El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ABATTI FARMS, INC., and ABATTI PRODUCE, INC., Respondent/ Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party, and TORIBIO CRUZ and JOSE DONATE, Petitioners/ Intervenors.	Case Nos. 78-RD-2-E 78-CE-53-E 78-CE-53-1-E 78-CE-53-2-E 78-CE-55-E 78-CE-56-E 78-CE-58-E 78-CE-60-E 78-CE-60-1-E 78-CE-61-E 79-CE-5-EC 7 ALRB No. 36

DECISION AND ORDER

On March 23, 1980, Administrative Law Officer (ALO) David Nevins issued the attached Decision in this proceeding. Thereafter, Respondent, Charging Party, Petitioners [1/] and the General Counsel each filed exceptions with a supporting brief, and a brief in response to the exceptions of the other parties .

The Board has considered the record and the ALO's

[1/] This case arose from a decertification election held among Respondent's employees on December 27, 1978. The hearing was a consolidated proceeding involving post-election objections, challenged ballots, and alleged unfair labor practices. The Petitioners named in the caption of this matter filed the decertification petition and became intervenors at the hearing. As we are dismissing the Petition for Decertification in this case, we find it unnecessary to discuss the ALO's recommended resolution of the issues raised by the challenged ballots.

Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings and conclusions of the ALO, as modified herein, and to adopt his recommended Order as modified herein.

Respondent's and Petitioners' Exceptions [2/]

Respondent has excepted to the ALO's reliance, in his consideration of the case, on: our Decision in Abatti Farms, Inc. (May 9, 1979) 5 ALRB No. 34, enf'd in principal part, Abatti Farms v. ALRB (1980) 107 Cal.App.3d 317; evidence of Respondent's anti-union statements and conduct; and problems which arose between Respondent and the UFW with respect to the administration of their contract.[3/] Respondent's precise exception respecting the ALO's reliance on our prior unfair labor practice Decision is based upon the fact that that Decision was under review at the time Respondent filed its exceptions. As that Decision has, in the main, been upheld by the court of appeal, we take it as clearly established that we can take it into account in our consideration of this

[2/]Petitioners have joined in Respondent's exceptions as well as lodging some of their own. For the sake of brevity, exceptions filed by one party, even when joined in by the other, will be identified by the title of the party initiating them.

[3/]Respondent and Petitioners make one other, generalized exception to what they characterize as an imbalance of credibility resolutions in favor of General Counsel witnesses. In the first place, even if such an imbalance could be said to exist, "'total rejection of an opposed view cannot of itself impugn the'integrity or competence of a trier of fact.'" Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 796, quoting Labor Board v. Pittsburg S.S. Co. (1949) 337 U.S. 656, 659 [25 LRRM 2177].Secondly, the ALO credits much testimony of Respondent's witnesses. Although we accord great deference to the credibility resolutions of the trier of fact, Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24, rev. den. by Ct. App., 2nd Dist., Div. 3, March 17, 1980, pursuant to our statutory duty we have reviewed the entire record of this case, Labor Code section 1160.3, and find that it generally supports the ALO's credibility resolutions.

case. [4/] Local Lodge No. 1424, IAM v. NLRB (1960) 362 U.S. 411, 416 [45 LRRM 3212] (Board can properly look to earlier events -"to shed" light on the true character" of events which are 'the subject of hearing). Nor was it improper for the ALO to utilize evidence of Respondent's anti-union acts and statements in his consideration of the case, for "motive is a persuasive interpreter of equivocal conduct." Pennsylvania Greyhound Lines, Inc. (1937) 1 NLRB 1, 23 El LRRM 303], enf'd in part (3rd Cir. 1937) 91 F.2d 178, rev'd (1938) 303 U.S. 261.

> Hostility toward the union was not in itself an unfair labor practice and a presumption that such state of mind once proven was presumed to continue to exist [does] not shift the burden of proving [an] alleged unfair labor practice ....
>
> .....
>
> We think the Board properly took judicial notice of [background evidence] for the limited purpose for which it was offered. [Citations] As said by the Supreme Court in Federal Trade Commission v. Cement Institute, 332 U.S. 683 ...[such evidence] may "nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." Paramount Cap Mfg. Co. v. NLRB (8th Cir. 1958) 260 F.2d 109, 113 [43 LRRM 2017].

We find it unnecessary to consider Respondent's exception to the ALO's reliance on contract administration problems that arose between the parties as we are not relying on such evidence in our determination of the issues in this matter.

Respondent first excepts to the ALO's conclusions that

4/ Although Respondent's precise exception has been mooted by the court of appeal decision, we point out that it was not error for the ALO to have relied upon our prior Decision even when it was under review. NLRB v. Mueller Brass Co. (1975) 509 F.2d 704, 709 [88 LRRM 3236]

Respondent instigated and assisted the employees' decertification efforts, in violation of section 1153(a) of the Act. Since instigation and unlawful assistance are separate concepts, American Door Company (1970) 181 NLRB 37, 44 [73 LRRM 1305], we shall analyze the evidence as to each separately. While we conclude that the record does not warrant the ALO's conclusion as to instigation, it amply supports his conclusion as to unlawful, assistance.

The ALO inferred the fact of instigation from his consideration of a number of factors, including doubts about whether the Petitioners were sufficiently motivated to undertake such a campaign. Both men, however, resisted joining the union pursuant to the contract's union security clause and although Cruz finally did join the union, he did so only after he was threatened with the loss of his job; Castellanos never did join and was discharged. While there is some doubt about the veracity of Castellanos' version of how he came to know about decertification procedures,[5/] in view of Petitioners' trial-and-error approach in getting the petition underway and of the disaffection of Respondent's regular employees for the union, the evidence falls short of establishing that Respondent implanted the idea of decertification in the minds of Petitioners. See, e.g., Sparry Gyroscope (1962) 136 NLRB 294 [49 LRRM 1766]; Wahoo Packing

[5/] Doubts about Castellanos' version of how he learned about decertifying a union do not necessarily provide proof of Respondent's instigation. Even assuming that Respondent told him about the procedure, it would not be an unfair labor practice unless Respondent initiated the idea for the decertification campaign. Southeast Ohio Egg Producers (1956) 116 NLRB 1076 [38 LRRM 1406].

Company (1966) 161 NLRB 174 [63 LRRM 1290J; NLRB v. Birmingham Publishing Co. (5th Cir. 1959) 262 F.2d 2 [43 LRRM 2270];.Sky Wolf" Sales d/b/a Pacific Industries of San Jose (1971)- 189 NLRB 933 [77 LRRM 1411], enf'd NLRB v. Sky Wolf Sales (1972) 470 F.2d 827.

There is, however/ ample evidence of Respondent's unlawful assistance to the employees in their decertification efforts. In considering such evidence, we first note that "... in a case of this kind, involving a charge of violations of the duty not to maintain a forbidden relation, a reliance on so-called circumstantial evidence is not only permissible, but often essential. On the very nature of such a case, there will seldom be discoverable data showing direct statements by a party charged with violation that he has performed improper acts." Sperry Gyroscope v. NLRB (2nd Cir. 1942) 129 F.2d 922 [10 LRRM 811]. In this case, the circumstantial evidence is of two kinds: the first goes to prove that the leading proponents of the decertification petition were provided leaves of absence and other benefits to facilitate their conduct, or as a result of their conduct, of the campaign; the second goes to prove that Respondent's agents assembled its employees for the purpose of obtaining signatures on the various decertification petitions.[6/]

The record supports the ALO's finding that Cruz was

[6/] Apparently on the theory that unlawful interference by assistance to decertification efforts can be found only with respect to the petition which resulted in the election in this case, Petitioners separately have excepted to the ALO's consideration of the entire course of the campaign in finding unlawful assistance. Petitioners cite no authority in support of their theory that we may look only to the successful part of the campaign; indeed, the cases indicate the contrary. See, e.g., Muncy Corp. (1974) 211 NLRB 263 [87 LRRM 1157]; Sky Wolf Sales d/b/a Pacizic Industries of San Jose, supra, 139 NLRB 933 [77 LRRM 1411].

personally assisted by Respondent. [7/] His extended absence from work to circulate the petitions, his receipt of a Christmas bonus " well in excess of any bonus received by the other tractor drivers, Respondent's allowing him to charge Respondent for the broken glass on his car and waiting to deduct the cost from his paycheck until shortly before the hearing, and his eligibility for insurance even though he did not work enough hours during the month he was circulating the petition to entitle him to coverage are all factors which support the conclusion that Respondent not only permitted Cruz to campaign, but also abetted him in his decertification efforts by insuring that he lost nothing because of the time he spent campaigning.

Respondent attempts to dispel the inference of unlawful interference readily drawn from these facts by pointing to evidence of its "liberal" leave policy, its history of largess to employees in emergencies and its practice of permitting employees to charge personal items. Respondent's ordinary practices differ sufficiently from its treatment of Cruz in these respects to compel the conclusion that Cruz received special favorable treatment because of his involvement in the decertification campaign. Thus, Respondent's treatment of Rosa Briseno's leaves for union business stands in

---

[7/] We omit making any findings with respect to special consideration given Castellanos for the following reasons: first, unlike Cruz, Castellanos participated only briefly in the campaign, having been discharged pursuant to the contract's union security clause after the circulation of the first decertification petition; second, there is no evidence of the amount of Castellanos bonus; finally, although both Castellanos and Ben Abatti went to some lengths to conceal the fact that Ben Abatti gave Castellanos a job tending Abatti cattle at a feedlot after his discharge, the fact of that hire itself is not persuasive proof of special consideration.

stark contrast to its assertions of a "liberal" leave policy with respect to an employee's concerted activities. Its failure to deduct from Cruz' pay the cost of repair to his auto immediately after it was incurred is also atypical, as is the size of the Christmas bonus it gave Cruz.

Finally, there is the matter of Respondent's making the arrangements which resulted in Petitioners' being represented by counsel. Although the Act cannot require an employer to refuse to respond to employee inquiry, Moore Drop Forging Company (1954) 108 NLRB 32 [33 LRRM 1465], Belden Brick Company (1955) 114 NLRB 52 [36 LRRM 1504], the evidence in this case shows that Respondent went well beyond merely naming or suggesting a lawyer whom Petitioners might consult; it brought Petitioners and counsel together. [8/]

We also agree with the ALO that Jose Rios unlawfully assisted in circulating the decertification petition and that Respondent's giving a Christmas party, at which time the decertification petition was circulated in the presence of its supervisors, also constituted unlawful support of the decertification effort. With respect to the campaigning in the

---

[8/] Vernon Manufacturing Co. (1974) 214 NLRB 285 [87 LRRM 1516], does not prevent our concluding that, on the facts of this case, Respondent's actions In procuring counsel for Petitioners violated the Act. In Vernon, the national board refused to find procurement of an outside attorney violative of the Act, but it did so because of the absence of any evidence as to the relationship between the petitioner's attorney and respondents. Although the attorney recommended to Petitioners by Respondent was not its own counsel, the initial meeting between Petitioners and their counsel was arranged by Jim House who transported Cruz to his father-in-law's home where Cruz met Slovak, the attorney. After Slovak entered the case, Respondent gave a Christmas party at which Slovak circulated the decertification petition.

fields, the evidence is, as the ALO notes, sharply conflicting. The ALO resolved these conflicts in conformity with his credibility resolutions and based on our review of the record we defer to his conclusions.

The ALO concluded that Respondent violated Labor Code section 1153(e) by its general refusal to bargain, and over reinstatement of the medical plan in particular, after the decertification election. Respondent contests the ALO's conclusions principally [9/] on the grounds that it had good faith doubt about the union's continuing majority status as a result of the decertification election.

In light of our finding of unlawful assistance, we do not face the question whether an employer may rely on good faith doubt of majority status when a decertification petition raises a real question concerning representation. The general rule is that there is no good faith in a doubt which an employer has manufactured:

> [Respondent] cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of the majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such by their own free will. Medo Photo Corp. v. NLRB (1944) 321 U.S. 678, 687 [14 LRRM 581].

[9/] Respondent also contends that the union waived its right to bargain over reinstatement of the medical plan when it failed to respond to its concerns over the lapse of medical coverage upon the expiration of the contract. However, we find Ben Abatti's admission that he did not intend to bargain over reinstatement of the medical plan to be conclusive on the issue of Respondent's lack of good faith in raising the issue of the lapse of coverage.

The rule applies with equal force to decertification campaigns: an employer that has orchestrated "a union-busting campaign cannot rely on the pendency of a decertification petition or the loss of majority status to justify ... [its] refusal to bargain." NLRB v. Maywood Plant of Grede Plastics (D.C. Cir. 1980) 628 F.2d 1, 5 [104 LRRM 2646].

Respondent excepts to the ALO's conclusions that it violated the Act: (1) by failing to bargain over discontinuing the rapini crop; and (2) by making its crews available to Albert Studer in order to disenfranchise them.

Because we are dismissing the Petition for Decertification in this case, the question whether Respondent transferred its crews to Albert Studer in order to disenfranchise them is moot and we decline to address it. However, we reject Respondent's contention that it did not violate the Act when it discontinued the rapini crop. In so doing, we do not adopt the legal analysis of the ALO which depends so much on the partial-closing cases now overruled by First National Maintenance Corp. v. NLRB (1981) 101 S.Ct. 2573 [107 LRRM 2705]. Instead, our conclusion is based upon our finding that Respondent's motivation for discontinuing the rapini was discriminatory. Accordingly, we do not reach the question of the scope of the duty to bargain over crop decisions which are economically motivated.

For more than a dozen years preceding the 1978 harvest season, Abatti Farms grew rapini, one of two growers in the Imperial Valley to do so. Rapini, a member of the broccoli family, is a labor intensive crop, requiring a harvest force of

approximately 140 employees. It is a winter crop, with harvesting beginning in early December and continuing through January and February. It is also a delicate crop which turns- to flower if not harvested when ready, unlike other leaf crops, such as lettuce, for example, which permit greater leeway in beginning the harvest.

When called as an adverse witness, Ben Abatti gave several reasons for his decision to discontinue the crop: he was not making any money on it; he had independently decided to increase his acreage in other crops so that he did not have enough land left for it; and, finally, the rapini market was volatile and did not offer as sure money as the other crops to which he was devoting more acreage. When called by his own counsel, however, he gave other reasons for his decision not to grow rapini: one was that he was generally trying to reduce his acreage in labor intensive crops in order to decrease his vulnerability to strikes,[10/] and the second was that he was having some tax problems and he wanted to reduce his distractions. Although he later denied that "strikeproofing" figured in his decision to discontinue rapini, Respondent now insists in its exceptions that "strikeproofing" was one of the major reasons for discontinuing the crop.

Jim House, Ben Abatti's second-in-command, essentially corroborated Ben Abatti's strikeproofing defense. House testified that both before and after the contract with the UFW was signed, he and Ben Abatti discussed the company's vulnerability to strikes

---

10/ When grown by Respondent, rapini was harvested by Ponfilo Avina's and Frank Preciado's crews, both of which had been involved in strikes against Respondent.

with respect to some of the more perishable crops, such as rapini, lettuce, and melons, and that, in general, he advised Ben to avoid planting too many acres of such crops. Respondent did, in fact, cut back on lettuce, [11/] on cantaloupes and watermelons (although increasing its acreage on honeydew because it has a longer field life), and on onions (although the decision to cut back on onions was apparently motivated by increased competition from other sources). We thus find that Respondent decided not to grow rapini as a form of "strikeproofing." [12/]

Albert Studer, Ben Abatti's brother-in-law and an Abatti supervisor, testified that Ben approached him to take over the crop. Although Ben Abatti testified that he made his decision not to grow rapini in April of 1978 (prior to his contract with the UFW which was signed June 7, 1978), Studer testified he decided to take over the crop in the "summer" of 1978. In view of Ben Abatti's testimony that he decided to discontinue rapini because of his fear of a strike, it seems more likely than not that he made his "final" decision not to grow the crop after he signed the contract with the UFW. The contract was due to expire January 1,

---

11/ Lettuce apparently has a longer field life than rapini and consequently is not so vulnerable to strikes .

12/ Our finding that Respondent was motivated by the desire to gain a measure of strike protection is not contradicted by Respondent's other explanations. If, as Ben Abatti testified, the volatility of the market makes growing rapini a gamble, the possibility of a strike during harvesting would increase the odds against him on an already comparatively risky venture. Similarly, why rapini in particular would be a distraction during- Ben Abatti ' s tax troubles except for its vulnerability to a strike is not otherwise explained. Finally, Ben Abatti's testimony that he increased his acreage in other crops is explained by Jim House as related to Respondent's attempt at strikeproofing.

1979, in the middle of the rapini harvest, when he would be most susceptible to the economic pressures he so feared.

There is no question that an employer may take measures to protect his business in the face of a strike, but its prerogatives in this area do not extend to what amounts, in this case, to a preemptive layoff. [13/]

> An employer is not prohibited from taking reasonable measures, including closing down his plant, when such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred.- The pedestrian need not wait to be struck before leaping for the curb. The nature of the measures taken, the objective, the timing, the reality of the strike threat and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances; and the ultimate legality of the employer's action. Manifestly, when there is no real strike threat .... there is no" objective need for protective measures.(Enphasis added.) Betts Cadillac Olds', Inc. (1951) 96 NLRB 268, 286 [28 LRRM 1509].

See also American River Touring Association d/b/a Elliot River Tours (1979) 246 NLRB No. 149 [103 LRRM 1095] (subcontracting not violative of the Act in view of an imminent strike threat);

13/ Respondent has presented no evidence that its crews which ordinarily harvested rapini would have had any unit work available to them had they not been sent to Albert Studer's fields. Indeed, Respondent continues to insist that it was merely fortuitous that its crews were available for Studer's use; however, it was possible for Respondent to meet such a "fortuity" only if it did not need the employees. The rapini harvest begins sometime in early December and goes through January and February so that, even if we were to credit Respondent's version that a freeze cut short its melon harvest and accounted for his crews' availability at the beginning of the harvest, only the fact that no work was available at Abatti during the next months could account for their continued availability. Albert Studer testified that the crews would have been laid off if they had not gone to the rapini.

Industrial Fabricating, Inc. (1957) 119 NLRB 162 [41 LRRM 1038] (Respondents violated the Act by laying off employees in "anticipation of a strike" when they could not reasonably believe they were confronted with an imminent strike situation). The mere possibility of a strike relied upon by Respondent cannot justify its elimination of unit work: "One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to gain future benefits." Textile Workers v. Darlington Manufacturing Co. (1965) 380 U.S. 263, 271 [58 LRRM 2657]. The Fernandez Layoffs

All parties except to the ALO's conclusions regarding the layoffs in the Fernandez group.

Although we reject Respondent's contention that the layoffs were lawfully motivated, we consider well taken General Counsel's and Charging Party's contention that the layoff of Salas, Torres and Valdez was a device to lend plausibility to Rios' discriminatory treatment of Clemente Fernandez and his group. We need not repeat the ALO's detailed and exacting analysis of the record which warrants his conclusion as to Respondent's motives in laying off members of the Fernandez family. The credited evidence amply supports his conclusion.

According to the list Respondent used to justify the layoffs by seniority, Francisco Salas has the same seniority date as the Fernandezes while Maria Valdez and Maria Torres have later dates; thus, if Rios were laying off by seniority, Salas, Valdez and Torres would have-had to go, too. Having concluded that

seniority was a pretext for laying off the Fernandezes, it follows that the others were unlawfully laid off [14/] NLRB v. Jack' August " Enterprises, Inc. (1978) 583 F.2d 575 [99 LRRM 2582]; D. V. Copying and Printing (1979) 240 NLRB 1277 [100 LRRM 1531]. The Discipline pf_ Rosa Briseno

Respondent excepts to the ALO's conclusion that it discriminated against Rosa Briseno. We agree with the ALO's conclusion, based on his finding that Respondent's treatment of Briseno stands in stark contrast to its treatment of Cruz and Eva Donate. Respondent's purported motivation simply amounts to a declaration that it would require the union to observe the contract to the last detail, while the record of this case otherwise presents a picture of its own attempts to evade it by supporting the decertification drive, by its discriminatory elimination of unit work and by its discriminatory treatment of other union adherents. The Cutback in Work Hours

We agree with the ALO's conclusion that there is insufficient evidence to support a finding of discrimination as to the alleged "cutback" in the hours of the Palacios crew. We thus affirm his dismissal of that portion of the complaint.

The Lettuce Bonus

We agree with the ALO that no evidence supports the conclusion that the 10 percent bonus paid to the lettuce workers

14/ General Counsel only excepts to the failure to find that Salas and Torres were discriminated against, apparently because Valdez went to work the next day in another crew. Whether Valdez suffered any damages as a result of Rios' laying her off is a matter for compliance proceedings.

was linked to the decertification campaign.

DISMISSAL OF PETITION FOR DECERTIFICATION

Because of Respondent's support and assistance of the decertification campaign, the Petition for Decertification shall be, and it hereby is, dismissed.

ORDER

By authority of Labor Code section 1150.3, the Agricultural Labor Relations Board hereby orders that Respondent Abatti Farms and Abatti Produce, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, suspending, eliminating the seniority or the work of, or otherwise discriminating against, any agricultural employee because of his or her union activities or sympathies;

(b) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of its agricultural employees.

(c) Changing any terms or conditions of employment of its employees without first notifying the United Farm Workers of America, AFL-CIO, of the proposed change and affording the UFW a chance to negotiate about it.

(d) Assisting or supporting any agricultural employee(s) in an effort to decertify its employees' certified bargaining representative.

(e) 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) Offer Clemente Fernandez, Gregoria Fernandez, Jose Armando Fernandez, Francisco Salas, Maria de La Luz Torres and Maria Valdez full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or other employment rights and privileges and make them whole for any loss of pay or other economic loss they have suffered as a result of their discharge or layoff, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest at a rate of seven percent per annum.

(b) Restore the full and complete seniority of Rosa Briseno and make her whole for any loss of pay and other economic losses she has suffered as a result of her suspension, plus interest on such sums at the rate of seven percent per annum.

(c) Make whole its employees for any loss of pay or other economic losses they have suffered as a result of Respondent's discontinuance of the rapini crop (1978) plus interest on such sums at the rate of seven percent per annum.

(d) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

(e) Make whole all agricultural employees employed

by Respondent in the appropriate bargaining unit at any time during the period of December 27, 1978, to the date on which Respondent commences bargaining which results in a contract or a bona fide impasse, for all losses of pay or other economic losses they have incurred as a result of Respondent's refusal to bargain in accordance with the formula set forth in Adam Dairy, dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24, plus interest computed at seven percent per annum. See Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal.3d 838, cf. Masaji Eto v. Agricultural Labor Relations Board (1981) 122 Cal.App.3d 41.

(f) Permit UFW representatives to take access to its properties in accordance with the terms of the contract which expired about January 1979 until such time as a new collective bargaining agreement is entered into or until the parties bargain to a bona fide impasse.

(g) 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.

(h) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(i) 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 from November 23, 1978, to the date of issuance of this Order.

(j) 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, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(k) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property, at time(s) and place(s) 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.

(1) 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 with its terms, and continue to

///////////////

///////////////

report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: October 28, 1981

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

ALFRED H. SONG, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro 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) supporting and assisting the decertification campaign; (2) refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW); (3) discriminating against the rapini crew in order to discourage union membership; (4) suspending and eliminating the seniority of Rosa Briseno because of her union activity or support; (5) laying off or discharging Clemente Fernandez and Gregoria Fernandez, on account of their union activity and support; and (6) laying off Juan Arrnando Fernandez, Francisco Salas, Maria Valdez and Maria de La Luz Torres as a disguise for our laying off of Clemente Fernandez and Gregoria Fernandez.

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 wages 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 lay off, suspend, eliminate the seniority of, discharge or otherwise discriminate against any employee in regard to his or her employment because he or she has joined or supported the UFW or any other labor organization, nor will we discontinue any crop in order to prevent or discourage employees from engaging in a lawful economic strike.

WE WILL NOT support or assist any decertification campaign.

WE WILL NOT refuse to bargain collectively with the United Farm Workers of America.

WE WILL offer to reinstate Clemente Fernandez, Gregoria Fernandez, Jose Armando Fernandez, Francisco Salas, Maria Valdez, and Maria de La Luz Torres in their previous work, or in substantially equivalent jobs, without loss of seniority or other rights or privileges, and we will reimburse them for any loss of pay and other money losses they incurred because we discharged or failed to hire or rehire them, plus interest at seven percent per annum.

Dated: ABATTI FARMS, INC. and ABATTI PRODUCE, 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 319 Waterman Avenue, El Centro, California. The telephone number is (714) 353-2130.

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

Abatti Farms, Inc. and Abatti Produce, Inc. (UFW)

7 ALRB No. 36
Case Nos. 78-RD-2-E
78-CE-53/53-1/53-2/55/56/58/60/60-1/61-E
79-CE-5-EC

ALO DECISION

After the UFW was certified as the collective 'bargaining representative of Respondent's employees, the parties entered into a six-month collective bargaining agreement which expired on December 31, 1978. On December 27, 1978, a decertification election was held among Respondent's employees. Based on unfair labor practice charges filed by the UFW, a complaint issued, alleging that Respondent instigated, supported, and assisted the decertification campaign, discriminated against certain employees because of their support of the UFW, unilaterally discontinued a crop without bargaining over the decision, and refused to bargain with the Union following the election.

The ALO concluded that Respondent: (1) either instigated the decertification drive and/or unlawfully supported it; (2) discriminated against certain UFW supporters by laying some of them off, using seniority as a pretext, and by reducing the pay and seniority of another; (3) refused to bargain over its discontinuance of the rapini crop and thereby discriminated against its harvest employees in order to disenfranchise them; and (4) refused to bargain with the UFW after the decertification election.

