], aff'd (6th Cir. 1967) 375 F.2d 202 [64 LRRM 2781] . We disagree with the ALO that it is always necessary to warn organizers that they are in violation of the regulation before documenting the violation. Carian was faced with a large number of organizers entering the fields, and his decision to take photographs did not violate the Act.[11/]

Vehicular Access and Violence

The record shows that until June 7, Respondent permitted union organizers to drive onto and to park on Respondent's property, in order to take access. On that day, four UFW cars were driven onto an access road on the property, and thereby blocked a loaded grape truck from traveling to the packing shed. This incident

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[10/]UFW president Cesar Chavez, along with two organizers and two bodyguards, visited three different crews as a group. Each crew contained between 16 and 25 employees.

[11/]Our conclusion is based upon our finding that the organizers did violate the regulation. However, surveillance of legitimate access, even if the claimed purpose is to document a violation, is unlawful. See D'Arrigo Bros, of California (Apr. 7, 1977) 3 ALRB No. 31 (calling police "where access was legitimate).

caused Respondent to change its policy and thereafter to prohibit union vehicles from entering the property. A number of incidents occurred on June 7 and 8, involving union cars driven onto the property. We need not determine whether the organizers legitimately drove onto the property as part of the access provisions, since we conclude that Respondent's reaction, which included violence by Robert Carian, was excessive and unreasonable, and therefore violative of the Act. We have said elsewhere:

> ... it is our view that physical confrontations between union and employer representatives are intolerable under our Act. Absent compelling evidence of an imminent need to act to secure persons against danger of physical harm or to prevent material harm to tangible property interest, resort to physical violence of the sort revealed herein shall be viewed by this Board as violative of the Act. Such conduct has an inherently intimidating impact on workers and is incompatible with the basic processes of the Act. Tex-Cal Land Management, Inc. (Feb. 15, 1977) 3 ALRB No. 14, slip opinion at p. 11, enf'd Tex-Cal Land Management v. Agricultural Labor Relations Bd.(1979) 24 Cal. 3d 3357

We affirm the ALO's conclusion that Respondent violated Section 1153(a) when Robert Carian admittedly hit organizer Acuna's car with his pickup and when he forcibly turned Acuna around to see his badge. We reject Respondent's argument that the organizers purposefully blockaded the grape truck, since the theory is not substantiated by the record, and find that physical violence was not justified in any event. We also affirm the ALO's conclusions that Respondent further violated the Act by Robert Carian's admitted conduct in hitting organizer David Martinez' car with a tractor, and pushing it to the other side of the road, and his turning abruptly in front of Acuna's car, forcing Acuna to veer

toward a pole.

Robert Carian also engaged in violence in violation of Section 1153(a), by assaulting David Villarino, a bodyguard to Cesar Chavez. Respondent argues that Villarino was not "an organizer, and that the organizers were at the time in violation of the numbers limitations imposed by the access regulation. We find it immaterial whether Villarino was at the ranch in the capacity of a union organizer. He was clearly present as an official representative of the UFW, and Carian's assault, in the view of employees, certainly had a substantial effect on the workers. Further, a violation of the access regulation did not justify this physical attack. Tex-Cal Land Management, Inc., supra, 3 ALRB No. 14. . .

Layoff of 13 Employees

We affirm the ALO's conclusion that the layoff of 13 employees on June 17 constituted a violation of Section 1153(c) and (a). Respondent claims that it needed to decrease its work force, and that it decided to lay off those employees who did not live in the HCS labor camps as an impartial method of doing so. We find, however, that Respondent's proffered reasons for the layoffs are a pretext for weeding out those employees who were most sympathetic to the UFW.[12/]

The General Counsel established a prima facie case that

[12/] disagree, however, with the ALO's logic that the layoffs were not required because employees would have voluntarily left Respondent's employ, since the election was imminent and their eligibility was already secured. We find such reasoning to be speculative, and not supported by the record.

the layoffs violated the Act. The employees who were laid off were active union supporters who had made their support known to Respondent's supervisors. The many unfair labor practices we find herein amply establish the existence of anti-union animus. We must decide, then, whether Respondent has established a legitimate business objective for the layoffs.

Harry Carian testified that many employees generally leave HCS between the harvest of the Perlette grapes and the Thompson seedless, and that he usually relies on this process of attrition to obtain the smaller work force needed for the Thompson grapes. This year he did not wait, and he based his change in practice solely on alleged conversations with unnamed employees.[13/] The ALO did not credit Carian's testimony, and the record supports his findings.

Carian's testimony regarding his choice of which employees to lay off is also not persuasive. He claims that he decided to lay off those employees who did not live in the company's labor camps as an impartial method of selection. He testified that the Thompson harvest would require only about one-quarter of the workers involved in the Perlette harvest, but he admitted that the number laid off constituted only a small percentage of the work force. Carian also admitted that he had no idea how many employees would be laid off before he implemented the plan, and that he failed to discuss the intended layoff with general foreman Jose Castro, even though Castro was generally in

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[13/]Carian testified that he heard from employees that they would not be leaving because there was to be an election.

charge of insuring that the proper number of workers was employed. We find that Respondent's true motivation in the layoff was anti-union animus.

Verbal and Printed Insults

We affirm the ALO's conclusion that Respondent violated the Act when Robert Carian made vulgar and derogatory comments about female employees to organizer Crespin, and by distribution of a leaflet with a thinly disguised message likening female organizers to prostitutes.

The NLRB has found that statements by employers which are disparaging to union adherents violate the NLRA. See, e.g., Globe Construction Co. (1967) 162 NLRB 1547 [64 LRRM 1217]; Doral Hotel and Country Club (1979) 240 NLRB No. 150 [100 LRRM 1392]. It is clear from the record that the insults herein were meant as a degrading and disparaging portrayal of women who support the union, and as such interfered with the employees' exercise of their statutory rights.. See, Wolfies (1966) 159 NLRB 22 [62 LRRM 1332].

Election Eve Speech

We affirm the ALO's conclusion that Respondent violated Section 1153(a) by Harry Carian[1]s promises of benefits in response to a question during his election eve speech. A violation occurs where the timing of such promises is such that there is a natural tendency to influence an anticipated vote, Royal Packing Company, supra, 5 ALRB No. 31. The fact that the promises herein closely preceded the election, and were made in the context of Carian[1]s attempt to persuade the employees to vote against the union, is sufficient to make the comments coercive, Anderson Farms Company

(Aug. 17, 1977) 3 ALRB No. 67.

Refusals to Rehire at Carian s Gilfenbain

We affirm the ALO's conclusion that Salvador and Maria Contreras, and Juan Garza, were not unlawfully refused rehire by Respondent in Delano.

As to the Contrerases, there is no evidence that work was available when Jose Castro told them the crews were full. Castro testified that most of the HCS employees followed him to Arvin, Lament, and then on to Delano. The Contrerases, however, had decided not to go to Lament, but later arrived at Delano. The evidence is insufficient for us to reject Respondent's claim that people who did work in Lament, along with those in Delano before 'the Contrerases arrived, completed Respondent's work force.

We also dismiss the allegation that Juan Garza was unlawfully denied employment by Jose Castro in Lament. Castro, Respondent's general foreman, testified that in Lament he, Castro, worked first for Vita-Gro, a company apparently unrelated to Respondent, and then for Carian & Gilfenbain. Because of the lack of specificity in the testimony, we find that the General Counsel failed to meet its burden of showing that Castro acted as Respondent's agent at the time he refused to rehire Garza.

BARGAINING ORDER

ALO Schoorl recommends that this Board order Respondent to bargain with the UFW as a remedy for the unfair labor practices committed prior to the election. This Board has never before ordered an employer to bargain with a labor organization absent an election in which a majority of the employees voted for union

representation. Before deciding whether a bargaining order is warranted by the facts of this case, we turn to the preliminary issue of the ALRB's power to order Respondent to bargain.

NLRA Precedent

The NLRB has long issued bargaining orders to remedy an employer's unlawful refusal to bargain, even where the union no longer enjoyed the support of a majority of employees. NLRB v. P. Lorillard Company (1942) 314 U.S. 512 [9 LRRM 410]; Franks Bros. Company v. NLRB (1944) 321 U.S. 702 [14 LRRM 591]. The NLRB relied on the fact that the union's loss of support -was caused by the employer's unlawful conduct. NLRB v. P. Lorillard Company, supra. Over the years, the focus of the order has shifted from a remedy for unlawful refusal to. bargain, to a remedy for the unfair labor practices which caused the union to lose support among the employees.

The earlier focus on the refusal to bargain is illustrated by the Joy Silk doctrine. In Joy Silk Mills, Inc. v. NLRB (D.C. Cir. 1950) 185 F.2d 732 [27 LRRM 2012], cert, denied (1951) 341 U.S. 914 [27 LRRM 2633], the Court enforced an NLRB 'bargaining order, relying on both the employer's lack of a good faith doubt that the union had majority support when it demanded recognition, and the employer's subsequent efforts to dissipate the union's strength. The Joy Silk doctrine thus required a finding as to the employer's motivation in refusing to bargain before the NLRB would issue an order. As the doctrine was applied in every circuit, however, an employer's bad faith could be established simply by showing misconduct tending to dissipate the union's strength, after

the initial refusal to bargain. Misconduct, or unfair labor practices, were essentially converted to a nearly conclusive presumption of bad faith, as the focus shifted from the motivation for refusing to bargain to a remedy for pre-election misconduct. Note, "Union Authorization Cards," 75 Yale L.J. 805 (1966).

In Bernel Foam Products Co. (1964) 146 NLRB 1277 [56 LRRM 1039], the NLRB rejected a rule which limited the use of bargaining orders to a remedy for refusals to bargain, reasoning that the purposes of the NLRA were effectuated by awarding such orders as a remedy for pre-election misconduct. The Board held that it would not withhold the remedy because the union had petitioned for an election which it ultimately lost, since the reason for losing the election may well lie in the employer's misconduct. Withdrawing the bargaining order as a remedy whenever an election was held would permit the employer to use the Board's procedures "as a tool to thwart the statutory rights of the majority of the employees involved and [subvert] the very purpose of the Act." 146 NLRB at 1281. Thus, the bargaining order was recognized as an effective device to remedy the violations committed by an intransigent employer to win an election. 75 Yale L.J. at 817.

During oral argument in NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481], the NLRB announced that it was abandoning the Joy Silk doctrine, which required an evaluation of the employer's motive in refusing to bargain prior to the election. Rather, the Board asserted that the key to issuance of a bargaining order is the commission of serious unfair labor practices which

interfere with the election process and tend to preclude holding a fair election.

The Court in Gissel affirmed the Board's approach, holding that a union can establish a bargaining obligation where an employer's unfair labor practices caused the union to lose an election:

> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred— method of ascertaining whether a union has majority support. The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice. 395 U.S. at 602.

The Court in Gissel thus acknowledged that to rely only upon an election, in the face of grave misconduct by the employer, would deny the employees the right to select a bargaining representative free of interference and coercion. Without the possibility of an' alternative indicator of employee support, an employer "could put off his bargaining obligation indefinitely through continuing interference with elections." 395 U.S. at 603. Such a rule would allow the employer "'to profit from [his] own wrongful refusal to bargain,' [Citation] while at the same time severely curtailing the employees' right freely to determine whether they desire a representative." 395 U.S. at 610.

The Court in Gissel found that bargaining orders were permissible in two categories of cases: those marked by "outrageous" and "pervasive" unfair labor practices, and "less extraordinary cases marked fay less pervasive practices which

nonetheless still have the tendency to undermine majority strength and impede the election processes." 395 U.S. at 614. A third category of "minor or less extensive unfair labor practices," which have only minimal impact on elections, will not support a bargaining order.

By classifying cases according to the severity and number of unfair practices, the Court focused on the bargaining order as an exercise of the NLRB's power to remedy such practices.

See United Dairy Farmers Cooperative Association (1979) 242 NLRB No. 179 [101 LRRM 1278];[14/] Comment, "A Reappraisal of the Bargaining Order Toward a Consistent Application of NLRB v. Gissel Packing Co.," 69 Nw. U.L. Rev. 556, 578-79 (1974). The courts and the NLRB have continued to emphasize the use of the order to remedy unfair labor practices which diminish the possibility of a fair election. See, e.g., Faith Garment Company (1979) 246 NLRB No. 44 [102 LRRM 1515]; NLRB v. Chatfield-Anderson Co. (9th Cir. 1979) 606 F.2d 266 [102 LRRM 2576]; NLRB v. Ultra-Sonic De-Burring, Inc. (9th Cir. 1979) 593 F.2d 123 [101 LRRM 2086]; NLRB v. Tischler (9th Cir. 1980) 615 P.2d 509 [103 LRRM 3033]. The purpose of the bargaining order is to return events to the status quo before the unfair practices occurred. J. C. Penney Co. v. NLRB (10th Cir. 1967) 384 F.2d 479 [66 LRRM 2272]; United Steelworkers of America, AFL-CIO v.

[14/]In United Dairy Farmers Cooperative Association, supra, 242 NLRB No." 179, four members of the NLRB agreed the Board's remedial powers "may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support" where the unfair labor practices were so outrageous and pervasive that the union was never able to obtain a majority. Two members of the NLRB would have issued the bargaining order in that case. See also J. P. Stevens & Co., Inc., Gulistan Division v. NLRB (5th Cir. 1971) 441 F.2d 514, 519 [76 LRRM 2817].

NLRB (D.C. Cir. 1967) 376 P.2d 770 [64 LRRM 2650], cert, denied (1967) 389 U.S. 932 [66 LRRM 2444].

In Steel-Fab, Inc. (1974) 212 NLRB 363 [86 LRRM 1474], the NLRB emphasized the irrelevance of a pre-election refusal to bargain to the issue of whether to award a bargaining order by announcing that it would no longer find violations of the duty to bargain in Gissel-type situations. Since the focus of attention was the pre-election misconduct of the employer, the Board reasoned that to find an unlawful refusal to bargain constituted an "artificial injection" of bargaining issues. 212 NLRB at 363.[15/]

The NLRB continues to issue bargaining orders despite the absence of a violation of the duty to bargain. See, e.g., Great Atlantic & Pacific Tea Co. (1977) 230 NLRB 766 [95 LRRM 3050]; Beasley Energy, Inc. (1977) 228 NLRB 93 [94 LRRM 1563]; Ann Lee Sportswear (1975) 220 NLRB 982 [90 LRRM 1352]. The validity of the order, rests on the severity and pervasiveness of the pre-election misconduct, and not on the employer's refusal to bargain prior to the election. See, e.g., Hedstrom Company (1978) 235 NLRB 1193 [98 LRRM 1105]; Knappton Towboat Co. (1978) 238 NLRB No. 151 [99 LRRM 1517]; Apple Tree Chevrolet, Inc. (1978) 237 NLRB No. 103 [99 LRRM 1505].

[15/] The Steel-Fab rule was modified in Trading Port, Inc. (1975) 219 NLRB 298 [89 LRRM 1565], and the NLRB will now find bargaining violations where supported by the evidence, but the rationale of the earlier case was not undermined. The rule was modified due to the unwanted result caused by Steel-Fab of leaving unremedied unilateral changes made after majority status was obtained and before the election was held, since the bargaining order dated only from the Board's decision. See NLRB v. Eagle Material Handling, Inc. (3rd Cir. 1977) 553 F.2d 160 [95 LRRM 2934].

Bargaining Orders as an ALRA Remedy

In turning to the question of the authority of the ALRB to issue bargaining orders in Gissel-type situations, we must consider the strong mandate for secret ballot elections which appears in the ALRA. The ALRA, unlike the federal act, prohibits an employer from voluntarily recognizing and bargaining with a labor organization. Under both statutes, however, the duty to bargain generally does not arise absent the conduct of a secret ballot election. As we have found, infra, the NLRB employs the bargaining order as a remedy for nonbargaining unfair labor practices, not, for an unlawful refusal to bargain prior to an election. The issue before us is whether the ALRA's remedial provisions are broad enough to encompass bargaining orders where unfair labor practices have dissipated the union's majority support, and diminished the possibility of a fair election.

Section 8(a)(5) of the NLRA provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." Section 9 (a) grants exclusive representative status to labor organizations "designated or selected" by the employees. The NLRA does not specify the manner in which the representative must be chosen, and does not prohibit employers from voluntarily recognizing unions. United Mine Workers of America v. Arkansas Oak Flooring Co. (1956) 351 U.S. 62 [37 LRRM 2828].

While the NLRA permits employers voluntarily to undertake bargaining with a union, Section 8(a)(5) does not impose a bargaining duty merely upon a showing of majority support by

authorization cards. In Linden Lumber Division, Sumner & Co. v. NLRB (1974) 419 U.S. 301 [87 LRRM 3236], the Supreme Court refused to order bargaining where the union requested the employer to bargain but did not petition for an election. The Court" held that a union with authorization cards purporting to represent a majority of the employees has the burden of taking the next step in invoking the Board's election procedure, unless an employer has engaged in unfair labor practices that impair the electoral process.

The rules regarding the commencement of a duty to bargain are similar under the ALRA. Chapter 5 of the ALRA provides for the conduct of secret ballot elections for the selection of collective bargaining representatives. Section 1153 (e) makes it an unfair labor practice for employers to "refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 (commencing with Section 1156) of this part." Section 1153 (f) makes it a violation of the Act 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." Respondent claims that these sections deprive the ALRB of authority to issue bargaining orders where the union has not won a Board conducted election, and thereafter been certified as the exclusive bargaining representative. We disagree. Reading the Act as a whole, and considering the legislative intent, it is this Board's interpretation of the ALRA that a bargaining order and certification may be issued

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pursuant to Section 1160.3[16/] as a remedy for pre-election misconduct. We conclude that where an employer has committed such severe and numerous unfair labor practices as to make unlikely the possibility of a fair election, we can rely instead on " authorization cards as the most reliable indicia of employee sentiment.

The legislative history and policy statements of the ALBA, along with the historical context of the Act, all point to the validity of issuing bargaining orders as a. remedy. While the ALRA evinces a clear and strong preference for employee designation of bargaining representatives through secret ballot election, this preference is based on the ultimate goal of employee free choice in the designation of their representative.

Section 1140.2 of the Act declares it to be the policy of the State of California:

> to encourage and protect the right of agricultural employees to full freedom of association; self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their .agents, in the designation of such representatives or in self-organization or in other concerted activities for

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[16/]Section 1160.3 provides, in part, that where the Board finds that an unfair labor practice has occurred:

> ... it shall issue ... an order requiring [the respondent] to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part ... (emphasis added).

Section 1160.3 is almost identical to Section 10(c) of the NLRA.

> the purpose of collective bargaining or other mutual aid or protection.

Section 1152 grants to agricultural employees the right "to bargain collectively through representatives of their own choosing."

Thus, the ALRA was enacted as a means of implementing free choice by agricultural employees, absent coercion and interference by employers. Where an employer's interference so impedes the Board's election process, however, that process can no longer serve to express the employees' choice. If the bargaining order were withdrawn as a possible tool to overcome the effects of an employer's efforts to destroy the election procedures as a method of employee free choice, the foremost policy goals of this Act would be thwarted. As the Supreme Court stated in Gissel Packing, supra, 395 U.S. at 602, "where an employer engages in conduct disruptive of the election process, cards may be the most effective -- perhaps the only -- way of assuring employee choice."

In reviewing the legislative history and the historical context of the ALRA, we find that the Act's secret ballot provisions are intended to preclude voluntary recognition of unions by employers. There is no indication that the framers of the Act intended to endorse secret ballot elections as the only means of ascertaining employee choice where the results of the election are tainted by an employer's coercion and interference. Furthermore, any potentially conflicting portions of the statute can be reconciled by construing the statute to prohibit voluntary recognition by employers, but to permit this Board to issue

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bargaining orders where required as a remedy.[17/]

Prior to the enactment of the ALRA, the California Supreme Court documented wide-spread instances of recognition and bargaining by growers, without consent of the affected agricultural employees. Englund v. Chavez (1972) 8 Cal. 3d 572. The Court found that growers agreed to exclusive representation status by the International Brotherhood of Teamsters union without even attempting to ascertain whether the workers desired to be represented. Even after collective bargaining agreements were signed by 27 growers in the Salinas Valley, the Court found that "at least a substantial number, and probably a majority" of the employees in fact desired representation by the UFW.

It was against this background of voluntary recognition, characterized by the failure to consider the workers' desires, that the ALRA was enacted. See also, Kaplan's Fruit & Produce Co., Inc. (Apr. 1, 1977) 3 ALRB No. 28; Highland Ranch, et al. (Aug. 16, 1979) 5 ALRB No. 54. The legislative authors' strong adherence to the secret ballot election as the method of selecting representatives must be seen in light of the past abuses they sought to cure. In hearings prior to the passage of the Act, the authors coupled the election requirement with the intent to be rid of voluntary recognition and "sweetheart" contracts.

[17/]We note that Section 1153(f) provides that it is illegal to bargain with a union not certified "pursuant to the provisions of this part." The word "part" refers to the statute as a whole, which is termed Part 3.5 of Division 2 of the Labor Code. An employer would therefore not be in violation of Section 1153(f) where it bargains with a union which has been certified pursuant to another section of the Act than Chapter 5, the election provision.

Assemblyman Herman, an author of the ALRA, stated:

> The primary theme of this bill is self-determination by the workers. Recognition cannot be obtained by recognitional strikes; it cannot be obtained by pressures on the growers through the secondary boycott; it cannot be obtained by sweetheart contracts. It can only be obtained by the workers going into the voting booth and selecting a union of their choice or rejecting any union, should they choose. See Hearings on Senate Bill No. 1 Before the Assembly Labor Relations Committee on May 12, 1975, page 2.

The use of a bargaining order as a remedy for preelection misconduct does not impose the dangers to free choice inherent in voluntary recognition. There is nothing in the statute nor in the legislative history which specifically precludes the Board's use of a bargaining order to remedy illegal conduct by an employer which destroys the employees free choice which the Act is designed to effectuate. To read such a prohibition into Section 1153(e) and (f), as Respondent would have us do, would deprive this Board of its only method of effectuating self-determination by employees where a fair election could no longer be conducted.

While bargaining orders are not mentioned in the ALRA, Section 1160.3 empowers the Board "to provide such other relief as will effectuate the policies of this part." This portion of the Act is based upon Section 10(c) of the NLRA, which provides in part, that the NLRB shall "take such affirmative action ... as will effectuate the policies of this Act." It is this portion of the NLRA upon which the NLRB and federal courts rely in issuing bargaining orders. NLRB v. Delight Bakery, Inc. (6th Cir. 1965) 353 F.2d 344 [60 LRRM 2501]. The remedial power is exercised to reestablish the status quo before the violations occurred, by

recreating the conditions and relationships which would have been had there been no unfair labor practice. G.P.D., Inc. v. NLRB (6th Cir. 1970) 430 P.2d 963 [74 LRRM 3057], cert. den. (1971) 401 U.S. 974 [76 LRRM 2779]; Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. NLRB (1961) 365 U.S. 651 [47 LRRM 2900].

In construing the ALRA to permit Gissel bargaining orders, we follow the cardinal rule of construction that words must be interpreted so as to promote rather than to defeat the general purpose and policy of the law. City of L.A. v. Pac. Tel. & Tel. Co. (1958) 164 Cal. App. 2d 253. In determining such general policy, "... intention may be ascertained, in doubtful cases, not only by considering the words used, but also by taking into account other matters, such as the context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, contemporaneous construction, and the like." Jordt v. State Board of Education (1939) 35 Cal. App. 2d 591.

With these rules in mind, we find that Respondent's overly literal interpretation of Section 1153(e) and (f) would lead to a result which would conflict with the Act's general policy of encouraging free choice by employees. Since a bargaining order may, in some cases, be necessary to effectuate the Act's general policy, we decline to interpret these subsections as denying us the power to issue such orders. "The manifest reason and purpose of the act must not be sacrificed to a literal interpretation of its verbiage. When the legislative intent has been ascertained, it must be enforced as intended notwithstanding the derived meaning may be inconsistent

with the strict letter of the statute as enacted." People v. Villegas (1952) 110 Cal. App. 2d 354, 357-58, 242 P.2d 657.

We note further that the propriety of the use of bargaining orders is accentuated by the difficulties encountered in conducting elections in the agricultural setting. Under the provisions of the ALRA, elections must be held within seven days of the filing of a representation petition. Section 1156.3(a). The petition may only be filed when the employer's payroll reflects 50 percent of the peak agricultural employment for the current calendar year. Section 1156.4. These statutory prerequisites, not present in the NLRA, make a rerun election less feasible. Even after waiting for the effects of unlawful conduct to subside, a labor organization may have to wait as long as another full year to file a new petition. Such delays, where caused initially by an employer's illegal interference, would further conflict with the effectuation of the goals of the Act.

Reading' the ALRA as a whole, and considering the policies upon which it is based, the historical context in which it was enacted, and the practical implications, we conclude that this Board has the power to issue a bargaining order where an employer has committed such severe and numerous unfair labor practices as to make it unlikely that a fair election could be held. Propriety of a Bargaining Order in this Case

Finding that this Board does have the authority to issue bargaining orders where a union has lost a secret ballot election, we turn to the question of whether such an order is required in the instant case. A review of the unfair labor practices committed by

Respondent shows a clear pattern of "pervasive" and "outrageous" conduct, the first category described by the Supreme Court in Gissel Packing. Respondent's misconduct severely interfered with the election, and will have a strong and lasting impact on the work force.

In the spring pruning season, when the UFW began its organizational efforts, Respondent's agents engaged in many instances of surveillance, interference and threats. Notwithstanding the employer's coercive tactics, many Carian employees took part in a march sponsored by the UFW through the Coachella Valley. The next day, Respondent discharged the pro-UFW Mayo crew.[18/] Two days after the march, Respondent granted a wage increase to the employees, stating that the company would pay the same wages as the union, along with medical benefits, and without requiring dues. By its actions, Respondent clearly warned the employees of repercussions if they voted for the union, while promising them the same benefits a union would provide if the UFW was rejected. The "fist in the velvet glove" was displayed forcefully on April 6 and 7, when Respondent abruptly laid off 35 employees who had shown support for the union. Departing from past practices, Respondent now created a "lay off period before the harvest. Respondent developed a harsh lesson through its wage increase, and the following illegal mass layoffs, that employees could feel secure in their jobs only if they rejected the union.

[18/]Even if we were to agree with the ALO's conclusion regarding the Mayo crew, we would still be of the opinion that a bargaining order is warranted in this case.

The harvest season at Carian brought intense organizing efforts by the UFW, met by a harsh and vindictive three-week program of illegal coercion and interference by Respondent. Supervisors committed numerous acts of surveillance and." interference, Robert Carian engaged in several violent acts against organizers, and Respondent distributed derogatory and vulgar portrayals of female organizers.

Ten days before the election, Respondent instituted another mass layoff of union supporters. Thirteen employees were laid off, allegedly due to the "fair and impartial" method of selecting employees who did not live on Respondent's property. But there was no convincing evidence of any need to lay off employees, and Respondent did not even consider beforehand the number of employees who would be affected by the procedure. Rather, a source of union activism was removed, and the clear message to the employees was that those who displayed support for the union risked their employment with Respondent. Shortly after this layoff, Respondent again displayed the other side of the coin: during an election eve speech to the employees, Harry Carian promised benefits to the employees, while asking them to vote against the union.

The effect of Respondent's ongoing campaign of serious illegal conduct during the UFW's organizing and the election, was to destroy the election as a method for obtaining the employees' uncoerced choice, and to leave lasting effects on the work force. The possibility of holding a fair election in the foreseeable future appears dim indeed. After Respondent's repeated harsh lessons displaying the harm that would befall union supporters and

the benefits that would accrue if the union were rejected, this Board cannot foresee any time within the near future when employees at Carian will be able to cast their ballots in a free and uncoerced atmosphere.[19/] No traditional remedy could repair the destruction Respondent has wrought on the election mechanism, and we are left with authorization cards as the means to determine the employees' choice in the matter of their representative.[20/] Respondent's conduct clearly undermined the union's support, chilled the employees' union sentiment, and precluded holding a fair and free election.[21/]

We affirm the ALO's conclusion that a majority of the employees in the bargaining unit had signed cards authorizing the UFW to represent them prior to the election. We therefore rely on these cards to establish that a majority of the employees had indicated their support for the UFW, and implement a bargaining

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[19/] While Member McCarthy, in dissenting from this portion of the Opinion, claims that the relevant misconduct on the part of Respondent occurred after May 28, the start of the harvest season, a review of the record reveals that employees signed authorization cards throughout both the thinning and harvest season. Most of the cards were signed from March 17 through 31 and June 7 through 15. Thus, the cards used to demonstrate majority support were often signed prior to the time of many of Respondent's illegal activities,

[20/] In a study concerning elections conducted by the NLRA, it was found that authorization cards are a highly accurate reflection of employee choice at the time they are signed, and a reasonably good predictor of vote. Getman, Goldberg, Herman, Union Representation Elections: Law and Reality (1976) pp. 131-137.

[21/]Even though there remain outstanding challenged ballots, the outcome of the election is not determinative of whether a bargaining order should issue. Case, Inc. (1978) 237 NLRB No. 60 [99 LRRM 1159]. Given the large number of challenges, no useful purpose would be served by delaying the proceedings herein further to determine a final result of the election.

order to return events' to the status quo prior to the unfair labor practices. Respondent excepts to the ALO's finding that the cards indicated support for the UFW as the employees' representative. We find no merit in this exception. The cards which were signed clearly stated that the employee who signed authorized the UFW to represent him or her, and the ALO credited the organizers' testimony that in soliciting cards they spoke not only about the use of the cards in qualifying for an election, but also about benefits the employees would receive through union representation. In Cumberland Shoe Corp. (1963) 144 NLRB 1268 [54 LRRM 1233], enf'd (6th Cir. 1965) 351 F.2d 917 [60 LRRM 2305], the NLRB held that a card which clearly designated the union as an employee's bargaining representative would be counted, despite representations by solicitors that the cards would be used to obtain an election. See also Levi-Strauss & Co. (1968) 172 NLRB 732 [68 LRRM 1338]; Medley Distilling Co. (1970) 187 NLRB 84 [76 LRRM 1103]; Gissel Packing, supra, 395 U.S. 575. We find that all of the signatures were obtained under circumstances complying with NLRA precedent.

We therefore conclude that, under the circumstances of this case, a bargaining order is appropriate, and that the UFW should be certified as the exclusive bargaining representative of the agricultural employees of Harry Carian Sales, pursuant to Section 1160.3.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that, pursuant to Labor Code Section 1160.3, the United Farm Workers of America, AFL-CIO, is the exclusive representative of all agricultural employees of Harry

Carian Sales in the State of California, for the purpose of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, working hours, and other terms and conditions of employment.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Harry Carian Sales, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of any UFW representative who is communicating with employees on its premises pursuant to 8 Cal. Admin. Code Section 20900.

(b) Interfering with the right of its employees to communicate freely with and receive information from UFW organizers on Respondent's premises pursuant to Section 20900.

(c) Physically assaulting union representatives and/ or their vehicles.

(d) Interrogating employees regarding their union sympathies.

(e) Making promises and/or grants of improved benefits or working conditions to employees in order to discourage any of its employees from joining or supporting the UFW.

(f} Threatening any employee for joining or supporting the UFW.

(g} Making disparaging remarks about women in order to discourage any of its employees from joining or supporting the

UFW.

(h) Discharging, laying off, or otherwise discriminating against any of its agricultural employees because of their membership in or support of the UFW.

(i) In any like or related manner interfering with, restraining or coercing any employee in the exercise of rights guaranteed in Labor Code Section 1152.

