

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

E. AND J. GALLO WINERY, INC.,)	
)	
Respondent/Employer,)	Case Nos. 75-CE-1-F
)	75-CE-22-F
and)	75-CE-26-F
)	75-CE-76-F
WESTERN CONFERENCE OF TEAMSTERS,)	75-CL-1-F
AGRICULTURAL DIVISION, INTERNATIONAL)	75-RC-6-F
BROTHERHOOD OF TEAMSTERS, and its)	
affiliated Locals,)	
)	
Petitioner,)	7 ALRB No. 10
)	
And)	
)	
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO,)	
)	
Charging Party/Intervenor.)	
_____)	

DECISION AND ORDER, DECISION ON ELECTION
OBJECTIONS, AND ORDER SETTING ASIDE ELECTION

The above-captioned cases, consolidated for hearing in this matter, involve challenged ballots, post-election objections, and related unfair labor practice allegations.

Following a Petition for Certification filed by the Western Conference of Teamsters (WCT or Teamsters) and a Petition for Intervention filed by the United Farm Workers of America, AFL-CIO (UFW), a representation election was conducted on September 10, 1975,^{1/} among the agricultural employees of E. and J. Gallo Winery, Inc. (Employer or Respondent). The Tally of Ballots

^{1/}Unless otherwise specified, all dates herein refer to 1975.

showed the following results:

WCT	223
UFW	131
No Union	0
Challenged Ballots	<u>195</u>
Total	549
Void Ballots	2

As the challenged ballots were sufficient in number to determine the outcome of the election, the Regional Director conducted an investigation and issued a Report on Challenged Ballots, except as to the issue of the eligibility of economic strikers, on which the Board ordered a hearing. After the hearing was conducted, the hearing officer issued a Report on Challenged Ballots of Economic Strikers. All parties filed exceptions with the Board as to portions of the Regional Director's Report and portions of the Hearing Officer's report. In E. and J. Gallo Winery (Sept. 19, 1979) 5 ALRB No. 57, the Board overruled the challenges to 111 ballots, sustained the challenges to 80 ballots, and deferred ruling on the challenges to 4 ballots. Subsequently, the Board granted a Motion for Reconsideration and deferred ruling on the challenges to three additional ballots. Thereafter, a second Tally of Ballots issued, which showed the following results:

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WCT	230
UFW	228
No Union	0
Challenges Sustained	77
Unresolved Challenged Ballots	<u>12^{2/}</u>
Total	547 ^{3/}
Void Ballots	5

As the 12 unresolved challenged ballots remained sufficient to determine the outcome of the election, the Regional Director conducted a further investigation and, on July 30, 1980, issued a Supplemental Report on Challenged Ballots. Respondent and the UFW filed timely exceptions to portions of that Supplemental Report. In E. & J. Gallo Winery (Nov. 28, 1980) 6 ALRB No. 60, the Board overruled the challenges to 11 ballots and declared 1 ballot void. Thereafter, a final Tally of Ballots issued showing the following results:

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^{2/}When the Regional Director prepared the second Tally of Ballots pursuant to our Decision in 5 ALRB No. 57, he did not count five ballots for various reasons, discussed infra. These ballots were added to the seven challenged ballots previously ordered held for further investigation and treated as unresolved challenged ballots.

^{3/}The Regional Director's Report does not account for two ballots, Attempts to account for these ballots have not proved fruitful. See E. & J. Gallo Winery, Inc. (Nov. 28, 1980) 6 ALRB No. 60 at p. 2.

WCT	237
UFW	232
No Union	0
Challenges Sustained	<u>77</u>
Total	546
Void Ballots	6

Pursuant to Labor Code section 1156.3(c), the UFW filed timely post-election objections to certain acts and conduct of the Employer. The UFW also filed charges alleging some of the same acts and conduct as unfair labor practices. Pursuant to Labor Code section 1160.2, the General Counsel issued a complaint and the matters were consolidated for hearing before Administrative Law Officer (ALO) David C. Nevins. On November 25, 1978, the ALO issued the attached Decision on the unfair labor practice issues and the post-election objections. Thereafter, Respondent and the General Counsel each filed timely exceptions and a supporting brief, as well as a brief in reply to the opposing party's exceptions.

The Board has considered the record^{4/} and the attached ALO's Decision in light of the exceptions and briefs of the

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^{4/} The exhibit file transmitted to the Board did not include General Counsel's Exhibit 244 or Respondent's Exhibit 161. The Board has, therefore, not included these exhibits in its review. Both exhibits appear to be of negligible significance and do not affect the result in any manner.

parties, and has decided to affirm the rulings, findings,^{5/} and conclusions of the ALO and to adopt his recommended Order as modified herein.^{6/}

Evidentiary Questions

Respondent and the General Counsel both except to several of the ALO's evidentiary rulings. We have reviewed the record in light of these exceptions and find no reversible error.

Respondent argues the ALO erred by admitting General Counsel's Exhibit 1 into evidence. This exhibit consists of the formal papers in the unfair labor practice proceeding, including the charges filed by the UFW. The charges admitted into evidence at the hearing, copies of which had previously been served upon Respondent, did not include the declarations submitted to the Board in support of the charges. Respondent argues it did not receive proper service and that the ALO should not have admitted the exhibit into evidence because the supporting declarations were not attached. 8 Cal. Admin. Code section 20213 requires that declarations submitted to the Board in support of unfair labor practice charges be kept confidential. Although the regulations in

^{5/}Respondent excepts to certain of the ALO's credibility resolutions. We will not disturb such resolutions unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; El Paso Natural Gas Co. (1971) 193 NLRB 333 [78 LRRM 1250]; Standard Dry Wall Products (1971) 91 NLRB 544 [26 LRRM 1531]. We have reviewed the record and find the ALO's credibility resolutions to be supported by the record as a whole.

^{6/}Respondent argues that we should dismiss the complaint because Respondent was denied pre-trial discovery. We reject this contention as the General Counsel complied with the requirements of Giumarra Vineyards Corp. (Mar. 1, 1977) 3 ALRB No. 21, and acted with due diligence in regard to all discovery matters.

effect when the charges in this case were filed did not explicitly state this rule, this Board has always interpreted its regulations as mandating the maintenance of maximum confidentiality of employee declarations submitted to the Board. Interharvest, Inc. (Oct. 15, 1975) 1 ALRB No. 2. We find General Counsel properly kept the declarations confidential. We conclude the ALO properly admitted General Counsel's Exhibit 1 into evidence and that Respondent received proper service of the charges.

Respondent argues the ALO improperly quashed its subpoena of Alien Cooper. Cooper testified during the General Counsel's case-in-chief. Respondent had a full opportunity to cross-examine him and did so. Respondent thereafter subpoenaed Cooper to testify during its own case. Cooper, who resides in New Mexico, moved to quash the subpoena. The ALO granted the motion to quash after he was informed by Respondent's counsel that Respondent was seeking to recall Cooper solely for the purpose of further cross-examination. Cal. Evidence Code section 774 provides: "A witness once examined cannot be re-examined as to the same matter without leave of the court Leave may be granted or withheld in the court's discretion." We find no abuse of discretion here.^{7/}

Respondent argues that the ALO unduly restricted its examination of William Winn. Respondent attempted to have Winn

^{7/}We also find the ALO did not prejudicially limit Respondent's cross-examination of Cooper. Respondent had a sufficient opportunity to question Cooper about his residence even though the ALO did not allow Respondent to procure Cooper's precise street address over the UFW's objection. We note that Cooper's reluctance to divulge his exact street address was based on his claim that he had received a death threat.

testify to conclusions derived from his examination of certain documents. The General Counsel objected to the use of the documents on hearsay grounds. Respondent argued that the documents were within the business records exception to the hearsay rule, Cal. Evidence Code section 1271, but the ALO rejected this contention and sustained the hearsay objection.

Initially, we note that Respondent failed to formally offer the documents into evidence. Consequently, the documents are not before us and it is impossible to rule conclusively upon their admissibility. In order to perfect its exception to an adverse ruling on the admissibility of documents, the party wishing to admit the documents should have them identified and placed in a rejected exhibits file so the Board may examine them in reaching its determination of their admissibility. This procedure serves the same function as a vouched offer of proof. As Respondent failed to perfect its exception to the ALO's ruling, we reject it. Furthermore, based upon the descriptions of the documents appearing in the record, we agree with the ALO's determination. We note, however, that even if the ALO erred in his ruling, the error would not be prejudicial. Winn's testimony would have dated certain photographs admitted into evidence. Our decision does not rest upon the specific date Respondent's personnel took any particular photograph(s).

Respondent excepts to the ALO's conclusion that its Corporate Safety & Security Offense Reports are not admissible into evidence within the business records exception to the hearsay rule, Cal. Evidence Code section 1271. We find no merit in this

exception. The reports were not prepared in the regular course of Respondent's business but in anticipation of litigation. Palmer v. Hoffman (1943) 318 U.S. 109; Gee v. Trimineri (1967) 248 Cal.2d 139.

Unfair Labor Practices

Surveillance and Interference

The ALO concluded that Respondent violated Labor Code section 1153(a) on several occasions between August 28 and September 9 by interfering with and surveilling UFW organizers as they attempted to speak with Respondent's employees. Respondent concedes that it closely monitored UFW activity throughout the pre-election period, but argues that its conduct did not violate the Agricultural Labor Relations Act (Act) because it acted for legitimate business reasons.

An employer violates Labor Code section 1153(a) by interfering with, restraining, or coercing agricultural employees in the exercise of their rights guaranteed by Labor Code section 1152. The surveillance of employees in their contacts with union organizers constitutes unlawful interference. Sam Andrews' Sons (Nov.30, 1979) 5 ALRB No. 68; Abatti Farms, Inc. (May 9, 1979) 5 ALRB No. 34; Merzoian Bros. (July 29, 1977) 3 ALRB No. 62; Blanchard Construction Company (1978) 234 NLRB 1035 [97 LRRM 1389]; NLRB v. Clark Brothers Co. (2nd Cir. 1947) 163 F.2d 373 [20 LRRM 2437]. Unlike discrimination cases arising under Labor Code section 1153 (c), an employer's reason for its conduct is not generally an element of unfair labor practices cognizable under Labor Code section 1153(a). Compare NLRB v. Great Dane Trailers,

Inc. (1967) 388 U.S. 26 [65 LRRM 2465] with NLRB v. Burnup & Sims (1964) 379 U.S. 21 [57 LRRM 2385]. Rather, the key consideration in unfair labor practice cases arising under Labor Code section 1153(a) is the tendency of the conduct to inhibit employees in the exercise of their rights guaranteed by Labor Code section 1152. Nagata Brothers Farms (May 23, 1979) 5 ALRB No. 39; Jackson & Perkins Company (Apr. 26, 1977) 3 ALRB No. 36; Caterpillar Tractor Company (1979) 242 NLRB No. 92 [101 LRRM 1207]; NLRB v. Aero Corp. (5th Cir. 1978) 581 F.2d 511 [99 LRRM 2800].

Notwithstanding the above, in certain circumstances an employer may have business reasons for its conduct which are so substantial that they outweigh the negative effects of the conduct upon employee rights, e.g., employer monitoring of illegal activity such as trespass or violence. Harry Carian Sales (Oct. 3, 1980) 6 ALRB No. 55; Berton Kirshner, Inc. (1974) 209 NLRB 1081 [85 LRRM 1548]; Stark Ceramics, Inc. (1965) 155 NLRB 1258 [60 LRRM 1487]. In accordance with such cases, Respondent urges us to find that its surveillance of union activity among its employees during the pre-election period was justified and lawful. While Respondent arguably may have acted lawfully in certain instances, we conclude that it violated Labor Code section 1153(a) on several occasions during the pre-election period by surveilling, and interfering with, the union activities of its employees.

The ALO concluded that Respondent violated Labor Code section 1153(a) when it interfered with and photographed its employees as they were meeting with UFW organizers in front of the personnel office on August 30. Respondent concedes that its

security guards and supervisors extensively photographed the union activity which occurred near the personnel office on that day but nonetheless excepts to the ALO's conclusion. Respondent argues that its conduct did not violate the Act because it acted for legitimate business reasons, i.e., its desire to document UFW access to its employees for a media campaign, its desire to identify UFW organizers who had not previously appeared at Respondent's property, and its desire to insure the safety of all persons present.^{8/}

The ALO discredited the testimony of Respondent's witnesses that Respondent photographed the union activity on August 30 for a media campaign. We affirm that credibility resolution, but we would not reach a different result even if we accepted Respondent's claim at face value. Neither documentation of access for a media campaign nor a desire to identify individual organizers constitutes a substantial business justification sufficient to outweigh the negative effects on employees' rights of the extensive surveillance conducted by Respondent. Moreover, we find that Respondent's surveillance was not justified by its asserted concern for safety. While Respondent may have lawfully documented incidents which posed a direct threat to the safety of persons present on its property, nothing in the record indicates a

^{8/} Although Respondent often asserted that it photographed and otherwise surveilled UFW organizers during the pre-election period because they trespassed upon Respondent's property or interfered with employees while they were working, Respondent makes neither assertion in regard to this incident. We note that the employees were not working and that Respondent surveilled UFW organizers speaking with employees on a public street.

significant potential for violence or other activity which would tend to threaten those present near the personnel office on August 30. A generalized concern for safety is not sufficient to outweigh the deleterious effects upon employee organizational rights attendant upon extensive photographic surveillance.

The ALO concluded that Respondent violated Labor Code section 1153(a) by the conduct of one of its supervisors, Luis Salado, in interfering with and surveilling a union meeting at the UFW's organizing office in Livingston on the afternoon of August 30. Respondent concedes that Salado observed the meeting but asserts that such conduct did not constitute unlawful surveillance because the meeting was open to the public and because Salado attended the meeting on his own initiative, without instructions from Respondent. Respondent also excepts to the ALO's factual finding that Salado disrupted the meeting by shouting and making threatening and obscene gestures.

An employer violates Labor Code section 1153(a) when its supervisor surveils a union meeting under circumstances which tend to inhibit employees from exercising their rights guaranteed by Labor Code section 1152. NLRB v. Aero Corp., supra, 581 F.2d 511; NLRB v. Standard Forge & Axle Co. (5th Cir. 1969) 420 F.2d 508 [72 LRRM 2617]. Although it is not an unfair labor practice where the employees invite a supervisor to attend the meeting, Sunnyside Nurseries, Inc. (Sept. 11, 1980) 6 ALRB No. 52; Eldo-Craft Boat Co., Inc. (1967) 166 NLRB 280 [65 LRRM 1620], we find there was no such invitation in this case. The meeting was not "open" in the sense that any member of the public was welcome. The UFW held the

meeting to organize Respondent's employees. The UFW distributed leaflets announcing the meeting to Respondent's employees and the meeting occurred at the UFW organizing office, a site removed from Respondent's premises. Nothing in the leaflet suggested that Respondent's supervisors were welcome to attend. Moreover, Salado's presence at the meeting was particularly coercive because he participated in a noisy and threatening disruption of the meeting.^{9/}

Respondent may not escape liability for Salado's actions by arguing that Salado acted without authority. As a general rule, employers are liable for the actions of their supervisors. NLRB v. Big Three Ind. Gas & Equipment Co. (5th Cir. 1978) 579 F.2d 304 [99 LRRM 2223]. While there are exceptions to this rule, they are not apposite here. Aldon, Inc. (1973) 201 NLRB 579 [82 LRRM 1399], cited by Respondent, does not compel a different result. In Aldon, the employer took steps to convey clearly to the employees that the supervisor was acting on his own, without the employer's authority. Respondent in this case took no such action.

The ALO concluded that Respondent violated Labor Code section 1153(a) on September 1 when a security guard and several supervisorial personnel surveilled UFW organizers Manuel Hernandez and Perry Collins as they spoke with an employee at the Azevedo housing area, located on Respondent's property. Respondent excepts to the ALO's conclusions concerning the security guard's conduct, arguing that the guard's photography was beyond the scope of his

^{9/} We find no basis for overturning the ALO's findings or credibility resolutions concerning Salado's conduct at the meeting.

authority and that the guard's other activity was justified by Respondent's concern for the safety of the housing area residents. Respondent also excepts to the ALO's factual findings concerning the activities of its supervisory personnel during this incident.

We reject Respondent's contention that the security guard acted beyond the scope of his authority and that Respondent is not liable for his conduct. Initially, we agree with the ALO that the guard's actions reflected Respondent's policy concerning organizers on Respondent's property prior to September 2. Even were we to find the contrary, however, the result would not change. The guard took pictures under circumstances which would lead reasonable people to believe he was carrying out Respondent's policies. Frank Clark, the Director of Corporate Safety and Security, and Robert Deatruck, the Vice-President and Director of Industrial Relations, observed the guard photograph the incident but made no attempt to stop him or to disavow his conduct. Those viewing the incident could thus conclude that the guard acted with Respondent's approval and Respondent must therefore bear responsibility for the conduct. Bertuccio Farms (Jan 24, 1979) 5 ALRB No. 5; Frank Lucich Co. (Nov. 7, 1978) 4 ALRB No. 89; Aircraft Plating Co. (1974) 213 NLRB 664 [87 LRRM 1208]. Cf. Frudden Produce Company (April 5, 1978) 4 ALRB No. 17. Furthermore, where an employer follows a practice of systematic surveillance of union organizers speaking with employees, the intimidating effect upon employees can not be disputed and the employer must be held responsible even if it had no knowledge of and did not authorize the specific incident involved. Baptist Memorial Hospital (1977) 229 NLRB 45 [95 LRRM

1043], enf'd (6th Cir. 1977) 568 F.2d 1 [97 LRRM 3165],

We also reject Respondent's contention that a concern for safety justified the guard's other conduct. As stated previously, Respondent's purported generalized concern with safety is insufficient justification for its surveillance of employees' union activity. There is no record evidence indicating any danger of violence or other situation which would tend to threaten the safety of the housing area residents. The UFW organizers were peaceably exercising their right of access to the housing area,^{10/} and Respondent was therefore not entitled to monitor the activity.

We further conclude that Clark and Deatruck violated the Act when they surveilled the presence and actions of UFW organizers as they spoke to a Gallo employee at the Azevedo housing area. Clark admitted that he and Deatruck went to the housing area for the purpose of observing the occurrences there after learning that UFW organizers were present. Clark testified that he was not personally contacted about the presence of the organizers at the housing area. Rather, he heard a radio transmission between Gallo's security guards and decided to drive to the housing area since he happened to be near the area at the time. Although Clark and Deatruck deny that Clark took photographs that day, we uphold the ALO's credibility resolution and find that Clark photographed the UFW organizers from inside his car.

We conclude that supervisor Dean May did not violate the

^{10/} United Farm Workers of America v. Superior Court (1975) 14 Cal.3d 902; Mario Saikhon, Inc. (June 25, 1979) 5 ALRB No. 44; Frank Lucich, Co., supra, 4 ALRB No. 89.

Act by driving through the housing area while UFW organizers were speaking with employees. The record reveals neither a purpose to surveil the union activity nor a reasonable probability that May's actions created the impression of surveillance. La March Mfg. Co. (1978) 238 NLRB No. 205 [99 LRRM 1640].

The ALO concluded Respondent violated Labor Code section 1153(a) on September 1 at the Azevedo housing area by the conduct of one of its security guards in photographing an employee as he spoke with UFW organizers Larry Tramutt and Joe Enos, in soliciting the employee's signature on a form requesting the UFW organizers to leave the housing area, and in calling local law enforcement officials to assist in ousting the organizers. Respondent excepts to the ALO's finding that the guard photographed the incident and asserts that the guard's other acts and conduct were lawful. We disagree.

General Counsel's witnesses Larry Tramutt and Steven Swanson each testified in detail that the security guard took several pictures of Tramutt and Enos during their conversation with one of Respondent's employees in front of the employee's house. The ALO credited this testimony. The only basis upon which Respondent urges us to reverse the ALO's credibility resolution is the lack of any developed photographs of the incident in the materials Respondent provided to the General Counsel. The absence of the developed pictures does not convince us to discredit Swanson's or Tramutt's testimony. Even if the camera contained no film, Respondent would still be liable for unlawful interference, because the guard clearly conveyed the impression that he was

engaging in photographic surveillance.

Respondent asserts that the guard's close surveillance of the incident, his solicitation of the employee's signature on a form requesting the organizers to leave, and his ouster of the organizers were justified by concern for the safety and desires of the housing area residents. As the record contains no evidence of any threat to the safety of the housing area residents, we find that Respondent's purported concern did not justify the surveillance. The solicitation of the employee's signature on the form constituted the first step in the guard's efforts to remove the organizers from an area where they were lawfully present. See cases cited in footnote 10, supra. Thus, that conduct as well as Respondent's attempt to procure assistance in the eviction from a local law enforcement official constitutes an unlawful denial of access to the housing area. Mario Saikhon, Inc., supra, 5 ALRB No. 44; George Lucas & Sons (Oct. 31, 1978) 4 ALRB No. 86.

The ALO concluded that Respondent violated the Act by surveilling UFW organizers Barbara Macri and Manjit Dhillon as they spoke with employees at the Van Cliff housing area on September 2. We affirm this conclusion although we note that the guard did not engage in photographic surveillance. We also affirm the ALO's conclusion that Respondent unlawfully surveilled UFW organizer Frank Ortiz as he attempted to speak with employees at the Azevedo housing area on September 7.

The ALO concluded that Respondent violated Labor Code section 1153(a) on September 9 at the Snelling housing area by a security guard's surveillance of UFW organizers Larry Tramutt and

Cathy Christian as they attempted to speak with employees at their residences. Respondent excepts to the ALO's factual findings, arguing that inconsistencies in the testimony of Tramutt and Christian render their testimony suspect. We find, to the contrary, that the inconsistencies are relatively minor and that the witnesses corroborated each other in material respects. We therefore affirm the ALO's conclusion, although we note that no photographic surveillance occurred on this occasion.

We find it unnecessary to determine whether Respondent violated the Act by allegedly observing UFW organizers on occasions when they may have been unlawfully present on Respondent's property. All of those occasions were either before the Board promulgated the access rule (8 Cal. Admin. Code section 20900) or during the period when the Board was prevented from enforcing the rule by a court injunction. Consequently, to resolve the issue, we would have to determine the UFW's access rights prior to the implementation of, or during the temporary suspension of, the access rule. Because determination of that issue would not affect the remedy in this case and because the situation is not likely to recur given the current status of the access regulation,^{11/} we make no findings or conclusions with respect to these allegations of the complaint. Accordingly, we hereby dismiss all allegations of surveillance in the complaint which have not hereinbefore been found to be in violation of section 1153(a) of the Act.

^{11/}The access rule has been held constitutional by the California Supreme Court. *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392.

Unlawful Assistance

The ALO concluded that Respondent violated Labor Code section 1153 (b) and (a) by its surveillance of UFW organizing activities while permitting Teamster union activities to progress without interference, by providing the Teamsters with preferential access to its employees and property, by campaigning on behalf of the Teamsters and by condoning and/or assisting the Teamsters' coercive actions against UFW supporters among the employees. Respondent excepts to these conclusions and asserts that it maintained a policy of absolute neutrality during the pre-election period except as otherwise required by its 1973 collective bargaining contract with the Teamsters. Respondent also asserts that to the extent it expressed a preference for the Teamsters, its conduct fell within the protection of Labor Code section 1155.

Under Labor Code section 1153(b), it is unlawful for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." As we must consider the "other support" clause of this section, our pivotal concern is whether Respondent's preference for and assistance to the Teamsters, vis-a-vis the UFW, constituted unlawful support for a labor organization and interference with employees' self-organization rights. Miranda Mushroom Farm, Inc. (May 1, 1980) 6 ALRB No. 22; Bonita Packing Company (Mar. 22, 1977) 3 ALRB No. 27. We make this determination by examining the totality of the Respondent's conduct during the relevant period, in this case from August 28 to September 10, inclusive. Conduct which may be held to be lawful when considered

in isolation may be revealed as part of a pattern of unlawful assistance and/or unlawful interference when examined in light of other events. Janesville Products Division, Amtel, Inc. (1979) 240 NLRB No. 109 [100 LRRM 1383]; Federal Mogul Corp. (1967) 163 NLRB 927 [64 LRRM 1354], However, an employer's noncoercive expression of opinions about unionization or any aspect thereof may not be found to constitute an unfair labor practice. Labor Code section 1155. On the basis of the record evidence, we conclude that Respondent rendered unlawful assistance to the Teamsters during the election campaign and thereby violated Labor Code section 1153 (b) and (a) .^{12/}

An employer violates the Act if it engages in surveillance of the pre-election activities of one union while allowing a rival union to campaign with relative freedom. International Association of Machinists v. NLRB (1940) 311 U.S. 72 [7 LRRM 282]; Goshen Litho, Inc. (1972) 196 NLRB 977 [80 LRRM 1829]. Respondent admittedly engaged in a practice of photographing UFW agents in contact with its employees prior to September 2 and, after September 2, Respondent continued to surveil UFW activity among its employees. During the same period, Teamsters agents campaigned on Respondent's property almost entirely without interference. We find this disparate treatment to be part of a pattern of unlawful assistance to the Teamsters.

^{12/}Our conclusion does not apply to any conduct which occurred before August 28, 1975, the effective date of the Act. Such conduct may not be the basis of an unfair labor practice finding, although the Board may consider it as background material. Jack T Baillie Co., Inc. (Nov. 22, 1977) 3 ALRB No. 85.

An employer may not grant one union access to its property for purposes of campaigning while denying such access to rival unions. River Manor Health Related Facility (1976) 224 NLRB 227 [93 LRRM 1069], enf'd (2nd Cir. 1977) 95 LRRM 3011. However, this rule does not affect the access rights to an employer's property which an incumbent union enjoys under the terms of a valid collective bargaining agreement. An employer must provide an incumbent union with the opportunity to continue administering a collective bargaining agreement because the denial of such an opportunity constitutes unlawful assistance to the rival union. Shea Chemical Corporation (1958) 121 NLRB 1027 [42 LRRM I486]. However, access taken pursuant to a collective bargaining agreement may not be utilized for campaign purposes unless the rival union is granted an equal opportunity. Dave Walsh Company (Oct. 27, 1978) 4 ALRB No. 84; Royal Packing Co. v. Agricultural Labor Relations Bd. (1980) 101 Cal.3d 826.

The record indicates that Teamster agents and/or representatives took access to Respondent's property during working hours not only for the purpose of administering the collective bargaining agreement, but also for the purpose of pre-election campaigning. The UFW agents, on the other hand, did not generally enjoy access to Respondent's property or employees during working hours despite their repeated attempts to organize during that period. Respondent's supervisors and working foremen were present during some of the visits of Teamster agents but made no attempt to limit the agents' activities to contract administration matters during working hours. Consequently, we find Respondent granted the

Teamsters preferential access to its property for campaign purposes and conclude that this conduct was part of a pattern of unlawful assistance.

However, we conclude that Respondent did not violate the Act by permitting the Teamsters to use its personnel office or Paisano Park.^{13/} The record indicates that the Teamsters used the personnel office solely for the purpose of administering the collective bargaining agreement, and that Respondent nondiscriminatorily allowed various organizations to use Paisano Park and that the UFW never requested use of the park. Accordingly, we find that Respondent did not engage in disparate treatment of the two unions in this regard. Signal Oil and Gas Co. (1961) 131 NLRB 1427 [48 LRRM 1275], enf'd (5th Cir. 1962) 303 F.2d 785 [50 LRRM 2505].

The ALO concluded that Respondent violated the Act by the conduct of its working foremen in soliciting the employees' support for the Teamsters and by allowing employees, including security guards, to post Teamster campaign propaganda on Respondent's equipment. Respondent excepts, arguing that it should not bear responsibility for the actions of its working foremen, that it acted with due diligence in removing the stickers, and that its conduct falls within the protection of Labor Code section 1155.

In E. & J. Gallo Winery (Nov. 28, 1980) 6 ALRB No. 60, we held that the working foremen were not supervisors within the

^{13/}On September 6, with Respondent's permission, the Teamsters held a picnic at Paisano Park, which is located on Respondent's property.

meaning of the Act, but were employees who were eligible to vote. Consequently, the working foremen were entitled to solicit support for the Teamsters and their conduct cannot be attributed to Respondent or be considered part of a pattern of Respondent's unlawful assistance to the Teamsters.

While we conclude that Respondent Gallo was not responsible for the actions of its working foremen, we find that at least two of its supervisors actively participated in the distribution of Teamster election propaganda. We therefore uphold the ALO's conclusion that Respondent violated section 1153(b) and (a) by their campaigning on behalf of the Teamsters Union.

An employer violates the Act if it condones or assists a union in coercing employees to stop supporting a rival union. Newport News Shipbuilding & Dry Dock Company (1978) 236 NLRB 1499 [99 LRRM 1375]. The ALO found that the Teamsters engaged in various coercive actions which Respondent assisted or condoned. We affirm the ALO's conclusion that supervisor Luis Salado's participation in the noisy, threatening disruption of the UFW meeting on August 30 constitutes unlawful assistance to the Teamsters and we find that this conduct was part of Respondent's pattern of activity which violated Labor Code section 1153(b).^{14/}

We need not consider whether the Teamsters' coercive acts or surveillance of UFW activity constituted a violation of the Act as

^{14/}Although we find that the leaflet which Respondent circulated to employees shortly before the election was not part of its pattern of unlawful assistance to the Teamsters, we do not believe it sufficiently negated the adverse effects upon employee rights resulting from Respondent's prior unlawful acts and conduct.

those issues are not before us.^{15/}

Discharges

The ALO concluded that Respondent violated Labor Code section 1153 (c) and (a) by discharging employees Jesus Garcia and Lorenzo Perez because of their union activities and/or sympathies. Respondent excepts to this conclusion. We affirm the conclusion of the ALO.

The facts surrounding the discharge were vigorously contested. The parties agree that on September 24, 30 to 40 gondola crews worked in the Smith-Stefani field. At some point, many workers began shouting that they should leave the field because they were not being paid enough. The altercation lasted three to four minutes. At some point, Garcia and Perez stood on their tractors. Garcia and Perez testified that they stood on their tractors to see whether people were leaving and that they did not join in the shouting. Respondent presented witnesses who testified that Garcia and Perez shouted from atop their tractors that the employees should leave the field. Respondent admits it discharged Garcia and Perez but contends that it did so because Garcia and Perez incited a work stoppage in violation of the no-strike clause of the contract.

^{15/}In Newport News, supra, the NLRB concluded that the union's conduct also violated the unfair labor practice provisions of the National Labor Relations Act. In the instant matter, a related unfair labor practice charge (Case No. 75-CL-1-F) against the Teamsters was withdrawn. It is not necessary that the assisted union be found in violation of the Act in order for the Newport News principle to apply. The unlawful assistance, interference, or coercion inherent in the employer's conduct constitutes a violation regardless of whether the union is found to be in violation of the Act.

The resolution of this issue turns largely on credibility resolutions. The ALO credited Garcia and Perez and discredited Respondent's witnesses. His credibility resolutions were based, in part, upon the demeanor of the witnesses. We find that the ALO's credibility resolutions are supported by the record and we therefore affirm them.

Setting Aside the Election

The ALO found that Gallo's commission of numerous unfair labor practices interfered with the September 10, 1975, election and recommended that the election be set aside. We adopt that recommendation and shall so order. Gallo's conduct reasonably tended to deprive employees of a free choice and thereby tended to affect the outcome of the election. Royal Packing Company (Feb. 5, 1976) 2 ALRB No. 29; Albert C. Hansen dba Hansen Farms (Dec. 20, 1976) 2 ALRB No. 61; Sears & Schuman Company, Inc. (July 18, 1980) 6 ALRB No. 39. We shall, therefore, set aside the election and dismiss the petition.