BOARD DECISION

The Board found that there was insufficient evidence to support a conclusion that Respondent instigated the decertification petition but that ample evidence supported the allegation of employer support and assistance.' The Board also found that Respondent unlawfully laid off two employees because of their support for the UFW and laid off four others as a disguise for the layoff of the union supporters. Without reaching the question of an employer's obligation, to bargain over economically motivated crop decisions, the Board found that Respondent discontinued its rapini crop as insurance against a possible strike without having any grounds to believe a strike was imminent. The Board held that such action was discriminatorily motivated. In view of its finding that Respondent supported and assisted the decertification campaign, the Board concluded that Respondent's refusals to bargain with the union subsequent to the decertification election were unlawful.

* * *

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

ABATTI FARMS, INC., and ABATTI PRODUCE, INC. Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party and TORIBI CRUZ and JOSE DONATE Petitioners-Intervenors	Case Nos. 78-CE-53-E 78-CE-53-1-E 78-CE-53-2-E 78-CE-55-E 78-CE-56-E 78-CE-58-E 78-CE-60-E 78-CE-60-1-E 78-CE-61-E 79-CE-5-EC 78-RD-2-E

APPEARANCES:

-- For the General Counsel,
Barbara Dudley and Octavio Aguilar

--For the Respondent,
Thomas A. Nassif and Scott A. Wilson,
of Byrd, Sturdevant, Nassif & Pinney,
of El Centro, California

--For the Charging Party,
Carlos M. Alcala, of
Salinas, California

--For the Petitioners,
Thomas S.Slovack, of
Best, Best & Krieger, of
Palm Springs, California

DECISION

//

//

//

STATEMENT OF THE CASE

David C. Nevins, Administrative Law Officer: This case was heard by me in El Centro, California, the trial beginning on May 8 and ending on July 4, 1979. This case is a consolidated proceeding, involving unfair labor practice charges, election objections, and challenged ballots. The unfair labor practice charges and the election objections were filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW"); the Respondent is Abatti Farms, Inc., and Abatti Produce, Inc., a joint employer (hereafter referred to as the "Respondent" or the "Company").[1/] Many of the allegations in this proceeding relate to a decertification election held among Respondent's employees on December 27, 1978;2/ those employees who were so named or who were the main participants in the decertification petition drive, Toribio Cruz, Manuel Castellanos, and Jose Donate intervened in and were represented at the proceeding (they are referred to jointly as the "Petitioners") .

All parties, including the UFW and the Petitioners, were represented at the hearing and were given a full opportunity to participate in the proceedings. All four parties filed briefs after the close of the hearing. The following findings and conclusions are based upon the entire record, including the observation of the demeanor of the witnesses and consideration of the respective arguments and briefs of the parties.

THE PLEADINGS

This proceeding is based, in part, on the General Counsel's unfair labor practice complaint, originally dated March 16, 1979, and amended in writing for the second time on May 10, 1979. Certain other amendments or deletions to the complaint were made at the hearing. In general, the complaint, as amended, charges that the Respondent engaged in the following conduct:

1. That it violated Section 1153(a) of the Act by assisting, supporting, and instigating the Petitioners' decertification efforts through providing the Petitioners with extraordinary individual benefits and inducements, through assisting the Petitioners in their gathering of support for the decertification petition, and through threatening and promising benefits to other employees in order to gain their support for the decertification effort. The charges with respect to the Respondent's purported support of .and assistance to the decertification effort were amplified and made more specific through a bill of particulars submitted by the General Counsel during the first few days

---

1/In a previous case Abatti Farms and Abatti Produce were held to constitute a single employer under the provisions of the Agricultural Labor Relations Act (hereafter the "Act"). Abatti Farms. Inc., and Abatti Produce. Inc., 3 ALRB No. 83 (1977). Hereinafter no distinction will be made between those two business entities, unless otherwise so stated. The Respondent stipulated at the hearing that the unfair labor practice charges were timely and duly served on it.

2/Unless otherwise specified, all dates herein refer to 1978.

of the hearing.

2. That Respondent violated Section 115 3 (o) by discriminating against certain supporters of the UFW by discharging them from their employment, taking away one UFW supporter's pay and seniority, and by decreasing the work-hours of an entire work crew that supported the
UFW.

3. That Respondent violated Sections 115 3 (a), (c) and (e) by its unilateral discontinuance of a major, labor intensive crop, the rapini crop, without bargaining with the UFW over the discontinuance, which discontinuance resulted in the disenfranchisement of some 98 voters in the decertification election.3/

4. That the Respondent violated Section 1153 (e) of the Act by refusing to recognize and bargain with the UFW following the decertification election held on December 27.

The UFW's election objections essentially charge the Respondent with the same conduct as does the complaint. In addition, however the UFW originally alleged that the Respondent improperly designated confidential employees as election observers and that such conduct affected the election's outcome. Although certain facts were adduced e the trial concerning this election observer issue, the UFW has 'failed 1 raise this issue in its post-hearing brief. This issue, accordingly, : considered as having been withdrawn as an issue; in any event, the evidence failed to demonstrate that the employees designated as observers were confidential employees or that any impropriety existed in Respondent's designation of them as election observers.

The Respondent denies that it engaged in any unfair labor practice or other conduct objectionable in connection with the decertification election. The Petitioners also deny that any unlawful condud existed or that any of Respondent's conduct, even if found unlawful, is sufficient to warrant disregard of the decertification election results

FINDINGS OF FACT AND CONCLUSIONS[4/]

I. Background.

The Respondent is composed of two basic entities: Abatti

3/The discontinuance of the rapini crop is challenged by both the complaint and the UFW's election objections, and, in addition, the disenfranchisement of 98 voters is a major issue in the challenged ballot portion of this proceeding. Although the harvesting of rapini involved a maximum of some 120 or 130 employees, only 98 of them cast ballots in the decertification election, ballots which were challenged. The Regional Director's report on the challenged ballots did not resolve whether the 98 rapini employees' ballots should be counted.

4/This general section relates to the unfair labor practice complaint and to the UFW's election objections. A separate section is set forth later that relates to the remaining challenged ballot issues,

Farms, Inc., is the entity engaged in growing the farm crops (i.e., cultivation, irrigation, weeding and thinning), and Abatti Produce, Inc., is the entity engaged in harvesting, packaging, and selling the farm crops. (Abatti Brothers is a separate legal entity which "owns" the crops.) The Respondent owns and leases some l4,000 acres of land in the Imperial Valley and grows and harvests a host of row crops, such as melons, lettuce, carrots, onions, sugar beets, cotton, wheat, alfalfa, asparagus, cabbage, and rapini (also known as "broccoli rabe"). Ben Abatti is president of Abatti Produce and his brother, Tony Abatti, is president of Abatti Farms, although it is Ben Abatti who effectively determines the policy of both entities and is their chief management force. Agnes Poloni, Ben Abatti's sister, is the secretary-treasurer of the two corporate entities and is the Respondent's chief bookkeeper. At its peak periods the Respondent employs approximately 500 farm workers.

In a representation election conducted on January 28, 1976, a majority of Respondent's employees voted to select the UFW as their bargaining representative. Their selection was certified by the Board on November 18, 1977. Abatti Farms, Inc., 3 ALRB No. 83. The UFW and Respondent signed their first collective bargaining agreement on June 7, 1978; that agreement's expiration date was January 1, 1979. The decertification election now in controversy was held on December 27, 1978, and the tally of ballots for that election reflected the following:

UFW	125 votes
No Union	14-9 votes
Challenged Ballots	121 votes5/

The Respondent's conduct and animus toward the UFW is the subject of not only this proceeding but of a prior one as well. In its recent decision, the Board concluded that in the past Respondent committed serious and numerous unfair labor practices against supporters of the UFW, including such conduct as denying UFW organizers lawful access to its property, threatening supporters of the UFW, interrogating such supporters, and discharging and/or refusing to rehire some 13 employees who supported the UFW; that unlawful conduct occurred in connection with the 1976 organizational campaign and representation election. Abatti Farms, Inc., S ALRB No. 34- (1979). 6/ Two of those workers who were found to have been unlawfully discharged by the Respondent, Elena Solano and Jesus Solano, wife and husband, worked in the crew of Foreman

5/Of those 121 challenged ballots, 98 were cast by the rapini harvest employees. In his report dated March 23, 1979, the Regional Director resolved seven challenged ballots and no further issue remains concerning that determination. Thus, 114- challenged ballots remain in issue in this proceeding. There was also one void ballot cast in the election.

6/The Board's decision in the previous unfair labor practice proceeding was issued on May 9, 1979, one day after the instant proceeding commenced, and in large part reversed the findings of the Administrative Law Officer. The Respondent has appealed from the Board's decision. Abatti Farms. Inc. v. A.L.R.B.. 4 Civil 18961 (Dist. Four, Div. One).

Jose Rios, who is herein alleged to have unlawfully laid off or discharged some five other crew members (including Clemente Fernandez, the crew's UFW representative, and his wife and son). 7/

The Respondent's short-lived contractual relations with the UFW were less than amicable. When the contract was initially signed on June 7, Ben Abatti refused to jointly appear with the UFW's representatives for the signing; rather, he individually signed the contract and immediately departed. Admittedly, Mr. Abatti was not pleased about having a contract with the UFW.

From the outset of their contractual relations, problems arose between the Respondent and UFW which can only be deemed obstructive to the collective bargaining process. First, on his initial few visits in July to the Company's shop area, Victor Gonzalez, a UFW contract administrator, was forced off the Company's property by Tony Abatti, who on two occasions used profanity toward Gonzalez in ordering him to leave the premises and on one occasion threateningly drove his truck to within a foot of where Gonzalez was standing.8/ Gonzalez had gone to the shop in an effort to get the Company's employees to sign up as members of the UFW, such membership being required by the UFW's contract .

A second and more generalized problem that existed between the UFW and the Respondent was the refusal of large numbers of employees to join the UFW as required by the collective bargaining agreement. As early as July, the UFW began complaining to the Respondent that workers were not becoming UFW members and urged the Respondent to either cooperate so that they did become members or so they were discharged pursuant to the contract. As late as July 28, Ben Abatti informed Gonzalez that he would not discharge employees who refused to join the UFW and, after Gonzalez unsuccessfully attempted to hand him a grievance protesting the employees' failure to join and then threw the grievance on the ground at Abatti's feet, told Gonzalez to get his ass off the Company's property. By mid-October the UFW identified some 124 employees who had still refused to become members as required by contract.9/

7/As will be discussed later in fuller detail, on May 10, 1979, one day after the Board issued its unfair labor practice findings, Jose Rios pistol-whipped and shot Jesus Solano in front of Rios's home in Mexicali, Mexico. As will be later noted, I have concluded that this physical assault by Rios was motivated by his anger at the just released unfair labor practice findings in Solano's favor and that such motivation should be considered when evaluating Respondent's conduct vis-a-vis other UFW supporters.

8/The Company's shop was located at McCabe and Pitzer Roads and is the location where the tractor drivers, irrigators, and shovel crews report each morning for their work instructions. There were approximately 95 such steady employees.

9/On September 11 the UFW and Respondent entered into a "grievance settlement agreement" which purported to resolve some six outstanding grievances, due to be heard in arbitration that same day. One of those grievances related to the Company's refusal to -- (continued)

Another general problem concerning the parties' contractual relations was the failure to provide an employees' seniority list. By contractual supplement the parties were to "cooperate to formulate appropriate seniority lists within thirty (30) days of execution of" the June 7 agreement. The UFW never received any such seniority lists from the Company until late November or early December, although the Company had agreed in the September 11 grievance settlement to compile such seniority lists "within a reasonable time." Although the Company's chief labor relations representative, Jim House, explained the long delay in compiling such seniority lists by claiming that the UFW failed to assist in their compilation, it is not clear just how the UFW was expected to assist, particularly in view of the Company's contemporaneous refusal to provide the UFW with current lists of its employees, their job classifications, addresses, and social security numbers, as also called for by the contract (a refusal that was also made subject to a formal grievance by the UFW). 10/

Although the Respondent seeks to minimize the importance of its conduct in respect to providing timely employee lists and seniority lists and in the failure of employees to timely join the UFW, the general conclusion emerges that Respondent made little or no active effort to satisfy certain basic contractual requirements. Its nonchalance and lack of effort to cooperate in meeting the legitimate contractual demands of the UFW reflect an attitude of recalcitrance and animus toward the employees' duly elected bargaining representative. It is upon this background of the Employer's contractual delay and avoidance that the events surrounding the decertification campaign unfolded.

9/(continued)-- discharge workers who refused to join the UFW, and was settled by the Company promising to meet with such workers and inform them of the requirement to join "or the Company shall be required to terminate them upon receiving written notification from the Union." Such terminations had not taken place as of October 19, when the UFW informed the Company of 12M- employees who still refused to join, nor as of October 23 or 2M- when there still remained approximately 100 such employees.

10/It is quite true, as claimed by the Respondent, that compiling all the appropriate seniority lists was no minor feat, particularly inasmuch as the yearly turnover in employment saw some 1,500 to 2,000 employees come and go. But that large turnover can hardly explain the absence of any meaningful attempt for some five months to provide seniority lists even for those crews which were then currently and regularly employed. Although the entire seniority information necessary for the employees hired prior to 1973 was not readily available on forms kept by the Company, no apparent effort was made to use what record information there was then available and supplement it with other available records and personal contact with the current employees. Indeed, the Company did provide seniority lists in late November or early in December, and no great difficulty then existed (at least as noted in the evidence) for the office clerk who compiled them immediately upon Jim House's request.

II. The Assistance And Support Given To The Petitioners' Decertification Effort.

A. The Petitioners:

Two employees have been singled out by the evidence as having spear-headed the initial decertification effort: Manuel Castellanos and Toribio Cruz.11/ Manuel Castellanos was an irrigator, a year-round, steady employee, and was employed by Respondent since 1964. Although Castellanos was involved in the initial efforts to decertify the UFW, his role in the decertification campaign cannot be easily described.

According to Castellanos, he single-handedly began to gather signatures for decertification on a blank yellow paper because so many of his fellow employees (i.e., irrigators) expressed strong dislike for the UFW's existing medical insurance plan.12/ Castellanos, however, had had no personal experience with or complaints regarding the UFW's medical plan. Initially Castellanos explained that he learned about gathering signatures for decertifying a bargaining representative by overhearing a conversation on the streets of Calexico; subsequently he explained that he learned about it from overhearing a two-hour conversation among some 20 unknown workers at a shopping center outside the Agricultural Labor Relations Board office in El Centro (though he never joined in that conversation and could scarcely remember what he had overheard), where he had gone regarding a bank loan.13/ Coincidentally, Castellanos began gathering employee signatures only days after the UFW's one-year certification period ended on November 18, and initially filed his "yellow sheet" on November 23.14/

11/Jose Donate along with Cruz was a named Petitioner in the decertification petition that actually led to the election, but he apparently played little or no active role in gathering support for decertification. His role and that of his wife, Eva Donate, will be discussed in later sections.

12/The eventual decertification campaign centered, in large part, on the issue of medical insurance for the workers. Much more of this issue will be discussed infra.

13/Castellanos testified on two successive days at the hearing. His testimony changed drastically from the first day to the second day, and—in effect—it was conceded that Castellanos had not told the truth during his first day's testimony.

Castellanos's testimony, often confusing and incomplete, was so self-contradictory and evasive as to establish its lack of credibility, as well as his obvious effort to evade all direct connection between himself and the Respondent's officials. His demeanor was no more convincing than the substance of his testimony.

14/Some chronology for the events surrounding the filing of the several decertification petitions is taken from General Counsel Exhibit 58, an exhibit offered but not formally admitted -- (continued)

Castellanos did not work the entire time he gathered signatures, first on the "yellow sheet" and then on the first two petition forms given t? him by Agricultural Labor Relations Board agents. According to the Company's records, Castellanos received no pay after the week of November 25. Castellanos's testimony contradicted itself as to whether or not he normally sought approval for such long absences from work, and thus no direct testimony was presented that the Respondent had authorized Castellanos to take time away from work to gather decertification signatures. .Yet, according to Castellanos, he did. not return to his job until December 7, the day after the second petition (78-RD-l-E) was docketed by the Board, at which point he claimed to have been abruptly informed by his foreman that he was being discharged for having failed to join the UFW. Castellanos made no effort to then join the UFW, although the UFW's contract had only some three weeks left until its termination and although he was fully aware that a decertification effort was well underway. With unintelligible nonchalance, Castellanos admitted to thereafter having no further interest in the eventual decertification election or its date, even though this longtime employee's future re-employment with the Respondent could well hinge en the election's outcome.

Castellanos had been one of those regular, steady workers for the Company who made it a practice to get regular and sizeable advances in his pay from the Respondent and who had Ben Abatti cosign bank loans for him. When his employment ended in December 'Castellanos still owed some $400.00 on one of his two co-signed loans that year and at least $95.00 for past pay advances (out of $1,225.00 in pay advances he had received during 1978).

Castellanos initially indicated that after his "discharge" he went to work at the LaBrucherie feed-lot tending cattle, that no one from the Company aided him in getting that employment, and that he received no further pay from the Company until he returned to work as an irrigator with the Company in latter February, 1979 (though he admitted receiving a Christmas bonus of $100.00 or $200.00 from the Company in December). His initial testimony squared also with the initial testimony of Ben Abatti, who indicated that he did not see Castellanos "for a

---

14/(continued)--into evidence, largely because the Petitioners' counsel wished to supplement the information contained in it (which was never done by counsel). Petitioners' counsel, however, indicated that the dates contained on the exhibit are correct.

At the time Castellanos began collecting signatures, the Board's existing policy (as of September 29, 1978) was that a decertification petition was timely if filed after the certification year expires and during the last month of a collective bargaining contract, when the contract's duration is for one year or less, as was true in the Respondent's case. See M. Carat an, Inc_. , 4 ALRB No. 68, reversed C.A. ( ). Even though Castellanos's initial decertification effort came close to meeting the standards set forth in the Board's recent Caratan decision, Castellanos, -himself, claimed to have believed that the UFW's representation at the Company would expire when its contract expired, only some six weeks front when he began gathering signatures.

long time" after his discharge, did not know his whereabouts, did not speak to him when he had seen him around the shop area in December (visits which Castellanos denied making), and did not know where Castellanos became employed except perhaps at LaBruoherie's feed-lot.

Pay advances given to Castellanos during January and February, 1979, were then used by the General Counsel for further questioning Castellanos (these involved pay advances of $M-25.0Q on February 19, 1979, $35.00 on. January 30, 1979, and $200.00 on January M-, 1979). After production of these checks, the testimony subsequently given by Castellanos and Ben Abatti changed. First Castellanos, who was then being questioned, and later Abatti, who reappeared as a witness, admitted that after his discharge, Castellanos went to work at a cattle feed-lot privately operated by Ben Abatti (the Ranney Feed Lot) with Ben Abatti's personal approval and involvement, although Castellanos's testimony places that re-employment about two days after his prior "discharge" and Abatti's testimony places that re-employment sometime during the week of December 24. Castellanos worked for Ben Abatti's feed-lot until he returned to the Company as an irrigator. In any case, both Abatti and Castellanos obviously fabricated their initial testimony when denying any further connection between Castellanos and Abatti after Castellanos's December departure from the Company. In addition, the Respondent qualified Castellanos for its new medical insurance coverage during the month of January, 1979, when the evidence shows that Castellanos did not compile any qualifying work-hours in the previous month, December, as an employee of the Respondent.

Toribio Cruz was even more active in soliciting support for the decertification effort than Manuel Castellanos. Cruz began soliciting that support almost from the outset and continued throughout the campaign. 15/ Mr. Cruz was primarily a tractor driver, another full-time position, and had been with the Respondent since 1965. In addition, from time-to-time, Cruz worked as a driver on a service truck, a position which Ben Abatti considered as a foreman's job and one which brought with it special coverage under the Company's supervisors' medical insurance program. Unlike Mr. Castellanos, Cruz spoke fluent English, but his testimony concerning his decertification involvement is nonetheless difficult to pin down.16/

15/Several decertification petitions were filed with the Agricultural Labor Relations Board, including the previously mentioned "yellow" sheet. The early petitions were either not docketed or were eventually dismissed by the Agricultural Labor Relations Board. The petition eventually filed that led to the election was denominated as 78-RD-2-E and was first docketed by the Agricultural Labor Relations Board on December 19.

16/Cruz's testimony was consistently self-contradictory. On a regular basis throughout his testimony he would first state one fact and then either subsequently modify it or contradict it by stating the opposite. His demeanor gave the impression that by his testimonial responses he sought to keep his role in the decertification campaign as confusing and vague as possible and to avoid any direct connection between himself and Respondent's representatives.

(Continued)

Although of no singular importance, it should be noted that Mr. Cruz was an unlikely figure to lead the decertification drive. He had never participated in any past organizational roles or in any of; the past union activity that had historically occurred among Respondent's employees. He admitted in nonchalant fashion that he had no particular ill will toward the UFW and did not much care whether the UFW won the decertification election or not. He did not even wait after the election to learn of its outcome. His leadership in the de- . certification drive, he admitted, was largely because his fellow employees, tractor drivers and irrigators, had complained about the inferiority of the UFW's medical plan, although Cruz had had no personal experience with that insurance plan.

Yet, from latter November to latter December Mr. Cruz absented himself from his regular job, almost entirely, in order to engage in his decertification activity. The Company's earnings records for Cruz indicate that he missed work entirely during the pay periods of December 2 and 9, that he was given credit for eight hours' work during the pay period of December 16, that he worked four hours during the pay period of December 23, and that he spent 26 hours at work during the pay period of December 30.17/ According to his testimony, he received no pay for the time missed from work. Mr. Cruz, however, did receive a special payment from Respondent of $400.00 during the pay period of December 23, which he described as a "Christmas bonus." This so-called Christmas bonus appears to have been substantially in excess of any given to his fellow employees.18/

16/(continued)--The description of Cruz's involvement in the decertification effort, as described in following paragraphs, is pieced together from those portions of his testimony which seem unlikely to have been misleading, facts which were testified to by others or corroborated by others, and by facts emerging from certain records introduced at the hearing.

17/It might be noted that on December 6, the day Cruz helped file the first docketed decertification petition, he apparently .left for two or three days for Mexico on an immigration matter, after the Company had provided him with an immigration letter on November 29 in order to allow his wife and family to immigrate. It should also be noted that while Cruz was credited and paid for eight hours r work on December 13 (during the December 16 pay period, the period used to determine voter eligibility for the decertification election), the facts, as noted infra, demonstrate that he did not work that day, thus indicating that for three successive weeks Cruz did not attend to his paying job and that during the fourth successive week he worked only four hours,

18/The earnings records for 12 other tractor drivers were introduced into evidence at the hearing, records which covered only about 33% of the tractor drivers then employed by the Respondent. Of these 12 tractor drivers, two received a Christmas bonus of $100.00, one received a $50.00 bonus, and one received a $40.00 bonus. It thus appears that Cruz was singled out for extremely favorable treatment in late December, as Castellanos also was around Christmas-time.

As to whether or not Mr. Cruz's extended absence from work to engage in his decertification activity was authorized by the Company is an issue hopelessly muddled in the record. Ben Abatti was of the opinion that a supervisor would be aware of the reasons for an extended absence from work, or at least demand an acceptable reason upon the employee's return. Indeed, Abatti claimed that if a worker was absent for an extended time (any time over a week) without a "pretty good reason" he would be subject to discharge. Yet, not one tractor foreman, nor Abatti himself when he admittedly learned later of Cruz's extended absence, sought any explanation from Cruz for his long absence. According to Cruz, he gave no explanation to anyone regarding his long absence, even though he admittedly sometimes saw his supervisors in the shop area when he was there visiting during his decertification activity. Albert Studer, one of two chief supervisors over the tractor drivers, recalled that he was only informed at some point that Cruz had to leave for an immigration matter. Tony Abatti, the other supervisor over tractor drivers, recalled that he saw Cruz one day in the shop area and Cruz informed him he was collecting signatures for the decertification petition.19/

On December 13, Mr. Cruz was visited at his home in Mexicali by an Agricultural Labor Relations Board agent, who discussed with Cruz the fact that his December 6 petition had been just dismissed by the Agricultural Labor Relations Board. Coincidentally, Cruz was later visited that morning by Jim House, the Company's chief labor relations official.20/ According to Cruz's uncorroborated and unbelievable testimony, he and Mr. House did not discuss during that entire visit the earlier visit from the Agricultural Labor Relations Board agent or the recent dismissal of Cruz's decertification petition; yet, immediately after House's visit, Cruz drove from Mexicali to the Company's premises, where he again met with Jim House, and plans were then laid to arrange for Cruz to be represented by an attorney.21/

19/Tony Abatti initially indicated that he informed his brother, Ben, that Cruz was gathering signatures for a decertification petition. But, upon subsequent questioning by the Respondent's counsel, Tony Abatti retracted his recollection and indicated he was uncertain as to whether he informed Ben Abatti of Cruz's gathering signatures. Ben Abatti, on the other hand.,- insisted he had no knowledge of the decertification drive until mid-December, when he was personally served with a copy of the petition by Cruz or Jose Donate.

20/Cruz attempted to explain in his testimony that House visited him only in order to find out why he had been absent from work for so long. That explanation for the visit is simply incredible, in view of House's labor relations position with the Company, his lack of responsibility over tractor drivers, his most unique personal visit to Cruz's home, and the sequence of events that unfolded later that day and the next. Indeed, if House was so concerned about Cruz's being absent from work, one wonders why Cruz continued to remain absent from his job for an additional 10 days after the visit.