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

(a) Upon request, meet and bargain collectively in good faith, as defined in-Labor Code Section 1155.2 (a), with the UFW as the certified exclusive bargaining representative of its agricultural employees, and if understanding is reached, embody such understanding in a signed agreement.

(b) Immediately offer to the employees listed in Appendix I full reinstatement to their former positions or to substantially equivalent positions, without prejudice to their seniority or other rights and privileges to which they are entitled, and make them whole for any loss of earnings or other economic losses they have suffered as a result of their layoffs, plus interest thereon computed at seven percent (7%) per annum.

(c) Offer to Vitaliano Mayo and the employees in his crew immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges to which they may be entitled and make them whole for any loss of pay or other economic losses they have suffered by

reason of their discriminatory discharge, plus interest measured thereon at seven percent (7%) per annum.

(d) Preserve and make available to the Board or its agents, for examination and copying, all payroll records and any other records necessary to determine the amount of back pay and other rights of reimbursement due the persons included in subparagraphs (b) and (c) under the terms of this Order.

(e) Sign the attached Notice to Employees and, after its translation by the Regional Director into appropriate languages, reproduce sufficient copies of the Notice in each language for the purposes set forth herein.

(f) Post copies of the attached Notice to Employees at conspicuous locations on its premises for a period of 60 days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any posted Notice which has been altered, defaced, covered, or removed.

(g) Mail copies of the attached Notice to Employees in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed at any time during the payroll periods encompassing the dates of April 1, 1977, through June 27, 1977.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice to Employees in appropriate languages to the assembled employees of Respondent on company time. The reading(s) shall be at such time(s) and place (s) as are specified 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 employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly employees to compensate them for time lost at this reading and the question-and-answer period.

(i) Hand a copy of the attached Notice to Employees to each of its present employees and to each employee hired during the six months following the date of issuance of this Order.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: October 3, 198

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Concurring in Part and Dissenting in Part:

I concur with my colleagues in their holding that this Board has the authority to compel an employer to bargain with a union which has lost a representation election after obtaining authorization cards from a majority of the unit employees, where the employer has committed "... serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair [second] election." Gissel Packing Co. (1969) 395 U.S. 575, 594 [71 LRRM 2481], Labor Code Section 1148. I also agree that Respondent's unfair labor practices tended to interfere with a free choice by the employees and thus justify setting aside the election which was held on June 27, 1977. International Manufacturing Co., Inc. (1967) 167 NLRB 769 [66 LRRM 1156].

I dissent only from those portions of the majority's decision and order which provide for certification of the UFW and require Respondent to meet and bargain with the union as a means of remedying its unfair labor practices. The. majority has concluded,

and I agree, that Respondent engaged in numerous violations of the Act which require remedial relief.[1/] However, under the appropriate standards articulated in Gissel, supra, I would find that Respondent's unfair labor practices, individually or collectively, were neither so "outrageous" nor so "pervasive" as to be beyond the curative reach of the Board's standard remedies.

In Gissel, the U.S. Supreme Court affirmed the holding of the Fourth Circuit that a bargaining order without an election victory is warranted in "exceptional" cases marked by "outrageous" [2/] and "pervasive" unfair labor practices, and

---

[1/]My agreement with the majority's unfair labor practice findings is not total. For example, the ALO found that Respondent discharged the crew of Vitaliano Mayo on March 28 for cause, a determination which the majority disputes. As I perceive nothing particularly unusual in Respondent's treatment of an entire crew as a single entity, I do not consider that act inherently suspect. Rather, I agree with the ALO's reasoning that since the crew came to Respondent's employ as a group, Respondent could not reasonably be expected to single out and discharge the foreman alone or the slowest of the crew members. See, e.g., Leatherwood Drilling Co. (1970) 180 NLRB 893 [73 LRRM 1327]. While the ALO properly found that the pace of the Mayo crew was the motivation for the discharge, he ruled, and the majority affirmed, that the same business justification defense would not be available as to the discharge of Francisco Mateo, the crew's cook. I disagree. Mateo, hired directly by Mayo one year before the crew began working for Respondent, was an integral part of the crew and there would be no reason to retain him after the crew's departure. The same rationale is applicable to Willie Garcia, the crew's record keeper.

[2/]In concluding that the bargaining order is an appropriate remedy in this case, the majority finds that the totality of Respondent's conduct brings this matter within the first category of cases described by the Gissel court, that is, an "exceptional" situation in which the employer has committed unfair labor practices so "outrageous" and "pervasive" that their coercive effects cannot be remedied by traditional means. There is a basic flaw in this reasoning in that the majority has failed to recognize that absent here are the types of unfair labor practices which were prevalent in each of the four cases which comprised the consolidat-

[fn. 2 cont. on p. 3.]

held that such a bargaining order is also appropriate in "less extraordinary cases marked by less pervasive unfair labor practices" which tend to undermine the union's majority strength, impede the election processes, and make it unlikely that a fair election, or rerun election, may be conducted. The court did not thereby abandon the secret ballot as the preferred means by which employees choose which union, if any, is to be their bargaining representative. Accordingly, the court directed the National Labor Relations Board (NLRB) to determine in any given case whether the gravity of the employer's conduct had so diminished the likelihood of ensuring a fair election (or a fair rerun election) "that employee sentiment, once expressed through [authorization] cards would, on balance, be better protected by a bargaining order." In making such determinations, the NLRB has indicated that it will be guided by "the seriousness of the conduct, the probable impact that conduct will have on any future election, and the efficacy of alternative remedies." General Stencils, Inc. (1972) 195 NLRB 1109 [79 LRRM 1608]. This Board should be guided by the same considerations.[3/]

[fn. 2 cont.]

ed decision in Gissel and which prompted the court to characterize them as "outrageous". There is no evidence here of numerous and repeated interrogations of employees about their union sympathies, or promises of significant benefits, or threats to withdraw existing benefits contingent upon the outcome of the election. Nor have we seen herein any evidence of threats of plant closure with the attendant loss of employment, a central factor in each of the four Gissel cases.

[3/]The majority's justification for the bargaining order is based on Respondent's unfair labor practices which occurred during two

[fn. 3 cont. on p. 4]

By the time a new election can be held among Respondent's employees in accordance with Labor Code Section 1156.4, four years will have passed since the first election. I do. not believe that such long-past conduct should be considered as a basis for issuing a bargaining order. While unlawful pre-election acts and conduct may, of course, be presumed to have a strong contemporaneous influence on employees, the NLRS has observed that:

> ... initial impact is not the focus of our inquiry. Under Gissel we must attempt to measure the impact over time and, also, to assess the likelihood that any lasting impact can be mitigated by remedies short of a bargaining order. [General Stencils, Inc. (1972) 195 NLRB 1109.]

Consistent with this view, the Fifth Circuit reads Gissel as clearly contemplating that:

> ... no bargaining order should be issued unless, at the time the Board issues such an order, it finds the electoral atmosphere unlikely to produce a fair election. [American Cable Systems, Inc. (5th Cir. 1970) 427 F;2d 446 [73 LREM 2810] cert. den. (1970) 400 U.S. 957 [75 LRRM 2810]. [Emphasis supplied.]]

The factor of actual time passed, and probable turnover in the

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[fn. 3 cont.]

distinct seasonal operations. The record in A.L.O.D. I covers thinning season violations between mid-March and April 7, 1977. ALOD II violations arose during the harvest season, which began on May 28, 1977, and culminated in an election held the following June 27. In my view, it is not reasonable to conclude that unlawful acts and conduct committed during the thinning season eroded the union's majority status since such acts and conduct preceded the union's most successful card signing period. Arbie Mineral Feed Co. (8th Cir. 1971) 438 F.2d 940 [76 LRRM 26lTH The petition for certification with the requisite showing of employee support was not filed until June 20, some 10 weeks after the end of the thinning season. Indeed, if the purpose of the bargaining order remedy is to restore the conditions which existed when the union attained its majority, it logically follows that conduct relevant to the bargaining order issue is that which occurred during the harvest season. On this basis, the impact of employer misconduct on the election atmosphere is not so extensive as the majority suggests.

voting unit, should certainly serve to diminish the residual impact on the election atmosphere which Respondent's unlawful practices might otherwise have had.

I believe as well that the nature and scope of the practices are such that the use of traditional remedies will insure a fair rerun election. Moreover, there is nothing in the record to indicate that Respondent's violations are of a continuing nature or that they are likely to recur. It should be borne in mind that our standard remedial order requires Respondent, inter alia, to reinstate and make whole employees who have been discriminatorily terminated and to cease and desist from engaging in unfair labor practices of the type found herein. In addition, the order requires Respondent to post, mail, read, and distribute an appropriate Notice to Employees which provides them with adequate information and assurances concerning their rights under the Act. Thus, the unfair labor practices are not irreparable in the sense required to justify a bargaining order. Respondent's compliance with the provisions of a standard remedial order should effectively restore a proper election atmosphere so that an impartial second election can thereafter be held. Chatfield-Anderson Co. (9th Cir. 1979) 606 F.2d 266 [102 LRRM 2576].

As indicated by the Gissel court, imposing a bargaining order without a prior election victory is an extraordinary remedy, defensible only where the union's loss of the election was likely caused by the employer's unfair labor practices for which there are no available, effective, alternative remedies. I cannot find that the unfair labor practices of more than three years ago, even when

evaluated in their entirety, meet the test of "pervasiveness" contemplated by the court in Gissel, or, given the efficacy of the Board's usual remedies, that they would have a residual adverse impact on a new election were one to be held now or in the near future. Absent a more compelling reason for doing so than is presented here, I am unwilling to go beyond the Board's established remedies.

Where a bargaining order is not clearly warranted, a second election is by far the most reliable measure of employee preference. Rapid Manufacturing Co. (3d Cir. 1979) 612 F.2d 144 [103 LRRM 2162]; NLRB v. Regal Aluminum, Inc. (8th Cir. 1971) 436 F.2d 525 [76 LRRM 2212]. In this case, therefore, I believe that the purposes of the Act would be better served by the prudent exercise of the Board's remedial authority, reliance on standard remedies, and a rerun election.

Dated: October 3, 1980

JOHN P. MCCARTHY, Member

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

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

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

1. To organize themselves;

2. To form, join, or help unions;

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

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

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

this is true, we promise that:

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

Especially:

WE WILL NOT watch or spy on employees who are engaging in activities.

WE WILL NOT interfere with union organizers who come onto the company property to communicate with our workers pursuant to the ALRB's access regulations.

WE WILL NOT engage in violence against representatives of the UFW.

WE WILL NOT threaten employees for joining or supporting the UFW.

WE WILL NOT promise or grant benefits to employees to induce them, to vote against the UFW.

WE WILL NOT make insulting remarks about women in order to discourage employees from joining or supporting the UFW.

WE WILL NOT discharge or lay off any employee because the employee joined or supported the UFW.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement on a collective bargaining contract concerning your wages, working hours, and other terms and conditions of employment.

WE WILL immediately offer to the crew of Vitaliano Mayo and to the following employees reinstatement to their old jobs and we will pay them any money they have lost, plus interest at seven percent (7%), because we laid them off in violation of the ALRA:

1. Ruben Miranda
2. Rosa Hitchman
3. Gabriel Yniguez
4. Hector Mendoza
5. Israel Salinas
6. Tomas Range 1
7. Victoriano Cortez
8. Francisco Morales
9. Francisco Victoriano
10. Jose Gonzales
11. Carmen Gonzales
12. Antonio Calzado
13. Beliton Granados
14. Serafin Granados
15. Antonio Varela
16. Enrique Castelum
17. Jose Contreras
18. Ricardo Sandoval
19. Ramon Ruiz
20. Ernesto Ruiz
21. Manuela Carmelo
22. Oscar Perez
23. Julian Navarette
24. Jose Briseno
25. Moises Figueroa
26. cesar Arreola
27. Victor Ibarra
28. Benito Ibarra
29. Elias Alamilla
30. Guadalupe Martinez
31. Salvador Amescua
32. Manuela Amescua
33. Berta Amescua
34. Jose Contreras
35. Jorge Vozcano
36. Francisco Flores
37. Esteban Sanchez
38. Gabriel Varela
39. Maria Contreras
40. Salvador Contreras
41. Alberto Martinez
42. Lydia Martinez
43. Uriel Martinez
44. Guadalupe Nieto
45. Josefina Nunez
46. Guadalupe Ramirez
47. Jaime Ramirez
48. Salvador Ramirez
49. Ezequiel Serrano
50. Maria Serrano
51. Yolanda Serrano
52. Teresa Sanchez

Dated:

HARRY CARIAN SALES

By: _____
Representative Title

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

DO NOT REMOVE OR MUTILATE.

APPENDIX I - EMPLOYEES UNLAWFULLY DISCHARGED OR LAID OFF

1. Ruben Miranda
2. Rosa Hitchman
3. Gabriel Yniguez
4. Hector Mendoza
5. Israel Salinas
6. Tomas Rangel
7. Victoriano Cortez
8. Francisco Morales
9. Francisco Victoriano
10. Jose Gonzales
11. Carmen Gonzales
12. Antonio Calzado
13. Beliton Granados
14. Serafin Granados
15. Antonio Varela
16. Enrique Castelum
17. Jose Contreras
18. Ricardo Sandoval
19. Ramon Ruiz
20. Ernesto Ruiz
21. Manuela Carmelo
22. Oscar Perez
23. Julian Navarette
24. Jose Briseno
25. Moises Figueroa
26. Cesar Arreola
27. Victor Ibarra
28. Benito Ibarra
29. Elias Alamilla
30. Guadalupe Martinez
31. Salvador Amescua
32. Manuela Amescua
33. Berta Amescua
34. Jose Contreras
35. Jorge Vozcano
36. Francisco Floras
37. Esteban Sanchez
38. Gabriela Varela
39. Maria Contreras
40. Salvador Contreras
41. Alberto Martinez
42. Lydia Martinez
43. Uriel Martinez
44. Guadalupe Nieto
45. Josefina Nunez
46. Guadalupe Ramirez
47. Jaime Ramirez
48. Salvador Ramirez
49. Ezequiel Serrano
50. Maria Serrano
51. Yolanda Serrano
52. Teresa Sanchez

CASE SUMMARY

Harry Carian Sales (DPW) 6 ALRB No. 55
Case Nos. 76-CE-37-R, 77-CE-34/41/54-C;
77-RC-15/1S/16-1-C,
77-CE-92/99/103/108/120/123/128/142/183/185/187/188/127-C

ALO DECISIONS

ALOD I

The ALO concluded that Respondent engaged in unlawful surveillance on two occasions, and recommended the dismissal of three other allegations of surveillance. He concluded that Respondent twice unlawfully interrogated its employees, but found that a third incident did not constitute interrogation. He concluded that a unilateral wage increase was unlawful, but found that an alleged bribe was not made. The ALO found four incidents of threats and interference to be unlawful and recommended the dismissal of six other such allegations.

As to Respondent's termination of a crew, the ALO determined that the General Counsel made a prima facie case, but that Respondent proved a business justification, and recommended that the allegation be dismissed. As to a group of employees who were laid off during the thinning season, the ALO concluded that Respondent unlawfully discriminated against the employees. The ALO further concluded that Respondent's transfers of employees, which took place after the discharge of the crew, did not violate the Act.

ALOD II

The ALO considered both objections to an election and unfair labor practice allegations. The election results were not determinative, as there was a large number of challenged ballots. The ALO recommended that the election be set aside, based on the unfair labor practices which he found Respondent had committed.

The ALO found that on seven occasions Respondent engaged in surveillance and interfered with organizing by the UFW. In one of those incidents, the photographing of union representatives, the ALO concluded that a violation occurred only when Respondent took pictures of activities which violated the Board[1]s access regulation, without first asking the organizers to comply with the regulation. The ALO concluded that on three other occasions no violation occurred.

A number of allegations involved the use of violence against organizers and their vehicles. The ALO concluded that on seven occasions Respondent violated the Act. No violation was found where Respondent refused to move a truck which was blocking organizers' cars.

The ALO concluded that Respondent unlawfully discriminated against 13 employees by laying off all employees who did not reside in company housing. Respondent was also found to have committed unfair labor practices by insulting a female organizer and by distributing leaflets which portrayed female union supporters in a vulgar manner.

The ALO concluded that a speech Respondent gave on the eve of the election was generally protected as free speech, but that he violated the Act by promising benefits in answer to an employee's question, and by the actions of supervisors in preventing an organizer from speaking to employees after the speech.

Two Section 1153(a) violations were found to have been committed on the day of the election, even though not the subject of an allegation in the complaint. One incident involved an assault on a union organizer. The ALO concluded that Respondent violated Section 1154.6 of the Act by hiring 40 people for the purpose of voting/ but that four other employees were not discriminatorily refused rehire. He also concluded that the evidence did not establish that one employee was constructively discharged.

The ALO further reasoned that the ALRB was empowered to order Respondent to bargain with the UFW, and that the unfair labor practices committed required a remedial bargaining order to issue.

BOARD DECISION

The Board found that Respondent's operation in San Joaquin Valley was incorrectly included in the bargaining unit, since there was little evidence regarding the relationship between that operation arid the Coachella Valley operation, where the organizing and the voting were centered. The Board concluded that Respondent's misconduct and unfair labor practices required that the election be set aside. The Employer's objections to the election—that the petition was untimely filed and that the presumption in 8 Cal. Admin. Code Section 20310(e)(1)(C) was improperly invoked—were dismissed.

In its review of ALOD I, the Board generally affirmed the ALO's findings and conclusions, except as to the following conclusions. The Board dismissed one allegation of unlawful surveillance, finding that the supervisor merely stood near an organizer and an employee. The Board concluded that Respondent's general foreman unlawfully threatened to discharge employees, and that a supervisor threatened to have employees deported. The Board concluded that Respondent did not prove a business justification for firing an entire crew, and that it therefore violated the Act.

The Board generally affirmed the findings and conclusions of the ALO in ALOD II, except in the following respects. The Board declined to find violations where the conduct had not been alleged as a violation in the complaint, except where the conduct was closely related to issues in the complaint and fully litigated by

Respondent and the General Counsel. The Board also dismissed one allegation of unlawful surveillance. In discussing Respondent's surveillance violations, the Board found that union organizers lawfully took access to visit employees pursuant either to a voluntary agreement between the union and Respondent or to the terms of the Board's access regulation. As to Respondent's photographic surveillance, the Board concluded that Respondent lawfully documented the organizers' excess access, and that it was not under a duty to ask the organizers to comply with the regulation before taking the pictures.

The Board affirmed the ALO's conclusions that it was empowered to issue a remedial order requiring Respondent to bargain with the union, notwithstanding the union's loss at the polls. The Board held that the facts of this case made such an order necessary.

DISSENT AMD CONCURRENCE

Member McCarthy, concurring and dissenting, agreed that the Board has authority to issue a bargaining order where the employer's conduct has made the holding of a fair second election unlikely. However, he would find that the facts of this case do not warrant a bargaining order, and that the employer's unfair labor practices can be remedied by traditional means, especially in view of the fact that more than three years have passed since the practices occurred. Contrary to the majority, Member McCarthy would also find that the discharge of the Mayo crew was not a violation of the Act.

REMEDY

The Board ordered Respondent to meet and bargain, on request, with the union, to reinstate employees with back pay, and to post and distribute the customary remedial Notice to Employees.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HARRY CARIAN SALES, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Nos. 76-CE-37-R 76-CE-37-R 76-CE-37-R

Gary Williams, Esq., Robert Farnsworth, Esq., Marian Kennedy, Esq., for the General Counsel

David E. Smith, Esq., of Indio, CA for the Respondent

Lydia Villarreal, Tom Dalzell, Esq., of Coachella, CA for the Charging Party

DECISION

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer: This case was heard by me on May 23, 24, 25, 26, 31, June 1, 2, 3, 6, 7, 8, and 9, 1977, in Coachella, California.

The Amended Complaint, dated May 13, 1977, is based on four charges filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW or union"). The charges were duly served on the Respondent Harry Carian Sales, on March 25, 1976, March 21, 1977, May 28, 1977, and April 6, 1977.[1]

[1] Unless otherwise specified, all dates herein mentioned refer to 1977.

The four cases were consolidated pursuant to Section 20244 of the Agricultural Labor Relations Board's Regulations by order of the General Counsel dated May 13.

The Amended Complaint alleges that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the "ACT").

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel, Respondent and Charging Party (Intervenor) filed briefs after the close of the hearing.

Based on the entire record, including my observations of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS

I. Jurisdiction

Respondent, Harry Carian Sales is engaged in agriculture -- specifically the growing and shipping of table grapes in the Coachella Valley, Riverside County, California, as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

Although the Respondent did not admit to such, I also find that the UFW is a labor organization within the meaning of Section 1140.4 (f) of the Act. That the UFW is a labor organization is a fact of such common knowledge within the

Section's territorial jurisdiction – and a fact not reasonably subject to dispute – that a sufficient basis exists for taking judicial notice of the UFW's status as a labor organization pursuant to California Evid. Code Section 452 (g) and (h). See Hemet Wholesale Company, 3 ALRB No. 47 (1977).

II. The Alleged Unfair Labor Practices

The General Counsel's Amended Complaint charges the Respondent with nineteen (19) violations of Section 1153 (a) of the Act, involving alleged surveillance of union organizational activity, interrogation of agricultural employees concerning their union activities, threatened discharges, deportations and/or police surveillance of an ALRB election and interference with the signing of UFW authorization cards.

Additionally, the Amended Complaint charges that the Respondent violated Sections 1153(a) and (c) of the Act by refusing to hire Juan Martinez because of his pro-UFW sympathies on Mach 15, 1976; by discriminatorily discharging the 43-person grape thinning crew supervised by Vitaliano Mayo on March 28, 1977 because of their alleged support for and activities on behalf of the UFW; by discriminatorily failing and refusing to continue in its employ or rehiring some 42 agricultural employees who worked for Respondent in the thinning of Pearlettes until April 6 or 7, 1977,

allegedly because of the employees' real or perceived support and/or activity;[2] and by changing the terms and conditions of employment of its agricultural employees by switching crew composition and foremen on a daily basis for purposes of discouraging union organization activity, commencing on or about April 1, 1977. Numerous other unfair labor practices were not pleaded but raised during the three-week hearing, which involved some 24 witnesses.

The Respondent denies that it violated the Act in any respect. Particularly, Respondent contends that the Mayo crew was fired for cause — "They thinned too slowly" -— and that the other layoffs were attributable only to the "slack" time between the thinning and harvest season.

At the close of General Counsel's case, Respondent moved for dismissal of various paragraphs on the ground that General Counsel had offered no evidence on said allegations. The motions to dismiss were granted on that basis as to Paragraphs 5, 7, 10, 14, 15 and 24, without opposition from General Counsel. [3]

III.A.Background:

Respondent has been a grower and shipper of table grapes in the Coachella Valley for some 27 years. His

[2] By stipulation and order of the A.L.O., General Counsel amended the Complaint during the hearing to include three additional alleged discriminatees in paragraph 27.

[3] Respondent's motion to dismiss paragraphs 6, 25, and 26 were denied, and will be discussed infra.

properties include approximately 300 acres of table grapes designated as (a) Ranch #1 (Rancho de Oro - 118.2 acres in Coachella, California); (b) Ranch #3 (115.6 acres. in Coachella, California); (c) Ranch #4 (approximately 40 acres in Mecca, California); (d) Ranch #10 (20 acres in Coachella, California). Labor camps are provided for the crews at three of the Ranches, respectfully called Camp #1 (Campo de Oro), Camp #3, and Camp #4.

Additionally, as "shipper", Respondent provides crew labor for other growers in the area who would not have sufficient acreage to support a labor camp or a work crew over extended periods of time. Thus, in 1977, Respondent additionally provided labor for various growers in the Coachella Valley — Wayne L. Mayfield (approximately 60 acres in Coachella, California), Charles Crockett (approximately, 30 acres in Coachella, California), and Bruce Kandarian (approximately 30 acres in Coachella, California). While Respondent had previously grown various varieties of table grapes, the 1977 production which was the subject matter of this hearing consisted of Pearlettes and Thompson seedless, the former being earlier bearers (by 2 1/2 weeks) than the latter.

Regardless of the variety of grape, pruning was the first major operation done by any work crew, and was usually performed in December-January. Respondent's payroll records

for January, 1977, indicated that approximately 90-100 workers were engaged in the pruning operation including the crew of Vitaliano Mayo which was assigned to the Mayfield Ranch. The next major operation on both Thompson seedless and Pearlettes would be the tying of vines, which required far fewer workers (four times fewer on Thompson seedless; 12 to 15 times fewer on Pearlettes). Succoring[4] would follow, and then the thinning of Pearlettes first, and Thompson seedless next (usually early spring).

For the Pearlettes, Respondent utilized the brush thinning method pioneered by himself. A solo plastic brush approximately 3 1/2 inches in diameter would be combed through the bunch and indiscriminately remove berries. This mechanical operation would allow the desired number of berries to remain depending on the number of strokes of the thinner. Because of the time factor involved (approximately 8-14 days) during which thinning must take place before the bunches "go to berries", more workers were required for thinning Pearlettes than pruning them. For example, approximately 120 persons were listed on the payroll records for the third week in March, it was during this time (usually March) that the bunches were large enough to comb, or "thin", yet had not gone to berries.

The Thompson seedless grapes were thinned with a

[4] A procedure involving the removal of spurs from the vine to avoid overcluttering. Respondent succored only Pearlettes and not Thompson seedless because of the high desert winds which tended to break the Thompson shoots.

clipper, and the use of growth regulators. The worker simply cut the bunch to the length desired.

Respondent employed a two-stage thinning process in many acres of his Pearlettes during the time in question. The first stage involved the aforementioned combing, and the second stage involved "tipping" the bunches to the desired size for picking. There was approximately a three-week time lapse between the end of combing and the commencement of tipping (first week in April - last week in April), with equal numbers of workers required for each stage. The harvest was the last phase, and commenced normally in late May or early June.[5]

The dramatis personae of Respondent's operations were Respondent, Harry Carian; his son, Robert, who supervised the specialized operations; Ray Peay, who had been in the grape business for over 50 years and was designated Respondent's "eyes and ears"; Hilario Castro, foreman and resident of Camp #1; Filiberto (Berto) Robles, foreman and resident of Camp #3; Jose Castro, foreman in charge of all crews, whose residence adjoined Camp #3, and Vitaliano Mayo, foreman and resident of Camp #4 from December, 1976 to March 28, 1977.

[5]There were other specialized operations to perform, such as irrigation, planting and girdling, which are generally done on a piecework basis and involved far fewer numbers of workers.

The alleged unfair labor practices occurred between February 19 and April 7, concommitant with the union organizational activity which had commenced on employer's premises in January in anticipation of upcoming elections. While no election date had been set, Respondent's three-year contract with the teamsters was to terminate in April, and the UFW had filed and served on the Respondent Notice of Intention to Take Access on January 3, and again on March 8, and Notice of Intention to organize on March 29, (Exhibits G.C. 2, 15, 16).

The UFW organizational effort was evidenced by daily visits to the fields and camps by union organizers, radio announcements, leaflets, weekly organizational meetings, UFW movies, posters, sound trucks, collections, and a "blitz" of the Coachella Valley to publicize the March of Cesar Chavez and his supporters from Mecca, California, to Coachella, California, on Sunday, March 28. Respondent admitted knowledge of the UFW campaign commencing in January, 1977, and testified to giving the following instructions to his supervisors: Organizers would be allowed on the premises 1 hour before work, 1 hour during lunch, and after work as long as the workers desired, They were to be "challenged" (asked to leave) if they came onto the fields during work. Otherwise, they were not to interfere with the UFW organizational effort.

The seven-week period was one of intense activity by the Respondent and the UFW alike, in fact, with the exception of the allegation of surveillance by Reyes Ortiz (February 19), all the alleged events occurred within the three-week period between mid-March and the first week of April. To strive for consistency in the application of legal standards, the charges and defenses will be discussed in subject matter groupings according to the nature of the alleged violations, rather than in strict chronological sequence. Findings of Fact and Conclusions of Law and Analysis will be discussed for each allegation in seriatim.

IV. Discussion

A. Unlawful Surveillance

Section 1153 (a) of the Act makes it an unfair labor practice for an agricultural employer to "interfere with, restrain, or coerce agricultural employees in the exercise of their rights guaranteed in Section 1153. Such rights include the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection . . . ." Surveillance of employee activities which has a reasonable tendency to affect the employee's exercise of his statutory

rights constitutes an unfair labor practice. Merozian Brothers Farm Management Company, Inc., 3 ALRB No. 62 (1977). Where the evidence supports the conclusion that the supervisor intentionally interjected his presence and listened to the conversations between the organizers and the workers, unlawful surveillance has been established. Dan Tudor & Sons, 3 ALRB No. 69 (1977).

In the instant case, General Counsel has raised five instances of unlawful surveillance by Respondent's supervisory personnel, each of which has been denied by Respondent.

1. Reyes Ortiz - Surveillance of February 19, 1977. (Paragraph 6)

(a) Facts::

According to the testimony of UFW organizer Liz Sullivan, Reyes Ortiz "showed up" with his brother while she and another union organizer (Mehta Mendel) were talking with some workers in Respondent's Camp #4 at about 2:30 P.M., on February 19, 1977. The site of the alleged violation was, in Ms. Sullivan's own estimation, approximately 150 feet from Reyes Ortiz' house. Mr. Ortiz and his brother were alleged to have stared and listened to the group at a distance of some five feet — making organizer Liz Sullivan very uncomfortable. Ortiz stated that he didn't want

anything, but had just come to listen, as Respondent had told him to "keep an eye on things". Although the organizer asked Ortiz to leave, and suggested that his behavior constituted unlawful surveillance, the supervisor stayed approximately 30 minutes, commenting to his brother that "this was more of their propaganda".

Ortiz testified on direct examination that he walked over to the organizers to find out what they were doing, as part of his maintenance and general overseer duties with Respondent, and that he was not familiar with these two women. He admitted to standing by the group for 5-6 minutes, but not paying attention to what was being discussed. On cross-examination, Ortiz admitted that he might have made a comment that "This was more of their propaganda" to his brother, but didn't think that the workers overheard it.

(b) Analysis and Conclusions:

Conceding that organizers Sullivan and Mendel had a perfect right to organize workers at Camp #4 at about 2:30 P.M., on February 19, I do not find that the incident as described reasonably tended to interfere with employee organizing rights or was done for the purpose of viewing union activity. Mr. Ortiz lived adjacent to the cite of the alleged violation, and part of his work included "general overseer duties." Organizer Mendel did not

testify, nor did any employee who may have witnessed the incident. Even organizer Sullivan did not consider the "violation" serious enough to prepare a declaration regarding same or incorporate the grievance into the original charges which formed the basis of the Amended Complaint and subsequent hearing.

Of note also is the fact that Supervisor Ortiz is not named in any other of the myriad violations which have been attributed to the Respondent and his other supervisory personnel. While I find that both organizer Sullivan and Foreman Ortiz were generally credible witnesses, I tend to give more weight to the Respondent's version of the incident. Organizer Sullivan, while credible, was not a particularly compelling witness. Perhaps because of her interest in the outcome, she was often combative, particularly when evidentiary rulings were made unfavorable to her side. Her hostility was revealed by gestures and occasional verbal outbursts. I do not find that this attitude interfered with the sincerety of witness Sullivan, but feel that it may have interfered with her ability to accurately recollect specific occurrences. Additionally, her rebuttal testimony seemed somewhat contrived – geared more to responding to a matter raised at the hearing than to shedding light on the alleged incident or event.

Further, this alleged incident occurred some four weeks before all other alleged unfair labor practices. It occurred relatively early in the organizational campaign, supporting the supervisor's position that he was not familiar with the two women organizers. Viewing the totality of the witnesses' testimony, I do not find that there was conduct in this instance which was sufficient to establish the infringement of the employees' free exercise of organizing rights.