The ALO recommended that the UFW be permitted expanded access to Respondent's employees to remedy the effects of Respondent's unlawful conduct. We adopt that recommendation and will therefore order Respondent to permit the UFW to take access to employees on Respondent's property during each 30-day period for which the UFW files a Notice of Intent to Take Access pursuant to 8 Cal. Admin. Code section 20900 (e) (1) (B) in the 12 months following issuance of our Order, with 2 organizers for every 15 employees in each work crew on the property. Jack Pandol and Sons, Inc. (Jan. 11, 1980) 6 ALRB No. 1.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent E. and J. Gallo Winery, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance or photographic surveillance of any UFW representative or other union agent who is communicating with employees on Respondent's premises pursuant to 8 Cal. Admin. Code section 20900.

(b) Interfering with, restraining, or coercing its employees in their right to communicate freely with and receive information from any UFW representative or other union agent present on Respondent's premises pursuant to 8 Cal. Admin. Code section 20900.

(c) Denying any UFW representative or other union agent access to its employees at or near their residences, or engaging in surveillance or photographic surveillance at or near their residences or at union meetings.

(d) Rendering unlawful aid, support, or assistance to the Teamsters or any other labor organization, particularly by allowing representatives of the Teamsters or any labor organization to engage in organizational activities on its premises while denying any other labor organization an equal opportunity to engage in such activities.

(e) Discharging or otherwise discriminating against any agricultural employee because of his union activities and/or

union sympathies.

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

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

(a) Immediately offer Jesus Garcia and Lorenzo Perez full reinstatement to their former positions, or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make whole Jesus Garcia and Lorenzo Perez for any loss of pay and other economic losses they have suffered as a result of their discharge, according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(c) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back pay period and the amount of back pay due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the payroll periods which include the following dates: August 28 to September 30, 1975.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises, the period and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed.

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

(h) Upon the UFW's filing of a written Notice of Intent to Take Access pursuant to 8 Cal. Admin. Code section 20900(e)(1)(B), permit the UFW to take access as provided by 8 Cal. Admin. Code section 20900(e)(3), utilizing two organizers for every fifteen employees in each work crew on the property. This

right of access shall encompass four 30-day periods within the 12-month period following the date of issuance of this Decision.

(i) During any 30-day period in which the UFW exercises its right to take access, provide the UFW with an up-to-date list of its current employees and their addresses for each payroll period, without requiring the UFW to make any showing of interest.

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

IT IS FURTHER ORDERED that the representation election conducted in this matter on September 10, 1975, be, and it hereby is, set aside and that the petition for certification in Case No. 75-RC-6-F be, and it hereby is, dismissed.

Dated: April 17, 1981

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Regional Office, the General Counsel of the Agricultural Labor Relations Board, issued a complaint which alleged that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by: (1) interfering with the right of our workers to communicate freely with and receive information from a labor organization; (2) engaging in surveillance of employees and union representatives; (3) rendering unlawful aid, support, and assistance to a labor organization; (4) denying union agents access to our workers' housing areas; and (5) discharging employees Jesus Garcia and Lorenzo Perez because they supported the union. By this conduct, we interfered with, restrained, and coerced our employees in the exercise of their right to freely decide which union, if any, they want to represent them. The Agricultural Labor Relations Board has told us to send out and post this Notice.

We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wage and working conditions through a union chosen by a majority of the employees and certified by the Board?
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because 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 discharge any employee or otherwise discriminate against any employee in regard to his or her employment because he or she has joined or supported the United Farm Workers of America, AFL-CIO (UFW), or any other labor organization.

WE WILL NOT prevent or interfere with your communications with UFW representatives or other union agents or organizers at our labor camps or premises where you live.

WE WILL NOT prevent, or attempt to prevent, UFW representatives or other union agents who enter or remain on our premises in accordance with the Agricultural Labor Relations Board's access rules from communicating with employees for purposes of organizing.

WE WILL NOT spy on, or engage in surveillance of, employees communicating with UFW agents or other union representatives.

WE WILL NOT aid, support or assist the Teamsters Union or any labor organization by granting it more or greater access to our employees for organizational purposes than we grant to any other labor organization.

WE WILL offer to reinstate Jesus Garcia and Lorenzo Perez to their previous jobs, or to substantially equivalent jobs, without loss of seniority or other rights or privileges, and we will reimburse each of them for any loss of pay and other money losses they incurred because we discharged them, plus interest at seven percent (7%) per annum.

Dated:

E. & J. GALLO WINERY, INC.

By: _____
Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1685 "E" Street, Suites 101 & 102, Fresno, California. The telephone number is (209) 445-5668.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

E. & J. Gallo Winery, Inc.
(WCT & UFW)

7 ALRB No. 10
Case Nos. 75-CE-1/22/26/76-F
75-CL-1-F/75-RC-6-F

ALO DECISION

The United Farm Workers of America, AFL-CIO (UFW) and Respondent Gallo maintained a collective bargaining relationship from 1967 when Gallo recognized the UFW as the representative of its agricultural employees until April 15, 1973, when their last bargaining agreement expired. Although Gallo and the UFW met to negotiate in 1973, they did not reach agreement on a new collective bargaining contract.

In the meantime, the Teamsters Union had started organizing Gallo's agricultural employees. By July 10, 1973, Gallo had signed a collective bargaining agreement with the Teamsters. UFW strike activity began in 1973 and was renewed in 1974.

In 1975, after the Act became effective, the Teamsters filed a Petition for Certification and the UFW intervened. A representation election was conducted among Gallo's agricultural employees on September 10, 1975. This case involves unfair-labor-practice allegations and post-election objections regarding conduct which occurred in August and September 1975.

The ALO found that Respondent Gallo had engaged in numerous instances of surveillance and photographic surveillance in violation of the Act, and had rendered unlawful assistance to the Teamsters union. In addition, the ALO concluded that Respondent had discriminatorily discharged two employees because of their union activities and/or sympathies.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions as to the following unfair labor practices committed by Respondent:

1. Photographic surveillance of employees meeting with UFW organizers in front of Gallo's personnel office on August 30, 1975;
2. Surveillance and interference by a supervisor at a UFW meeting at the UFW's organizing office in Livingston on August 30, 1975;
3. Surveillance of UFW organizers as they spoke to employees at the Azevedo housing area on September 1, 1975;
4. Photographic surveillance of UFW organizers speaking with an employee at the Azevedo housing area on September 1, 1975;

5. Surveillance and unlawful denial of access to the Azevedo housing area by a security guard who solicited an employee's signature on a form requesting an organizer to leave and who procured assistance from a local law enforcement official in evicting a UFW organizer on September 1, 1975;

6. Surveillance of UFW organizers as they spoke to employees in the Van Cliff housing area on September 2, 1975;

7. Surveillance of a UFW organizer as he attempted to speak with employees at the Azevedo housing area on September 7, 1975;

8. Surveillance of UFW organizers as they attempted to speak with employees at their residences at the Snelling housing area on September 9, 1975;

9. Unlawful assistance to the Teamsters Union by providing preferential access, distributing Teamster campaign propaganda, and disrupting a UFW meeting; and

10. Discriminatorily discharging employees Jesus Garcia and Lorenzo Perez because of their union activities and/or sympathies.

REMEDY

The Board set aside the election, finding that Respondent's commission of numerous unfair labor practices interfered with the election and reasonably tended to deprive the employees of a free choice. In addition, the Board ordered Respondent to permit the UFW to take expanded access to Respondent's property by utilizing two organizers for every fifteen employees in each work crew on Respondent's property. Respondent was ordered to cease and desist from engaging in surveillance of UFW representatives who were communicating with employees, interfering with the right of its employees to communicate freely with, and receive communication from, union representatives, rendering unlawful aid, support or assistance to the Teamsters or any other labor organization, denying access to, interfering with, or otherwise surveilling union organizational activity in its employee housing areas, discharging or otherwise discriminating against any agricultural employee because of his union activities and/or union sympathies, or in any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of protected rights. Also, in addition to mailing, posting, and reading of a remedial Notice to Employees, Respondent was ordered to immediately offer Jesus Garcia and Lorenzo Perez full reinstatement to their former positions and to make them whole for loss of pay and other economic losses they have suffered as a result of their discharge.

* * *

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

was held on March 13 and March 22, 1978. The proceedings occurred at various locations in Fresno and Merced, California.

The General Counsel, the Respondent, E. and J. Gallo Winery, Inc., and the United Farm Workers of America, AFL-CIO, the Charging Party (hereafter the "UFW"), were represented throughout the proceedings. Briefs were filed by each of these parties, consisting in the aggregate of over 700 pages. Various memoranda were also filed by these parties before and during the course of the trial.

Four unfair labor practice charges were filed by the UFW against Respondent Gallo that served as the basis of the complaint in this proceeding. These charges had the following file dates: 75-CE-1-F dated September 2, 1975; 75-CE-1-F (amended) dated September 3, 1975; 75-CE-22-F dated September 5, 1975; 75-CE-26-F dated September 8, 1975; and 75-CE-76-F dated September 29, 1975.^{1/} (Following the first pre-hearing conference in this matter Respondent Gallo moved to dismiss the complaint, claiming that the underlying charges were either substantively insufficient to form the basis of a complaint or improperly served; this motion was denied by me by written order on March 27, 1978.)^{2/} These four charges were timely served on Respondent Gallo during September, 1975.

An objections petition, challenging the results of the election conducted among Gallo employees on September 10, was also filed by the UFW. This petition was filed and served on September 16. The UFW's election objections were consolidated for hearing with the unfair labor practice complaint.^{3/}

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments, memoranda, and briefs of the parties, I make the following:

^{1/}Unless otherwise stated, all dates hereinafter refer to 1975.

^{2/}In addition to the reasons set forth in my March 27 order for denying Respondent Gallo's motion to dismiss the complaint, the following fact emerged at the hearing: a letter sent by one of Gallo's counsel, Mr. Quinlan, to the Agricultural Labor Relations Board's Regional Director, dated September 8, 1975, clearly shows that Gallo by that date had been served with Charge 75-CE-1-F (and its amendment) and generally understood the basis of the several charges filed against it by that time. Gallo's motion to dismiss also challenged the various amendments and additions to the original complaint, a challenge addressed in my March 27 order.

^{3/}Substantial similarity exists between the unfair labor practice allegations and the UFW's election objections. The similarities and differences between the complaint and the objections petition will be noted below.

FINDINGS AND CONCLUSIONS

I. Jurisdiction

Respondent E. and J. Gallo Winery was alleged in the complaint to be a California corporation engaged in agriculture in Stanislaus, Merced, and Fresno Counties, and was alleged to be an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (hereafter the "Act"). These allegations were not denied by Gallo. Accordingly, and in view of the substantiating evidence, I find that Gallo is an agricultural employer and that jurisdiction exists under the Act to resolve the matters in dispute.

Also based on the pleadings and the evidence I find the following: that, both the UFW and the Western Conference of Teamsters, Agricultural Division, International Brotherhood of Teamsters and its affiliated Locals (hereafter the "Teamsters" or the "Teamsters Union") to have been labor organizations during the times pertinent to this proceeding, within the meaning of Section 1140.4(f) of the Act.

II. The Unfair Labor Practice Allegations

The complaint serving as the basis for this proceeding is the second amended consolidated complaint (referred to herein as the "complaint") . It was dated and served on April 20, 1977. This complaint was further amended at the hearing. The complaint generally alleges that Respondent Gallo violated Sections 1153(a), (b), and (c) of the Act; Gallo generally denies it committed any violations of the Act.^{4/}

The complaint is structured as follows: Paragraph 9 (Sections 9 (a) through 9(hh)) alleges that Gallo unlawfully interfered with, coerced, and restrained employees by engaging in acts of surveillance, denial of access, and disruption of UFW organizing efforts; Paragraph 10 (Sections 10 (a) through 10(i)(11)) alleges that Gallo unlawfully assisted and supported the Teamsters Union; and Paragraph 11 (Sections 11(a) through 11 (c)) alleges that Gallo unlawfully discriminated against employees by discharging and refusing to hire or rehire certain

^{4/}The complaint was preceded by two others. The initial complaint was dated November 26, 1975, and the first amended complaint was dated January 23, 1976.

In response to each of the three complaints Respondent Gallo submitted a demurrer, a motion for particulars, and a motion for discovery. These Gallo pleadings have been resolved by either Board orders or rulings made during the pre-hearing conference. The record generally reflects that Respondent Gallo has received every declaration in the possession of the General Counsel and UFW, names of proposed witnesses , copies of documentary evidence, and a recitation of particulars with respect to the identity of participants involved in the disputed events. Except with respect to the charges pertaining to Gallo's so-called "security guards," whose individual identities were largely unknown to the General Counsel and UFW, the complaint, as amended during the pre-hearing conference, sets forth the identity of individual perpetrators of the alleged unfair labor practices.

employees. Significantly, Paragraph 9 of the complaint charges Gallo as responsible for several acts of interference, coercion, and restraint allegedly engaged in by Teamster representatives, who were purported to be acting also as agents of Gallo.^{5/}

When the proceeding first began the Teamsters Union was also named as a respondent. Paragraphs 17 and 18 of the complaint were directed against the Teamsters Union alone. After the hearing began, however, the General Counsel moved to dismiss these two paragraphs of the complaint due to the UFW's written withdrawal of the underlying charge (75-CL-1-F). On May 9, 1978, on the 26th day of the hearing, I granted the General Counsel's motion to dismiss Paragraphs 17 and 18 (over Gallo's objection), pursuant to Section 20212 of the Board's Rules and Regulations.^{6/}

The conduct put into issue by both the complaint and the election objections occurred mainly between August 28 and September 10. The following paragraphs of the complaint were dismissed during the course of the hearing: Paragraphs 9 (a), (n), (s), (y), (z), (aa), (bb), (dd), 10 (b), (g), (i) (9), and 11 (a). Other modifications in the complaint that arose during the hearing will be noted below.

III. Background Facts

A. Gallo's Operations.

As part of its operations, E. and J. Gallo Winery maintains ranchlands around Modesto, Snelling, and Livingston, California. Gallo's executive offices are in Modesto, where its Vice President and Director of Industrial Relations, Robert Deatruck, and its Director of Corporate Safety and Security, Frank Clark, have their offices.

The events cited in the complaint involve Gallo's Livingston and Snelling ranches. The Livingston Ranch is a large operation, whose primary function is growing and harvesting wine grapes. On that ranch Gallo maintains a large shop area and its personnel office (or referred to as the "Employment Office"). The Employment Office fronts on Griffith Road; Magnolia Avenue, a dirt road, runs along its southern boundary. The office is enclosed by a chain link fence, and within that fence is a vehicle parking area around three sides of the building where Gallo and its management's vehicles were parked as well

^{5/}While the Teamsters Union was still named in the complaint as a respondent it filed an answer, admitting that the following persons were its agents: Imelda Lopez, Johnny Macias, Homer Mendiola, Bill Powers, and Jim Tucker. Several of these admitted Teamster agents are named in Paragraph 9 of the complaint as acting as agents for Respondent Gallo.

^{6/}Thus, only two features of this case continue to involve the Teamsters Union. First, the UFW's election objections continue to cite conduct on the part of the Teamsters as a basis for setting aside the election. Second, certain admitted Teamster agents are also alleged to have acted as agents for Respondent Gallo.

as Gallo equipment. Across the street (Griffith) is an open parking lot for employees' vehicles. During the time of the events in question, Gallo's Director of Personnel, Ruben Castillo, had his office there, as did the supervisor for ranch security. The Employment Office is where the employees were paid during the grape harvest, on each Saturday.

On the Livingston Ranch, Gallo maintains several housing areas exclusively used by its employees. One is by the shop area, another is referred to as the Azevedo Camp, and another is referred to as the Van Cliff or River Road Housing Camp, which is located on Van Cliff Road.

The primary activity at the Snelling Ranch (also referred to as Cowell Ranch) is the growing and harvesting of apples for Gallo's wine production. The Snelling Ranch is about a 30-minute drive from Livingston. The Snelling Ranch also has a shop area, ranch office, and housing. The housing project at Snelling has a number of one-floor apartments, provides living for both Gallo employees and others not associated with the Company, and is located on Turlock Road, just outside the ranch entrance.

Because of its two crops Gallo has two different harvest periods. The record does not reflect when the apple harvest began, but it ended on August 22. The grape harvest at Livingston began on August 21, starting first with the use of picking aids;^{7/} the regular harvest using gondolas pulled by tractors, with the employees picking on foot, began on August 26.

B. Background Of The UFW's Dispute With Gallo.

Many of the contentions raised in this proceeding cannot be fully measured without some reference to the history of the relationship between the UFW and Respondent Gallo. The following paragraphs do not purport to set forth in detail that relationship, but only attempt to summarize briefly those facts alluded to by the parties during the course of the hearing.

For six years the UFW and Respondent Gallo maintained a collective bargaining relationship, beginning in 1967 when Gallo recognized the UFW as the representative of its field workers and lasting until April 15, 1973, when their last bargaining agreement expired. Negotiations between Gallo and the UFW took place in 1973 over a new collective bargaining agreement, but they produced no agreement.

Apparently while negotiations were going on between Gallo and the UFW, the Teamsters Union was soliciting support pledges from Gallo's employees. In June, 1973, a high Teamster official, Jim Smith, met with Gallo's chief labor representative, Robert Dietrick, and informed him that the Teamsters had achieved a large number of employee

^{7/}Picking aids are large machines first used by Gallo in 1975. Employees ride on the machine as it straddles four rows of grapes, and the employees pick as the machine is driven slowly down the four rows. Some 17 or 18 employees work on each machine. In 1975 Gallo had four or five picking aids, but they were rarely all operating at the same time.

signatures on authorization cards and petitions. Before that meeting, however, the UFW's president had written Robert Gallo, a Company vice president, suggesting that if doubt existed over whether the UFW represented a majority of workers that an election be conducted. No such election took place in response to that May 13 letter from Cesar Chavez.

On June 27, 1973, a strike commenced at Gallo's Livingston Ranch, supported by the UFW. Thereafter, some 53 workers were officially replaced by Gallo, and another 31 workers failed to show up for work. During the first week of July telephone calls and a telegram were directed to Robert Gallo by a Sister Joyce Higgins, asking that the UFW be given the opportunity to demonstrate that it still represented a majority of the Company's field workers. Those calls and telegram went unanswered.^{8/} As of the time of the strike, however, Robert Gallo believed that the UFW still represented a majority of Gallo's workers.

Nonetheless, by July 10 Respondent Gallo had negotiated and signed a collective bargaining agreement with the Teamsters Union, which claimed by then to represent the workers. On July 10 a ratification vote regarding the new contract was held among employees, and between 153 and 159 employees cast votes. At least 84 of those voters were new employees, apparently. Gallo and the Teamsters then maintained a collective bargaining relationship up through the events described in this proceeding.

The UFW's strike continued until October, 1973. Its boycott against Gallo then followed. Strike action was renewed in 1974.

Strike activity at the Gallo Livingston Ranch in 1973 and 1974- was not without incidents. Cars, grape vines, buildings and people were injured and damaged, including Gallo workers and UFW picketers. A large police presence existed at the Livingston Ranch. In 1973 up to 100 police were sometimes present during the day, and the Merced County Sheriff's Department regularly maintained a force of 25 to 30 deputies near the ranch. In 1974- fewer police were present, but nevertheless the Merced Sheriff's Department regularly assigned 18 to 20 deputies to the area. In addition, as noted below, Gallo maintained a large force of security guards at its Livingston Ranch during the 1973 and 1974 grape harvests.

C. Gallo's Actions And Policies Regarding Union Organizing.

By August 28, when the Act became effective, Respondent Gallo had set in motion certain policies with respect to union organizing which had a bearing on its subsequent course of conduct. Gallo's early policy devised by June 24, after UFW organizers had begun to visit Gallo properties in anticipation of an employee election, was essentially to deny access to union organizers on Gallo property during working hours. But, according to Mr. Dietrick's uncontradicted testimony,

^{8/}Robert Gallo, who was in overall charge of the Company's ranch operations, explained that he refused to respond to Sister Higgins's overtures because he felt that she had misled him during a previous meeting and that she did not represent the UFW.

organizers were permitted to meet with employees before and after work in bus-loading areas and eventually the parking area across Griffith Road from the Employment Office.

On August 5 Dietrick promulgated a more extensive policy regarding union organizing. The August 5 letter he wrote to Bill Heuer (the acting manager at Livingston Ranch) continued to ban any union organizing "during working hours on Company premises," including organizing efforts by Teamster shop stewards and representatives, but excluded from the ban organizational contact in the employee parking lot across from the Employment Office at Livingston and in the bus-loading area at Snelling. Significantly, the directive to supervisors noted that "any union may visit employees residing in Company housing by invitation only so long as their presence does not create a disturbance."

By August 6 Dietrick's announced access policy was already modified. After newspapers began to publicize the UFW's criticism of being denied organizational access to workers, criticism particularly aimed at Gallo and particularly at its prohibition of access during lunch-time breaks, it was determined by Gallo to allow organizers access for one-half-hour during the employees' lunch break.^{9/} Thus, beginning on August 6, Gallo permitted lunch-time access, primarily at the Snelling Ranch where the apple harvest was underway,

Despite the lunch-time access granted on August 6, concern was still expressed by Communications Director Solomon regarding the continued UFW criticism of Gallo's access policies after August 6, criticism which was reported in the press. On about August 11, Bob Gallo directed that the Company begin photographing UFW organizers meeting with Gallo field workers. Responsibility for the photographing was given over largely to the growing number of security guards then being employed by Gallo, although various ranch supervisors, such as Luis Salado, Ruben Castillo, Jon Yori, and others were also instructed to photograph such organizational gatherings.

On August 11 the following directive was put out by Frank Clark to his security force:

The U.F.W. has made charges through the news media that Gallo has refused to permit U.F.W. representatives access to their workers. As you are aware, it is the policy of Gallo to permit U.F.W. organizers the opportunity to petition Gallo farmworkers . This may be accomplished prior to

^{9/}Dan Solomon, Gallo's communications director and the person responsible for combatting the UFW's boycott and publicity campaign against Gallo, believed that the UFW's public campaign against access restrictions in early August was in effect—a major campaign that Gallo would have to respond to. Solomon testified that in response to newspaper coverage regarding the UFW's access complaints, he received numerous press inquiries and expressed his concern to Dietrick regarding the anti-Gallo publicity.

the work day, during the lunch break or at the end of the work day. In order to disprove the U.F.W. accusation, the following procedures will apply:

1. A Kodak Instamatic camera, with film, has been provided Unit 55.
2. Each time UFW representatives appear at the Maze Ranch, Unit 55 should obtain photos while they are conversing with the workers.
3. Make sure you accomplish this in the most discreet and inconspicuous manner possible.
4. In each instance where photos are taken, explain to our workers that we are taking pictures only to disprove the U.F.W.'s claim that they are not being permitted access to Gallo Property to talk to the workers. Make sure you do this after the U.F.W. has departed.
5. Continue to make a comprehensive and complete report each time the U.F.W. appears at Maze Ranch.

This August 11 memorandum was specifically directed to "Maze Ranch Security" (Unit 55), Maze Ranch being the ranch property in Modesto. The record reflects, however, that this same policy was implemented at the Livingston and Snelling Ranches, apparently through verbal instructions.

As will be detailed in following sections, Gallo's photographic policy was carried out from about August 11 through at least the morning of September 2.10/ By August 11, some 10 instamatic cameras were distributed by Gallo to security guards and supervisors at the Modesto, Snelling, and Livingston Ranches. In addition, one security guard, Art Atkinson, was permitted to use his own 35-mm camera for the picture-taking.

Gallo's allowance of noon-time access was short-lived. On August 19, Personnel Director Ruben Castillo received a so-called "employee petition," which stated that the "workers ... do not want any agents or sympathizers of the United Farm Workers talking, approaching or bothering us anymore while working or while on our break or lunch

10/It might be noted that pursuant to the General Counsel's-subpoena, Respondent Gallo turned over 946 photographs (with some duplications) ; these were stipulated to have been taken between August 11 and September 1 by security guards or salaried supervisors. Nonetheless, as discussed below, several UFW witnesses described being photographed during that period but were unable to find such photographs in those turned over by the Respondent.

period." The petition appeared in both Spanish and English versions, although names of Portugese and Punjabi workers appeared on it, as well as the names of foremen and their relatives. The petition was presented to Castillo by Yulanda Luga (who testified at the hearing under her married name of Aldama), who was known to Castillo as a friend of two Teamster representatives (Imelda Lopez and Bill Powers) and as an open advocate for the Teamsters Union.

After reviewing the petition's signatures, Vice President Dietrick banned further noon-time access. On August 20 he ordered distributed to employees a letter informing them that "effective immediately, we are not allowing organizers access to our fields during working hours or lunch breaks." Dietrick, however, made no effort to learn the circumstances surrounding the petition's circulation, a petition that on its face was solely directed against the UFW.^{11/}

From August 21 to at least August 29, Gallo attempted to ban organizers from communicating with workers during their lunch breaks, limiting organizer access to areas of bus-loading and parking before and after work. Various UFW organizers refused to comply with Gallo's ban on noon-time access, and on August 21 and 22 at least several UFW organizers, including Pam Whalen and Agnes Rose, were arrested at noon for trespassing at the Snelling Ranch.^{12/}

It cannot be seriously doubted that the UFW's organization campaign at Gallo was a concentrated one. By latter August the UFW had some 16 full-time organizers, plus three to four legal aids, who directed their efforts at Gallo workers. Other supporters joined these UFW representatives from time-to-time. It is fair to say that from the last half of August until the September 10 election, the UFW had numerous organizers at the Gallo ranches, primarily at noon times and after work. Nor can it be doubted that on many occasions, particularly after August 29, these organizers solicited support from workers in the fields, in and around the Employment Office compound, in housing areas, and around the Griffith Road parking lot.

The UFW's organizing campaign, however, cannot be fully evaluated without some understanding of Gallo's employment of security guards. Frank Clark, as noted, was the director of security forces.

^{11/}Dietrick's lack of curiosity regarding the petition's circulation seems a little strange, inasmuch as he was intensely concerned with the problems of union organizing from August on. Thus, from August 6 until 21, when the apple harvest ended, he visited Snelling daily during the lunch hour to observe and report on organizing activities. After the grape harvest began, also on August 21, Dietrick spent every afternoon at Livingston observing organizing activities and engaging in labor relations matters.

^{12/}Considerable testimony was presented regarding their disputed claim that Teamster organizers were present at Snelling on August 21 when UFW representatives were arrested. To the extent this dispute has a bearing on the issues herein, it will be discussed infra.

Several security supervisors reported to him: Charles Mahin, Gene Fones, Tim Cassell, and Virgil Staley. With respect to ranch security (as contrasted with winery security), Virgil Staley was the overall supervisor at Livingston and Snelling from early August to August 26, when he was replaced by Charles Mahin. Thereafter, Mahin was in charge of security at Livingston and Snelling and reported for this ranch assignment at noon on each day. Tim Cassell was the night shift security supervisor for the two ranches. The security supervisors had their office in the Employment Office.

The security guards employed by Gallo during harvest time were not professional security persons. Rather, they were summer-help, without any specialized training or background. This harvest employment of guards first began in 1973, when about 100 seasonal guards were employed by Gallo; in 1974- about 60 seasonal guards were employed. The highest number employed in 1975 was 33 guards. During the day shift, two guards generally were stationed at Snelling and four guards at Livingston. Other guards reported for night work at both ranches, including some who were posted at or near the housing areas .13.7 Of course, various security supervisors, like Clark, Mahin, and Cassell, were also present at the Livingston Ranch at various times.

In general, the work of ranch security was governed by verbal and written directives. Significantly, one of the earliest directives, dated June 25, provided the following:

Due to the possible U.F.W, activity in the area
all unusual events must be documented.

Example: slow moving vehicles, making several trips
by the winery or ranch areas on weekends, people in
vineyards, river levees, etc.

Get as much information as possible.

I.E. vehicle make, model, lie. no., number of
occupants, their descriptions and any other
information possible. Note time and location, also.
Pass on all information to be logged.

13/Frank Clark testified that employment of guards in 1975 was in large part based on fears that the violence and damage that existed in 1973 and 1974- would be repeated. In particular, Mr. Clark cited the following factors as increasing his concern in 1975 that the past trouble would be repeated: on August 14 a caravan of four buses drove by the Livingston Ranch with some 300-400 UFW supporters on them; on the night of August 14 the Employment Office was broken into and office equipment and files were damaged; that same night the Livingston Ranch office had an attempted break-in; several employees expressed concern over security for their families in the housing areas; and on August 21 and 22 a number of UFW organizers were arrested at Snelling. It might be noted that over half of Gallo's seasonal guards were employed by August 13; about 14 more were hired between August 22 and September 4.

Other written directives issued throughout July and August repeatedly emphasized that guards were to keep daily records or "logs" of events occurring on ranch property, including union organizing activities. For example, on August 26 Frank Clark instructed the security guards in writing that they should fill out Corporate Safety and Security Offense Reports "(a)nytime any UFW or Teamster activity occurs" (These reports are known colloquially as "CSSO's.")

Despite the penchant for record-keeping evinced by Gallo's security supervisors, the individual guard's responsibility is confusing at best. Thus, despite repeated instructions to the contrary that were issued to the guards, Respondent Gallo claimed that its guards did not maintain daily logs or fill out daily CSSO's. On the other hand, a few examples of such logs and CSSO's were introduced during the hearing, made out in the names of individual guards such as Atkinson and Toupin, and Virgil Staley (no longer a Gallo employee) admitted that during his tenure as ranch security supervisor the individual guards regularly kept daily logs of their activities. Frankly, Gallo's claim that individual guard reports did not exist seems difficult to comprehend in view of the other evidence.

Nor is it easy to understand precisely what policies Gallo implemented with respect to organizing activities in its housing areas, except that substantial attention was given to them. On August 14, Supervisor Staley, who was then in charge of ranch security, issued a written directive to the guards regarding "UNIDENTIFIED VISITORS." This directive stated:

When unidentified persons are observed on Ranch property, either at Livingston or Cowell, try to get the following information:

1. WHO ARE THEY? Name(s), license number (s), color and type of vehicle(s) driven, etc.
2. WHY ARE THEY HERE? Were they invited onto the property? If so, by whom? If they state they were invited onto the property, find out who invited them. Contact the individual who extended the invitation AND VERIFY THAT INVITATION. Keep the visitors under observation until they leave the premises.
3. If they have no invitation, ask them to leave. If they refuse to leave, advise them that they are trespassing and that they will have to leave. BE FIRM, BUT BE POLITE AT ALL TIMES: DO NOT HOLD UNNECESSARY CONVERSATION WITH THEM! Complete an "AVO" form and have the tenant sign that form. If they still refuse to leave contact Virgil Staley or Frank Clark and inform them of the situation. With THEIR PERMISSION ONLY, contact the Sheriff's Office.

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Then, on August 17, Staley issued another directive to his guards which provided the following, in part,

II. One security officer will remain in the housing area on swing and graveyard shifts, making contact with the motor patrol every one-half (1/2) hour.

He is to patrol the entire housing area being alert for any unauthorized personnel and/or vehicles. If unwanted visitors are reported to him, he is to follow the instructions dated August 14-, 1975, subject, Unidentified Visitors.