21/That the events described occurred on December 13 is established through the testimony of Mr. Cruz and the far more credible testimony of his counsel, Thomas Slovack.

According to Cruz, when he met with House at the Company's premises he informed House that he needed legal help. (Cruz at one point admitted telling House he needed legal assistance because of the dismissed petition, but at another point he denied explaining to House any reason as to why he needed legal assistance.) Through House's aid, Cruz then met in El Centro, at approximately 1:00 or 2:00 p.m., with one of the Respondent's labor lawyers, Scott Wilson. The two discussed legal representation for Cruz, and Wilson suggested who might assist Cruz regarding the dismissed petition. Wilson was then instrumental in contacting another attorney, Thomas Slovack, to represent Cruz.22/

By early the next morning, December 14, Thomas Slovack had come from his law office in Palm Springs to El Centro and met with Wilson and another of Respondent's lawyers; they discussed Cruz's dismissed petition. Slovack was a management lawyer and brother-in-law of Jim House. At around noon, Mr. Cruz was driven by Jim House to House's father's home, where Cruz met with Mr. Slovack. From that point on Mr. Slovack became Cruz's attorney, handling an appeal from the Agricultural Labor Relations Board's dismissal of the first docketed petition, personally assisting in the gathering of signatures for another decertification petition, and attending the pre-election conference in place of Cruz, who admitted that he did not even know when the conference took place.23/ Until the decertification election took place, Slovack remained in El Centro, almost exclusively, and assisted in the decertification drive. It was also Mr. Slovack who encouraged Mr. Donate to become a named Petitioner on the last decertification petition. Throughout his pre-election representation of the Petitioners, Mr. Slovack used the office and library facilities of Respondent's lawyers and of the Imperial Valley Vegetable Growers Association (to which the Respondent belonged), without reimbursement for the use of such facilities (though reimbursement was made by Slovack's firm for any use of secretarial help, xeroxing, and phone calls): Mr. Slovack admittedly discussed the Petitioners' case with Respondent's labor counsel and with

---

22/Cruz at first insisted that he was working on December 13, although subsequently he indicated that he was not working but at home that morning, after which he met with Wilson at 1:00 or 2:00 p.m. (not at lunch-time, as he originally claimed). Cruz's time card for the week in question credits him with eight hours' work on December 13, a Wednesday (as acknowledged by Agnes Poloni, the Respondent's bookkeeper, who indicated that the time card dates for the week in question refer to December 13, not the 29th as might be suggested from the face of the time card). But, from the sequence of events it is clear that Cruz did not work on the 13th. He next claimed that he worked on December 14-, but the Respondent's official time card for Cruz indicates he did not work at all that day.

23/Slovack apparently represented Mr. Cruz, then later Mr. Castellanos and Jose Donate, on a pro bono basis. He continued representing them throughout the 30-day trial herein and also arranged for them (Cruz and Donate) to attend a legislative meeting in Sacramento, California, regarding decertification election issues (all at his firm's expense). By the time the instant trial herein began, it was estimated by Mr. Slovack that the value of his services had exceeded $25,000.00.

Jim House, while representing the Petitioners.

Two other features of Mr. Cruz's relationship with the Respondent are established by the record. First, on December 1 he charged on Respondent's account with Jones Brothers Glass Company the installation of a new rear window in his automobile, amounting to $169.28. His rear window was damaged, he suspected, by persons affiliated with the UFW, although Mr. Cruz denied telling anyone from the Company about his suspicion. According to Tony Abatti, however, when Cruz asked permission to charge his new rear window on the Company's account, which provided him a substantial discount for the window, Cruz mentioned that he thought supporters of the UFW had destroyed the window.24/ In contrast with Tony Abatti's testimony, Cruz more-or-less refused to commit himself as to whether he asked anyone's permission to use the Company's charge account. Although it seems that it was not uncommon for the Company's full-time, steady employees to charge personal purchases on the Company's charge accounts, with the Company's approval, rather than having Cruz's charge immediately scheduled in for subtraction from his next paychecks, as was the normal practice, Cruz's charge began being deducted from his pay as late as April 7, 1979, some three weeks after the original complaint in this proceeding was filed.

The second feature noted in the record is the fact that as it had done with Castellanos, the Company listed Mr. Cruz as eligible for its new medical insurance coverage in January, 1979, although he did not work enough hours the prior month to qualify for such coverage. At that juncture, when Cruz was qualified for coverage by the Company, he was anticipating future medical surgery on his son's hand and other medical needs regarding his wife.25/

B. The. Decertification Campaign:

1. Introduction.

As earlier noted, the campaign to decertify the UFW involved the gathering of signatures on three different decertification petitions, in addition to the "yellow sheet" initially circulated by Manuel Castellanos among only the tractor drivers and irrigators. The first petition filed by Castellanos and Cruz was not docketed, the second was docketed as 78-RD-l-E on December 6 and, as noted, dismissed on December 12, and the third petition was docketed as 78-RD-2-E on December 19 and eventually led to the election on December 27. Most of the evidence adduced with respect to the Petitioners' decertification

---

24/Before Tony Abatti testified, Ben Abatti had claimed that Cruz asked his permission to charge the glass installation on the Company's account, but that Cruz did not mention who broke the window.

25/Although Respondent claims that in the past it has extended insurance coverage to other nonqualified workers who have been faithful employees, these exceptions appear to arise when expressly requested by individual employees in, need, not as a matter of voluntary initiation by the Company as occurred in the case of Cruz and Castellanos.

activity related to their gathering signatures on the first two petitions .

As is highlighted below, the Petitioners' decertification activity had certain common features, irrespective, of which work crew they were visiting or whose signatures they were gathering. Nonetheless, the decertification activity is discussed below in relation to the particular work crews involved.26/

2. Panfilo. Avina's Crew.

Panfilo Avina has two crews working under his direction, each being led by a so-called "helper": Manuel Galindo and Trinidad Soto. Avina spends very little time directly with either crew, for he mainly observes their work while seated in his truck at some distance from the crews. Avina, or General Foreman Hernandez, normally gives the necessary work instructions to the "helpers" and they then pass them along to the crew workers. The two helpers are in the fields with the workers, observing the quality of their work, and are the ones who direct when breaks and lunch periods are taken. The two crews number approximately 22 or 23 workers apiece. During the time of the decertification petition drive these two crews were harvesting melons by machine.

Manual Galindo's group: Toribio Cruz and Manuel Castellanos visited Galindo's work group (or crew) on two occasions, once in late November and once in early December. Several witnesses described these two visits through contradictory testimony. Based on their comparative demeanor and the substance of their testimony, I have generally credited the testimony of Jesus Tarin$_s$ a worker in Galindo's crew and still an employee with Respondent.

Mr. Tarin recalled that when Cruz and Castellanos first visited the crew they waited at an edge of the field until the melon harvesting machine (and the crew which worked along with it) reached that edge. The machine and its motor were then stopped for some 15 minutes while Cruz and Castellanos talked with the crew and solicited their signatures on the decertification petition. According to Tarin's credible recollection, the machine's driver, Jouquin Lopez, dismounted the tractor and signed the petition, as did Manuel Galindo. Castellanos told the workers they were gathering signatures for a new election because the UFW's medical plan was inadequate and so that the Company could start another medical plan. Tarin's testimony indicates

---

26/It was stipulated by the Respondent that the following persons were supervisors within the Act's meaning: Ray Hernandez, general foreman; Jim House, assistant to Ben Abatti and labor relations representative; and the following crew foremen: Panfilo Avina, Angel Avina (when in charge of a thinning crew during October and November), Jose Rios, Pedro Palacio, Thomas Romero, Raraon Veliz, 3r., and Pedro Padilla. It also should be noted that the Respondent denies any responsibility for statements made by Petitioners during the campaign to decertify the UFW, claiming that they were not agents of the Respondent and could not bind the Respondent by their statements.

that the solicitation by Cruz and Castellanos took place during work time, not during break time. When they departed after IS minutes or so the crew immediately returned to work.

Mr. Cruz claimed that his first visit occurred during a break from work, but both Manuel Galindo and Panfilo Avina (who observed the first decertification solicitation) denied that the machine stopped at the field's edge because of a break. Tarin recalled that Cruz and Castellanos appeared after the employees had taken their morning break. Nor does it appear that Cruz and Castellanos engaged in their campaigning merely during the time that it normally takes the harvest machine to exit the field and turn around to re-enter in the next set of rows, as suggested by Galindo and Avina. For, as Jououin Lopez recalled, the Petitioners were there for about 15 minutes, longer than it normally takes for the machine to make its turn-around (somewhere between five to 10 minutes), and the harvest machine was actually shut off while they solicited signatures, though the motor is never shut off when the machine is simply in the process of turning around. Indeed, according to Lopez, he was directed by Galindo to shut off the machine's motor.27/

Cruz and Castellanos again visited Galindo's crew in early December, once again gathering signatures on a decertification petition. According to Mr. Tarin this second visit occurred early in the morning, before the employees were given their morning break. And again, Cruz and Castellanos gathered their signatures for some 15 minutes or so, while the melon machine waited at the edge of the field. When they left, the workers returned to work.

In contrast to Tarin's recollection, both Cruz and Jouquin Lopez claimed that the Petitioners' second visit took place during lunch-time. Although the matter is not free from doubt, it is fair to conclude that that visit was not during lunch, as claimed by Cruz and Lopez. Significantly, Lopez recalled that Cruz arrived when the workers were heading for their cars where they would eat their

---

27/It seems to be the case with melon machine crews, as with some of the other field crews, that employees are free to visit the portable toilets or drink water at the edge of the field when the machine is turning around or before they turn back into the field and. begin other work rows. But, it does not appear that the first visit of Cruz and Castellanos merely took place during a time when Galindo's machine was waiting for workers to return from the toilets or from drinking water. For one thing, their visit lasted longer than the normal turn-around time. For another thing, the melon machine does not wait for the workers when there are sufficient extras to fill in for them on the machine, which was evidently the case when Cruz and Castellanos first visited the crew. According to Jouquin Lopez the crew was full that day, meaning there were some 23 or 24 employees there, while according to him only some 17 workers are necessary to keep the machine running in the field. Furthermore, the machine coincidentally began operating immediately upon the departure of Cruz and Castellanos. Finally, the motor was shut off, which is not done when the machine is waiting for employees to return to it.

lunches, but Cruz claimed that he read the petition aloud to the workers, which seems as though it would have been impossible if they were going to or already seated in their individual cars eating. - Neither Galindo nor Panfilo Avina claimed that Cruz came during lunch. In addition, Avina was apparently not present during the second visit, although it appears to have been his common practice to visit each of his crews during the lunch break. Furthermore, had Cruz visited the crew during lunch it would have been a departure from his regular practice of soliciting signatures from the field crews during normal work hours and not during their lunch breaks.

Trinidad Soto's group: The testimony surrounding Toribio Cruz's solicitations of the group of workers led by Trinidad Soto is in deep conflict among the various witnesses, The. most likely scenario for those solicitations comes from a composite of the testimony.

Maria Covarrubias, the UFW's representative in the Soto group and an employee of Respondent's for nine years, described three visits made by Mr. Cruz. Her sincerity and demeanor as a witness were eminently credible; however, her testimony was occasionally confused and somewhat inconsistent as to various details and, therefore, cannot be strictly relied on. A similar impression emerged from observing the testimony of her husband, Tadeo Covarrubias, a man in his 70's and who has worked for 14 years for the Respondent.

Mrs. Covarrubias initially observed Mr. Cruz and Mr. Castellanos visiting her crew in November. On that occasion they spoke only with Trinidad Soto, for approximately 30 minutes, and then departed. According to Mrs. Covarrubias, Soto later informed her of Mr. Cruz's identity and told her that they had checked with the foreman (presumably Panfilo Avina) and were going to return to gather signatures, and that they had been sent by Ben Abatti. Soto, however, denied having such a conversation with Mrs. Covarrubias. 28/ However,

---

28/Were it crucial to resolve the conflict between Soto and Mrs. Covarrubias, I would credit Mrs. Covarrubias's account, particularly since Soto's denial was delivered in a noticeably unconfident and jerky manner. A reason why one is hesitant in resolving some of the myriad credibility choices in this case is that often the witnesses called by the same party contradicted one another. As an example, we see that Panfilo Avina admitted in his testimony that on one occasion Cruz informed him prior to his solicitation that he was gathering signatures on a petition, although Cruz denied having such a conversation with Avina. To further confuse the matter, Avina, as earlier noted, 'described his observation of Cruz's solicitation among Galindo's crew but denied seeing him visit Soto's crew, a denial put into question not only by Tadeo Covarrubias, who described Avina as present on one occasion and as talking with Cruz, but by Maria Escobeda (a witness for Respondent), who described Avina as being across the field when Cruz solicited signatures among the workers of Soto's crew, and by Soto, himself, who described Avina as being some 50 yards away when such a solicitation took place. On the other hand, neither Galindo nor his machine driver, Jouquin Lopez, placed Avina near the Galindo group when Cruz was soliciting signatures.

Soto admitted that Mr. Cruz informed him one day that he was present to talk to the workers and get support for a new election and that Soto told Cruz he could talk to the workers when the melon machine -stopped £t the edge of the field.

In any event, general agreement exists among the witnesses that Cruz and Castellanos came to the Soto crew and solicited petition signatures around late November or early December, on two occasions. On the first of these occasions, it is fair to conclude that the solicitation took place during work time. Mrs. Covarrubias pinpointed the visit at about 10:30 a.m., when the crew's melon machine reached the edge of the field known as La Coyote. She recalled that Soto stopped the machine and its motor, that Cruz and Castellanos gathered signatures for about 30 minutes, and that after they left the employees were given their lunch break.29/ Tadeo Covarrubias also recalled a solicitation at the La Coyote field, and although he was not sure when it occurred, he recalled that the machine was ordered shut off when Cruz was there to talk with the workers. (Mr. Covarrubias identified Panfilo Avina as the person who ordered the melon machine shut off, but it may be that when he identified Avina he meant Trinidad Soto, especially since Avina rarely spent time inside the field where he was placed by Mr. Covarrubias's testimony.) Maria Escobeda also pinpointed this first employee solicitation as being at the edge of the field, at about 10:30 a.m., and before the lunch break. Escobeda, however, indicated that the solicitation lasted only 15 minutes or so, and then the employees returned to work.30/

The next visit by Mr. Cruz to the Soto crew, about a week later, appears to have occurred during the lunch hour. While the time of his visit is not free from doubt, Mrs. Covarrubias's testimony is hopelessly muddled as to when this visit occurred, Mr. Covarrubias could not recall this visit, and Maria Escobeda pinpointed the visit as taking place during lunch. Even Mrs. Covarrubias suggested through her testimony a likelihood that this second employee solicitation occurred during or very close to the lunch break, although at other portions of her testimony she fixed the visit as taking place after lunch. In view of all the testimony, and particularly Ms. Escobeda's credible assertions in regard to the second visit, it is concluded that on this occasion Cruz solicited employees during their lunch break and not during normal work hours.

29/Although Mrs. Covarrubias indicated that the lunch break may last one hour, this estimate is highly unlikely. The UFW contract, for example, provided that lunch breaks were to last only one-half hour (G.C. Exh. 10, p. 33).

30/Although Escobeda indirectly implied that the machine was not shut off during Cruz's solicitation, I credit the recollection of Mr. and Mrs. Covarrubias that the machine was shut off while Cruz gathered signatures for the decertification petition. Their recollection even conforms with the implicit conclusion emerging from the testimony of Soto, who indicated that he gave Cruz permission to talk to the workers during lunch or break-time, times when the machine is normally shut off.

3. Angel Avina's_ Crew.

Mr. Cruz solicited signatures for the decertification: drive only one time among the crew of Angel Avina, an admitted supervisor, while that crew was engaged in thinning lettuce. It was in late November.

According to the credible testimony of one crew member, Fernando Franco,31/ the following occurred on that occasion. Cruz appeared at the edge of the field, arriving after Angel Avina's crew had returned to work following their morning break. Franco observed him speak with four crew members as they approached the edge of the field on their way to turn around into other work rows and that the four signed a paper that Cruz had with him. When Franco and his two co-workers approached the same area Cruz showed them the paper, asked them to sign it, and explained that it was for a new election so the employees could get d. better medical plan. Throughout Cruz's visit, Angel Avina stood near him and watched the transactions.

Franco recalled that he told Cruz that the employees were satisfied with the Union. Avina, still standing nearby, then told Cruz that he should return at lunch time to explain to the employees what it was all about. Mr. Cruz then left, but he never returned to the crew, apparently because even those few who had signed his petition later told him to remove their names from it. 32/

4. Jose Rios's Crew.

Although Toribio Cruz and Manuel Castellanos visited the crew of Jose Rios regarding the decertification drive, neither one took an active role in soliciting employee signatures and neither of

---

31/The only other witness to directly testify about this solicitation was Angel Avina, whose testimony did not contradict that of Franco's. Indeed, Avina admitted that Cruz approached him and informed him he was gathering signatures for a new election so the employees could vote no; Avina also acknowledged that he gave Cruz permission to speak with the employees if he wanted. Avina indicated at one point that Cruz was present for a total of five to 10 minutes, but then later testified that he was present for only two or three minutes.

32/The Respondent elicited testimony from several witnesses, including Panfilo and Angel Avina, to the effect that UFW representatives were circulating throughout Respondent's fields prior to the decertification election, campaigning, and thus it is argued that the UFW was given as much access to the workers during work time as were the Petitioners. More will be said of this issue later, but in terms of the testimony of Panfilo and Angel Avina it should be noted that they could describe precisely only the presence of UFW representatives in the rapini fields after the rapini harvest began in early December (a harvest that both Avina crews joined) and that these representatives were investigating the matter of who the rapini crop belonged to, a major issue in this proceeding. Thus, no first-hand evidence exists that the UFW used work time to engage in election campaigning in the crews of Panfilo and Angel Avina.

them spoke with employees during work hours (except perhaps on one very minor occasion with Eva Donate). Rather, the collection of signatures from that crew, while it was in the field, was the responsibility of Eva Donate, a member of the Rios crew.

Eva Donate, not a named Petitioner, and her husband Jose, one of the named Petitioners, both lived in rent-free housing on the Company's premises. Jose Donate had worked for Respondent since 1963, and Eva had worked on and off since 1972. Both of them had close connections with the Abatti family, for in late 1977 Jose Donate became seriously ill and almost died, and he recovered largely through the intervention of Ben Abatti and Agnes Poloni. No evidence exists, however, that Jose or Eva Donate received any noteworthy treatment from the Respondent or its management immediately before or during the decertification drive. Nor does it appear, with but one minor exception noted below, that Eva Donate was given special consideration by Jose Rios when she solicited decertification signatures among her crew, as her solicitation activity invariably took place during non-work time.33/

Several factual features, however, do stand out with respect to decertification activity involving the Jose Rios crew. First, on one of the occasions in late November when Mr. Cruz and Mr. Castellanos were visiting the Rios crew before work, and after Eva Donate had been gathering decertification signatures around the morning fire, she requested permission from Jose Rios to leave for a short tine and, after permission was granted, she departed with Cruz and Castellanos in Cruz's car. Although it may have been unknown to Rios, Eva Donate then went to the crew of Pedro Palacio where she engaged in soliciting signatures for the decertification petition. When Donate returned to the crew, work had already been in progress approximately one-half hour, but Donate was not docked in pay for that absence.

Another feature involving the Rios crew 'relates to a party held on December 16 at a restaurant known as La Coyote, where many of the crew gathered for eating and drinking. Also in attendance were Jose Rios, Ray Hernandez, the general foreman, Jim House, Toribio Cruz, and his attorney, Thomas Slovak. As both Cruz and Eva Donate

---

33/Two members of the Fernandez family, Clemente and his son Jose Armando, members of the Rios crew who were discharged or laid off during the decertification drive, testified to several statements made by Eva Donate to the effect that she was campaigning for decertification because Agnes Poloni had requested her to and had given her the decertification petitions and to the effect that employees who did not sign the decertification petition would be discharged. I do not place reliance on these testimonial assertions, which were denied by Eva Donate. Mrs. Donate's testimonial demeanor was as credible as that of Clemente and Jose Fernandez, and the evidence fails to demand a finding that she was acting as an agent of the Respondent so as to bind the Respondent with the import of such statements, had they been—in fact— made. Mrs. Donate's purported hearsay threats and statements, as described by the Fernandezes, are not so critical to the issues in this proceeding as to require resolution of the testimonial conflict regarding them, particularly inasmuch as her agency vis-a-vis the Respondent is not clearly evidenced in the record.

acknowledged, the occasion was used to solicit signatures for a decertification petition and, according to Cruz, some 20 to 24- signatures were gathered. Mr. Slovak also used the opportunity to get various crew members to sign declarations to be used in seeking reversal of the recent dismissal of a prior decertification petition. .The evidence does not indicate, however, that any of the supervisory personnel present directly participated in the gathering of signatures on either the petition or the declarations.

The last, and most significant, feature of activity involving the Rios crew occurred around December 21. The Rios crew was laid off after the week of December 16 and remained on layoff until December 26, when they returned en mass. During that hiatus in work the third and instant decertification petition was filed, on December 19, but because it had an insufficient number of signatures, the Petitioners were given one or two more days to gather the necessary signatures.

It was estimated to be December 21, when Petra Ortiz, a member of the Rios crew, received a telephone call from Alehandrina Gutierrez, another crew member, who requested that Ortiz go to the Kennedy Market in the town of Heber so she could sign a decertification petition.34/ Ortiz went as requested and located Jose Rios sitting in his car in front of the market, along with Pedro Martinez, another crew member. When Ortiz asked Rios what he wanted her to do, Rios, saying nothing, nodded toward Martinez, who promptly produced an unsigned decertification petition. Ortiz informed him that she had already signed the petition and left, observing another crew member, Rarnon Torres, also present in the market area.

Ms. Gutierrez admitted telephoning Ortiz and a few other employees, such as Adelina Moreno, and requesting them to meet at the Kennedy Market in order to sign the petition. Ms. Gutierrez claimed she made her telephone calls at the request of Pedro Martinez, who came on foot to her home behind the market. Mr. Martinez had never been to her house before or made any similar request of her in the past. But, Ms. Gutierrez had been Jose Rios's customary contact person with crew members who lived in Heber, Brawley, El Centro, and Imperial, when he wished to deliver telephone messages for them to return to work from layoff status or when he wished to leave paychecks for employees who had not received them at work.

Indeed, Jose Rios also visited Gutierrez's house the same day as Martinez. According to Rios and Gutierrez both, Rios said nothing that day about the decertification petition, but merely

---

34/Although not accepted in evidence at the time for the truth of this hearsay assertion, Ms. Ortiz recalled that Gutierrez told her that Jose Rios wanted her to come to the Kennedy Market to sign the petition. This hearsay assertion is noted here, because Gutierrez later denied telling Ortiz that Rios had requested her to come to the market. In addition to this contradiction in testimony, several other reasons, as noted soon, indicate that Gutierrez's testimony cannot be accepted as credible.

requested Gutierrez to telephone employees and let them know that work would resume the next day. Rios also claimed that he coincidentally met Pedro Martinez and Ramon Torres at the market and then gave them a ride from Heber to Calexico, as Martinez had no automobile.

Neither the testimony of Gutierrez nor Rios can be accepted as credible. When Gutierrez was first approached by a Board agent concerning the Kennedy Market incident she denied having any knowledge whatsoever concerning it and admitted being fearful of her discharge if she were compelled to testify. While she testified, in behalf of the Respondent, Gutierrez materially changed her testimony regarding Rios's visit to her home: first she claimed that he came to her house before Martinez did; then, after she was questioned as to why she had not mentioned the work-recall to the workers she later telephoned about coming to the Kennedy Market, she claimed that Rios had come to her home after Martinez. Nor is it true that the crew was to return to work the next day, for their return did not take place for some five more days. And Rios's assertion that he accidentally encountered Martinez and Ramos at the market and drove them to Calexico cannot be accepted in view of the rebuttal testimony of Sylvia Ponce, who described z. day in December when Martinez and Ramos came to her house in Mexioali driven by Jose Rios,who waited outside in his car, and solicited her to sign the decertification petition. It is more than fair to conclude that this incident involving Ponce took place on the same day as the day on which Rios assisted Martinez in trying to gather the latures of Ortiz and Moreno (and her mother) at the Kennedy Market, signatures apparently needed in order to qualify the last-filed decertification petition for an election.35/

5. Pedro Palacio's Crew.

Pedro Palacio, an admitted supervisor, was foreman of a weeding and thinning crew that performed work similar to that of the Rios crew. Cruz and Castellanos visited Palacio's crew on two occasions .

The first time the two Petitioners, came they spoke only to Palacio. According to Palacio, they asked when they could come and speak with the crew about voting against the Union. Palacio told them to return at lunch time. Palacio then informed members of his crew that two men had come to get their signatures and would return at lunch, according to Guadalupe Mantes, a crew member.36/

35/In a later section of this decision, the testimony of Jose Armando Fernandez, regarding a threat made by Jose Rios over employee supp-ort for the decertification drive, will be discussed. This threat, and its implication, is more related to the discharge or layoff of workers in the Rios crew than it is to the kind of incidents discussed in this portion of the decision, although it is not without bearing on the matters discussed in the immediate pages.