With reference to Bud Antle, Inc. , 3 ALRB No. 7 (1977), this particular finding should not be interpreted to condone activity which could be construed by employees as amounting

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to surveillance. Rather, in this instance, I find that the General Counsel has failed to establish the unfair labor practice. The evidence establishes only that 2 UFW organizers had been speaking to employees for a " period in the afternoon, and continued to do so, as a supervisor with general overseer duties came over on one occasion and conversed with the organizers. There was no evidence that Ortiz had followed the organizers (and employees) around the camp and/or was peculiarly stationed given the time of day and the nature of his duties. Finding the supervisor's presence capable of both a legitimate and illegitimate inference, I find insufficient evidence to indicate that Supervisor Reyes Ortiz engaged in unlawful surveillance on February 19, 1977, and recommend that Paragraph 6 of the Amended Complaint be dismissed.

2. Hilario Castro

(a) Surveillance of March, 17, 1977. (Paragraph 9)

1. Facts:

UFW organizer Liz Sullivan testified to visiting "Campo de Oro" which housed Hilario Castro's crew in order to talk to worker Jose Briseno about the ranch organizing committee. Other workers were present in Briseno's cabin and entered and left the premises during the conversation. At some point, Hilario Castro stuck his head in a screenless window and looked around stating "The Chavistas are going to start a colony here." No reply was

forthcoming from persons inside, all of whom were supporters of the UFW. Although Hilario Castro admitted to "maybe seeing inside" when people kept their windows open, he denied looking inside Briseno's cabin for the purpose of observing.

2. Analysis and Conclusions:

This "peeping through an open window" incident did not tend to interrupt or interfere with organizational activity. As per the testimony of Liz. Sullivan, General Counsel's own witness, "she and the workers merely smiled and went on talking". As there is no evidence that Foreman Castro repeatedly passed, peered into the open window, or remained present for any length of time, I do not find that Respondent, through Supervisor Hilario Castro, engaged in unlawful surveillance on this occasion.

The intervenor relies upon Better Val-U Stores (174 NLKB No. 32, LRRM 1169 (1969)) for the doctrine that open observation of union activities by employer agents in plain view is unlawful where the intent and purpose is to impress upon the employees that management was watching union activity. Here however, it cannot be said that a passing view of union organizational activity by a foreman walking in the labor camp where he dwelled would reasonably tend to interfere with employee rights. Even assuming foreman

Castro did state that there is a "Chavista Colony" here, I do not find that the General Counsel has met its burden of proof of intentional surveillance of organizational activity. I, therefore, recommend that Paragraph 9 of the Amended Complaint be dismissed.

(b) Surveillance of April 1, 1977. (Paragraph 22)

1. Facts:

Organizer Liz Sullivan went to Camp #4 to speak with the workers during the lunch period on April 1, 1977. As no lunch break was given the workers that day, she went into the field to "organize". She talked to "everyone" in the crew — some 50 workers — and noticed that Hilario Castro kept watching her all the time, never more than 2 rows away. She particularly noticed his presence some 10-12 feet away when she was speaking to worker Debbie Navas, and his peculiar criss-crossing pattern of following her among the vineyards.

Hilario Castro denied the surveillance, recalling that Liz Sullivan had asked him on that particular day why there was no lunch hour, and he explained to her that the workers "wanted to work 8 hours straight," rather than take a lunch break. (They took off 20 minutes in both the morning and afternoon.) He denied following the organizer or telling the workers not to talk with the organizer.

2. Analysis and Conclusions:

Although Foreman Castro's alleged extraordinary "pattern" of thinning Pearlettes suggests purposeful conduct that tended to interfere with UFW organizational activity, I find that the General Counsel has not met its burden of establishing a violation in this instance. Organizer Sullivan characterized her previous encounters with Hilario Castro as "friendly", adversary" situations, some of which included discussions with employees who felt "comfortable" during these sessions. Organizer Sullivan made no declaration regarding this incident, and no specific charge was filed. Debbie Navas did not testify. The conduct was of limited duration and consistent with the foremans' legitimate duty to supervise ongoing field work. Although other alleged unfair labor practices were attributed to Hilario Castro, I find that he was a generally credible witness who recalled most incidents with precision. He was soft-spoken, conveyed no hostility to the union or the hearing process and generally respected the rights of employees (with one exception relating to Foreman Castro's inability to recollect his inebriated encounter with worker Miranda following the layoffs of April 6-7, discussed infra).

As no workers corroborated Ms. Sullivan's recollection of the events involved, and she herself did not suggest that Castro's conduct tended to interfere with her organizational activity, I do not find that the preponderant

evidence establishes intentional surveillance by Hilario Castro. An uncorroborated observation of "union organizing activity" by a foreman while working in the fields, even conceding that the UFW's presence was lawful because no lunch period had been given that afternoon, does not support the charges raised in Paragraph 22 of the Amended Complaint, and I, therefore, recommend that they be dismissed.

3. Filiberto Robles

(a) Surveillance of March 31, 1977. (Paragraph 21)

(b) 1. Facts:

Father Joseph Tobin, an organizer for the UFW ministry for some $3^{1/2}$ years chronicled an incident involving foreman Robles at Camp de Oro on March 31, 1977. Between 5:30 and 6:30 P.M., Father Tobin entered the camp with organizers Vince Silva, Julio Gutierrez, and Alberto Puga, and went to the kitchen to speak with 5-6 women who were sitting around talking. After about 15 minutes, Robles came into the kitchen, stood behind the group for 2-3 minutes, said nothing, and then left. About 7 minutes later, Robles repeated this process. The women ceased their questions upon his first appearance, and departed upon his second entry. Accompanied by the same organizers, Father Tobin then proceeded to Camp #3 (a five-minute drive), where he again encountered Robles who stood by on two occasions for approximately 1-2 minutes, as the organizers talked with workers. At one point, Robles broke his silence by

querying whether "they were going to stay all night?" Robles denied ever getting near the workers when they were talking to union organizers because he "didn't want them to think that he was interferring", but proffered no specific testimony.

2. Analysis and Conclusions:

Although General Counsel presented no corroborating witnesses, Father Tobin's recollection of the series of events (of approximately 2-hour duration) and his description of the locations and persons involved lead me to find that the surveillance and interference did occur, was intentional, and was not de minimis, thus constituting a violation of Section 1153 (a) of the Act.

Given the protracted period of observation, and the lateness of the hour, no reasonable legitimate inference can be made as to Supervisor Robles' behavior in this regard, Certainly, his employment duties did not call for his particular tracking of Father Tobin on the evening of March 31. From the credible testimony, Foreman Robles stood directly behind the organizers and employees. He followed them to Camp #3 and maintained his vigil throughout their stay. To suggest that the repeated encounter was coincidental belies credulity, and I will recommend the appropriate remedy.

Since Respondent himself described Robles as "in

charge" of Camp #3, foreman of a crew directed by Jose Castro, and "responsible for the camp, its operation, and things that go on with it", I find that Robles is a foreman under Section 1140.4(j) of the Act, and that his conduct is hence attributable to the Respondent in this regard. Respondent's testimony that no instructions regarding surveillance were given to his supervisors (other than "not to interfere") does not exonerate his affirmative duty to see that supervising personnel conduct themselves within the boundaries of the Act. See Venus Ranches, 3 ALRB No. 55 (1977) citing Newton Brothers Lumber Company, NLRB No. 1557 (1953) enf'd 39 LRRM 2452 (5th Cir., 1954); Jewell, Inc., 30 LRRM 103 (1952) . (Pursuant to Section 20230, Cal. Admn. Code, all allegations of the Amended Complaint were deemed denied, and there were no stipulations at the commencement of the hearing. However, Respondent did not contest at hearing or in his brief the supervisory status of Foreman Jose Castro, Hilario Castro, Filiberto Robles, Reyes Ortiz and Ray Peay).

b. Surveillance of April 1, 1977.

Although not pleaded specifically in the Complaint,[6] testimony of Manuela Camelo detailed Robles'

[6]I rely upon Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977) for the authority to consider alleged unfair labor practices not alleged in the Complaint but raised at hearing. Since there was a full hearing on this issue and Respondent was able to cross-examine and present rebuttal witnesses, I find no prejudice to Respondent in consideration of this non-pleaded incident. Also, this surveillance issue is related to the subject matter of the Complaint, which alleges similar conduct by the same supervisor on one other occasion. See also, Anderson Farms Company. 3 ALRB No. 67 (1977) citing Monroe Feed

standing some five feet away when organizer Liz Sullivan handed her a UFW authorization card. Witness Carmelo signed this card, and within hearing distance of foreman Robles informed organizer Sullivan of her home address. As this incident occurred 3-4 days prior to the layoff of Manuela Carmelo and her husband, Oscar Perez, and was corroborated generally by witness Sullivan (although not mentioned by witness Danny Lopez, apparently a co-organizer on that particular day), I find that Robles' conduct constituted unlawful surveillance within the meaning of the Act.

Robles denied"getting close to union organizers" lest they think he was trying to interfere. However, I credit the testimony of Father Tobin, Liz Sullivan, and Manuela Carmelo in these incidents. Of all the supervisors, Robles[1] testimony was the least coherent -- as he alternately confused his duties, the work done by various crews, and the performance standards expected. He could not remember most specific incidents raised at the hearing, and others he considered "friendly talks" (See infra).

B. Interrogation of Employees

Interrogation of employees which "reasonably tends to interfere with the employees' rights under the Act constitutes an unfair labor practice. Maqgio Tostado, Inc.,

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Store, 112 NLRB 1336 (1954). Omark-CCI, Inc., 208 NLRB 469 (1974)

Note also that the credible testimony here places the foreman near the employee and the organizer for some five minutes of observation, at a time when work had finished and Sullivan and Camelo were leaving the fields.

3 ALRB No. 33 (1977), citing Hanes Hosiery, Inc., 219 NLRB 47 (1975), 90 LRRM 1027. The rationale for this judicially-created violation is the implied threat or warning to employees of the consequences of organization, which chills self-organization, and frustrates employee attempts to bargain collectively. Blue Flash Express, Inc., 109 NLRB 591, 34 LRRM 1384 (1959). To avoid the "taint" of interference", once General Counsel has proven a prima facie violation, it is necessary for the Respondent to establish that (1) the purpose for questioning was legitimate; (2) the employer communicated to employees its purpose; (3) the employer assured employees that there were no reprisals; (4) there was a background free of employer hostility to union organization. Blue Flash Express, Inc., supra. Three distinct acts of "interrogation" have been raised by General Counsel and the charging party.

1. Willie Garcia - Interrogation of March 15, 1977.

(Paragraph 8)

(a) Facts:

This allegation charges Respondent, through his agent, Willie Garcia, with distributing Employee Information Cards (General Counsel's Exhibits 9A and 9B) and telling employees to complete them in such a manner as to reveal their union sympathies.

The cards in English and Spanish, were worded as follows:

Name _____

Address _____

City _____State _____Zip_____

Social Security No._____

I DO WANT

I DO NOT WANT

The information contained in this card to remain confidential.

Signature _____

Date_____, 19____.

Willie Garcia testified that he was hired directly by Respondent as assistant crew leader and bookkeeper or "timekeeper", whose duties included time keeping, instructing workers in their jobs, record keeping, and "keeping watch" on people. As other members of the crew, Willie Garcia was paid hourly, but his pay was also based upon a flat daily rate of $2.50/hour for 10 hours of work rather than the $2.95/hour for an eight-hour day for the other members of the Mayo crew.

The index cards in question were given to Willie Garcia by Respondent bookkeeper Elizabeth, with instructions to have the workers sign them. No explantions for the cards were given. Many workers refused to sign

because they didn't know why they were signing, and Respondent admitted that the boxes referring to the confidentiality of the information had been added this year.

The Respondent explained that these employment cards had always been a portion of his operation, to supply necessary information for W-2 forms, and that the new information squares were inserted, at his attorney's advice, because of the Respondent's fears of releasing the requested data.

b. Analysis and Conclusions:

On their face, the cards are innocuous informational requests seeking employee names and addresses, and asking whether or not the employee wishes this data to be kept confidential. No reference is made to "union" or "no union" preference, or to the choice of a department supervisor (Paoli Chair Co., 213 NLRB No. 121, 87 LRRM 1363 (1974) or to the conduct of a Board and/or a third party election (NLRB v. Historic Smithville Inc., 71 LRRM 2972 (3rd Cir. 1969). The cards here merely inform the employer of those workers who wish to keep their name and addresses confidential, and give no suggestion of union preference.

However, applying the four-prong test of Blue Flash, Inc.,

supra, it is doubtful that the employer can avoid the "taint" of interference The nature of Respondent's "fears" of releasing the requested information were never established, nor was it explained why this particular feature (the confidentiality election) of the card had been added at this time, and for this year. There was ample testimony that the employees did not understand the purpose of the newly requested data — "I DO WANT" — "I DO NOT WANT" — and consequently no assurances that there would not be reprisals for "wrong answers" to the interrogation.

In the midst of the pre-election campaign, over two-thirds of the members of the Mayo crew refused to sign the cards. Witnesses Danny Lopez and Willie Garcia testified that they did not know-what the choice represented "union or no union". Nor did anyone ever explain the significance of the cards to the employees.

The very nature of the information sought denigrates the secret ballot requirement for lawful polls under the NLRB. See Strukenes Construction Co., Inc., 165 NLKB 1062, 65, LRRM 1385 (1967) Despite Respondent's denial, the cards essentially attempt to discover which employees are sympathetic to the UFW cause. Those who wish to be contacted by the union would check the "no" box. Respondent could easily have chosen to fulfill his obligations as an employer by omission of the "new features," or by explaining the significance of the information desired. It makes no difference that the

attempt is unsuccessful or even that the employees reveal just the opposite by incorrect understanding of the information requested. See Anderson Company, supra. Nor do I find a background free of employer hostility to union organization. To the contrary, there is substantial evidence of this "anti-union animus" by virtue of the number of violations discussed herein. Consequently, I find that in this context, the information cards passed out at Respondent's request, and without explanation, tended to chill employee organization rights and constituted unlawful interrogation in violation of Section 1152 of the Act.[7]

2. Jose Castro - Interrogation and Promised Benefits of April 7, 1977. (Paragraph 25).

a) Facts:

Worker Cesar Arreola testified that on the day following the layoffs of April 6, 1977, he reported for work in the courtyard at Camp #3 where he was told that there was no more work available for him, since work was finished. He was informed by foreman Jose Castro that he would get his job back within 15-18 days, but "don't get involved with

[7]Pursuant to 9 Cal. Admin. Code Section 20286 (a), I decline to take judicial notice of the Laflin and Laflin case,(77 CE-52-C) referred to in intervenor's Brief.
As the cards were distributed at Respondent's direction, I find that Willie Garcia acted as the latter's agent in this regard. See Section 1140.4(c) of the Act; Venus Ranches, 3 ALRB No. 55 (1977).

the union." Arreola explained that he needed the union because of the medical plan, but was told that Respondent would have a medical card for him within one week after he returned to work. Castro remembered worker Arreola, but denied ever questioning the latter about union activities or promising him anything for not supporting the union. Castro denied knowledge of Arreola's union preference during the time in question. Upon further examination, Castro admitted that Arreola had recently been rehired for the harvest season but allegedly was being fired because he placed "dirty" fruit in the "packing boxes, (b) Analysis and Conclusions:

The supervisor's warning to Cesar Arreola "not to become involved with the union", voiced in the same conversation promising future employment and benefits (medical card) and on the day of massive layoffs is typically violative of the Act. As in Maggio Tostado, Inc., 3 ALRB No. 33 (1977), where an interrogation is initiated by Respondent's agent, in the context of a threatened firing, said conduct would reasonably tend to restrain or interfere with the exercise of employee rights. The "hidden" threat here is not subtly obscured'. The warning to "stay away" from the union on the day of an unforeseen layoff violates the letter and spirit of Section 1152 of the Act.

Even though foreman Jose Castro denied the specific

incident in question, I credit the testimony of Cesar Arreola. Castro's statement that Arreola did not work properly because he placed "dirty" fruit in the packing boxes suggested his hostility to the employee. Arreola's testimony was precise and detailed on this issue even though cross-examination did reveal that he had erroneously recalled the date on his authorization card (See Exhibit R-6), and did not specify the interrogation in his declaration (R-8) which precipitated the charges underlying the Amended Complaint. Because the card was dated subsequent to that recalled by the witness, rather than earlier, I do not find that discrepancy significant, such as, indicative of covert activity on behalf of the union. Nor do I find the omission of this event in Arreola's declaration critical, as the "layoff" of that day was the principal motivational force of the statement.

For the reasons discussed above with respect to Supervisor Robles, I find that Jose Castro's actions are similarly attributable to the Respondent. Further, as Respondent admitted, Jose Castro was hired to bring in the required labor force and was in charge of supervision, including the designation of foremen to direct work. He is thus a "supervisor" within the meaning of Section 1140.4 (j)

3. Hi1ario Castro - Interrogation.

In his brief, General Counsel referred to Hilario Castro's friendly discussions regarding the UFW with employee Alvaro Zendejas.[8] Since these discussions were not corroborated by Mr. Zendejas, who testified, and were not specific as to time, place, and detail, I find the evidence insufficient to prove an unfair labor practice on this issue which was not pleaded in the Amended Complaint.

C. Promise of Benefits

1. Raise of March 29, 1977 (Paragraph 17)

(a) Facts:

As admitted by Respondent, and evidenced by General Counsel's Exhibit 4A, a "merit raise for a job well done" (from $2.70 per hour to $3.15 per hour) was given to all workers on March 29, 1977, one day after the Mayo crew had been fired. Jose Castro announced the raise to the workers, informing them that there would also be a medical plan and no dues, assuring that the Respondent would "go to $3.40" if the union also went to $3.40.

(b) Analysis and Conclusions:

The promise of benefits may constitute an unfair labor practice in violation of Section 1153 (a) of the

[8]The record reflects this testimony to be attributed to Foreman Robles.

Act because of the inherent danger that well-timed increases in benefits will "suggest" a "fist inside the velvet glove." Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. NLRB v. Exchange Parts Co., 375 U.S. 405, 55 LRRM 2098 (1964). The test is whether the conduct tended to affect the workers. Lawrence Vineyards Farming Corporation, 3 ALRB No. 9 (1977). And in particular situations, the Respondent may have the burden of justifying the timing of the benefits conferred. Kawano, Inc., 3 ALRB No. 54 (1977), enf'd. 384 F.2d 479, 484-85; NLRB v. Panhandel Bradford, Inc., 520 F.2d 274, 89 LRRM 3195 (1st Cir. 1976).

In Kawano, an election was in the offing. Here, UFW organizational activity had increased, gearing for the anticipated peak employment period during thinning. An entire crew had been terminated the day before, and the raise was announced by distribution of an electioneering leaflet, (See Exhibits G.C. 4A-4B) pointing out the benefits of "NO-UNION". Supervisor Jose Castro admitted in testimony corroborated by employee Victor Ibarra, that the raise was also announced to the workers with the assurance that the Respondent would "go to S3.40" if the UFW also went to

$3.40.

Respondent's testimony that he had previously given piece rate incentives that would far surpass the $.45/hour raise, and had given his own raises when not under contract (over 6 years ago) does not demonstrate a historical pattern of matching or improving benefits granted by competing employers which would justify this conduct. Cf. J.P. Stevens & Co. v NLRB, 406 F.2d 1017 (4th Cir. 1963).

Nor do the Respondent's contentions that the Union-Teamsters "sweetheart" deal (Exhibits G.C., 4A, 4B) enable him to ignore the Teamster contract explain why he did not wait two weeks until the April 14 termination date of that contract. As in Lawrence, supra, in the context of intense union activity, and pre-election campaigning, this grant of significant benefits to the remaining portion of the workforce cannot be seen as a mere expression of noblesse oblige. And the Respondent's purpose and tenor to deprive his employees of their right to self-organization and collective bargaining was made more evident when viewed with Respondent's other actions and independent violations. See Butte View Farms, 3 ALRB No. 53 (1977).

I find that the grant of benefits announced at the peak of the pre-election campaign, one day after the firing of an entire crew, two days after a widely publicized UFW march, and presented in an employer propaganda speech and leaflet

was made to induce employees to vote against the union. See Anderson Farms Company, supra. The conduct amounted to substantial inference with employee rights and constituted an unfair labor practice in violation of Section 1153(a). The "velvet glove had worn thin" and was not able to "veil the clenched fist of unlawful activity".

2. "Bribe" by Jose Castro of April 5, 1977.

Intervenor has raised in its brief Jose Castro's loan of $10,00 to Ruben Miranda during an argument in the Campo de Oro. As Miranda admitted that he asked for the $10.00 - stating that he would sign up with the UFW if he didn't get it — I do not find that Castro's conduct constituted an unfair Tabor pracice.

D. Unlawful Threats and Interference.

While the Respondent's rights to free speech are protected in Section 1155 of the Act, that Section prohibits threats of reprisal or force. Thus, an- employer cannot threaten employees with discharge or layoff for participating in organizational activity. National Tape Corporation, 187 HLRB No. 41, 76 LRRM 1008 (1970). The test is whether the statement's of the foreman amount to threats of force or reprisals within the control of Respondent. Bonita Packing Co., 3 ALRB No. 27 (1977). General Counsel

[9]The payroll records reflect that the $10.00 was deducted from Miranda's final check.

has raised six (6) incidents of alleged threats, three (3) each by Supervisors Filiberto Robles and Jose Castro as well as four (4) other allegations of unlawful interference,

1. Berto Robles - Threats of Discharge and Removal and Deportation of March 18, 1977, and April 6, 1977.

(Paragraphs 11, 12, 26).

(a) Facts:

Worker Rosa Zendejas recalled a conversation with Foreman Filiberto Robles which took place in the fields of Mecca "sometime" in March, on the day after she had started thinning Pearlettes for Respondent. During lunchtime, an unidentified UFW organizer came over to talk with her and later returned because nobody else would talk with him. Approximately 10 minutes after she had resumed work, Foreman Robles approached her and told her to be careful about signing authorization cards, because "at the first scarcity of work, all the Chavistas would be kicked out". Robles allegedly made these remarks with a look of hatred, which elicited no reply from Mrs. Zendejas.

On the last day that she worked the field in Mecca (on or about April 6, 1977), Rosa Zendejas recalled further that Robles saw her reading a leaflet given her by UFW organizers that day. The foreman told her "do not look at that dirty paper, the rancher will see you and will fire you". On that very day, Robles was overheard by Mrs.

Zendejas to admonish two other unidentified workers situated in the nearest row — approximately 5 feet away — to be careful and not sign authorization cards. "We know you are illegal, and the rancher will get you out or fire you. If not, immigration will get you, or we will get immigration to take care of you."

Mr. Zendejas' 17-year old son Alvaro related an identical threat by Foreman Robles on the second day of thinning Pearlettes — to wit, that he should be careful about signing authorization cards, because "in case of shortness of work, the Chavista's would be the first to go."

Foreman Robles denied having said that the "Chavistas" would be kicked out," or even having talked with Mrs. Zendejas while she was reading a union leaflet. But he did recollect that she and her family were union supporters, and did admit to a "casual" conversation with a worker friend where he jokingly told the man that he would fire him if he went with the union (in response to some insults about Robles[1] mother). And Robles confirmed that there may have been people close enough to hear and took what he had to say "badly".

b. Analysis and Conclusions:

Robles[1] warning to Rosa Zendejas and her son

Alvaro Zendejas on the same day that the Chavistas would be the first to go in case of work scarcity constitutes unlawful restraint and coercion. The threat of reprisal is manifest, since Robles had the authority to hire the members of his crew.[10]

A similar conclusion must be reached for Robles[1] warning of April 6 to Mrs. Zendejas not to read the "dirty paper" (UFW leaflet) --"the rancher will see you and fire you".

I credit the testimony of Mrs. Zendejas and her 17-year-old son in these incidents. Although uncorroborated by other witnesses, the Zendejas[1] testimony withstood lengthy cross-examination by Counsel. They had driven down from Delano, California to testify, admitted their previous support for the UFW, but denied ever having organized for the union, or of even talking with others outside of the immediate family about union matters. Although both were uncertain as to dates, their ability to recollect the incidents and the circumstances of the threats was persuasive.

Mrs. Zendejas who had worked many years in the fields,

[10] It was unclear from the record whether these were two separate conversations. Although General Counsel has alleged two counts (Paragraphs 11 and 12 of the Amended Complaint), because of the imprecision of dates and witnesses present, I find that the evidence supports a single violation.

and had no known "stake" in the layoff or discharge issues involved in the hearing, was a particularly compelling witness. Thus, I believe that her testimony merits greater consideration than that of Berto Robles who was often confused and attempted to pass off the remarks as jests. For the reasons cited earlier regarding allegations fully litigated at the hearing and relating to the subject matter of the Amended Complaint, I find that the warning about reading the UFW leaflet incident "appropriate for cnnsideration" and constitutes a separate violation of Section 1153(a).

I reach a different conclusion with respect to the overheard conversation that "the immigration will get you",as Robles, allegedly warned two nearby workers not to sign UFW authorization cards, since the "friendly" worker who might have corroborated or denounced Respondent's position never testified.

The suspicion is raised that the words were not in jest. However, without other evidence in the record and in light of the fact that the utterances were not directed at Mrs. Zendejas (and hence she could not testify as to whether the conversation was serious or jestful), I do not find that General Counsel has sustained its burden of proof on this issue and recommend that Paragraph 26 of the Amended Complaint be dismissed.

2. Jose Castro

(a) Instruction to to Sign Authorization Card of March 18, 1977. (Paragraph 13)

1. Facts:

Worker Victor Ibarra recalled foreman Jose Castro instructing him to tell people not to sign UFW authorization cards sometime during his first week at Respondent's Ranch #3. Mr. Ibarra responded that he didn't think his people would sign, referring to the group of some 15-20 people who had travelled to Madera with him in order to work Respondent's Coachella Valley fields. Jose Castro denied ever knowing Mr. Ibarra by name, but did admit to telling a 13-year old boy that he should talk with his father before signing since he was underage.

2. Analysis and Conclusions:

I credit Mr. Ibarra's testimony in this regard, because Jose Castro's contentions vacillated between outright denial and admission that he had told a "13-year old boy to talk with his father before signing." Although neither witnesses' allegations were corrorborated, I find that Mr. Ibarra recollected the incident with precision and clarity (albeit he was sometimes confused about dates). On cross-examination, his lengthy experience (over 20 years) in the fields further buttressed his credibility as a witness. That

the warning carried with it the implicit threat of discharge should the workers not take heed mandates a finding that Castro's statement constituted unlawful restraint and coercion. See Hemet Wholesale, 3 ALRB No. 47 (1977).

As the head supervisor in charge of other ranch foremen, with authority to hire and fire crew personnel, I find that this threat is attributable to the Respondent and thus violative of Section 1153 (a).

(b) Threat of police surveillance of ALRB election of March 30, 1977. (Paragraph 20).

1. Facts:

Mr. Ibarra further testified that during the last part of his second week at Respondent's Camp #3, in the alley behind the kitchen, Jose Castro said "there was going to be an election with policemen, sheriffs, and if necessary, the border patrol". Mr. Ibarra recollected that the statement was made sometime in the morning, in a loud voice, with others present (including Liz Sullivan) and that foreman Castro was a "little bit upset" when he spoke. Liz Sullivan corroborated this statement, adding that he repeated it twice, "stunning" all those who could hear.

Foreman Castro admitted to the substance of the speech but denied any intent to threaten, explaining that he was merely informing the workers that "there would be police or someone from the Labor Board if there were an

election." His explanation for the statement was that it was time for work. When there was an election, "the police would come to supervise that."

2. Analysis and Conclusions:

Regardless of the tone of voice or specific motivation involved, I find that Jose Castro's admitted statement in this context tended to interfere with employee rights under Section 1152. The scenario was corroborated by organizer Sullivan, and the effect was to "stun" the nearby workers within hearing distance. The words cannot reasonably be interpreted as "simple election propaganda" or as a carefully phrased statement geared to enabling employees to evaluate its contents. See Mitch Knego, 3 ALRB No. 32 (1977); Hemet Wholesale, supra. Thus, the statement is not protected free speech. As the words tended to restrain workers in the exercise of their rights guaranteed by the Act, the incident constitutes a violation of Section 1153 (a) and I so find.

(b) Threat of discharge because of organizational activities of March 30, 1977. (Paragraph 19)

1. Facts:

Organizer Liz Sullivan recalled Jose Castro's stating that "they're going to fire us all", as he picked up the UFW leaflet (1-1) which responded to the raise of March 29, 1977. She had gone to Campo de Oro with organizers

Ruth Shy and Father Tobin and began passing out the leaflet to sleepy workers who were just awakening that morning. Many read and started to talk about the leaflet when Jose Castro picked one up, threw it down angrily, and made the foregoing remarks.

On cross-examination, organizer Liz Sullivan admitted that her handwritten chronology of alleged violations did not refer to this incident or to the presence of anyone else. Neither witness Shy or Tobin corroborated the alleged threat. Jose Castro denied ever having threatened employees with discharge because of organizational activities by the UFW.

2. Analysis and Conclusions:

Whereas I categorize this type of incident as an unfair labor practice, I find that General Counsel failed to meet its burden of establishing the occurrence by a preponderance of the evidence. While Liz Sullivan's testimony concerning this incident was credible and precise, it was uncorroborated by any workers or by organizers Shy and Father Tobin, who both testified and were allegedly in the camp yard when it occurred. Jose Castro's denial of this charge was also specific and made without vacillation and organizer Sullivan failed to refer to this incident by prior declaration or in the chronology she maintained to outline

Respondent's conduct during the organizational campaign. With a direct conflict in the testimony and no additional evidence to shed light on the truth of the allegation, I find that General Counsel did not meet his burden of proof. I therefore recommend that this charge be dismissed, S. Kuramura, 3 ALRB No. 49 (1977).

3. Hilario Castro -- Interference with signing of UFW authorization cards -- March 30, 1977. (Paragraph 18)

(a) Facts:

UFW organizer Ruth Shy testified that one noon hour near the end of March, 1977, she went out in the courtyard at the Respondent's Campo de Oro to talk with three or four younger workers. She spoke with them about the union for approximately 20 minutes and had persuaded one worker to sign an authorization card. Another worker was examining the card when Hilario Castro appeared from behind and stood for some four minutes, commenting that "it's a vote." According to Ruth Shy, the workers froze before she was able to explain the election process, the secret ballot, etc. Hilario Castro mumbled something and then walked away, at which point the workers dispersed.

Hilario Castro recalled the incident in question, but denied ever telling anyone to sign or not to sign an authorization card. He affirmed his suggestion that the signature was a vote, but explained that the young worker

asked him what the card meant and he informed him that it was a vote for the organizers that "there should be an election", but not "that there was a vote for the union."

(b) Analysis and Conclusions:

I find that this allegation of interference by Hilario Castro to be more an expression of his views than a threat or inducement not to sign an UFW authorization card. See Mitch Knego, supra. Organizer Shy did not recall who these young workers were, whether or not she made a formal declaration regarding this incident (which did not appear in the charges) and admitted that no authorization card was lost by the encounter. Without a corroborating witness to dispel Castro's testimony that the information was solicited, I find that General Counsel failed to sustain its burden of proof and recommend that Paragraph 18 of the Amended Complaint be dismissed.

4. Use of Violence

In its brief, Intervenor contends that Berto Robles pulled a worker's ear, just as the latter had begun to read a leaflet one morning at the Crockett Ranch, as described in Father Robin's testimony. It is alleged that such constituted physical violence in violation of the Act.