Virgil Staley, the author of both the foregoing memoranda, was not questioned when he appeared as a witness as to how they related to one another.14/

Several other security memoranda are of note. On August 25, Clark issued a memorandum telling guards that if informed that a union organizer was asked to leave an employee's home, he should go to that home, ask the organizer to leave, and "(i)f they refuse to leave, then call the Sheriff's Office." The guard was instructed that a tenant must first ask the organizer to leave and then the guard was to have the tenant fill out an "AVO" (a form entitled Avoid Verbal Orders). Between August 23 and 25 Vice President Dietrick promulgated written notices to employees, both those living off and on Gallo premises, informing them that they did "NOT HAVE TO TALK TO ANY UNION ORGANIZER OR SIGN ANYTHING" and informing them that they could call the Company's security guards and/or the local police to have the organizers removed from their homes. These letters were distributed to employees approximately between August 25 and August 30,

One final background fact exists with respect to Gallo's overall access policy regarding union organizers. In his September 4 telegram to ALRB agents, Francis Brennan, Gallo's vice president and

14/Although Frank Clark attempted to explain Gallo's policies with respect to union housing access, his testimony was confusing and self-contradictory. When he initially appeared as a witness, Clark indicated that Staley's August 14 memorandum was not rescinded but he believed it to have been modified around September 2 (even though he had the opportunity to review the August 17 memorandum). When he returned as a witness a second time, Clark was then sure that the policy of verifying organizers' invitations to housing areas, as set forth in the August 17 memorandum, was changed by the August 17 memorandum to one where security guards would not initiate the verification but only respond to calls made by tenants regarding "unwanted" visitors. To further confuse the matter, Clark claimed during his second witness appearance that the verification policy was changed on August 26, when Mahin replaced Staley. As noted below, however, as late as September 1 we find security guard Art Atkinson unilaterally attempting to verify two UFW organizers' invitations to the Azevedo housing area.

general counsel, stated the following, inter alia:

Union organizers have been permitted access to employee housing on Gallo property without restriction.

* * * *

Beginning August 29, and continuing to the present, union organizers have been permitted access on employee parking and bus loading areas on Gallo Property before and after work and in the Gallo fields where employees are working during lunch breaks. Despite the temporary restraining order reportedly issued yesterday we are continuing to allow union organizers access to employees on our property in conformance with Chapter 9, access to workers in the fields by labor organizations, of the emergency regulations of the California Agricultural Labor Relations Board.

IV. The Facts Regarding Respondent Gallo's Alleged Interference, Coercion And Restraint. And Its Alleged Assistance And Support Of The Teamsters Union

The following is a summary of the various incidents raised in the complaint and/or in the UFW's election objections petition. The discussion that follows will be broken down into various categories. Within each category the incidents will be considered in chronological fashion. Cross-references to the complaint and UFW petition will be as follows: the term "Paragraph" will refer to the complaint paragraph (s); the term "Section" will refer to the section (s) of the election objections petition.

A. Gallo Activity As It Related To The UFW's Organizing Campaign At Or Near Gallo's Ranchlands (Excluding The Housing Areas).

1. August 28 (About Noon) (Paragraphs 9(b), (e) , And (f); Sections IA2(a), IA2 (n)):

In The Fields--Frank Ortiz, one of the UFW's organizational leaders in the Gallo campaign, recalled going to the Livingston Ranch at about noon on August 28, parking his car by the intersection of Griffith and Westside Roads. Ortiz walked into one of Gallo's grape fields and approached two parked picking aids; employees were then eating their lunches. While he was in the field Ortiz spoke to several employees , after which he proceeded to Griffith Road where other workers were eating their lunches on a Gallo bus.

When Ortiz initially entered the field he was

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confronted by a Gallo security guard, who drove up to him in the field.^{15/} The guard informed Ortiz that he was trespassing and would be arrested if he did not leave.^{16/} Ortiz, nonetheless, proceeded through the field to Griffith Road, meeting with and talking to employees on the way. During Ortiz's organizational conversations with workers the security guard repeatedly photographed him and workers, following Ortiz all the way to Griffith Road. When Ortiz arrived at Griffith, other UFW organizers (Delores Huerta and Richard Chavez) were observed by him near a parked bus, where other employees were eating their lunches, Ortiz also observed a second security guard by the bus taking photographs. One of the photographs taken of Ortiz while he was in the field is in evidence (G.C. Exh. 63), a photo of Ortiz talking with Mathew Silva by a picking aid. The photograph was taken from only a short distance.

Gallo presented no witness to challenge Mr. Ortiz's recollection of being followed and photographed by one of its security guards. Basically, Respondent Gallo argues that Ortiz's uncorroborated testimony concerning this and other events on August 28 cannot be credited, asserting also that its production records demonstrate that no picking aid was present in Section C, the field by Westside and Griffith, and thus Ortiz's placement of the incident is in error.^{17/}

No convincing reason emerges from the evidence, however, to discredit Frank Ortiz's testimony in connection with the August 28 events. Although his testimony may have contained slight errors in regard to subsequent events he testified about (e.g., the incident on September 6), Ortiz's testimony was in the whole credible and unexaggerated, as was his demeanor while testifying. Furthermore, Ortiz's description of events on August 28 accurately portrays Gallo's admitted policy as of that date with respect to UFW organizer activity-- namely, that Gallo sought to prohibit organizers from noon-time access with workers, treating them as trespassers on its property, and photographing them when meeting with Gallo workers.

^{15/}In almost every instance where a witness identified someone as being a Gallo security guard it was on the basis of that person's uniform. Gallo guards were distinctively attired in khaki shirts and olive green trousers. They also drove trucks or other vehicles belonging to Gallo.

^{16/}This threat of arrest is apparently the basis of Paragraph 9(f)^T's claim that on the day in question "UFW representatives and observers were denied access to Respondent's property (at Livingston). . . ."

^{17/}Respondent Gallo raises several other basic arguments that go generally to all the numerous charges that it unlawfully surveilled and denied access to UFW organizers. It argues that throughout much or all of the period in question the UFW organizers had no right to enter onto Gallo's property and must be considered only as trespassers. Gallo also raises several business justifications for its practice of keeping UFW organizers under observation and photographing them. Gallo's arguments in this connection will be discussed at length infra, after the chronological factual occurrences are set forth.

While it is true that Ortiz's geographic placement of the event was somewhat confusing, that confusion does not vitiate the purport of his testimony. The incident described by Ortiz undoubtedly occurred, either in the field known as Section C on August 29, when Company records indicate the picking aids were present, or just as likely the incident occurred on August 28 in the South Howell field, which borders on Griffith Road and is one field away from Westside, where four picking aids were present according to Gallo records.^{18/}

By The Employment Office--Frank Ortiz also recalled that after the events described above, he returned to his car. As he was pulling away, Frank Clark drove up in his car with Johnny Macias, a Teamster organizer. The two of them stopped where Ortiz's car had been.^{19/}

Ortiz then drove to the Employment Office, arriving at about 12:30 p.m. About five or six UFW organizers were outside the Employment Office compound. Although his testimony fails to pin down specifically the number of persons present or personal identifications, Ortiz recalled that both security guards and Teamster representatives were outside the Employment Office taking photographs of UFW organizers as well as of the very few employees present. The details surrounding Ortiz's brief stop at the Employment Office are vague, at best, although it should be understood that this hearing took place almost three years after the events in question.

2. August 28 (About Noon) (Section IA1(b)):

Manuel Hernandez, an ex-Gallo worker who became a UFW organizer following the 1973 strike, recalled the following: he, Perry Collins, and Jerry Crevillo, all UFW organizers, went to the Snelling Ranch to talk with workers. They arrived around noon on August 28. As they were about to enter the ranch through the main entrance on Turlock Road, a Gallo security guard pulled across their path and, even though Collins identified himself and his UFW affiliation, the guard refused to let them pass onto the ranch. The guard informed the three men that he had orders to keep them off the ranch.

Hernandez was an extremely credible witness, whose demeanor and lack of strained testimonial assertions were most impressive. Despite the fact that he left Gallo after six years of work, due to the

^{18/}Thus, it should be noted that originally Paragraph 9(b) claimed that the event in question occurred "in the vineyards near Van Cliff and River Roads," which more likely described the South Howell field. However, that paragraph was amended at the hearing, after Ortiz's testimony, to place the incident at Westside and Griffith Roads. But, even Ortiz's testimony at times seemed confused as to which of those two locations he was at on August 28, an understandable confusion in view of Gallo's many fields.

^{19/}Originally, Paragraph 9 (e) charged that Clark and Macias surveilled Ortiz. This portion of the paragraph was dismissed, inasmuch as Clark's driving up, as Ortiz left, did not constitute unlawful surveillance, in my view.

1973 strike, he showed no bitterness toward the Company, nor any effort to distort his testimony against it. His soft-spoken appearance and efforts at a fair portrayal of the events lead me to generally credit his testimony and, in particular, his description of the event at Snelling, an event again consistent with Gallo's then-existing policy of barring UFW access.^{20/}

3. August 28 (At About 3:30 p.m.) (Paragraph 9(d):
Section IA2(n)) :

At approximately 3:30 p.m. in the Hogan and/or Codi Fields, by the intersection of Magnolia and Van Cliff, the first major confrontation under the Act took place between the UFW and Gallo. The UFW turned out in force, where between 150 and 200 workers were harvesting grapes. The UFW's numbers were placed at between 23 and 27 by Gallo representatives, a number confirmed by Stephen Hopcraft, who was then a UFW legal aid.

Various witnesses agreed that initially Frank Clark, who was at the intersection with four or five of his security guards, barred the UFW organizers from entering the fields. While those present were milling about, with Magnolia Avenue more-or-less blocked by security guard vehicles, the security guards repeatedly photographed the UFW organizers and wrote down license numbers of their vehicles. Hopcraft, who also took photographs of the event, captured some of the early moments of the stand-off (see G.C. Exhs. 27-37, 50). (Several UFW representatives had cameras there, such as Hopcraft, Doug Tottle, and Jordan Stanzler.) In addition, a Merced deputy sheriff was parked at the intersection, having been called by Frank Clark; he also pointed a camera toward where the organizers were congregated.

After about 15 to 30 minutes of the confrontation had passed, Frank Clark gave permission for the organizers to enter the field, telling them that they should not interfere with the work going on. At least several UFW organizers then proceeded down Magnolia, a dirt road, into the field area.^{21/} At least two of those organizers, Pam Whalen and Frank Ortiz, conceded that they entered into one of the vineyards to talk with employees who were still picking grapes. Both of them were followed by security guards and photographed. Other workers were then leaving work, walking down or standing on Magnolia: photographs of organizers approaching these workers were also taken by the

^{20/}The complaint does not allege this August 28 incident as an unfair labor practice. On the other hand, Hernandez's assertions were fully litigated at the hearing.

^{21/}The number of organizers who entered the ranch is unclear. Ortiz, Whalen, and apparently Delores Huerta entered. Huerta described some six or seven organizers as having entered; Whalen described only her, Huerta, and Barbara Macri as entering. Hopcraft claimed that most of the organizers remained on Van Cliff Road. On the other hand, Robert Dietrick and Frank Clark counted some 23 to 27 UFW organizers in the area, but neither of these Gallo representatives sought to pinpoint the number of UFW organizers who actually entered the field and met with the workers.

security guards. During the incident, three high management representatives drove slowly down Magnolia to observe the organizers' activity, Robert Dietrick, Julio and Bob Gallo. I do not find, however, that Teamster Organizer Johnny Macias accompanied them in their vehicle, as claimed by one of the UFW organizers.22/

The event at Magnolia and Van Cliff on August 28 has several features worthy of mention. Although Gallo's production records show that numerous workers were still working when UFW organizers entered the field, those records also reflect that approximately 104 workers quit between 3:15 p.m. and 4:00 p.m. and that another 42 workers left work by 4:15 p.m. Thus, a large number of workers were quitting for the day just at the time that UFW organizers entered the field area.

The practice followed by Gallo's gondola crews was that only the one crew member who drove the tractor would accompany the crew's last gondola through weigh scales, while the other three would remain standing in the dirt avenue or head for their cars. A number of photographs in evidence portray UFW organizers contacting workers in the avenues, even though their crew's last gondola was perhaps still being weighed and parked for the night or perhaps other crews continued working in the field. No set quitting time existed for the gondola crews, and they left as early as 1:30 p.m. to as late as 4:30 p.m.

Respondent Gallo's claim that UFW organizers flagrantly interfered with work on August 28 is not supported by the evidence. Except for the inconclusively vague assertions by Clark and Dietrick (see Note 21, supra) and the slight interference admittedly engaged in by organizers Ortiz and Whalen, no other reliable evidence establishes any substantial work interference. Indeed, at most, only one or two of all the Gallo photographs in evidence reflected any contact between an organizer and a working employee. On the other hand, on August 28 Gallo made no effort through its guards or supervisors to curtail whatever

22/Several considerations lead me to conclude that Macias was not in the Gallos' car, as claimed by Delores Huerta. First, Robert Dietrick asserted that they were riding with Ruben Castillo, the personnel director, who greatly resembled Johnny Macias. Under the existing circumstances, Dietrick's claim is more likely to have been the case than was Huerta's. Second, Huerta's assertion was not corroborated by any other observer or participant. Third, Ms. Huerta's claim that Macias was in the Gallos' vehicle is contradicted by her pretrial declaration, signed the same day as the event, wherein she made no mention of Macias's presence. It seems likely that if Macias had been present, one of the UFW's major leaders would have noted such a significant Teamster tie-in with Gallo management, particularly since the UFW vehemently claimed, even then, that Respondent Gallo was favoring the Teamsters.

The General Counsel vigorously argues that a witness's testimonial assertion cannot be impeached by the absence of that assertion in the witness's pretrial, hearsay declaration. This same type of impeachment problem existed with respect to pretrial declarations of several witnesses. The General Counsel's arguments regarding such impeachment are considered later.

contact there was between an organizer and an employee who was still working. Nor did Gallo seek to limit the number of organizers entering the field or have the deputy sheriff who was then present arrest any for trespassing.23/

4. August 29 (Around Noon) (Paragraphs 9 (g), (h), (i), (j), (k), 10(c); Sections IA1(a), IA2(b)):24/

In The Fields--Two incidents are described by UFW organizers as having taken place in unidentified fields belonging to Gallo. First, Barbara Macri recalled arriving at one of Gallo's fields where the work involved gondola picking. She arrived at about 11:30 a.m.

Ms. Macri left her car on a paved road and commenced organizational discussions with several employees who were at the edge of the vineyard eating lunch. She was talking with these employees when a Gallo security guard drove up and began taking photographs of her and the workers. Shortly afterward, Frank Clark drove up, also took some photographs of her and the workers, and told Macri she was trespassing and would be arrested if she did not leave. Clark could not recall the incident with Macri, but acknowledged that the remarks attributed to him by Macri would have been consistent with his understanding of Gallo's policy at the time. After Clark left, Macri remained. The workers whom she was with asked her what had been said between her and Clark and about the photographs. She recalled being there for a total of 10 to 15 minutes.

The second incident involved Antonio Santos, a Portugese-speaking UFW organizer. He arrived in a field area where Gallo signs were posted, entered a bus where some 12 to 15 employees were eating, approximately 20 yards away from one of Gallo's unique picking aids.

After Santos entered the bus, a security guard came to the door of the bus, and informed Santos he would have to leave or be arrested. Santos departed the bus; the guard then began photographing his departure. Employees were both inside and outside the bus at the time.

23/Frank Ortiz also described going to the Employment Office, after being at Magnolia and Van Cliff, to pick up several UFW organizers who were there. Despite the assertion in Paragraph 9(c) that security guards there engaged in surveillance, "including photographic surveillance," Ortiz admitted he had no distinct recollection of the guards taking photographs, and his testimony was vague in details. The only thing he distinctively recalled was that two Merced deputy sheriffs were parked there (summoned by Frank Clark) and one was pointing a camera at the UFW organizers.

24/One of the central themes stressed by the General Counsel and UFW as to the incidents that took place at noon on August 29 is the claim that discriminatory access was given to Teamster Johnny Macias by Gallo's supervisory force, as is specifically noted in Paragraphs 9 (i), (j), and 10 (c).

Respondent Gallo presented no conflicting evidence with respect to the testimony of Macri and Santos. Essentially, the Company concedes that it sought to ban noon-time access on August 29 and argues it was proper to arrest or threaten with arrest the organizers who were trespassing.

Behind The Employment Office--At approximately noon on August 29 Manuel Hernandez, Pam Whalen, Larry Tramutt, and Fred Ross, Sr., who was in overall charge of the UFW's Gallo campaign, arrived at the Employment Office. They parked on Griffith Road, walked down Magnolia Avenue into the South Howell Field, where two picking aid crews had been working, and went their separate ways in order to talk with employees who were eating lunch in the shade of the vines.

Larry Tramutt testified that he approached one employee who was sitting and eating by four or five other workers, at a location just outside the southwest corner of the Employment Office compound. After Tramutt discussed the UFW with the employee for a short time, Ruben Castillo walked up to him, asked Tramutt if he was a worker and, when Tramutt said no, Castillo told him to leave the premises. Tramutt recalled a short, heated exchange with Castillo over the organizer's right to be there. Castillo continued to insist that Tramutt leave. Tramutt stood up to leave and noticed Johnny Macias talking to employees by the corner of the compound. As Tramutt began to leave the field, Macias was mockingly waving good-bye. Tramutt also noticed that security guards were in the immediate area, taking photographs of him but not of Macias.

Pam Whalen walked up to a tractor driver on his lunch break. As she was talking with him, she noticed Macias coming over and taking photographs of her and the tractor driver. She also recalled seeing security guards in the immediate area, but could not recall whether they had cameras.

Manuel Hernandez went to the left, off of Magnolia, approaching some 17 employees who had left the picking aid and were beginning to eat lunch. He talked with various employees, making his way back toward Magnolia. As Hernandez talked with a woman employee who was eating her lunch some four vines away from Magnolia, she called his attention to someone taking their picture. Hernandez turned around and saw Johnny Macias some 30 to 35 feet away on Magnolia pointing a movie camera at him and the woman worker. Hernandez recalled that despite the woman worker's lunch she covered her face with a scarf and told Hernandez to just drop the UFW leaflet he offered her on the ground.^{25/}

^{25/}Maria Castillo. a Gallo worker, testified about a similar incident happening to her on August 29 behind the Employment Office, although she denied covering her face or asking that the UFW leaflet be dropped on the ground. But, she failed to identify Manuel Hernandez or Larry Tramutt as participants in the incident ; she did, however, recall seeing a Mexican Teamster representative by the end of the vine row with a black object in his hand (big enough to be a movie camera). Her testimony also tended to corroborate Hernandez's recollection that Albert Cardenas was present, as Ms. Castillo recalled seeing a supervisor's truck at the end of the row just before given a leaflet by a UFW organizer.

As Hernandez looked at Macias he also saw Albert Cardenas, an admitted Gallo supervisor, in the cab of a Gallo pickup truck no more than an arm's reach from Macias's filming.^{26/}

Ruben Castillo admitted being present during this incident behind the Employment Office and asking the UFW organizers to leave the property. Further, he admitted that Johnny Macias was present at the time. Castillo could not recall if Macias had a camera, but he did recall Macias "jabbering" and talking at Ross as the organizers were leaving--in other words, harassing Mr. Ross.

The only major disagreement in the evidence arises from Castillo's claim that he demanded that Macias leave at the same time as the UFW organizers and that all the organizers left at the same time. Manuel Hernandez recalled that Macias stayed in the field with Castillo as the UFW departed and that Castillo and Macias were still together by a picking aid when Hernandez reached Griffith Road, Larry Tramutt remembered that Castillo followed the UFW organizers down Magnolia but that Macias remained in the field.

I accept Manuel Hernandez's testimony as that closest resembling what happened, corroborated in part by Mr. Tramutt. Castillo's testimony was often self-serving, was contradicted by other Gallo witnesses in significant respects as to other incidents, and was at times exaggerated (e.g., when he alone sought to claim that grape berms, the dirt mounds running under the vines, were two feet high and when he sought to claim he regularly photographed Teamster as well as UFW organizers, only to later admit he could not attest to more than one such photograph of a Teamster organizer). Significantly, had Castillo allowed Macias to remain in the fields after ordering the UFW organizers to leave, it generally would have been consistent with

^{26/}Gallo sought to impeach Hernandez's testimony on the basis of omissions of fact in one of his pretrial declarations. However, the attempted impeachment fails, since between that declaration, dated August 29, and a subsequent one written on September 4, Hernandez substantially accounted for the material facts he testified about, and the one remaining omission (his failure to mention Castillo's presence) was amply corroborated by not only Tramutt but Castillo himself.

Ignoring Hernandez's September 4 declaration, Respondent Gallo sought to confine its impeachment attack to only the earliest of Hernandez's declarations; but, such an approach--in view of the obvious fact that numerous declarations were being written by UFW organizers, some of which related to the same incident--would unnaturally distort the rules of evidence in this regard. In reality one must consider Hernandez's two declarations as being part of a single sworn version of the incident--that is, if one of the declaration's omission of fact is to be viewed fairly within the surrounding circumstances of the declaration's writing--or one must consider the almost contemporaneous, subsequent declaration as a prior consistent statement, occurring before any motive to fabricate testimony arose. In either case, it is appropriate to look at Hernandez's two pretrial declarations regarding August 29 when evaluating Gallo's attempted impeachment.

his pro-Teamster attitude as evidenced by other events which are later described.^{27/}

Respondent Gallo, in large part, challenges the incident alleged in respect to August 29 by citing various inconsistencies in the testimony of Hernandez, Whalen, and Tramutt. To be sure, their testimony did not consistently portray the same exact occurrences. But, with the possible exception of Ms. Whalen, whose testimony at times demonstrated either an exaggerated recollection of details or a failure of recollection, the three organizers' composite testimony convincingly establishes that Gallo's personnel director, Ruben Castillo, ordered the UFW organizers off Gallo property while at the same time permitting Johnny Macias to remain. Nor is there sufficient reason to doubt their claim that Macias was taking pictures of them in the presence of both Castillo and Supervisor Cardenas, before the UFW was directed off the property. It is significant to note that the most revealing inconsistency in regard to the incident is established by Gallo's own security report for August 29 (R. Exh. 96), which completely fails to mention the presence of Johnny Macias, as admitted to by Castillo, or that Macias was asked to leave, as the report describes Castillo as demanding of the UFW organizers. Thus, it readily appears that Macias's presence was ignored not only by Castillo but by the security guard who reported the incident.

5. August 29 (Around 3:30 p.m.) (Paragraphs 9 (1) and (m) ; No Specific Section):

Barbara Macri again returned to the field that she had been at earlier on August 29, arriving as various crews were quitting work for the day. She walked down one of the dirt avenues toward where the scale operation was, but she made her organizational contact with those workers who were standing and walking about on the avenue. She made contact with between 15 and 20 workers.

As she was conversing with and leafletting the workers, Luis Salado, an admitted Gallo supervisor, and several Gallo security guards repeatedly photographed her and the workers, taking their photographs from various angles and as from as near as four or five feet away. Some five photographs taken of Macri that day were introduced into evidence (G.C. Exhs. 68, 69, 188, 189, and 190). They show multiple photographs of Macri and the same group of workers from several different angles.^{28/}

^{27/}Even though Mr. Castillo was no longer employed by Gallo when he testified, he cannot be considered a disinterested observer. He is now employed by another agricultural employer and maintains his own labor contracting business in agriculture. His testimonial demeanor was not such as to instill confidence in his ability to recollect events.

^{28/}Both Frank Clark and Ruben Castillo indicated their agreement that the policy was to take as many photographs as possible of UFW organizers meeting with workers, even if that meant photographing the same organizer and workers over and over again.

Fred Ross, Sr., was apparently part of the UFW group that included Macri. He recalled going to one of the Gallo fields with six to eight organizers, including Manjit Dhillon and Barbara Macri. The organizers split into two groups, one apparently going toward a group of 25 to 30 employees who were parking their gondolas and leaving and the other group of 25 to 30 employees standing around in the dirt avenue.

Mr. Ross recalled that a security guard followed his organizers into the field, and then commenced taking numerous photographs of the organizers who began talking with and leafletting the workers. Ross described most of the workers in one of the two groups as turning away from organizers when the guards were pointing cameras at them.^{29/} Ross likewise recalled that Supervisor Luis Salado also came up and began taking photographs of the organizers and workers. Ross described how one worker yanked back his hand from organizer Manjit Dhillon when Salado pointed his camera at the employee to whom Dhillon was then handing a UFW leaflet. Mr. Ross, not without some obvious feeling about the matter, described the security guards as "using those cameras like guns."

Gallo challenges the testimony of Macri and Ross because of their inability to place the incidents described as within the geographical locations specified in Paragraphs 9 (l) and (m) of the complaint. Even if their placement of the events described by them is inconsistent with the complaint, however, their testimony regarding Luis Salado's and the security guards' picture-taking not only stands unrebutted but is completely consistent with Gallo's then-existing photographic policy. Nor can it be accurately claimed that the UFW organizers were disrupting work, as the photographic evidence relied on by Gallo in making that claim (G.C. Exhs. 188-190) clearly shows Ms. Macri making contact only with workers who were no longer engaged in work.

6. August 30 (Morning) (Paragraphs 9 (q) , 10 (d) , and 10 (i) (7); No Specific Section):

August 30, a Saturday, was the date set for a UFW organizational meeting at one of its local offices known as the Casa Campasina. The meeting was to begin at 2:00 p.m., was to feature Cesar Chavez, and was intended primarily as a meeting with respect to the UFW's Gallo campaign. The meeting took place that afternoon and will be discussed in a following section.

Various UFW organizers appeared at Gallo's Livingston Employment Office the morning of August 30 to distribute leaflets regarding the meeting. As noted earlier, Saturdays were pay days at Gallo and the employees, who worked only a partial day, reported to the

^{29/}Respondent Gallo sought to impeach Ross's testimony on the basis of his failure to mention in his August 30 declaration that these workers shied away from the photographing. But, Mr. Ross's almost simultaneous September 4 declaration, regarding the same incident, makes full mention of the facts he described in his testimony nearly three years later.

Employment Office for their paychecks. In addition to UFW organizers and workers, some three security guards were present along with Frank Clark and Charles Mahin, and approximately nine Teamster representatives were there. Both unions' organizers talked with and distributed materials to employees inside and outside the Employment Office compound, although most of the UFW organizers remained outside the compound either on Griffith Road or in the employee parking lot.

One central fact in regard to this Saturday morning encounter is without dispute. Gallo's security guards, including Mr. Clark, took numerous photographs of the UFW organizers talking with and leafletting the workers. Clark, himself, recalled taking at least 18 photographs. The photographs were of UFW organizers inside the compound, outside on Griffith Road, and while they were in the employee parking lot.30/

Some other features of the August 30 incident are without serious dispute. Shortly after Manuel Hernandez arrived at the Employment Office, early in the morning, he observed one of Gallo's security guards come out on Griffith Road; the guard looked at two cars that had been driven by UFW organizers and behaved as if he were writing down their license numbers. Steven Hopcraft, also there taking photographs, depicted in one of his photos a Teamster bumper sticker prominently displayed on the Employment Office front gate (G.C. Exh. 4-3). Finally, it is not disputed that at one point during the morning Johnny Macias strode across Griffith Road, wrote down Fred Ross's license number, went inside the Employment Office, and then returned some 10 to 15 minutes later, telling Ross that his car, registered at Ross's home address, had been involved in threatening a worker; Macias then told Ross he had better be careful. Mr. Ross's car is identified by make and license number on Gallo's security report dated August 30 (UFW Exh. 5). Gallo maintained at the time a vehicle license number file that set forth information regarding those vehicles' registered owners, although that information was kept at Gallo's Modesto offices.31/

30/It was frequently difficult for witnesses to verify what photographs entered as evidence were taken at which times. Some photographs put forward by Respondent Gallo as photos from August 30 were pictures portraying Teamster organizers (R. Exhs. 165-169). Two of these, however, also portray UFW organizers (R. Exhs. 166 and 167), and several other photographs also show both Teamster organizers and UFW organizers around the Employment Office (R. Exhs. 176-177, 195-197). With but possibly a rare exception or two, all the remaining Gallo photographs in evidence do not portray other instances of Teamster organizers meeting with and talking to employees. In other words, the only photographs of Teamsters engaging in organizational activity were taken around the Employment Office, apparently on August 30.

31/Maria Cordova, a Gallo worker, described reporting a threatening incident to Macias regarding a UFW vehicle and that Macias then wrote down the license number of the vehicle involved. It is not clear, however, that Cordova's testimony relates to Mr. Ross's vehicle, since her recollection places the incident at another time and date.

The major controversy surrounding August 30 is over whether Frank Clark and his son Gregory, who were together in the compound, helped distribute Teamster literature to the workers. No doubt can exist that Gregory Clark possessed a stack of Teamster bumper stickers, as Hopcraft's photographs clearly depict. Gregory Clark, 15 years old at the time, remembered asking his father if he could get some Teamster stickers and that his father asked a Teamster organizer for the stickers. According to the Clark boy, this organizer in turn asked another organizer, who in turn handed the stickers to the first organizer, who then gave them to Frank Clark. Clark who was then some 15 feet away from his son, according to Gregory, walked back and gave them to Gregory, Both Clarks adamantly denied handing out the stickers to workers, although Gregory admitted holding onto the stickers for approximately 45 minutes while standing in the compound.

Several UFW organizers (Fred Ross, Pam Whalen, Steven Hopcraft, and Delores Huerta) testified that they observed Gregory Clark distribute the Teamster stickers to workers.^{32/} While it is not appropriate to credit Frank Clark's testimony over that of the UFW organizers, in view of the character of his testimony (as discussed later), I am inclined nonetheless to conclude that neither of the Clarks distributed Teamster stickers to employees on August 30, Gregory Clark's testimony appeared credible and his recollection precise. Nor is there any evident reason to expect that the 15-year-old boy, unfamiliar with the Teamsters and workers alike, would have made any effort to pass out Teamster leaflets or would have been instructed to do so by his father.

Rather, I believe the evidence warrants the conclusion that various UFW organizers thought they saw Gregory Clark handing out the stickers, when what they probably observed was the exchange of stickers between Teamster organizers, Frank Clark, and then his son, and then observed Gregory Clark standing around with the stickers while talking to at least one Teamster organizer (whose identity was apparently unknown to the UFW organizers) and most probably other persons as well. I believe that to those then at the scene it quite likely looked as if Gregory Clark, clearly displaying the Teamster stickers, was also participating in the general distribution of literature; materials (including the bumper stickers) were being distributed by unknown persons and as many as 200 or 300 workers may have passed through the area where Gregory stood with the stickers. Had Gregory spoken to any of these workers, a distinct possibility, it surely would have looked as though he were passing out Teamster stickers, particularly if the worker who passed him or talked with him also had a sticker in his or her hand. Given the existing excitement and large crowd present that morning, it might be expected that observers' perceptions might be confused or distorted.

^{32/}Ms. Huerta was the only witness who claimed that Frank Clark, himself, passed out the Teamster bumper stickers to workers. Her declaration dated August 31, however, made no mention of the older Clark distributing the stickers.

7. September 2 (Around Noon And After Work) (Paragraphs 9(v), (w) , and (x) ; Sections IA3 (f) and IB1(d)):

On September 2, the day after the Labor Day holiday, Reverend John Phillips, rector of Holy Trinity Episcopal Church in Richmond, California, visited Gallo's Livingston Ranch in behalf of the UFW. Mr. Phillips wore clerical clothing and displayed a UFW button.^{33/}

Mr. Phillips's first visit to Gallo's ranch was at noon time. He went with Aggie Rose and several other UFW organizers: they stopped at a field where a picking aid was parked and approached some 10 workers who were eating lunch under the vines. After he had been talking to some workers for 10 to 15 minutes a Gallo security guard drove up in a pickup truck, stopped on the road by where Phillips and the employees were, and began taking photographs, Phillips could not recall who the guard was photographing but, in addition to Phillips, Aggie Rose was also in the immediate area. Reverend Phillips, who carried his own 8-mm movie camera, captured the last seconds of the guard's picture-taking, before the guard spoke on his truck's radio and drove off. The guard can be identified in Phillips's film as Art Atkinson, who frequently took photographs of UFW organizers with his own 35-mm camera (G.C. Exh. 251). Atkinson's picture-taking was aimed in the direction of Phillips and the workers.