36/Mr. Cruz claimed he came to the Palacio crew only once and denied speaking to Palacio. Mr. Palacio, however, contradicted that testimony. Palacio did not contradict Montes's testimony that he informed his crew members that Cruz would come to them -- (continued)

The second visit of Cruz and Castellanos occurred about a week later, in late November, along with Eva Donate. They arrived before the crew began work; some of the crew were outside of the crew bus and some eight to 10 were still sitting in the bus. According to Palacio, he went to the bus at Cruz's request and told those seated within that someone was there to speak with them and that they should gather outside. According to Ms. Montes, Palacio told those in the bus to gather together "because the people who came to talk to you are here about some signatures."

Eva Donate then attempted to get the Palacio crew members to sign a decertification petition. But, the crew, in to to, refused to sign the petition. While Eva Donate spoke to the crew Mr. Palacio remained nearby and overheard the conversation, as he admitted. None of the Petitioners returned again to the Palacio crew, as no one in the crew had supported the anti-Union effort.

6. Thomas Romero's Crew.

Toribio Cruz and Manuel Castellanos solicited support also among the crew of Thomas Romero. The testimony concerning the nature and extent of their solicitation effort is again in conflict.

Thomas Romero claimed that the two Petitioners came only one time to his crew. Romero claimed that when Cruz and Castellanos arrived the crew was approaching the edge of the field picking melons, and that he (Romero) declared a break. He recalled that the Petitioners remained with the crew for some 12 to 13 minutes, longer than the normal 10-minute break, although Romero claimed he sometimes extended the break five to 10 minutes when the crew had worked well. Romero described how three different employees, including Ramon Berumen, read aloud to the others from the decertification petition as Romero remained standing against a trailer some 30 to M-0 feet away. Initially Romero said he more or less instructed Berumen or the others to read the petition, but later he denied telling them to read it. Romero remembered that the employees returned to work immediately upon Cruz's departure.37/

Ramon Berumen, a member of Romero's crew, recalled that Cruz visited the crew twice. On both occasions, about a week apart from one another, Cruz stood by the edge of the field and spoke to employees as they carne out of their respective work rows to turn around and re-enter the field. On the first visit, according to Berumen, Cruz was there about 10 or 15 minutes, and Foreman Romero remained only a few meters away from him. As Berumen turned at the field's edge and Cruz solicited his signature on the petition, Romero said aloud that Berumen could sign. Other employees were also then nearby. Berumen believed

---

36/(continued)--during lunch to gather their signatures.

37/Cruz, whose testimony I generally do not credit, claimed also to have visited Romero's crew only once. But Cruz claimed that his visit occurred when the crew was changing fields and awaiting a new trailer. Cruz's version of his visit is contradicted by not only Mr. Berumen but by Mr. Romero as well.

that some six or seven employees signed the petition that day.

The second visit was similar, according to Berumen. On this occasion, however, Romero stood some 30 feet away and did not tell the workers they could sign the petition. Berumen denied that either visit occurred during a declared break time and claimed that official breaks on both days occurred after Cruz and Castellanos had departed.

In some respects the difference in testimony between Romero and Berumen is not that great. If one focuses on one portion of Romero's testimony, his recollection reflects that Cruz solicited the crew for longer than a normal break, that Romero purposely called a break (or permitted one to take place) because Cruz had come, and affirmatively advised the workers to read the petition (while Berumen recalled he advised workers they could sign it). In these respects the import of Romero's testimony is not unlike that of Berumen's.

On balance, however, I am more convinced that Berumen's recollection is the more accurate one. In the content of his testimony and in his manner of testifying no effort was apparent that Mr. Berumen exaggerated or had a partisan cast to construe events loosely so as to falsely accuse the Respondent of misconduct. On the other hand, Romero's testimony was both confusing and in self-conflict over such significant matters as to whether he instructed members of his crew to read aloud the petition to the others and whether he understood the reason for Cruz's visit. Romero at one point acknowledged he more or less understood that Cruz was campaigning against the UFW, but at other points insisted he paid no attention to the visit and that its purpose was none of his concern. On the whole, then, I believe Berumen's account that Cruz visited the crew on two occasions and solicited support for the decertification effort during work time; and, even if he did not, it seems evident, at least on one of Cruz's visits, that Romero directed his crew to take a work-break in order for them to speak with Cruz and discuss the decertification petition.

7. Piece-Rate Melon Crews_..

About November 30 two piece-rate crews were hand-harvesting melons in the same field; the foremen of the crews were Pedro Padilla and Ray Velez, Sr. Hilario Corall, a member of the Velez crew, observed Mr. Cruz come into the field while work was in progress. He remained for about 15 minutes, talking with members of the Padilla crew and gathering their signatures while they continued working.

Later that morning, as members of the two crews were on the crew bus waiting to leave the field, Mr. Cruz joined them on the bus.38/ Mr. Cruz said he was there with a petition for a. new election.

38/ No evidence was presented that Padilla or Velez, Sr., either knew of or assistedin Cruz stalking to workers on the bus. Because the evidence indicated no active involvement of the two foremen in the after-work solicitation by Cruz, Respondent was assured during 'ie hearing that Cruz's campaigning while on the bus could not be construed as connected with unlawful Employer assistance for -- (continued)

According to Mr. Corall, he asked Cruz who had sent him and Cruz at first answered that he was there on behalf of the state and then said that Ben (Abatti) had sent him. Corall asked Cruz what benefits they were talking about on behalf of the Company, and Cruz told him "they were offering better benefits, like a medical plan, better than the plan that we had."

Angel Carillo, another member of the Velez crew, similarly recalled the discussion, although somewhat differently than that recalled by Corall. Carillo recalled that Cruz said he wanted the workers to sign for a new election so they could get better benefits and a better medical insurance plan, but he failed to answer Carillo's inquiry as to who had sent him together signatures. According to Carillo, Cruz responded to a question from Hilario Corall by saying that if the Union loses it would make no difference, for Ben had said he would keep the same benefits and working conditions and that the only difference would be that the workers would get better medical insurance. 39/

Mr. Cruz returned on a later day to gather signatures again, telling the workers that the previous signatures had been voided. According to Carillo, Cruz again came on the bus and similar to his first visit said pretty much the same thing. Carillo also recalled seeing Cruz earlier during that day riding on one of the trucks which picked up harvested melons; he rode on the truck for some two or two and one-half hours along with Pedro Padilla, the foreman. But, Carillo, who was not in Padilla's crew, did not testify to hearing anything that Cruz had said to workers while riding on the truck. 40/

38/(continued)--the Petitioners. Nonetheless, Cruz's comments while on the bus remain in the record since they relate to the charge that Cruz, while acting as an agent for the Respondent, made unlawful promises to employees in order to have them sign the decertification petition.

39/Hilario Corall was then the UFW's highest elected representative from among the Respondent's workers, serving as president of the ranch committee; Angel Carillo also served on the ranch committee and as a substitute for Corall. Despite their affiliation with the UFW, the testimony given by Corall and Carillo seemed credible as to the events they described. Ray Velez, Jr., son of Mr. Velez the foreman, and who was called as a witness by the Respondent, did not contradict their testimony concerning what Cruz'had said on the bus. Roberto Tafoya, who had also been present on the bus and was called as a witness by the Respondent, was not questioned about and, thus, also did not contradict their testimony regarding Cruz's statements.

40/Counsel for the Respondent, in its post-hearing brief, requested that the hearing be reopened so that Respondent could present evidence with respect to Cruz's activity among Padilla's crew, which evidence Respondent's counsel failed to present previously. Respondent claims that such evidence was not presented through an inadvertent error. Respondent's request for reopening is denied. It was made clear before Respondent commenced its defense that Cruz's activity among the Padilla crew was considered as falling within -- (continued)

C. Changes In The Employees' Working Conditions After The Decertification Election:

1. Medical Insurance Coverage.

As earlier noted, according to the credible testimony of several employee witnesses, the decertification drive centered largely on the issue of improving the employees' medical insurance coverage.41/ Immediately following the decertification election, which tentatively indicated that decertification had succeeded, the Respondent put into effect its own new and improved medical insurance program.

According to Susan Estrella, on December 28, the day after the election, Agnes Poloni called her at the Beach Street Health Services in San Diego, where Estrella was employed. Beach Street Health Services ("Beach Street") had provided medical insurance for Respondent's field workers prior to the UFW contract. After mentioning the election, Poloni told Estrella that the Respondent wanted a medical insurance program for field workers effective by January 1, a plan which increased the employees' benefits. Sam Hartman, a vice president of Beach Street who participated in the telephone call, corroborated Estrella's testimony, although he recalled the day on which Poloni called as being December 29.42/

According to Hartman, he had been forewarned that Respondent might seek to have Beach Street administer a new nedical insurance program for employees. When initially approached concerning the matter by a Board agent in January or February, 1979, Hartman told that agent that he had talked with Mr. Ed Kendal, the Respondent's primary insurance agent, in late November or early December, 1978, and learned from Kendal that Respondent was thinking about reinstating a medical insurance program and that an election petition was in process. While testifying at the hearing, Hartman claimed that based on a subsequent conversation with Kendal, Hartman now believed that his earlier conversation with Kendal had not occurred on the dates originally recalled by

---

40/(continued)--the complaint and was an issue raised by the General Counsel's witnesses. Thereafter, the Respondent had the opportunity to respond to the evidence but did not.

41/At one point in his testimony, Toribio Cruz acknowledged that he told employees that he was seeking decertification to see if the employees could get a better medical insurance program. Castellanos also acknowledged telling employees that the Petitioners wanted to see if they could get better medical insurance coverage. As indicative of his testimony throughout, however, Mr. Cruz also took the position that he never mentioned improved medical insurance coverage to the employees he solicited: "No, I never said nothing about the medical plan, of having another medical plan, no. I never mentioned."

42/Mrs. Poloni denied talking to either Hartman or Estrella on the telephone. Mrs. Poloni's testimony in this respect cannot be credited, as contrasted to the far more trustworthy recollections of Hartman and Estrella.

Hartman, but rather that Kendal had informed him of Respondent's intentions sometime in mid-December.

In any event, on December 29 Estrella went to the Respondent's office. She spoke with Ben Abatti and Agues Poloni about a medical insurance plan to cover employees effective January 1 and that the plan should contain improvements from the last one Respondent had. Several days later Estrella presented a proposal to the Respondent concerning an improved medical plan, estimated at that time to cost the Respondent $5,000.00 more per month than the plan last carried with Beach Street in 1977-1978. The proposal was accepted and provided for increased coverage and a new dental plan. Estrella recalled that in the first meeting on December 29 Mr. Abatti had said that employees had suggested to him certain improvements for the medical insurance coverage, such as increased maternity benefits and office visit benefits .43/

The Beach Street plan as devised by Ms. Estrella was then agreed to on or about January 3, but made retroactively effective back to January 1, even though the UFW's existing medical coverage for Respondent's employees would continue in effect at least through January. Thus, during January, if not for longer, Respondent's employees received double medical insurance coverage. (It was the Beach Street plan that Cruz and Castellanos were covered by in January even though neither of them had sufficient qualifying work hours to be entitled to such coverage.)44/

In placing into effect its own medical insurance program for the field workers the Respondent did not bargain about the matter, with the UFW, although the Respondent's counsel had raised the subject of medical insurance with the UFW. During December, as industry negotiations proceeded between various lettuce growers and the UFW, Respondent's counsel, Thomas Nassif, who was a spokesperson for the lettuce growers, asked David Burciaga, the UFW's spokesperson in the lettuce negotiations, whether the UFW intended to continue covering Respondent's field workers under the UFW's medical insurance plan, but (according to Massif) the UFW never replied to his inquiries. Mr. Ben Abatti, however, testified that he never authorized his counsel to

---

43/it was well known to both Ben Abatti and Agnes Poloni that numerous employees were unhappy with the UFW's medical insurance program. Both recalled hearing employees complain about the UFW plan almost from the time that the UFW contract was signed, some six months before the decertification election. But Abatti denied talking to any employees about having a new medical insurance plan.

44/By the time of the hearing Respondent's costs for the Beach Street plan had diminished substantially from those which were predicted at the outset of the plan. However, the reason why the costs decreased was because Beach Street later began implementing a special "medical provider" service, which provided even greater medical insurance coverage for employees than originally commissioned in January, 1979, but at lower costs. Irrespective of the cost to Respondent, both the employees and the Respondent had to view the Beach Street plan as an improvement over the previous Beach Street plan.

bargain with the UFW about the workers' medical insurance coverage. Indeed, the Respondent did not participate and was not represented at the lettuce industry negotiations, and David Burciaga apparently was not the UFW's negotiator with respect to the Respondent's employees. ' And, when the UFW, through Delores Huerta, requested the Respondent to bargain over a new contract, on December 29, the Respondent formally refused to enter into negotiations with the UFW.45/

2. Increased Wages.

Some three months after the decertification election the Respondent paid to its piece-rate lettuce harvesters, about 105 employees, an aggregate premium of 10%, in addition to their past piece-rate wages. The facts surrounding this extra wage payment, however, are confusing and inconclusive.46/

A composite of testimony indicates the following as

45/The Respondent's refusal to bargain is evidenced in a letter dated January 12, 1979, written by Respondent's counsel, wherein the UFW was informed:

> The Company has a good faith belief that the Union no longer represents the majority of its work force and therefore the company no longer has a duty to bargain with the United Farm Workers. * * * * (S)ince the (election) results have indicated that the Union no longer represents the majority of the Companys' (sic) agricultural employees and since the majority of the persons challenged to vote are not eligible voters in the election, the Company does not intend to negotiate.

One of the charges in the General Counsel's complaint is that the Respondent unlawfully refused to bargain with the UFW following the December 27 election.

46/When he originally testified at the hearing, Ben Abatti denied outright making any premium wage payment to his lettuce employees. When he testified later at the hearing, after it had been established that the 10% premium was paid to lettuce employees, Abatti admitted he had paid them the extra 10%, and he claimed that his earlier denials arose because he was questioned with respect to a "bonus" and that he did not consider the 10% payment as a bonus.

Mr. Abatti's explanation for his earlier testimony (i.e., his denial) regarding the 10% wage payment cannot be accepted. His earlier testimony was addressed to whether he gave the lettuce employees a bonus or pay raise and, although he denied giving them either, he contemporaneously admitted they asked him for one and that he told them he would not give them a raise until the hearing was over, or the decertification matter was resolved. Thus, it is clear that Abatti understood which "pay raise" or "premium" or "bonus" the General Counsel was interrogating him about. Yet he flagrantly denied granting one when he initially testified.

the most likely explanation behind the 10% wage increase for the lettuce employees. Sometime around late December, or even in January, 1979, the lettuce harvesters discussed among themselves their 'desire -for either a raise in wages or the need of a new contract to replace the expired UFW contract. Led apparently by Roberto Tofoya, the lettuce harvesters began demanding from Abatti an increase of 20% in their existing piece rates, based on the so-called "Hansen contract," a contract that existed between another grower, Hansen Farms, and its non-organized field workers.

Through some three meetings with Ben Abatti, wherein the Hansen contract was discussed, Abatti finally agreed to pay the employees an increased wage, giving them first a 10% increase and promising them the second 10% increase after the dispute regarding the UFW's decertification was settled by the government. The first increase was given to employees in a lump sum payment in late March, 1979, when the lettuce harvest was over. Although some confusion surrounding the matter exists, it appears, as indicated by Ben Abatti, that the lettuce increase was in addition to all other wages and benefits that the lettuce workers continued to receive under the expired UFW contract. According to Roberto Tofoya, Abatti acceded to the demand for a lettuce wage increase when he was finally threatened with a strike by the employees. 47/

The General Counsel attempts to correlate the March, 1979, lettuce premium with the earlier decertification campaign, but the facts leave this correlation unconvincing. Nothing substantial reflects that the lettuce harvesters were promised any wage increase or premium in connection with the decertification election. The wage increase occurred approximately three months after the election. And, a composite of the testimony indicates that the wage increase probably

47/It is difficult, if not impossible, to rely heavily on Mr. Tofoya's testimony, as it was often confusing and nonresponsive. Indeed, as to Tofoya's claim that Abatti agreed to pay a 10% increase because of a threatened strike, Abatti, himself, never made that claim and could offer no substantial reason why he agreed to pay the costly increase to some 105 workers.

On the other hand, the testimony of Juan Alvarez, another lettuce harvester, appeared credible. Alvarez testified in a slow, even manner, and it did not appear that his testimony was fabricated or exaggerated. I have largely based my conclusions upon his testimony. In this regard it should be noted that Alvarez's testimony regarding the wage increase was not so at odds with the testimony of Angel Carillo, who I have generally credited as a witness, so as to place one or the other's testimony in serious question. Most of Alvarez's testimony portrays events that can be squared with Carillo's recollection, and it would not be surprising if the workers who were led by Mr. Tofoya, among them being Mr. Alvarez, discussed and planned their strategy regarding the Hansen contract demands without the knowledge of Mr. Carillo, who—after all—had been an important UFW representative among the harvesters and an unlikely person to have been consulted when the workers decided to try to replace the UFW's contract with the Hansen contract.

resulted from the lettuce workers' demands for increased wages during the height of the lettuce harvest and not as a result of Respondent's effort to satisfy a promise to or reward the lettuce workers in connection with the decertification election. The inference connecting the decertification campaign and election to the subsequent lettuce wage increase is factually inadequate.48/

III. Discriminatory Conduct Allegedly Engaged In By The Respondent.

A. The Jose Rios Crew:

1. Introduction.

As earlier noted, Jose Rios distinguished himself among Respondent's crew foremen by the active help he provided to Pedro Martinez and Ramon Torres in soliciting signatures for the last decertification petition in order that it qualify for an election. This active help occurred around December 21, while Rios's crew was laid off.

Two other features of Jose Rios's conduct are noted in the record. The first feature was described by the testimony of Jose Armando Fernandez, who along with his father, Clemente Fernandez, was laid off from Rios's crew on December 12. Jose Armando recalled that two days after he signed the first decertification petition circulated by Eva Donate, on November 28, he spoke with Jose Rios in a field where the crew was working. Ben Abatti had just finished conferring with Rios in the field, and after Abatti had left Jose Armando asked the foreman what the boss thought of the crew's work. According to Jose Armando's recollection, Rios informed him that the boss had come to say that everyone in the crew should sign the decertification petition, that especially that crew should sign the petition so that they could continue working. Rios said that "anyone that didn't sign it was going to be laid off."

Although the Respondent challenges the credibility of Jose Armando's testimony, I credit his recollection concerning the layoff threat that Jose Rios passed to him on November 30. Jose Armando's demeanor was credible; he testified in an unexaggerated fashion and appeared convincing in his sincerity. The fact that he had not prepared an affidavit or declaration prior to. the hearing does not destroy the veracity or accuracy of his recollection, as the Respondent suggests. No requirement exists that a witness's testimony be documented by a contemporaneous affidavit; indeed, the absence of one may just as much reflect that Jose Armando did not wish to become personally involved in the litigation against the Respondent than it reflects

48/Another "payment" to the lettuce harvesters, however, was much more proximate to the decertification election. At the end of 1978, days after the decertification election, the Respondent gave to all its lettuce workers a "fifth" of Seagram's V.O. whiskey. Although Ben Abatti loosely asserted that the Company had occasionally made such gifts in the past, I credit Angel Carillo, a Company employee for some 10 years, who denied that any such gifts had ever been given before.

a recent attempt by him to fabricate or distort his recollection. And, although Jose Armando cannot be characterized entirely as a disinterested witness, inasmuch as his father and mother are herein actively challenging their layoffs, it should be noted that Jose Armando (as discussed later) openly admitted facts that might foreclose, him from any back pay claim in respect to his own layoff or discharge. In addition, it should be noted that much of his testimony related to Eva Donate, who had been his friend and work partner when he was employed by the Respondent, and he did not appear eager to malign her conduct. Finally, Respondent notes that on cross-examination Jose Armando failed to recall his prior testimony regarding Jose Rios's threat; but, that failure appeared to result from confusion over the generalized questions he was being asked and did not strike me as an inconsistent failure of recollection that it is accused of being. Indeed, to clear up the testimonial confusion (over such general questions as to how many different conversations Jose Armando had regarding the decertification drive) he was asked specifically during his redirect testimony whether Jose Rios said anything concerning the decertification drive and he reconfirmed Rios's threat that he had earlier described during his direct testimony.

Nor is it as unlikely as Respondent suggests that Rios would have referred to Ben Abatti and the layoff threat in a conversation with Jose Armando, so as to make Jose Armando's testimony questionable. One must remember that Jose Rios also intruded openly on December 21 into the decertification campaign by chauffeuring two sponsors of the decertification petition. One will also see, in the coming paragraphs, that Jose Rios became personally violent with a prior crew member who, as the Board found, Rios discharged unlawfully two years before. Furthermore, it is fair to conclude that Rios viewed Jose Armando as being distinct and apart from his father, Clemente, the crew's Union representative, since Rios continued to befriend Jose Armando after the December 12 "layoff" and even offered to help gain other employment for him. Based on these foregoing considerations, and after having observed Jose Rios while testifying, I do not believe it unlikely that Rios would have off-handedly remarked to Jose Armando, on or about November 30, that Ben Abatti wanted everyone in the crew to sign the decertification petition and that those who did not would be laid off. In this connection it might be noted that Rios's comment to Jose Armando occurred a day or two after the members of the Pedro Palacio crew had—en masse--refused to sign the decertification petition, thus making the Rios crew's support for the petition more crucial to its success.49/

49/As earlier noted, Jose Armando (as did his father) also described Eva Donate as warning him that those who did not sign the decertification petition would be laid off. I have determined not to resolve the credibility conflict between their testimony and Eva Donate's denials. But, in passing it should be noted that when two other Rios crew members, Adelina Moreno and Maricela Neblas (Alfara), were asked whether they had heard Donate issue any threatening remarks regarding layoffs, both of them visibly faltered in their denials. Further, Ms. Moreno's testimony vaguely suggests that she was aware of a layoff threat, as suggested by her unpersuasive claim that Donate made no verbal effort to encourage Moreno to sign a decertification petition when the matter first arose, and as suggested by — (continued)

The second feature concerning Jose Rios's behavior that has a bearing on his involvement with the Layoffs in question, as well as with his credibility, involves his attack on Jesus Salano, a prior crew member. As earlier noted, on May 9, 1979, while the instant hearing was in progress, the Board issued its decision involving charges filed against the Respondent in early 1976 and held, inter alia, that Jose Rios had unlawfully discharged Jesus Salano.

The day after the Board issued its decision involving Salano, he saw Rios by Rios's home, where Salano had just driven a friend. According to Salano, Rios yelled at him to come to Rios's house, after which Rios went in his home and came outside with a pistol. Rios told Salano that "you have completely bored me," after which he threatened to kill Salano.50/ As Salano moved away from him, Rios shot him in the leg and then hit Salano on the head with the pistol. Rios also pointed the gun at Salano's head and threatened to kill him.

Although Rios admitted shooting Salano and hitting him three times with the pistol, he claimed that Salano provoked the encounter and that it had nothing to do with the Board's recent unfair labor practice finding against him. Neither of Rios's claims is credible. For one thing, Rios's version of the encounter is inconsistent and incredible. At first he claimed that Salano was outside his home with a knife, yelling at Rios. But, Rios later claimed that the first time he saw Salano's knife was after he came outside his house with his pistol. Then Rios claimed he shot Salano when Salano attempted to pick up a bottle (apparently to strike Rios), but it is unclear why Salano would have reached for a bottle when, as Rios claimed, he had a large knife in his hand. Rios also contradicted himself when he claimed that he knew Salano always carried with him a gun, first claiming to have always seen him with one and next claiming to have only heard that he shot a gun at night in the neighborhood.

It seems more probable that the Rios-Salano encounter on May 10, 1979, related to the Board's recent holding against Rios and the Respondent. The two men had seen one another before, after Salano's discharge, and no trouble ensued. It also seems unlikely that Salano would have gone out of his way to provoke Rios at that juncture. It is far more probable that Rios was the one who was now provoked and sought to take out his retribution against Salano.51/

49/ (continued)--Moreno's response to Donate when Donate gave her the petition to sign—to wit, that "I told Eva that what I needed was to work and not be involved in other things. I need the money for my expenses."

50/Although the English translation of Rios's comment to Salano sounds somewhat odd, it appears that the meaning of his comment was essentially that Rios was fed up with Salano or tired of the trouble Salano had caused.

51/Earlier I noted that Jose Rios's testimony could not be credited in respect to the incident involving his assistance to Pedro Martinez and Ramon Torres at the Kennedy Market (supra, -- (continued)

2. The Layoffs.

On December 12 the following persons were laid off : from Jose Rios's crew: Clemente Fernandez, his wife, Gregorio, his son, Jose Armando, Francisco Salas, and Maria de la Luz Torres. (Francisco Salas and Maria Torres were not: members of Clemente' Fernandez's family, but they were the only others who rode to work with Mr. Fernandez.) Clemente Fernandez was the designated UFW representative in the Rios crew, and the Company was aware of that fact since October. Clemente and Gregorio Fernandez were the only two who had not signed the first decertification petition solicited by Eva Donate among the Rios crew, and they plus their son, Jose Armando, were the only three among the crew who did not sign any of the later decertification petitions .52/

The five crew members were laid off without prior notice, at the conclusion of the work day on December 12. Rios informed Clemente that he and his car of workers were being laid off because there was very little work left and because they were the most junior workers in the crew. According to Clemente Fernandez, one of the two UFW representatives who were present among the crew that afternoon asked Rios whether there were not employees more junior than those who were being laid off, and Rios replied "he did not know anything, that it was an order from the office." At the time he issued his layoff notices, Jose Rios had not seen the seniority list for his crew.