I wholly concur that such violence is anathma to the goals of the ALRB and cannot be condoned. See Tex-Cal

Land Management, Inc., 3 ALRB No. 14 (1977). However, I do not find that General Counsel established the conduct by a preponderance of the evidence. The worker was never identified, and the incident was revealed more as an afterthought by Father Tobin, who failed to record same in his declaration which outlined the unlawful surveillance earlier discussed. Without more evidence, I cannot determine whether Robles was merely (playfully) urging a worker back to the field, or physically intimidating him to discourage union organization. I, therefore, decline to find a violation of this unpleaded allegation.

5. Employer Leaflets

Intervenor contends in its brief that various employer leaflets (Exhibits G.C. 5-8) constituted serious threats in violation of the Act. Reviewing the documents which list the benefits of "No-union" and warn of the "trap" of a three-year contract, I do not find the information contained therein so misrepresentative, or inflamatory that they could not be properly evaluated by workers. Indeed, the union produced its own leaflet to assist the workers in this evaluation (See Exhibit 1-1 and 1A). In the context of an emotional and heated organization campaign, I find the documents to contain the type of obvious propaganda which would be easily

recognized as such and does not serve as the basis for finding unfair labor practices. See Bud Ajitle West Foods Inc., 3 ALRB No. 12 (1977). As protected free speech, I decline to find violations with respect to these unpleaded issues.

6. Interference with UFW and ALRB.

In its brief, Intervenor contends that Respondent violated the Act when Willie Garcia stopped Liz Sullivan (in January, 1977) and told her that she needed permission from the office to enter the camps.

Respondent testified that he desired to discuss permissible access with the UFW organizers at the commencement of the pre-election campaign.

As this was an isolated instance, occurred only at the commencement of the organization campaign, and apparently did not thwart organizer Sullivan's activities even on the day in question, I find that there is insufficient evidence on the record to constitute another unfair labor practice. Since it was not clear whether organizer Sullivan followed these instructions, spoke with the Respondent, or simply continued onto the fields, I recommend that this unpleaded allegation be dismissed. See D'Arrigo Brothers Co. , 3 ALRB No. 31 (1977).

E. Termination of The Mayo Crew (Paragraph 16) 1. Facts:

General Counsel alleges that Vitaliano Mayo

and the 43 members of his crew were discriminatorily discharged because of their support for and activities on behalf of the UFW. Respondent denies that the crew was discriminatorily discharged — proffering alleged "slowness" as the rationale for the mass-firing of March 28.

Assistant crew leader Guillermo Garcia testified that he was hired in January by the Respondent himself, was in charge of keeping the Mayo crew records, and acted as "assistant" supervisor in Mayo's absence. Prior to the layoff of March 28, Garcia had never been told by Mayo or anybody that the crew had been working too slowly. While he had worked in grapes for 11 years, he had never been in a crew where the entire crew had been fired for working too slowly A few days prior to the crew layoff, foreman Jose Castro gave some leaflets to Garcia to pass out among the workers (Exhibits G.C. 4A-8A); Garcia testified that he didn't pass out the leaflets but kept them, because the people "would just throw them in the field."

Francisco Mateo was hired as a cook by Mayo in December 1976. He was a long-time union supporter, who signed an authorization card on February 14, and put up a union poster on the kitchen wall at Camp #4. Mateo talked to workers when they returned from the fields about the benefits of the union, attended weekly union meetings

and other conferences, as well as made a radio broadcast which promoted the Cesar Chavez march from Mecca on March 27. Mr. Mateo had been a cook for 5 years, stating that nobody had complained about his cooking while he worked for Respondent. He was told by Mayo that "we were fired out"' but no reason was given him.

Danny Lopez had worked in grapes since 1952, and was hired by Mayo in late January, 1977. He was asked by the UFW to participate in the Radio Announcement concerning the Cesar Chavez march from Mecca to Coachella. He did the advertisement, stating his name, and identifying himself as a Harry Carian Philippine worker. He also signed a UFW authorization card and had casual talks with other workers regarding the benefits of the union. Mr. Lopez participated in the "March from Mecca" holding the Philippine flag and walking in the front ranks. He was fired with the rest of the Mayo crew — the day following the march. Lopez asked foreman Mayo the reason for the layoff, but was told only: "I don't know. You see, with these Chavista people, you work too slow." He had never been forewarned of the inadequacy of his or the crew's work, nor had he ever been told to speed up his labor, or even strive for a given number of rows per hour or rows per

day. As the other members of the crew, Lopez was paid hourly. His instructions were to do the work carefully, to avoid "dropping or bruising" the fruit. Never before had Lopez worked on a crew that had been fired as a group, although admittedly the entire Mayo crew worked at about equal ability. At the hearing, there was still doubt in Lopez's mind as to why he had been fired.

Organizer Sullivan described the Mayo crew as enthusiastic. Her first contact with them in January, 1977, yielded some 4 authorization cards and the renewal of old acquaintances from her organizational work in Yuba City. The Mayo crew — 1/3 Philippine and 2/3 Mexican, as opposed to the other two crews (those headed by Hilario Castro and Filiberto Robles) were in organizer Sullivan's estimate 85% pro-union by March 28 - the date of the discharge. They signed authorization cards, took part in UFW projects, donated funds for radio spots, passed out leaflets, and displayed posters and bumper stickers. About 4 members of Mayo's crew joined the 5000 people who participated in the Chavez "March from Mecca" on the day before the layoff. In contrast, the other crews were more "tense" and offered less UFW support. By the date of the layoff, organizer Sullivan was confident of majority union support, stating that "they would all vote for us".

For Respondent, grower Wayne Mayfield testified that Harry Carian employees pruned and thinned his Thompson seedless and Pearlette table grapes in January-March, 1977. Mr. Mayfield did not find fault with the pruning work accomplished by the Mayo crew in January of 1977, but somewhere between March 21 and March 24, he discussed with Mr. Ray Peay — Respondent's "eyes and ears" — his dissatisfaction with the "thinning" operation. To his visual inspection, the Mayo crew was working too slowly Respondent asked Mr. Mayfield to keep records of the Mayo crew work, and eventually, on March 25, brought in a new crew (Robles' crew) to help finish the job on the second Mayfield Ranch. Mr. Mayfield was "amazed" at the difference. His records reflected that the Robles crew, working in the same field, thinned an average of 61.6 vines per day. The Mayo crew thinned only 42.4 vines per day.

Respondent corroborated the low production rate of the Mayo crew's thinning operations, adding that he first noted the slowness in mid-March during succoring. He personally checked the Mayfield Ranch on the first afternoon of thinning after everybody had gone home, and recognized that the work was "very slow". He then asked Mr. Mayfield to keep accurate records of the number of vines done by the Mayo crew, explaining that many had never

thinned for Carian Sales before and hence might not have been familiar with brush thinning.

Respondent stated that he admonished Mayo on the 22nd of March, saying that "they were making a clipper thinning job out of brush thinning" and that there was no need to do that. The next day's progress was still not satisfactory, and Respondent queried of Mayo whether something in the vineyard was causing a problem. Respondent then ordered Jose Castro to have Robles send his incubating crew onto the Mayfield Ranch and asked Mr. Mayfield to make a comparison, and Mr. Mayfield kept a written log of the two weeks' work. (Respondent's Exhibits 11, 12; General Counsel's Exhibit 21).

Respondent was "in grave doubt as to how to handle the situation since a lot had been thrown out" at Respondent from the UFW and the ALRB. He consulted an attorney who advised that a crew could be fired for non-productivity. On Friday, March 25, 1977, it rained and no work was done. Saturday was a half day, and a comparison was again made. At 12:00 noon on Monday, the 28th day of March, Respondent asked for a vine count, comparing the two crews and sent Ray Peay into the field to have Mayo "see me between 1:30 and 2:00 P.M." In Respondent's own words, he "was very sorry, but the crew was obviously not going at the correct pace. For whatever

reasons, the crew chose not to do work as I want them to do, and I have to terminate you. Get your payroll in this afternoon and you can have your paychecks."

2. Analysis and conclusions:

Section 1153 (c) of the Act makes it an unfair labor practice for an employer " (b)y discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." The General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the discharges. Maggio-Tostado, 3 ALRB No. 33 (1977), citing NLRB v. Winter Garden Citrus Products Co-Operative, 260 F.2d 193 (5th Cir. 1958). The test is whether the evidence, which in many instances is largely circumstantial, establishes by its preponderance that employees were discharged for laid off) for their views, activities, or support for the union. Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977). Among the factors to weigh in determining General Counsel's prima facie case are Respondent's anti-union animus, the timing of the alleged unlawful conduct, and the extent of the employer's knowledge.

Apart from Respondent's own admitted preference for "no-union", and the campaign literature proclaiming same, which I consider protected free speech under Section 1155

of the Act (and therefore not supportive of General Counsel's theory) the record is replete with instances of anti-union animus. Specifically, the prior finding of various unfair labor practices — unlawful surveillance, interrogation and threats — all of which occurred within a six-week period during a heated pre-election campaign constitute strong direct indicia of anti-union animus, which suggests the impropriety of the mass discharge. See Southwest Janitorial and Maintenance Corp., 209 NLRB 402, 85 LRRM 1590 (1974). See also, Kellwood Co., 206 NLRB 665, 669 (1973); D. H. Baldwin Co.. 207 NLRB 25, 26-27 (1973); Mademoiselle Shoope, Inc., 199 NLRB 983, 990 (1972).

Respondent's knowledge of employee union sympathy and/or activity may be inferred by the highly visible and vocal union activities of the Mayo crew -- the "most activist" of the crews. Posters publically displayed at the camp kitchen, radio broadcasts sponsoring the upcoming Cesar Chavez rally, and the "evacuation" of the camp on the day of the March would not reasonably go unnoticed by the Respondent. This crew would not sign the "Employee Information Cards", and anti-union leaflets would be dumped into the fields. Respondent's "eyes and ears" Ray Peay daily observed the activity of the Mayo crew, as did owner Mayfield who would describe some workers as "noisy" and troublesome.

Organizer Sullivan described the differences in the response she received between the Mayo crew and the Hilario Castro crew and noted the openness with' which the Mayo people talked with her at the camps, in the fields, and in the presence of supervisors.[11] Invoking the "Small Plant Doctrine and imputing the supervisor's knowledge regarding the employees' activities (S. Kuramura, supra; NLRB v MacDonald Engineering Co., 202 NLRB No. 113, 82 LRRM 1646 (1973), I find that the Respondent was fully aware of the union sentiments of the Mayo crew.

The timing of the discharge — one day following the "March from Mecca" {with a member of the Mayo crew prominently parading in the front ranks carrying the Philippine flag) furtherbuttresses the suggestion that the discharges were discriminatorily directed at discouraging membership in the UFW. Indeed the very next day raises would be given to the remaining crews, along with promises that work would continue through the

[11]The record does not reflect whether the Mayo crew was the only active and visible pro-union group on the date of termination. There were many vocal UFW supporters who remained at least until April 6-7. See infra.

harvest season. The message to the employees was clear --either the "carrot" of increased benefits and more work ,or the "stick" of sudden discharge. Union support and outward sympathy might be associated with the latter, but not the former.

Respondent makes a persuasive showing, however, that the real reason for the layoff of the Mayo crew was one of sound business necessity — they simply were not productive. The comparative records reflect that the Robles crew worked approximately 50% faster than the Mayo crew. (See Exhibits G.C. 21; R. 11, 12). Discounting the mathematical differential caused by the larger overhead factor (three for Mayo, one for Robles), there is still a considerable gap between the crews' productivity quotients. [12]

Respondent's contention is buttressed by his uncontroverted efforts on at least three previous occasions to rectify the situation — to give further instruction on the "thinning" operations and ascertain if there were any particular difficulties on the Mayfield Ranch — as evidenced by his conversations with employer Mayfield and with supervisor Mayo. Since Mayo did not testify to contradict Respondent's contentions in this

[12]I do not distinguish between the portions of the Mayfield Ranch that were thinned, as I find Respondent's testimony (Mr. Mayfield) that the Robles portion was more dense, and hence more difficult to thin than that of the Mayo crew to be directly contradicted by supervisor Ray Peay who declared that it was a generally "good field." Nor do I find that the testimony of Board Agent Mauricio Nuno to be persuasive in light of his

regard, [13] I make the inference that that portion at least of Respondent's case is not refuted by the General Counsel. AS-H-NE, 3 ALRB, 53, citing Scott Gross Co., Inc., 154 NLRB 1185, 60 LRRM 1114 (1965).

As the previous warnings to Mayo proved futile, Respondent felt compelled to terminate the employer-employee relationship. Wages paid would have to be deducted from the ultimate selling price of the grapes following harvest. Hence, Respondent could not justify the lack of productivity to the cost-conscious Mr. Mayfield.

Respondent's repeated efforts to remedy the situation render inconsequential the factual disputes as to the experience of the Mayo crew in the brush-thinning method (this was their first year with Respondent as a crew, although some individuals had worked the Carian Ranches previously), and the mechanical nature of this procedure. I find that the members of the Mayo crew were given adequate instructions on the "thinning" technique which was

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limited experience thinning Pearlettes, (no "thinning" and only two summers during the "harvest" over the last 13 years) , and his confusion as to which portions of the field corresponded to which geographical directions.

[13]Mayo was apparently available to testify as he assisted General Counsel and Board Agent Nuno inspect the Mayfield premises during the hearing.

developed by Respondent himself. Additionally, the records kept on the crew's progress -- an eight-day period during the thinning season which would soon be completed — gave them ample time to improve their' performance.

Respondent's position is not immune from scrutiny, however. There had been no "mass" firing of an entire crew by Respondent in over 19 years. There were no other comparative figures of the thinning production of any crew, except the charts of Mr. Mayfield comparing the Robles and Mayo crew over a four-day period. Nor did the Respondent rely upon his usual procedure of posting stakes at the end of each row with the worker's names to identify the productivity or pace of the individual.

Placing the burden on the Respondent (See Maggie— Tostado, 3 ALRB No. 33 (1977), relying on NLRB v. Great Dane Trailer's, Inc., 388 U.S. 26, 65 LRRM 2465 (1967)), once the General Counsel has proved its prima facie case by showing that the employer has engaged in discriminatory conduct which could have adversely affected employee rights, I find that the preponderance of the evidence establishes that the Mayo crew firing was motivated by legitimate business objectives. Had they not been "slow", the Mayo crew would not have been discharged, irrespective of their union sympathies and/or activities. While

crews were not previously fired by Respondent en masse for many years, they were hired as a group, lived as a group, and were in contact with Respondent only through foreman Mayo. Foreman Mayo (with the exception of timekeeper Willie Garcia) was wholly responsible for recruiting "his people". The testimony of Mr. Peay, Mr. Mayfield, and Respondent confirmed the contention that the entire crew worked at approximately the same (slow) pace, which made the omission of the individual name posts inconsequential. Respondent acted through the advice of counsel in charting the Mayo crew performance, and did so in this instance because of his particular concern not to violate the Act.

Nor do I find that any anti-union motive constituted "the last straw which broke the camel's back". See NLRB v Whitfield Pickle Co., 374 F.2d 576, 582, 64 LRRM 2656 (5th Cir. 1967). The discharge of the Mayo crew was consistent with Respondent's avowed purpose to give merit raises and extend work to those who earned it. It was a necessary, albeit unfortunate, alternative to maintaining his commercial enterprise.

While there lingers a suspicion of discriminatory purpose in these discharges, the thought persists that the employer must retain the discretion to terminate his

workers for his reasons, so long as he does not do so on account of their union activity. (See Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977). Where, as here, those reasons are well-documented, where they do not shift from basis to basis, where they are born of economic necessity, and there has been fair warning of the employer's displeasure, I do not find that there is sufficient evidence to reject his determination. Viewing the record in its entirety, I find that the greater probability of truth suggests that the motivating reason for the discharge of the Mayo crew was lack of productivity, Thus, having determined that Respondent's explanation by a preponderance of the evidence refutes the inferences of discrimination drawn from the circumstances, I therefore find that the Respondent did not violate Section 1153(a) and (c) of the Act by discharging the Mayo crew — with the following exceptions:

I do not find the Respondent's contentions meritorious with respect to Francisco Mateo, as there was no evidence that he was derelict in any of his duties as a cook.[14] While General Counsel in his brief suggests the "public nature" and purpose of

[14] Since his duties were "incidental"to the Respondent's agricultural operation, I find that Mr. Mateo was an"agricultural employee" within the meaning of the Act. See Dairy Fresh Products Co., 2 ALRB No. 55 (1976).

the Act, I find that employees' personal rights — particularly the right to a job — to be of great significance. Since Mr. Mateo was a cook of five years experience, who received no criticisms for his cooking, I do not find that the "lack of productivity" defense justifies his termination. Since Mr. Mateo was in charge of the one camp area openly adorned with Union campaign material, and had participated in the radio broadcast prior to the "March from Mecca", I find that the employer had knowledge of Mr. Mateo's union activity, and that there arises the strong suspicion that his discharge arose at least in part from the employer's anti-union animus. AS-H-NE Farms, 3 ALRB No. 53 (1977).

I reach a similar conclusion with respect to Mr. Willie Garcia who received no criticism or warning for his work as timekeeper and who exhibited union sympathy when he did not pass out the Respondent's anti-union leaflet.

Having found that Respondent terminated the group as a whole for their "slowness", rather than focusing on the particular productivity or union sympathy of any one worker, I do not opine that the business necessity contention can rationally be applied to Mssrs. Mateo and Garcia. Whether or not the employer actually gave

consideration to each worker individually when deciding to discharge the crew becomes irrelevant once it is determined that each discriminatee is protected by Section 1152 of the Act. Since the lawful reasons are insufficient to explain these two individual firings, I find that the discharge of Francisco Mateo and Willie Garcia constituted violations of Sections 1153 (a) and (c) of the Act, and will recommend the appropriate remedy.

I find that at least with respect to these two named agricultural employees, the moving reason for the discharge necessarily related to their support for the UFW (NLRB v. Linda Jo Shade Co., 307 F.2d 355, 357 (5th Cir. 1962), rather than to non-productivity. This determination encourages the suspicion that unlawful purposes engendered the mass firing as well. The anti-union campaign lends credence to the allegations of an overall pattern of conduct to rid Respondent of UFW supporters under the pretextual guise of a justifiable termination for "slowness." I do not feel, however, that this suspicion upsets the preponderance of the evidence which supports the Respondent's contentions on this issue. See V.O.A. Fuller Supermarket, Inc., 347 F.2d 197 (5th Cir. 1967) 64 LRRM 2531; Schwob Manuf. Co. v. NLRB, 292 F.2d 864 (5th Cir. 1962) 49 LRRM 2360.

The Mayo crew was fired as a crew for their slowness. They came to Respondent as a group through their foreman, and their group performance was inadequate. Having found

the group performance inadequate and the thinning season rapidly coming to an end (at least on the Mayfield Ranches), Respondent could not reasonably be expected to single out and discharge the foreman, p_r the "slowest" of the "slow." Thus I conclude that the crew would have been terminated on March 28 regardless of their perceived or actual union sympathy.

Nor do my subsequent findings alter this determination. The discharge of the Mayo crew was forewarned; the layoffs of April 6-7 were not. The March 28 firing was documented by Respondent's records; the layoffs were not. The firing was consistent with Respondent's overall (legitimate)
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aspiration to reward meritorious work and punish poor productivity; the layoffs singled out UFW sympathizers. The inadequacies of Respondent's explanation with respect to the April 6-7 events do not compel rejection of the documented indicia of the Mayo crew's "slowness". I perceive the balance here to preponderate with Respondent, and so find.[14a]

F. Layoffs of April 6-7 (Paragraph 27)

1. Facts:

General Counsel alleges that on the 6th or 7th of April, Respondent failed and refused to continue in its employ or to rehire 42 agricultural employees who worked for Harry Carian Sales in the thinning of Pearlettes, said refusal being due to the employees' real or perceived UFW support and/or activity." Respondent denies any discriminatory motive, attributing the layoffs to the end of the thinning season, following which there was insufficient work in his fields until the harvest season — seven to eight weeks later.

Employee Guadalupe Yniquez testified that he started pruning for Respondent in December, 1976, and was hired by Jose Castro. He was an active supporter of the union, talked with other workers about the benefits of the UFW, attended union meetings, solicited signatures on authorization cards, donated his truck to be used as a

[14a]Because of this finding, and the reasons stated therefor, I decline to dismiss Paragraph 16 on the basis suggested in the Respondent's brief.

stage for shopping center rallies, and joined the "March from Mecca" on March 27. His room at Campo de Oro was decorated with the union flag, buttons, bumper stickers, and decals, the latter of which were posted on his window. Following the march on March 27, Mr. Yniquez met with Cesar Chavez and "told many people" about the meeting.

On further examination, Yniquez admitted that he conducted his activities privately, because he "was afraid and . . . wanted to continue working," but did recall that he would tell Hilario Castro that he was going to the union meetings. Yniquez became more inspired as more and more workers signed authorization cards, but on the morning of April 6th or 7th, he was told by Jose Castro that there was no more work. Agents from the ALKB showed up that morning, and Jose Castro recanted, telling Yniquez that he could return to work. As people had already been working for 2 hours,, and he was told that there was only 4 hours of work in any event, he did not work that day but returned the day after, and stayed until he voluntarily left in the last days of May because of the impending summer heat. Approximately one week before the "layoff", Yniquez testified that numerous people were arriving and being put into Camp #3.

Ruben Moreno Miranda testified that he was hired by Jose Castro in December, 1976, and worked for Hilario Castro and Filiberto Robles, living at Campo de Oro with

approximately 60 others from the same crew. He pruned, did general repair work, irrigation, and commenced thinning toward the end of March. He did not sign a UFW authorization card until mid-March, and from that time on, would talk with other workers about the union, but was careful not to say anything in front of the foreman because he felt he would have gotten fired." On April 5, Miranda testified that he witnessed Liz Sullivan and another UFW organizer talking with workers in the camp yard at about 6:00 P.M., when Jose Castro and Hilario Castro came over. He became embroiled in an argument with the two foremen which "got pretty heavy for awhile". Miranda recollected that the incident was the first time he ever "spoke up" (about the UFW), and also that he had asked for a ten dollar loan from Castro saying, "if I don't get the money, I'll sign up with the Union".

On the morning after the union meeting of April 6,[15] Miranda went to the yard to be dispatched, but was told

[15]The meeting focused on the UFW "plan of action for the Carian Ranch." Work was slacking off, but more and more people were coming in. The union people felt that the new people were being "used for Respondent's own purposes." They were about to file a petition for election, but feared that the majority of workers — taking into account the recent influx — would not support the UFW. Miranda particularly recalled the hiring (three or four days before the layoff) of Jose Castro's nephew who had been previously fired for showing up late to work.

by Jose Castro that he didn't have a job anymore. Although others -- about 15 -- went to work, Miranda testified that nobody participating in the previous" evening's argument, including Guadalupe Yniquez, Moises Figueroa, Gabriel Varela, and Antonio Varela, went to work on the day in question. According to Miranda, Jose Castro said that the new people needed the money, or had worked for Respondent for many years, and that is why they were selected for work. Later that night, Jose Castro apparently told Miranda that he would have his job back when the latter returned from Riverside the following Sunday, but an allegedly inebriated Berto Robles and Hilario Castro said "get the hell out." When Miranda reported for work on Monday morning, April 11, he was not sent out, even though others were. None of the "Chavistas" were working. He stayed until Thursday, and reported for work in the yard each morning, but was not allowed to go to work. A number of times prior to the layoff, Miranda had asked Jose Castro and Hilario Castro for how long he would have his job and was told "all the way through picking season."

Moises Figueroa also commenced working for Respondent in December, 1976. With no prior experience, Figueroa was offered the job because his cousin's wife was the sister of foreman Filiberto Robles[1] wife. Figueroa pruned,

did general repair and clean-up work for Respondent, and eventually "leafed" table grapes. He was not laid off following the pruning season, but remained to do general repair and clean-up work. He was not a member of the UFW when he started working for Carian, but became involved by March 30, 1977, by which time he had talked with union organizers in the Campo de Oro, talked to fellow workers about the union, and signed a UFW authorization card. Figueroa never concealed his activities or sympathies and indeed shared a room with foreman Jose Castro.

On April 6, he came to work in a UFW organizer's car accompanied by Ruben Moreno Miranda, Jose Luis Noris Garay, Guadalupe Yniquez, Hector Mendoza and Rosa Hitchman. That evening he attended a UFW general meeting, along with his above-named cohorts, as well as Israel Salinas. The next morning, foreman Robles knocked at his door early and told Jose Castro who had gone to the UFW meeting the night before, and what had happened, stating that the "workers would strike and would make a disaster in the camp". Jose Castro responded, "That is good, but we know them". Robles asked Figueroa where he had been working, and Jose Castro told Figueroa that he would not be working that day. It was not until the arrival of the ALRB agents

that Figueroa was permitted to work, which offer was not accepted by Figueroa.[16] When Figueroa later queried Jose Castro whether he would have work for the following week, he was told, "only the boss knows."

Figueroa noted that many other workers had been laid off the day before (April 6) but that some 30-50 "new" people were hired during the last days of work. He recalled that Jose Castro had told him earlier that the work would continue until harvest.

Israel Salinas, a former student in Mexico, started working for Respondent two days after the "March from Mecca" to Coachella. Hired by Jose Castro, he lived at the Campo de Oro with Hector Mendoza, Francisco Flores and others. He signed a UFW authorization card his first week of work, and recalled once being observed by Jose Castro when speaking to organizer Liz Sullivan. He witnessed the Miranda-Jose Castro altercation and observed Hector Mendoza signing an authorization card in his room. Salinas worked two weeks, when on the day preceding his last day of work, Jose" Castro went to

[16]Figueroa testified that work had been offered to Ruben Miranda, Gabriel Varela and Antonio Varela, and Guadalupe Yniquez, but much time had already passed that day, and he understood the offer to be for work on that day only.

Salinas' room to inform the occupants (including Miranda, Mendoza, Floras) that "work had finished and there would be no work" for them. Although the group reported for work at 5:30 A.M. the next morning, Jose Castro reiterated that they couldn't work. That same day, Salinas saw "new faces" going to work. Jose" Castro told him that work would start in two to three weeks during the harvest. At the time of the hearing, Salinas had just returned to Carian's employ.

Cesar Arreola began working for Respondent during the last days of March, and was hired by Jose Castro, at the suggestion of one of the latter's relatives. He lived in Camp #3 and was active in the UFW — signing an authorization card, attending meetings, and being named to the Ranch's (#3) organizing committee. On April 7, Arreola reported for work in the courtyard and was told that there was no work for him, even though he saw others going to work. He was told that he would have his job back in 15-18 days, but not to get involved with the union.

Arreola returned in 15-18 days, but was told by Jose Castro that he wasn't hiring. The foreman suggested, "Why don't you ask (organizer) Liz Sullivan for a job?"

Manuela Carmelo began working for Respondent

approximately two or three months prior to the hearing, (March-April) and was hired by Filiberto Robles some two weeks after her husband Oscar Perez commenced working for Respondent. Three or four days before she was laid off, she signed an UFW authorization card at her home. She admitted to talking with other workers about the union, as well as speaking with organizer Sullivan in the presence of Foreman Robles. She and her husband were laid off after she had worked approximately one month, "stopping the day everybody stopped." Once when she and Mr. Perez returned to the camp and spoke with Robles, they were told that "only people from the camp were going to start working."

Victor Ibarra came to Respondent's Ranch to look for work on March 16, 1977. He spoke with Jose Castro and was told that there was work for everybody (approximately 20 people from Madera) until June when the grape season ended. Ibarra returned with his group — including his son Benito, Beliton and Serafin Granados, Francisco Victoriano, Victoriano Cortez, Antonio Calzado, Elias (Jose) Alamilla, Francisco Morales, Jose and Carmen Gonzalez, and"Norberto" Sanchez. Ibarra and the Maderans thinned for approximately two weeks, and then "stretched

wire" for about 4 days. They returned to thinning for one more day when everybody received the $.45 per hour raises (infra). During his last week, Ibarra signed a UFW authorization card, in the presence of many people outside Camp #3. Others also signed — including Victoriano Cortez and Elias (Jose) Alamilla.

On April 6, Robles told the Madera group that work had finished and that they were going to close the camp, even though during the last week, Ibarra saw approximately 50 new workers arrive.

Robles told Ibarra that he would probably have work when harvest arrived, but "probably not because many people would come looking for jobs." That night, all the people from Madera attended the UFW general meeting.

No other alleged discriminatees of the April 6-7 layoffs testified at the hearing, although worker Alvaro Zendejas Pimental recollected that Robles told him that "there was a possibility that there would be work for him" the week following the layoffs, but that "if Don Salva (Amescua) asked for work, tell him it had not started." Zendejas opined that Robles did not want to give work to Don Salva (Zendejas' close friend) who was a known Chavista.

Organizer Liz Sullivan identified the following

employees: Lupe Yniquez, Ruben Miranda, Elias Aland 11 a, Antonio Calzado, Victoriano Cortez, Francisco Victoriano, Jose Contreras, Israel Salinas, and Francisco Floras, all participated in the "March from Mecca". She characterized Hector Mendoza and Rosa Hitchman as supporters of the UFW who were willing to talk with her openly in the presence of foremen at the camp and who attended UFW meetings and spoke favorably to others about the union.

Thomas Rangel was a witness to the Miranda-Jose Castro altercation of April 4.

Julian Navarette attended the UFW general meeting on the night before the April 7 layoff, and signed a UFW authorization card in the presence of foreman Hilario Castro. He openly talked to Sullivan in the presence of foremen in the Camp and in the fields.

Jose Contreras went to the April 6 meeting and talked openly to organizer Sullivan.

Victoriano Cortez went to the general meetings of March 30 and April 6 and talked to organizer Sullivan openly.

Esteban Sanchez wore a UFW button on the front of the scarf on his head and was "always willing to talk openly in the presence of foremen." Sanchez helped Sullivan sign up new people, and accompanied by Ricardo

Sandoval, showed Sullivan where new workers were in the presence of foreman Robles. He was a member of the UFW organizing committee and shouted "Viva Chavez" at the April 6 meeting.

Richardo Sandoval was always willing to talk openly in Camp in the presence of foremen, attended the UFW meeting of April 6 and almost always wore a UFW button. He was a member of the UFW organizing committee for the Robles crew.

Jorge Vozcano went to the April 6 meeting and shouted "Viva Chavez" in the presence of foreman Hilario Castro. He always wore a UFW button.

Francisco Flores attended the April 6 meeting, was always willing to talk to Sullivan openly in the field and camp, and lived in room #A — the active "Chavista" room at Campo de Oro. Antonio Varela signed a UFW authorization card while sitting on a bench outside Campo de Oro. He would talk to Sullivan in the camp and fields and attended the April 6 meeting.

Enrique Castelum[17] lived in room #A, and would talk openly in the field and camp to organizer Sullivan in the presence of foremen. Antonio Calzado went to the March 30 meeting with Father Tobin, attended the April 6 meeting;

[17]Erroneously drafted "Castela" in Paragraph 27 of the Amended Complaint.

marched and would always talk openly in the camp and fields to UFW organizers in the presence of foremen.

Jose Contreras attended the meeting of April 6.

Elias Alamilla was willing to talk openly with organizer Sullivan in the field and camp and in the presence of foremen. He attended the April 6 meeting, marched and signed a UFW authorization card at Campo. de Oro while sitting on one of the benches in the presence of foremen Jose and Hilario Castro.

Guadalupe Martinez came to work with the group from Madera which was very active. He talked with organizer Sullivan in the field.