Reverend Phillips returned to the Gallo ranch later that day, stopping at the Employment Office. When he arrived, he observed Johnny Macias and another person carrying boxes from two vehicles into the Employment Office.^{34/} Phillips next noticed Macias coming across Griffith Road; he stopped at several cars and appeared to write down their license numbers. Macias then photographed with a movie camera a UFW organizer who was talking with a worker. Phillips then observed a Gallo security guard outside the compound, who was also noting the license numbers of several cars parked on Griffith Road by the employee parking lot. These foregoing observations, or portions of them, are again captured on Phillips's own film.

Phillips then moved into the Employment Office

^{33/}Respondent Gallo argues that its treatment of Reverend Phillips cannot be found unlawful, since he admitted going to Gallo property not so much to organize in behalf of the UFW as to merely observe the election campaign and its moral tenor. Gallo also argues that "not only did Phillips deny that his presence was for the purpose of union organizing, but he did not testify to a single conversation with any worker where he attempted to organize the worker on behalf of the UFW" (R. Br. p. 189). Gallo's arguments, however, ignore the obvious significance of Phillips's visit, he accompanied UFW organizers to the property, associated with them in front of workers, identified himself openly by a UFW button as being a UFW supporter, and was generally unable to communicate with Gallo workers largely because of the conduct of Gallo's own security guards.

^{34/}Evidence does not directly establish what was contained in the boxes, but Gallo's security report for September 2 notes that the Teamsters distributed their newspapers to employees after work that day.

compound, where he attempted to speak in succession with three different workers. As soon as he approached each of the three workers, a security guard walked up and asked Phillips to identify himself. These identification demands were made by the same guard three different times in the same area., within moments of one another. The conversations Reverend Phillips was attempting to engage in with the workers were ended abruptly each time the guard interrupted him. Phillips, after repeatedly identifying himself, finally asked the guard why he was not making similar demands on the Teamsters.

8. September 4 (Around Noon) (Paragraph 9 (cc) ; Section IA2 (h) and IA2 (1)) :

At about noon on September 4 Pam Whalen went to one of Gallo's fields near Westside Road, where gondola picking was in progress. She proceeded down one of the vineyard rows to where Jesus Garcia and his crew were eating their lunches. After she was with the crew for about 10 minutes her attention was called to Luis Salado and his brother Salvador, a Gallo foreman, who were watching her and the workers from the end of the row. The Salados remained there for about five to 10 minutes.

Luis Salado admitted having observed Ms. Whalen in the field known as Hardy Charles, but denied knowing that she was talking with employees or which crew she was with. Instead, he claimed he and Salvador were checking the row Whalen was in and, after being in the row no more than five minutes, they left.

I do not credit Luis Salado's purported reason for being in the same row as Whalen on September 4. Although it is true that the workers' picking is checked to see if it is done properly, normally that checking is done by a foreman, working alone. And if the two Salados were, in fact, checking the row it is difficult to understand why they did not check the entire row, rather than only the part of it proximate to Whalen's organizational activity. It is also ironic that Luis Salado denies he recognized Jesus Garcia with Whalen when, at the time of Garcia's subsequent discharge three weeks later, no Company supervisor had difficulty in recognizing Garcia as the purported violator of Gallo's rules. Finally, I do not generally credit Luis Salado's testimony, as is noted infra in connection with the August 30 incident at the Casa Campasina.^{35/}

^{35/A} portion of Paragraph 9(cc) was amended at the hearing to include the assertion that Frank Clark, Robert Dietrick, and Joe Silviera, a foreman, were also engaged in surveillance or the impression thereof on September 4. Ms. Whalen testified to seeing these three men on September 4 in the avenue, near the gondola-weighting operations. Her testimony, however, does not satisfactorily lead to a conclusion that they were then engaged in observing her organizational activity or that they were not properly in that location where work was then taking place.

9. September 6 (Around Noon) (Paragraphs 9 (ee), (ff), and 10 (h) ; Sections IA2 (e) and IA2 (f)) :

Two incidents on September 6 are referred to in the testimony. The first incident occurred in one of Gallo's fields on Lander Avenue (Hayes or Silva Field), where Stephen Hopcraft, Barbara Macri, Pam Whalen, and Frank Ortiz went at about noon, as the employees were leaving work that Saturday. Hopcraft, corroborated by Ms. Macri, recalled that as he was distributing leaflets to workers one of Gallo's crew supervisors, Jose Gonzalez, came up, grabbed a leaflet from one of the workers, angrily glared at the worker, but said nothing. Hopcraft took the leaflet away from Gonzalez, returned it to the worker, and extended another one to Gonzalez. Other workers were in the immediate area, including some family members of the worker whose UFW leaflet was so abruptly grabbed from him by his supervisor.^{36/}

Pam Whalen recalled that as she spoke with employees who were by the drinking water tank, she observed Mr. Gonzalez near by, around the corner of one of the portable toilets. Her impression was that Gonzalez was eavesdropping on her conversation, and she conveyed some hearsay statements made by those with whom she was talking which indicated they too thought Gonzalez was observing them. On the other hand, the toilets and drinking water tanks were close together and in the same general area where gondolas were weighed and the trucks loaded, an area where a supervisor like Gonzalez would be stationed near the end of a picking day. Nor is it sufficiently clear from the ambiguity inherent in Whalen's testimony whether Gonzalez was, in fact, observing her conversation with the group of workers, or if she simply jumped to that conclusion. She evinced a tendency to exaggerate certain occurrences, as for example when she sought to claim that some 25 to 30 guards were present on August 30 at Magnolia and Van Cliff. Her testimony, in my mind, did not sufficiently set forth enough facts from which one would be warranted in accepting her impression of Gonzalez's surveillance.

Frank Ortiz recalled that as he approached several different workers who were standing in the avenue, Jose Gonzalez would also come up; Gonzalez would then ask each of the workers whether the harvest was going well, whether the grapes were good, or whether the worker was making a lot. This interruption of Ortiz's organizational efforts occurred on three distinct occasions that day. For a supervisor

^{36/}Mr. Gonzalez sought to portray a different, more innocuous version of the event, claiming the only UFW leaflet he ever received was from an employee whom he had once asked for a UFW leaflet. Gonzalez's testimony was not convincing, as he was reluctant and repetitious in his answers and ill at ease when cross-examined. Also, he altered his story with respect to the leaflet incident when cross-examined about it (as he did concerning UFW organizers carrying flags that day), and he appeared strikingly close to the gruff, short-tempered supervisor that Hopcraft credibly pictured him as. In addition, Gonzalez's response to Hopcraft's leafletting was nearly identical to his conduct on August 27, when he had grabbed a UFW leaflet from a woman employee, tore it up, and threw it on the ground, just after Manuel Hernandez had given her the leaflet.

who was purportedly very busy at the end of the day, as Gonzalez repeatedly characterized himself, this expenditure of time cannot be merely ascribed to the supervisor's normal communication with his workers,,

Mr. Ortiz also recalled, seeing Virgil Staley at the field. Ortiz described Staley as having a camera with him and pointing it at Ortiz and other UFW organizers. By September 6 Staley was no longer a security supervisor but was Gallo's director of safety at the Livingston Winery and Ranch.

I do not find, however, that Staley took photographs of UFW organizers on September 6. The record is reasonably clear that Gallo's photographic activity ended by the afternoon of September 2, although Mr. Staley did continue to possess a camera after that date in connection with his safety functions. But, Ortiz's testimony regarding the picture-taking was not just contradicted by Staley but was wholly uncorroborated by the other UFW observers. In addition, no mention is made in Mr. Ortiz's two declarations concerning September 6 that Staley took photographs that day. Under these circumstances, and in view of the timing of this event, I have concluded that Mr. Staley took no pictures of UFW organizers and that Mr. Ortiz's testimony to that effect should not be credited.37/

A second, distinct event on September 6 occurred at the Employment Office. Aggie Rose arrived there around noon and first talked to several workers individually; she then spoke with a group of Portuguese workers. Entering into the group after Rose began talking with it was Jorge Fegundas, a Gallo foreman.38/ When Rose initially began speaking to the various employees Ruben Castillo was standing around some 10 to 20 feet away from her; he did nothing but look at her talking to the employees. After she had spoken to the Portuguese group for a short time, Herman Mendiola, a Teamster organizer, also walked over and stood by the group. As Ms. Rose moved from worker to worker and eventually to the Portuguese group, both Castillo and Fegundas continued to observe her and generally move in the same direction as Rose was moving, although of the two Fegundas stood closer to her, only a few feet away from her as she attempted to talk with the employees.

37/Frank Ortiz also claimed that he and several workers from the town of Newman were photographed in the Griffith Road parking lot several days before the election. One of these photographs was part of Gallo's admitted photographs (G.C. Exh. 177). Again Ortiz's timing of this photography is contradicted by the extensive evidence that shows Gallo's photography to have ended around September 2. It is not surprising that Mr. Ortiz's memory of this particular photograph may have been confused in view of the extensive use of cameras by Gallo security guards and the difficulty in keeping track of just when and how often the particular organizer involved was so photographed.

38/Rose recalled that Fegundas remarked in front of the group about Rose passing out too many leaflets and that he had a garbage-can full of them.

10. September 9 (Around 3:30 p.m.) (No Specific Paragraph; Section IA3(a)):

On September 9, as workers were leaving work.

Barbara Macri went into one of Gallons fields near Lander and Westside. She walked down the dirt avenue, where workers were standing by the end of the rows, and approached three middle-aged women workers. As she began to speak with them, Ruben Castillo and Homer Mendiola came up, stopped about three or four feet from her with their arms crossed in front of their chests, and stood looking over Macri's shoulder as she spoke with the other women. The three workers refused to accept Macri's offer of UFW leaflets, turning their backs to her. After Macri left them, and after Gallo's personnel director and the Teamster organizer had departed, the three women again approached her and asked for leaflets.

While engaged in her distribution of leaflets, Macri gave one to a worker still on his tractor. As he was reading it, Johnny Macias walked up, took it away from the employee, and crumpled it.

B. Gallo Activity As It Related To The UFW's Organizing Campaign
In Gallo's Housing Areas.

As earlier noted, Respondent Gallo promulgated several security and industrial relations memoranda which dealt with security guard conduct in Gallo's housing areas. While a serious lack of clarity surrounds the precise chronology of such policies, and whether or not they in fact moved from one of initiating "verification" of UFW invitations to the housing areas to one of responding only when tenants initiated calls to security guards regarding visitors (see Note 14, supra), the following is manifestly clear from the evidence. From mid-August on, Gallo regularly maintained at least one security guard stationed at each housing area. Guards took photographs of UFW organizers who visited the housing tenants, both prior to and after August 28. Thus, various photographs in evidence demonstrate repeated instances of photographing UFW organizers in the housing areas, either in front of certain identifiable residences or repeated photographs of them conversing with persons in the housing areas (e.g., G.C. Exhs. 106-110, 111-122). In addition, the repeated photographs taken by a Gallo security guard when Manuel Hernandez visited the Company house of Roy Thomas, as credibly described by Hernandez, were not among the photographs produced by Respondent Gallo. Picture-taking by security guards in the housing areas was, in short, part of Gallo's policy.^{39/}

^{39/}Although he originally conceded that the housing photographs were consistent with Gallo policy, or at least were not prohibited by that policy, Frank Clark recanted his prior testimony when recalled as a witness by Gallo. Nonetheless, Clark admittedly did nothing to discourage security guards from taking such photographs in the housing areas, although he was clearly a-ware of them.

Nor can one accept Mr. Clark's vacillating and inherently contradictory testimony, His recollection changed in several strategic instances and was prodded not infrequently by an obvious --(continued)

The following paragraphs discuss specific allegations relating to Gallo's housing areas. But, the general approach employed by Gallo's security guards was summed up by Charles Mahin, their supervisor, whose testimony in this respect fit consistently with Frank Clark's;

We had a security officer stationed at the housing area during other than normal working hours. He was to maintain an observant posture, to . . . insure that people other than the residents of the housing areas who came to visit were actually invited or wanted visitors. This was done by observing the people as they came into the housing area, if they went to an individual home, if they knocked on the door, if the occupant who opened the door appeared to be cordial and invited them into the house, that was the end of the situation. If the occupant became agitated or looked around and attempted to summon security officers or apparently seemed unhappy about the situation, then he would avail himself to the person at the home.

Mahin likewise indicated that his security guards' presence sought "(t)o insure that they (the organizers) didn't just arbitrarily go from one place to another after having been invited to one location."

1. September 1 (Paragraphs 9 (r) and (t) ; Section IA2 (c)) :

The most notorious incident relating to housing occurred on September 1, the Labor Day holiday, in the Azevedo housing area on Livingston Ranch. Azevedo is located on Ranch Road, off of Westside Boulevard, and consisted of nine individual houses along with two small apartment buildings (near the end by Westside).

At about 11:00 a.m. Manuel Hernandez and Perry Collins went to the home of a Mr. Unruh, then a Gallo tractor driver. Unruh's house was one of the first houses toward Westside Boulevard, near the two small apartment buildings.

The two UFW organizers went to Unruh's door, he came out, and the three then proceeded to converse on Unruh's front porch.

39/(continued)--attempt to exonerate the Company and himself from all wrong-doing, so much so that his description of events fails to form a credible portrayal of events. Not the least of his self-contradictions involved Mr. dark's nearly total about-face as to whether the developed photographs taken by his security guards were ever shown by him to others at the Livingston Ranch; his early, steadfast refusal to admit such use of the photographs was contradicted first by Ruben Castillo and Alan Cooper, and then dark's own subsequent turnabout. Ironically, Clark's subsequent change in testimony remained in direct contradiction to his own pretrial declaration.

Hernandez's attention was called by Unruh to picture-taking. Hernandez looked and saw a security guard taking their photograph from Unruh's front yard. The guard was using a 35-mm camera with what looked to be a long lens. This was the second security guard to appear at Azevedo, as one guard was already posted in his truck as Hernandez and Collins came in; this first guard watched them from his truck during the picture-taking. According to Hernandez's credible testimony, while the security guard was repeatedly photographing them, Mr. Unruh was trying unsuccessfully to light a cigarette, first burning the filter-end and then visibly shaking when trying to light a second one. Four photographs in evidence vividly portray the event: three are of Hernandez, Collins, and Unruh on Unruh's front porch and the fourth depicts Unruh's mail box with his name on it (G.C. Exhs. 102-105). (During a personal observation of the Azevedo camp it was noted by me that Unruh's mail box is located across Ranch Road from his house.)

In addition to the two security guards who were there, several other Gallo personnel appeared on the scene. While the one guard was taking photographs (apparently Art Atkinson), Dean May drove by Unruh's home, stopped briefly and observed the scene, and then drove on. Dean May was then a supervisor of Gallo's tractor drivers.

Shortly after May left, Frank Clark drove into the camp with Robert Dietrick. According to Hernandez's credible recollection, Clark took photographs himself of the organizers from inside his car.⁴⁰ Clark then spoke with the security guard, who then left. Clark and Dietrick also left about a minute later.

The second incident that happened that holiday occurred approximately one hour later, also in the Azevedo camp. About noon, Larry Tramutt and Joe Enos, another UFW organizer, went to visit Manuel Lemos, who lived next door to Mr. Unruh. Lemos was not home. As the two organizers were leaving, they saw Honorato Pimentel in his front yard, five houses away. They walked over to Mr. Pimentel, who was trimming bushes in his front yard.

Tramutt recalled that Enos and Pimentel, a Gallo employee, talked with one another in Portugese and, while Tramutt did not understand the conversation, it appeared to him as a normal discussion. Mr. Pimentel, appearing as a witness for Gallo, corroborated Tramutt's impression by describing the conversation as amicable.

After the conversation had gone on for about 10 minutes a Gallo security guard pulled up in his vehicle. Shortly thereafter a second guard pulled up in a second vehicle. The second guard was again

⁴⁰Both Clark and Dietrick deny that Clark took photographs that day. I do not credit their denials. In view of subsequent events that day, and in view of Gallo's strong interest in demonstrating that Clark did not then participate in picture-taking, I believe their denials must be viewed skeptically. Hernandez, on the other hand, had little to gain from establishing that Clark took photographs in addition to the security guard. Moreover, Clark's picture-taking would have been consistent with his existing and consistent practice of taking photos of UFW organizers.

Art Atkinson. Atkinson, according to Tramutt, began taking repeated photographs of the two organizers and Pimentel, again with a long lens, and was as close as 10 feet away.^{41/} One of the two guards then went to the house of Tony Zavalla, a Gallo foreman, whose wife (Irene) had come outside. Although versions of the event are somewhat at variance, Tramutt, Swanson, and even Pimentel essentially agreed that the guard approached Irene Zavalla (a well-known antagonist to the UFW), had her sign a piece of paper, and then approached Mr. Pimentel and urged him to sign a paper. Although Pimentel signed the piece of paper offered him by the guard and was told to sign it if he wished the UFW organizers to leave, he did not read the paper, Pimentel signed the paper and testified that he wanted the organizers to leave, but he admitted that he never asked Enos and Tramutt to leave, that they were not bothering him, and that he did not call the security guards because of them. The security guards were apparently leaving no stone unturned, for Steve Swanson (who by this time was standing outside with Welch observing the activity) was approached by one of the guards, who also asked Swanson and Welch to sign the paper so that the organizers could be excluded from the Azevedo housing.

After Mr. Pimentel signed the guard's paper, Security Guard Atkinson requested the organizers to leave. Tramutt refused, claiming the right to remain and pointing out that it was then the Labor Day holiday. Atkinson then made a radio call from his truck and a few minutes later an officer from the Livingston Police Department or the Merced Sheriff's Office also appeared on the scene. During the ensuing conversation Atkinson admitted he could not read the paper signed by Pimentel, which was in Portuguese, and would not acknowledge who had complained about the UFW's presence.

Eventually, Tramutt and Enos departed. The opportunity for UFW organizers to campaign for the UFW with Mr. Pimentel ended with the substantial display of uniformed persons congregating in the front

^{41/}Mr. Pimentel could not remember if photographs were taken that day. Frank Clark maintained that when he first went through Azevedo and learned of the Unruh photographs that he instructed the security guards that the picture-taking should stop.

Tramutt's recollection of Atkinson's picture-taking is specifically corroborated by Steve Swanson, then a Gallo employee, who was visiting Danny Welch just next door to Pimentel, Swanson, a credible witness who sought to accurately recall the events about which he testified and who is no longer employed by Gallo, recalled the picture-taking by one of the two guards who was using an expensive camera. I credit the testimony of Tramutt and Swanson that Atkinson took photographs of Pimentel and the organizers, although the photos in question were not among those turned over by Gallo pursuant to the General Counsel's subpoena. Had such photographs appeared in evidence, they would have visibly contradicted Mr. Clark's assertion that just minutes before he had instructed the two guards to stop the picture-taking, an assertion not borne out by any other evidence than Clark's unreliable testimony. Indeed, the fact that Atkinson continued taking photographs of UFW organizers with his expensive camera and lens was vividly established by Reverend Phillips's film taken just the next day, September 2.

of Mr. Pimentel's house. This encounter between uniformed guards and police and UFW organizers in the small housing area was apparently initiated by either Irene Zavalla, who was not personally approached by the organizers, or the guards themselves, only minutes after their supervisor, Frank Clark, had spoken with them.

2. September 2 (Paragraph 9(u); No Specific Section):

On September 2, at about 6:30 p.m., Barbara Macri and Manjit Dhillon went to Gallo's Van Cliff housing, which consisted of some 22 small homes grouped in two sections across from one another on Van Cliff Road. They went to contact an employee named Sandhu.

As the two UFW organizers drove into the housing area, Macri observed a Gallo security guard parked in Van Cliff Road. The guard drove into one of the housing circles ahead of their vehicle. The guard parked. Macri and Dhillon went to one of the houses looking for Sandhu, but were told by a Mexican woman that Sandhu lived next door and was not at home.

As the organizers spoke with the Mexican woman, they could observe the security guard parked in his vehicle. Although Macri initially recalled seeing the guard parked right by the house she visited with Dhillon, her pretrial declaration placed the guard some four to five houses away. In any case, however, she credibly testified that she could easily see the guard from the woman's front porch.

Respondent Gallo challenges Ms. Macri's testimony concerning the September 2 incident by pointing to various inconsistencies between her testimony and her pretrial declaration. Such inconsistencies as existed, however, dealt with such insignificant features of her activity as to how many turns she made going into the housing area, whether she parked in an open area, and whether the guard parked four houses away or only one. These slight variations in Macri's recollection, after almost three years, hardly casts a fatal blow to her testimony. Nor is it of strategic significance that Macri's testimony would seem to place her and Dhillon in the circle of homes east of Van Cliff, whereas Sandhu probably lived in the circle of homes on the west side of Van Cliff. For a person not intimately familiar with the Livingston Ranch, it is scarcely surprising that Ms. Macri's recollection did not precisely pinpoint the house she visited out of the 22 then located off' of Van Cliff.

3. September 7 (Paragraph 9(gg); No Specific Section):

On Sunday, September 7, Frank Ortiz went to the Azevedo housing area to speak with one of Gallo's employees. As he entered the area a security guard was parked near the entrance, by Westside Boulevard. Ortiz went to one of the small apartment buildings in search of the employee; a young man answered the door. As Ortiz and the young man were talking, the man became suddenly silent. Ortiz turned around, looked toward Ranch Road, and observed the security guard looking at the two of them from his pickup truck. He had moved from his original post to in front of the apartments. Ortiz then left the young man, but as he departed he stopped by the security guard and asked his

name. The guard said it was Toupin. (Ortiz originally wrote out the spelling as "Taipen," but Gallo then employed a guard by the name of Toupin.)

4. September 9 (Paragraph 9 (hh) ; Section IA2(m)):

Two distinct events are described with respect to September 9, the day before the employee election. The first one involved Frank Ortiz, who went again to the Azevedo camp at about 5:30 p.m. He went to visit an employee named Francisco Aquiniga. 42/

As Ortiz drove into Azevedo he could see a security guard stationed in a van., Ortiz went to the apartment building closest to Westside Boulevard, where Aquiniga lived. Ortiz went inside Aquiniga's apartment, which looked out onto Ranch Road, and began to talk with him about supporting the UFW. Mr. Aquiniga interrupted the conversation, saying he did not want to be seen and that Ortiz should leave. As Aquiniga spoke he was looking out his side window; when Ortiz went to the window and looked out he observed the security guard in his vehicle only some 10 to 15 feet from the building.

The second incident occurring on September 9 took place in the Snelling housing area. Cathy Christian and Larry Tramutt went to the housing area at about 6:00 p.m. to contact several Gallo workers. As they drove into the housing area one of the security guards, then parked by Turlock Road, followed them in and parked right behind their vehicle. As they visited several units which fronted on the avenue the guard continued to follow them, parking just in front of each unit they visited. From review of the photographs involving the Snelling housing area and from my personal observation of the housing area, it is fair to say that the various units visited by the two UFW organizers were no more than 15 feet from the avenue.

Mr. Tramutt also recalled that at one point lie and Christian went to one of the apartment units behind those that fronted on the housing avenue. As they did so, the security guard left his vehicle and followed them on foot, watching them speak with a woman tenant from only a few feet away.43/

42/It should be noted that no specific paragraph of the complaint or section of the election objections petition encompassed this September 9 incident at Azevedo. Ortiz's testimony, however, was not objected to, and it was subjected to a full and complete cross-examination, although the incident is not directly addressed in Gallo's post-hearing brief.

43/Unlike Ms. Christian, Tramutt claimed that the security guard took photographs of them as they visited with several housing residents. Tramutt's testimony on this point was somewhat in doubt, however, and his pretrial declaration dated the same day made no mention of the photographing. Accordingly, I do not rely on Tramutt's claim that photographs were taken on September 9.

It should be noted, nonetheless, that several photographs of Tramutt in the Snelling housing area are exhibited - (continued)

Respondent Gallo challenges the testimony of Tramutt and Christian due to certain discrepancies in their description of the September 9 visit to Snelling. From a review of their testimony, however, those discrepancies appear minor. For example, their disagreement over the length of time spent in the housing area, the number of homes visited, and whether the guard followed them to one apartment on foot are disagreements significantly overshadowed by their mutual recollection that when they visited the several housing units the guard was always present. As Ms. Christian put it, "to the best of my recollection he was there everywhere that we were. He went where we went, along to the different addresses that Larry had."

Respondent Gallo also suggests that because the Snelling housing project had residents who were not Gallo employees, its security force had some special obligation to protect those non-employees against UFW visits. Gallo's evidence, however, did not purport to show that Christian and Tramutt visited the homes of non-employees at Snelling, although its other evidence did spoof finally demonstrate which employees lived in which units at the Azevedo and Van Cliff projects. Nor does any evidence establish that the UFW organizers were asked to leave the homes of any non-employees.

C. The Disruption Of The UFW's Organizing Meeting At The Casa Campasina (Paragraphs 9(o),(p),10(e), And(f): Sections IA4 And IB1(b)).

Considerable testimony was adduced with respect to the meeting held on August 30 by the UFW at its Casa Campasina office in the town of Livingston. As earlier noted, UFW organizers had distributed leaflets to Gallo workers at the Livingston Ranch that morning, inviting them to attend the meeting at 2:00 p.m. The meeting, in large part, was intended for Gallo workers.

Between 75 and 100 persons attended the outdoor meeting, including UFW staff, UFW sympathizers, ex-Gallo employees, and approximately 10 active Gallo workers. Current employees who attended the meeting included Eribero Franco and Salvador Prado. Jesus Garcia and several other workers also came to the meeting, but remained for the most part outside the Casa Campasina's eastern fence, away from the center of activity. The meeting was conducted within the fenced-in yard, in the southwestern corner of the yard.

Only moments after UFW President Cesar Chavez began speaking to the semi-circle of participants, a group of Teamsters appeared outside the chain-link fence. They included Johnny Macias, Homer

43/(continued)--in the evidence. These photographs of Tramutt and Perry Collins in front of various housing units, were taken by a Gallo security guard during the week of August 31, according to Tramutt's uncontradicted testimony (see G.C. Exhs. 106-110). Thus, Tramutt's recollection, otherwise credible, may have confused the earlier picture-taking with the events on September 9.

Mendiola, Jim Tucker, Bill Powers,^{44/} Marty Zuniga, Alfredo Rugnuo, and Marty Montelongo. Initially, the Teamsters lined up along the sidewalk running north and south, some 10 feet away from the chain-link Fence.

For a short time the Teamsters remained quietly on the sidewalk. As indicated by Michael Angelo, who was then outside the fence by Johnny Macias, Macias and the Teamsters appeared to be waiting for someone, as Macias kept asking Bill Powers when another person would arrive.^{45/} Although some disagreement existed among various witnesses as to the arrival time of Luis and Salvador Salado, these two Gallo employees arrived shortly after the Teamsters did. From the testimony of several witnesses, such as Angelo, Agnes Rose, and Eribero Franco, it is fair to conclude that several Teamsters walked over to greet the Salados when they arrived and all of them then returned to the sidewalk area together.

Once congregated on the sidewalk again, the Teamsters commenced their yelling, gesturing, cat-calling, and picture-taking. With Mr. Macias leading the chorus the Teamsters continued to shout toward those attending the meeting, calling Cesar Chavez various names and challenging him to come outside the fence to fight. Very quickly those within the yard began shifting about nervously, turning their backs or faces from the Teamsters, and hiding around the corner or inside of the Casa Campasina's building.

In addition to the yelling and gesturing, Bill Powers was engaged in picture-taking with his Polaroid. Many of his at least eight to 10 photographs were taken of those attending the meeting. Many of those photographs he took from the southwest corner where Luis and Salvador Salado mainly remained. That corner had a slight rise and from it one could more easily look into and down into the meeting place. As Powers took his photographs he also appeared to be writing notes.^{46/}

44/Bill Powers was the Teamster representative primarily responsible for representing Gallo workers at the time. The evidence shows him as a regular, frequent visitor at both the Snelling and Livingston Ranches.

45/Michael Angelo was then a bodyguard and driver for Cesar Chavez. He was assigned to stand outside the fence to watch for trouble. Apparently the Teamsters did not know his identity, as they freely conversed with one another in front of him and only later did Macias discover that Angelo was a UFW worker. Bill Powers was identified by Angelo by his having a camera; Powers admittedly carried a Polaroid camera that day and was the only Teamster to have a camera.

Mr. Angelo was no longer an employee of the UFW when he testified. His demeanor as a witness was most impressive; he responded to his interrogation with manifest sincerity and care. His testimony was extremely credible and is supported by that of many of the percipient observers.

46/Mr. Powers denied taking notes that day despite the contrary testimony of Mr. Angelo and Betsy Temple, and contrary to the portrayal of such note-taking as is persuasively -- (continued)

According to the credible testimony of Angelo and Temple, who were both outside the fence, Luis Salado not only conferred with Powers as he wrote out his notes but pointed to various persons inside the yard as Powers took his photographs.

According to Luis and Salvador Salado they did virtually nothing more than stand by the southwest corner and observe the unruly conduct of the Teamsters on August 30. Their placid description of such innocuous behavior was not convincing. For one thing, their description is not only contradicted by Agnes Rose, Betsy Temple, and Cathy Christian (who, in particular, gave a credible impersonation of the pelvic gyrations Luis Salado engaged in as he raised his hands and yelled "pendejo" toward those in the meeting), none of whom was still employed by the UFW at the time of their testimony, but by Eribero Franco, who continues to work under Luis Salado's supervision. To accept Luis Salado's version regarding his conduct over the credible testimony of these other witnesses would require acceptance of his claim that he came only to see Cesar Chavez in person, only once spoke with Bill Powers despite standing next to him for some 15 to 30 minutes (and that was only to inquire who Mr. Chavez was), and his implicit lack of interest in those attending the meeting. None of these claims rang true. In sum, I conclude that Luis Salado, who remained among the Teamsters outside the fence, participated in yelling, gesturing, and pointing at various persons attending the meeting as Powers took his photographs and wrote his notes.

After about 30 to 40 minutes of the yelling and gesturing, the UFW's meeting ended. Actually, Mr. Chavez's ability to speak with those present in the yard ended when the yelling began. But, after 30 or 40 minutes those in attendance largely dispersed, and Macias, Mendiola, and Tucker were arrested. Officers from both the Livingston Police Department and the Merced Sheriff's Office appeared on the scene as a result of the UFW's calls for help. As the Teamsters left so did the Salados.

D. Other Features Of Gallo's Alleged Favoritism Toward The Teamsters Union.

Paragraph 10 of the complaint raises claims that Respondent Gallo openly favored, assisted, and supported the Teamsters Union between August 28 and September 10. Paragraph 10 (i) divides the alleged acts of favoritism into various categories. It is this paragraph, in

46/(continued)--demonstrated by one of Ms. Temple's photos of him (G.C. Exh. 7). Mr. Powers's denial of the note-taking was only one of his denials uttered in a faltering, quivering voice. I do not find Mr. Powers's testimony credible, both on the basis of his demeanor as a witness and the incredible assertions he made. Thus, he claimed a total lack of interest as to who was attending the meeting and that he showed none of his photographs to either Salado, despite the fact that he took many of them by the Salados, remained next to them most of the time, and immediately developed his photos through the Polaroid process.

particular, which is discussed immediately below.47/

1. Background Events:

Several 1975 features of the Gallo-Teamster relationship that pre-dated the Act's effectiveness are cited in the testimony. The feature most emphasized through the testimony is the cooperation extended by Gallo to the Teamsters Union when, on May 12, the Teamsters engaged in a rally in Sacramento, California, opposing passage of the Act. Numerous Gallo employees attended that week-day rally, boarding three or four buses for it on Gallo premises. Respondent Gallo not only permitted the Teamster buses to board passengers at its ranches, but permitted employees to take the day from work with nothing more than a loss of pay, Ruben Castillo, then Gallo's new Personnel Director, also traveled to Sacramento to attend the rally.48/

As admitted by several Gallo representatives, such as Robert Dietrick, Ruben Castillo, and Frank Clark, Teamster representatives and organizers regularly visited Gallo's ranches during work time and lunch time during August and September. At that juncture, the Teamsters' contract with Gallo provided:

Authorized agents of the Union shall have the right to visit properties of the Company at all reasonable times and places to conduct legitimate Union business; however, they shall not interfere with or interrupt operations. The Union will notify the Company before such visitation.