According to Rios, he issued the layoffs pursuant to the direction of Ray Hernandez, the Company's general foreman. Rios claimed he was given the instruction without prior discussion with Hernandez and was not consulted regarding the size of the layoff. Rios recalled at one point in his testimony that Hernandez instructed him to lay off five or six employees so the crew would not be over 25 employees , and at another point he recalled that Hernandez instructed him to lay off the "newer ones" so the crew would not be over 25 or 26 employees .53/

51/(continued)--pp. 20-21). Now I might note that Rios's testimony was generally unconvincing in view of his testimonial demeanor. His efforts to deny any unlawful or questionable conduct on his part were characterized by notable jerkiness and faltering, so much so and so consistently so that his denials betrayed the opposite impression to this neutral observer. Having observed Rios as a witness, and having listened to his self-conflicting answers, I have determined that his testimony cannot be generally accepted as credible.

52/In pursuing his role as the UFW crew representative, Clemente Fernandez had had several discussions with Jose Rios in November and December regarding what Fernandez believed to be employee problems, such as the location of water containers, appropriate bathroom facilities for the crew, and the use of crew helpers. According to Fernandez, Rios did not respond amicably in these discussions.

53/During the week when the "Fernandez group" was laid off, the pay week of December 16, the Rios payroll showed -- (continued)

Fernando Franco, a worker in Angel Avina's crew and who also worked in the rapini harvest, portrayed a far different version of Ray Hernandez's layoff instruction to Rios. Franco recalled -that on December 6, the first day of the rapini harvest, he encountered Hernandez and Rios talking by the side of a field, as Franco was searching for the rapini field. He parked his car and walked across the road, where Hernandez sat in his pickup truck talking to Rios through the open door on the passenger side. As Franco approached to ask where the rapini field was he heard Hernandez tell Rios: "fire him, fire him, fire him. I don't want anybody from the Union—any representative from the Union--talking to the people." When Rios agreed to follow the instruction if Hernandez would "respond" for him, Hernandez told Rios he would respond for him. At that juncture Rios saw Franco approaching and asked what he wanted, and after Franco explained he was looking for the rapini field Hernandez agreed to show him where it was.

The Respondent attacks Franco's strategic testimony on several grounds, none of which prevails. For one thing, Franco's declaration is not significantly at odds with his testimony: the only possible discrepancy between the two is that his declaration fails to mention that Hernandez told Rios he did not want someone from the Union talking to the workers and, instead, reflects that Hernandez told Rios to "fire him, fire him to hell. I don't want a single Union representative." For another thing,, from Franco's description of the encounter it does not seem unlikely that he could have approached to within hearing distance of Rios and Hernandez without their noticing him, as Rios had his back toward Franco while leaning in the open pickup door, blocking Hernandez's view toward the approaching Franco.

In addition, Franco's description of how he came to provide information concerning the Rios-Hernandez conversation seems believable. Franco went to the UFW's office around December 13 with his first paycheck from the rapini harvest, as the UFW was attempting to learn whose rapini crop it was; he then informed Anita Morgan from the UFW of the Rios-Hernandez conversation. Morgan then expressed no concern over any discharges and told Franco his observation was not significant. On December 29, however, UFW agents came looking for Franco to discuss what he had overheard, as they now expressed concern because some discharges had taken place. Franco then prepared his declaration the following day.

Finally, one cannot help but be impressed with Mr. Franco's testimony, from the standpoint of both his observable demeanor

---

53/(continued)—29 active employees in the crew (not including Ramon Torres, whose placement in the Rios crew will be discussed later, but who was not a regular member of the crew at that time). During the prior week a similar number of employees worked in the crew (not including Ricardo Padilla, whose name only shows up as having worked December 8 and 9 in the crew). Thus, the layoff on December 12 did not bring the crew size down to 25 or 26, as Rios claimed was Hernandez's intention, but down to 24- employees; and the additional layoff the following day brought the total down to 23 employees, which is reflected by the payroll data for the next two work weeks of December 30 and January 6.

and the fact that he, as an employee of nine years with Respondent and one who had no personal association with the Fernandez group or its work crew, had nothing to gain from providing such damaging testimony against his long-time employer. Franco's testimony is worthy of great weight, in keeping with the risk he has exposed himself to by way of his long-time employment. 54/

Apparently because concern existed over whether the Fernandez group was the proper group of workers to lay off based on seniority, Jose Rios checked with Agnes Poloni in the office about his crew's seniority. She, in turn, reviewed certain earnings records of the Company to verfy the seniority of three other workers in the Rios crew who were designated on the Company-prepared seniority list as having the same seniority month as Clemente Fernandez and the rest of his group, namely, September, 1977. After her review, Poloni changed the seniority dates of the three other employees, Alejandrina Gutierrez, Vicenta Orta, and Eva Donate, from September to August, 1977, thus making these three more senior.55/

In reviewing the Rios crew's seniority list, Poloni discovered that Maria Valdez, another worker, was a newer employee than anyone in the Fernandez group, she being hired sometime during the week of October 15, 1977. Poloni informed Rios that Valdez was junior to the Fernandez group and should be laid off. Without rehiring one of the Fernandez group, Rios laid off Valdez the following day, December 13, thus bringing the total to six layoffs. (Had one of the Fernandez group been recalled to work them, it appears that it might have been Clemente Fernandez, as his testimony stands unrebutted that he began working before his wife and son, and no evidence exists as to the precise beginning dates for Francisco Salas and Maria Torres.) Despite Valdez's layoff on December 13, she began working again for the Respondent the very next day in another crew; no one from the Fernandez group returned to work for months.

54/Both Hernandez and Rios acknowledged that Franco encountered them one day at the edge of a field, as he was looking for the •rapini harvest. Both, however, denied talking about discharging anyone from Rios's crew. In describing Franco's encounter with them, Hernandez and Rios claimed that Franco yelled at them from between 45 and 100 feet away, asking where the rapini field was. It seems doubtful to me that Franco, a soft-spoken person while appearing as a witness, would be likely to have yelled at a crew foreman and the general foreman from that distance to ask about the rapini field.

55/Based on certain "Company Information and Earnings Records" .introduced into evidence, the three employees mentioned above appear to have had paychecks issued to them during August, 1977, whereas the Fernandez group's earliest paychecks were issued the week of September 3, 1977. More will be said about seniority in the Rios crew in the following section, but it seems fair to conclude that Gutierrez, Orta, and Donate were employed in the Rios crew earlier than the Fernandez group, even though testimony establishes that the Fernandez group began working in late August rather than in September, 1977 (for which work they were first paid on September 3, 1977).

3. Seniority And The Economic Justification For The Six Layoffs.

A review of the record evidence indicates that the Fernandez group, or at least some members of that group, were not the most junior workers in the Rios crew.56/ It has already been noted that the Fernandez group was laid off before the Respondent laid off Maria Valdez, a less senior worker. At least three other Rios crew members likewise appear to have been more junior to the Fernandez group, although they continued to work. For one there is Eva Donate, who pursuant to the clear terms of the UFW contract would have become more junior to the Fernandez group by virtue of her having worked outside of the bargaining unit.57/ The other two junior workers were Adelina Morena and Armida Vega. Ironically, they were laid off in December of 1977 by Rios because of their lack of seniority, while the Fernandez group continued to work due to its higher seniority; although Moreno and Vega had worked initially on the crew before the Fernandez group was hired, they quit their employment in 1977 and did not return to the crew until October, 1977, after the Fernandez group was hired, and Rios then considered their quitting to have severed their crew seniority when he laid them off in late 1977. Inexplicably, the original seniority of Moreno and Vega was resurrected in December of 1978, thus making them appear on the seniority list as more senior than the Fernandez group.58/

56/In Section E of the Supplemental Agreement Number 2, as found in the contract then existing between the UFW and the Respondent, the following appears: "Layoffs shall be in order of classification seniority with the worker having the least classification seniority being laid off first . . . ." And, in Section B of that Supplemental Agreement the Company was directed to maintain seniority lists for many different work classifications, such as irrigator, shoveler, rapini harvest, and thin and hoe, the latter being the type of work performed by the Rios crew. On the other hand, the Rios crew was not the only one which performed thin and hoe work, even though the Company's seniority lists were based on individual work crews and not general work classifications.

57/Article 4(B) (5) of the parties' contract provided that seniority would be lost when a "worker leaves the bargaining unit to accept a ... position with the Company outside the bargaining unit." It was undisputed that Eva Donate performed non-bargaining unit work, namely, in the Company's asparagus shed, between early February and April 1, 1978, which by contract should have resulted in her loss of seniority in the Rios crew (were it not for Ben Abatti's admitted refusal to adhere, to the quoted contract provision). Eva Donate's original seniority date is also placed into question by Jose Rios, himself, who at one point in his testimony indicated his belief that Donate began in his crew after Clemente Fernandez did, which also agreed with the recollection of Clemente Fernandez.

58/Although Rios claimed he did not lay off Moreno and Vega because the Company's seniority list showed them to have greater seniority than the Fernandez group, Rios admitted he had not seen the list at the time he issued the layoffs. His admission squares -- (continued)

Nor is the economic rationale for the Fernandez group's layoff clearly evidenced in the record. Rios claimed he reduced his crew's size in order to provide more work-hours to the rest of the crew and that his crew historically had layoffs in December and January. Yet, several considerations arise from the evidence to place Rios's assertions in question.

First, virtually nothing in the record supports Rios's claim that traditionally his crew had group layoffs during that time of the year. For example, the time records involving 1977-1978 indicate no significant layoffs during that period. Although some eight employees left the Rios payroll between December 3, 1977, and January 14-, 1978, nine other workers appeared on his payroll between December 3, 1977, and January 28, 1978. Indeed, when he was initially asked about his crew's annual work habits, Rios indicated that a layoff only occurs around July, except for rainy periods when the entire crew does not work.59/

Second, Rios's crew records for the period of December 16, 1978, through January 13, 1979, indicate that at least two employees, who had no designated seniority in the crew, were employed by Rios. Thus, during the very week that the Fernandez group was laid off (indeed, the day before) Rarnon Torres began working on the Rios crew; he continued working almost regularly thereafter. In addition, during two weeks of that same time period Ricardo Padilla, a worker not appearing on the crew's seniority list, is named as having performed work as a Rios crew member. Also, Rios admitted that Maria Valdez was re-employed in his crew approximately one month after her December 13 layoff and Maria Torres (one of the Fernandez group) was re-employed on his crew as of mid-March. As one continues to review Rios's 1979 time records, one finds that others, such as Ricardo Padilla and Luis Pena, appear as having worked in Rios's crew even though they are not designated on the crew's seniority list.

Finally, although Rios claimed he laid off the

58/(continued)--with the fact that he had no apparent concern regarding the seniority of Eva Donate, Alejandrina Gutierrez. and Vicenta Orta, who were originally (and at the time of the layoffs) designated on the list as having the same seniority dates as those for the Fernandez group, and whose seniority dates were not "corrected" until after the layoffs. Thus, it is exceedingly difficult to understand how Rios selected the Fernandez group as being the most junior workers in his crew.

59/As for any layoffs from the Rios crew in the 1976-1977 winter period, the Board dealt with several of them in Abatti Farms. Inc., 5 ALRB No. 34, and found that not only were they pretextual and unlawfully motivated, but rebutted by the fact that increased work became available to the Rios crew almost immediately after the layoffs there in question. Nothing empirical was put forward by Rios to demonstrate the decrease of work in either the 1976-1977 or 1977-1978 winter periods that establishes a historical track-record of layoffs during those periods of time.

Fernandez group to provide more work time for the rest of the crew, that does not appear to have been accomplished. Beginning only a few days after the Fernandez layoff, the rest of the crew was laid off for over a week. Exactly why it was important to lay off Clemente Fernandez and five others on December 12 and 13, when the remainder of the crew would be laid off after December 15, is demonstrated by neither logic nor the evidence.60/

When Clemente Fernandez was laid off on December 12, Jose Rios informed him that he would be-contacted if and when work became available. Thereafter, Mr. Fernandez saw Rios twice, once in February and once in March, each time asking Rios whether he could return to work. On each of these occasions, according to Fernandez's testimony, Rios told him there was no work for him and his wife but that Rios would contact him when there was.61/

After Clemente Fernandez was laid off, Jose Rios openly indicated his willingness to try and find other employment at the Company for Francisco Salas and Jose Armando Fernandez. When Rios saw Clemente Fernandez he indicated that Salas and Jose Armando could find work in another crew. He also spoke directly to Jose Armando and offered to seek work for him in one of the lettuce harvesting crews, but Jose Armando rejected the offer on December 16, telling Rios he would rather not work in lettuce harvesting and that he had found other employment. According to Jose Armando, Rios told him that while he (Jose Armando) might find other employment with the Company, Rios would not rehire Jose's parents because he had had problems with them. Rios, himself, acknowledged his willingness to assist Salas and Jose Armando in gaining other work with the Respondent.

60/The time records of the Rios crew do indicate that after the crew returned to work, minus the six layoffs, the crew in general worked longer work days than it had during the pay week of December 16, although so did the Falacio crew which performed the same type of work. And, when one reviews the time records for both the Rios crew and the Palacio crew no correlation is apparent between the number of crew members working on any given day and the number of hours worked by them. This absence of correlation detracts from the notion that by reducing the crew size on December 12 Jose Rios was thereby able to assure the remaining crew members more substantial work time.

61/Jose Rios denied telling Fernandez that he (Rios) would contact him if there were work available and also denied that he had a practice of contacting laid off workers when work became available. The credible testimony of Clemente and Jose Armando Fernandez establishes that Rios, in the past, had either come himself or sent a representative to their homes when recalling them to work from previous layoffs. This practice is also in keeping with Rios's use of Alejandrina Gutierrez to telephone those crew members who had phones, when it was time for them to return to work after a layoff. Indeed, Rios's testimony on this issue was not consistent, as he also admitted to having personally notified the Fernandezes on one past occasion when it was time to return to work after a layoff, and he also admitted that on one occasion when he saw Fernandez after the layoff he had said to Fernandez, "I would let them know as we needed them."

B. The Pedro Palacio Crew:

1. Rosa Briseno.

Rosa Briseno began working for the Respondent in about 1972 and was a member of Pedro Palacio's crew. She was also a member of the UFW's ranch committee, serving that committee as its recording secretary, and was the UFW's representative on the Palacio crew. The Company, of course, had been advised of Briseno's positions with the UFW. Briseno was also designated by the UFW as an alternate committee member for collective bargaining negotiations.

On November 27 Briseno attended negotiations in behalf of the UFW, substituting for a regular member of the negotiating committee. (The negotiations involved the "lettuce industry," but did not include the Respondent.) She was informed by a UFW staff person that the Company was advised that she would be absent on the 27th for negotiations. 62/

On the day she attended negotiations Briseno drove some of her family members to work that morning. Either she (according to her testimony) or her family (according to the testimony of Pedro Palacio) advised Palacio she would be absent that day for Union business. Palacio, in turn, advised Jim House that Briseno was absent that day because of Union business. According to Palacio, House had instructed him previously to inform him when Rosa Briseno missed work because of the Union. On November 27 House told Palacio he should tell Briseno that she could not return to work until she first talked with House.

On the evening of November 27 Briseno talked with Palacio by telephone, and Palacio told her that she could not return to work until she conferred with Jim House. House, himself, confirmed that instruction in a subsequent telephone conversation that evening with Briseno's brother. The following morning, Briseno looked for House at his office and in various fields, without success. That afternoon, on November 28, she returned to House's office with two staff persons from the UFW. The staff persons went in and spoke with House, who told them that Briseno could not return to work until House reviewed the matter with the Company's attorney. He said that the Company's attorney would contact the UFW to let Briseno know about returning to work.

At 10:00 or 11:00 in the morning of the next day, November 29, Briseno was informed by the UFW that the Company would

---

62/Although Briseno's testimony regarding the Company's notice of her absence was hearsay, Jim House of the Company confirmed that the UFW had notified his office that she would be absent. It is not clear whether that notice was originally received by his office on the afternoon of November 26 or on the next day, but House claimed he did not personally receive the notice until the 27th. House claimed that the message he received indicated that Briseno would be gone for between one and four weeks.

allow her to return to work. She did not return that day, however, claiming that she was unfamiliar with the location of the field she was to work in and that only an hour or two of work remained that-day. She did return to work the following day, after meeting the Company's bus and following it to the field her crew was working in.

As a result of her missing work, Briseno lost three days' pay and her seven years' seniority._63/ Exactly how she came to lose her seniority over the .incident is not completely clear. Briseno claimed that on the afternoon before she returned to work she was advised by a UFW staff person that while she could return to work her seniority would be lost. Although this testimony was hearsay insofar as it relates to what someone from the Company had advised the UFW, it comports with the Respondent's position as originally stated at the hearing—namely, that "she did not return to work when the offer of reinstatement was made, and that she then was reinstated with loss of seniority the following day."

Jim House, however, claimed in his testimony that he did not consider that Briseno had lost her seniority when she returned to work. Rather, he asserted that when the UFW later filed a grievance protesting her loss of pay following November 27, that he believed the UFW had failed to live up to the bargain struck regarding the reinstatement of Briseno and, thus, the Company then took the position that Briseno had quit her employment by leaving work without proper authorization and had lost her seniority. House confirmed his position in writing on December 20, in answer to the UFW's grievance, by claiming that Briseno had—in effect—quit her employment and, thus, lost her seniority.64/ Nonetheless, it is unclear from House's testimony just what "agreement" House believed the UFW had failed to honor, as none of the discussions he described between himself and the UFW or Briseno conditioned her return to work on her forfeiture of a pay claim. Indeed, by taking the position he did with respect to the Briseno pay grievance, House impliedly suggests that he initially viewed her absence as reason to abolish Briseno's seniority and informed the UFW originally of that viewpoint.

According to Mr. House, he had had previous problems with Union leaves for Rosa Briseno and was attempting to enforce the contract provision regarding written notice for such leaves. The evidence, however, casts some doubt on the seriousness of the problem

---

63/She lost pay for the two days of absence following the negotiations on November 27, plus one day for the Thanksgiving holiday • because she had not worked the requisite days to qualify under the UFW contract for the holiday pay.

64/According to Article 11 (B) of the UFW's contract with Respondent, leaves of up to three days for Union business shall be granted when, inter alia, "written notice shall be given by the Union to the Company at least two (2) days prior to commencement of any such leave." As for other leaves, Article 11 (C) O) provided that " (a)11 leaves in excess of three (3) days shall be in writing on approved leave-of-absence forms provided by the Company."

involving Briseno. On one occasion, in June or July, she had gone to Yuma, Arizona, regarding the UFW, after notifying her foreman, but without having provided written notice to the Company. House conferred with Victor Gonzalez of the UFW over this absence, and from then on it appears that Briseno's leaves were generally taken after written notice was provided. Thus, the Company was advised in writing of her leave between August 2 and 20,' her one-day leave for UFW business on August 26 to visit LaPaz, and her personal leave between October 7 and 26. In fact, when the UFW advised the Company of the October 7 leave, Gonzalez indicated in writing to House his understanding that "(i)n the future, leaves will be channeled through the crew foreman except in emergencies." Although House had never warned Briseno personally that she should give written notice to the Company of her absences for Union business, House claimed that when she had gone to Yuma and once when she had gone to the Union's headquarters in LaPaz she had left without prior written notice and that he had complained to Gonzalez and Saul Martinez from the UFW about the lack of written notice and had warned them that a further lack of notice would be deemed as if the employee had quit his or her employment. On the other hand, one cannot be sure from House's testimony whether his complaint regarding Briseno's visit to LaPaz involved the same visit for which written notice was provided, which, if it was, would mean she had only failed once to provide written notice, when she had gone to Yuma in June or July.65/

2. The Cut-Back In, Work, Hours.

As previously noted, on or about November 28, Eva Donate, Manuel Castellanos, and Toribio Cruz solicited support among the crew of Pedro Palacio with regard to an early decertification petition. It is undisputed that no one from the Palacio crew signed that petition, a fact acknowledged even by the foreman, Palacio. According to Cruz, the Palacio crew was not again approached regarding the decertification drive because the crew members were unanimously opposed to it.

65/Ben Abatti claimed that the Respondent had no policy that distinguished between leaves for Union business and for personal reasons. He also asserted that crew foremen do not punish employees who only miss work for a few days.

But, Rosa Briseno described 'an encounter that she had with Mr. Abatti regarding the UFW, which occurred during melon-thinning season, sometime in October. Briseno had requested Palacio, the foreman, to provide water for the crew that day, and about 30 minutes later Ben Abatti confronted her in the field. He asked her what she wanted, and she explained that as the Union's representative she had asked for water, after which he said, "Who is paying you for what you are doing? Is it that bunch of cabrones or I? Who signs your checks?" He also added, "when that bunch of stupids sign and pay you, then they can order you. Meanwhile, I am the one who orders, I am the one who pays you." According to Briseno, Abatti's voice was raised during the discussion, and he concluded by telling her that he wanted nothing to do with the Union.

Records for the Palacio crew tend to confirm the recollection of Rosa Briseno and Guadalupe Montes, two crew members, that the crew's work-time began to decrease around the same time as the decertification effort began. In their view, the work hours decreased because of their crew's opposition to the decertification drive and its open support for the UFW.66/

After reviewing the Palacio and Rios crews' work records that were introduced into evidence, several observations must be made. First, the reduction that took place with respect to the Palacio crew's work-hours on Saturdays, as described in the testimony, long predated the decertification drive and, thus, seems to have had nothing to do with that drive. As early as August and September, 1978, regular work was either not scheduled on Saturdays, or when it was the Palacio crew worked only five hours. The same is true for the Rios crew. The decrease in Saturday work-time—namely, from eight to five hours—appears to have resulted from the Company's determination, as described by Ben Abatti, to reduce hours on Saturdays so that an "overtime premium" would not have to be paid, as required by the UPW's contract. Whatever the reason, the practice of working five or fewer hours on Saturdays appears to have begun after the UFW's contract was signed, in July.

Second, although the work-hours did decrease generally for the Palacio crew at the end of November, after the decertification effort was underway, the Rios crew experienced a similar decrease in work.67/ During October and most of November the Rios and Palacio crews generally were both working seven and eight-hour days. In early December, their work-time decreased to five, six, or seven-hour days, and both crews were laid off between December 16 and December 26. Despite some minor variation between the two crews on any given day in

---

66/The General Counsel's complaint charges that Respondent violated Sections 1153 (a) and (c) of the Act by decreasing the Palacio crew's work-hours because of its support for the UFW. In large part the General Counsel contrasts the treatment extended to the Rios crew, whose members largely supported the decertification effort (at least by signing the various petitions), and that accorded to the Palacio crew. Both crews, it will be recalled, performed similar work-—namely, weeding and thinning.

67/In contrasting the Rios and Palacio crews , two approaches are put forward. The General Counsel seeks to focus attention on the daily work-hours put in generally by the main body of the crews (not including the work of foremen and helpers), while the Respondent seeks to focus attention on the average weekly work-hours performed per worker in the two crews. The Respondent's averaging by worker, however, fails to consider the workers absent on any given day and the guaranteed work time provided to the foremen and helpers. In my analysis of the time records, I have generally employed the General Counsel's approach by focusing on the number of work-hours in any given day that were performed by the main body of each crew, even though on any given day certain employees worked more or fewer hours than the crew in general.

December, their work-time remained generally consistent with one another, as it had in the past.

Third, even though the Palacio crew began working in the lettuce harvest in January, 1979, thus making difficult a continued comparison with the Rios crew's weeding and thinning work, it appears that the Palacio crew was not disfavored during early 1979. During the pay periods of January 20 and 27, February 3, 10, and 24-, March 3, 10, 17, and 24, the Palacio crew in general worked substantially more total hours than the Rios crew (even in light of the fact that the Palacio crew was larger). Generally, during these pay periods the Palacio crew worked either longer or more days than the Rios crew. Yet, during a comparable three-month time period in 1978 both crews worked almost identical daily hours, thus suggesting that on a comparative basis it was the Rios crew that fell behind in work-time between January and March, 1979.

A final consideration arises with respect to the Palacio crew's layoff between March 26 and April 25, 1979, an unusually long layoff for the Palacio crew at that time of year. Although the Rios crew continued working during this time, the significance of this long layoff for Palacio's crew is by no means clear. Initially it should be noted that this layoff occurred some three months after the decertification election had taken place. Moreover, in the past on one occasion or another one of the two crews in question was laid off while the other was not. Thus, the Palacio crew was laid off during the weeks of April 22 and September 16, 1978, while the Rios crew was laid off during the week of August 5, 1978. In other words, a layoff of one crew or the other was not unique, even though in the past such single layoffs had not been of long duration. It is also of some significance that of the 25 work days missed by the Palacio crew between March and April of 1979, the Rios crew likewise did not work on 10 of those days, thus making the Palacio crew's layoff less dramatic than it might otherwise seem.

In view of all the foregoing considerations, it is difficult to see, one, whether a distinctive decrease in work-hours-actually was experienced by the Palacio crew, particularly before its general layoff in latter March, 1979, and, two, a factual connection between the Palacio crew's work-time and its open support for the UFW. Except perhaps for the Palacio crew's 1979 layoff, the Rios crew, which more openly favored decertification, did not seem to reap a distinctive work benefit in comparison. It is, therefore, not possible to find that the evidence supports a conclusion that the Palacio crew's work-hours were decreased in comparison to those of the Rios crew.