Ernesto Ruiz came to the April 6 meeting, would always talk to organizer Sullivan openly in the field and camp in the presence of foremen. He was a friend of Vocal UFW supporter Jorge Vozcano and arrived from Calexico together with Arturo Acuna and Ramon Ruiz. [16]

Francisco Victoriano was always open in talking to organizer Sullivan and spoke to her in the presence of foremen in camp and in the fields. He marched, attended the meetings of March 30 and April 6, and was given rides to and from these meetings by UFW organizers.

Jose Gonzales came to the general meeting of April 6,

[18]Erroneously drafted "Ramo" in Paragraph 27 of the Amended Complaint .

signed a UFW authorization card at Campo de Oro while sitting on a bench, and talked openly in the fields and camp to organizer Sullivan in the presence of foremen.

Carmen Gonzales came with the group from Madera which was very active.

Salvador Amescua helped make the union banner for the "March from Mecca", came to committee meetings, attended the April 6 meeting, and talked openly to Sullivan in the fields in the presence of foremen. His two daughters, Berta and Manuela, also worked with him, and talked openly and freely to organizer Sullivan in the presence of foreman Robles. They were always receptive, responsive, helpful, interested workers who voiced support for the union in the fields and in the presence of Robles.

Beliton and Serafin Granados were very quiet, but were always with the same group of "Chavistas" from Madera.

Organizer Sullivan referred to the entire list of workers named in Paragraph 27 of the Complaint, as "all workers that had good cases for being discriminatorily fired". Hilario Castro and Filiberto Robles were their foremen, and all were laid off either April 6 or April 7.

On April 7 Liz Sullivan's organizing efforts at Harry

Carian ceased. Related groups of people — e.g., the Beas family, the Castro family and the Gutierrez family-continued working after the 7th of April, as well as a new group from Madera.

Sullivan further testified that Israel Salinas, Cesar Arreola, Salvador Amescua, Manuela Amescua and Berta Amescua all were back working for Respondent at the beginning of the harvest season.[19]

Respondent denied a discriminatory motivation for the April 6-7 layoffs, testifying that all Pearlette thinning (first stage) had ended for the 1977 season. All crews were laid off from thinning at that time, and the next work would not commence until the following Monday when certain special projects, preparatory to planting, were to be performed. The payroll records would reflect that the work force dropped to zero for a few days. Unlike thinning which required between 150-200 workers, these "special" tasks would involve only some 10-13 people, and then gradually increase to 30-40 workers. The workers were chosen by their availability in camp. Had they all stayed following April 7, Respondent admitted that there would have been a

[19]Organizer Sullivan testified that Respondent personally had to take Salinas out to the field because of "problems with Jose Castro."

"problem", since there was not enough work. However, only a few stayed in camp.

Respondent specifically denied firing any of the workers listed in Paragraph 27 of the Amended Complaint. He also denied having refused to rehire them. At the opening of the hearing, Respondent mailed "unconditional" notices of offers of employment (Respondent's Exhibits 14, 14A) to the last-known address of each employee named in Paragraph 27 of the Amended Complaint, as well as to the three additional employees included by amendment at the commencement of the hearing. For as long as Respondent could remember, the labor flow at Harry Carian has always followed a similar pattern with respect to table grapes: a large workforce for pruning in December-January; reduction of work before thinning; increased workforce for thinning (March-April); reduction of work before harvest; increased workforce for harvest (late May-early June).

Previously, it had not been necessary to send out formal notices to workers to return for the harvest since they generally knew when work was available and a nucleus of people would return each year. People who worked for Respondent during thinning generally stayed on until the

harvest season. There was no seniority policy per se, but if persons worked in the past and would return in the future, they were normally welcome into a particular crew regardless of size.

Jose Castro stated that after thinning, he told all workers to return for the harvest about May 20-25. He denied promising work before that time.

Hilario Castro confirmed that all people in his crew were laid off after the thinning (April 6-7) stating , "We just told everyone that work was finished and that we would be calling them later." He denied threatening to throw Ruben Miranda off the Ranch.

Filiberto Robles also recalled the end of work following thinning, and told people that "there would be a layoff until we came back to do (the) picking." "No one was refused work when they returned." On cross-examination, Robles qualified his statement, declaring, "to some I told that there would be work at harvest, to others no."

2. Analysis and Conclusions:

I reach a different conclusion with respect to the layoffs of the workers listed in Paragraph 27 of the Amended Complaint. Applying the same standards to the General Counsel's prima facie case, I find the following:

The anti-union animus discussed previously reached its

peak as the union organizational effort prepared to petition for election. On the day of the general UFW meeting to plan the next course of action, many of the members of Hilario Castro's and Filiberto Robles' crew were told that there would be no more work as thinning had ended. The decision to lay off the remaining UFW adherents was inferentially triggered by Robles' early morning report to Jose Castro. Those identified as union activists — many of them emerging in the previous few days—would not have work.

I credit the testimony of witnesses Victor Ibarra, Rosa Zendejas, Alvaro Zendejas, Moises Figueroa, Gabriel Yniquez, Ruben Miranda, Manuela Carmelo, Israel Salinas, and Cesar Arreola in this regard. On the morning of April 7, Jose Castro went down the row of workers pointing to those who would or would not be laid off. Respondent and/or his supervisors had knowledge of the union inclinations of the discriminatees, learning of same through attending union meetings, engaging in discussions, or simply observing the progress of the organizers as the thinning season reached its conclusion. Thus, the group of activist friends could be easily isolated and relieved of their duties — Ruben Miranda, Rosa Hitchman, Gabriel Yniquez, Hector Mendoza, Israel Salinas, Tomas

Rangel, Julian Navarette, Jose Briseno, Moises Figueroa

and Cesar Arreola were all friends and could be easily identified as such by the observant foremen. Victor Ibarra and his group from Madera — Benito Ibarra, Elias Alamilla, Guadalupe Martinez, Victoriano Cortez, Francisco Morales, Francisco Victoriano, Jose Gonzales, Carmen Gonzales, Antonio Calzado, Beliton Granados, Serafin Granados, Salvador Amescua and his family — -Manuela Amescua and Berta Amescua — would be picked out because of their actual or supposed union sympathies. A similar fate awaited other camp leaders Jose Contreras, Jorge Vozcano, Francisco Flores, Esteban Sanchez, Gabriel Varela, Antonio Varela, Enrique Castelum, Jose Contreras, Ricardo Sandoval, Ramon Ruiz, and Ernesto Ruiz. Manuela Carmelo would be seen signing an authorization card, and she ahd her husband Oscar Perez would likewise be laid off.

These layoffs could not have been otherwise better timed to devastate the union organizational plan. With the end of thinning, there would be no peak period until the harvest season as the UFW activists scattered in search of available work, and the winter campaign would have gone for nought.

The critical distinction between these layoffs and the termination of the Mayo crew lies with the Respondent's

avowed rationale for the unemployment, to wit, that the end of the thinning season dictated a reduced workforce. Respondent and his foremen would all confirm that the same hiring and layoff patterns had occurred annually in attempting to refute the union charges of discriminatory practices. But the reasons of Respondent are not supported by his own admitted and documented (Exhibits G.C. 4A-4B) intention to have this year's workforce continue through the harvest season. They are not supported by the pattern of hiring new people following the Mayo crew termination — many of whom would be out of work within seven to ten days. They are in direct conflict with Respondent's own payroll records which bear the designation "Fired" after Hilario Castro's crew roster. They conflict with the same payroll records which show full crews working within two weeks from the date of the layoffs, one month prior to the harvest season. They conflict with Respondent's own admitted practice of keeping on those who had been working, rather than displacing them with new workers.

Further evidence underscores the inference of discrimination which is drawn from the circumstances: The foremen failed to corroborate Respondent's avowed attempt to extend the work through the 1977 harvest season, testifying rather that the seasonal pattern and the size

of the work force was identical to previous years. Respondent's payroll records from 1975 and 1976 reflect full crews throughout the month of April, with some." diminution in early May prior to the harvest. Of note is the reappearance of employee names throughout the spring months, i.e., from thinning to harvest. The 1977 records demonstrate a similar pattern, but the names change after the April 6-7 layoffs. By April 13, Hilario Castro would be listed as foreman of a "new" 30 men crew, and Berto Robles would have "new" crews of 16 and 21 for the respective weeks of April 14 and 20. By April 27, Jose Castro would have a full 58-member crew? Hilario Castro would have 56; and Robles 24. Since the harvest was not to commence for another month, the data belies Respondent's position that there was no other labor-concentrated work to be done until the" picking.

Had the layoffs been a true business necessity, or usual practice, as Respondent has contended, it would have been incongruous to terminate the entire Mayo crew one week before the end of work. It would serve no legitimate business purpose to hire a large number of new workers for a seven-day period, particularly when they must travel from all parts of the state to work for Respondent;

The fact that all of the "new hirees" were not laid off further suggests that choices were made for other than justifiable economic purposes. Some 24 people who appeared on Respondent's payroll the week following the April 6 and April 7 layoffs had been hired following the Mayo crew discharge (between March 29 and April 6). Had the layoffs been the natural result of an ordinary "slack" period, there would have been no need for the decisive signaling by Jose Castro of those who would be permitted to work April 7, and those who would have to seek work elsewhere. The inescapable conclusion is that the selected layoffs of April 6 and 7 were directed at thwarting the union organizational drive on the eve of the anticipated election, and I so find.

While the Act does not give the Board a license to dictate the methods by which an employer chooses to reduce his work force, it may consider the method selected where the action is taken for prohibited purposes and the method may itself be evidence of a discriminatory purpose when considered in light of surrounding circumstances. Maggio-Tostado, 3 ALRB No. 38 (1977), citing NLRB v. Midwest Hanger Co., 82 LRRM 2693 (8th Cir. 1973) . In the instant case, I find that on April 6-7, Respondent through its foremen has engaged in a campaign

directed against the UFW organizational efforts. The offenses were neither isolated, nor minimal, and reflected a pattern of discharging UFW members or actual or supposed UFW sympathizers. See Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977). I find that the evidence by its preponderance establishes the discriminatory layoff of the employees named in Paragraph 27 of the Amended Complaint and recommend the appropriate remedy.

With respect to named employees Enrique Sembrano, Antonio Calzade, and Rafael Sanchez, about whom no evidence of any nature was produced, I recommend that they be dismissed from the action herein. I make the same recommendation with respect to employee Jose Luis Noris Garay whose name appears on Respondent's payroll records for the weeks subsequent to the April 6-7 events.

G. CREW CHANGES OF APRIL 1.(Paragraph 23)

1. Facts:

General Counsel has alleged that beginning April 1, Respondent changed the terms and conditions of employment of its workers by switching crew composition and foremen on a daily basis in order to discourage union organizational activity.

Witness Israel Salinas described how he had worked for four foremen in a two-week period, with crew assignments

made on a daily basis by Foreman Jose Castro.

Witness Manuela Carmelo recited a similar experience with 3-4 foremen during her 1-month tenure with Respondent. She testified that she and her husband were always moving, "and did not know the reason for such work assignments."

Witness Ruben Miranda worked with Roberto Rodriguez, Hilario Castro and Filiberto Robles — three different crews — within a one-week period during the latter part of March — early part of April.

Organizer Liz Sullivan testified that the composition of three crews changed after March 27. Workers would be switched randomly, making it "extremely difficult to organize." Organizers could not keep track of the new people, and it was impossible to know who worked where during a given eligibility period.

Respondent denied that there were any differences between this year's crew assignments and those of former years, except that there were many special projects for which Jose Castro made work assignments at Robert Carian's request. As Respondent testified, such work included the laying of a drip irrigation system, planting, concrete work on pipelines, special repairs, stretching twine, renewing vineyards, and mechanical projects in the packing house.

Foreman Jose Castro denied changing the crews around, and foreman Hilario Castro recalled that nearly everybody was thinning in late March, although small groups of workers would be called to do special tasks.

Robert Carian would ask for a number of people, and they would be supplied by Hilario Castro, on an "as available" basis.

Foreman Berto Robles stated that he didn't really have a crew during pruning, but that some 30-45 people worked regularly for him by the thinning season. He would "take anybody who comes in". During the thinning, Robles and his workers went from Crockett to Mayfield and then Ranch #1. Some of his people returned to shear, but Robles didn't, because new people were coming in, some who began girdling. After thinning, just 2-3 people remained, and the camp was closed until he told them to come back for picking.

2. Analysis and Conclusions:

Transfers of employees in order to interfere with organizing activities or to isolate certain employees from others whom they might organize constitute unfair labor practices. See NLRB v. Tamper, Inc., 522 F.2d 781, 89 LRRM 3634 (4th Cir. 1975), enf'g. in part 85 LRRM 1375. In light of previous determinations, however, I do not find that Respondent attempted to minimize the "group

response syndrome" in the work assignments during the last week of thinning. While some confusion reigned, and certain employees found themselves working under several foremen during this period (which concededly made the union organizational effort more difficult), I find that this result was occasioned by the discharge of the Mayo crew, and the need to replace personnel in order to finish the thinning operations in process. Further, I find that specific assignments of workers to special projects under the direction of Robert Carian were dictated by legitimate Ranch needs, rather than by any attempt to interfere with employees' rights to organize.

To the extent that the termination of the Mayo crew was for legitimate business reasons, then any subsequent dislocations which occurred in the ensuing ten days flowed naturally from that act. Thus, I recommend that Paragraph 23 of the Amended Complaint be dismissed.

SUMMARY

I find that Respondent violated Section 1153(a) of the Act in the following respects: Unlawful surveillance by Filiberto Robles of March 31 (Paragraph 21); unlawful surveillance by Robles of April 1 (litigated at hearing); unlawful interrogation in the use of employee information

cards (Paragraph 8); unlawful interrogation by Jose Castro of April 7 (Paragraph 25); unlawful promise of benefits of March 29 (Paragraph 17); unlawful threat of Robles of March 18, 1977 (Paragraph 11); unlawful threat of Robles of April 6 (litigated at hearing); interference by Jose Castro of March 18 (Paragraph 13); unlawful threat of Jose Castro of March 30 (Paragraph 20). I find that Respondent violated Section 1153(a) and (c) by the discharge of Francisco Mateo and Willie Garcia on March 28 (Paragraph 16), and by the April 6-7 layoffs (Paragraph 27) of the 38 workers listed in the recommended "Order"

At the hearing, I recommended dismissal of Paragraphs 5, 7, 10, 14, 15 and 24. I hereby recommend dismissal of Paragraphs 6, 9, 12, 18, 19, 22, 23 and 26 as well as all other fully litigated allegations raised during the hearing. I further recommend dismissal of the allegations with respect to the remaining named employees in Paragraphs 16 and 27.

Upon consideration of these repeated, serious acts of misconduct by the various foremen, it is apparent that they engaged in interference with employees' rights, and did so unrestrained by Respondent. Indeed, Respondent initiated some of the unfair labor practices such as the employee information cards, and the granting

of the $.45/hour raise. While numerous allegations were either trivial or unproven and various supervisors played different roles with respect to the violations, a pattern does emerge. The events of the three-week period tended to thwart the UFW organization drive, and deprive agricultural employees of their statutory rights. Apart from the issue of Respondent's good or bad faith, I find the extent of the misconduct was not insubstantial. Neither the relative "newness" of the Act or the lack of a historical union-employer relationship can justify the violations. I therefore recommend the following:

REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153 (a) and (c) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Francisco Mateo, Willie Garcia, and unlawfully laid off 38 members of the Hilario Castro Filiberto Robles crews listed in Paragraph 27 of the Amended Complaint, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former or substantially equivalent jobs if he has not already done so without prejudice to their seniority or other

rights and privileges, I shall further recommend that Respondent make each of them whole for any losses they may have suffered as a result of its unlawful discriminatory action by payment to them of a sum of money equal to the wage they each would have earned from the date of the discharge (in the case of Francisco Mateo and Willie Garcia) or from the date of the layoff (in the case of the others) to the dates on which they are each reinstated, or offered reinstatement (May 25, 1977 with respect to the discriminatees named in Paragraph 27, except Garbriel Yniquez who was offered reinstatement on April 7), less their respective earnings, together with interest at the rate of seven percent per annum, such back pay to be computed in accordance with the formula adopted by the Board in Sunny side Nurserijas, Inc., 3 ALRB No. 42 (1977) .

To dispel the effects of Respondent's interference with union organizers[20], I will order the following additional remedies (See Anderson Farms Company, supra) :[21]

[20](Which I have determined to seriously undermine the UFW organizational effort)

[21]In their briefs, General Counsel and Intervenor made no specific remedial requests. At the commencement of the hearing, however, they had asked for expanded access and bi-weekly payroll lists during the harvest season.

(a) During the time that the union has filed a valid notice of intention to take access, I recommend the removal of any restrictions on the number of organizers

allowed to come on the Respondent's property under 8 Cal. Admin. Code Section 20900 (e) (4) (A), as amended in 1976. In addition to the three one-hour time periods permitted under Section 20900 (e) (3), supra, access to employees on the Respondent's property shall also be available under the above terms during any established breaks, or, if there are no established breaks, during any time employees are not working.

(b) I recommend that during any 30-day period in which the UFW exercises its right to take access, the Respondent shall provide the union with an updated list of its current employees and their addresses for each payroll period. I further order that such lists shall be provided without requiring the UFW to make a showing of interest.

In order to further effectuate the purposes of the Act and to ensure to the employees the enjoyment of the rights guaranteed to them in Section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act and that it has been ordered not to engage in future violations of the Act. Accordingly, I shall recommend

that Respondent furnish the regional director of the San Diego region, for his or her acceptance, copies of the notice attached to this decision, accurately and appropriately translated into Spanish, Tagalog, and Ilocano, and that the notice and translations then be made known to its employees in the following methods:

1. Post a copy of the Notice, including a copy of the translations, for the duration of the 1978 grape season at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

2. Mail a copy of the Notice and the translations to each employee employed by Respondent for any period from December 1, 1976, to the date of mailing (excluding employees who are current employees). The Notice shall be mailed to the employee's last known home address.

3. Give a copy of the Notice and the translations to each employee employed by Respondent at the time of distribution.

4. Have the Notice and the translations read to assembled employees on company time by a company representative or by a Board agent and accord said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act.

To further ensure to the employees the enjoyment

of the rights granted in Section 1152, I will recommend that Respondent notify the Regional Director on a periodic basis of the steps he has taken to comply with this decision.

I decline to recommend litigation costs and attorneys fees as I find that both the charges and defenses presented extremely difficult factual and legal determinations. Further, I find that the other recommended remedies are sufficient to correct the harms done. See, Resetar Farms, 3 ALRB No. 18 (1977); Western Tomato Growers & Shippers, Inc., 3 ALRB No. 51 (1977) , citing Tiidee. Products, Inc., and I.E.E., 194 NLRB 1234, 79 LRRM 1175 (1972).

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended

ORDER

Respondent, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Threatening employees with layoff, termination, loss of employment, or deportation because

of their union activities or sympathies.

(c) Interrogating employees concerning their union activities or sympathies, including, but not limited to the distribution of employee name and address cards requesting whether or not such information should remain confidential without giving explanation therefor .

(c)Engaging in surveillance of union organizers and/or employees to determine union activities or sympathies.

(d) Promising benefits to discourage union activities or sympathies.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Sections 1152, 1153 (a) and 1153 (c) of the Act.

(f) Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging, laying off, 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.

2. Take the following affirmative action:

(a) Offer to Willie Garcia and Francisco Mateo immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges, and make each of the

following named employees whole for any losses each of them have suffered as a result of his or her termination in the manner described above in the section entitled "The Remedy":

Francisco Mateo
Willie Garcia
Ruben Miranda
Rosa Hitchman
Gabriel Yniquez
Hector Mendoza
Israel Salinas
Tomas Rangel

Victoriano Cortez
Francisco Morales
Francisco Victoriano
Jose Gonzales
Carmen Gonzales
Antonio Calzado
Beliton Granados
Serafin Granados

Antonio Varela
Enrique Castelum
Jose Contreras
Ricardo Sandoval
Ramon Ruiz
Ernesto Ruiz
Manuela Carmelo
Oscar Perez

Julian Navarette
Jose Briseno
Moises Figueroa
Cesar Arreola
Victor Ibarra
Benito Ibarra
Elias Alamilla
Guadalupe Martinez

Salvador Amescua
Manuela Amescua
Berta Amescua
Jose Contreras
Jorge Vozcano
Francisco Flores
Esteban Sanchez
Gabriel Varela

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay due to the above-named discriminatees.

(c) Furnish the Regional Director of the San Diego

region, for his or her acceptance, copies of the notice attached hereto, accurately and appropriately translated into Spanish, Ilocano and Tagalog.

(d) Post a copy of the Notice attached hereto including the Spanish translation, for the duration of the 1978 grape season at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

(e) Mail a copy of the Notice attached hereto and the translations to each employee employed by Respondent for any period from December 1, 1976, to the date of mailing (excluding employees who are current employees). The Notice shall be mailed to the employees' last known home address.

(f) Give a copy of the Notice attached hereto and the translations to each employee employed by Respondent at the time of distribution.

(g) Have the Notice attached hereto read in English, Spanish, Ilocano and Tagalog to assembled employees on company time by a company representative or by a Board agent and accord the Board agent the opportunity to answer questions which employees might have regarding the Notice and their rights under Section 1152 of the Act.

(h) During any period during its next organizational

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

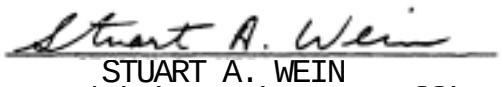
(i) The Respondent shall, during the time that the UFW has on file a valid notice of intent to take access during its next organizational campaign, provide the UFW once every two weeks with an updated employee list of its current employees and their addresses for each payroll period. Such lists shall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

(j) Notify the Regional Director in the San Diego

Regional office within twenty (20) days from receipt of a copy of this decision of the steps Respondent has taken to comply therewith, and to continue to report periodically thereafter, in intervals of twenty (20) days until full compliance is achieved.

It is further recommended that the remaining allegations in the Complaint and those raised at the hearing be dismissed.

DATED: SEPTEMBER 29, 1977



STUART A. WEIN
Administrative Law Officer

APPENDIX A

NOTICE TO WORKERS

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

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

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

1. To organize themselves;
2. To form, join or help unions;
3. To bargain as a group and chose 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.

Because this is true, we promise that:

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

Especially:

WE WILL NOT ask you whether or not you belong to any union, or do anything for any union, or how you feel about any union; nor will we require you to fill out name

and address cards which ask whether you want such information kept confidential without prior explanation.

WE WILL NOT observe your conversations with union organizers and others concerning your feelings about activities or membership in any union.

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

WE WILL NOT fire, lay off, or give less work or do anything against you because of the union.

WE WILL offer:

Francisco Mateo
Willie Garcia
Ruben Miranda
Rosa Hitchman
Gabriel Yniquez
Hector Mendoza
Israel Salinas
Tomas Rangel

Victoriano Cortez
Francisco Morales
Francisco Victoriano
Jose Gonzales
Carmen Gonzales
Antonio Calzado
Beliton Granados
Serafin Granados

Antonio Varela
Enrique Castelum
Jose Contreras
Ricardo Sandoval
Ram6n Ruiz
Ernesto Ruiz
Manuela Carmelo
Oscar Perez

Julian Navarette
Jose Briseno
Moises Figueroa
Cesar Arreola
Victor Ibarra
Benito Ibarra
Elias Alamilla
Guadalupe Martinez

Salvador Amescua
Manuela Amescua
Berta Amescua
Jose Contreras
Jorge Vozcano
Francisco Flores
Esteben Sanchez
Gabriel Varela

their old jobs back if they want them, and we will pay each of them any money they lost because we laid them off.

DATED:

Signed:

HARRY CARIAN SALES

By:_____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

HARRY CARIAN, Employer and Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner and Charging Party.	)	Case Nos. 77-RC-15-C 77-RC-16-C 77-RC-16-1-C 77-CE-92-C 77-CE-99-C 77-CE-103-C 77-CE-108-C 77-CE-120-C 77-CE-123-C 77-CE-128-C 77-CE-142-C 77-CE-183-C 77-CE-185-C 77-CE-187-C 77-CE-188-C 77-CE-127-D

DECISION OF ADMINISTRATIVE LAW OFFICER

Robert W. Farnsworth, Esq.
for the General Counsel

David E. Smith, Esq.
for the Employer and Respondent

Ellen Greenstone, Esq.
for the Petitioner and Charging Party

STATEMENT OF THE CASE

Arie Schoorl, Administrative Law Officer: These cases, consolidated pursuant to Order Consolidating Cases and Notice of Allegations dated February 7, 1978, were heard by me on March 15, 16, 17, 20, 21, 22, 28, 29, 30, April 3, 4, 5, 6, 10, 11, 12, 13, 17, 26, 27, 28 and May 4 and 5, in Indio, California. Following a petition for certification and amendments filed by United Farm Workers of America, AFL-CIO (UFW) on June 20 and June 24, 1977 respectively an election by secret ballot was conducted on June 27, 1977 among the agricultural employees employed by Respondent. The tally of ballots was as follows: UFW-80, No Union-88 and 142 unresolved challenged ballots.

The UFW filed a timely petition pursuant to Labor Code Section 1156.3 (c) seeking to set aside the election on seventy separate grounds. Fifty-five of the objections were dismissed by order of the Executive Secretary, dated February 7, 1978 and fifteen were noticed for hearing. The 'UFW filed a Request for Review, pursuant to Labor Code Section 1142 (b), which was granted, and twelve more objections were noticed for hearing

by order of the Board, dated March 9, 1978. The Employer filed a timely petition, pursuant to Labor Code 1156.3(c), seeking to set aside the election on two separate grounds, which grounds were also noticed for hearing.

The first complaint, dated June 20, 1977, is based on charges filed by the United Farm Workers of America, AFL-CIO. The charges were duly served on Respondent on June 1,6, 7 and 8, 1977 respectively. The second complaint, dated January 11, 1978, is based on charges filed by the UFW and duly served on Respondent on June 13, 15, 20 and 21, July 12 and August 24, 1977. The complaints allege that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the Act or the ALRA).

On August 29, 1977, the Regional Director issued his Report on Challenged Ballots herein. Petitioner filed timely exceptions to the Report. In the Report, the Regional Director set forth his recommendations with respect to challenges to forty-four voters. As the Board decided that the Report did not provide an adequate basis for decisions on three issues, on March 9, 1978, it ordered that these three challenged-ballot issues be consolidated, for purposes of hearing, with the instant case.

The hearing was held pursuant to an order consolidating the post-election objections with the various unfair labor practice allegations contained in the complaints issued against the Respondent. Harry Carian Sales, Employer and Respondent, General Counsel, and the UFW, Petitioner and Charging Party, were represented at the hearing. All three parties filed briefs after the close of the hearing.

Upon the entire record, including my observations of the demeanor of the witnesses and briefs submitted by the parties I make the following:

FINDINGS OF FACT

I. Juristiction

Respondent has admitted in its answer, and I find, that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act and that the United Farm Workers of America, AFL-CIO is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. UFW Objections Set for Hearing

1. That the Employer engaged in surveillance, interrogation and polling of employees, threatened employees with economic retaliation, denied meaningful access by interfering with communications between organizers and employees, made illegal promises of benefits, illegally granted employees a pay raise, illegally granted a new medical plan, made material misrepresentations,

and employee supporters of the UFW, discriminatorily discharged a grape-thinning crew, engaged in selective hiring, designed to destroy employee support for the UFW and discriminatorily discharged or laid off employees because of support for the UFW, dissolved crew structure and switched employees from crew to crew to de-stroy support for the UFW, failed to provide a pre-petition list of employees, failed to supply an employee eligibility list conforming to ALRB regulations Section 20310, hired employees for purpose of voting at the Tulare voting site, illegally evicted from labor camps employees whom it had discharged or laid off contrary to previous policy, held election-eve company meetings at labor camps which employees were required to attend, and failed to identify supervisory personnel so they could be kept out of voting area; and in addition during the voting numerous supervisory personnel remained in polling areas prohibited to company and union personnel, supervisors played radio loudly for employees waiting to vote so they could hear advertisements calling for a no-union vote.

2. That the Board, through its agents, improperly allowed persons with no identification to cast unchallenged ballots and denied UFW observers the right to challenge voters.

3. That there existed an atmosphere of fear and confusion [among the employees] resulting from-deportations and threats of deportations.

III. Objections of the Employer Set for Hearing

1. That the election did not provide the opportunity for employees who worked in the payroll period immediately preceding the filing of the petition for certification to vote in the election.

2. That the Board agents inappropriately applied Section 20310 (e) (1) (C) of the Board's regulations, and thus improperly prevented the Employer's observers from challenging voters.

IV. Challenged Ballots Issues

1. Whether these voters were hired for the purpose of voting in the election.

2. The identity of the employer of these employees.

3. Whether these employees should be included in the same unit even though employed at geographically non-contiguous locations.

V. The Alleged Unfair Labor Practices

1. Respondent is alleged to have violated Sections 1153(a) and 1153 (c) of the Act in the following respects: engaged in surveillance and/or created the .impression of surveillance, including photographic surveillance; engaged in interference with the UFW organizers' access to and conversations with employees;

harrassed and physically assaulted union organizers; rammed union organizers' automobiles, once with a pickup and once with a tractor; pursued organizers' automobiles at close proximity, forcing one of them off the road; discriminatorily discharged, laid off and refused to hire employees; threatened to deny employment to workers because of their support for UFW; tampered with the vehicle of a UFW organizer; made promises of benefits to employees if they voted "no union"; threatened employees with loss of work if the union won the election and made numerous material misrepresentations about the UFW at captive-audience speeches to employees on the eve of the election; ordered several employees not to sign UFW cards or talk to UFW organizers; and interrogated an employee and told him Chavistas would not be hired.1/

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1/General Counsel filed two separate complaints rather than an original and an amended one. Thus there was no amended complaint filed which contains the allegations of both complaints. Most of the charges set forth in the two complaints refer to separate and distinct incidents, however there is some overlap.

VI. Background Information

Respondent has been a grower, harvester and shipper of table grapes in the Coachella Valley for 27 years. It's properties include approximately 300 acres of table grapes divided into: (1) Ranch No. 1 (Rancho de Oro 118 acres, in Coachella); (2) Ranch No. 3 (115 acres in Coachella); (3) Ranch No. 4 ."(40 acres in Mecca) ? and (4) Ranch No. 10 (20 acres in Coachella). Labor Camps are provided for crews at three of the ranches: Camp No. 1 (Camp de Oro), Camp No. 3 and Camp No. 4.

Respondent has 310 acres of Perlette grapes, 85 acres of Thompson seedless grapes, 35 acres of Cardinal grapes and 3 acres of Black Beauty seedless grapes. The Perlettes are harvested first and then immediately afterwards, or after a few days'break, the Thompson seedless. The harvest of the Cardinal and Black Beauty grapes have a minimal impact on the size of the work force and are of no significance in this case. Harvesting began towards the end of May 1977 and continued through the first part of July.

Respondent's personnel included at times material herein: Harry Carian, owner, who lived on the property at Rancho de Oro; his son, Robert, who supervised the specialized operations; Jose Castro, supervisor in charge of all crews; Robert "Booby" Castro, friend and assistant to Robert Carian; Hilario Castro and Prudon Estrada, foremen, who resided at Camp No. 1; Filiberto Robles, foreman, who resided at Camp No. 3; Leopardo Galindo, foreran, who lived at Camp .No. 4.

VII. Discussion

A. Unlawful Surveillance and Interference

The complaint contains numerous allegations of Respondent's surveillance of and interference with union organizers' and/or employees' conversations with workers about the UFW. Respondent denies such allegations, contending that: supervisors interrupted these conversations only during work time to tell employees to resume work; photographs were taken to obtain proof that the UFW had exceeded the number of organizers permitted by the access regulations of the ALRB.