Noting a host of contract and employee problems that existed during the 1975 harvests, Dietrick and Castillo claimed that the Teamsters' presence at the ranches was due to their role as the

47/Paragraphs 10 (a) through 10 (h) deal with conduct corresponding to that also set forth in certain of the Paragraph 9 charges; that conduct has been previously discussed. The UFW's election objections petition also sets forth allegations similar to the Paragraph 10 (i) charges in the following sections: IA2(i) , IA2 (p) , IA3 (b) , (c) , (d) , (e) , (g) , and (h) .

48/In addition, Steve Swanson, who was then a Teamster steward at Gallo, testified that his supervisor, Al Cardenas, transported him and another worker, Frank Bettencourt, around the Livingston Ranch while he contacted several workers to urge them to attend the rally. Although Swanson's testimony is contradicted by Cardenas and Bettencourt, a conflict in testimony not particularly significant to this proceeding, it would appear that Swanson's recollection might well be the most accurate. After all, such a trip around the ranch admittedly was made and such a purpose for the trip would have been natural in view of Swanson's participation in it and his role as a steward. In this connection it should be noted that Bill Powers was provided the opportunity by a foreman, Kalwant Sandhu, and a Gallo supervisor (unnamed) to speak with employees and urge them to attend the Teamsters' rally.

collective bargaining agent. Nonetheless, other than Dietrick's and Castillo's general catalog of problems needing Teamster attention during the work day, virtually no effort was made to place these Teamster business visits in the fields (as opposed to office conferences), nor would their explanation of the visits cover those that clearly had nothing to do with contract administration, as discussed below. And, as the record amply indicates, Gallo representatives made virtually no realistic efforts during the election campaign to insure that Teamster visits were, in fact, centered around contract administration or employee representation.49/

Several pre-Act visits by Teamster representatives are noted in the testimony. One such visit occurred on August 7, when Johnny Macias accosted Steve Swanson in a Gallo field and threatened him with bodily harm if he continued to show sympathy for the UFW. Macias had located Swanson while at work through a radio call made by Jon Yori, one of Gallo's top Livingston supervisors, over Gallo's radios to Al Cardenas, Swanson's immediate supervisor. Even though Swanson later discussed Macias's visit with Yori and even though Yori understood that Macias had threatened Swanson, Yori was admittedly unconcerned about the incident. He made no subsequent effort to curtail such conduct on the part of Macias, nor did he speak to the Teamster organizer about the threatening incident.

Also in August, a Teamster representative joined with one of Gallo's security guards to play a prank on UFW Organizer Frank Ortiz and his associate. The guard, at the request of a Teamster representative, took photographs of Ortiz and his vehicle after the Teamster representative had placed a Teamster bumper sticker on the hood of Ortiz's car. Several of Gallo's photographs entered as evidence show the Teamster sticker on Ortiz's car and his associate's effort to remove it (C.P. Exhs. 8-10).SO/

49/In contrast with the apparent lack of concern over the substance of Teamster visits during the 1975 harvests, Aggie Rose credibly recalled as a rebuttal witness the constant observation of her activity in 1973, when she was responsible for administering the then-existing UFW contract.

50/Substantial testimony was also adduced as to whether various Teamster organizers were present when UFW organizers were arrested at the Snelling Ranch on August 21. Pam Whalen claimed that persons in Teamster jackets (not, however, Johnny Macias) were there, but her contemporaneous declaration makes no such indication. Agnes Rose claimed that Johnny Macias was then present.

Although by comparing the testimony of Bill Powers and Frank Clark one could conclude that Powers was present when the arrests were made, having left Snelling Ranch only after the arrests when notified of an employee's drowning at Hagaman Park near Livingston Ranch, neither UFW organizer described Powers as present. Nor was there testimony about the arrest incident from Barbara Macri, who was one of the other five or six organizers arrested that day. In short, I believe the testimony to be insufficient in establishing that Teamster organizers were left free to remain at Snelling during noon time -- (continued)

A day or two before the Act became effective, on August 26 or 27, Frank Ortiz observed Frank Clark driving in his automobile on the Bettencourt Field at the Livingston Ranch with Johnny Macias in his car. As Ortiz was walking alongside the canal at about 3:30 p.m., Clark and Macias came by, with Macias taking photographs. Clark would stop the car as it passed various UFW organizers and Macias would get out and take photographs of the organizers. Ortiz saw Clark again driving Macias just days later, when on August 28 Ortiz drove away from a field by Westside and Griffith.^{51/}

2. Post-August 28 Activity:

During much of the campaign between the Teamsters Union and the UFW, Gallo's equipment was used to display various Teamster insignia. As was noted, on August 30 a Teamster bumper sticker was pasted to the pedestrian gate at Gallo's Employment Office. But, that was but a token advertisement.

Photographs in evidence, as well as the testimony of numerous witnesses, establish beyond doubt that numerous Teamster stickers were displayed on Gallo's tractors, gondolas, picking aids, portable toilets, buses, and pickup trucks. One graphic example of the display can be found in Reverend Phillips's movie film taken on September 2, showing one of Gallo's huge picking aids with over 20 "flower stickers" saying "Mahubey Teamsters." As the General Counsel accurately notes in his brief, the picking aid "looks more like a parade float for the Teamsters than a farm implement. . . ." (G.C. Br. 105.) Buses driven by Gallo foremen, used to transport the workers from place to place, displayed numerous flower stickers, along with Gallo's own stickers. Trucks regularly assigned to foremen, such as Art Oliviera, had Teamster stickers on their bumpers. Indeed, Art Oliviera admitted he distributed Teamster stickers to the workers. And workers such as Yulanda Luga (Aldama) admittedly placed as many as 50 Teamster stickers on Gallo equipment. She was observed by Luis Salado placing some of these stickers on Gallo equipment, but she was never disciplined or reprimanded for it.

Various employees of Gallo gave various accounts regarding the removal of the Teamster stickers. Jorge Fegundas, a foreman, claimed the Teamster flower stickers on the bus and picking aid he worked on were removed a week or two before the September 10 election. But, he also indicated, "I don't know how long they were on there. All I know is that we took them off before the election." Mathew Silva, a picking aid driver, remembered that the stickers were removed from his picking aid and a bus five or six days before the election. Art

^{50/} (continued) --on August 21 while UFW organizers were arrested, although Powers's own testimony places him at Snelling during that morning and perhaps still there when the arrests were made.

SL/Although Mr. Clark denied that Macias ever took photographs from his oar, I" do not credit his denial. His testimony was generally unreliable. Clark did admit, however, that he once drove Macias and a journalist around on the Livingston Ranch on August 28 or 29.

Oliviera, the foreman, remembered a removal of stickers two or three weeks before the election.

Although according to Robert Dietrick some of the stickers were removed around the end of August, more stickers thereafter reappeared. According to the credible account given by John Silviera, who was personally engaged in removing Teamster stickers, the bulk of stickers was not removed until September 6. This timing of the removal likewise comports with Mr. Dietrick's recollection. Thus, although some Teamster stickers may have been removed earlier, the bulk of them was not removed from Gallo equipment until September 6. four days before the election and one day after the pre-election conference.

On about September 4, Manuel Hernandez and Perry Collins observed that one of the Gallo bulletin boards at the Snelling Ranch was half-covered with Teamster election propaganda. Collins took photographs of it. Although Hernandez could not specifically identify several photographs placed into evidence as those taken by Collins, he could state that what they depicted was exemplary of what he saw at Snelling (G.C. Exhs. 245-248) . The glass enclosed bulletin board, located in the shop area, is a board that Gallo used to post seniority lists, pay day and pay schedule information. Although glass enclosed, the bulletin board had no lock on it.

As several current and ex-Gallo employees testified, after August 28 the Teamsters engaged in organizational activity during work time. Thus, Eribero Franco recalled that following his attendance at the UFW's August 30 meeting at the Casa Campasina, he was approached by Johnny Macias during the morning work hours and told that he was seen at the Casa Campasina and could be fired for that activity. As Macias spoke to Franco, Bill Powers waited in his pickup truck. Salvador Prado recalled that on September 5, as he was working, Macias approached him and warned him also that he could be fired for his attendance at the Casa Campasina meeting. Macias also invited Prado to a picnic to be held the next day. All in all, Macias kept Prado away from his work for about an hour, while Macias first talked with Jose Campion, who was then a foreman. Macias also informed Prado that he had a list of some 1.1 workers who supported the UFW and that Prado was on the list.

Jesus Garcia recalled that on two mornings before Work, as the tractor drivers were about to drive into the field with their gondolas, Teamsters made speeches to the gathered employees. Both speeches occurred before the election, but one of them was after the August 30 UFW meeting. Macias was the speaker, he stood on a tractor to address the 120 to 160 employees who were present, and the tractors which had been running before the speeches were shut off so Macias could be heard. Macias's two speeches occurred at times when the employees would ordinarily have been working. Lorenzo Perez recalled being at one of these speeches, where Bill Powers and another Teamster were, as one of the foremen gave orders to shut down the tractors so the Teamster could speak. Indeed, Luis Salado was also present at one of the speeches and admittedly did nothing to send the workers into the fields at their usual starting time.52/

52/At the second Macias speech, Jesus Garcia --(continued)

Similar Teamster activity occurred at Snelling. Thus, according to the credible testimony of Fortunate Reynoso, on two occasions Johnny Macias prevented the employees from working. On August 28 Macias appeared at the edge of the field in which Reynoso was working. He beckoned Reynoso and two other workers, seeking them to participate in a filmed interview. Although Reynoso could not participate because he spoke only Spanish, Macias's action had taken him away from work for 15 or 20 minutes. Reynoso's foreman, Jesus Sandoval, was working with his crew that morning, but said nothing to Reynoso about his absence.

On the same or next day, August 29, Macias returned to Snelling. He called Reynoso's crew of seven together, including Foreman Sandoval, and addressed them for 15 minutes regarding Teamster benefits and asking for their support in the election. Macias's speech occurred during a time when they otherwise would have been working.

Both Jesus Garcia and Steve Swanson recalled seeing Johnny Macias and Jim Tucker daily with the harvest crews at Livingston Ranch prior to the September 10 election. The evidence fairly establishes that Macias, at least, had virtually no responsibility regarding the administration of the Teamster-Gallo contract.

With the slight exception of some photographs being taken of Teamster organizers at the Employment Office on August 30, the witnesses were virtually unanimous in their recollection that when various Teamsters appeared in the field during working hours, giving speeches or threatening employees, no Gallo security guard followed them or was in their presence or photographed them.

As the election approached, a large employee picnic was held at a private park owned by Gallo named Paisano Park, by the Livingston Ranch. The picnic was held on September 6, and in attendance were Homer Mendiola, Bill Powers, Imelda Lopez, Jim Tucker, other Teamster representatives, and Ralph Kotner, the then leader of the Teamsters' agricultural division. As with other picnics held at Paisano Park, Gallo furnished sporting equipment. In addition to employees and Teamsters, several Gallo security guards attended the picnic, where food and beverages were offered by the Teamsters Union.

The planning and decision to hold the Teamster picnic at Gallo's park was explained by Robert Dietrick, Gallo's Vice President of Industrial Relations. According to his testimony, the picnic was approved by him originally for August 23, upon the request of Yulanda Luga (Aldama). Wary about any Teamster involvement, Dietrick asked Luga if the Teamsters were involved; she assured him that it was merely an

52/(continued) --spoke up from the crowd, disputing with Macias the Teamsters' purported role in favoring passage of the Act and over Macias's claim that employees could lose their jobs if the UFW won the election. Garcia recalled that various supervisor and foremen trucks were in the area, but could not recall seeing any such persons. The evidence, however, establishes that the customary practice at Gallo was to have at least one foreman and one supervisor where the tractors began work each day.

employee picnic. The scheduled date for the picnic was postponed due to the drowning on August 21; eventually the date of September 6 was chosen.53/

Dietrick claimed that he never learned of any Teamster involvement in the picnic until the afternoon of September 5. On the next morning Dietrick and others went to the Employment Office and, according to his testimony, attempted to move the picnic from Gallo's park to Hagaman Park, a public park nearby. After several hours of discussion with various Teamster representatives, Bob Gallo and Dietrick decided to allow the picnic to go on. Dietrick described the dilemma that led him to recommend that the picnic go forward: that the food, which was already located at Paisano Park, could not be moved to Hagaman Park. Based on that purported dilemma, Dietrick recommended to Bob Gallo to allow the picnic to go on "from an employee relations standpoint." Mr. Gallo OK'd Dietrick's recommendation.

Many of the employees, however, were already gathering at Hagaman at that very moment, according to Dietrick, Ironically, Dietrick was never informed as to what type of food was being served at the picnic or why it was so difficult to transport it only a few miles to Hagaman Park.

Dietrick's explanation for the Teamster-sponsored picnic on Gallo property, just four days before the election, leaves much to question. Most significantly, Yulanda Luga, whose bias in behalf of Respondent Gallo was obvious throughout her testimony (as discussed later), contradicted Mr. Dietrick's testimony by denying any -immediate role in planning or scheduling the picnic. Also, Dietrick's purported reason for not insisting that the picnic be moved to Hagaman Park appears questionable on its face. Finally, no effort was made by Respondent Gallo to disassociate itself from its permission to hold the Teamster picnic. No explanation for its conduct was issued by Gallo to its employees regarding the picnic.

On September 9, three days after the Teamsters' picnic, Gallo formally announced its position with respect to the September 10 election. It distributed to employees a letter, signed by Bob Gallo, which stated, inter alia:

We believe that it is better for you and for the company to vote for a union to represent you.
When you go to vote in the election, we ask you please do not vote for NO UNION.

In addition to the employee letter, Ruben Castillo went around the Livingston Ranch and spoke to employees, urging them that they should cast their votes for one of the two unions and that they should not vote

53/It should be noted that the official transcript of the proceeding contains an error when indicating that Mr. Dietrick's memorandum concerning the September 6 picnic, Respondent Exhibit 209, was admitted into evidence. The memorandum was excluded as hearsay evidence.

the "no union" alternative.

The following day the Teamsters won the balloting by a vote of 223 to 131, with 195 votes being challenged. There was not one vote cast in favor of "no union,"^{54/}

V. Analysis And Conclusions Regarding Respondent Gallo's Alleged Interference, Coercion. And Restraint, And. Its Alleged Assistance Aid Support Of The Teamsters Union

A. Preliminary Evidentiary Considerations..

In reaching the factual conclusions previously set forth and in evaluating certain defenses raised by Respondent Gallo to the charges against it, two general evidentiary considerations have required resolution. First, as earlier noted, certain testimonial assertions put forth by UFW organizers were challenged by Respondent Gallo because such assertions are not found in those organizers' pretrial declarations. Respondent Gallo challenges the credibility of such testimonial assertions due to their absence from the witness' pretrial declarations. Second, when putting forward certain defenses to the charges against it, Respondent Gallo refers to or relies on facts described in its CSSO's (Corporate Safety and Security Offense Reports), which Gallo preferred as business records. Thus, Respondent Gallo refers to certain facts contained in these preferred business records when arguing that UFW organizers exceeded their access rights to Gallo property by coming in excessive numbers and at improper times and when claiming that organizers from both the UFW and Teamsters were similarly treated.

1. Impeachment Of The Witness' Testimony On The Basis Of Facts Omitted From Their Pretrial Declarations:

The General Counsel and UFW vigorously argue that a witness's testimonial assertion cannot be impeached by its omission from that witness's pretrial, hearsay declaration. They rely in making their argument on Section 1235 of the Evidence Code and two court cases: Brooks v. E. J. Willig Truck Transp. Co., 40 C.2d 669 (1953) ; and People v. Casanova. 54 C.A. 439 (1921).

Section 1235 of the California Evidence Code provides:

Evidence of a statement made by a witness

^{54/}Again Mr. Dietrick sought to explain Respondent Gallo's motives for telling employees they should cast their ballots for one of the two unions. He explained that after several high-level policy meetings, it was determined that by September 9 it was too late for Gallo to begin a "no union" campaign, and since such a campaign had not been waged it was unwise to ask employees to vote for "no union." But, this explanation hardly purports to explain, one, why Gallo had not engaged earlier in a "no union" campaign if that was its desire, or, two, why Gallo had to take any position at all as late as September 9 vis-a-vis the voting—that is, unless it wanted to affect the voting's outcome.

is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770»

McCormick on Evidence (2d Ed., 1972, p. 68) notes that "under the more widely accepted view any material variance between the testimony and the previous statement will suffice.() Accordingly, if the former statement fails to mention a material circumstance presently testified to. which it would have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent." This view of using pre-trial statements to impeach a witness's testimony corresponds with that view employed by the National Labor Relations Board ("NLRB"). Thus, as noted in *Tidelands Marine Service*, 126 NLRB 121, 126 (1960) , approved, J74 F.2d 974 (C.A. 9, 1967), cert., denied, 389 U.S. 913, where the NLRB quoted with approval from *Jencks v. U.S.*, 353 U.S. 657, 667 (1956):

Every experienced trial judge and trial lawyer knows the value for impeaching purpose of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in the emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony. . . .

In an administrative proceeding such as this one, where no jury participates, the administrative fact finder should have available for consideration material variances between a witness's testimony and his or her prior sworn statement, including any material omissions from that statement. A material omission in that sworn statement is one of the relevant considerations when evaluating a witness's testimony. Of course, any such omission should be considered in the light of whose statement it is (e.g., whether the declarant has a substantial interest in the proceeding, or whether the declarant was likely to understand the significance of making a sworn, written statement and/or the significance of the fact omitted), the circumstances surrounding the statement's writing, the materiality of the fact omitted, the likelihood that the particular declarant would not have made the particular omission if the fact testified about existed, and any explanation for the omission. These considerations should also be viewed in light of the passage of time between the occurrence of facts put forth by the witness, the date of the witness's pretrial statement, and the date of the witness's testimony.

Nor is it clear that the two California court cases cited by the General Counsel preclude a comparison between a witness's testimony and the omission of a testimonial fact in his or her prior,

sworn statement. The two cases cited did not involve administrative hearings where the hearsay-rule is somewhat relaxed, and they did not particularly deal with an omission from a witness's sworn, written statement. Also, from the following quote taken from *People v. Gentry*, 270 C.A.2d 462, 473 (1969), a strong suggestion exists that under California law a sworn statement's omission may be considered in evaluating a witness's testimony:

Different considerations come into play when a charge of recent fabrication is made by negative evidence that the witness did not speak of the matter before when it would have been natural to speak. His silence then is urged as inconsistent with his utterances at the trial. The evidence of consistent statements at that point becomes proper because "the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story." (Cite omitted.)^{55/}

Indeed, the Board itself has suggested that when evaluating a witness's testimony at trial, it can be useful to note that a factual assertion "was not mentioned in the witness's original declaration. . . ." *Bud Antle, Inc.* 3 ALRB No. 7, p. 10 (1977).

In the instant case, I have been influenced by a declaration's omission of fact in four particular instances--namely. Ms. Huerta's failure to note that Johnny Macias, a notable Teamster representative, was chauffeured through Gallo fields in the sama vehicle that carried three high-ranking Gallo officials on August 28; Larry Tramutt's failure to note that he was repeatedly photographed in the Snelling housing area on September 9; Frank Ortiz's failure to note that Virgil Staley photographed UFW organizers on September 6; and Pam Whalen's failure to note the presence of Teamster representatives at the Snelling Ranch on August 21 when several UFW organizers were arrested. In addition to the significance and materiality of these testimonial assertions that were omitted in the four witnesses' pretrial declarations, their testimony concerning such facts was uncorroborated by other percipient witnesses to the events in question and was contradicted by persuasive evidence put forward by Respondent Gallo. Also, they were testimonial assertions it is natural to expect that these experienced UFW organizers would have put forward in their pretrial declarations, given the nature of the UFW's claims against Gallo at the time. In short, these witnesses' failure to cite in their pretrial declarations such material facts as they testified about is a material inconsistency

^{55/}Obviously, if the prior omission of fact in *Gentry* was improper to raise for its impeachment value, no need would there have existed for the court to consider the redemptive quality of a separate, prior consistent statement corresponding to the witness's trial testimony.

worthy and proper to consider in evaluating their testimony, along with the other relevant circumstances.

2. The Reliance By Respondent Gallo On Its Preferred CSSQ's As Business Records:

Resting on Section 1200 of the Evidence Code, the General Counsel argues that Gallons CSSO's cannot be relied on for the truth of the matters asserted therein. Conversely, Respondent Gallo seeks to rely on certain hearsay facts contained in its CSSO's, which were preferred under the "business records" exception to the hearsay rule, as noted in Section 1271 of the Evidence Code.^{56/}

Two persuasive grounds exist in reaching a conclusion that no weight or consideration can be given the hearsay facts set forth in Gallo's CSSO's. First, Gallo's CSSO's do not truly fall within the definition of business records and are, therefore, subject to exclusion under the hearsay rule. In the leading case of *Palmer v. Hoffman*, 318 U.S. 109, the United States Supreme Court was faced with a similar problem. The court in *Palmer* indicated that to be considered as a business record "made in the regular course of a business." as is provided in the California Code (and as is virtually identical to the provision involved in *Palmer*), the term "must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." 318 U.S. at 115. Thus, the court held inadmissible the defendant's use of an accident report despite the fact that such accident reports were part of the defendant's normal reporting procedures, as the CSSO's could be characterized here. The court stated (318 U.S. at 113).:

An accident report may affect that business in the sense that it affords information on which the management may act. * * * * But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. . . . Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. * * * * Regularity of preparation would become the test rather than the character of the

^{56/}When Respondent Gallo preferred its CSSO's as documentary evidence at the hearing, and they were objected to by both the General Counsel and UFW, they were admitted by me subject to an eventual ruling as to the weight of consideration to be given them. Thus, rather than treat the CSSO's as a matter of strict admissibility, my ruling at the hearing framed the admissibility issue as one involving the eventual weight and meaning to be given the facts contained in the CSSO's with respect to the issues In this proceeding.

records and their earmarks of reliability ()
acquired from their source and origin and the
nature of their compilation.

The Palmer view of "business records" has been adopted in California. See *Gee v. Timineri*, 24-8 C.A.2d 139 (1967); *Reisman v. Los Angeles City School District*, 123 C.A.2d 493 (1954). Indeed, in *Gee* the court held inadmissible an estimate of accounts receivable as it was prepared not so much in the normal course of the business qua business "but in anticipation of the lawsuit with defendant." 248 C.A.2d at 148.

Under the foregoing precedent, Gallo's CSSO's cannot be characterized as business records within the meaning of Section 1271 of the Evidence Code. In addition to the fact that the CSSO's had virtually nothing to do with grape growing and wine production, Gallo's actual business, the record amply indicates that the particular CSSO's relied on by Gallo were drafted with an eye toward potential litigation with the UFW. Thus, as early as June 25 Gallo's security guards were instructed that "due to the possible UFW activity in the area all unusual events must be documented"; by August 11 they were instructed to make comprehensive reports "in order to disprove the U.F.W. accusation" that Gallo was denying UFW organizers access to workers; and by July 28 Gallo's vice president and general counsel had issued written instructions to maintain logs "at least until we have a farmworker election." These reporting instructions demonstrate that the CSSO's in question (R. Exhs. 90-104) cannot be considered as authentic records compiled to conduct Gallo's actual business, but were records maintained with an eye toward future litigation or conflict with the UFW.

Were doubt to remain concerning the CSSO's admissibility as meaningful evidence, a second basis exists to preclude reliance on them. The Evidence Code requires that the "sources of information and method and time of preparation (must be) such as to indicate . . . trustworthiness." Gallo's CSSO's do not contain that required element of trustworthiness.

In addition to the fact that the CSSO's were prepared to either document charges against the UFW or to rebut UFW charges against Gallo, a motive for preparation that casts grave doubt on their accuracy, a number of errors in the CSSO's are revealed by other evidence. For example, it has already been mentioned that the CSSO for August 29 erroneously fails to mention the presence of Teamster Johnny Macias behind the Employment Office at noon-time. Similarly, the September 6 CSSO makes no mention of the Teamster picnic held at Gallo's Paisano Park. The CSSO for September 2 makes no mention of Macias and an associate unloading boxes at the Employment Office. And, when comparing a handwritten log made out in Security Guard Taupin's name, dated either September 8 or 9, one can see serious variance from the two CSSO's for those two dates. It is also significant that the CSSO's generally fail to note the presence of Teamster representatives who were servicing the contract, a fact which Gallo's officials assert occurred on a daily basis.

In short, I do not find that the CSSO's contain

sufficient accuracy or detail to be considered trustworthy, a failing that undoubtedly results from their highly partisan nature. Indeed, the CSSO's preferred by Gallo are not reports made out by guards who personally observed the events reported, but reports made out by Charles Mahin based on radio messages and handwritten notes turned in by the guards (that were destroyed by Mahin), Thus, Mahin, who could pick and choose the information he reported in the CSSO's in a partisan manner, which he even evinced at the hearing, could subject them to artificial editing.

B. Gallo's Interference, Coercion, And Restraint.

As the Board has noted with regard to violations of Section 1153(a) of the Act, the issue of an employer's motive to violate that section is largely irrelevant. "Our primary concern is not whether the employer specifically intended to interfere with, restrain and coerce its employees in the exercise of protected organizational rights. We must rather evaluate the nature and extent of the misconduct itself. . . ." Anderson Farms Co.. 3 ALRB No. 67 (1977). Accord, Jackson & Perkins Co.. 3 ALRB No. 36 (1977). Beginning with that basic premise, the question essentially posed herein is whether the nature and extent of Respondent Gallo's conduct, as earlier described, interfered with, restrained, or coerced employees in the exercise of rights guaranteed them by Section 1152 of the Act.

1. Gallo's Interference. Coercion, And Restraint In The Employees' Housing Areas:

The Board has already enunciated clear standards of conduct applicable in employee housing areas. As stated in Silver Creek Packing Co. 3 ALRB No. 13, p. 4 (1977),

We have determined that communication at the homes of employees is not only legitimate, but crucial to the proper functioning of the Act, * * * * An employer may not block such communication. The fact that an employer is also a landlord does not give him a license to interfere with the flow of discourse between union and worker.

And, as was noted in Vista Verde Farms, 3 ALRB No. 91, p. 5, n. 3 (1977):

The right of home access flows directly from Section 1152 and does not depend in any way on the "access rule" contained in our regulations, which only concern the work place.

Accord: Merzoian Bros.. 3 ALRB No. 62, p. 3, n. 5 (1977). As the Board explained in Merzoian Bros. in respect to the right of workers to receive organizational visits at their homes (3 ALRB No. 62, at p. 4) :

The right of employees who are residents

of a labor camp to receive visitors is akin to the rights of a person in his own home or apartment. The owner or operator of a labor camp cannot exercise for the worker his right not to receive visits from union organizers. * * * * it is our duty to balance these rights and a heavy burden will lie with the owner or operator of a camp to show that any rule restricting access does not also restrict the rights of the tenant to be visited or have visitors.

In addition to the restraining effect on employees' protected rights that an employer causes when shutting off communication between his employee housing tenants and union organizers, "(w)hen the employer uses his power as landlord to dictate that union organizers can't be received it is in itself an awesome display of power which cannot but chill enthusiasm for union activity." Vista Verde, supra, 3 ALRB No. 91, at pp. 5-6.

In applying the foregoing principles to the accredited facts in this case it seems clear that Respondent Gallo unlawfully interfered with, restrained, and coerced those of its employees who lived in its various housing areas by interfering with their right to receive communication from UFW organizers in their own homes. On September 1, various supervisory personnel, such as Vice President Dietrick, Security Director Clark, and Supervisor Dean May pointedly stopped and observed the meeting between organizers Hernandez and Collins and Mr. Unruh; a security guard (including Clark) repeatedly photographed that private meeting on Unruh's porch and then later photographed the front yard conversation between organizers Tramutt and Enos with Mr. Pimentel, In addition, Security Guard Atkinson initiated an effort to exclude Enos and Tramutt from the Azevedo housing area by soliciting Mr. Pimentel to authorize their banishment, without any initial effort by the worker to disengage himself from the conversation with Enos and Tramutt. Other instances of similar interference are documented on September 2, when organizer Maori was purposely kept under surveillance by a Gallo guard in the Van Cliff housing, on September 7 when organizer Ortiz was similarly surveilled, on September 9 when organizers Christian and Tramutt were closely surveilled by a guard from house to house at the Snelling camp, and on that same day when Ortiz was pointedly watched while visiting an employee's housing unit in Azevedo. As the Board has noted, "Interfering with contact between a union and employees at the employees' homes by posting guards at the entrance of such labor camps or promulgating rules controlling the times of such contact is clearly a violation of Section 1153 (a)." Isamu Minami. 3 ALRB No. 81, p. 5.⁵⁷

57/Although Respondent Gallo generally defends itself against the surveillance charges by seeking to characterize the UFW organizers as trespassers, this defense is clearly inapplicable to the incidents involving surveillance and interference in the employee housing areas. As earlier noted, the organizers' right to engage in home visitations stands separately from any right of access to field areas as is granted by the Board's "Access Rule." Thus, the legal - (continued)

Need does not exist in this case to ponder the legitimacy of Respondent Gallo's basic deployment of security guards in its housing areas. Gallo's guards were not simply deployed or stationed in the housing areas; rather they engaged in, by explicit direction of their supervisors, the close observation and following of UFW organizers who entered the housing areas and contacted workers in their homes. As a UFW organizer moved from house to house, so did the ubiquitous security guard. As a worker was contacted at his home or in his yard by UFW organizers he was closely observed by Gallo's uniformed personnel or, as exemplified on September 1, repeatedly photographed by such uniformed personnel. The chilling and coercive effect of having a uniformed guard, employed and controlled by one's very same employer, staring omnipresently from only feet away as a worker conversed with or was contacted by UFW organizers is obvious beyond dispute. It would be reasonable and natural for the employees to believe they were under threat of economic retaliation for their closely watched contact with UFW organizers ,58/

Respondent Gallo's main claim in connection with its conduct in the housing areas is that it had a legitimate business purpose in closely observing UFW housing visits. Gallo cites the disturbances that took place in 1973 and 1974 in the housing areas and the concern expressed in 1975 by various workers over security for the housing areas. Thus, Gallo claims its security guards were legitimately engaged in protecting housing residents.

Respondent Gallo's purported reasons for its security guards' conduct in the housing areas, are unconvincing. Despite the fact that disturbances may have existed in 1973 and 1974 in the housing areas, no such disturbances existed throughout 1975. By August 28, the effective date of the Act, Gallo was well aware that UFW organizers were

57/ (continued)--effectiveness of the Access Rule on the dates mentioned above is wholly irrelevant to the housing incidents. Furthermore, wholly apart from the Act, the trespass laws in California have been held inapplicable to bar contact between union organizers and farm workers when that contact occurs in the workers' homes. U.F.W. v. Superior Court of Santa Cruz, 14 C.3d 902 (1975).