III. The Growing And Harvesting Of Rapini.

A. The Respondent's Decision To Discontinue Rapini:

Rapini, a mustard green and member of the broccoli family, was a crop grown for some 12 years by the Respondent. Between 160 and 200 acres were annually devoted to the crop. Rapini was one of Respondent's most labor-intensive crops, needing up to 140 workers to harvest it, which generally occurs in December, January, and February.

In 1978 the Respondent did not plant rapini, but the reasons behind this planting decision are not clearly portrayed in the evidence. Ben Abatti asserted that in April he decided not to plant rapini because "we weren't making any money with it, and because the Company had lost money on the crop the past year. Abatti acknowledged that the Company did not lose any more on the crop in 1977-1978 than it had the prior year, and no records were introduced to demonstrate the nature or size of the claimed loss.

When Abatti first testified he cited only the loss of money and the desire to plant the land with a more stable crop as reasons for not growing rapini. When he reappeared as a witness he brought forth two additional reasons: one, that he feared he would not have sufficient time to devote to the crop because of a criminal indictment he was served with in April, and, two, that he feared a strike at the end of the UFW's contract, at the end of December, and did not want to risk such a labor-intensive crop. The fact that these two reasons were newly added by him as reasons for not growing rapini, after he had failed to mention them when he was first extensively examined regarding his planting decision, leaves his rationale for not growing rapini open to doubt. Indeed, when questioned further during his second appearance as a witness, Abatti again changed his testimony, acknowledging that the UFW's contract term played no role in his planting decision, which he claimed was made even before the contract was entered into, in June . In fact, Jim House claimed that Abatti told him in January that the Company would not grow rapini, which, if true, also indicates that the criminal indictment played no role in Abatti's decision. 68/

Instead of the Company growing rapini, the crop was grown by Albert Studer, Ben Abatti's brother-in-law. Studer recalled that Abatti told him that the Company "made a couple of bucks on it every year." Studer denied that Abatti informed him that Respondent had lost money on the rapini crop and claimed he would not have grown it had Abatti mentioned any such loss.69/ Studer recalled that he spoke to Abatti in the summer of 1978 and that Abatti asked him "if I wanted to take the crop over." According to Frank Preciado, a foreman of one of Respondent's weeding and thinning crews and who customarily worked in the rapini harvest stitching boxes (not as a foreman), Studer informed him "that Ben Abatti had not planted rapini this year because of the

---

68/In disputing Mr. Abatti's claim that the rapini market was unsatisfactory in 1977-1978, the General Counsel sought to introduce certain market data referring to rapini, purportedly put out by the United States Department of Agriculture. No witness identified the data as coming from official government reports or testified concerning any use or reliance that persons may place in the reports. Nor were the data complete for the time periods under scrutiny. For all these reasons, I have determined that the reports submitted as General Counsel Exhibit 61 are not admissible, and I have not considered them.

69/Abatti testified that the only reason he gave to Studer for not growing the rapini was that the Company could not make any money on it.

union 70/

Albert Studer maintained his own small farming operation]• leasing out 200 acres to others and growing his own crops on the remaining 200 acres. In the past five years he had grown only such stable crops as alfalfa and wheat, and before then beets and cotton. He had never grown a labor-intensive crop or hired his own employees, having necessary work performed by others on a custom basis. In 1978, this admittedly conservative person decided to grow what appears to be a high-risk crop, requiring substantial capital ($600.00 to $800.00 per acre to begin with, and a total investment of $2,500.00 to $3,000.00 per acre). In addition to being Ben Abatti's brother-in-law, Studer was one of Respondent's full-time tractor foremen and the Respondent's equipment supervisor; he continued working full-time in these positions throughout the growing and harvesting of rapini.

Studer's land was initially prepared for rapini planting in mid-August.' The planting occurred in mid-September. In accomplishing these two tasks, as well as the subsequent irrigation work, the Respondent's equipment and employees were used. Although Ben Abatti claimed that Studer was charged for this work at the ordinary custom work rates including overhead charges, Studer acknowledged that he did not pay any overhead charges to Respondent for the land preparation and planting work; in fact, rather than being billed within the normal 30 to 90 days for that work, Studer admitted that he was not billed by Respondent for that work (which billing responsibility was Studer's in his capacity as a Company tractor foreman) until February, 1979.71/

B. The Decision Not To Harvest The Raaini:

The rapini harvest began approximately December 6 or 8, initially employing 20 to 30 workers and then eventually employing approximately 120 workers. The harvest ended on February 17, 1979. Most of the workers who harvested Albert Studer's rapini came from the crews of Panfilo Avina, Angel Avina, Frank Preciado, Thomas Romero, and Ray Velez, Sr.

Ben Abatti and Albert Studer claimed that the reason why Company employees harvested the rapini was because in December the

---

70/The quotation above is taken from Preciado's sworn declaration, which was taken from him and read to him by Ellen Sward, an Agricultural Labor Relations Board agent, and which declaration Preciado signed in December during the rapini harvest. When called as a witness, Preciado attempted mightily to disclaim his declaration, but his disclaimer was wholly unconvincing and, indeed, was contradicted by his own half-hearted acknowledgment of having signed the sworn statement. His declaration stands as a glaring inconsistency to his testimony and was admissible as such.

71/In discontinuing the rapini crop, the Respondent neither advised nor bargained with the UFW over the discontinuance. Yet, the UFW contract, signed in July, provided for a separate work classification for rapini harvest employees and for a. rapini harvest piece rate.

Company's melon crop was frozen and it became necessary to lay off employees, at which point Albert Studer decided to hire them. According to Abatti and Studer, the freeze, layoff, and re-employment all took I place on or about December 6, immediately before the rapini harvest began.

Other facts in evidence, however, indicate that Studer's employment of the Respondent's employees was not due to a fortuitous turn of weather. For example, Sam Hartman from Beach Street, which medically insured "Studer's employees," recalled that he was informed in latter November that a medical insurance plan was wanted for Studer's harvest workers. Yet, according to Studer he was at that time still intending to employ a labor contractor for the harvest, which would not have called for his having medical insurance. Angel Avina, though seeking to downplay the significance of his admissions, admitted being informed up to two or three weeks before the harvest that he and his crew would be working on Studer's rapini. And, except for the rather common, brief layoffs experienced by some of the employees, following the melon harvest, Respondent's employees went directly from their work at the Company to the Studer rapini harvest, without suffering any exceptional layoffs (many did not seem to experience any distinctive break in their work). Moreover, it is difficult to accept Studer's proposition that he had made no definite harvest arrangements until a day or two before it began, particularly in light of the substantial financial stake in the rapini and the fact that rapini can be very difficult to harvest if not done in a prompt fashion.

No one who was associated with the rapini harvest could identify any difference in the harvest due to the fact that the rapini was allegedly Studer's, except that the workers were paid with Studer's checks. The foremen and sub-foremen were-all the same as had worked in Respondent's past rapini harvests. The trucking service used to deliver the rapini to the shed was the same. The boxes in which the rapini was packed were Company boxes, identifying the Company as the grower and shipper. Ray Hernandez, the Company's general foreman, regularly visited Studer's rapini field throughout the harvest. The piece-rate paid to workers for the harvest was the same piece-rate as established in the UFW's contract with the Respondent.72/ And, when the harvest was over, the workers continued, just as they had in the past, with their other work at the Company. Yet, when 98 rapini harvest workers voted in the decertification election on December 27, their votes were challenged because they were not on Respondent's payroll during the eligibility week, the week of December 16.

Studer explained that he personally employed the workers to harvest rapini, rather than contracting with a custom harvester or labor contractor as he had in the past, because he wanted to save the 25% overhead cost that a custom harvester or contractor would charge. But, when one reviews Studer's expense sheet for the harvest one sees

---

72/It is interesting to note that Studer explained that he paid a piece-rate of 10¢ per pound, rather than the $9\frac{1}{2}$¢ per pound that was paid by the Company before the UFW contract began, because it was easier to calculate in round numbers, a decision which cost Studer over $9,000.00 in wages.

that his own overhead was between 23% and 26% of his labor costs (depending on whether one adds into the overhead the $8,344.00 for the trucking service).

The ostensible relationship between the Company and Studer with respect to the rapini is set forth in a written contract dated September 2. Essentially this contract portrays as Studer's responsibilities the owning, growing, and harvesting of the rapini, and portrays as the Company's responsibilities the packing, shipping, and selling of the rapini. It is noteworthy that this contract explicitly states, inter alia:

> Shipper (the Company) is an experienced grower and shipper of broccoli raab and holds no interest in the current crop. Shipper will have no responsibility in the growing of broccoli raab or the field harvesting as shipper has no monetary interest in the crop.

In portraying Studer as the sole owner of the rapini and as having total responsibility over its harvest and growing, this contract is unique to the Respondent's practice. Every other contract that the Respondent, as a packer and shipper, has entered into with other growers during the past several years provided for extensive control by Respondent over the growing and harvesting of the crop to be sold by it. Although the contract itself is dated September 2, Studer testified that it was signed in latter November or some three to four weeks before the harvest began, he was not sure which.

C. The Economic Relationship Between Albert Studer And The Company:

The written contract between the Company and Albert Studer with respect to the rapini harvest guaranteed to the Company $2..75 per carton of rapini for packing, shipping, and selling the rapini. When one examines this contract rate in connection with the 1978-1979 harvest, one can see that the Respondent, as much as Albert Studer, gained a substantial financial return from the rapini.

According to the records produced and Studer's testimony, Studer harvested approximately 92,600 cartons of rapini. Two methods can be employed to arrive at this total harvest figure. First, one can add the 71,674- cartons that Studer actually sold and was paid for by the Respondent to the 21,000 cartons that he estimated as being wholly or partially lost or damaged in shipment.73/ Second, one can take Mr.

73/Although the trial transcript indicates that Studer testified he lost 21,000 "bucks" in shipping losses, the transcript is in error. Studer's reference was not to "bucks" but to the loss of 21,000 boxes, as is evident from the related interrogation concerning his losses. A total harvest figure of some 92,000 boxes or cartons is also consistent with Studer's general estimate that he harvested about 500 cartons per acre. It might be noted that each carton contained 20 pounds of rapini.

Studer's expense sheet for the harvest, which he prepared to demonstrate his total costs, and we see a "shipping charge" of $254,655.50, which at $2.75 per carton indicates that a charge was calculated for 92,602 cartons. This "shipping charge," which was Studer's payment or credit to the Respondent, was apparently calculated for the entire harvest, including the shipping losses.

From the available harvest data, it appears that Albert Studer's personal gain from the rapini was approximately the same as that of the Respondent's. Studer's gain can be calculated from the following data: from the sale of 71,674. cartons a gross return of $551,168.53 was generated,74/ and by estimating the loss of 21,000 cartons at a possible gross return of $195,510.00, if Studer is successful in pursuing his claims for the shipping losses. 75/ Thus, a gross return of $746,678.53 might be realized for the sale of the rapini. Against this figure Studer's expenses of $626,061.24 must be subtracted, leaving him a net profit of approximately $120,617.29.76/

74/Out of this $551,168.53, Studer only received $354,065.03, after a deduction was made of $197,103.50 for the payment to the Respondent for its shipping charges. These figures are evidenced by the payments made from the Respondent to Studer for the sale of the 71,674 cartons.

In calculating Studer's profit from the rapini, however, it is best to keep the calculation based, first, on the gross revenues generated by the rapini, and, second, by then deducting from those gross revenues Studer's total expenditures, as evidenced from his expense sheet. The General Counsel's brief erroneously calculates Studer's rapini profit by failing to keep the "gross" and "net" calculations distinct. The General Counsel uses Studer's net return of $354,065.03 in estimating his potential profit, but ignores the fact that the $197,103.50 in shipping charges that went to Respondent (as part of the same transaction regarding the sale of the 71,674 cartons) is a charge that is also included in the total shipping charges of $254,655.50, as set forth on Studer's total expense sheet. Thus, the General Counsel twice subtracts the $197,103.50 in shipping charges from the rapini returns (first by crediting Studer with only the "net" return from the sale of 71,674 cartons and then by subtracting from his returns the total shipping charge of $254,655.50), thereby erroneously concluding that Studer could be expected to gain virtually nothing by way of the rapini.

75/The rapini was sold at various prices: $5.65, $8.19, $10.70, and $12.98 per carton. It is unclear what price, or prices, was agreed to for those cartons lost or damaged in shipment. Thus, a. median figure of $9.31 per carton has been employed herein for the purpose of estimating the possible returns that Studer might receive from the 21,000 lost or damaged cartons.

76/To a large extent the net profit Studer will receive for the rapini depends upon his recovery for the lost shipments. At the time he testified, he had received only $551,168.53 in gross receipts and had listed some $626,061.24 as his expenses. His expense sheet did not take into consideration certain fertilizer work -- (continued)

By examining the $2.75 per carton charge that the Respondent received for packing, selling, and shipping, it is also possible to form an estimate of the financial gain that Respondent achieved from the rapini harvest. In making this examination, one first must look to the testimony of Howard Hall, the president of a large, unrelated packing and shipping company in the Salinas Valley, which testimony set forth the costs and profits that can be expected for performing functions similar to those of the Company. Mr. Hall testified that a basic cost (before profit) of 60¢ per rapini carton would be normal for the packing, shipping, and selling of it. A normal charge to the grower by Hall's company would then amount to $1.10 per carton, thus leaving Mr. Hall's company a profit of between 50¢ and 55¢ per carton. Mr. Hall saw no reason why a higher charge would be made or warranted, unless other costs were involved in the packing process.

Ben Abatti claimed that the Respondent had certain extra costs in its operation regarding the rapini, over and above those described by Mr. Hall, which can be added in when estimating the Respondent's costs. Thus, the Company claimed the following costs in addition to those set forth by Mr. Hall:.015¢for stitcher wire 015¢ for staples, 1Q£ for additional ice, 20¢ for hydrocooling, and 75¢ for the rapini boxes (bought by the Company). These extra costs to the Respondent, as pinpointed by Mr. Abatti, would bring the total per carton cost to $1.68 per carton, founded on Hall's basic cost estimate of 60¢, leaving the Respondent with an estimated profit of $1.07 per carton.

Thus, an estimate can be made that the Respondent profited from the rapini in the amount of $99,161.18 (if one uses the figure of 92,674 cartons for the harvest). To be sure, one cannot stand on this estimated profit as hard fact, but in view of the testimony, the sales, and the reasonable cost estimates put forward, it surely seems that the Respondent stood to make a substantial gain from the rapini, approximating the profit that Studer might receive. Indeed, in view of the Company's guaranteed rate of return from each box of rapini, the Company was reasonably certain from the outset to profit handsomely from Studer's rapini.

No reason is apparent in the record for concluding that Mr. Hall's company in Salinas would have costs incomparable with those of the Respondent. His company provides exactly the same service to growers. Mr. Hall, who had no stake in this proceeding and who had many years' experience in packing and selling agricultural products, testified in a most forthright and credible manner, and he appeared cautious in his testimony and cost estimates. Although his company did not have extensive experience in selling and shipping rapini, its shipping and selling of comparable agricultural goods (including a small amount of rapini) seems wholly applicable to rapini. There appears to be no particular magic or uniqueness to the shipping and sale of rapini that would distinguish its costs from those of numerous

---

76/(continued)-- which would further reduce his profit.

other, similar products shipped and sold by Mr. Hall's company.77/

ANALYSIS AND CONCLUSIONS

I. The Respondent's Role In The Decertification Campaign.

A. Introduction:

A key charge in both the General Counsel's complaint and the UFW's election objections petition is that the Respondent unlawfully instigated and supported the effort to decertify the UFW, Several of the complaint's subparagraphs allege that Respondent, through its agents, threatened, promised, and benefited employees in order to encourage them to support the decertification effort. Both the General Counsel and the UFW seek to set aside the decertification election held on December 27.

Of course, it is "unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union-repudiating document. . . ." N.L.R.B. v. Sky Wolf Sales. 470 F.2d 827, 829 (9th Cir. 1972). To be unlawful the employer's conduct must go beyond simple, innocuous assistance to employees seeking to decertify a union. See, e.g., Southeast Ohio Egg Producers Corp., 116 NLRB No. 130 (1956) ; Belden Brick Co., 114 NLRB No. 13 (1955); Solar Aircraft Co., 109 NLRB No. 22 (1954). The employer's conduct must affirmatively encourage or promote the employees to engage in a decertification effort, or the employer must give active assistance and support to such a decertification effort, before the employer's conduct becomes unlawful. See N.L.R.B. v. American Casting Service. Inc., 365 F.2d 168 (7th Cir. 1966); Wahoo Packing Co., 161 NLRB 174 (1966); Sperry Rand. 136 NLRB No. 45 (1962).

In determining whether the Respondent unlawfully instigated and promoted, or unlawfully assisted and encouraged, the decertification campaign led by the Petitioners, a careful scrutiny must be given to all the record facts and to the inferences naturally flowing from them. In a review of the evidence, the fact-finder cannot close his eyes to pervasive imponderables either, for "(t)he detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency." International Association of Machinists v. N.L.R.B., 311 U.S. 72, 79 (1940). Furthermore, when weighing the record facts and evaluating their import, one cannot ignore the important role played by witness credibility. After all, the

---

77/To be sure, Ben Abatti claimed that his cost for the shipping and selling of rapini was somewhere around $2.50 per carton, thus indicating a profit to him of only 25£ per carton. .At no time was Abatti, or the hearsay cost estimate of his accountants that was offered as evidence (but not admitted), able to analyze that cost figure or break it down intelligibly. Nor is it apparent why the Company's cost for icing, closing the boxes, shipping, and selling the rapini would have been so much higher than those of another large, professional packing house which performed identical functions. Mr. Abatti's conclusory cost estimates appeared no more credible than much of his other testimony.

demeanor of a witness "may satisfy the tribunal, not only that the wit ness's testimony is not true, but that the truth is the opposite of his story . . . ."78/

And in evaluating the many and subtle facts in this proceeding, one also must be concerned with the sensitive issue at stake. Full enforcement must be accorded to the employees' right to disassociate from their collective bargaining representative through a. free and fair decertification election, but protection must also be accorded to assure that they not be interfered with in their right to continue being represented by their designated collective bargaining representative. The initial, and perhaps most profound, question in this case is whether the credible record evidence is sufficiently persuasive to call for concluding that the Respondent's employees did not freely exercise their right to decertify the UFW as their bargaining representative, as the General Counsel and the UFW argue.

B. The Factual _Analysis:

Any factual analysis concerning the Petitioners' decertification campaign must begin with those facts that naturally arise to cast such a strong and doubting light on the very commencement of their campaign. Although it may be fair to say, as the Respondent emphasizes, that many of the Respondent's steady, year-round employees began rebelling against the UFW as their representative because of their dislike for the UFW's medical insurance coverage, this explanation falls short of providing a workable, realistic rationale for understanding just how Manuel Castellanos and Toribio Cruz, the two decertification leaders, came to lead a decertification effort. Neither one possessed any particular knowledge about decertification procedures. Indeed, Manuel Castellanos's explanation about how he came to learn about gathering signatures was not only incredible (and self-contradictory) but fails to explain how he came to begin soliciting signatures at the strategic time that he did, believing as he did that the UFW's representation would cease of its own accord when the contract would expire in only one more month.

Neither Castellanos nor Cruz had any particular dislike for the UFW when he began his decertification effort, neither had any particular experience with the medical insurance program to lend credence to his attack upon it, and neither professed to have much interest in the success of his decertification activity. Both Castellanos and Cruz testified in such a fashion as to-make their testimony incredible: Castellanos openly altered his testimony, and Cruz made it impossible for others to grasp his testimony by constantly changing it and making it hopelessly vague and confused. Yet, each of these decertification leaders forsook his steady work and wages, each for a substantial time, to engage in a campaign that neither one much cared about or understood, according to their own testimony. Although the work-time they lost through their decertification activity may have been more substantial than either man originally anticipated, neither

78/N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 408, quoting with approval Judge Learned Hand in Dyer, v. McDougall, 201 F.2d 265, 269 (2nd Cir).

man evidenced a sufficient interest in the outcome of that activity to make it likely that he would have continued on his own to have foregone substantial work and wages when that sacrifice became obvious-and - necessary.

The imponderable factors surrounding Cruz's and Castellanos's leadership role in the decertification effort, and their lack of candor as witnesses, are cast against a backdrop that reveals many strong connections between them and the Respondent's upper management. Of course, both were long-time, steady workers. Castellanos, more than most steady workers, had benefited from the Respondent's generosity in receiving numerous pay advances and funds by way of co-signed bank loans. He continued to benefit directly at the hands of Respondent's top management official, Ben Abatti, during and after the decertification campaign, first, by continuing to receive substantial pay advances and, second, by becoming privately employed by Ben Abatti, after December 6. Castellanos also received a substantial "Christmas bonus" around the end of December.79/

Cruz, like Castellanos, also received certain benefits from the Respondent during the decertification campaign. He was given a letter by Respondent which could allow him to immigrate his family to the United States, a letter dated around the very time that Cruz joined in the decertification campaign. He was given pay for work on December 13, though he performed no work that day. (December 13 fell within the pay week used to determine voter eligibility for the decertification election, and had Cruz not been credited with work that day he would not have been eligible to vote in the election, as he worked no other day that week.) He was allowed to make a charge on Respondent's business account to replace a car window believed to have been damaged by UFW sympathizers, a charge which the Respondent—contrary to

---

79/One's curiosity is aroused by Castellanos's "discharge" from the Respondent on or about December 6. Frankly, it is impossible to conclude that he was discharged for failing to become a UFW member, as he claimed. For one thing, Castellanos admitted thinking that he would not have to be a member after the UFW's contract expired, which meant that, at most, he believed he would have had to join the UFW for a month, a seemingly small consideration to save 14- years' employment. For another thing, he was well aware of the decertification campaign and, thus, the possibility that the UFW would be rejected as the employees' bargaining agent, in which case his "forced" membership would be short-lived indeed. Finally, the Respondent had refused for over four months to enforce the Union membership requirement in the UFW contract, and no apparent reason emerges as to why suddenly Castellanos would be compelled to leave his employment because of that requirement. It might also be noted that Castellanos left his job immediately after he and Cruz had filed for the decertification election with their second petition, and Cruz, as well, departed from the scene, leaving for Mexico on a purported immigration matter. Thus, the two decertification leaders suddenly disappeared immediately following the submission of their petition, and Castellanos's whereabouts were somewhat shrouded in mystery, so much so that both he and Ben Aba-tti initially concealed the fact that Castellanos was privately hired by Abatti to- work at his feed lot.

its regular practice—made no effort to recapture from Cruz for four months, or until shortly before the hearing began. He also received a substantial payment from Respondent at the end of December; although, described as a "Christmas bonus," Cruz's payment was four times larger than any other comparable payment or bonus evidenced in the record. Cruz received this substantial year-end payment even though he had missed nearly four straight weeks of work without authorization (according to him), an act of "generosity" on the part of the Company that contrasts starkly with its treatment of Rosa Briseno, who had missed work for only one day without authorization and lost her seven years of seniority as a result.

When Cruz's second decertification petition was dismissed, he was immediately visited at home by the Respondent's chief labor relations official, Jim House, and immediately following that visit Cruz's decertification activity took on the assistance of legal counsel, largely through the help of House. Thomas Slovack, a lawyer from Palm Springs, was recommended to Cruz by the Company's labor counsel, was then contacted initially and interested in representing Cruz not by Cruz but by the Company's labor counsel, and immediately thereafter conferred in person with the Company's labor counsel regarding the dismissed petition, even before meeting with Cruz. Slovack's subsequent meeting with Cruz was arranged by the Company, and Cruz was driven to and from his first meeting with Slovack by Jim House, Slovack's brother-in-law. From then on Slovack represented Cruz without charge, using the offices of Respondent's labor counsel much as if they were his own, without reimbursement for any rental expenses.

The Respondent's consideration toward Toribio Cruz was similarly evident out in the fields where the decertification campaign took place. When he met with various field crews to solicit workers' signatures for the decertification petitions, the Company's field foremen uniformly allowed him work-time in which to engage in his solicitations. In the case of Panfilo Avina's two crews, the melon harvest machines were actually shut down and employees were given extended time at the edge of the field in order to speak with Cruz and sign his petitions. This occurred once with respect to the portion of the crew led by Trinidad Soto and at least once with respect to the portion of the crew led by Manuel Galindo; in both instances these crew leaders ordered their melon harvest machines shut off so that Cruz and Castellanos could solicit workers during their normal work-time.80/

80/Although the Respondent denies that either Soto or Galindo are supervisors within the meaning of the Act, I find that they hold such positions for the Company that it can be held accountable for their conduct in question. They were clothed with authority to direct the work forces while in the field and generally oversaw the work of over 20 employees each. Panfilo Avina, the main crew foreman, rarely entered the fields. Soto and Galindo directed workers when to begin and end their work and when to take their breaks. Clearly, the employees would have reasonable cause to view them as acting as Company agents when Soto and Galindo directed that the harvest machines be shut off so that the decertification drive could take place during normal work-time: such orders were well within their general range of authority.

When Cruz solicited signatures among the lettuce thinning crew of Angel Avina, Avina gave him permission to talk with workers at the edge of the field as they turned into new work rows, again allowing for the solici-" tation to take place during normal work time. Pedro Palacio helped Cruz by calling out of the crew bus a group of workers which was sitting inside waiting for work to begin, after which their signatures were solicited by Cruz and Eva Donate, who had left her work on the Rios crew to engage in soliciting Palacio's crew. Prior to this pre-work solicitation, Palacio had prewarned crew members that Cruz would be coming to get their signatures. Thomas Romero, another crew foreman, allowed Cruz to twice solicit his crew members outside his work fields as they were turning around during the course of their work. And Cruz spent about 15 minutes talking with members of the Padilla crew as they were at work harvesting lettuce inside the field.