I will deal with each episode of alleged surveilance and interference in chronological order. Some background information is necessary so the individual occurences can be evaluated to determine whether the supervisory personnel had a right to interrupt these conversations. There was no established lunch hour, as the harvest employees worked straight through from 5:30 A.M. to 11:30 A.M.. They worked piece-rate and were permitted to take short breaks for eating lunch, resting, drinking water, etc. I have determined that the 9:30 to 10:30 A.M. period was the lunch access hour in conformity with Section 20900 (e)(3)(B) which

provides:

> "In addition, organizers may enter the employer's property for a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall encompass such lunch break. If there is no established lunch break, the one-hour period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day."

The UFW organizers customarily visited Respondent's fields between 9:30 and 10:30 A.M. during the harvesting system. The evidence shows that most of the employees stopped work sometime between 9:30 and 10:30 to eat their lunch. It was convenient for both Respondent and the Union to have this definite daily period for access rather than to have a separate access time for each individual worker whenever he stopped to have lunch during the day. From the very beginning of the harvest, the UFW began to take access during that hour and Respondent acceded to it. Robert Carian testified that he and Robert Castro visited crews on a daily basis and asked UFW organizers to leave if they overstayed this de facto lunch hour.

The employees were working on a piece-rate basis and would stop to take short breaks for rest, food etc. They were never reprimanded by a supervisor or foremen for doing this. However, Harry Carian testified that as the workers were working piece rate he considered that they had no right to stop work during work time. Accordingly, he had instructed the foremen that if a worker stopped working to talk to a union organizer the foreman was to tell him to go back to work.

1. Surveillance of Elizabeth Sullivan (Paragraph 5 of First Complaint

(a) Facts

On or about May 29, 1977, UFW representative Elizabeth Sullivan was in Respondent's fields during the de facto lunch hour, conversing with workers about the UFW. Robert Carian approached her and told her to leave. She refused. He threatened to call the sheriff and stated that he had been told to keep an eye on her. He then stood three feet away and observed her while she talked to an employee. Then, as Sullivan moved along to talk to other workers, Robert did not follow her but continued to watch her.

Some of the workers were eating their lunch and others were working at the time. 2/

(b) Analysis and Conclusion

Clearly, UFW agent Sullivan had the right to be in the fields at that time, during the de facto access hour, and .there was no contention that she was interrupting work or not carrying proper identification. As she had a right to be there, Robert Carian did not have the right to call the sheriff to have her removed. The Board in D'Arrigo Bros., 3 ALRB No. 31 (1977), stated, "A threat to call the sheriff to arrest for trespass UFW organizers on the property for legitimate reasons constitutes an unfair labor practice". I find that Robert Carian's above described conduct constituted unlawful interference within the meaning of Section 1153 (a) of the Act.

Carian's standing three feet away from the union organizer while she was talking to a worker and thereafter observing her further conversations with other workers amounts to unlawful surveillance. Where the evidence supports the conclusion that a supervisor intentionally interjected his presence and listened to conversations between union organizers and employees, unlawful surveillance has been found. Dan Tudor Sons, 3 ALRB No. 69 (1977)

A supervisor has the right to be present near workers and organizers if he is engaged in some legitimate task but here there was no evidence that Carian was so occupied. Moreover, his statement to Sullivan that he was going to keep an eye on her confirms the fact that he was present without any legitimate reason. I find that Robert Carian's conduct constituted illegal surveillance and a violation of Section 1153 (a) of the Act, as alleged in paragraph 5 of the first complaint.

2. Surveillance of and Interference with Phyllis Has-Brouck and Lucy Crespin on the Mayfield Ranch (Paragraph 6 of First Complaint)

(a) Facts

On May 31, 1977 at about 10:10 A.M. Phyllis Hasbrouck, a UFW organizer, conversed with some employees who were harvesting at the Mayfield Ranch. Mayfield , the owner of the Mayfield Ranch, ordered her off the property. He threatened to call the sheriff and told crew foreman Robert Rodriguez to "stick to her". Rodriguez

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2/ Robert Carian denied that he ever went to a location where an organizer was talking to a worker and intentionally listened to the conversation. However, he did not testify specifically regarding this incident. I credit the specific testimony of Sullivan over his general denial. She testified in a straightforward manner and remembered in detail the entire incident.

followed her and stood close to her as she talked to each packer. Hasbrouck accused Rodriguez of illegal surveillance but he said he was just doing his job. Some of the packers she talked to were resting and some were working. 3/

The next day, June 1, Phyllis Hasbrouck and Lucy Crespin, another UFW organizer, were conversing with some workers at the Matfield Ranch during the de facto lunch hour. Mayfield ordered Crespin to leave. She showed her identification and explained her right to access. Mayfieid told crew foreman Rodriguez to keep an eye on Crespin and then went to call the sheriff. Each time Crespin attempted to talk to a worker, Rodriguez stood close to her and the worker. Shortly thereafter, a deputy sheriff arrived and Crespin explained the access rule to him. The deputy said she could stay. Rodriguez continued to follow her until she left about 10:30 A.M. with Phyllis Hasbrouck. 4/

(b) Analysis and Conclusion

On May 31 and June 1 Hasbrouck and Crespin, respectively, were in the fields during the de facto lunch hour, exercising their right of access and talking to the workers. I find that Mayfield illegally interfered with their right to access and with employees' Section 1152 rights, by threatening Hasbrouck on May 31 and Crespin on June 1 that he would call the sheriff. D'Arrigo Brothers, 3 ALRB No. 31 (1976)

I find that Respondent has also been guilty of illegal surveillance. In Dan Tudor Sons, supra, the Board stated that an employer is guilty of unlawful surveillance when its supervisor intentionally interjects his presence and listens to conversations between union organizers and employees. In both incidents described above it is evident that Rodriguez was present for the purpose of surveillance. Following Mayfield's instructions to "stick to" Hasbrouck and to "keep an eye on" Crespin, Rodriguez followed the union organizers from place to place and stood close

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3/ Respondent raises the question of whether Mayfield can be considered an agent for Respondent and thus make the latter responsible for his actions. From the tmcontradicted testimony of Hasbrouck, it is evident that Mayfield was exercising authority over Respondent's employees, as he was giving orders to Respondent's foreman Rodriguez and the latter was following them. Also Hasbrouck'B uncontradicted testimony, shows that she observed Rodriguez supervising Respondent's employees (Robert Carian had testified that Respondent's employees harvested Mayfield's grapes) and it was evident he was the foreman of the crew.

4/ Although this incident was not included in Crespin's declaration, her testimony about the sheriff was confirmed by Hasbrouck's testimony.

to them during their conversations with employees. The fact that while he was following and observing Hasbrouck, Rodriguez was also checking how the packers were doing their work does not mitigate his unlawful surveillance of the Union agent's conversations with employees.

3. Interference with Lucy Crespin (Paragraph 7 of First Complaint)

(a) Facts

At the beginning of June, 1977, UFW organizer Lucy Crespin was in Respondent's fields talking to some of the workers. Ray Paey, one of Respondent's supervisors, told her she had no right to be there and that if she did not leave he would call Carian. She told him she had a right to access and he left. A few days later, Hector Castro, a second foreman of the same crew, told Crespin that Ray Paey had said she should leave the field. She replied that she had the right to access and continued talking to the employees.

(b) Analysis and Conclusion

The important fact in both of these instances is that Crespin did not leave but continued to talk to the workers. In D'Arrigo Brothers, supra, a supervisor told an organizer that the employer's policy was that organizers could not speak to the workers during working hours. Then the supervisor drove away leaving the organizer free to speak to the employees who were coming out of the field. The Board found no violation.

In these two incidents both Paey and Castro, after suggesting that Crespin discontinue her activity, left the area and Crespin was free to continue talking to the workers, which she did. As I consider the facts in the instant case very similar to those in the D'Arrigo case, I find there was no violation of the organizer's right to access here and recommend dismissal of the allegations of the complaint as to these incidents.

4. Interference with Albert Martinez and Lucy Crespin by Jose Castro(Paragraph 9 of First Complaint and Paragraph 7L of Second Complaint)

(a) Facts

About June 6, 1977 Alberto Martinez, a harvest worker and Lucy Crespin, UFW organizer, were talking to an employee named Erasmo between 9:30 and 10:30 A.M. While they talked to him, Erasmo continued to pick grapes. He then stood up and took a pen from them to sign an authorization card. At that moment Jose Castro, the general supervisor, came up and in an angry voice told Erasmo not to sign the card and to get back to work. Erasmo returned the unsigned card to Crespin and resumed work. Martinez and Crespin proceeded to talk to other workers and Castro left. At the end of work Jose Castro told Martinez, and his brother and sister-in-law, Uriel and Lydia Martinez, that if he had known they were going to organize he would not have hired them but now

he knew it for the next time not to hire them.

A day or two before or after the above-described incident Martinez and Crespin were talking to two workers named Guillermo and Santos during the de facto lunch hour. Both of the workers were picking grapes and had stopped work to listen to Martinez and Crespin. Santos had signed an' authorization card and was filling in his Social Security number and Guillermo was about to sign a card when General Supervisor Jose Castro came up and told Guillermo, "Don't sign, go do your work". Both Guillermo and Santos stopped writing and handed the cards back to Crespin and resumed work. Crespin told Castro she was permitted to organize for one hour. Castro left and made no further comments to the workers.5/

(b) Analysis and Conclusion

Both Martinez and Crespin had the right to converse with the workers about the UFW and to solicit their signatures on authorization cards. Crespin was wearing her identification button, was not disrupting work (speech by itself cannot be considered as disruptive action according to ALRB regulations Section 20900 (e) (4) (C)), and was present in the field during the de facto lunch hour. Martinez was a fellow worker of the three employees involved and had the right to talk to his fellow workers about union activities and to solicit their signatures. No foremen ever reprimanded him for engaging in such activities before or after this episode.

Because Martinez and Crespin had the right to engage in conversation with the workers and to solicit and obtain their signatures on authorization cards at that time in the fields, Respondent and its. agents had no right to interfere with or restrain them in the exercise of that right. Respondent maintains that employee Erasmo had no right to stop work between 9:30 and 10:30 A.M. except to eat lunch so when Castro told him to return to work he was giving him a legitimate work order. However, I have found that Castro not only told the employee to

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5/My findings of the above-described facts are based on the credible testimony of Alberto Martinez. He testified in a straightforward manner and did well under cross-examination. I credit his specific testimony over the general denial by Jose Castro that he had never told any workers not to sign authorization cards. Castro at the same time also testified that he had told the organizers and the workers that the workers could not sign. cards on the job but only when a worker was free or in town. His telling the workers not to sign the cards is consistent with his belief that they were prohibited from signing them on the job.

return to work, but also said, "Don't sign the card". The latter remark clearly constitutes interference with union activities protected by Section 1152 of the Act. I reject Respondent's contention that the workers were not permitted to stop work during the de facto lunch hour except to eat lunch. The workers were working on a piece-rate basis, rather than at an hourly rate, and they were permitted to converse with their fellow workers and to stop periodically; for a break or to take a drink of water. It appears from the testimony that the workers had stopped for a very short time, Erasmo to take the pen and Guillermo and Santos to converse for a few moments. There was no evidence presented to establish that if the workers had paused for any purpose other than union activities they would have been told immediately by a supervisor to return to work.

On the basis of the above, I find that Castro, Respondent's agent in these two incidents, unlawfully interfered with the rights of employees to engage in union activities and conclude that Respondent thereby violated Section 1153 (a) of the Act.

I also find that Jose Castro unlawfully threatened the Martinez family members when he told them about not hiring them in the future because now he knew they were 'union organizers and thus Respondent has violated Section 1153 (a) of the Act.

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5. Surveillance of Juan Garza and Jesus Munoz (Paragraph 8Jof First Complaint and Paragraph 7 E of Second Complaint)

(a) Facts

On or about June 6, Jesus Munoz, a UFW organizer, was at Respondent's ranch talking to workers in the fields during the de, facto lunch hour. He had begun to talk to Juan Garza, a picker, when Robert Carian approached and stood about one yard away, observing the two. Carian was looking over a bunch of grapes in his hands and slowly eating them as Munoz was attempting to talk to Garza, After a few minutes, Munoz left and Carian followed him.

Munoz next talked to employee Antonio Bielma, who was about to sign an authorization card when Robert Carian approached. Bielma said, "How do you think we can sign with Robert Carian applying the pressure?" Bielma declined to sign the card that time but did so later that day. Later on, Carian approached when Munoz attempted to talk to employee Manuel Bielma, in order to solicit his signature on an authorization card. As a result, Manuel Bielma also delayed signing a card until later on that day. 6/

(b) Analysis and Conclusion

The evidence indicates that Robert Carian was present during Munoz[1] conversations with the three employees for the purpose of observing and/or overhearing their conversations. If he were merely "checking the grapes," Carian would not have had to remain for such a protracted period of time eating the grapes. Moreover, Garza testified that the testing of sugar content was done only at the beginning of the harvest, at the end of May. I am not convinced that Carian was merely checking grapes while he was present at the three conversations. Accordingly I find that Robert Carian was engaged in illegal surveillance and thereby violated Section 1153 (a) of the Act.

6. Surveillance of Cesar Chayea on June 8 (Paragraph 7 C of Second Complaint)

(a) Facts

On or about June 8, 1977 Cesar Chavez, President of the

6/Robert Carian in his testimony denied that he ever intended to overhear or observe any conversation between an organizer and a worker. He explained that every day he was near organizers and workers as they were conversing but that he was busy checking grapes at the time and tried to be inconspicuous. In this instance however, I credit the testimony of Munoz and Garza over that of Robert Carian, noting that they testified to specific details whereas Carian only made a general denial and that both Munoz and Garza were straightforward and convincing witnesses.

UFW, visited the Baes-Medrano crew at Respondent's ranch. Federico Vargas, a UFW organizer, accompanied Chaves and introduced him to individual workers. Florencio Beas, and Teofilo Medrano, the two foremen, remained close by about 30 to 35 feet away, looking in Chavez' direction while Chavez talked to the workers. As Chavez walked across some rows, Jose Castro, Respondent's general supervisor and Hilario Castro, a foreman, walked across in the same direction. Chavez conversed with the workers for about 15 minutes and then left.

(b) Analysis and Conclusion

In this situation it would appear that the two foremen of the crew, Beas and Medrano, had a legitimate business reason for being present where the crew was working since they had the responsibility to supervise the work. No evidence was presented that Jose Castro and Hilario Castro were there for anything other than a legitimate business reason. To establish unlawful surveillance more is needed that just the fact that two foremen were standing within 30 to 35 feet of a union organizer and looking in his direction while he was talking to workers or that two supervisors walked in the same direction as a union organizer. In Tomooka Bros. 2 ALR3 No. 52 (1976), the Board stated that "the burden is on the party alleging illegal surveillance to present evidence to warrant the conclusion that the employer was present at a time when union organizers are attempting to talk to workers for the purpose of surveillance." General Counsel has failed to meet this burden so I dismiss this allegation.

7. Unlawful Interference with Federico Vargas' Organizing' Activities(Paragraph 13 of First Complaint and Paragraphs 7 D and 7 L of Second Complaint)

(a) Facts

On or about June 10, 1977 Federico Vargas, a UFW organizer, was in Respondent's fields during the defacto lunch hour, talking to an employee, Luis Munoz. Foreman Florencio Beas approached them and said to Munoz, "Do not sign. Do not give your name". Munoz was in the act of signing the authorization card and became nervous when Beas made the above-mentioned comment. Then Fernando Vargas began to talk to a woman worker and Beas interrupted that conversation also, telling the woman not to give her name or to sign the authorization card. After his comment, she declined to give her name or to sign the authorization card. Later, Vargas talked to Beas' daughter and was about to give her a leaflet when Beas approached and told her not to give her name, that Vargas did not have the right to make the workers take the leaflets or to sign authorization cards and that Vargas had no right to talk to her because she was a minor. Vargas replied that he was only

trying to give her a leaflet. 7/

(b) Analysis and Conclusion

As previously explained, during the de facto lunch hour union organizers have the right to be on Respondent's" premises organizing and conversing with employees about the union. That right, of course, includes the right to engage in all that organizing entails e.g. distributing leaflets (see Tex-Cal Land Management, Inc., 3 ALRB No. 14)., obtaining signatures on authorization cards, asking employees their names and addresses etc. When a union organizer is legitimately exercising such rights, a supervisor has no right to tell a worker not to sign an authorization card because such conduct is an obvious interference with union activities and therefore violative of Section 1153 (a) of the Act. Here Beas also instructed workers not to give their names to the UFW agent and told employees in effect that Vargas had no right to distribute union literature or to talk to workers who were minors. It goes without saying that such statement constitutes interference with the rights of employees and union organizers in their legitimate contacts with emoloyees. Accordingly, I conclude that, Respondent, through its foreman Florencio Beas, has violated Section 1153 (a) of the Act by interfering with and restraining employees in the exercise of the rights guaranteed them by Section 1152 of the Act.

8. Surveillance of Employee Maria Serrano by Foreman Hilario Castro. 8/

(a) Facts

On or about June 16, 1977, Maria Serrano, a harvest employee and a known active UFW supporter, was seated close to a fellow worker as the latter was kneeling, packing a box of grapes. They were talking about the upcoming election and

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7/In his testimony, Florencio Beas denied that he ever told any worker not to sign an authorization card or that he ever followed an organizer on the job-site. However, I credit the specific testimony of Federico Vargas over Beas's general denial. Vargas testified in a very careful manner concerning all details of each incident and impressed me with his credibility. Moreover, his testimony concerning Beas telling a worker not to sign was corraborated by employee Maria Serrano.

_8/ Although this incident was not specifically alleged in the complaint it is related to the charges in the complaint with respect to surveillance of union organizers and it was fully litigated at the hearing.' See Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977) for the authority to consider unfair labor practices not alleged in this complaint but raised at the hearing.

Serrano was obtaining the other employee's name and address in Tijuana so she could notify her of the time and place of the election. During their conversation, foreman Hilario Castro walked up behind Serrano very quietly, without her being aware of his presence. Lydia Villareal, a UFW agent approached and called Serrano's attention to the fact that Hilario Castro was standing behind her. Hilario Castro became angry, began to argue with Villareal, and then left.

(b) Analysis and Conclusion

I credit Maria Serrano's testimony, but there is no evidence in the record as to how long Castro was standing behind her, and no evidence indicating that he had to positioned himself in order to overhear the conversation. As I find the General Counsel has failed to meet the burden of proof with respect to this allegation of the complaint, I recommend that it be dismissed.

9. The Surveillance and Photographing of Cesar Chavez, Organizers and Workers, (paragraph 7 G of Second Complaint)

(a) Facts

On or about June 10, employee Juan Garza was introducing Cesar Chavez to his fellow workers in foreman Prudon Estrada's crew during the de facto lunch hour. Garza had almost finished introducing Chavea to the crew members when he noticed Harry Carian in an automobile with a camera at his eye pointed in the direction of Garza and Chavez. Jesus Munoz, a union organizer assigned to the same crew, also noticed Harry Carian in an automobile pointing a camera at Chavez and the workers. Harry Carian himself admitted taking a picture and stated that he was 100 feet away at the time. Garza testified that Carian was 12 to 13 meters away. Observing the photograph (General Counsel's Exhibit 12), it would appear that Garza was accurate in his estimate of the distance, as a normal lens rather than a telephoto lens was used.

On or about June 23, during the de facto lunch period, Cesar Chavez, accompanied by UFW organizers Federico Vargas and Fred Ross and two bodyguards, entered Respondent's Jackson ranch to talk to the workers in the Beas-Medrano crew. As there were 16 employees in the crew, two organizers were permitted under the Board's regulation. 9/

Robert Carian arrived with a camera and began to take pictures of Chavez as he talked to the workers. Robert Carian

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9/ Section 20900 (e) (4) (a): Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

then told Chavez that he and the others should not be there, that they should have called in advance and that there were too many of them. Chavez told the workers in the vicinity that Carian did not have the right to be there, that he was interfering with their privacy and intimidating them, and then he told Carian that he should leave. Carian made no reply but backed away. Chavez and the two organizers, accompanied by the two bodyguards, continued to talk to the workers in the Beas-Medrano crew. They next went to Prudon Estrada's 25-worker crew. Chavez and two organizers 10/ conversed with members of the crew. Then Chavez and the group went on to Pepe Castro's 23-worker crew. Carian continued to follow them and take pictures. After talking to employees in the third crew, Chavez and the group returned to Estrada's crew. Chavez, the two organizers and the bodyguards all left the fields at 10:30, the end of the de facto lunch hour. Robert Carian credibly testified that he took the photographs to gather evidence to show that the UFW had exceeded the number of organizers permitted under the ALRB regulations and that Fred Ross was not wearing an identification badge as required by the same regulations.

(b) Analysis and Conclusion

The Board has held that taking pictures of union organizers" while they are talking to employees about the union constitutes unlawful surveillance. See Anderson Farms Company, 3 ALRB No. 67 (1977). When Harry Carian took a picture of Chavez, Garza and the workers, it was clearly unlawful surveillance and a violation by Respondent of Section 1153 (a) of the Act. However, the taking of pictures of the organizers and workers by Robert Carian calls for a detailed discussion. The NLRB, like the ALRB, forbids photographic surveillance of union activities such as conversations between union organizers and employees. The NLRB has held, however, that where an employer has an authentic, non-coercive reason for engaging in photographic surveillance, the picture-taking will not necessarily constitute a violation of Section 8 (a)(1) of the NLRA (equivalent of Section 1153 (a) of the ALRA). 11/ In the instant case, Respondent's motive for photographing this particular union activity was to document the fact that the UFW had violated the Board's regulations in respect to the number of organizers permitted a crew and in respect to the requirement that union organizers wear identification badges. I find this motive to be was authentic and noncoercive. In the cited NLRB cases, the employer's legitimate reason for taking the pictures is weighed against the natural coercive effect the picture taking will have on the employees in their interaction with the union organizers. As the Supreme Court has noted, "...it is only when the interference with Section 7 rights outweighs the business justification for the

10/ Only two organizers at a time would accompany Chavez, Fred Ross and. either Vargas, Munoz or Crespin, depending on which crew being' contacted.

11/ See, Berton Kinschner, Inc., 209 NLRB 346 (1975)85 LRRM 1549, affirmed, 523 F.2d 1046 (CA 9, 1975); Franklin Stores Corp., 199 NLRB 52 (1972)j 81 LRRM 1650. Section 1148 of the ALRA mandates this Board to follow appropriate NLRA precedent.

employer's action that Section 8 (a)(1) is violated." Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268-269(1965).

In the instant case, the balance weighs in favor of Respondent when after Mr. Carian had advised the union organizers that they were violating certain regulations, they persisted in such violations. Thus, in this situation, I find that the employer had a right to utilize photography in documenting said violations even though it may have had some coercive effect on the employees. However the balance would weigh against Respondent when, without advising the union organizers of their violations, it proceeds to photograph the conversations between them and the employees.

Accordingly, I find the photographing before Robert Carian conversed with Chavez and the organizers was unlawful surveillance and a violation of Section 1153 (a) of the Act.

However, I find that the photographing after Robert Carian conversed with Chavez and organizers was lawful.

10. Interference with David Martinez' Access to a Labor Camp [12/]

(a) Facts

On or about June 21, David Martinez, A UFW organizer, was at the Campo de Oro labor camp, talking through the open window of a building to two employees inside. Robert Carian drove by in his pickup truck, stopped near Martinez, and shouted at him to leave. The employees pulled back from the window and stopped talking to Martinez. Martinez told Carian that he had the right to visit the employees because the labor camp was considered the employees' home. Once again Carian again asked Martinez to leave, but the latter attempted to continue talking to the employees; however they were unwilling to resume the conversation. [13/]

(b) Analysis and Conclusion

In a series of cases, Silver Creek Packing, 3 ALRB No. 13 (1977), Whitney Farms, 3 ALRB No. 68 (1977), and Vista Verde Farms, 3 ALRB No. 91 (1977) the Board has consistently held that employees have the right to receive visits from and to communicate with union organizers in the labor camps where the employees live. Here Robert Carian, a Respondent supervisor, clearly interfered with and restrained employees in the exercise of those rights and, by his presence and conversation with Martinez, discouraged the employees from continuing their conversation with Martinez. I

[12/] Although this incident was not alleged as an unfair labor practice by General Counsel, it was related to the other charges with respect to the harassment of union organizers by Respondent and it was fully litigated at the hearing. See Sunnyside Nurseries, supra.

[13/] I credit Martinez' testimony over Carian's where they differ. Martinez' detailed account is more believable than Carian's version.

conclude that, by such conduct, Respondent violated Section 1153 (a) of the Act.

11. Alleged Tampering with Lucy Crespin's Automobile (Paragraph 7 F of Second Complaint)

There was no evidence presented that indicated that anyone tampered or did any damage whatsoever to union organizer Lucy Crespin's automobile. Accordingly, I recommend that this charge be dismissed.

B. Events of June 7 to June 10 Involving Motor Vehicle Access and Alleged Violence

Prior to June 7, there had been no problems arising from the presence of UFW motor vehicles on Respondent's property. The UFW vehicles had been driven on and parked on Respondent's property but there had been no complaints that they had interfered with the movement of Respondent's trucks or other vehicles. On June 7, an incident occurred which caused Respondent to adopt a new policy prohibiting the presence of UFW vehicles on its property.

1. The Four-car UFW Caravan of June 7 (Paragraph 10 of First Complaint)

(a) Facts

At about 9:30 A.M. on June 7, Cesar Chavez, four bodyguards, and UFW organizers Lupe Murguia, Marshall Cans, David Martinez, Elizabeth Sullivan, Robert Acuna, Federico Vargas and Lucy Crespin drove in 4 automobiles to Respondent's ranch. The purpose of the visit was for Chavez, the President of the UFW, to Meet and talk to the members of each crew, accompanied by the union organizer assigned to the crew along with Marshall Cans and the bodyguards. According to a prearranged plan, the union organizers Sullivan, Acuna, Vargas and Crespin in the two trailing cars were to accompany the rest to the first crew and then immediately drive to their respective crews.

Chavez, the organizers, and bodyguards entered the rancb and drove some distance into the fields where they all stopped one behind the other in an avenue next to a 26-worker crew. Robert Carian had seen the four vehicles enter, so he followed them in his pickup truck down the avenue until they all came to a standstill. He stopped behind the 4th car, which was driven by Robert Acuna with Federico Vargas and Lucy Crespin as passengers.

Robert Carian got out of his truck and began shouting at them-all to move along. When the fourth car did not move, he got into his pickup and rammed the bumper of the fourth car twice, slightly moving the car each time.

Chavez, his four bodyguards and the two union organizers

exited from the first two cars and Chavez and the organizers began to talk to the workers in the crew. Acuna and Sullivan got out of the other two cars and confronted Carian. Carian shouted at Acuna for his name and the latter refused to give it to him. Carian seized him by the arm and spun him around and read his name on the union organizer's badge he wore. Carian, using vulgar language, shouted at Lucy Crespin asking how much she would charge for a trick and commenting that she would be a good bed-partner. Acuna and Sullivan then asked Carian to move his pickup so they would be able to back their cars out, as they wanted to go where their assigned crews were and the two UFW cars parked in front of them blocked that alternate route. They explained at the hearing they did not want to ask their fellow UFW organizers to move those two cars because they did not want to interrupt their conversation with the crew members. Carian refused to move his pickup. The four then left on foot to visit their respective crews, leaving their two cars there.

Carian took from 5 to 10 minutes to write down the names of Cesar Chavez, the other organizers and the bodyguards. He made no further request for them to leave. He went in his pickup to the nearby ALRB office where he requested that Board Agents come out to the ranch and see that there were too many union organizers per crew and that there were UFW cars blocking the flow of grape trucks. At about 10:00 A.M. he returned to the ranch and there were only two cars left (the ones that Vargas, Acuna, Crespin and Sullivan had come in). He saw a fully loaded truck which was ready to leave but prevented from leaving because the two UFW cars were blocking the way. Carian explained at the hearing that the trucks could not back out because it would be dangerous because of the limited rear vision of the driver and crew members crossing in its path.

Carian went to his father's house nearby to obtain some cameras, then returned and began taking pictures of the two cars and the truck. While Carian was thus occupied, David Zuniga, a Board agent, arrived and observed the scene. He went to look for the union organizers to ask them to move their cars. Between 10:35 and 10:40 A.M. Crespin and Sullivan returned and they and Carian removed their vehicles and the loaded truck was then able to leave. It had been completely loaded and ready to go to the packing shed for 35 to 40 minutes. 14/

(b) Analysis and Conclusion

14/ I have found these facts based on the testimony of Carian, Acuna; Vargas, Crespin and Sullivan. There was little discrepancy since" Carian admitted deliberately hitting the fourth car twice and also turning Acuna around. Carian never specifically denied making remarks to Crespin, although he did not include them in his testimony concerning this incident. I credit the testimony of Vargas, Acuna and Crespin concerning Carian's remarks to Crespin.

General Counsel contends that Respondent is guilty of three unfair labor practices based on Robert Carian's actions in the car caravan episode. I find only two. Carian did interfere with agricultural employee's rights when he rammed the UFW car twice with his pickup and when he seized union organizer Acuna and spun him around to read the name on the badge he was wearing.

The Board has condemned the use of any violence by employer representatives directed at union organizers taking lawful access to the employer's property. The Board stated in Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977):

> Absent compelling evidence of an immediate need to act to secure persons against danger of physical harm or to prevent material harm to tangible property interests ,resort to physical violence. .. shall be viewed by this Board as violative of the law.

In Anderson Farms, 3 ALRB No. 67 (1977), the Board stated:

> Physical confrontations between union and employer representatives are intolerable under the Act.

In the instant case, there was no danger of physical harm or harm to tangible property interests present, so Carian had no right or cause to ram the Acuna car twice or to utilize physical force to spin Acuna around to read the name on his badge. Carian had alternate non-violent means at his disposal such as requesting the ALRB agents or the sheriff to come and remove organizers who refused to supply identification or automobiles which were blocking' grape-truck movements and thus delaying the movement of produce.

However, I find that Carian did not violate the Act when he left his pickup parked behind the UFW automobiles or photographed the UFW automobiles and the truck.

General Counsel argues that Carian interfered with the union organizers' access to their respective crews by leaving his pickup parked behind the UFW cars and thus preventing the organizers from driving them to the crew locations.

However, Carian had just observed eleven UFW organizers 15/ arrive in four automobiles at the location of one crew. He saw seven of them immediately exit from the automobiles and start to converse: with and leaflet members of a 26-worker crew. It was evident that the UFW was violating the ALRB regulation by having an excess number of organizers visiting one crew and so Carian

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15/The fact that individuals wearing organizers' badges were bodyguards does not diminish the reasonableness of Robert Carian's actions, because to him they would all appear to be union organizers.

planned to report it to the ALRB 16/ and began to gather proof to support his accusation.

I consider he had the right to leave his pickup there so he could have physical proof for the ALRB agents when they arrived to see that the UFW had exceeded the number of organizers permitted for each crew and the number of cars parked there was proof of that. Even the two cars that were left when an ALRB agent arrived could still serve as some proof of the alleged excessive access taken by the UFW.