58/It is specious to suggest, as Respondent Gallo does (Co. Br. p. 183), that "(g)iven the fact that housing area photography was not directed by Respondent, there can be no finding of an unlawful attempt to interfere with protected employee activities (in the housing areas by such photography)." First, despite Frank Clark's testimonial turnabouts, he conceded initially that photographing organizers and workers in the housing areas was not inconsistent with Gallo's security policies. Second, not until September 2 was such photography discontinued; thus, Clark impliedly approved of such photography prior to that date, which he was clearly knowledgeable of. Finally, security guards were expressly instructed to take photographs of UFW organizers and workers, and such instructions made no exception for the housing areas. Gallo cannot escape its liability for the picture-taking by now claiming it did not expressly direct it specifically in the housing areas: clearly, the photography was one of the responsibilities expressly given to security guards by Gallo management.

visiting its housing areas without incident. Nor was the same strike or confrontation atmosphere of 1973 and 1974 present in 1975. Indeed, with the advent of the Act's passage in mid-1975 an institutional vehicle was created for the two labor organizations involved to peaceably demonstrate their respective strengths among Gallo's employees. It is not second-guessing to say that in 1975, Respondent Gallo was aware of no recent misconduct that would lead it to legitimately fear UFW organizer visits in the housing areas, at least none that would justify the constant surveillance by security guards.

The various employee concerns expressed in 1975 over housing security, as cited by Gallo, are equally unconvincing. Only three instances are noted in the record where employees expressed security concerns, involving Foreman Moreno, Yulanda Luga (Aldama), and Irene Zavalla. Significantly, these latter two persons were recognizably staunch adversaries of the UFW and whose motives in voicing concern over housing security was--even then--obviously questionable. It is also significant that the employee concern Gallo claims to have based its security policies on was concern over the security for family members left alone in the housing areas when workers were away in the fields. Yet, Gallo's increased security for the housing areas, as well as its unlawful conduct in the housing areas, was focused during non-work times, when employees were home with their families. Nor can the concern over housing security explain the degree of surveillance and interference engaged in by security personnel.

A far more credible reason for Gallo's security policies emerged from the testimony of Alan Cooper, a Gallo security guard employed from September 3 through the election.^{59/} Mr. Cooper recalled that when he was hired, he received his instructions from the night shift supervisor, Tim Cassell. Cassell told him his job was to protect

^{59/}Mr. Cooper appeared at the hearing in behalf of the General Counsel, having traveled from his home in New Mexico. Clearly, he was a sympathizer of the UFW, but I am unconvinced by Gallo's arguments that Mr. Cooper was surreptitiously assigned by the UFW to work undercover as a security guard. Mr. Cooper was an extremely credible witness, whose demeanor, veracity, and care when testifying were impressive. His testimony, for the most part, was corroborated by Gallo's own written policies and the practice of security guards as evidenced by the vast majority of testimony. Nor was any witness called, except for Charles Mahin, to directly rebut Mr. Cooper's testimony concerning the instructions he received. Cooper's accuracy in recollection was also corroborated by evidence presented by Gallo, as--for instance--the presence of state officials in its fields in early September and the reduction in security guard, work hours on September 8.

Respondent Gallo argues that it is improper to rely on Mr. Cooper's testimony, since Respondent was denied the opportunity to recall Mr. Cooper as a witness, after he had been subjected to extensive cross-examination and excused as a witness. Respondent Gallo, however, had no unlimited right to recall Mr. Cooper as a witness. See Evidence Code Sections 774 and 778. And, Gallo's purported reasons for recalling Mr. Cooper were not sufficient to mandate that recall.

against property damage by the UFW and to keep UFW organizers under surveillance. Cassell explained that the Company was also concerned over UFW contact with workers and on several occasions referred to the UFW as the "enemy." Cooper was never instructed to keep Teamster representatives under observation.

Cooper was also instructed that UFW organizers were to be watched in the field and housing areas, and was told that when those organizers were contacting workers Cooper was to place himself in the line of vision of the worker or workers involved. On several occasions Cooper put his instructions into action. When UFW organizers were once observed by him driving by a field area he reported their presence by radio to the Employment Office and was instructed to follow the organizers. On two occasions, one of them being at the Azevedo housing area, he placed himself between 25 and 100 feet away from the workers and organizers who were conversing, making himself visible to the workers. Mr. Cooper also credibly testified about being informed by Charles Mahin on two occasions between September 4 and 9 to maintain a lower and innocuous profile due to the presence of state officials then observing the Gallo election campaign. On September 4 Cooper was told not to be conspicuous when observing UFW activity, and on September 9 he was told by Mahin to deny surveilling or harassing the UFW if questioned by state officials.60/

In view of all the foregoing considerations, I find that the specific examples cited in the evidence regarding Gallo supervisors and security guards engaging in surveillance and interruption of UFW visits to workers in its housing areas interfered with, restrained, and coerced employees in the exercise of their right under Section 1152 of the Act to freely--without employer interference--receive union organizers and meet with them at or in their homes. Neither the police-state atmosphere created by the omnipresent and watchful security guards nor Gallo's written policies which set in motion that coercive atmosphere comported with the mandates of Section 1152. Accordingly, I find that Gallo violated Section 1153(a) of the Act by the conduct of its agents and supervisors in the housing areas, as is specifically set

60/Although the record is somewhat unclear as to when and how many different government officials appeared at the Livingston Ranch prior to the September 10 election, ALRB agents were there at least on one day, September 5, and two representatives of the Attorney General were present daily from the afternoon of September 3 on. Frank Ortiz also recalled seeing a state-marked vehicle on September 6 while he was in a Gallo field. The initial appearance of the Attorney General's representatives, on September 3, corresponds to the first time Mr. Cooper recalled being warned by Mahin to remain inconspicuous because of the presence of state officials, on the very next day. Coincidentally, the timing of the arrival of Attorney General agents on September 3 and Cooper's instructions the next day to maintain a lower profile are facts which may explain the general absence of charges regarding security guard conduct after September 2.

forth in Paragraphs 9 (r) , (t) , (u) , (gg) , and (hh) of the complaint .61/

2. Gallo's Interference, Coercion, And Restraint In Its Field Areas:

Other than certain factual arguments it raises regarding the events between August 28 and September 9, which have been discussed previously. Respondent Gallo raises several basic defenses to charges that it surveilled, interfered, with, and denied access to UFW organizers in its field areas. Thus, Gallo claims the following: First, that because the Board's access rule was not legally effective prior to September 10, UFW organizers had no right to enter onto Gallo fields between August 28 and September 9. Gallo argues, accordingly, that it granted only permissive access to the UFW organizers, considered them as trespassers, and could lawfully surveil them, photograph them, and attempt to ban them from its property. Second, Respondent Gallo argues that business reasons justified any surveillance and photography that occurred, which exculpate that conduct. Third, Respondent Gallo argues that in many cases the General Counsel failed to establish that surveillance was purposely engaged in by its guards and supervisors. Rather, Gallo contends that the evidence indicates only a lawful presence on the part of guards and supervisors.

Respondent Gallo's claim seems to have merit that the access rule cannot be relied on to establish a right on the part of UFW organizers to take field access to the workers during the dates in question. Although repeatedly indications have been made that the Board's access rule became effective on August 29, the date of its promulgation, 62/ this does not appear to be the actual fact. As the record produced by the Secretary of State indicates, as introduced in this proceeding, the access rule was not filed with that office until 2:00 p.m. on September 2. As an emergency regulation of the Board, it would not become effective by statute until its filing with the Secretary of State. See California Government Code, Sections 114-21 and 114-22 (c) . Thus, the earliest application of the access rule would not have been until mid-afternoon on September 2.63/

61/Despite its lack of reference in the complaint, I also find that Gallo violated Section 1153 (a) when its security guard surveilled Frank Ortiz's visit to Francisco Aquiniga's home in the Azevedo camp on September 9. This fact pattern involving Ortiz was similar to the other allegations regarding housing surveillance and was fully litigated at the hearing. Under these circumstances, it is appropriate to consider whether it constituted a further example of unlawful surveillance and interference. Anderson Farms Co., 3 ALRB No. 67, p. 10, n. 6 (1977).

62/See, e.g., A.L.R.B. v. Superior Court of Tulare County, 16 C.3d 392, MOO, n. 3 (1976); K. K. Ito Farms, 2 ALRB No. 51 (1976); Tomooka Brothers, 2 ALRB No. 52, p. 2, n. 2 (1976).

63/Sub sequent to the hearing Respondent Gallo moved to reopen the hearing to introduce into the record the dates on which the Board's original emergency regulations, including the Access Rule, were filed with the California Senate's Rules Committee. By Section 114-22 (c) of the Government Code such a filing is also necessary before -- (continued)

If the access rule was legally effective on September 2, its effectiveness was short-lived. As the Board has previously recognized, the access rule was enjoined from September 3 through September 18. *Bud Antle, Inc.*, 3 ALRB No. 7, p. 6, n. 8 (1977). The Board has hitherto refrained from giving the access rule its effectiveness during the period its enforcement was enjoined. *Isamu Minami*, 3 ALRB No. 81, p. 4, n. 5 (1977); *Anderson Farms Co.*, 3 ALRB No. 67 (1977). In view of the fact that the access rule could not have been effective until September 2 and its immediate enjoinder, and in view of the Board's previous approach as to the regulation's enjoinder, it would be inappropriate in this case to rely on the access rule as a basis for establishing any of Respondent Gallo's conduct as violative of the Act between August 28 and September 9,

Nonetheless, I do not share Gallo's view that UFW organizer activity occurring in Gallo's field areas finds no protection whatsoever under the Act. To begin with, it is important to understand that even if UFW organizers had no right of access under the access regulation, Respondent Gallo was still not free to engage in conduct that flagrantly violated Section 1152 rights when the organizers were present. Thus, the Board has held that even when organizers were not properly on an employer's property, that employer cannot engage in such flagrant, coercive conduct as using firearms or physical force to bar union access to workers. *Western Tomato Growers & Shippers, Inc.*, 3 ALRB No. 51 (1977); *Anderson Farms Co.*, 3 ALRB No. 67, pp. 9-10 (1977). Similarly, the NLRB, whose applicable precedents we must observe, has held that even when a union representative was present among workers, though that presence was not entirely legitimate or proper, an employer cannot engage in the photographing and recording of his communication with workers. *Blanchard Construction Co.*, 234 NLRB No. 153, 97 LRRM 1389, 1391 (1978). As the NLRB therein noted:

Such conduct necessarily tends to inhibit employees in their communication with their designated bargaining representative, in that it constitutes a form of surveillance of the employees' union activities, or at least creates that impression, and thereby impermissibly interferes with, restrains, and coerces the employees. . . .

63/(continued)--an emergency regulation becomes effective. Gallo claims in its motion that the earliest date on which the access rule could have been filed with the Senate's Rules Committee was September 3.

Respondent Gallo's motion to reopen is hereby denied. Clearly, Gallo knew of or had reason to know of the Section 114-22 requirements at the time of the hearing, particularly inasmuch as it based its defense in part on that statutory provision, and had ample opportunity during the 52 days of hearing to bring forth any evidence pertaining to the filing of the access rule with the Senate's Rules Committee. Furthermore, Gallo's reliance on Section 11422 of the Government Code is not of critical significance in this proceeding, as is indicated above.

In other words, both the Board and the NLRB have sought to balance an employer's right, either to be free from harassment or unwarranted visits by union representatives, and the right of employees to be free from employer restraint and coercion in their dealings with union representatives or organizers. Thus, it is no absolute answer for Respondent Gallo to say it could act as it wished toward the UFW organizers, as they had no right of access to its property.

Several other facts bear on Gallo's freedom to act as it wanted toward the UFW. First, the fact is clear that from August 28 on Gallo permitted organizers to enter its property. Gallo did not bar such visitations, as it may have been entitled to. Indeed, Gallo publicly, and particularly toward the Board, announced its policy of granting access pursuant to the Board's access rule. Thus, one of Gallo's chief officers, its vice president and general counsel, informed the Board that as of August 29 Gallo was observing the Board's access rule. To now claim in hindsight the new "legal position" that it considered and treated UFW organizers as mere trespassers, who possessed no rights, brings with that new claim its own contradiction. In fact, one might even conclude that Gallo's open, public acceptance of the Board's access rule effectively waived its right some three years later to reject that acceptance.

Finally, Gallo's "trespass claim" must be viewed in light of its comparable treatment of Teamster representatives who visited workers in its field areas. While it is true that the Teamsters Union had a contractual visitation right to service its contract with Gallo, the evidence credibly and amply establishes that Teamster representatives were present in Gallo fields for other purposes as well. They engaged in threatening workers who might be UFW sympathizers, they photographed and took down license numbers of UFW organizers, and they campaigned among the workers. As the election approached more Teamster representatives visited Gallo's fields, a fact that would lead a reasonable person to believe that they were engaged in organizational work.

Although Gallo argues that it treated the two unions in similar fashion, the facts belie that assertion. Clearly, when Johnny Macias threatened Steve Swanson on August 7 over his support for the UFW, Jon Yori, a high-ranking Gallo supervisor, learned of the threat and did nothing to curtail such "organizational" activity in the future. Supervisor Luis Salado was admittedly present when a Teamster representative, apparently Macias again, made a campaign speech to some 160 workers when they should have been working, yet he did nothing. Ruben Castillo was present when Macias again was photographing and harassing UFW organizers on August 29, yet permitted Macias to remain on the property while banning the UFW organizers. And, given the degree of interest shown by Gallo as to the two unions' organizational efforts, and given the presence of a crew foreman, it is inconceivable that Gallo did not know of the work disruption and campaign speech engaged, in by Macias during work hours on August 28 and 29 at the Snelling Ranch.

To now assert a lack of knowledge concerning Teamster organizational activity during work hours, as Gallo does, cannot be accepted as a credible assertion. Furthermore, I find it impossible to understand Gallo's trespass argument in view of the fact that, on the

one hand, Teamster organizers were permitted to engage in organizational activity before and after work and during lunch-time breaks (which Gallo's representatives admitted both in 1975 and at the unfair labor practice hearing), and, on the other hand, for Gallo to assert it nonetheless had a right to interfere with UFW organizers when they engaged in organizational activity during similar times. Surely, the Act does not countenance Gallo's disparate claim that UFW organizers could be treated as trespassers when engaging in the very same conduct, at the same times, as the Teamster representatives engaged in.^{64/}

The evidence amply establishes that between August 28 and the afternoon of September 2, comprising some four work days in toto, Gallo's security guards and various supervisors regularly photographed UFW organizers meeting with, talking with, and distributing leaflets to Gallo workers. The evidence, from both the testimony and admitted photographs in evidence, persuasively establishes that a single supervisor or guard took repeated photographs of the same UFW organizers and workers and that such photographs were commonly taken from only a few feet away. The picture-taking of Teamsters that occurred, however, was either of Teamster representatives posing for the photographer or was limited to activity occurring on the morning of August 30, when--given the logistics of the wide-scale organizational activity--it would have been virtually impossible not to photograph the Teamsters along with UFW organizers.

Gallo asserts that it had a legitimate purpose for photographing UFW organizers making contact with workers--namely, that the photographs were taken to disprove the UFW's claim that it was being denied access to Gallo workers and to prove that its organizers were trespassing. Although the General Counsel and UFW contest any inquiry into Gallo's motives for the picture-taking, it is appropriate to examine whether Gallo's purported business explanation outweighs the

^{64/}Respondent Gallo seeks to rely on a number of "department store" cases, where the NLRB has held it permissible for an employer to keep outside union organizers under observation while on the selling floor talking with employees at work, when customers are also present. See, e.g., J. C. Penny Co., 209 NLRB 313 (1974) ; G. C. Murphy Co., 171 NLRB 370 (1968), affirmed, 422 F.2d 685 (C.A.D.C. 1969). Such legitimate observation, however, does not protect actual surveillance of an employee's activity. See Qertle Management Co., Inc., 182 NLRB 722 (1970).

But, in view of Gallo's significantly different treatment of the Teamsters Union, in view of Gallo's public policy of allowing UFW access on its property, in view of the degree of conduct engaged in by Gallo's agents, and in view of the fact that organizational activity essentially took place during non-working times, the so-called department store cases are not convincingly apposite to the instant state of facts. While I have considered their reasoning, I have concluded it cannot be aptly applied herein.

naturally coercive effect resulting from such photography.^{65/}

It is virtually impossible to accept Gallo's explanation for the photographs. The trespass rationale for its photography is nearly vitiated by the following considerations: it was concededly not Gallo's original purpose in taking its photographs to demonstrate trespass, and thus the trespass explanation appears more as an afterthought to explain its conduct; the photographs were never employed, in any way by Gallo to press trespass claims against the UFW, nor were any such claims raised by Gallo after August 28; the photographs were taken indiscriminately by Gallo's agents and in many cases show only UFW organizers standing or walking on public roads; and many of the photographs were taken at times when Gallo was openly permitting UFW access to its workers, thus negating any claims of trespass. The portrayal of UFW access as an explanation for the picture-taking is also unsupported by objective considerations: with but a very rare exception workers were not informed that Gallo's purpose for photographing them with UFW organizers was only to demonstrate UFW contact with Gallo workers; the photographs were neither shown to Dan Solomon, Gallo's chief spokesman responsible for disputing the UFW's claim that it was being denied access to Gallo workers, nor to the press itself to dispute the UFW's claim; the developed photographs were not only circulated among Gallo's hierarchy but among guards and supervisors at the Livingston Ranch for the purpose of establishing UFW organizers' identity; the photography was--to put it mildly--flagrant and repetitive and pursued in such a way as to hardly comport with the simple purpose of demonstrating the UFW's access to Gallo's workers. Nor can Gallo realistically claim that it employed photography to document UFW misconduct or violence, as there simply was none to document. See *Russell Sportswear Corp.*, 197 NLRB 1116 (1972), reversed on other grounds, 83 LRRM 2225 (C.A. 6, 1973).

Equally as important to consider with respect to Gallo's photography is the question of whether any business explanation

^{65/}It is clear that taking photographs of employee organizational contact with union organizers has a natural tendency to restrain and coerce employees. See, e.g., *Anderson Farms Co.*, 3 ALRB No. 67, p. 11 (1977); *Belridge Farms*, 4 ALRB No. 30, p. 5 (1978); *General Engineering, Inc.*, 131 NLRB 901 (1961); *Tennessee Packers, Inc.*, 124 NLRB 1117, 1123 (1959). The NLRB has held, however, that where an employer has a valid, noncoercive motive for engaging in such photographic surveillance, his picture-taking will not necessarily constitute a violation of Section 8 (a)(1) of the National Labor Relations Act (the statutory equivalent of Section 1153(a) of the Act). See, *Matlock Truck Body*, 217 NLRB 346 (1975) (no violation where employer's motive was to show union violation of state court injunction); *Berton Kirschner, Inc.*, 209 NLRB 1081 (1974), affirmed, 523 F.2d 1046 (C.A. 9, 1975) (where employer's motive was to document union trespass so that it could be excluded from employer's property); *Summit Nursing & Convalescent Home, Inc.*, 204-NLRB 70 (1973) (where single instance of photography was de minimis); *Cavalier Division of Seeburg Corp.* 192 NLRB 290 (1971), modified, 476 F.2d 868 (C.A.D.C. 1974) (where employer's motive was to document misconduct or violence on picket lines for use in court proceeding). Thus, it appears appropriate to consider Respondent Gallo's preferred motive for its picture-taking.

put forward by Gallo for its picture-taking outweighs the naturally coercive effect it would have on its employees. Surely, the Act does not absolutely forgive an egregiously, flagrant violation of Section 1153 (a) merely because the reason for engaging in it was deemed legitimate by the employer. Gallo's explanation must be weighed against the consequences of its conduct. As the Supreme Court has noted, "... it is only when the interference with Section 7 rights outweighs the business justification for the employer's action that Section S (a)(1) is violated." *Textile Workers Union v. Darlington Mfg. Co.,* 380 L.S, 263, 268-269 (1965). And, as the NLRB has noted in a context similar to this case,

. . . this may have been Respondent's motive in so acting (picture-taking), its surveillance nonetheless could be expected to have the natural effect of interfering with, restraining, and coercing the employees in their interaction with their bargaining representative. Thus, the fact that the Union was engaging in harassing activities against Respondent . . . did not in the circumstances justify this form of surveillance.

(*Blanchard Construction Co., supra.* 97 LRRM at 1391.)

Gallo's photographic attack on the UFW's organizational efforts was, I believe, a clear violation of Section 1153(a) of the Act, even were Gallo's motive behind the photography to be as it claimed (which claim is unsupported by the evidence). It can scarcely be gainsaid that the obvious, natural impact of the close-up and repetitive picture-taking was for workers to fear employer retaliation for their photographed presence with UFW organizers. At the very least, the workers would not have understood Gallo's one-sided and ubiquitous photographic assault on UFW organizers as a disinterested reaction to the campaign between the UFW and the Teamsters.

Nor can Gallo's purported explanation for its photographic surveillance be accepted as a necessary business action. If Gallo wished to treat the UFW organizers as trespassers, the local police officials were readily available for Gallo's call to exclude the trespassers. If Gallo wished to show the public media that the UFW falsely claimed it could not communicate with Gallo's workers, representatives of the media could be personally shown or told that Gallo was not interfering with such communication, as Gallo's media spokesman actually did on several occasions. On balance, I simply cannot accept Respondent Gallo's purported justification for its photographic surveillance when weighed against the severe harm caused by that surveillance to the employees' protected rights.^{66/}

^{66/}To the extent that Respondent Gallo also argues that its photographic surveillance was to document excessive numbers of UFW organizers on its property or interference by them of ongoing work, I find these purported reasons wholly unconvincing. -- (continued)

Gallo's purported reasons for engaging in photographic surveillance do not outweigh the "blatant acts of surveillance involving use of cameras ... in close proximity to the workers, (which) had a substantial chilling effect on the workers receptivity to information from the union organizers." Belridge Farms, 4 ALRB No. 30, p. 5 (1978) . Accordingly, I find that Gallo violated Section 1153 (a) by its photographic surveillance, as specifically set forth in whole or in part under Paragraphs 9 (b) , (d) , (e) , (g) , (h) , (k) , (l) , (m) , (q) , and (v) of the complaint.61/

Portions of the complaint sections cited, in the foregoing paragraph, as well as other complaint sections, allege other Forms of Gallo interference with its employees' rights (other than photographic surveillance), including non-photographic surveillance. Paragraphs 9 (g) , (h) , (i) , (j) , and (k) allege a host of infractions relating to noon on August 29. These allegations go to the threat to arrest and attempt to bar Ms. Macri from her organizational efforts (9 (h) and (k)), the similar conduct directed toward Antonio Santos (9(g)), the discriminatory enforcement of a no-solicitation rule (9(j)), and the surveillance by Supervisor Alberto Cardenas and Johnny Macias (9 (i)). While it could be argued that Respondent Gallo had a right to ban UFW organizational activity on that date or threaten the arrest of UFW organizers on its property, such an argument cannot be put forth in the context of the events in question.

At the very time that Frank Clark was threatening Ms. Macri with arrest, that a security guard was threatening Antonio Santos with arrest, and that Ruben Castillo was banishing (and security guards

66/ (continued)--The only real effort to prove such excessive access or work interference related to August 28 at Magnolia and Van Cliff, but Gallo's own photographs do not establish that they were taken for such purported reasons. Indeed, much of the security guards' picture-taking occurred while the UFW organizers were gathered at the intersection, before they entered the field to engage in organizing activities. Furthermore, the guards had standing instructions to photograph the organizers and workers together for reasons having nothing to do with excessive numbers of organizers or work interference. Gallo's changing reasons for its photography, as portrayed through the changing testimony of Frank Clark, apparently were neither communicated to its guards nor the workers. It is difficult at this late date to place much reliance on Mr. Clark's changing views regarding the photography.

67/The UFW argues that Gallo's extensive photographic surveillance effectively denied the UFW access to the workers, as was protected by the Board's access rule. Inasmuch as I have previously indicated that the access rule should not be relied on herein to establish the UFW's affirmative right to take access during the dates in question, I refrain from making any determination that the photographic surveillance effectively denied the U.FW access. For the same reason, I refrain from finding that Gallo violated the Act by threatening Frank Ortiz with arrest on August 28 when he entered the fields at noon, as is alleged in Paragraph 9 (f) of the complaint. The threat was inconsequential at best, as Mr. Ortiz totally ignored it.

were photographing) Larry Tramutt, Fred Ross, Pam Whalen, and Manuel Hernandez from Gallo property, Teamster Organizer Johnny Macias was permitted to remain on the property, even though he had been filming the UFW organizers talking with workers and otherwise harassing the UFW organizers. Clearly, Mr. Macias was not engaged in servicing the Teamsters' contract when he engaged in such conduct behind the Employment Office, in front of Castillo, Cardenas, and Gallo's security guards. Thus, I find that by so disparately treating UFW organizers, in front of Gallo workers, Gallo further violated Section 1153 (a) by seeking to curtail or limit UFW organizing efforts while permitting Mr. Macias to do as he wished on its property.68/

As for other conduct of Gallo's supervisors and guards, Respondent Gallo raises two primary arguments. First, Gallo contends that a supervisor's mere presence in an area where organizational activity occurs is insufficient to establish that supervisor's conduct as unlawful surveillance. Gallo notes that the Board has declared :

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.

(Tomooka Bros., 2 ALRB No. 52, p. 5.)69/

Yet, one need not establish by affirmative evidence that the supervisor's motive is to surveil his employees' union activity; the purpose of a supervisor's conduct may be adequately established from the surrounding circumstances. Moreover, Gallo's argument as to the lack of unlawful "purpose" behind a supervisor's presence has virtually no bearing on the following conduct, as was established by the credible evidence:

68/I make no specific finding that Alberto Cardenas engaged in surveillance, as is alleged in Paragraph 9 (i). The mere fact that at one point he sat in his truck while Macias filmed Manuel Hernandez's solicitation of an employee does not necessarily mean that Cardenas, himself, was guilty of unlawful surveillance. To the extent that the claim is made that Cardenas assisted Macias in surveillance, or to the extent that Gallo is blamed for Macias's conduct, these claims will be discussed infra.

69/It has been routinely recognized that a supervisor's presence where union organizing occurs does not unlawfully interfere with employee rights when he is present in a work area where work is in progress, or present in an area common for him to be in, or present in an area by passing coincidence. See Tomooka Bros., supra; Konda Bros., 2 ALRB No. 34 (1976); Vincent's Steak House. Inc., 216 NLRB 647; Peerless of America, 198 NLRB 982 (1972), modified in other part, 484 F.2d 1108 (C.A. 7, 1973).

--As alleged in Paragraph 9(x), a security guard repeatedly interrupted Reverend Phillips on September 2 when he attempted, to speak with Gallo's workers in front of the Employment Office, repeatedly demanding that Phillips identify himself, all at a time when Phillips openly displayed a UFW button;

--As alleged in Paragraph 9 (cc) , Luis Salado stared down a grape row for several minutes at Pam Whalen who was speaking to workers on their lunch break;

--As litigated under Paragraph 9 (ee) , on September 6 Supervisor Jose Gonzalez stood by Stephen Hopcraft and yanked from a worker a UFW leaflet just handed to the worker by Hopcraft and repeatedly interrupted Frank Ortiz's organizational efforts with workers;

--As alleged in Paragraph 9 (ff) , on September 6 Ruben Castillo and Jorge Fegundas, a foreman, more or less followed Agnes Rose from employee to employee while she was soliciting their support, continuously observing her activity;

--As not alleged in the complaint but as fully litigated at the hearing, on September 9, at about 3:30 p.m., Ruben Castillo, along with Homer Mendiola from the Teamsters, stood some three to four feet away and stared at Ms. Macri as she engaged in organizational activity.

These foregoing acts on the part of Gallo personnel can hardly be described as involving innocent coincidences or conduct flowing merely from the normal course of work. In each instance the person involved made it appear that he was personally observing the particular organizing activity going on. The supervisor or agent interjected himself in such a way as to interfere with the organizational activity or to convey the impression that the activity was being closely watched. These five instances, as noted above, indicate a purposeful effort by Gallo's supervisors and agents to either scrutinize or interrupt the UFW's election campaign among employees. Accordingly, I find that Respondent Gallo violated the Act's 1153(a) prohibition by engaging in the conduct alleged in those portions of Paragraphs 9 (x), (cc), (ee), and (ff), including Castillo's surveillance of Macri on September 9, as briefly recounted above.

On the other hand, Respondent Gallo justifiably challenges some of the allegations raised against it. In connection with Paragraph 9 (cc) of the complaint, Ms. Whalen's testimony was

insufficiently clear that on September 4, Frank Clark, Robert Dietrick, and Joe Silviera created the impression of surveillance,, Their mere presence in a work area on September 4 where work was in progress, by the weighing scales, does not adequately establish their conduct as surveillance. Similarly in connection with Paragraph 9(ee) , Ms. Whalen's testimony failed to sufficiently dispel the possibility that Jose Gonzalez, who was placed by Whalen in an area of active work on September 6, was merely performing his supervisory duties when Whalen observed him around one side of the portable toilets. And .in connection with the same paragraph, Frank Ortiz's testimony fails to adequately establish that Virgil Staley was not engaged in his legitimate duties on September 6 as a safety supervisor, as Staley apparently had responsibilities to oversee the safety of tractor operations in the area where Ortiz placed him at. These incidents, as well as the alleged Cardenas surveillance in Paragraph 9 (i) (see Note 68 , supra) , were described in such fashion by the witnesses involved that it is impossible for me to conclude that the supervisors were engaged in something more sinister than their normal functions at work sites where they commonly were.

A second general contention raised by Respondent Gallo seems to be that it cannot be held to have violated the Act when its supervisors were present in the vicinity of organizational activity for the purpose of "making a record" or to deter unlawful activity. Hut, taking these points to the conclusion sought after by Gallo would virtually eliminate employer surveillance from the Act's prohibition, a conclusion warranted neither by the factual circumstances nor case precedent. How can it be said that photographic surveillance is permissible because the employer's agents are merely making a record? The record they made, of course, was the photographic one of Gallo's workers meeting and talking with UFW organizers. Simply because Gallo employed its personnel director, its security director, its vice president of industrial relations, and its various security guards and supervisors to continually observe the UFW's organizational activity whenever it occurred in areas where Gallo's agents were stationed (e.g., at the Employment Office) does not convert that purposeful surveillance into innocent, idle curiosity or into legitimate business activity. Some legitimate, compelling reason to make a photographic record or to engage in direct observation of protected activity must exist, and, in this case, it did not.

In short, in a host of ways Respondent Gallo's agents violated Section 1153 (a) of the Act by engaging in conduct in Gallo's field areas. Respondent Gallo's purported justifications for such conduct are either unsupported in fact or reason or are clearly overcome by the balance that must be drawn in favor of protecting its employees' right to engage in activity allowed them by virtue of Section 1152 of the Act.

3. Gallo's Interference, Coercion, And Restraint At The Casa Campasina On August 30:

As was earlier described in detail, on August 30 Luis Salado, an admitted Gallo supervisor, and his brother Salvador, a foreman, attended a UFW rally at its Livingston headquarters sponsored for Gallo's employees. The Salados remained some 15 to 20 feet from the

Casa Campasina's meeting, standing outside the chain-link fence among some eight or nine Teamster representatives. The Salados remained primarily in one area close to Bill Powers, a Teamster business representative who took photographs of those inside the Casa Campasina's yard. Luis Salado conferred with Powers as he took the photographs and Salado occasionally pointed at persons in the yard. The other Teamster representatives engaged in yelling and calling out challenges to those in the meeting, with Luis Salado occasionally participating in the shout-fest. The noise and confusion generated by the shouting ended the UFW's meeting prematurely and sent some of those in attendance into hiding.

Quite naturally "(i)t is well settled that surveillance of a Union meeting by a company supervisor constitutes a violation of" the NLRA. N.L.R.B. v. Standard Forge & Axle Co.. 72 LRRM 2617, 2619 (C.A. 5, 1969). So too is it obvious that if a company supervisor engages in shouting, cooperates in photographic surveillance, and otherwise lends a hand in the disruption of a union meeting that conduct unlawfully interferes with, restrains, and coerces employees.