On December 16, at a Company-sponsored party, Cruz and Donate again solicited decertification signatures from the members of Pedro Palacio's and Jose Rios's crews who were in attendance. This large-scale solicitation took place while Company officials such as General Foreman Hernandez and Jim House were present, not to mention the presence of Foremen Rios and Palacio. The party-time solicitation took place just following the dismissal of the second petition and just prior to the layoff of the Palacio and Rios crews, which would make further solicitation of those crews for a third petition more difficult. Jose Rios personally assisted the decertification campaign on December 21 or 22, when he chauffeured two of his crew members to at least two different locations, during a last-minute effort to get enough signatures on the third decertification petition in order to qualify it for an election. Rios had also warned at least one worker, Jose Armando Fernandez, who had refused to sign any but the first petition, that those workers who did not sign for decertification would be laid off from their jobs.

Then, within days of the election, just as Mr. Cruz and Mr. Castellanos had been telling employees the Company would do, the Company began setting plans for a new, improved medical insurance program for the workers. The implementation of this was agreed to by the Company within the first week of January, 1979, but insofar as the record reflects the medical plan was not then needed, as the UFW's existing medical insurance program would cover employees for an additional one to three months; thus, a substantial, unnecessary cost was undertaken by the Company. In addition, Cruz and Castellanos were qualified by the Company under its new medical insurance program even though neither one of them had sufficient eligibility under the plan's terms.

Against the foregoing factors, all of which would appear to closely identify the Respondent with the Petitioners and their decertification campaign, the Respondent notes three basic considerations. First, that Respondent's benevolence toward Cruz and Castellanos fits within a pattern of similar treatment toward other senior, steady employees'; thus, as the Company points out, among such workers, particularly among the ranks of tractor drivers and irrigators, it was not uncommon for the Company to provide pay advances, or letters for immigration, or to allow them to charge personal items on Company charge accounts, or to permit them to take off a substantial time from work

without express authorization. Second, the decertification campaigning that took place in the fields during work-time was not unlike the treatment accorded to UFW representatives, who, according to several employee witnesses, visited various crews during work-time prior to the election and were permitted to campaign in behalf of the UFW without the Company's intervention.81/ Third, the Respondent points out that no direct evidence exists that Respondent conspired with Cruz or Castellanos in respect to the decertification campaign.

The Company's basic contentions, however, tend either to ignore individual factors of great significance or to disregard those conclusions most naturally emerging from the factual circumstances generally surrounding the decertification campaign. Thus, one should keep in mind that the Petitioners' decertification campaign arose in the context of Respondent's hostility toward the UFW, as evidenced from its unlawful conduct in 1976 when the original representation election took place, as well as by its continuing lack of cooperation with the UFW to fulfill even such basic contract requirements as by failing to compile current employee lists and seniority lists, its refusal to enforce the Union membership requirement until the contract was nearly expired, and its open hostility toward UFW representatives, such as can be seen through Ben and Tony Abatti's reaction to Victor Gonzalez or Ben Abatti's remarks to Rosa Briseno. This anti-UFW attitude is further manifested through the glaringly disparate treatment accorded to Toribio Cruz and Rosa Briseno, who experienced such distinctively different responses from the Company as a result of their unauthorized absences from work, even though their conduct was governed by similar provisions of the labor contract.

The most significant features of the Respondent's relationship with Castellanos and Cruz, as just briefly reviewed, do not stem from its providing them those amenities of employment that may have been similarly bestowed on other senior employees, but from Respondent's overt support and assistance that was provided them at crucial stages of the decertification campaign. Although the Respondent engaged in little direct campaigning in behalf of the decertification petition, the Respondent measurably helped to sustain and encourage

---

81/Although it appears that the UFW did not wage any concerted campaign in opposition to the move for decertification, inasmuch as it did not have sufficient manpower to wage such a campaign, and although the level and extent of the UFW's presence in the fields during work-time prior to the election is neither clear nor precise, it is fair to conclude that UFW representatives were present in the fields during work-time prior to the election and spent at least as much time as Cruz and Castellanos campaigning during the employees' work time. After all, the evidence does not establish that Cruz and Castellanos spent a substantial amount of time during the employees' normal work-hours campaigning, but rather that they appeared mainly during brief intervals during work time. Although not charged in the complaint, if it were it would be difficult to conclude that Respondent evidenced sufficient favoritism toward Petitioners' work-time campaigning, as opposed to the UFW's, so as to make out a violation of Section 1153 (b)'s prohibition against unlawful support and assistance. See Bonita Packing Co., 3 ALRB No. 27.

that campaign by providing Castellanos and Cruz with substantial "bonuses" which helped restore the wages they lost as a result of their campaigning during work-time, by seeking and arranging for legal counsel in behalf of Cruz when difficulties developed with the second decertification petition, by insuring Cruz for the property damage he sustained as an apparent result of his decertification involvement, by providing a captive party audience from which a third decertification petition could be launched, by tracking down and helping to contact additional petition signers when only a few additional signatures were needed to validate the final petition, and by making good on the Petitioners' major campaign promise that Respondent would improve the medical insurance program if the UFW were defeated. Coupled with these strategic acts of assistance to the Petitioners was the general permission granted to them by the Company to campaign during the employees' normal work-time, without interruption or interference from crew foremen. These consistent, telling features of Respondent's conduct vis-a-vis Cruz and Castellanos clearly warrant the conclusion that the Company either initiated the decertification campaign in the first place, taking advantage of the general lack of support for the UFW among its steady, full-time workers, of which the Respondent was well aware, or that the Respondent carefully watched the campaign and acted to rescue it whenever it ran into serious difficulties. In either case, the Respondent's conduct was that of an active participant and supporter.

Nor can it be surprising that little or no direct evidence exists that Respondent conspired with the Petitioners in furtherance of the decertification campaign. One cannot expect that Cruz, Castellanos, or Ben Abatti would admit openly to such a conspiracy, particularly in view of their evident willingness to camouflage even the many smaller links that tied them together during the campaign, as noted throughout this decision. Much in the manner of their testimony forces a conclusion that they were closely bound together in a common attempt to decertify the UFW; otherwise, their testimony would have been far more candid than it was. The fact that their collusion was not perfectly concealed does not indicate such collusion did not exist, nor does the fact that their collusion was not more overt and aggressively carried out. Based on all the credible facts (even including those that will be discussed in subsequent sections), I have concluded that the evidence demonstrates that Respondent violated Section 1153 (a) of the Act by interfering with, restraining, or coercing employees in their protected rights by actively supporting and assisting the Petitioners in their decertification campaign.

II. The Respondent's Discriminatory Conduct.

Section 1153(c) of the Act provides it to be unlawful for an employer to discriminate "in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Generally, in testing an employer's treatment of an employee, whether it be by way of discharge, layoff, or other discipline, "the motive of the employer is the controlling factor. * * * * 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 (or other disability)." N.L.R.B. v.

Mueller Brass Co., 509 F.2d 704, 711 (5th Cir. 1975). The evidence must persuasively show that the conduct in issue has as its moving force, albeit it may not be the only force, the employer's anti-union motive. S. Kuramura. Inc., 3 ALRB No. M-9.

Charges raised in the General Counsel's complaint allege that Respondent discriminated against employees in violation of Section 1153 (c) of the Act by, one, laying off or discharging Clemente Fernandez and four of his co-workers and, two, by eliminating Rosa Briseno's seniority and withholding her from work. 82/ These two issues, reviewed extensively in regard to their facts, will now be considered with respect to the conclusions flowing from those facts.

A. Clemente Fernandez And His Group:

Of the facts extensively set forth earlier with respect to the layoffs involving Clemente Fernandez and his family, several major conclusions emerge. First, Clemente Fernandez was an active UFW representative and supporter in the crew of Jose Rios. He and his wife, Gregorio, were the only two members of the crew who consistently refused to sign the decertification petitions; his son, Jose Armando, followed their example by refusing to sign any petition after the first one. These three employees were laid off by Rios on December 12, along with Francisco Salas and Maria Torres, two workers who rode to work with Clemente Fernandez.

Second, the Rios crew was an important one in respect to the possible success of the decertification drive. A sister crew, that of Pedro Palacio had unanimously rejected the move for decertification. Other crews, such as Angel Avina's, also had refrained from supporting the campaign or were less uniformly in favor of it than was the Rios crew. And, it will be recalled, Jose Rios, more than any other foreman, became personally involved in the decertification drive by chaufeuring two signature gatherers and by warning that layoffs would occur for those who did not sign the petition. His crew's party on December 16 was also used as an opportunity by the Petitioners to gather signatures on the third and last decertification petition.

Third, the selection of layoffs in the Rios crew makes little sense unless one concludes that the Company was attempting specifically to eliminate Clemente Fernandez and those associated with him. Although Rios claimed he selected those to be laid off on the basis of seniority, it is fair to conclude that under the .terms of the then

---

82/The complaint also alleges two other violations of Section 1153 (c). First, it asserts that Respondent discriminatorily decreased the work-hours of Pedro Palacio's crew due to its support for the UFW, but as it was earlier noted, the evidence failed to sufficiently establish that such a decrease in work-hours took place—in fact—and, therefore, I have determined there is no factual basis for inquiring into whether Respondent acted unlawfully. Second, the complaint asserts that Respondent discriminated against employees by subcontracting the growing and harvesting of rapini, a charge that will be considered in the subsequent section of this decision.

existing UFW contract at least four other workers had less seniority than Fernandas: Eva Donate, Maria Valdez (who was laid off the next day because of Rios's "mistake" in seniority), Adelina Moreno, and -Armida Vega. No explanation is evident as to why these four workers were passed up when Rios selected his layoffs.83/ Furthermore, if one accepts Rios's explanation that he was instructed to cut his crew back to 25 or 26 employees, no need would have existed to have laid off first five and then a sixth employee. Rather, he would have needed to lay off only three or four employees. In this connection it should be recalled, as noted earlier, that in the following months several new employees periodically joined the Rios crew, including Maria Valdez who permanently returned to the crew only a month after the layoffs. (Valdez, it will be recalled, never left the Company's employment, being placed with another of the Company's crews the day after her "layoff" from the Rios crew.)

Fourth, a few days before Fernandez and his group were laid off by Rios, the general foreman, Ray Hernandez, was overheard by Fernando Franco telling Rios to discharge his crew's UFW representative, according to Franco's credible testimony. Hernandez's order to Rios was issued either on the same day, or two days after, the second decertification petition was submitted for filing.84/ This discharge order, which Franco overheard, comes very close to establishing direct evidence that Respondent intended to eliminate Clemente Fernandez from the Rios crew because of his position with the UFW.

Other testimony also generally establishes that it was Fernandez, personally, that the Company was seeking to eliminate from the Rios crew. Thus, Rios offered to assist both Salas and Jose Armando Fernandez in finding other work with the Company; Maria Valdez was re-employed by the Company the day after her "layoff" and was rehired in the Rios crew one month later; Maria Torres was eventually re-employed in the Rios crew in March, 1979. Clemente Fernandez and his wife,

---

83/It should be recalled that when he made his layoffs Rios had not seen the Company's printed seniority list. He admittedly believed that Donate had begun after Fernandez did (and, in any case, she would have lost any greater seniority than the Fernandez group under the UFW's contract because she had left her bargaining unit work). He had laid off Moreno and Vega as the most junior employees just the previous December, after the Fernandez group was hired in August, thus considering them at that time as junior to the Fernandez group. No adequate explanation has been put forward to justify the change in Rios's belief regarding the seniority of Moreno and Vega, unless he was specifically intending to eliminate the Fernandez group. And, he should have known that Valdez was more junior to the Fernandez group.

84/Franco recalled that the first day of the rapini harvest, the day on which he overheard Hernandez and Rios speaking, was December 6. Albert Studer, on the other hand, claimed the first day of the rapini harvest was December 8. Whether the conversation took place on December 6 or 8 does not appear material to the significance of it.

however, were never approached or offered an opportunity to return to work at the Company, even though Fernandez twice approached Rios seeking to return to work. And, according to the testimony of Jose Armandd Fernandez, Rios informed him that he would not re-employ the -father and mother because he (Rios) had had problems with .them. Therefore, it appears that Clemente and Gregorio Fernandez's separation from their employment must be considered as discharges, and not as mere layoffs.85/

The many circumstantial factors, such as the timing of the December "layoffs," the manner of selecting those to be laid off, which did not strictly adhere to the contractual concept of seniority, the fact that Clemente Fernandez was a prominant UFW supporter in a crew whose support against the UFW was statistically important, and the lack of a demonstrable economic justification for the layoffs, plus the direct evidence concerning Hernandez's order to Rios to discharge the crew's UFW representative, all are factors that lead me to conclude that Clemente and Gregorio Fernandez were discharged on December 12, under the guise of a layoff, in order to eliminate Clemente Fernandez from the Rios crew due to his position with the UFW and the support he could be expected to provide to it in the anticipated election. This conclusion is further buttressed by the fact that the Respondent manifested not only its animus against the UFW but its related, active effort to ensure success for the decertification effort.

It is more difficult, however, to reach the conclusion that Respondent unlawfully discharged or laid off Francisco Salas, Maria Torres, and Jose Armando. Salas and Torres had not opposed the decertification petitions as Clemente and Gregorio had consistently done, or as Jose Armando had done on the last two petitions. Nor were Salas and Torres members of the Fernandez family, a family connection which might have led to the expectation that they would follow Clemente's pro-UFW attitude. Nor does any evidence establish that Torres and Salas were UFW supporters. And it is difficult to understand just how the "layoff" of Salas and Torres might have been implemented to justify the Fernandez' layoffs, for the evidence fails to establish that their seniority required them to be laid off prior to or at the same time as the Fernandezes. Also, as earlier noted, Rios suggested where Salas might find other work at the Company, and three months later re-employed Maria Torres on his crew.

One perhaps can suspect that the Company determined to

85/During the course of his testimony at the hearing, Jose Rios suggested that work was available for the Fernandezes and Francisco Salas in the onion harvest then underway, although Rios had never mentioned such work to Clemente Fernandez in March, 1979, when Fernandez last approached him for work. As a result of Rios's suggestion at the hearing, Clemente, his wife, and Francisco Salas returned to work in the onion harvest, but when that harvest abruptly ended two or three days after their return so did their employment. Rios told Fernandez that the office had not informed him of any other work that they could perform. This brief return to work, some six months after their original "layoff" does not substantially undercut the notion that Clemente and Gregorio Fernandez were discharged and not simply laid off.

eliminate the group of employees it identified as associated with Clemente Fernandez, but at most it is a suspicion. Except for the fact that Salas and Torres rode to work with Clemente Fernandez, nothing else in the record reflects any significant nexus among the three of them.

A different matter exists with respect to Jose Armando, however, inasmuch as he was Clemente's son and another nonsupporter of the decertification effort. . Although Rios also offered to assist Jose Armando in finding other employment with the Company, I have nonetheless concluded that it had been determined to eliminate Jose Armando from the Rios crew due to his close connection with Clemente Fernandez. The work Rios specifically suggested his willingness to help Jose Armando get was never definitely offered to him, and it is unclear whether it ever would have been.86/

In sum, I have concluded that the Respondent violated Section 1153 (c) of the Act by discharging Clemente, Gregorio, and Jose Armando Fernandez. This conclusion- emerges from a preponderance of the evidence.

B. The Discipline Of Rosa Briseno:

As earlier discussed, Rosa Briseno, a member of Pedro Palacio's crew, was barred from working two days and lost her seven years' seniority as a result of her having missed work for one day to attend UFW collective bargaining negotiations in her capacity as an alternate member of the UFW negotiating committee.87/ The Company has provided a twofold rationale for disciplining Briseno: first, because her absence for negotiations was not announced in writing in advance to the Company and, second, because the UFW later filed a grievance in her behalf seeking to restore her lost wages and the Company took that grievance to violate an understanding under which the Company allowed Briseno to return to work.

It is difficult to reach any conclusion other than that the Company discriminated against Briseno unlawfully, in violation of Section 1153 (c) of the Act. Clearly, the Company treated Briseno's "unexcused" absence of one day for Union business in a distinctly

---

86/It should be recalled that on December 16, at the Rios crew's party at La Coyote, Jose Armando rejected the prospect of working in the lettuce harvest as a piece-rate harvester, the job suggested by Rios. Whether he would have rejected other work at the Company is not established in the record, for Jose Armando also informed Rios that he had decided to work for another employer.

87/Briseno missed two days of work following the one day of negotiations because Jim House, the Company's labor relations representative, did not allow her to return to work on the day following the negotiations and then the Company did not provide notice for her to return on the second day until such time as it became impracticable for her to work that day. And, as a result of her missing so much work she also missed a third day's pay because of the Thanksgiving holiday.

different manner than it treated other unexcused absences. For one thing, as Ben Abatti testified, discipline was never issued by the Company for brief, unexcused absences. For another thing, as we observed-in the case of Toribio Cruz and Manuel CasteUanos, who absented themselves for weeks in order to engage in the decertification campaign, no discipline was issued for their unauthorized absences. Indeed, the Company has claimed in defense of its equanimity toward Cruz's and Castellanos's extended absences that it was common among the steady workers to be absent from work without prior authorization or permission.

Thus, what we see is that when Briseno absented herself for one day without permission, to engage in UFW business, she was prevented from returning to work and eventually had her seniority eliminated, but when other workers absented themselves similarly without permission they received neither a warning nor discipline. "The essence of discrimination in violation of section (1153(c)) is treating like cases differently." Amalgamated Clothing..Workers v. N.L.R.B., 95 LRRM 2821, 2826 (D.C. Cir. 1977). In the case of Rosa Briseno the Company did just that, treating Briseno differently than other like cases, based solely on the fact that her unauthorized absence related to the UFW.

No acceptable explanation emerges to warrant the Company's different treatment of Briseno. No sufficient rationale for that discriminatory treatment is supplied by the fact that the Company had been concerned over her past unauthorized absences, as the Company admitted to having no such concern over others who were similarly absent but for reasons having nothing to do with the UFW. Furthermore, the contractual provision that provided for absences when engaged in Union business was—in essence—no different than the contract provision providing for absences due to other reasons.88/ Accordingly, no significant basis exists to distinguish the "unauthorized" absence of Rosa Briseno from that of other employees. If the Company's discipline of Briseno resulted from her having taken an unauthorized absence, clearly it was discriminatory and in violation of Section 1153(c) of the Act. See, Reichhold Chemicals, Inc., 187 NLRB 989 (1971); Spotlight Co., Inc., 188 NLRB 774 (1971); Amalgamated Clothing Workers, supra, 95 LRRM at 2821.

Nor can the Company justify its discriminatory treatment of Briseno by claiming that it eliminated her seniority only because the UFW filed a grievance in her behalf over her loss of wages. For "the right to file a grievance with one's .collective bargaining representative over wages, hours, and working conditions has been a basic statutory right." General Motors Corp., 232 NLRB 335 (1977); Keokuk Gas Service Co. v. N.L.R.B., 98 LRRM 3332, 3335 (8th Cir. 1978). Both General Motors, and Keokuk Gas, demonstrate that it is unlawful for an employer to discipline an employee or increase discipline because he attempts to submit a grievance. Thus, when Jim House admitted to

88/It should be noted that the contract provision which provided for written requests for an absence to engage in Union business was not one which required such written requests to be made. Rather, the contract provision merely mandated the Company to grant such an absence when requested in advance in writing.

abrogating Briseno's seniority in response to the grievance filed in her behalf he essentially admitted violating the Act.89/

III. Respondent's Discontinuance Of The Rapini Crop.

A. Introduction And A Brief Review Of The Law:

Two unfair labor practice allegations are put forward with respect to the rapini crop that was discontinued by the Respondent in 1978. Paragraph 14- (e) of the complaint charges that the Respondent unilaterally terminated or subcontracted the growing and harvesting of rapini, without bargaining with the UFW regarding its decision, and thereby violated Sections 1153 (a) and (e) of the Act. Paragraph 14(h) charges that the Respondent unilaterally terminated or subcontracted the growing and harvesting of rapini for the purpose of discouraging employees from exercising their voting rights in the decertification election, and thereby violated Sections 1153(a) and (c) of the Act. Although these two allegations are analytically distinct from one another under the Act and can be considered separately, under the circumstances of this case, particularly because of the Respondent's contractual defense to the refusal to bargain charge, it seems appropriate to consider the two allegations as related and inter-connected.

As a preliminary matter in respect to the refusal to bargain charge, however, it should be noted that it is undisputed that the Company did not bargain with the UFW regarding its decision to discontinue the rapini crop, and that the General Counsel and the Company are essentially in dispute over whether a legal obligation existed on the Company's part to bargain over that decision. It is, therefore, appropriate to initially review a portion of the law surrounding collective bargaining, as it has developed under the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. Section 151, et. sea., which contains identical requirements as does our Act in Sections 1153 (e) and 1155.2 (a).90/

89/Although Mr. House claimed he retaliated against the UFW's grievance because he believed that the UFW had acted inconsistently with an "agreement" regarding Briseno's reinstatement, his testimony fails to establish or describe any agreement that was entered into between the UFW and the Company that constituted a waiver of Briseno's right to file a grievance. Moreover, House's explanation of why he decided to eliminate Briseno's seniority does not go to explain why he prevented her from working for two days following her one-day absence.

90/It might be noted that Section 114-8 of the Act requires the Board to "follow applicable precedents of the National Labor Relations Act. ..." As will be seen in the discussion which follows, a uniformity of opinion does not exist under the National Labor Relations Act regarding certain features of collective bargaining that are pertinent to this case. Since the state of law under the National Labor Relations Act remains unsettled in this area, one must select which body of precedent is more appropriate to apply in this case.

In Fihreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964) , the United States Supreme Court held that when an employer's employees are represented by a collective bargaining agent, that employer must submit its decision to subcontract bargaining unit work to the process of collective bargaining. The court found that a decision to subcontract bargaining unit work could substantially impact the employees' "terms and conditions of employment," particularly when that decision will effectively terminate their employment, and by thus affecting the employees' "terms and conditions of employment" the decision to subcontract falls within those subjects that the NLRA, as does our Act, makes mandatory for bargaining. The court further noted that even when a decision such as to subcontract out bargaining unit work is motivated by economic considerations on the employer's part, it is a fitting subject for bargaining, as

> These (economic considerations regarding the cost of certain work functions) have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests.

The decision to subcontract that Fibreboard was held obligated to bargain over was a decision that replaced bargaining unit employees at Fibreboard's plant with those of an independent contractor, who was to perform the same work previously performed by the bargaining unit employees.

Other decisions then followed Fibreboard that deal with an employer's decision to close or terminate or relocate a portion of his business. With only a minor exception,9,17 the National Labor Relations Board ("NLRB™) has consistently held that such employer decisions must be submitted to the collective bargaining process before they are effectuated. See Ozark Trailers, Inc., 161 NLRB 561 (1966); Senco. Inc., 177 NLRB No. 102 (1969); Royal Typewriter Co., 209 NLRB 1006 (1974), reversed in relevant part, 533 F.2d 1030, 1039 (8th Cir. 1976).92/ The NLRB's approach has been followed by certain federal

---

91/See General Motors Corp., 191 NLRB No. 1M-9 (1971), enforced, M-70 F.2d M-22 (D.C. Cir. 1972); Summit Tooling Co. , 195 NLRB 4-79 (1972).

92/The court decision in Royal Typewriter suggests that an employer's decision to partially terminate bargaining unit work must only be submitted to collective bargaining where the decision is based on anti-union motives. This suggestion finds no basis in the law, however, for the statutory requirement to bargain collectively over such mandatory subjects as wages, hours, and terms and conditions of employment is a requirement having nothing to do with an employer's motivation regarding his employees' union. Other statutory provisions, such as our Act's Section 1153 (c), restrict an employer from engaging in discriminatory acts because of anti-union motives.

courts, such as in N. L. R. B. v. Winn-Dixie, Stores , Inc., 361 F.2d 512 (5th Cir. 1966), cert, denied, 385 U.S. 935, where the employer gave up certain work and commissioned an outside company to perform it off the employer's premises; and in Weltronic Co. v. N.L.R.B., 419 F.2d 1120 (6th Cir. 1969), cert, denied, 398 U.S. 939, where the employer transferred unit work to another plant; but the NLRB's approach has been rejected by other federal courts, such as in N.L.R.B. v. Adams Dairy. Inc., 350 F.2d 108 (8th Cir. 1965), where the employer discontinued a portion of his operations; in N.L.R.B. v. Thompson Transport Co., U-06 F.2d 698 (10th Cir. 1969), where the employer closed one of his transport terminals; and N.L.R.B. v. Transmarine Com., 380 F.2d 933 (9th Cir. 1967), where the employer moved his operations from one transport terminal to another.

The foregoing cases and the requirement to collectively bargain over partial business discontinuances or terminations are ably discussed and reviewed in Brockway Motor Trucks v. N.L.R.B., 582 F.2d 720 (3rd Cir. 1978). The Third Circuit in Brockway concluded its analysis of the existing state of law by rejecting the conflicting "per s_e" approaches raised before it—namely, that bargaining is never required when an employer decides to discontinue a portion of his bargaining unit operations if the decision is economically motivated, or that bargaining is always required when such partial closings or discontinuances are decided upon—and, instead, concluded that a more balanced approach to the question must be taken. The Brockway court determined that one must begin with the presumption that an employer who intends to close, terminate, or transfer a portion of work from a bargaining unit should submit that intention to the employees' bargaining agent for negotiation, inasmuch as that decision significantly affects the employees' terms and conditions of employment by decreasing or eliminating work opportunities within the bargaining unit. But, the Brockway court also held that when circumstances exist which demonstrate a severe economic necessity behind the employer's decision, or which demonstrate some real exigency which makes bargaining impracticable or harmful to the employer's operations, then the employer is not obligated to submit his decision to the collective bargaining process. The Brockway court stressed that simply because the employer's decision to cease a portion of his business is economically motivated does not free him from his collective bargaining obligations. Rather, one must balance the rights and interests of both the employer and bargaining unit employees based on the existing factual circumstances.