General Counsel alleged in the complaint that Robert Carian had violated the Act by photographic surveillance of organizational activity. However the photographs were of parked UFW automobiles and a loaded grape truck would hardly qualify as union organizational activity and, besides, Carian took the pictures not for the purpose of surveillance but for proof of an access violation committed by the UFW.17/

2. The Tractor Incident of June 8 (Paragraph 12 of First Complaint and 7 A of Second Complaint)

(a) Facts

On June 8 at about 5:45 A.M. Robert Carian stopped his pickup on a road bordering Respondent's ranch, and had a conversation with a group of UFW organizers including David Martinez. He told them that because of the way the UFW cars had been parked the previous day, i.e., in a four-car caravan, he would not permit any more UFW cars to be parked on Respondent's property, and that if the cars were parked on his property he would have them towed away. David Martinez replied that he knew his rights and that he could come and go anytime during the day. Carian told him that his car would be towed away if he parked it on Respondent's property during working hours.

At about 9:45 A.M. that day, David Martinez entered Respondent's ranch in an automobile and parked it on a road on Respondent's premises. A few seconds later, Robert Carian and Robert Castro, his assistant, arrived in Carian's pickup truck and stopped beside the UFW vehicle, Carian got out and told David Martinez that he would not tolerate UFW organizers' cars on Respondent's property, and asked him to turn around and drive out. Martinez replied that he had the right to be there and that he was obeying the law while Carian was disobeying it. There was ample space for both vehicles to park in the roadway and still leave

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16/ Respondent actually filed an unfair labor practice charge with the ALRB alleging that the eleven organizers had interfered with and obstructed work on that day. A copy of the charge was introduced into evidence as Respondent's Exhibit 24. Robert Carian testified that the ALRB subsequently dismissed it.

17/ See pages 16 and 17 for discussion of employer's right to photograph union activities.

room for a grape truck to be driven through, because Martinez' car was not wide enough to block the road.

Martinez got out of his car and walked down the road about 40 yards where he met Alberto Escalante, another UFW organizes. Carian went to get a tractor and started moving it onto the road. Escalante warned Martinez of this and both organizers returned and got into the UFW vehicle. As the tractor driven by Carian approached the car, Carian shouted at Martinez to move the car but Martinez did not comply or indicate that he would. The tractor hit the car and moved it back 4 to 5 yards into the soft sand just off the side of the road. A few seconds later Martinez and Alberto Escalante emerged from the car and walked away toward Camp No. 1. Robert Carian took a chain out of the truck and was preparing to attach it to Martinez[1] car bumper. Martinez and Escalante, observing this, returned to the car and drove it off Respondent's property. 18/

(b) Analysis and Conclusion

General Counsel has alleged that Respondent violated the Act by interfering with the union organizer's rights to access by ramming their automobile. I find that Carian's conduct in ramming the car was a resort to violence which the Board has held cannot be used unless to prevent harm to a person or a tangible property right. See Tex-Cal Land Management Inc., supra. As there was no threat of such harm in these circumstances, I conclude that by its resort to violence, Respondent violated Section 1153 (a) of the Act which prohibits any interference, restraint or coercion with respect ot employee's right to organize and engage in union activities, including the right to receive visits and communications from union representatives at the job-site.

3. The Assault of Bodyguard David Villarino on June 8 (Paragraph 11 of First Complaint)

(a) Facts

On June 8, 1977, UFW President Cesar Chavez and UFW organizers Marchall Cans, David Martinez, and Jesus Munoz, accompanied by three bodyguards, were talking to Respondent's employees at its ranch. At about 10:30 A.M., Robert Carian approached them and told them to get off the ranch. He did not tell them that the hour for access had ended or that there were too many of them. As the group did not comply with his request, Robert Carian repeated his demand 2 or 3 times. Chavez

18/ The findings of fact as to this incident are based on the testimony of the three witnesses, Martinez, Carian and Castro, who testified about this incident. Although there were some discrepancies on minor points, all testified; including Carian himself; that Robert Carian did push the car with his tractor while the car was occupied by Martinez and Escalante.

continued to talk to the employees, telling them that Robert Carian was engaging in illegal surveillance and hampering their organizing efforts. Then Chavez signaled for his group to leave and they slowly walked down the avenue toward Highway 80. There was some jousting between Robert Carian and Cans because the former wanted to get closer to Chavez to talk to him but the latter wouldn't let him .

As they arrived at the road, Robert Carian made a move toward Chavez and bodyguard David Villarino stepped between them. Robert Carian shouted at Villarino, "You have a problem" and grabbed him at the waist and shoved him. Villarino and two other bodyguards reacted and stood between Carian and Chavez. Then the whole group left the property. Cans suggested calling the police because Robert Carian had committed an assault and battery against Villarino, Fifteen minutes later the sheriff arrived and Robert Carian was arrested for battery against Villarino.

(b) Analysis and Conclusion

General Counsel has alleged that Respondent, through its agent Robert Carian, battered David Villarino and assaulted Cesar Chavez while they were exercising their lawful right to access. As has been set forth above, an employer cannot resort to violence unless harm is imminent to either a person or a tangible property interest. It is obvious that there was no such imminent harm here. In fact, the organizers were in the process of leaving the Respondent's property when the assault and battery occurred. When David Villarino stepped between Chavez and Robert Carian he did not represent a threat to Carian's physical safety. Carian himself testified that all Villarino did was to block his movements so he couldn't pass and then Carian seized him. Clearly, Carian had no right or justification to use physical force or violence and, in so doing, he violated Section 1153 (a) of the Act.

General Counsel has failed to prove that Carian assaulted Cesar Chavez. Carian testified that he was trying to get close to Chavez to talk to him and David Villarino testified that all Carian did when he made the move toward Chavez was to quicken his step, an action which cannot reasonably be interpreted as an assault. Moreover, there was no testimony that Cesar Chavez was put in fear of a battery when R. Carian made this move toward him. Accordingly, I recommend dismissal of the allegation that Carian assaulted Chavez.

4. Robert Carian Forced Union Organizer Robert Acuna to Stop His Car 19/

19/ Although this incident was not alleged as an unfair labor practice by General Counsel, it is related to the charges with respect to harassment of union organizers by Respondent and it was fully litigated at the hearing. See Sunnyside Nurseries Inc., supra.

(a) Facts

At 5145 A.M. on June 8, 1977, UFW representative Robert Acuna was driving his car along a road that bordered on Respondent's grape fields. He was trying to determine where the crews were working that morning. Robert Carian, driving his pickup, spotted Acuna's car on Respondent's property and started to follow close behind it, traveling at 10 to 15 miles per hour. Carian then drove alongside Acuna's car and veered his pickup diagonally in front of it forcing, Acuna to stop. Carian got out of the pickup and told Acuna that he had warned him the day before that if he came on Respondent's property in an automobile Carian would knock his ass off. Acuna made no reply, but backed up and drove off Respondent's property. Carian followed him closely until he was off the property.

There were no substantial differences in Acuna's and Carian's testimony about this incident.

(b) Analysis and Conclusion

In the circumstances related above, it is not necessary to decide whether Acuna was rightly or wrongly on Respondent's premises because even if he were wrongly there Carian did not have the right to resort to violence to remove the car from the premises. As previously stated herein, an employer cannot resort to violence to remove a motor vehicle from company property if its presence does not present imminent danger of harm to persons or tangible property interests. Respondent claims that the presence of Acuna's car on the property constituted a natural hazard to any employee or vehicle of Respondent's which might be in the area. I consider an automobile traveling between 10 and 15 miles per hour not to be a hazard and find that Carian had no legitimate reason to resort to violence. He did so by swerving his car in front of Acuna's car and forcing him to stop. He could have attracted Acuna's attention in some less threatening manner, e.g. by .driving close to him at a safe distance and sounding his horn or otherwise signalling him to stop. Both Carian's and Acuna's testimony shows that Carian made no attempt to do so. 20/ By Carian's violent use of the pickup as above described, I find, Respondent violated Section 1153 (a) of the Act in that it unlawfully interfered with, restrained, and coerced agricultural employees in the exercise of their right to receive visits and communications from union agents and organizers at the job-site.

20/ Even if he had signaled to him and had failed to stop him Carian still wouldn't have had the right to resort to the violent maneuver he utilized.

5. Harassment of Mario Vargas by Robert Castro and Robert Carian 21/

(a) Facts

On June 10, 1977 UFW organizer Mario Vargas has just driven from Respondent's field in his automobile when he noticed that Robert Castro was following in a pickup a very short distance behind. The two vehicles were traveling between 25 and 35 miles per hour. This took place in full view of one of Respondent's crews.

Three days later, on June 13, Vargas was driving along Highway 50, looking for Leopado Galindo's crew. At the end of Respondent's property, he made a U-turn. Standing at the side of the road were Robert Carian, General Supervisor Jose Castro and Ray Paey. As Vargas completed his U-turn, Robert Carian threw a bunch of grapes at the upper part of the car on the driver's side. Then Carian entered his pickup truck and followed Vargas until he arrived at another field, where Vargas stopped and looked for Galindo's crew. As the crew was not in sight, he turned and drove back. As he passed Robert Carian's car, Carian threw another bunch of grapes at him.

In his testimony Robert Carian did not deny the actions ascribed to him or even mention these two episodes. I fully credit the clear and detailed testimony of Mario Vargar with respect to these two episodes.

(b) Analysis and Conclusion

I find that Carians' conduct, in throwing grapes, at Vargas and Carian's and Castro's conduct in closely, following him in a motor vehicle, constitutes restraint and coercion calculated to discourage Vargas from exercising his legitimate right to access. By such acts and conduct Carian and Castro interfered with the employees' rights to receive visits and communications from union agents in an election campaign. Respondent thereby violated Section 1153(a) of the Act.

6. The Assault of Union Organizer Fred Ross (Paragraph 7H of Second Complaint)

(a) Facts

On July 1, at about 10:00 a.m., Union organizers Fred Ross, Lupe Murguia, Elizabeth Sullivan, Mario Vargas, Lucy Crespin and Federico Vargas arrived by automobile at Respondent's field near Camp No. 3. David Martinez and Lupe Crespin entered

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21/ Although the incidents involving Carian, Castro and Vargas, were not alleged as unfair labor practices by General Counsel, they were related to other charges with respect to harassment of organizers by Respondent and they were fully litigated at the hearing.

the fields. Then Fred Ross and Federico Vargas began to walk down an avenue into the fields. At that moment, Robert Carian noticed their arrival and immediately walked down the same avenue, then turned in front of Fred Ross, and shouted, "Get the hell out of here, Ross, you lost an election. This is private property. You have no right to be here." Ross retorted, "We have a right to access for five days after the election. We are here to talk to the employees and have the right to do so." 22/ Fred Ross then tried to walk quickly around Robert Carian, but Carian grabbed him around the neck and tried to pull him to the ground. Ross, freeing himself from Carian's grasp, hit Carian with his elbow, and then ran down the avenue. Carian pursued him and brought him down with a tackle. Fred Ross lay there a few moments and then arose and continued down the avenue toward some workers. He asked them whether they had witnessed the fracas but no one responded. Carian returned to where his car was parked and called the sheriff's office. The sheriff's deputies arrived and talked to both Fred Ross and Robert Carian, who thereafter left in the police car.

(b) Analysis and Conclusion

The Board has held that one of the main purposes of the Act was to end the use of violence in the fields and especially to avoid confrontations of violence between employers and the unions. In this case, Robert Carian, without regard to the union organizers' right to access during the five days after the election, resorted to violence to stop organizer Fred Ross from exercising his right of access. The Board held in Tex-Cal Land Management Inc., supra, that an employer is entitled to use force where there is a danger of imminent harm to a person or a tangible property interest. It is clear that Fred Ross did not represent such a danger, as he was merely on his way to talk to some workers. I conclude that by Carian's assault and battery of a union representative to prevent lawful access, Respondent violated Section 1153(a) of the Act.

C. Discriminatory Layoff of Thirteen Employees (Paragraph 70 of second Complaint)

(a) Facts

On or about June 17, 1977 Respondent laid off all of its harvesting employees who lived off the ranch and continued to employ those living at its labor camps. Among the employees laid

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22/ Robert Carian testified that Ross refused to say anything to him "concerning his right to access at the ranch, despite Carian' s repeated requests for an explanation. Ross and various other witnesses, including Robert Castro and Dale Hoy, Carian's friends, all testified that Ross explained to Carian that he had the right to visit employees at the ranch for 5 days after the election and that since it was July 1 it was within the 5 days after the June 27 election. I credit these witnesses' testimony over that of Carian on this matter.

off were Maria Serrano, Ezeguiel Serrano, Yolanda Serrano, Salvador Contreras, Maria Contreras, Salvador Ramirez, Guadalupe Ramirez, Jaime Ramirez, Guadalupe Nieto, Alberto Martinez, Uriel Martinez, Lydia Martines and Josefina Nunez. General Counsel contends that these named employees were discriminatorily laid off by Respondent because of their union activities.

Respondent claimed it had a legitimate business reason to lay off large numbers of employees in mid-June because it needed fewer employees to harvest the Thompson grapes than it needed for the Perlettes. The harvest of the 310 acres of Perlettes was coming to a close and in a few days the harvest of the 85 acres of Thompson grapes would begin. According to Harry Carian, this was the first year he had to lay off workers, because in previous years the workers left voluntarily because there was an abundance of Thompsons to be picked on other ranches in the Coachella Valley. Carian testified that he had heard that most of the workers wanted to remain at Respondent's in order to vote in the upcoming election and that these circumstances forced him to make a reduction of the work force. Without a precedent to guide him, Carian testified, he decided to consult his attorney to find a method that could not be characterized as discriminatory. After a few days of consultation, Carian told Jose Castro to lay off all employees not living at Respondent's labor camps. All the above mentioned alleged discriminatees, because they did not live at a labor camp, were included among those laid off.

(b) Analysis and Conclusion

General Counsel argues that most of the active UFW supporters lived off the ranch and that Harry Carian knew this. So when he devised and utilized this "living-off-the-ranch" criterion for determining which employees to lay off he knew he would be eliminating most of the active UFW supporters and thus the real motive for his decision was to discriminate against employees because of their union activities. Respondent denies that was so and insists that its decision was based on the most impartial method it could devise.

Under ALRB precedents it is necessary to prove the following elements in order to establish a discriminatory discharge or lay off and thus a violation of Section 1153(c) and (a) of the Labor Code:

1. belief or knowledge by the employer of the employee's pro-union attitude and/or activities.

2. a discriminatory action by the employer toward this employees because of his union sympaties or activities.

Respondent's knowledge, through its crew foremen, of the pro-UFW tendencies of all of the alleged discriminatees may

be inferred from the fact that these employees were actively campaigning for the UFW in their respective crews. Alberto Martinez talked to employees about the UFW and asked them to sign authorization cards. His brother Uriel Martinez passed out UFW literature and both Uriel and his wife Lydia wore UFW buttons. Both Maria Serrano and Salvador Contreras talked about the UFW, distributed leaflets to the crews and escorted Chavez around to meet their co-workers. Serrano's husband Ezequiel and daughter Yolanda and Contreras' wife Maria wore UFW buttons. Teresa Sanchez wore a UFW button and escorted Chavez around to meet heir crew.

Salvador Ramirez, his wife Guadalupe, his brother Jaime and a friend Guadalupe Nieto all wore UFW buttons. On one occasion Hector Castro, a second foreman asked Salvador whether he was for the union and Salvador answered in the affirmative. Josefina Nunez went to work for Respondent after Maria Serrano asked foreman Florencio Beas to hire her. A few days later Beas told Maria he knew she was trying to trick the company by bringing Josefina in as a union supporter.

Respondent's explanation of its motive in effecting, the layoffs is not persuasive. First of all there was no actual need for a layoff at that time. The layoff was carried out on' the day the harvest of the Perlettes ended, that is on June 16 or 17.,2_,3 Respondent didn't give the natural attrition that had occured in previous years a chance to work. If he had, it is likely that the workers, seeing their earnings drop as they moved into the Thompsons, would have left for the other ranches where there was an abundance of Thompsons to be harvested. If they had not, Respondent could then have justifiably laid off some workers.

Carian's explanation that the habitual annual attrition was not going to occur because the workers wanted to stay for the election is unpersuasive since the election was imminent. The UFW filed its petition on June 20 and anticipated a June 7-13 payroll period for eligibility. So the workers could have left Respondent's employ, moved on to higher-paying jobs at other ranches in the same valley and still be eligible to vote in the Carian election. Workers who had worked for Respondent for years were dismayed when they were laid off merely because they lived off the ranch and considered that method of selection highly unfair. Under normal circumstances, Carian would have wanted to avoid this resentment but he was willing to chance it because, he sought the overriding benefit of ridding the ranch of the UFW's most active employee supporters who were also in this category of "off-the-ranch" employees. Therefore I find that the

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23/ Carian testified with a week or ten days to go in the Perlettes he realized that there would be no attrition that year because some workers told him that they would not be leaving. However he did not remember the place or time of the conversation or names of the involved workers.

true motive to lay off the "live-off-the ranch" employees was to remove the active UFW supporters from the crews in the final days of the UFW campaign.

Statements by Respondent[1] s foremen.24/previous to the lay-off provide additional proof of the discriminatory motive behind the lay-off. On or about June 10, 1977 Prudon Estrada, a foreman, told employees there would be a lay-off and that the first workers to go would be the Chavistas or the workers who were pro-union. About the time of the lay-off foreman Florencio Beas, told workers that some employees hired by the Respondent had been campaigning for the UFW, for example the Serranos and the Contreras, and if the company had known that fact ahead of time they would not have hired them. General Supervisor Jose Castro, told employee Alberto Martinez that if he had known that he, his brother and his sister-in-law were going to organize for the UFW he would have never hired them but now he knew that fact for the future.

So I find that Respondent violated Sections 1153(c) and (a) of the Act by discriminaterily laying off Maria Serrano, Ezequiel Serrano, Yolanda Serrano, Josefina Nunez, Salvador Contreras, Maria Contreras, Salvador Ramirez, Guadalupe Ramirez, Jaime Ramirez, Guadalupe Nieto, Alberto Martinez, Uriel Martinez, and Lydia Martinez because of their union activities.

D. Verbal and printed insults of women employees and union organizers

(a) Facts

(i) Robert Carian insults Lucy Crespin on four separate occasions.

On four separate occasions, UFW organizer Lucy Crespin, was subjected to vulgar and suggestive remarks from Robert Carian25/

Three times during June she was waiting at the edge of the fields for Robert Acuna a fellow organizer to give her a ride. Each time Robert Carian and Robert Castro drove by and stopped next to her and Carian asked her how much she charged for a trick and said that she would make a good bed partner.26/ The last time

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24/ These three statments were testified to by Robert Acuna, David Martinez and Alberto Martinez respectively. The three supervisors all testified for Respondent but none of them testified with respect to these statements. I therefore credit Acuna, David Martinez and Alberto Martinez that these three statements were made.

25/ These facts are based on Crespin's credible testimony. Robert Carian and Robert Castro, who both testified on other matters, never denied any of her testimony.

26/ The language used here to describe the insulting remarks is actually the euphemistic paraphrasing 'used by Crespin in her testimony since she did not want to repeat the vulgar language used by Carian.

Carian said he would take her to a dance and that Robert Castro would satisfy her. On this last occasion the workers nearby told Carian and Castro to shut up.

On June 7, 1977 after Robert Carian had rammed the car in which she, Acuna and Vargas were riding, he got out of his pickup and during the ensuing conversation insulted Crespin by asking how much she was worth and that she would made a good bed partner.

(ii) Respondent distributes a pamphlet defiling women employees' and union organizers' moral character

During the election campaign, the Respondent admittedly printed various leaflets and distributed them among the workers. One of them, GC Exhibit 18 depicted a young lady UFW organizer saying to a worker (in Spanish) "Hello Jose! I understand that you have a problem understanding all the benefits you could obtain signing an election petition." Jose answers, "I already told another organizer that all the things that they are promising for the future, I have now." Then she says, "Why don't we return to your house and I am sure I can teach you the benefits that you do NOT have now." Then it shows the young lady leaving his house and he is saying to himself, "Well, I had not thought about that benefit BUT I don't know if it is worth while to give 2% of my salary. That's more than 6 cents an hour."

Maria Serrano, an active UFW supporter was working in the Beas-Medrano crew and Medrano, a foreman, gave her a copy of this leaflet. She also observed him passing these leaflets out to the other members of the crew. She read it and interpreted it to mean that as a woman organizer for the UFW she would have to submit her body. She felt angry about the leaflet and felt that she would be embarrassed among the workers.

(b) Analysis and Conclusion

It is obvious that Robert Carian[1]s verbal insults referring to UFW organizer Lucy Crespin's moral character tend to discourage lawful organizing activities of union agents and thus to interfere with employees' right to hear the merits of unionization so they can make an informed decision in their voting to designate or reject a union. These insults were reasonably calculated to discourage Lucy Crespin and other UFW woman organizers from coming onto Respondent's premises and talking to workers. I find these acts to be violations of Section 1153(a) of the Act.

There is NLRB precedent holding that it is an unfair labor practice for an employer to cast aspersions on the moral

character of woman emoloyees. See Wolfies e.g. 159 NLRB 22 (1966) 62 LRRM 1332 27/

The pamphlets circulated by Respondent could have only one clear connotation to the reader: that women organizers for the UFW will exchange their womanly favors for a union vote. The circulation of this pamphlet had a reasonable tendency. to discourage woman employees and UFW organizers from continuing organizing activities for the UFW. The woman employees and organizers would naturally be very reluctant to engage in such union activities because they would be fearful of embarrassment and ridicule, especially so among the Mexican-American and Mexican employees.

Respondent's defense is that this is just campaign propaganda and that standards under the NLRB permit an extremely broad license in an organizational campaign with respect to leaflets and propaganda material. However the reasoning behind that policy is that it is usually relatively easy for the employees to recognize propaganda and take it for what it is worth. However in this situation Respondent imputes sexual immorality to organizers, a delicate matter entirely different from propaganda concerning an employer's oppressive working conditions or a union's reputation for fomenting strikes. In the normal course of human relations the mere accusation of moral turpitude is embarrassing and has a reasonable tendency to dissuade a woman from engaging in union activities which might elicit such accusations or innuendoes. I find that Respondent's circulation of this leaflet constituted interference with the Section 1152 rights of workers and therefore was a violation of Section 1153(a) of the Act.

27/ Employer found to have violated Section 8 (a) (1) of the Act by referring to waitresses (employees) with the words "who had been taken off the street," thereby imputing impurity to them.

E. Harry Carian's Election Eve Speeches

(a) Facts

On election eve, June 26, 1978, Harry Carian accompanied by general supervisor Jose Castro, went to Camp No. 1 to talk to the workers about the next day's election. At the urging of foremen Hilario Castro and Florencio Beas, all the workers present at the camp at that time gathered in the courtyard to listen to Harry Carian. He told them there was some confusion about whether he favored the union and he wanted to make it clear he preferred no union because he thought Respondent and its employees were a harmonious family and that the union would bring problems. He recited the benefits, including medical benefits, that the workers already were enjoying. UFW organizer David Martinez was present and wanted to interrupt to correct come statements he considered to be lies but was prevented from doing so by the shouts of some workers and foremen. After Harry Carian left, Martinez tried to call a meeting to talk to the employees there but supervisors Zoila Castro and Hilari Castro shouted him down.

The next morning, union organizer Federico Vargas went, to Camp No. 1 and noticed a change in the workers' attitude toward him; On previous occasions they were eager for the election but that morning they acted coldly toward him and would not accept any UFW leaflets.

On the eve of the election, Harry Carian, accompanied by Jose Castro, also visited Camp No. 3 to talk to the workers. At the latter's urging, all the workers present at the camp at that time gathered in the kitchen to listen to Harry Carian. Carian repeated the same speech he had given at Camp No. 1. When he finished, Raul Bretado, an employee, complained to him about conditions at the Carian and Gilfenbain ranch in Delano. Carian promised the conditions would be corrected and also promised a bus, better wages and higher premiums per box. 28/

(b) Anaylsis and Conclusion

I consider Carians speech at Camp No. 1 well within the confines of free speech and typical pre-election campaign talk. He made no threats of any kind or promises of benefits. The first part of his speech at Camp. No. 3 falls into the same category. However when Bretado began to ask him questions, his promises of benefits, e.g. improving the camp conditions and

Harry Carian denied making any promises to improve conditions or raise wages. However, I credit Raul Bretado who testified in a straightforward manner and was very clear about the details of Carian's speech.

paying better wages, constituted interference with the rights of the workers and .a violation of Section 1153(a) of the Act, and I so find. See Exchange Parts Co., 375 U.S. 405, 84 S.CT. 475 (1964) .

Moreover, Respondent violated Section 1153(a) by the actions of its supervisors in preventing UFW organizer Martinez from convening a meeting of employees after Carian finished his talk. The labor camps are considered the homes of the workers and an organiser has the right to contact employees there and talk to them as long as the workers are willing. See Si1ver Creek Packing, supra, Whitney Farms, supra, and Vista Verde Farms, supra.

F. Jose Castro Assaults Union Organizer at Polls on Election Day. 29/

(a) Facts

On election morning, at the Camp No. 3 election site, Board Agent David Zuniga, UFW agent Fred Ross, general supervisor Jose Castro, and Respondent's attorney David Smith were standing together talking about the election procedures. Ross told Castro in a loud voice, in Spanish, that he and the other supervisors had no right to be in the election area and should leave. Castro answered that he had a right to be there and could talk to the people. Ross told Zuniga that Hector Castro could not be an observer for Respondent since he was a second foreman and that Zuniga should keep the supervisors and foremen out of the polling areas. Zuniga answered that the Board Agents would take care of those matters because it was their job. Ross repeated his objection with respect to Hector Castro being an observer and stated that Hector should vote a challenged ballot because of his supervisory status. At that moment, Jose Castro swung his fist at Ross, missed and instead hit Zuniga a glancing blow. Smith took hold of Jose Castro to restrain him. Jose Castro was angry and wrestled around in Smith's grip but did not free himself from Smith's grasp. Ross did not retaliate and remained unruffled. He told Zuniga he wanted Jose Castro removed and Castro left the area. This scene was observed by about 75 employees .who were standing nearby waiting to vote.

(b) Analysis and Conclusion

As has been previously mentioned, the Board stated in Anderson Farms, supra, "Physical confrontations between union and employer representatives are intolerable under the Act." One of the main purposes of the Act is to end the violence in

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29/Although this incident was not alleged as an unfair labor practice by the General Counsel, it was alleged as an objection to the election in the representation case, and was fully litigated at the hearing. See Sunnyside Nurseries. Inc., supra.

the fields and especially to avoid confrontations of this kind between a union organizer and a representative of the employer such as a general supervisor in view of employees.

The only pretext that Castro might have had for attempting to strike Ross was the latter's loud demands that he and other supervisory personnel leave the area forthwith when they actually had the right to stay there until the polls opened. However, the Board held in Tex-Cal Land Management Inc., supra that the only time the use of force is permissible by an employer under the Act is when there is danger of imminent harm to a person or an employer's tangible property interest. There was no such imminent harm in this case. Fred Ross and Board Agent Zuniga were peacefully making arrangements for the orderly conduct of a representation election, and Castro's assault and battery in the presence of employees constituted a violation of Section 1153 (a) of the Act, i.e. interference with employees' rights as protected by Section 1152 of the Act.

G. Respondent Arranges for 40 Persons to Vote in Election 30/

The UFW petitioned for a statewide bargaining unit and at the pre-election conference on Thursday June 23 the Board agent requested Respondent to provide information with respect to an appropriate bargaining unit and also a list of Respondent's employees in the San Joaquin Valley. Respondent contended that all Respondent's employees in the Coachella Valley constituted an appropriate bargaining unit and declined to supply any of the requested information. Although the Board had not made a final ruling on whether Carian and Gilfenbain31/ was part of the appropriate bargaining unit, it did set up a voting place in the San Joaquin Valley at the Woodville Labor Camp. On Saturday June 2 5, Harry Carian telephoned his son Blaine Carian and told him to make arrangements for all employees who had worked for Carian and Gilfenbain between June 14 and 20 to vote in the election scheduled for Monday June 27. Blaine telephoned his father back and told him that he had contacted Carian and Gilfenbain's labor contractor Mario Macias.

30/Although this allegation was not pleaded as an unfair labor practice by General Counsel, it was listed as an objection to the election in the representation case and it was fully litigated at the hearing.

31/Carian and Gilfenbain is a firm that grows and harvests grapes in the San Joaquin Valley and Harry Carian is a partner in such firm.

On Sunday June 26, Blaine Carian contracted for two buses to transport voters to the polls. On the same day, Juanita Villareal, a forelady for Mario Macias who supervised Carian and Gilfenbain employees supplied by Macias, contacted Erma Saenz, a field worker who had worked under her supervision for Carian and Gilfenbain in June 1977, and told her there would be no work Monday because there was going to be an election. Villareal asked Saenz whom she was going to vote for and Saenz answered Chavez. Villareal said she was not sure whether there would be work Monday but that she would call Saenz back. Saenz did not hear from her after that.

Also on Sunday June 26, former employee Liliana Salas contacted Villareal about returning to work at Carian and Gilfenbain. She had previously been recruited by Macias and had worked in the Carian and Gilfenbain fields in June. Villareal told her there would be no work on Monday but that there might be work on Tuesday. While Salas was working for Macias in early June, during a conversation about the union, Salas told Villareal that she supported the UFW. About June 29, Salas returned to work for Macias and informed Villareal that she had heard about the election and how the workers were paid to vote and she would, have liked to have voted and to have been paid for it. Villareal told her that she did not know anything about it.

Mary Salazar also worked for Macias in Villareal's crew in June and was laid off on or about June 22. On Saturday June 25 she contacted Villareal and inquired about work. Villareal informed her there would be no work for the employees on Monday because they were going to vote in an election. She told Salazar to go to a Safeway store parking lot on Monday morning June 27 and Salazar did so. Once there, she boarded one of two buses along with approximately 49 other persons including some members of the Villareal crew and was transported from Arvin to Woodville, a place just south of Delano. En route, Villareal told the passengers to remember to vote for Carian and told then what side of the ballot the "no union" choice was on. When they arrived at the voting site everyone, except 8 or 9 persons, signed a joint declaration that they were employees of Harry Carian Sales. The 8 or 9 persons who refused to sign the declaration said they did not want to sign anything and returned to the buses. The remaining 40 persons voted challenged ballots. They all returned to Arvin on the two buses and subsequently those who voted received checks for $28, equivalent to pay for 8 to 9 hours work. The checks were from Harry Carian Sales. Copies of these forty checks were admitted into evidence and the names of the payees on the checks corresponded with the names of the voters who voted challenged ballots at Woodville. Harry Carian admitted signing the forty checks. Sixteen of the 40 workers were not on either the C & G or Mario Macias[1] payroll lists. Only a little over half of the workers employed by Carian and Gilfenbain through labor

contractor Macias voted.32/

Analysis and Conclusion

Section 1154.6 of the Act makes it an unfair labor practice to wilfully arrange for persons to become employees for the primary purpose of voting in elections.

In this particular case it is evident from the facts that Respondent, through Harry Carian, his son Blaine Carian, labor contractor Mario Macias, and foreperson Juanita Villareal, selectively chose no-union-vote workers from the Mario Macias crew who had worked for Carian and Gilfenbain during the elgible payroll period. Respondent through the above-mentioned agents, transported the employees to and from the polls, instructed them to vote no-union and paid them a day's wages. Respondent did not arrange for the pro-UFW workers in Mario Macias[1] crew or any of the employees it directly employs to go to the polls.

In addition to selectively recalling no-union-vote workers to its employ, it also selected 16 non-employees and employed them to vote in the election with instructions to vote no union.

It is evident from the foregoing that Respondent wilfully arranged for these forty persons to become employees for the primary purpose of voting in election and thus violated Section 1154.6 of the Act, and I so find.