Respondent Gallo does not essentially challenge the foregoing principles, instead leveling its primary attack against Paragraphs 9 (o) and (p) of the complaint by claiming that neither Salado engaged in any offensive conduct but merely observed an open, public union meeting out of personal curiosity. Earlier I rejected the testimony of the two Salados and of Bill Powers to the effect that the Salados peacefully observed in silence the Casa Campasina meeting. Given my finding that Luis Salado vocally and physically participated in the general Teamster disruption of the meeting and the photographic surveillance, as established by the credible testimony, it is impossible to ignore his position as a Gallo supervisor in that misconduct or Gallo's ultimate responsibility for his misconduct.

Respondent Gallo also attempts to disassociate itself from Luis Salado's misconduct by denying any responsibility for his presence, by forgiving his presence at the Casa Campasina because the UFW's meeting was open to outsiders, and by disassociating the two Salados from any conspiratorial conduct with the Teamsters who were also present. The cases^{70/} relied on by Gallo, however, do not support the conclusion that the two Salados could surveil the UFW meeting for Gallo employees or assist in disrupting it with impunity. While the NLRB has recognized that an employer cannot be held to have violated provisions in its statute that are the equivalent to our Act when a supervisor attends a union meeting on his own initiative, where that attendance was recognized and accepted by the employees present, or where the supervisor was invited, or where the supervisor was drunk and acted on his own, the circumstances surrounding the UFW's August 30 meeting and the Salados' presence clearly do not portray the innocent features found in those NLRB cases cited by Respondent Gallo. Clearly, the Salados were not invited to the meeting, and their ominous scrutiny from outside the

^{70/}See. e.g., Fraley and Schilling. Inc., 211 NLRB 4-22 (1974) ; Aldon, Inc., 201 NLRB 579 (1973); Preiser Scientific. Inc., 158 NLRB 1375 (1966), affirmed, 387 F.2d 14-3 (C.A. 4, 1967); Eldo-Craft Boat Co., Inc., 166 NLRB 280 (1967); Atlantic Gas Light Co., 162 NLRB 436 (1966) .

chain-link fence cannot by implication suggest such an invitation. Nor did they gregariously mix with those in attendance at the meeting or openly participate in the meeting, which may have made their presence more innocent.

Nor can Respondent Gallo avoid its responsibility for the Salados' conduct by seeking to disassociate their presence at the meeting from that of the Teamsters. For one thing, their presence outside the fence was not unassociated from the Teamsters,, The two Salados stood in the same line outside the fence as did the Teamsters, they were constantly next to Bill Powers, Luis walked among the other Teamsters, and no one who attended the meeting could have disassociated the Salados' presence from that of the Teamsters. Indeed, based on the credible testimony of Michael Angelo, it is fair to conclude that the two Salados were expected at the meeting by the Teamsters .and that Luis, at least, actively assisted the Teamsters in their surveillance and disruption of the meeting. Nor, despite having knowledge that the Salados attended the UFW meeting, did Gallo seek to eliminate any employee fears resulting from their surveillance or apologize for the Salados' attendance.

In conclusion, I find that Respondent Gallo violated Section 1153 (a), as alleged in Paragraphs 9 (o) and (p) of the complaint, by the two Salados' help in disruption and surveillance of the UFW's meeting on August 30. Their conduct at the meeting, where they purposely went, was such that would instill in the minds of the employees present fear of retaliation and created the clear impression that their employer was actively and aggressively opposed to the UFW, even to the extent of following employees to a union meeting far away from their work place.

4. Gallons Assistance And Support To The Teamsters Union:

Paragraph 10 of the complaint alleges a number of acts [by Gallo that purportedly supported and assisted the Teamsters Union. Several of these acts have been discussed in preceding sections in connection with the conduct of particular Gallo supervisors and/or agents. Thus, Respondent Gallo has been found by me to have violated Section 1153(a) of the Act by the conduct of Luis and Salvador Salado on August 30 at the Casa Campasina meeting (also noted in Paragraphs 10 (e) and (f)), by the conduct of Ruben Castillo on August 29 when he banned UFW organizers from Gallo property while permitting Teamster Johnny Macias to engage in "organizational" activity (also noted in Paragraph 10 (c)) , by the conduct of Frank Clark and security guards on August 30 when they repeatedly photographed UFW organizers and workers in front of the Employment Office.(also noted in Paragraph 10 (d)), for the conduct of Ruben Castillo and Jorge Fegundas when they created the impression of following and surveilling Agnes Rose's organizational contact with workers on September 6 (also noted In Paragraph 10 (h)), and the conduct of Ruben Castillo when he created the impression of surveilling Barbara Macri's organizational contact with workers on September 9 (not specifically noted in Paragraph 10). This foregoing conduct occurred in the presence, and related to certain conduct, of various Teamster agents and is, accordingly, alleged also as indicia of unlawful support and assistance for the Teamsters Union. This conduct as well as that alleged in Paragraph 10(i) of the complaint forms the fabric of the Section 1153(b) charge against Gallo.

The Board has laid down certain broad tests for determining whether an employer under our Act violates Section 1153(b). Such a violation

. . . requires a finding that the degree or nature of the employer's involvement with the labor organization has impinged upon the free exercise of the employees' rights under Section 1152 of the Act to organize themselves and deal at arm's length with the employer,,

(Bonita Packing Co.. 3 ALRB No, 27, p. 2 (1977).)

When two unions compete for the support of employees "the existence of discriminatory grants and denials of concessions, such as the use of company time and property, to one or the other of the unions, becomes a pivotal issue for consideration. Where the employer acts affirmatively to promote one union over the other the natural tendency of this support is to inhibit the employees in their free exercise of the rights granted under Section 1152 of the Act." Id. at p, 3. And where, as here, the charge is only that of assistance and support for one of the two competing unions, Bonita indicates that the question is

. . . not whether the Teamsters union is in fact the creation of the employer or is controlled by the employer, but whether the employer has become so involved" in bolstering the fortunes of that union that the self-organization rights of the employees have been blunted.

In this case it seems inappropriate to single out certain acts on the part of Gallo as to whether each one, by itself, violates the proscription of Section 1153(b). As the Supreme Court long ago noted in International Association of Machinists v. N.L.R.B., 311 U.S. 72, 78-79 (1940):

The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign utterances. * * * * Silent approval of or acquiescence in that (one union's) drive for membership and close surveillance of the competitor; the fact that the employee-solicitors have been closely identified with the company union. . .; the rank and position of those employee solicitors; . . . the employer's known prejudice against (one of the unions), were all proper elements for (the NLRB) to take into consideration in weighing and drawing its inferences.

The election atmosphere at the Gallo ranches favored the Teamsters Union at the expense of the UFW. Beginning in mid-August and lasting until September 2, Gallo's supervisors and security guards closely followed, observed, and photographed UFW organizers when meeting with the workers. Those Teamsters present on the property were virtually left alone. In mid-August and again on August 28, deputy sheriffs were summoned to Gallo's property in response to the presence of UFW organizers. On occasions UFW organizers were purposefully scrutinized by supervisors from only feet away as they spoke with employees, as can be seen from Ruben Castillo's conduct on September 6 and 9, or as can be seen by Frank dark's personal surveillance of organizing discussions on August 28, 30 and September 1, or as can be seen in a security guard's constant interruption of Reverend Phillips as he spoke with the workers on September 2, or as can be seen from the constant surveillance of UFW organizers in Gallo's housing areas, or as can be seen from Jose Gonzalez's menacing disruption of Stephen Hopcraft's leaflet distribution on September 6, although in no case does it appear that Gallo extended similar treatment to Teamster organizers. In addition, Gallo's security guards systematically noted the vehicle license numbers of UFW organizers, while in the presence of employees.

Also as noted in several places herein, such treatment as Gallo directed toward the UFW is sharply contrasted with its condonation of, or its benign neglect of, the Teamsters openly campaigning among work crews even during working hours, their threatening UFW sympathizers, and their harassing actions toward the UFW. Significantly, various Teamsters engaged in conduct identical to Gallo's at the ranches --namely, photographing UFW organizers with workers and taking down the license numbers of UFW organizers while both workers and Gallo supervisors were present.

In addition, Gallo permitted its property and equipment to serve as advertising vehicles for the Teamsters Union. Until shortly before the election, Gallo's picking aids, employee buses, tractors, and gondolas were virtually swathed in Teamster stickers. Gallo's bulletin board openly displayed Teamster election propaganda. Trucks assigned by Gallo to various foremen also displayed the Teamster campaign stickers. And, in contrast to Gallons responsibility for and failure to rebuke Luis Salado's help in disrupting the UFW's meeting on August 30, Gallo permitted the Teamsters Union to sponsor a picnic at Gallo's own park on September 6, where employees and security guards ate and drank with high-ranking Teamster officials just four days before the election .71/

Finally, on several occasions Gallo supervisors and

71/The record also amply establishes that Teamster representatives were given free and open access to the facilities inside the Employment Office. Although it is probably true that the Teamster agents were engaged in servicing their contract during some of their visits inside the Employment Office, surely their frequent and casual use of Gallo's office space must have contrasted sharply in the employees' eyes with the surveilling and photographing of UFW organizers just outside the Employment Office.

agents acted in such a way as to condone or assist Teamster interference with the UFW's organizing efforts. On August 29, behind the Employment Office, Ruben Castillo permitted Johnny Macias to remain on Gallo's property after having observed him harassing UFW organizers and after ordering the UFW organizers to leave, and Albert Cardenas sat mildly in his truck only feet away as Macias filmed UFW organizers soliciting workers; on September 6 both Ruben Castillo and Homer Mendiola joined forces to scrutinize Agnes Rose's organizational activity in the Employment Office area; and on September 9 Castillo and Mendiola joined as companions in "nonchalantly" observing Barbara Macri solicit support from several women workers in a field area. And at least two of Gallo's foremen, Oliviera and Silviera, actively participated in the distribution of Teamster election propaganda. Arthur Oliviera, while working as a relief foreman, placed Teamster bumper stickers on his Gallo truck and distributed several stickers to workers in his crew; and on election day, according to the credible testimony of Alfredo Guera (a Gallo worker), Gallo Foreman Jose Silviera distributed Teamster buttons in the polling area to those waiting to cast their votes.

One need not retrace the pre-Act history of Gallo's relationship with the UFW or Teamsters to discern the clearly favored light it allowed the Teamsters to walk in between August 28 and September 10. Nor can it be argued, as Gallo seeks to do, that Gallo bore no responsibility for any favoritism toward the Teamsters. Gallo clearly maintained control over its bulletin board, over its farm equipment and machinery, over its park, and over its security guards and supervisors. When Gallo finally determined to act it efficiently and promptly removed the Teamster stickers from its many vehicles: when it desired to surveil the UFW it launched a massive effort by using its security guards; when it learned of an employee petition to exclude UFW organizers from Gallo ranches it acted immediately to exclude them; when it desired to communicate with its workers it could efficiently distribute notices to them that they need not allow union organizer visits to their homes or that they should not vote the "no union" alternative at the election. That all the many features of the election campaign came together to permit the Teamsters Union to campaign among the workers as freely and as often as it pleased could not have been an act of coincidence. Rather, by conscious design or by a conscious absence of design, Respondent Gallo allowed its property, equipment, and agents to be used in establishing Gallo's strong support for retaining the Teamsters Union as the employees' collective bargaining agent, while at the same time conducting its coercive campaign against the UFW.

In sum, by many specific acts and by the totality of its conduct, Respondent Gallo lent unlawful support and assistance to the Teamsters Union, in violation of Section 1153(b) of the Act. Gallo's permissive conduct toward the Teamsters Union and its restrictive conduct toward the UFW could only have blunted and made dull those rights accorded to employees under Section 1152 to freely choose their own bargaining representative. In particular, I find that Gallo's actions, as alleged in Paragraph 10, to have violated Section 1153 (b).^{72/}

^{72/}Nor is it an answer to Gallo's assistance and support of the Teamsters Union to suggest, as Gallo does, that the UFW never requested from it such equal access to its vehicles. -- (continued)

5. Gallop Responsibility For The Conduct Of The Teamster Agents:

The General Counsel and the UFW both seek to hold Respondent Gallo responsible for conduct engaged, in by admitted Teamster agents. They seek to hold Gallo responsible under a broad theory that the Teamsters acted as Gallo's agents.

While it is true that under our Act an employer may be held responsible for the conduct of others who are not employed by him,^{73/} and while it is true that the mandates of our Act seek to free the collective bargaining process from employer interference, so much so that an employer may be held vicariously responsible for the acts of employees or non-employees where the employer "'is within the reach of the Board's order to prevent any repetition of such (unlawful) activities and to remove the consequences of them" or where "the employees would have just cause to believe that (the actors) . . . , were acting for and on behalf of the management,"^{74/} these broad boundaries of employer liability--not necessarily depending on an employer's express authorization, ratification, or condonation of the conduct in question--do not seem to call for holding Respondent Gallo liable for the conduct of Teamster agents. In this case we are not confronted with the acts of a labor organization that is dominated and controlled by the employer, whose conduct can be traced back to the employer. In this case we are not confronted with the misconduct of an outsider that will inure to the benefit of the employer, over whom the remedy can only be levied to make it most appropriate in order to redress the wrongs. Nor can it be objectively said that the Teamsters' conduct would be seen by employees as attributable to Respondent Gallo.

The holdings have been few where an employer was held liable for the acts of a representative of a non-dominated labor organization. It is generally understood "(i)n theory at least, the employer and the union occupy adverse positions and neither ... is liable for the acts of the other where each is pursuing its independent course." *Progressive Mine Workers v. N.L.R.B.*, 187 F.2d 298, 304 (C.A. 7, 1951). Thus, in *Wolfie's*, 159 NLRB 22 (1966). the NLRB found the employer liable for a union agent's conduct after the employer had placed the agent into a role of representing him by hosting at the employer's

^{72/}(continued)--equipment, bulletin board, and park. It could not be expected, or demanded under the Act, that the UFW pursue such requests in the face of Gallo's consistently disparate treatment of the two unions.

^{73/}See, e.g.. *N.L.R.B. v. Bibb Mfg. Co.*, 188 F.2d 825 (C.A. 5, 1951); *Mid-South Mfg. Co.*, 120 NLRB 230 (1958); *Waynline. Inc.*, 81 NLRB 511 (1949).

^{74/}The two quoted phrases are found, respectively, in *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 521 (1941) ; and *International Association of Machinists*, supra, 311 U.S. at 80. The Board has seemed to adopt the approach taken in *H. J. Heinz Co.* See *Whitney Farms*, 3 ALRB No. 68 (1977). See also *N.L.R.B. v. Arkansas-Louisiana Gas Co.*, 333 F.2d 790, 795-796 (C.A. 8, 1964).

restaurant and counseling employees. In Rupp Equipment., 112 NLRB 1315 (1955), the NLRB held an employer liable where he knew in advance of the union agent's misconduct and fostered its occurrence,

Of course, many of the Teamster acts for which the General Counsel and the UFW seek to hold Gallo responsible are acts which were indicative of Gallo's unlawful support and assistance for the Teamsters Union. Thus, to the extent that the remedy herein prohibits the renewal of such assistance and support, Gallo's violations will be cured. What further remedial dosages that will result from a finding that Gallo is twice liable for such misconduct, this time as being liable for what the Teamsters generally did, is not clear from the General Counsel's and UFW's briefs. Nor is it clear that Respondent Gallo possessed the power in 1975, or would in the future, in control the Teamsters' activity, although its total failure in attempting to control that activity clearly portrayed support and assistance for the Teamsters Union. What seems implicit from the record is that the Teamsters Union had its own ends to gain by acting as it did, and the fact that Gallo's ends coincided does not force the conclusion that various Teamsters must be construed as Gallo agents or that Gallo was so intertwined in the Teamster campaign as to encourage employees to view activity of the Teamsters as that of their employer.

To be sure, our Act would not prohibit finding an employer liable for the conduct of a union's agent, particularly where that union is dominated or controlled by the employer, but under the circumstances of this case such a finding would be both inappropriate and unnecessary. Clearly, the Gallo workers could view their employer's favoritism and support for the Teamsters Union, but would they have understood that the Teamster agents were acting in behalf of Gallo? While the answer to that question may not emerge as forcefully as Gallo would like, neither does it emerge as forcefully as the General Counsel and UFW would like. With but few exceptions, involving some pre-Act conduct and Luis Salado's conduct at the Casa Campasina, Gallo's representatives did not directly foster the Teamster conduct in issue.

For the foregoing reasons I conclude that Respondent Gallo should not be held directly liable for the conduct of agents of the Teamsters Union. By seeking dismissal of the complaint's allegations against the Teamsters Union, the General Counsel and UFW have lost the opportunity to place liability on the entity that may have been responsible for the Teamster agents' conduct namely, the Teamsters Union. All that Gallo can be faulted for herein is the unlawful assistance and support given to the Teamsters Union.

6. Gallo's Responsibility For The Conduct Of Its Supervisors And Foremen:

Not much question can exist that Respondent Gallo must bear responsibility for the misconduct engaged, in by such admitted supervisors as Frank Clark, Ruben Castillo, Albert Cardenas, Luis Salado. and Jose Gonzalez. The "test of the employer's responsibility for acts of one of its supervisors is whether 'employees would have just cause to believe that he was acting for and on behalf of the company.'" Oil. Chemical and Atomic Workers v, N.L.R.B., 547 F.2d 575, 585 (C.A.D.C.

1976) (other cites omitted}. Clearly, these supervisors were cloaked by Gallo to act in its behalf, and their actions antagonistic to the UFW's organizational campaign were consistent with Gallo's posture in the election campaign.^{75/} Nor can it be doubted that Gallo must bear responsibility for the conduct of its security guards, whose activities were expressly authorized and ratified by responsible management officials .

A more serious question arises over Gallo's responsibility for the conduct of certain foremen, such as Jorge Fegundas, Arthur Oliviera, Jose Silvera, and Salvador Salado. Respondent Gallo denies that these persons, referred to by Gallo as "working foremen" and covered at the time by the Teamsters' contract, were supervisors within the meaning of Section 1140.4(j) of the Act. Respondent Gallo emphasizes that its "working foremen" possess no power to hire, fire, or discipline, and no authority to responsibly direct the work of others.

The following characteristics regarding the foremen emerge with clarity. Generally, the foremen do not perform field work but review or check the work of others, although they may gather grapes left on the ground or vines by the harvest crew or replace a worker on a picking aid while the worker is temporarily absent. The foreman tells a worker or a crew to repick a row if he is not satisfied with the picking's thoroughness.^{76/} The foreman also directs the gondola crews into the rows they are to pick, but this routine assignment is made in an order set by the supervisor. The foreman takes attendance in the morning and assists in keeping the tractors in line when they pass through the scale operation and are parked in the evening. They are paid an hourly rate that may not exceed certain work classifications or the harvest piece-rate, but they are given free housing by Gallo on its ranches. The foremen are assigned small pickups by Gallo and also drive workers around in Gallo buses. One of their chief responsibilities is to translate work orders from the supervisors and pass them along to the workers. When the foremen worked on Gallo's picking aids, they

^{75/}Without serious doubt, Gallo workers would have viewed Luis Salado's conduct at the Casa Campasina as being in behalf of Gallo. Since his presence there had no legitimate purpose, his conduct cannot be condoned. See *Oil and Chemical Workers*, supra, 547 F.2d at 586 (and cases cited). It was not necessary that Gallo expressly authorize or ratify his conduct, 'although 'it appears that Gallo did ratify it by doing nothing to disassociate itself from it.

^{76/}One foreman, Gabriel Moreno, claimed that he only directs repicking after consulting with a supervisor. His testimony, however, was not particularly credible as a result of his overly obvious effort to conform his testimony to Gallo's defenses. After being cautioned on several occasions to directly answer the question posed he tellingly indicated, "Well, in my feeling is that I feel better if I say an explanation because when I say yes or no, inside me I don't feel right." It seems highly improbable that Moreno or any other foreman would bother a supervisor over whether too many grapes were left in a row by the pickers, particularly when there was one or at most two supervisors overseeing the work of approximately 160 harvesters.

occasionally signed (along with supervisors) the load tickets. They also assist in passing out employee paychecks.

It is not a clear matter that Gallo foremen acted as statutory supervisors in 1975. Although their duties and work were similar to those found to be supervisory in Anderson Farms Co., 3 ALRB No. 67, pp. 13-14 (1977), their responsibility over other employees was relatively insubstantial. The evidence reveals no power to hire and fire, and their role in disciplinary actions appears limited to informing a supervisor of a worker's deficiencies. Their assignment of work was routine and was generally directed by the supervisors.

On the other hand, Gallo's foremen are a class of worker separate and above from the rank-and-file employees and are closely identified with Gallo supervisors by their translating work orders, attendance-taking, free company housing, their checking or observing of others' work, their non-performance of field work, their use of company vehicles, and their help in distributing paychecks. As has been noted, an employer may be held responsible for the conduct of a person he puts in "a position whereby employees would have just cause to believe that he was acting for and on behalf of the company. ..." N.L.R.B. v. Texas Independent Oil Co., Inc., 232 F.2d 447, 4-50 (C.A. 9, 1956). In any number of cases an employer has been held liable for the conduct of persons having similar responsibility and authority as possessed by the Gallo foremen. See, e.g., Broyhill Co., 210 NLRB 288 (1974), affirmed, 514 F.2d 655 (C.A. 8, 1975); Huberta Coal Co., Inc., 168 NLRB 122 (1967), affirmed, 408 F.2d 793 (C.A. 6, 1969); Proctor-Silex Corp., 159 NLRB 598 (1966). This employer responsibility is particularly apropos where the persons whose status is in issue engage in anti-union conduct that emulates the example set by their management. International Association of Machinists, supra, 311 U.S. at 80-81.

Upon the foregoing considerations I reach the conclusion that Respondent Gallo must bear responsibility for the conduct of its foremen, particularly of Jorge Fegundas, Arthur Oliviera, Jose Silvera, and Salvador Salado. Indeed, their activities for which Gallo is here held responsible, their surveillance of UFW activities or their distribution of Teamster campaign materials, were consistent with Gallo's general policy of surveillance and its acquiescence in the posting of Teamster campaign material on its property and equipment. Surely the consistent conduct of these foremen would be seen by employees as conduct for or in behalf of Gallo management.

VI. The UFW's Complaints Regarding The Election

The UFW has raised several additional objections to the September 10 election based on certain conduct specifically related to or taking place on the election day. These objections will be discussed individually.

First, the UFW strongly protests its inability to use Steve Swanson as one of its election observers. According to both Delores Huerta and Steven Burton, who attended the pre-election conference on behalf of the UFW, an understanding was openly reached with the Board agent conducting the election that names of observers could be

submitted up to the morning of the election. Robert Dietrick, attending the conference on behalf of Gallo, denied that any such agreement existed and claimed instead that the Board agent insisted that all parties submit the names of their observers at the conference. Such a name list was submitted by each of the parties during the pre-election conference, and when the UFW sought to have Swanson act as observer on the morning of September 10 the Board agent rejected the attempt due to objections from the Teamsters Union and Gallo.

Although the UFW may have considered it important to have Swanson as one of its observers and believed it had the right to add him as one on election day,^{77/} the Board agent's refusal to let him serve as an observer cannot be said to have interfered with the election., For one thing, a serious question exists regarding the UFW's understanding that it could hold back divulging Swanson's identity until election day. Each of the other election parties, as did even the UFW, supplied a list of its observers well in advance of the election so that the other parties could make their objections. For another thing, the Board agent apparently acted in conformity with Section 20350 (b) of the Board's Emergency Regulations, which provided, inter alia, that "(e)ach party may be represented by pre-designated observers" Thus, the pre-designation insisted upon by the Board's agent seems appropriate. Finally, the UFW made no substantial effort to establish to what degree it was prejudiced by Swanson's inability to serve. Thus, while Tiofilo Gonzalez and Jesus Garcia, two of the UFW's three observers, claimed to have difficulties with reading and pronouncing "Anglo" names, Gonzalez could only say that he was unable to challenge one voter because of it and Garcia could only pinpoint two or three instances when he had difficulty. Accordingly, it does not appear that the absence of an English-speaking observer could have affected the outcome of the rather lopsided election margin.^{78/}

Second, the UFW complains of campaigning in the polling area. As earlier noted, Jose Silvera, a foreman, distributed Teamster buttons in the polling area, where employees waited to vote. Also, Yulanda Luga (Aldama) and her friend, Ms. Galvan, both bedecked in Teamster buttons, were observed by Salvador Prado and Manuel Hernandez standing in the polling area over a substantial time talking to various employees. Neither Prado nor Hernandez could say, however, that Luga and Galvan were talking to those waiting to vote or to those who had completed their voting. From Prado's credible testimony it can be inferred

^{77/}Swanson was the only English-speaking observer who the UFW had and was, therefore, considered important in order to challenge potential "Anglo" voters. That the UFW representatives genuinely believed that Swanson could be used seems clear from the fact that he received UFW instructions along with its other observers and was prepared to serve as an observer the morning of September 10. Swanson had requested the UFW to keep his identity as an observer secret for as long as it could, and that is the apparent reason why his name was not submitted during the pre-election conference.

^{78/}Nor can it be said that the UFW was prejudiced by the voting of Anglo security guards, since their votes apparently were challenged in toto by one of the Board agents.

that Luga was campaigning for the Teamsters, but the record discloses that she possessed no supervisory position with Gallo and fails to establish just how long she actually discussed the election with workers . Given the vagueness of circumstances surrounding the conduct of Silvera and Luga in the polling area, and "absent a showing that any conversations (they) . . . might have had with prospective voters affected the outcome of this election," it would be inappropriate to set aside the election due to their conduct. Superior Farming Co., 3 ALRB No, 35, pp. 11-12 (1977).

The final claim made by the UFW as to the election relates to the conduct of Johnny Macias, Bill Powers, and Imelda Lopez. According to the credible testimony of Frank Ortiz, corroborated in part by Bill Powers, early on election day these three Teamster agents arrived at Westside and Griffith, where Ortiz, Barbara Macri and Lupe Murghia were leafletting workers regarding the election; and the Teamsters proceeded to yell at the UFW organizers and at the workers who were driving into the Gallo ranch. The Teamsters also blocked the UFW's efforts to distribute leaflets to passing workers. While this conduct on the part of the Teamsters standing alone would be insufficient as a reason for setting aside the election, this conduct should, not be excluded from the other Teamster conduct established in the record.

This Decision is sufficiently replete with instances where Teamster agents threatened workers regarding their support for the UFW and where Teamster agents (representing an incumbent union) harassed, photographed, and openly took down the license numbers of UFW organizers. The Teamsters' conduct, which must surely have blunted the employees' freedom of choice at the election, coupled with Gallo's similar and substantial unfair labor practices clearly disturbed the appropriate atmosphere in which to conduct a fair election. Given the conduct of Gallo and the Teamsters Union, it simply cannot be said that Gallo's workers could have exercised the election rights guaranteed them by virtue of the Act and, therefore, the election should be set aside.

VII. The Discharge Of Jesus Garcia And Lorenzo Perez

A. The Facts Surrounding The Discharges.

Substantial conflict in the testimony exists with respect to the discharges of Jesus Garcia and Lorenzo Perez, two of Gallo's field workers-. Some background facts, however, are not in dispute.

Jesus Garcia, also called "Chuy," was employed by Gallo as a full-time worker since December, 1974. As the September 10, 1975, election approached Garcia became an active supporter of the UFW. Approximately a month before the election he attended the UFW's convention in Fresno and was, as far as he knew, the only Gallo worker to so attend. He thereafter campaigned among his fellow employees in behalf of the UFW. As earlier noted, Garcia publicly disagreed with Johnny Macias in front of some 160 workers (including Luis Salado) as Macias spoke one morning from a tractor top to the employees in behalf of the Teamsters. Garcia argued back to Macias that it was not the Teamsters Union that could take credit for enacting the new law under which

employees could vote for unions and argued back that the new law would not allow the UFW to discharge workers if the UFW won the Gallo election as Macias told, the gathered workers. Garcia wore a UFW button on several occasions at work before the election, and on election day he served as an observer for the UFW.^{79/} Of course, the Gallo supervisors involved with Garcia's discharge, such as Jon Yori, Luis Salado, and Ruben Castillo, knew of Garcia's role as a UFW observer.^{80/}

Lorenzo Perez first worked temporarily for Gallo in the 1974 grape harvest; he was rehired in March of 1975 as a steady employee. Mr. Perez testified that he spoke to fellow employees at both the Snelling and Livingston Ranches about supporting the UFW. He had several disagreements over the two unions with a fellow crew member named Fidel Mercado, who was a Teamster supporter and who eventually served as a Teamster election observer. According to Perez, Mercado on occasion called him a "Chavista" and, on one occasion after election, called him a "Chavista" in front of a high-ranking Anglo supervisor who was walking by, although Perez could not identify the supervisor or indicate that the supervisor paid any attention to Mercado's remark. Perez also attended a UFW meeting in Merced during the summer of 1975, but no other Gallo worker was present.^{81/}

^{79/}Two incidents regarding Garcia's duty as an observer should be noted. One, at the conclusion of the voting, while the parties were gathering for the vote count, Johnny Macias pointedly asked Garcia his name. Second, during the election the UFW observers (Garcia and Tiofilo Gonzalez) challenged Yulanda Luga's vote, in response to which she derogatorily referred to Garcia as a "carbon" and told Gonzalez that he would pay for it.

^{80/}Mr. Yori initially testified that he did not know that Garcia was a UFW election observer. The declaration he signed shortly after Garcia's discharge, however, indicated he did know of it. After being confronted with the apparent inconsistency between his testimony and his sworn declaration, Yori then indicated he did not remember that Garcia was an election observer.

^{81/}Those Gallo supervisors involved with Perez's discharge all denied having any knowledge of his support for the UFW. On the other hand, Yulanda Luga (Aldama), who appeared for Respondent Gallo as a witness in respect to the Perez and Garcia discharges, admitted her knowledge of Perez's UFW support, thus indicating that his support was known among the workers. Although Luga was neither a supervisor nor foreman with Gallo, she had close ties with both the Teamsters Union, as she was a close associate of Bill Powers and Imelda Lopez, and Gallo, as she was no stranger to Ruben Castillo, Frank Clark, and Robert Dietrick. Also, she was given by Gallo a position during the summer of 1975 which involved her (somewhat distinctively) in driving a supervisor's pickup truck and transporting equipment to the field. She also lived in Gallo housing. In view of Ms. Luga's incredible testimony against Perez and Garcia (see infra, p. 78), it appears that she may well have played some role in the two discharges due to her strong antipathy against the UFW, as is well established in the record.

Perez and Garcia were both gondola pickers when they were discharged. On September 24 their crews were among those working in the Smith-Stefani field. That morning and the early part of the afternoon the crews were working in the field south of the irrigation canal, which snaked in a east-west direction across the Smith portion of the field. At approximately 1:00 or 1:30 p.m. that afternoon the crews began to move north of the canal, where the trouble began.

After most of the 30 to 40 gondola crews had relocated themselves north of the canal, the workers began yelling. No serious dispute in the testimony exists concerning the fact that many, if not most, of those working on foot among the grape vines began yelling that they should stop picking, that the grapes were not good, that they were not getting paid enough for the grapes, and that the workers should leave. This yelling lasted approximately five to 10 minutes and was accompanied by the increased revving of tractor engines. After the yelling had gone on for several moments, Perez and Garcia climbed on their respective tractors, standing on them so as to make themselves visible above the vines.^{82/}

Both Perez and Garcia insisted in their testimony that they neither yelled from atop their tractors nor waved with their arms. Both insisted that they stood on their tractors after the yelling had gone on to see whether or not their fellow workers were actually leaving the field. Mr. Garcia acknowledged yelling several times that they should leave the field while he was still on foot picking grapes, before he mounted the tractor.

Several witnesses called by Respondent Gallo claimed that Perez and Garcia yelled while standing on their tractors. To a significant extent, however, the testimony of this latter group of witnesses is questionable. For example, Jon Yori, who drove into the field while the yelling went on, claimed that he saw and heard Perez and Garcia standing above the vines yelling and waving their arms. Yori claimed that he made this observation for some two to four minutes, while he drove down Middle Avenue and until he parked his pickup truck and spoke with Gabriel Moreno in the avenue. Yori also claimed that he personally recognized both Perez and Garcia, although they were standing with their backs (or at least their sides) toward Yori, and that he knew each employee by name (though in his testimony he referred to Perez as "Mr. Lorenzo" and described him as wearing a scarf while it was apparently Garcia who had the scarf). Moreno, on the other hand, testified that when he saw Yori in Middle Avenue, Yori asked him who was standing on

^{82/}One of the foremen working north of the canal, Gabriel Moreno, admitted somewhat begrudgingly that most or nearly everyone in the field was yelling about leaving. He also indicated that it was two or three minutes after the yelling began that Perez and Garcia mounted their tractors. Moreno's testimony corroborates the chronology of events as described by the two discharges. Luis Salado indicated he heard the yelling while first walking down a vine row toward Middle Avenue, walking some 300 to 350 feet before he mounted the berm (a raised portion of dirt eight to 10 inches high that runs underneath the vines) and was able to see Perez and Garcia above the vines.

the tractors and what was going on. Although Yori denied knowing at the time that other employees were yelling, Moreno testified he told Yori "the people" were yelling about the grapes before Yori asked who was

on the tractors; Moreno also indicated that at the time the yelling was "all over the place." Similarly, Luis Salado, who eventually walked some 600 feet down a row before he met Yori in Middle Avenue, also indicated that several workers were yelling and that it continued even up through the time he spoke with Yori.^{83/} Also in apparent conflict with Yori's testimony, Moreno indicated that Perez and Garcia dismounted their tractors at the point in time when Moreno first approached Yori in Middle Avenue, before Salado appeared in the avenue.

Lorenzo Perez's recollection of the events seriously conflicts with that of Yori, Salado, and Moreno. Perez struck me as an eminently credible witness, whose demeanor was extremely sincere and whose answers contained no exaggeration or effort to make his discharge claim the stronger. He readily answered questions in such a way that could not possibly benefit his cause. Furthermore, he appeared to possess a keen intellect capable of precise recollection.

According to Perez's credible testimony, he mounted his tractor after the yelling had stopped. When he rose above the vines he saw another man on his tractor some 30 to 35 rows away, who did not appear to be yelling.^{84/} Perez recalled that when he mounted his tractor, Moreno was in the area and told him to get down and that he should not be yelling. Perez then dismounted the tractor and told Moreno he was not yelling, that he was only on the tractor to see if other workers were leaving the field. Perez's recollection that Moreno confronted him while Perez was still atop his tractor seems corroborated by the testimony of Ruben Castillo, who twice described Moreno as telling him in the field that he (Moreno) had heard "a lot of people yelling" and "he had (then, when walking around,) run into Garcia and Perez on top of the tractors."

The most dubious of all testimony concerning September 24 came from Yulanda Luga (Aldama). Luga claimed she was in the field when Perez and Garcia were yelling along with some 20 to 30 others from

^{83/}Luis Salado, like Yori, was to the back or side of Perez and Garcia and could not see their faces or their actual yelling. Indeed, Salado indicated he could not recall even seeing Perez or Garcia from where he stood once he reached Yori in Middle Avenue. Nor is it easy to accept Salado's claim that he could by ear recognize and identify the voices of Perez and Garcia, two of some 150 workers in the field. As will be recalled, Salado's testimony cannot be given much credit.

^{84/}Perez and Garcia were not acquainted with each other on September 24. Garcia indicated that when he stood on his tractor he saw only Sergio Alaniz above the vines, who was two rows away from him at the time. Witnesses such as Yori, Salado, and Moreno all placed Perez and Garcia only two rows apart from one another. Thus, in view of Perez's otherwise credible testimony, it appears that it may have been Alaniz who was seen above the vines along with Garcia and not Perez at all, at least not until later.

atop their tractors, and that both she and Garcia's sister, Maria Martinez, yelled at Garcia to get down and stop his yelling. But, Gallo's own harvest records for September 24 indicate that Luga checked through the scales for the last time at 12:15 p.m., long before the events in question occurred, and that Maria Martinez was not even working with the gondola crews on September 24 in the Smith-Stefani field. Martinez confirmed the fact she was not present in that field, as she worked only with the picking aid crews in the 1975 harvest. Luga's testimony regarding Perez and Garcia appears to be nothing short of complete fabrication. Likewise, her claim that UFW organizer Pam Whalen threatened to harm her children if Luga did not support the UFW was both absurd on its face and credibly denied by Ms. Whalen. In short, Luga's testimony not only fails to corroborate the facts cited by Respondent Gallo for discharging Perez and Garcia, but her testimony contains so much fabrication and distortion as to cast doubt on the other witnesses' corresponding testimony.^{85/}

In any event, Jon Yori, after speaking with Moreno and Salado, radioed for Ruben Castillo to come to the field. Castillo arrived shortly afterward, interviewed Yori, Salado, and Moreno, and then walked among the crews, asking various workers about the commotion that had taken place.

Two significant features emerge in respect to Castillo's field investigation. First, Yori's own description of his initial conversation with Castillo appears so overstrained as to raise suspicion regarding the discharges. Thus, Yori, a field supervisor having virtually no labor relations involvement, testified that when Castillo arrived in the field, he immediately told Castillo that "as far as I'm concerned, this is a serious enough matter to discharge these two men,

^{85/}Jose Camera was also called as a witness by Gallo to verify that Jesus Garcia stood on his tractor and yelled for the others to stop work. Camera is currently a Gallo employee and lives in one of Gallo's housing projects. Although Camera could not identify Jesus Garcia, Gallo's harvest records indicate that he worked in Garcia's crew on September 24.

Camera's demeanor as a witness was worthy of credit, and he appeared to describe what he recalled of the incident. On the other hand, close to three years had passed between the incident in question and the first time Camera was even questioned or interviewed about it. Thus, some doubt exists in my mind as to whether Camera could accurately and independently recall an incident involving an employee (Garcia) who he did not know at the time and who he never saw again and over which he never fixed his memory through notes or interrogation for some three years. Nor was Camera's testimony so absolutely persuasive as to destroy Jesus Garcia's credibility, as Garcia appeared as a credible witness as well. Indeed, according to Ruben Castillo, when he interviewed Camera individually after the yelling incident Camera then told Castillo he had not seen or heard anything.

according to Section 12, Section 7."86/ Yori, however, ameliorated his surprising advice to Castillo in response to subsequent questioning by admitting that he did not cite or quote the contractual provisions to Castillo, although Yori claimed he nonetheless told Castillo he considered the matter "an economic action against the Company. . . ." Yori claimed he then cautioned Castillo that "a discharge is a very serious thing" and told the personnel director that "before rushing into this, I'd like you to check out the whole thing too and give me your opinion."

The second noteworthy feature of Castillo's investigation relates to his confrontation with Jesus Garcia and Lorenzo Perez. Castillo insisted that when he first went to Garcia's crew to speak with Garcia, Lorenzo Perez walked over to the same row that Garcia was in, and that Castillo then spoke to Perez some 15 to 20 vines (100 to 140 feet) away from Garcia. Perez and Garcia, however, denied that they were in either the same row or area when Castillo spoke to their respective crews. In view of the fact that Garcia and Perez were unacquainted with one another and that it is more probable that they were a substantial distance from one another when they stood on their respective tractors, one can only speculate as to why Castillo recalled them in the same row as one another when he spoke to them; again the record suggests that Perez may have been confused with another worker.

During their field interrogations by Castillo, both Perez and Garcia admitted being on top of their tractors but denied yelling. Both they and Jose Camera recalled that Castillo cautioned the workers not to be disturbing the other workers in the future. Perez and Garcia ^recalled that Castillo warned them that the next time they yelled to stop work they would be discharged.

Castillo completed his field investigation by talking to other employees and then returned to speak again with Yori and Salado. Yori and Salado were writing out statements concerning the event, but according to Castillo, "All they did was just write down: Jose (sic) Garcia was standing on a tractor, and I saw him, and that's it." Castillo, himself, claimed he took notes of what Yori, Salado, and Moreno told him (though he took no notes of what any workers told him) and he then went to his office and prepared typewritten statements for them to sign. Later, Castillo returned to the field and had Yori and Salado sign the typed statements, although (contrary to Castillo's testimony) Moreno testified he did not speak to Castillo that day and did

86/Yori's testimonial reference was to the Teamsters' contract. Section 7 of that contract provided:

The Union agrees that there shall be no strikes, slowdowns, job or economic action, or other interference with the conduct of the Company's business during the term of this Agreement. * * * *

And, Section 12 provided that "just cause" for discipline or discharge would include "soliciting other employees to violate rules, regulations or work instructions; (or) instigating, participating in or giving leadership to any activity prohibited under Section 7."

not sign the statement prepared by Castillo until the following day.

After Castillo's two field visits he discussed the incident with Robert Dietrick, and it was determined that Perez and Garcia would be discharged. Perez was notified of his discharge that afternoon and Garcia (who refused to go to Castillo's office that day) was discharged the following morning. Their discharge notices reflected the following as the reason:

Discharged. Soliciting other employees to violate rules, regulations or work instructions; instigating, participating in or giving leadership to any activity prohibited under Section 7. Conducted job or economic action and otherwise interfering with the conduct of the Company's business.

Mr. Perez made several attempts to retain his job with Gallo. When he initially met with Castillo in the Employment Office late that afternoon he pleaded to keep his job and denied having participated in the yelling. He made a similar plea to Imelda Lopez, when she arrived to participate in the discharge interview.

Perez's most significant effort to keep his job, however, took place on the following morning. Initially he spoke with Bill Powers in the fields, then he went to the Employment Office where he found Luis Salado and asked for his help in retaining his job. Then, after also speaking with Jesus Garcia by the Employment Office, Perez returned to the field where his crew was working and where he found Castillo, Powers, and Imelda Lopez.

As Perez spoke to Castillo about retaining his job, Powers and Lopez came up. Lopez spoke to Castillo in English, which Perez could not understand, and then told Perez (in Spanish) to return the following Saturday for work. Castillo, however, interrupted and told Perez that he should return on Saturday to see if he could get his job back. Perez told them he could not wait until Saturday because he needed a job immediately. Imelda Lopez then told him "I had to wait, that they couldn't give me the job right away because if they gave it to me, they would also have to give it to Chuy (Jesus)." When Perez protested that he was asking for his job on good terms, which Garcia was not doing, Lopez told him, "no matter how Chuy does it, he will no longer work here. He will never work here." Perez then asked Castillo if that meant he did not have work there, and Castillo responded, "For this year, no. Maybe for next year."87/

87/Both Perez and Garcia submitted written statements to Bill Powers in order that grievances could be filed regarding their discharges. Grievances were filed for them by the Teamsters Union, but they were never pursued or processed through the contractual grievance procedures. It is noteworthy that contrary to Gallo's records and contrary to Ruben Castillo's testimony, Bill Powers baldly asserted that he processed the two grievances through the three contractual grievance steps and that the grievances were dropped only when it came time to pursue them to the fourth step, arbitration. The --(continued)

B. Analysis And Conclusions.

The principles which generally govern the fact-finder's inquiry into whether Section 1153 (c) of the Act is violated by an employee's discharge have been repeatedly noted in case precedent and are not the subject of much dispute. Broadly speaking, those principles can be stated as follows. First,

In controversies involving employee discharges or suspensions, the motive of the employer is the controlling factor. * * * * Absent a showing of anti-union motivation, an employer may discharge or suspend an employee without running afoul of the fair labor laws for a good reason, a bad reason, or no reason at all. * * * * If the specific employee happens not only to break a Company regulation but also to evince a pro-Union sentiment, that coincidence alone is not sufficient to destroy the just cause for his discharge or suspension. * * * * The Board must sustain its burden of showing evidence on the record as a whole which establishes a reasonable inference of causal connection between the employer's anti-union motivation and the employee's discharge.

CN.L.R.B. v. Mueller Brass Co.. 509 F.2d 704, 711 (C.A. 5, 1975)0

And, as the Board has noted,

. . . the existence of "independent grounds" for the discharge of an employee does not preclude a finding that the motivation for the discharge arose in part from the employer's anti-union animus. * * * * (W)e disavow any implication that a discriminatee must be "very active" in union affairs before the employer's knowledge may be inferred. Such knowledge may be inferred as to any union adherent from the record as a whole.

(As-H-Ne Farms. 3 ALRB No. 53, p. 2 (1977).)88/

87/(continued)--record amply reflects, however, that the Teamsters Union never processed the grievances through any step, except for their initial submission.

88/Although both the General Counsel and the UFW argue that Gallo's discharge of Perez and Garcia should also be considered a violation of Section 1153(a), in view of the protected, concerted activity for which they were purportedly discharged (i.e., a protest over working conditions), I do not believe that Section 1153(a) -- (continued)

Numerous factual considerations come into play when considering whether Section 1153 (c) was violated by Respondent Gallo when it discharged Perez and Garcia. We need not review the extensive evidence of Gallo's antipathy toward and unlawful campaign against the UFW, nor its clear favoritism and assistance in behalf of the Teamsters Union. Gallo's anti-UFW attitude is amply documented and serves as the starting point in testing its motive for discharging the two pro-UFW workers.

Other salient factual considerations are as follow. First, it is uncontroverted that Perez and Garcia, at worst, were among many other employees in the Smith-Stefani field engaging in a work protest over the poor quality of grapes. Yet, they were singled out for discharge. Second, the seriousness of the work protest is substantially diluted by the fact that none of the workers actually left their jobs. For a period of some five minutes or so, the harvesters engaged in a general shouting protest that did not result in any work stoppage. Work continued after the shouting as it did before. That even Respondent Gallo's supervisors considered the shout-fest as relatively insignificant at the time can be seen from the return to work by Salado and Moreno, as soon as the shouting ended, and the fact that Ruben Castillo issued only warnings to the workers that they would be discharged if it happened again in the future.

In addition, Gallo's treatment of Perez and Garcia is oddly inconsistent with its background. Thus, when the Teamsters Union removed a substantial portion of Gallo's field workers to participate in a political rally back in May, Gallo quietly acquiesced to that work interference. Clearly, the "work stoppage" resulting from the Teamsters' rally, where a majority of Gallo's workers absented themselves, was far more serious from the standpoint of Gallo's operations than the shouting on September 24. Nor did Gallo respond to the various

88/(continued)--can serve as a basis for consideration in this case. As earlier noted, the Teamsters' contract contained a "no strike" clause that seemingly waived the employees' right to engage in the type of work protest or incipient work stoppage that took place on September 24. It has been long held that a union may waive such otherwise protected employee activity in a duly executed collective bargaining agreement. See, e.g., Mastro Plastics Corp.. 103 NLRB No. 51 (1953); Joseph Dyson & Sons. Inc.. 72 NLRB 445; Scullin-Steel Co., 65 NLRB 1294.

Although the Teamsters' contract with Gallo was entered into prior to the Act and even though that contract may have resulted from conduct now considered unlawful, the Act clearly did not vitiate the effectiveness of that contract. See Section 1.5. Furthermore, the record indicates that the then-existing employees voted in favor of the initial Teamsters' contract and that Gallo's employees have been regularly given copies of the contract ever since. Under these circumstances it would be improper to ignore the efficacy of the Teamsters' contract and, thus, ignore the fact that it effectively waived the right of Gallo employees to engage in "strikes, slowdowns, job or economic action, or other interference with the conduct of the Company's business. ..."

Teamster organizing activities in August and September that interfered with the field work. And, it is undisputed that Gallo's harvest workers could leave work at any time during the day without penalty, as they were paid on a piece-rate basis.

Coupled with Gallo's quick response to the inchoate work disruption on September 24 is the strong anti-UFW attitude manifested by various Teamster representatives and supporters, who were closely connected with such supervisors as Ruben Castillo and Luis Salado. It is fair to infer from the evidence that various Teamsters, such as Johnny Macias, Bill Powers, and Imelda Lopez, were well aware that not only Jesus Garcia but Lorenzo Perez were both strong UFW supporters. Various Teamster representatives and supporters, such as Macias and Yulanda Luga (Aldama), threatened openly that UFW activists or supporters would be discharged or otherwise dealt with aggressively. Coincidentally, Powers, Lopez, and Luga are all somehow oddly connected with the discharges and/or their justification.

Of course, the discharges of Perez and Garcia occurred only two weeks after the hotly contested employee election was held, and while (because of the substantial number of challenged ballots cast by ex-Gallo employees who must have been considered as UFW sympathizers) the election result was still in doubt. We have two abrupt discharges of UFW supporters, one of them having served openly as an observer, after they had worked satisfactorily for Gallo each for over half a year.^{89/}

Also, we have Lorenzo Perez's credible testimony that directly links his discharge to Jesus Garcia's, with the attitude of the Teamsters Union, and with Ruben Castillo's participation in the discharge. Just one day after the discharges we find a Teamster agent, Imelda Lopez, telling Perez in front of Bill Powers and Gallo's personnel director that Perez could not return to work because it would mean that Garcia might return and that result "they" did not want. From the subtle implication of Lopez's statement, acquiesced in by Castillo, it is fair to conclude, one, that Garcia's discharge was likely motivated in order to eliminate a bothersome and open UFW advocate, and, two, that Perez's discharge resulted in order to give Garcia's discharge greater credibility. That the Teamsters Union made virtually no effort to assist Perez and Garcia in challenging their discharges was certainly consistent with Lopez's statement to Perez. And that Respondent Gallo was antagonistic toward the UFW and consistently acted to assist the Teamsters Union is persuasive evidence of its discharge motives.

Finally, it is difficult to accept the seriousness of Garcia's and Perez's conduct on September 24-, as was portrayed by the elastic testimony of Jon Yori. For one thing, the evidence persuades me

^{89/}Ruben Castillo, however, sought to claim that Garcia had been warned only two days before that he should not be encouraging fellow workers to engage in a work stoppage. I do not credit Castillo's uncorroborated and contracted testimony concerning that purported September 22 warning, nor his undated written report concerning the incident. Indeed, Castillo's written report of the purported incident is even inconsistent with his testimony concerning it.

that neither Garcia nor Perez sought to incite a work stoppage when standing on their tractors, and I am further convinced that neither Yori nor Salado could actually identify them as instigators of the shouting. For another thing, common sense suggests that Garcia's and Perez's conduct could hardly be distinguished from that of many other workers, for it is clear that the other workers who remained on foot shouting and picking could not have observed Perez and Garcia above the vines or seen them exhorting others to engage in a work stoppage. In order to have seen Perez and Garcia on their tractors one had to have either been in their particular rows (or in the next one perhaps) or, as Luis Salado had to, raise his six-foot height above the vines by standing on a berm and grappling with the vine wires and bushy shrubbery.

I am persuaded by all the foregoing considerations that the discharges of Jesus Garcia and Lorenzo Perez resulted either from their active support of the UFW or because of Garcia's active support. The circumstantial facts surrounding their discharges form a mosaic of evidence that their discharges were in violation of Section 1153 (c) of the Act, and I so find. I conclude that Castillo and others seized on the events of September 24- in an effort to eliminate one of the UFW's most open advocates, Jesus Garcia, and a fellow sympathizer. See *Wonder State Mfg. Co. v. N.L.R.B.*, 331 F.2d 737 (C.A. 6, 1964).

REMEDY

Having found that Respondent Gallo engaged in certain unfair labor practices within the meaning of Sections 1153 (a) , (b) , and (c) of the Act, I recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the purposes of the Act. Having found that Gallo unlawfully discharged two employees, conduct which strikes at the heart of the Act, I also recommend that Respondent Gallo be ordered to cease and desist from infringing in any manner upon the rights guaranteed to employees by Section 1152 of the Act. The totality of Respondent Gallo's conduct and its serious infringement on the rights of its employees warrant a broad proscription against further violations of the Act.

Most of the affirmative action I am recommending that Gallo take to remedy its unlawful conduct, such as notice-posting and distribution, record-keeping, and the like, are remedial features more-or-less standard in our case law. The General Counsel and the UFW, however, urge the application of other remedies that might be characterized as more unusual, whose nature requires some discussion.

A. The Bargaining Order.

The UFW (not the General Counsel) strenuously urges that I order Respondent Gallo to recognize and bargain with the UFW as the representative of Gallo's employees. The UFW argues that only a bargaining order will truly effectuate the purposes of the Act in view of Gallo's numerous violations.^{90/}

^{90/}It should be noted that throughout the evidentiary hearing, the UFW sought to introduce evidence that it once represented a majority of Gallo's workers, thus indicating the -- (continued)

It can be assumed that under the NLRA two types of situations may give rise to the remedy of a bargaining order. As the Supreme Court indicated with approval in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 613-611 (1969), a bargaining order may be appropriate

. . . without need of inquiry into majority status (of the union) on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."

(Cite omitted.)

Assuming arguendo that our Board has authority to issue a remedial bargaining order as does the NLKB, an assumption placed into serious doubt by Section 1153(f) which, unlike the NLRA, makes it unlawful to recognize, bargain with, or sign a contract with labor organizations not certified pursuant to the Act, the question remains as to whether Respondent Gallo's conduct was so egregious, so widespread, so destructive of its employees' rights, as to warrant a bargaining order as a necessarily appropriate remedy.^{91/}

^{90/}(continued)--appropriateness of a bargaining order. In response to objections raised by both Respondent Gallo and the General Counsel in respect to that evidence of majority support, I ruled that such evidence was inadmissible.

The UFW's preferred evidence went to its purported majority status in 1973, before the Teamsters Union contracted with Respondent Gallo. In my view, introduction of such evidence would necessarily have resulted in lengthy litigation over what happened to that majority status in 1973 and over Gallo's involvement in its purported dissipation. Thus, a serious portion of the hearing would have concentrated on a period of time prior to the Act's effectiveness and, perhaps, would have required consideration of whether Gallo and the Teamsters Union unlawfully interfered with the UFW's majority support, under principles of law not even then on the horizon. It would have been inappropriate, I believe, to have focused attention on the UFW's purported majority support at a point in time so long predating the Act.

^{91/}Of course, *Gissel* also indicated appropriateness of the bargaining order remedy "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." *Gissel*, supra. 395 U.S. at 614. The remedy in these lesser circumstances, however, depends on a finding that the labor organization had majority support among employees and that such support eroded as a result of the employer's unfair labor practices. See, e.g., *Steel-Fab, Inc.* 212 NLRB 363 (1974) .

(continued)

While it is my view that Respondent Gallo engaged in serious unfair labor practices for which a strong remedy is appropriate, I do not believe that its conduct can be regarded as so exceptional, outrageous, or pervasive as to require imposition of a bargaining order, even in the event such a remedy is contemplated by the Act. In addition to its unlawful conduct, Gallo did permit the UFW to contact workers both in its housing areas and its fields. The amount of UFW organizing that occurred was substantial, even though Respondent Gallo may have legally excluded union organizers entirely from its property. See Jack G. Zaninovich. 4 ALRB No. 82 (1978). Furthermore, Gallo's unfair labor practices seem of the nature that can be remedied without resort to a bargaining order. And finally, a bargaining order may not truly reflect the desires of Gallo's employees which our Act should endeavor to achieve, for in no small part those employees accepted the Teamsters Union when it first became their collective bargaining representative and again in the 1975 election. In sum, I do not believe the circumstances of this case warrant imposition of a bargaining order even if permissible under the Act, when--at best--the UFW's majority support was lost some two years prior to the Act and when Gallo's misconduct was not so serious and pervasive as to make the bargaining remedy the only device available to eliminate the consequences of that misconduct.

B. Increased Access.

Both the General Counsel and UFW urge that the UFW be granted additional access to Gallo's workers than is allowed for by the Board's Access Rule. In view of the nature of Respondent Gallo's unlawful conduct, I believe that some additional access is warranted. See Belridge Farms. 4 ALRB No. 30 (1978) ,

Several types of expanded access are appropriate to help restore the employees' protected rights, their confidence in the law, and to undo the lingering effects of Gallo's pervasive surveillance and interference. First, during the four 30-day access periods provided by regulation, the UFW shall be permitted twice the number of organizers as is now allowed by the regulation. This moderate increase in the number of organizers is not so substantial as to lead to over-saturation and, yet, it should meaningfully facilitate the UFW's dissipation of Respondent Gallo's misconduct by allowing the UFW to make its presence felt more easily among the workers than the regulation would now allow for. In addition, during these four access periods, Respondent Gallo shall provide the UFW with employee lists on a bi-monthly basis, setting forth the information required by Section 20310 (a)(2) of the Board's regulations. Such lists will be provided by Gallo without regard to the UFW's showing of interest.

Second, Respondent Gallo will allow the UFW and its

91/(continued)--Inasmuch as the UFW's majority support, if it existed in the first place, existed only as of 1973, and inasmuch as neither the UFW nor Gallo was bound by the provisions of the Act at that time, it would be inappropriate to consider the UFW's request for a bargaining order under the standard set forth in the preceding paragraph. A contrary approach would necessitate an evaluation of pre-Act conduct of a kind that our statute does not allow.

representatives to meet with Gallo's employees for two periods of two hours each during work time. The employees will not be required to attend the meetings, but those who do attend shall be paid either their appropriate hourly wage for the time of their attendance or the appropriate piece-rate basis, as determined by the Regional Director. Gallo shall be obliged to provide the UFW space on its property on which to conduct the meetings, as determined by the Regional Director, and shall provide transport for its workers to that site, again without loss of pay. No supervisors or foremen shall be present at the meeting. The UFW may suggest when the meetings shall be held and who shall attend them on its behalf, although the Regional Director shall seek to insure that the meetings do not unduly interfere with work requirements.

Third, Gallo shall make available to the UFW use of its Paisano Park and related facilities, if the UFW wishes to conduct a gathering, social or otherwise, for Gallo's employees. Employees will not be required to attend, and the gathering shall not take place during working hours. The UFW shall determine who will attend the gathering in its behalf.

These foregoing remedies will help readjust the imbalance that Respondent Gallo's unlawful assistance to the Teamsters Union created and help undo Gallo's role in disrupting the Casa Campasina meeting held by the UFW. Further, the presence of UFW representatives meeting with employees during work-time on Gallo's property and at Paisano Park should alleviate any residual fears employees may possess concerning their right to engage in Section 1152 activity.

C. Posting Of Notices.

It is also appropriate that a high-ranking official of Respondent Gallo, acceptable to the Regional Director, publicly read to employees during work-time the Notice to Employees that is attached to this decision.^{92/} The times and places of the reading shall be determined by the Regional Director. After the Notice is read to employees, a Board agent designated by the Regional Director shall be given one hour in which to answer questions raised by the employees. Respondent Gallo shall be responsible to see that its employees are brought together for this meeting. They shall be paid their normal rates for the time spent away from work in order to attend the reading of the Notice and the question-answer period. The Regional Director may determine, if appropriate, that because of peak season employment that such a reading should take place both before and after the peak season commences.

D. Bulletin Boards.

Respondent Gallo shall provide the UFW with space on its

^{92/}I have taken the liberty to expand somewhat the type of Notice normally distributed to employees. I have attempted to more fully inform Gallo's employees of the unlawful conduct in which Gallo engaged and better assure them that such conduct will not recur. Since the Notice is such an important part of our remedial devices, it is strategic that its importance be fully enunciated to employees.

employees bulletin boards at each of its various ranches for the UFW to post organizational notices and the like. The UFW shall be entitled to post such notices during any and all of the four periods it determines to take access in the appropriate calendar year.

The availability of bulletin board space will restore to some extent the ability of the UFW to communicate with workers. It may also help to erase from memory the free use of Gallo vehicles and equipment granted for Teamster propaganda.

E. Confiscation Of Gallo's Photographs.

Gallo shall also be ordered to deliver up to the Regional Director all its photographs, negatives, and developed film that resulted from its photographic surveillance between August 11 and September 3, 1975. Gallo should not be permitted to retain the fruits of its unlawful photographic surveillance, and the record indicates that it would be virtually impossible to determine which film was taken prior to the Act's effective date and which was taken after. Employees should be assured that in no case does Gallo retain photographs, film, or negatives of them engaging in organizational activity.

F. Newspaper Ads.

Both the General Counsel and UFW urge that Respondent Gallo be required to publish advertisements regarding its misconduct similar in number and in size to those it published regarding its denial of wrong-doing during the 1975 election campaign. I believe that this remedy would be unwieldy, unduly punitive in a financial sense, and not closely enough associated with restoring the workers' rights that were violated. Accordingly, I do not recommend that Gallo be ordered to publish such advertisements.

G. The Election.

As earlier noted, as I have determined that Respondent Gallo's conduct interfered with the September 10, 1975, election, I am recommending that the election be set aside. I do not believe that, given Gallo's conduct, the election results adequately reflect the full exercise of rights granted to employees by virtue of Section 1152 of the Act.

ORDER

Respondent Gallo, its officers, agents, and representatives shall:

A. Cease and desist from:

1. Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging or refusing to rehire them 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.

2. Surveilling or giving the impression of surveilling its employees' protected activities.

3. Giving unlawful support or assistance to any labor organization.

4. Denying access to, interfering with, or surveilling organizational activity in its employee housing areas,

5. In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Labor Code Section 1152.

B. Take the following affirmative action:

1. Offer Jesus Garcia and Lorenzo Perez immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges, and to make them whole for losses they may have suffered as a result of their discharges in the manner set forth in Sunnyside Nurseries, 3 ALRB No. 4-2 (1977).

2. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reimbursement under the terms of this order.

3. Permit the UFW organizers to organize among its employees during the periods and times set forth in the Board's Access Regulation, using twice the number of organizers as is presently permitted by that regulation.

4. Provide the UFW with bi-monthly employee lists during any and all of the four 30-day periods in which the UFW desires to take access, without the need for the UFW to make a showing of interest.

5. Provide the UFW two two-hour periods, during work time, for it and its representatives to meet with employees on Respondent Gallo's property. The UFW shall present to the Regional Director its plans for utilizing the two-hour periods. After conferring with both the UFW and the Respondent, the Regional Director shall determine the manner and most suitable times for these two meetings. During this time, no employees shall be allowed to engage in work-related activities, although no employee shall be forced to attend the meetings or organizational activities. All employees shall receive their regular pay for the time away from work.

6. Provide the UFW use of Paisano Park and related facilities to conduct a gathering for Gallo workers. The use of this park shall not be during work time, and employees shall not be required to attend.

7. A high-ranking Gallo representative, acceptable to the Regional Director, shall read to employees the attached Notice to Employees in appropriate languages on Company time. The reading or readings shall be at such times and places as are specified by the Regional

Director. Following the readings, the Board agent shall be given the opportunity, outside the presence of supervisors, foremen, and management, to answer any questions employees may have concerning the notice or their rights under the Act.

8. Provide the UFW with bulletin board space at each of its ranches, as determined appropriate by the Regional Director, for the UFW to post organizational information and the like. Such space shall be provided during any and all of the four periods during which the UFW desires to take access.

9. Deliver over to the Regional Director all film, negatives, and developed photographs used by Gallo in photographing employees' protected activities during the period between August 11 and September 3, 1975.

10. Post copies of the attached notice at times and places to be determined by the Regional Director. The notices shall remain posted for a period of 12 months from the date of initial posting. Copies of the notice shall be furnished by the Regional Director in appropriate languages. The Respondent shall exercise due care to replace any notice that has been altered, defaced, or removed.

11. Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this Order, to all employees employed during the payroll periods which include the following dates: August 28 to September 30, 1975.

12. Hand out the attached notice to all present employees and to all employees hired in the next six months, as well as to all employees hired during the next peak season.

13. Notify the Regional Director in writing, within 20 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent Gallo shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ORDERED that the September 10, 1975, election results be set aside.

And, it is further ORDERED that all allegations contained in the complaint and not found herein to be violations of the Act are dismissed.

Dated: November 25, 1978

AGRICULTURAL LABOR RELATIONS BOARD

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