H. Refusals to Rehire at Carian and Gilfenbain

Refusals to rehire of Jose Villalobos, Juan Garza, Salvador Contreras and Maria Contreras. (Paragraph 7P of Second Complaint)

(a) Facts

Jose Villalobos worked in the crew of his good friend Prudon Estrada during Respondent's June and July harvest. Toward the end of the harvest foreman Estrada told Villalobos he could not take him to work at the Carian and Gilfenbain ranch in Lament because Jose Castro had said he did not want Villalobos and Juan Garza in camp any longer because they were Chavistas. Later in August, Estrada and Villalobos drove up to the Lament area together. After working for another grower a short time Estrada took Villalobos to see Jose Castro and the latter told him he would give him work at Carian and Gilfenbain and living

I base the findings of facts on the credible and uncontradicted testimony of Mary Salazar, Erma Saenz , Liliana Salas, Isidro Martinez, and Harry Carian and on the documentary evidence o the checks, payroll sheets the joint declaration and the list of challenged voters.

quarters at the labor camp. Villalobos left to get his clothes but did not thereafter report to the camp or go to work for Carian and Gilfenbain. In November, Estrada talked to Villalobos in Mexicali and the latter told him he had returned to Mexicali without returning to work.33/ At the time of the hearing, Villalobos was back to work for Respondent.

For a number of years Juan Garza, a grape harvester, had worked for the Respondent on its Coachella Ranch and afterwards would go up to Lamont and work for Carian and Gilfenbain. Garza was a known UFW supporter who wore a UFW button, had escorted Cesar Chavez around to meet crew members, and had frequently talked to fellow workers about the UFW. A few days before the end of the grape harvest in Coachella, Garza asked Castro for employment in Lamont and Castro said yes and told Garza to check with Estrada later because Castro would leave information with Estrada about the location of the labor camp in Lamont which Castro would be using that year. Garza complied but Estrada had not received the information about the camp, so Garza went to the Lamont area and made inquiries for Castro, but could not locate him. He went to work for another grower and later met Castro in a supermarket in Lamont. Garza testified that he asked Castro when he would employ him and Castro answered that he would not do so, adding "Why do you want to work for us? You are a Chavista. You'd better go with the Chavistas". Jose Castro denied ever having seen Garza in Lamont. At the time of the encounter between Garza and Castro, the latter was not working for Harry Carian but for Vita-Gro.

Salvador and Maria Contreras, known UFW activists, were laid off at Respondents in mid-June because they resided off the ranch. In the latter part of July, they left the Coachella Valley and went north to Porterville. Salvador Contreras located the Gilfenbain and' Carian fields where Jose Castro was directing the work. Contreras requested work for his wife and himself and Castro told him to come back the 15th of September and he would

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33/ In his testimony, Villalobos said he never tried to obtain employment from Castro because of what Estrada had told him about Castro's attitude toward him. Estrada testified about the Castro job offer to Villalobos. The latter never mentioned anything about it in his testimony. I credit Estrada over Villalobos in this regard because Estrada testified in a sincere manner and remembered all details about the job offer. Villalobos himself testified that it was his custom not to work steadily throughout the harvest season.

have work for them. Contreras returned on that date and before he talked to Castro., Medrano told him he believed there was work. Later he talked to Castro who informed him that as he had a large number of employees there would be no work for him and his wife.34/

(k) Analysis and Conclusion

As Jose Villalobos was offered a job by Jose Castro in August 1977 I find that the allegation that Respondent refused to rehire him because of his support for the UFW was not proven and I therefore recommend that this allegation of the complaint be dismissed.

The allegation that Respondent refused to rehire Juan Garza in the Lamont area is somewhat difficult to resolve. Juan Garza was a very forthright and guileless witness. I credit his testimony but in analysing it there are some incongruities which tend to raise a question as to whether Garza actually requested and was refused employment in the Lamont area in his supermarket encounter with Jose Castro.

Garza's pro UFW tendencies were well known to his supervisors during the weeks leading up to the election. According to Garza, a few days after the election Jose Castro, having been asked by Garza, agreed to employ him in the Lamont area and provided him with instructions about how to locate the labor camp that Castro would be using during the Lamont harvest. If Castro had had any resentment against Garza for his pro-UFW tendencies he would not have so readily offered him a job when requested. When Garza ran into Castro in the supermarket he was already employed and so had little motive to apply for work with Carian and Gilfenbain. There was probably an exchange of words between Garza and Castro about available work and the UFW but I find that General Counsel has failed to meet his burden of proving by the preponderance of the evidence that Garza requested employment and Castro refused to hire him. I therefore recommend dismissal of this allegation.

Salvador Contreras was a sincere and believable witness. However, his testimony as to Castro refusing him reemployment contains an incongruity which casts doubt on the allegation that Castro refused to hire him because of his support of and activities for the UFW. Contreras testified that when he first talked to Castro the latter told him to come back later and he would give him and his wife employment. If Castro had any resentment against the Contrerases because of their pro-UFW views, it is unlikely that

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34/There is no evidence in the record that the crews were not full or that Jose Castro hired additional workers after turning away the Contreras.

he would have told them to come back. Both Castro and Contreras testified that Castro said at that time that the crews were full and he had no room for Contreras and his wife. The General Counsel has failed to show by a preponderance of the evidence that Jose Castro refused to rehire Salvador and Maria Contreras because of their union propensities and/or activities so I recommend dismissal of said allegations.

I. Alleged Discriminatory Treatment of Cesar Arreola. (Section 7N of Second Complaint)

(a) Facts

In March 1977 Cesar Arreola went to work for Respondent. Shortly thereafter he was discharged and the UFW filed a charge against Respondent alleging a discriminatory motive on the part of Respondent in said discharge. Before the hearing on said charge, Respondent sent a letter to Arreola informing him that they had employment for him if he wished to apply. Arreola went to Jose Castro and requested reemployment but Castro said that there was no room in the crews. After Arreola showed him the letter Castro assigned him to foreman Prudon Estrada's crew as a picker. The latter would not put Arreola to work until Castro verified to him that Arreola had actually been reemployed. Arreola had never picked grapes before but he did not inform Estrada of that fact. Estrada testified that Arreola's grapes were dirty and rotten and because of that he had problems keeping a packer for Arreola's grapes. On the fifth day of work Estrada informed Arreola of these two facts.

Estrada then talked to Jose Castro who in turn contacted Harry Carian by car radio and asked him to come which he did. Castro showed Carian 3 or 4 boxes of unclean grapes and informed him that Arreola had refused to clean them. Arreola came out of the vines with another box of grapes. Carian asked him what was the problem and Arreola yelled some vulgarities. Arreola started to clean the grapes. Carian filled out a warning notice and asked Arreola to sign it. Arreola refused, picked up a box of grapes and threw that at Harry Carian's feet and said, "Here are your filthy grapes. Give me my check."_35/ Carian left and shortly returned with a pay check for Arreola who then left the fields. Arreola testified that he had worn a UFW button at work and had distributed UFW literature to his fellow crew members.

(b) Analysis and Conclusion

General Counsel argues that Respondent set Arreola

35/Arreola did not mention in direct examination that he had asked for his check but under cross-examination admitted it. Where there has been discrepancies in the testimony I have credited Castro's, Carian's and Estrada's testimony over that of Arreola's.

up to be eliminated from the work force once again. His theory is that Respondent made Arreola's working conditions so burdensome that he was forced to quit. Arreola testified that after he returned from drinking some water he discovered dirty grapes that he had not picked on top of one of his boxes. He claimed that Harry Carian showed these dirty grapes to him and ordered him to clean them. I discount Arreola's testimony regarding this substitution of grapes because he was not a reliable witness.36/

In order to constitute a constructive discharge, General Counsel must show that Respondent, because of Arreola's union activities, changed his working conditions to such an extent that it made continued employment difficult or unpleasant and because of this change Arreola was forced to resign.37/ Respondent's chastising him for the condition of his grapes and asking him to sign a warning notice falls far short of making his further working at Respondent's difficult or unpleasant. In fact the chastisement and the warning notice request are more in the order of incidents rather than changed conditions. Accordingly, I find that there was no constructive discharge and that Arreola voluntarily quit his employment with Respondent. I recommend that this charge be dismissed.

VIII. Remedies

A. Set Aside the Election

1. Summary of Violations in the Instant Case.

I have found that the Respondent has committed the following unfair labor practices, all of which have been alleged by the UFW as objections in the representation case:

Unlawful surveillance of a union organizer who was speaking to workers in the fields by Robert Carian on May 29, 1977.

Unlawful surveillance of and interference with union organizers who were speaking to workers by supervisor Wayne Mayfield on May 31 and June 1, 1977.

Unlawful interference by General Supervisor Jose Castro in ordering three workers not to sign authorization cards on June 6 and 9, 1977

36/This unreliability was demonstrated by his evasiveness in testifying about the facts with respect to his asking for his check.

37/See Crystal Princeton Refining Co. , 222 NLRB 167 (1976) 91 LRRM 1302 the National Labor Relations Board held that "there are two elements which must be proven to establish a constructive discharge First, the burden imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employees' union activities."

Unlawful surveillance by Robert Carian of three employees and a union organizer while the latter was soliciting signatures on authorization cards on June 6, 1977.

Unlawful interference by foreman Florencio Beas with a union organizer while he was soliciting signatures on authorization cards on June 10, 1977.

Unlawful surveillance and photographing of union organizers and workers by Harry Carian on June 10, 1977.

Unlawful surveillance and photographing of union organizers and workers by Robert Carian on June 23, 1977.

Unlawful interference with a union organizer's access to a labor camp by Robert Carian on June 21, 1977.

Unlawful ramming of a UFW vehicle with a pickup truck by Robert Carian on June 7, 1977.

Unlawful battery of a union organizer by Robert Carian on June 7, 1977.

Unlawful striking of a UFW vehicle with a tractor by Robert Carian on June 8, 1977.

Unlawful battery of a UFW bodyguard by Robert Carian on June 8, 1977.

Unlawful harassment and pursuit by pickup truck of a union organizer by Robert Carian on June 8, 1977.

Unlawful harassment and pursuit by pickup truck of a union organizer by Robert Carian and Robert Castro and the throwing of grapes accompanied by insults at a union organizer by Robert Carian on June 13, 1977.

Discriminatorily laying off thirteen active UFW supporters ten days before the election.

Unlawful interference with the activities of a woman union organizer by Robert Carian by insulting and disparaging her moral character in presence of employees on 4 separate occasions in early and middle June, 1977.

Unlawful interference with employees' rights by printing and circulating leaflets which disparaged the moral character of women union organizers and workers who solicited signatures for authorization cards, first party of June, 1977.

Unlawful promise of benefits by Harry Carian in election-eve speech at one of Respondent's labor camps.

Unlawful interference by foremen with employees' rights to hear union organizer speak to them at a labor camp on election eve.

Unlawful battery of a union organizer by Jose Castro, General Supervisor, the morning of the election in presence of 50 voters just before the

polls opened June 27.

Unlawfully employing 40 individuals for the purpose of voting in the election of June 27, 1977.

2. The Administrative Law Officers in two previous cases_38/ 76-CE-37-R and 76-CE-37-R (77-CE-34-C, 41-C and 54-C) , and I in the instant case, have found that Respondent committed numerous and flagrant unfair labor practices. Evaluating their impact on the election, I find that in face of such conduct, a fair election could not be held. Therefore, I find it unnecessary to consider individually the other objections to the election or the challenged-ballot issues that were consolidated for hearing with the instant case. Based upon my independent review of the records in the two previous cases and evaluating the record in the instant case I find that the majority of the objections are supported by the same evidence proving the unfair labor practices, which are sufficient misconduct affecting the results of the election. Accordingly, I set aside the election.

B. The Bargaining Order

I have found Respondent guilty of numerous unfair labor practices of a serious and flagrant nature. The usual remedies of expanded access, posted notices, back pay etc. are not adequate to offset the deleterious effects of Respondent's unfair labor practices on the election process.

Under NLRB precedents, where an employer has engaged in unfair labor practices so flagrant as to distort the election process the NLRB has ordered the employer to bargain with the union despite the fact the union did not establish its majority through an election. Section 1148 of the ALRA mandates that the Board follow applicable NLRA precedents. In this case, the NLRB remedy of bargaining order is clearly applicable because Respondent has committed unfair labor practices that have so adversely affected the election process that the holding of a fair election now or in the near future would be impossible.

Before preceding further we shall consider the bargaining order and how the NLRB uses it as a remedy in cases where the secret-ballot election method has been stultified by the actions of the employer.

[38/] The Employer and the Petitioner-Union both stipulated that I could take administrative notice of the record in the two above-mentioned unfair labor practice cases in determining whether the objectionable conduct had occured as alleged in the representation case now before me.

In NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918 (1969) the U.S. Supreme Court makes a, clear exposition of the manner in which the bargaining order is applied. The Court, describes in detail the two types of cases in which a bargaining order would be warranted as a remedy: (1) where egregious and pervasive unfair labor practices committed by the employer have had the effect of rendering a fair election impossible, even if the union had never achieved a majority status; and (2) where the employer has committed unfair labor practices which are less flagrant but still serious enough "to undermine majority strength and impede the election process", and the union at one time enjoyed majority support which was later dissipated by the employer's unfair labor practices. In a situation where the employer's unfair labor practices had only a minimum impact on an election process, the court held that a bargaining order would be inappropriate.

The reasoning behind the NLRB's bargaining order remedy in the second category is that the employer by his serious unfair labor practices has rendered the secret ballot election process useless in ascertaining the will of the employees and thus the Board Is forced to resort to another method to determine the true desires of the employees. If the other method, e.g. the authorization cards, indicates that a majority of the employees want a certain labor organization to represent them, the Board will order the employer to recognize and bargain with the labor organization.

In the instant case, Respondent has deliberately vitiated the election process so the only reliable way left to determine the will of the majority of his employees is through the authorization cards. The Supreme Court said in Gissel that if the only remedy were a cease-and-desist order and a new election, "it would in effect be- rewarding the employer for his own wrongdoing ....while at the same time severely curtailing the employees' right freely to determine whether they desire a representative."

The Legislature has endowed the Board with broad remedial powers as set forth in Section 1160.3 of the Act:

> "the board shall state its findings of Tact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take a affirmative action....making employees whole...and to provide such other relief as will effectuate the policies of this part."

It is obvious that the Board with its broad remedial powers has the authority to provide as redress, a bargaining order, rather than to issue a cease-and-desist order and order a new election, especially as the latter remedies, according to the Supreme Court in Gissel, supra, would only reward the employer for his wrongdoing and severely curtail the rights of the employees to select a representative of their own choosing.

If the Board lid not have available the remedy of a bargaining order the alternate remedy would be even more inadequate than the NLRB remedy of a cease-and-desist order and a rerun election which was mentioned in the preceding paragraph. It has not been settled yet under the ALRB whether the Board can order a rerun election. Therefore the only remedy at the Board's disposal would be a cease-and-desist order to prevent a repitition of unfair labor practices by the employer, and expanded access for union organizers. However, the union would have to wait until the next peak season of employment to petition for an election and to utilize the advantage of expanded access. Peak season in most California agricultural operations occurs only once or twice a year so this could involve a wait of between 6 months and a year. Under these conditions, an anti-union employer, without the remedial effect of a bargaining order would be able to render inoperative sucessive elections by commiting unfair labor practices and thus delay indefinitely the designation of a bargaining agent by its employees and its duty to bargain with same. Such an opportunity to obstruct the law over a period of years is not in keeping with the intent of the ALRE which was to:

> encourage and protect the right of agricultural employees to full freedom of association, self-organization and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

As the Board has this authority to issue a bargaining order and Respondent has committed unfair labor practices which have undermined the UFW majority and impeded the election process the next step is to review the authorization cards and determine whether at one time the union enjoyed majority suppoet. If majority support can be shown then it will be unnecessary to decide whether Respondent's unfair labor practices were of an egregrious and pervasive character.

A comparison of Respondent's payroll records and the signed authorization cards indicates that the UFW had obtained 155 authorization cards from among the 266 [39/] agricultural employees employed by Respondent during the period June 7 to

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[39/] The UFW argued that fourteen employees on Respondent s payroll lists should not be included in the total number of agricultural employees in Respondent's employ during these two eligibility periods. I have not included nine of them because Respondent admitted in its pleadings that the following were supervisors and thus ineligible to vote under the Act: Florencio Beas, Hilario Castro, Teofilo Medrano, Zoila Castro, Filiberto Robles and Prudon Estradajand its General Supervisor Jose Castro admitted in testimony that the following were foremen or assistant foreman with the same duties as foremen and thus ineligible to vote under the Act: Leopardo Galindo, Jose Luis Castro and Hector Castro.

I have concluded however that the five remaining employees should be included in the total number of employees eligible to vote.

The UFW argues that three of the five(Gloria Robles, Juan Castro and Jorge Castro)acted as assistant foremen and thus they should be considered as supervisors under the Act .and ineligible to vote. However, no evidence was presented in respect to Roble's position with the Respondent so I cannot find her to be a supervisor. Evidence was presented about Jorge Castro's duties. He was the twelve-year old son of Jose Castro, General Supervisor, who assisted in keeping count of the piece work and told employees at times where to pick. As he worked under the tutelage of his grandmother, Zoila Castro, the crew's foreperson, I do not consider that he had any authority of his own and therefore was not a supervisor and was eligible to vote. There was testimony about Juan Castro's duties as a second foreman but it was while he was working for another employer, C & G Ranch, in Delano. However there is no testimony regarding his duties while working for Respondent in June 1977 so I cannot find him to be a supervisor and so he is eligible to vote.

The UFW also argued that the other two employees who should not be eligible to vote are two Japanese students Kazuhito Saegusa and Sumiyoshi Ono, who were working for Respondent as part of a student program. However as no evidence was presented at the hearing about their employment status, I find them to be employees and eligible to vote.

June 13, 1977 and 152. authorization cards from among the 259 agricultural employees employed during the period June 13 to 20, 1977. So the UFW has demonstrated that during each of the two possible correct payroll periods for eligibility in the June 27 election, it enjoyed the support of a clear majority of Respondent's agricultural employees.

At the hearing, the UFW had either the employee, himself, testify that he had signed the card or had the subscribing witness, whether a fellow employee or a union organizer, testify that he had witnessed the employee sign the card. The authorization card had a single-purpose significance and that was that the signatory employee was designating the UFW as his or her bargaining agent and there was no reference to an election on the card.

The union organizers, who gathered the employees' signatures on the cards, testified that they invariably explained to the employees that signing the card meant a commitment to the UFW and an expression of their desire that the UFW be their agent in bargaining with Respondent.

Respondent attempted to bring out on cross-examination of the union organizers that when they solicited signatures they told the employees that the only effect of the card was to bring about an election, at which time they could vote for or against the UFW. All of the union organizers credibly denied saying that. Most of them admitted that in addition to explaining that signing the card meant a commitment to the UFW they informed the employees that once a majority signed the cards there would be an election. A U. S. Court of Appeals has held that cards with clear language of authorization for union representation are not rendered invalid by statements such as, "The cards are for a vote", "You have to have a certain percentage of signed cards in order to have an election."[40/] So the fact that organizers in this case explained to employees the concurrent purpose of the cards, i.e., to call for an election did not invalidate the cards.

[40/] Gotham Shoe Mfg. Co., 359 F. 2d 684, 61 LRRM 2177 (CA 2, T.966)

Respondent called as witnesses, twelve current employees, who all testified that at the time they signed the authorization cards, the union organizers told them it was just for an election and that they had not read the cards nor had the cards been read to them before they signed. On cross-examination, all but one of these witnesses 41/ admitted that the organizers told them about union benefits before and at the time they signed the cards. This indicates that the organizers were informing employees of reasons why they should designate the UFW as their bargaining agent. This corroborates the testimony of the UFW organizers that they were explaining considerably more than just the election purpose of the cards.

It is noted that these twelve witnesses were all working for Respondent at the time of the hearing. The Supreme Court in Gissel, supra, warned against the acceptance of interested employees post-facto ruminations and second thoughts, as here, concerning their alleged subjective thoughts and "intentions" at the time they signed authorization cards, indicating that such testimony in not only suspect but inefficacious (as in the case of other written instruments) to overcome the clear language of the cards.

Based upon the foregoing, I find that the totality of the circumstances surrounding the card-solicitation indicates that the union organizers did not inform the card-signers that the authorization cards were for the sole purpose of obtaining an election. I note additionally.} that the cards state unambiguously that the cards are for representation purpose.42/ Consequently I find that the cards, signed by these twelve witnesses, as well as all the other cards in evidence in this preceeding. were proper expressions of support for representation purposes.

At the hearing, Respondent, by its examinations of the subscribing witnesses implied that there were some technical deficiencies that would invalidate the cards. Some of the so-called deficiencies were; that not all the spaces were filled in with personal data about the signer,' or that the name of the crew was written on that card, or that the date was written in the Mexican manner (Spanish-language style)with the date first rather than the month etc. These variations in the cards do not detract from their validity. The important fact is that the cards contained the essential information called for byethe Board's regulations 20300 (j)(I): (1) the signature of the employee; (2) dated during the year prior to the date of the filing of the petition; and (3) the signer authorizes the union to be the collective bargaining representative.

The UFW presented 155 authorization cards of employees

41/ The twelfth one was not asked the question.

42/ Each card had a tab which was handed to each employee after signing and which read, "___ has signed an authorization card to have the United Farm Workers of America, AFL-CIO represent his/her as his/her union."

who worked for Respondent during the payroll period of June 7 to 13, 1977. 135 of these authorization cards had signatures of employees who were on Resoondent's payroll for the period June 7 to 13, 1977.

Twenty of the authorization cards had signatures of employees who worked during the same period but were not on Respondent's payroll sheet. Six of them worked, but not under their own names and had the boxes of grapes that they picked attributed to a relative with whom they worked. Union organizers testified they observed them working in Respondent's fields during the payroll period June 7 to 13 and that the number of boxes credited to the relative was considerably higher than the average picked per harvester. Union organizers credibly testified they saw two more of them, Rafael Galindo and Vicente Abundia, working in Respondent's fields during this period and had them sign authorization cards. Liz Sullivan, a UFW organizer, credibly testified that she had observed Raymundo Rodriguez working as a steady worker for Respondent from late March 1977 to the time of the election. Twelve of them were loaders who worked for Isidore Torres. Torres and Sierra, one of the loaders, supplied Respondent with five trucks which were manned by these employees.

In Kotchevar Bros., 2 ALRB No. 45, the Board stated that a supplier of workers would not be considered a labor contractor but a custom harvester and an employer in its own right if it supplied not only workers but costly specialized equipment and its payment was related not to labor costs but to its furnishing a complete service. In the instant case Torres did not supply costly specialized equipment, only flatbed trucks, while Respondent supplied the boxes, lids etc. Robert Carian testified that during the harvest he would direct the drivers where to pick up boxes etc. so no. complete service' was furnished. Respondent paid Torres at a piece-rate, so much per box transported to the packing shed. He in turn paid the loaders by piece-rate. So the payment of Torres' services was directly related to labor costs and had nothing to do with a complete service. Accordingly I find Torres at all times material herein was a labor contractor under the Act 43/ and the employees he furnished to Respondent were employees of Respondent and eligible to vote.

Trinidad Sierra testified that he, his uncle Elias Sierra, Manuel Roman and Salvador Perez worked with the trucks from the beginning to the end of June. David Martinez credibly testified he saw Rojas, Resendez, Montes and Serna working with the trucks during that same period. Martinez testified he remembered Bolanos and Jackson working as loaders from early June through June 13 or 14 and Alvarez only the early part of June so these_" three would only be eligible for the earlier payroll period. There was no testimony of when exactly Efrain Garcia worked other than on May 26, 1977 when he signed an authorization card so I do not include him on the eligibility list.

43/Section 1140.4 (c) of the Act.

Accordingly, I find that the eleven abovenamed loaders worked for Respondent during the period June 7-13 and thus were eligible to vote for. that payroll period.

The UFW presented 152 authorization cards of employees who worked during the payroll period of June 14 to 20, 1977. 132 of these authorization cards had signatures of employees who were on Respondent's payroll for the period June 14 to 20, 1977.

Twenty of the authorization cards had signatures of employees who worked during the same period but were not on Respondent's pay sheet. Eight of them worked but not under their own names, and had the boxes of grapes they picked attributed to a relative who worked with them. Union organizers observed them working in Respondent's fields during this same payroll period and the records showed that the number of boxes credited to the relative was considerably higher than the average picked per single harvester. Union organizers credibly testified they saw three more employees, Jose Carlos Contreras, Helen Contreras and Rosa Contreras, working in Respondent's fields during this period and had them sign authorization cards.

Elizabeth Sullivan credibly testified that she had observed Raymundo Rodriguez working as a steady worker for Respondent from late March 1977 to the time of the election. All of the eleven drivers and loaders previously mentioned also worked during this payroll period with the exception of Bolanos, Jackson and Alvarez. So eight of them were eligible to vote in this second payroll period.

At the hearing, I received into evidence authorization cards signed by 25 employees found to have been discriminatorily discharged in the previous unfair labor practice case. Authorization cards of discriminatorily discharged employees are of course' counted toward a majority. 'Ludwig Fish and Produce, 220 NLRB No. 116, 90 LRRM 1348 (1975). Exceptions have been taken to the Administrative Law Officer's decision in the afore-mentioned case, so to the extent the Board finds that the 25 employees laid off on April 6-7, 1977 to have been discriminatorily discharged, their cards will be counted. Those twenty-five cards would bring the totals to 180 of 266 for the June 7-13 period and 177 of 259 for June the 14-20 period. However, those 25 cards are not added to the total eligible to vote, because we must assume that had those workers not been discriminatorily laid off they would have continued to work for Respondent during the eligibility payroll periods but that would not have increased the total number of employees employed by Respondent during those same periods. Otherwise stated, the total number of workers employed by Respondent during the eligibility periods would not have been augmented by their number had they not been laid off.

Accordingly, I find that, during each of the possible correct payroll periods for the election held on June 27, 1977, the UFW represented a majority of Respondent's agricultural employees

in an appropriate unit. 44/

As set forth, supra, the clear majority support which the UFW achieved during each of the possible eligibility periods, when viewed in light of the grievous and extensive unfair labor-practices found herein, which make it unlikely or impossible for a fair election to be conducted among Respondent's employees, require the issuance of a bargaining order, and a certification by the Board, as the only reasonable means of confirming the UFW's de facto status as exclusive bargaining representative, affirming the employees' clearly designated choice of the UFW as their bargaining agent and preventing Respondent from indefinitely delaying the usual processes of certification, recognition and bargaining by the repressive and unlawful acts and conduct found in this case in order to defeat the statutory rights of its employees and their chosen representatives.

Where the unfair labor practices of an employer effectively foreclose the normal procedures for granting certification and bargaining rights to a union, the broad remedial powers of the Board must be utilized to .establish the conditions, and the relationship between the parties which would have existed but for the employer's unlawful acts.

As Section 1153 (f) of the Act prohibits an employer from recognizing, bargaining with, or signing a collective bargaining agreement with an uncertified labor organization, I recommend that the Board certify the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees and order Respondent to recognize and bargain with the UFW on request.

44/Harry Carian, the sole proprietor of Harry Carian Sales, is a partner in Carian and Gilfenbain but the two agricultural operations are two distinct business entities. In addition, Respondent in the Coachella Valley and Carian and Gilfenbain 200 miles crway in the San Joaquin Valley cannot be considered as in a "single defineable agricultural production area". The record indicates that Respondent, Harry Carian Sales, is a much smaller operation that Carian and Gilfenbain, only producing 3.2 to 3.3 million boxes of grapes compared to Carian and Gilfenbain's 26 million boxes per year. Carian and Gilfenbain has a much larger work force, utilizes labor contractors for a considerable amount of its employees and has a different harvest season, from August through November.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent Harry Carian Sales, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging or laying them off, or by threatening to do so, or in any other manner discriminating against employees in regard to their hire or tenure of employment, or in regard to any term or condition of employment, except as authorized by Section 1153 (c) of the Act,

(b) Any and all actual or attempted physical attacks, physical assaults, or any other acts of violence, against the person or property of any officer, agent, employee, representative or organizer of the United Farm Workers of America, AFL-CIO, either:

(1) on or about the Harry Carian Sales premises?

(2) in the presence of Harry Carian Sales employees; or

(3) in the course of organizing activities conducted by the UFW with respect to Harry Carian Sales employees.

(c) Engaging in surveillance including photographic surveillance or giving the impression of engaging in surveillance of its employees' union activities,

(d) Denying UFW agents access to employees in" their places of residence, or otherwise interfering with UFW agents in their contact with and communications with employees in their labor camps or other housing areas,

(e) Threatening, insulting or vilifying union representatives to discourage their lawful contacts and communications with employees on the work-site or at their places of residence,

(f) Promising or granting economic benefits to employees to induce them to vote against union representation,

(g) Arranging for the hire of any person for the primary purpose of voting in an ALRB representation election,

(h) Directly or indirectly engaging in any of the foregoing actions or activities in order to dissipate the collective bargaining status of its employees' lawfully designated collective bargaining representative, or for the purpose of causing its employees to discontinue or refrain from exercising their right to bargain collectively with Respondent, or otherwise so as to interfere with, restrain or coerce its employees in the exercise of their rights under the Act.

(i) In any manner interfering with, restraining, or coereing employees, in the exercise of rights guaranteed by Labor Code Section 1152.

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

(a) Offer Maria Contreras, Salvador Contreras, Alberto Martinez, Lydia Martinez, Uriel Martinez, Guadalupe Nieto, Josefina Nunez, Guadalupe Ramirez, Jaime Ramirez, Salvador Ramirez, Ezequiel Serrano, Maria Serrano and Yolanda Serrano reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and priviledges, beginning with the next crop activity for which they are qualified and make them whole for any loss of pay or other economic losses (along with interest thereon at a rate of seven percent per year) they may have suffered as a result of being laid off before the end of the 1977 grape harvest at Respondent's operations. Such offers of reinstatement shall in no event be made later than the beginning of the 1979 grape-harvest season and shall be unconditional as to each of the above named employees.

(b) Preserve and, upon reques't, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records, and reports, and all other records necessary to analyze the amount of back pay due and the rights of unconditional reinstatement under the terms of the Board Order.

Cc) Sign the attached Notice to Employees and post copies of it at times and places to be determined by the Regional Director. The Notices shall remain posted for a period of 90 days. The Regional Director shall determine a second period of consecutive days within the next 12 months when these notices shall again be posted on Respondent's property. Copies of the Notice, after translation by the Regional Director into appropriate languages, shall be furnished by Respondent in sufficient numbers for the purposes described herein. Respondent shall exercise due care to replace any copy of the Notice which has been altered, defaced, covered, or removed.

(d) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified 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 employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost during this reading and the question-and-answer- period.

(e) Hand a copy of the attached Notice, in both English and Spanish, beginning within 31 days after receipt of the Order, to each employee hired in the next six months, as well as to each employee hired during Respondent's next thinning and harvest seasons.

(f) Mail copies of the attached Notice in appropriate languages to all employees employed during Respondent's 1977 thinning harvest seasons.

(g) Recognize and upon request bargain collectively in good faith with the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed contract any understanding reached.

(h) Notify the Regional Director in writing, within 31 days from the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

3. It is hereby recommended that the Board issue an order dismissing Cases Numbers 77-RC-15-C, 77-RC-16-C, and 77-RC-16-1-C in their entirety, including all challenges to ballots therein, the UFWs objections, and the Employer's Objections to the election held on June 27, 1977 and vacating all proceedings held in said cases, including the aforesaid election.

4. It is further ordered that the allegations in the complaint not specifically found herein to be violations of the Act shall be, and hereby are, dismissed.

DATED: .December 21, 1978 AGRICULTURAL LABOR RELATIONS BOARD

By: ARIE SCHOORL
Administrative Law Officer