B. A Factual Analysis With Respect To Paragraphs l4(e) And (h) Of The Complaint;

1. The Refusal To Bargain Allegation.

If one were to apply the general approach taken by either the Third Circuit in the Brockway case or that taken by the NLRB, which is even more supportive of employee collective bargaining rights, one would have to conclude that the Respondent was obligated to submit its decision to discontinue the rapini crop to the collective bargaining process. Nothing put forward by the Company in support of its economic rationale for discontinuing the rapini was so compelling as to make it necessary to act with such speedy or secretive disposition in

discontinuing the crop as to make bargaining about the decision impracticable or unwieldly. In fact, the only economic support put forward for the Company's decision regarding rapini was Ben Abatti's con- •_ elusory assertion that the rapini market was not rewarding in .the past year or two and that the Company made little or no profit during those years from rapini. No supporting data for that conclusion was offered by the Company. Furthermore, when the Company purportedly first decided to discontinue the rapini it was then engaged in collective bargaining with the UFW over the parties' first contract and some three to four months remained before the rapini planting would normally take place, thus providing a substantial opportunity and time in which to negotiate over the Company's decision. Nor did the Company's decision to discontinue rapini involve a major change in capital formation or in business operations, which may have made bargaining over it more difficult or impracticable.

On the other hand, the decision to discontinue rapini quite obviously stood to have a substantial impact on bargaining unit employees (particularly if they did not follow the rapini to Studer's fields) . Eliminating rapini would mean the layoff of some 130 to 14-0 workers for over a two-month period. No crop was grown to replace the rapini that would have employed a comparable number of the Company's employees. Thus, it was foreseeable that the Company's decision would lead to the substantial termination of employment for a sizeable group of the Company's year-round field workers. Indeed, the rapini crop was one of the Company's most labor-intensive crops.

One must keep in mind that the requirement to bargain over such a significant impact on members of the bargaining unit is not a requirement that will inevitably frustrate an employer's decision-making or flexibility. Our Act does not require that agreement be reached as to an employer's plan to discontinue a major crop, but only that the employer and union engage in good faith bargaining in order to see. if through that bargaining process some reason can be found to either forego the discontinuance, ameliorate its impact on employees, or protect them against the consequences of it. If good faith bargaining is pursued without a satisfactory conclusion emerging, then the employer is free to implement his decision to discontinue a crop. But to wholly ignore the statutory mandate to engage in good faith negotiations over decisions that so significantly bear on the employees' terms and conditions of employment would be to nullify an important voice that our Act seeks to give workers in matters affecting their employment conditions, as well as frustrate the. concept that by working together labor and management can resolve their conflicting interests, hopefully to pursue jointly a direction by which both will benefit.93/

93/It might be noted that even were we to give substantial weight to that precedential authority under the National Labor Relations Act that has held that an employer is not obligated to bargain over a decision to partially close or terminate its operations, these holdings are not wholly applicable to the facts in this case. Thus, Adams Dairy,, supra, 350 F.2d 108, involved an employer who made a basic change in its capital structure; Thompson Transport Co., supra, 406 F.2d 698, involved an employer forced to close one of its terminals due to a substantial loss of business; Transmarine Corp., -- (continued)

The Company, in large part, seeks to justify its failure or refusal to bargain over the discontinuance of rapini by relying on its collective bargaining contract with the UFW. In particular, the Company cites the "management rights" clause. Article 16, which provided, inter alia, that "unless . . . limited by some other provision of (the) agreement" that "the Company retains all rights . . •. to determine the products to be produced, or the conduct of its business ..." The Company also refers to Article 38, which permitted the Company to continue the common practice of entering into various legal relations with others in regard to the growing, harvesting, and shipping of farm crops, and which precluded the UFW from interfering with or preventing any such agreements "with a grower and/or .shipper for the growing, packing, harvesting or selling of a crop . . . ." Thus, the Company argues that its original decision to discontinue the rapini and its subsequent relationship with Albert Studer were sanctioned by the UFW contract and that it was not obligated to bargain about discontinuing the rapini crop.

Several considerations arise, however, that indicate that the Company's reliance on its contract with the UFW is misplaced. First, and perhaps foremost, is the fact that by Ben Abatti's own admission, supported likewise by the testimony of Jim House, the decision to discontinue rapini was made at least as early as April, 1973, before the UFW contract was entered into. Inasmuch as the decision to discontinue rapini was made not only before the contract was agreed to but while collective bargaining was in progress regarding that contract, it is difficult to see how the Company can now rely on contract language agreed to two or more months later to justify its rapini decision. The UFW was simply never advised of the Company's rapini decision and, therefore, could not have contemplated that it was waiving its right to bargain over that decision.94/ Indeed, the contract clearly

---

93/(continued)--supra, 380 F.2d 933, similarly involved an employer compelled to close a part of his business operations due to the loss of substantial business and the need to regain that lost business by consolidating operations; and N.L.R.B. v. Royal Plating and Polishing Co., 350 F.2d 191 (3rd Cir. 1965), involved an employer compelled to partially terminate its business due to severe financial losses and a municipal government order that earmarked the employer's property for redevelopment. In other words, many—if not nearly all— of the court decisions which have refused to follow the National Labor Relations Board's approach to collective bargaining over partial closings or partial business discontinuances are decisions involving severe economic necessity on the employer's part, which clearly was not the case behind Respondent's discontinuance of its rapini crop.

94/If one concludes that the Company made its decision in April of 1978, as Ben Abatti claimed, an issue may seem to arise as to whether that decision can be protested through an unfair labor practice charge filed more than six months later, as was the case herein. But the six-month limitation found in Section 1160.2 of the Act is not a jurisdietional limitation; rather, it is a limit that must be raised as an affirmative defense. Perrv Farms, Inc.. M- ALRB No. 25 (1978) (Slip Opinion, p. 2, note 1). The Respondent has not raised the six-month limit as a defense in this case and, accordingly, — (continued)

contemplates that the Company would grow rapini, as it provides for a rapini harvest piece-rate and for a rapini employees' seniority system.

Second, it is fair to conclude that the contract's management rights clause cannot be relied on to dispose of the refusal to bargain matter, since it was—under the circumstances present here—"limited by some other provision of the agreement. ..." Thus, Article 37 of the parties' contract prohibits "subcontracting" when it is "to the detriment of the Union or bargaining unit workers," permitting subcontracting only under certain limited circumstances that are not found in this case. If the Company's conduct in regard to rapini falls within Article 37, its conduct would then be prohibited by that provision and fall outside the management rights clause.

The Company denies that it engaged in subcontracting with respect to its rapini crop, distinguishing between its conduct and the conduct that existed in Fibreboard Paper Products,, supra, 379 U.S. 203 (Co. Brief, p. 206); the Company claims that it did not bring in outside employees to perform work on Company premises as did the employer in Fibreboard. The court in Fibreboard, however, noted that the terms "contracting out" and "subcontracting" have no precise meaning and that "(t)hey are used to describe a variety of business arrangements altogether different from that involved in this case." A review of the facts in this case makes it clear that taken together the Company's decision to discontinue rapini and its contemporaneous agreement with Albert Studer fit comfortably within the concept of subcontracting, as prohibited by the parties' contract, surely more so than those arrangements fit the description of a grower-shipper relationship as is authorized by Article 38 of the contract.

No arms-length relationship existed between the Company and Albert Studer with respect to the Company's discontinuance of the rapini crop. Albert Studer, Ben Abatti's brother-in-law and full-time tractor foreman for the Company, did not by happenstance decide to grow rapini; rather, as he admitted, his brother-in-law asked him if he wanted to take over the crop. Thereafter, much of the growing work in respect to the rapini was performed by the Company's tractor drivers and irrigators, while they were paid by the Company. Studer was not billed for the planting work until the crop was harvested, thus indicating that the Company helped finance the growing of "Studer's rapini." A written agreement was then entered into between the Company and Studer which provided the Company with shipping fees in respect to the rapini, fees that one experienced neutral observer described as

---

94/(continued)—the limit cannot be relied on to bar a finding on the bargaining issue. In fact, the UFW had no knowledge of the Company's decision until December of 1978, when the harvest began and it became evident that Albert Studer was paying the harvest employees; until December no change in respect to the rapini was evident. The law is clear that the Act's six-month limitation period "does not begin to run until the aggrieved party knows, or reasonably should have known, of the illegal activity which is the basis for the charge." Bruce Church. Inc., 5 ALRB No. US (1979) (Slip Opinion, p. 7) .

"exhorbitant." The Company, through this agreement, was guaranteed a very substantial profit merely for selling and shipping the rapini, a profit that could well equal or exceed the profit Studer could expect : from growing the rapini. Finally, the rapini was harvested by entire crews that had been long employed by the Company, supervised by foremen who were normally Company employees. Indeed, the Company's general foreman, Mr. Hernandez, and its tractor foreman, Albert Studer, regularly visited the rapini harvest while it was underway even though they remained full-time Company employees.

Thus, except for the fact that Albert Studer paid the harvest workers and had his land used for the growing of rapini, the rapini was planted, irrigated, fertilized, and harvested by crews normally employed by the Company. The rapini was then sold in Company boxes which identified the Company as the grower and shipper. As far as the outside world knew the rapini was the Company's, not Studer's, just as it had been for the last 12 years. Irrespective of the language employed in their written contract,95/ the relationship between the Company and Studer was—in effect—one where the Company subcontracted with him to use his land for the rapini: the Company gave up growing rapini, a traditional crop, on its land; Studer's land was used instead; the growing and harvest of the rapini was generally performed and supervised by employees associated with the Company; and the Company was guaranteed a substantial rate of profit for continuing to ship the rapini under its name. Putting aside the rhetoric used to describe the facts in this case, an objective appraisal of them establishes a situation similar to an industrial manufacturer whose plant discontinues producing one of its products and, instead, contracts with another company to supply him that product to his specifications and under his brand-name, thus continuing the product line but having eliminated his own employees from the manufacturing process. See N.L.R.B. v. Winn-Dixie Stores, supra, 361 F.2d 512.

Based on the foregoing analysis, it should be concluded that the Company's relationship with Studer fell within the contractually proscribed subcontracting and was not an arrangement permitted by the contract. The Company's contractual defense in respect to its rapini decision must be rejected. An additional issue arises with respect to the Company's contractual defense, an issue which inevitably leads to a consideration of Paragraph 14(h) of the complaint.

2. The Discrimination Allegation.

Article I (B) of the parties' contract also provided:

95/In its form and language the Company's written agreement with Studer was vastly different to written agreements entered into between the Company and other landowners regarding the packing and selling of farm crops, as is evidenced by several examples introduced by the General Counsel. The Studer agreement is also grossly exaggerated in its effort to portray Studer's sole ownership of the rapini. It is difficult to rely on the wording of that agreement in construing the reality of Studer's relationship with the Company.

> The Company agrees that no business device, including joint ventures, partnerships or any other forms of agricultural business operations shall be used by the Company for the purpose of circumventing the obligations of this Collective Bargaining Agreement subject, however, to the provisions of Article 37, Subcontracting, and Article 38, Grower-Shipper Contracts.

Similarly, Article 38 provided that the Company will not "subvert the Union by entering into" grower-shipper agreements. Presumably, if the Company's decision to discontinue the rapini and transfer it to Albert Studer was intended to discriminate against bargaining unit members for anti-Union reasons, as is alleged in Paragraph 14-(h) of the General Counsel's complaint, then such discrimination would likewise violate the contract provisions quoted above.

Several features in the record suggest that the Company's original decision to discontinue the rapini crop was motivated by its anti-Union animus. For one thing, the decision was in keeping with various threats made during the original campaign, which had ended with the UFW's certification. In that campaign the Company had threatened to eliminate certain labor-intensive crops if the UFW became certified. See Abatti Farms, supra, 5 ALRB No. 34. For another thing, the Company made little or no effort to document its "economic rationale" for having discontinued the rapini. This missing evidence (which surely must have been available in terms of market reports or sales invoices) was also coupled with the shifting and self-contradictory testimony of Ben Abatti in respect to his reasons for not growing the rapini. As will be recalled, Mr. Abatti initially claimed that his growing decision was based solely on economic reasons, then later he testified to additional reasons for not growing it, then later he retracted these additional reasons. Additionally, there is the sworn declaration of Frank Preciado, a Company foreman, who had indicated to a Board agent that he was told by Studer that the Company was not growing rapini because of the Union.96/

Nonetheless, other considerations exist that make it difficult to conclude that the Company's original decision to discontinue rapini was motivated by its anti-UFW animus. Preciado's declaration, while damaging on the surface, is somewhat ambiguous. The declaration's significance is also limited inasmuch as it only purports to describe s. statement made to Preciado by Albert Studer, which Ben Abatti

---

96/On January 21, 1980, the General Counsel moved to submit additional evidence by way of declarations or affidavits as to whether the Company grew rapini in the 1979-1980 season. The Respondent opposed the motion. At the hearing, Mr. Abatti claimed he did not know whether he would grow rapini in the 1979-1980 season.

The General Counsel's motion is denied. No compelling reason exists to warrant reopening the record in this case, when so much time has already passed since the hearing was held.

allegedly had made to Studer. As for the unlawful campaign threats made by the Respondent, they were made in late 1975 or early 1976, some two years before the rapini was discontinued. Thus, these unlawful threats: were not closely related in time to the discontinuance of raplni. And, although one might suspect that the Company sought to frustrate the UFW in its representation of employees in order to encourage a movement to decertify the UFW, by—among other things—discontinuing the rapini, no substantial evidence pushes one to reach this damaging conclusion. Furthermore, one cannot be very sure of what the Company originally intended in regard to "Studer's rapini." For example, the Company may have originally intended to serve Studer as a custom harvester, which would have resulted in no discriminatory impact on the rapini employees, as they would have remained Company employees during the harvest. In short, the evidence, I believe, is not sufficiently persuasive to infer that the Company originally discontinued its rapini in violation of Section 1153 (c).

On the other hand, the evidence is more persuasive that the Company engaged in discriminatory conduct when it came to the rapini harvest. The harvest, beginning in December, closely followed the Company's most recent efforts to frustrate the collective bargaining agreement. Basic provisions of that short-term agreement were not fulfilled by the Company, for no substantial reason. The harvest also began after the decertification campaign had been mounted. Inasmuch as the Company indicated consistently its strong support and backing for this decertification effort, it is reasonable to infer that the Company was interested in seeing that the decertification effort succeeded. One way to aid its success was to eliminate a large portion of field workers, whose support could not be counted on by the Company. This shuffling of potential voters could be particularly important in view of the beginning lettuce harvest which brought another large complement of field workers onto the Company's payroll as the decertification petitions were being qualified for an election. Thus, by eliminating approximately 130 employees from its payroll the Company could better hope for victory in the decertification election, basing its hope on the large complement of steady workers whose lack of enthusiasm for the UFW was readily known to Ben Abatti.

It is virtually impossible to accept the testimony of Ben Abatti and Albert Studer as to how the Company's employees ended up on Studer's payroll for the rapini harvest. Studer, despite years of farming, had never hired a large harvest crew before. Yet, Studer claimed he had made no final arrangements, for a harvest crew with only a day or two to go before the harvest was to begin, when a failure to install a harvest crew could have resulted in substantial financial losses. Abatti claimed that Studer accepted his employees because they were being laid off due to a freeze, although neither the employees nor the foremen were aware of any such layoffs. Studer claimed he directly hired the Company's employees to save himself a labor contractor's overhead costs, yet he had overhead costs as high as those of a labor contractor. Abatti claimed that Studer personally employed the harvesters, although the Company had historically provided harvest assistance to other growers on a custom harvest basis, similar to the custom service it had provided in growing "Studer's rapini."

Once again a realistic appraisal of the facts belie the Company's contentions regarding them. In effect, the Company performed the harvest for Struder; it was the Company's crews, foremen, general foreman, and boxes that were used in the harvest, not 'Studer's even though Studer superficially could claim himself as the employer by maintaining the payroll. But the evidence amply warrants the conclusion that it was the Company that maintained control over the harvest, not Studer, who knew nothing about harvesting the large and expensive crop.

3. Conclusions.

In view of the foregoing analysis I conclude that the Company violated Section 1153 (e) of the Act by refusing to bargain with the UFW about the discontinuance of rapini and that the Company violated Section 1153 (c) of the Act by disenfranchising its rapini employees by having them temporarily placed on Albert Studer's payroll during the rapini harvest. It is appropriate to conclude from the foregoing facts and analysis that the moving reason why the rapini employees were "hired" and paid directly by Albert Studer, and stricken from the Company's employment, was so the Company could remove them as possible voters in an upcoming decertification election.

CHALLENGED BALLOTS

A portion of this consolidated proceeding was concerned with the challenged ballots left unresolved by the Regional Director's report on challenged ballots, dated March 23, 1979. The findings set forth now with regard to these unresolved challenged ballots are offered in the event that the Board determines to honor the results of the decertification election conducted on December 27, 1978.

The challenged ballots cited in and left unresolved by the Regional Director's report fall into three categories: (1) a challenge was made to the ballot of Ray Veliz, Jr., based on the UFW's claim that Mr. Veliz was a supervisory employee; (2) a challenge was put forward as to 15 voters whose names, according to the Regional Director's report, did not appear on the eligibility list; and (3) a challenge was made with respect to 98 votes cast by workers in the rapini harvest. These challenges will be taken up in the aforestated order.

I. Ray Veliz, Jr.

Mr. Veliz, Jr., whose father is a foreman and supervisor with the Company, performs a number of different jobs for the Company. He drives an employee bus, he checks on the onion topping, he observes the melon picking to see that the picked fruit is acceptable, and he is a nailer in the lettuce harvest. The testimony put forward by the UFW with respect to Mr. Veliz, Jr., fails to show that he performs, in any responsible manner, the functions set forth in Section 114-0.M-(j} of the Act, which defines supervisory employees. At most, Mr. Veliz, Jr., performs work at a slightly higher level of responsibility than that of a rank-and-file field worker, in that he reviews the onion and melon picking to ensure that workers are performing up to the Company's standards. In doing so, however, he does not perform or effectively recommend any of the functions which reflect supervisory employment. The supervisory

challenge to Ray Veliz, Jr., should be overruled, as unsupported by the evidence.

II. Fifteen Voters Not On The Eligibility List.

Fifteen voters were challenged because their names appeared to be absent from the voter eligibility list. These voters were: Maurelio Resales Chavez, Higino Arias, Dolores Velez, Sr., Santiago Valencia, Jose De La Cruz, Isidra Escobedo, Ignacio Medina, Manuel Lopez, Maria Luisa Escobedo, Felix Cantu Reyes, Atanacio Avina, Francisco Ortiz Rios, Ezequiel Zavala, Rafael Martinez Marquez, and Celia Ramirez Vasquez. At the hearing the Company and the UFW were able to stipulate to certain facts concerning these 15 voters, as noted below.

Four of the 15 challenged voters, Ignacio Medina, Manuel Lopez, Atanacio Avina, and Ezequiel Zavala, were—in fact—listed on the voter eligibility list, although their names were overlooked during the voting. No dispute exists as to their eligibility. Their votes, therefore, should be counted. Santiago Valencia's name also appears on the eligibility list, and the Company's earnings records indicate that he worked during the eligibility week of December 16. His vote also should be counted. Maurelio Chavez and Dolores Velez, Sr.., are two voters whose names fail to appear on the eligibility list, but the Company's earnings records indicate that they were working during the eligibility week of December 16. Inasmuch as the Company's earnings records indicate they were working during the eligibility week, I have concluded that their votes also should be counted. No valid reason has been brought forward to discount their votes, except for the apparent inadvertent error of having their names not placed on the eligibility list.

Of the remaining eight challenged ballots, the following should be noted. Pursuant to an understanding reached at the conclusion of the hearing with respect to submitting additional information concerning these eight voters, it was established by correspondence from a Board agent that Francisco Ortiz Rios, one of the eight, appeared on the eligibility list as Francisco Ortiz. This was determined by a check of Ortiz's social security number. Thus, Mr. Francisco Ortiz Rios was actually listed on the eligibility list; his vote should be counted.97/

A final challenged ballot concerned Rafael Martinez Marquez. Mr. Martinez had worked in the Company's lettuce harvest the year before and also wqrked during the 1978-1979 harvest, but he did not appear at

---

97/When the hearing closed the parties were given until July 11, 1979, to submit further information regarding the challenged voters (including Francisco Ortiz Rios) that either party wanted considered regarding their votes. Information was not submitted by either party with respect to Higino Arias, Jose De La Cruz, Isidra Escobedo, Maria Luisa Escobedo, Felix Cantu Reyes, or Celia Ramirez Vasquez. I recommend, therefore, that the challenges with regard to these six ballots be sustained.

work until after the week of December 16 (used as the week for the eligibility list). According to Angel Carrillo, Martinez told him that he did not begin the harvest right away, prior to the week of December 16", because of illness. Martinez, of course, was not listed on the eligibility list. In view of the foregoing circumstances, I recommend that the challenge to his vote be sustained. The evidence is not substantial enough to insure that Martinez's absence from work and from the eligibility list was--in fact--due to illness.98/

III. The 98 Rapini Emplovees.

In view of my unfair labor practice findings, I have concluded that the ballots cast by workers in the rapini harvest should be counted, even though the workers were technically on Albert Studer's payroll during the eligibility week. One reason is because the Respondent unlawfully refused to bargain with the UFW regarding its discontinuance of the rapini. A second reason is because Respondent shifted its rapini employees to the payroll of Albert Studer in order to disenfranchise them as voters. A third, and more important, reason is because the facts generally demonstrate that the Company never relinquished real control over the rapini harvest and the work performed by the harvesters, and, even though the harvesters were technically treated as employees of Studer's, they actually remained under the Company's control. They continued to be supervised by foremen associated with the Company, and after the harvest they returned to their normal work at the Company, just as they had done in previous years.

CONCLUSIONS AND REMEDY

By way of general summary, I have concluded that the Respondent violated Sections 115 3 (a.), (c) , and (e) of the Act. The preponderance of evidence establishes that the Company provided significant assistance and support to the Petitioners' decertification campaign, so much so as to seriously interfere with its workers' protected rights under Section 1152 of the Act. The evidence further showed that this active, unlawful assistance by the Respondent occurred at the same time that the Respondent was actively frustrating basic provisions of the UFW's collective bargaining agreement, demonstrating the Respondent's continuing animus against the UFW.

In addition, I have concluded that the Company unlawfully laid

---

98/Pursuant to my request, certain information was viewed by a Board agent, David Arizmendi, with respect to whether Mr. Martinez appeared on the Company's payroll following the week of December IS; the UFW's counsel, Carlos Alcala, also submitted corres pondence after the hearing that dealt with Mr. Martinez and also with Mr. Francisco Qrtiz Rios. For the sake of clarity, I have marked this correspondence as follows: ALO Exhibit 1 (Arizmerde letter of July 5, 1979); ALO Exhibit 2 (Alcala letter of July 10, 1979), and ALO Exhibit 3 (Alcala letter of July 13, 1979). Neither the Petitioners nor the Company opposed the information contained in these letters which I have relied on in part in making my findings regarding Francisco Ortiz Rios.

off or discharged Clemente Fernandez, Gregorio Fernandas, and Jose Armando Fernandez. As a related matter, I have concluded that the Company unlawfully suspended and then eliminated the seniority of Rosa Briseno, solely because of her Union activities. I have also concluded that the Company unlawfully refused to bargain with the UFW when it discontinued the rapini crop and unlawfully discriminated against the rapini employees by attempting to disenfranchise them from voting in the decertification election.

Finally, in view of the foregoing conclusions, it follows that the Company refused to bargain with the UFW, in violation of Section 1153(e) of the Act, when it refused to recognize and bargain with the UFW following the decertification election. Clearly, our Act does not permit an employer to refuse to recognize and bargain with his employees ' certified bargaining representative based on the employer's purported good faith doubt of that representative's majority status, when that majority status has been undermined through the unlawful conduct of the employer. N.L.R.B. v. Sky Wolf Sales, supra, U70 F.2d at 263. Similarly, it was unlawful for the Company to have unilaterally altered its medical insurance plan (or any other terms and conditions of employment), after the Company had unlawfully refused to recognize and bargain with the UFW.

Having found that Respondent engaged in certain unfair labor practices within the meaning of Sections 1153 (a) , (c) , and (e) 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, including the posting and distribution of the attached Notice to Employees. Having found that the Company unlawfully discharged or laid off three employees, unlawfully suspended one other and eliminated her seniority, and unlawfully assisted and supported the Petitioners' decertification campaign, conduct which reflects a serious, broad-ranging violation of employee rights, I also recommend that the Company be ordered to cease and desist from infringing in any manner upon the rights guaranteed to employees by Section 1152 of the Act.

Several other features of my recommended remedy should be noted. First, because of the Respondent's unlawful support and assistance to the Petitioners' decertification campaign, the results of the decertification election should not be honored. One cannot fairly say that the election results sufficiently reflect the uncoerced and unrestrained free expression of the bargaining unit members. Second, although the General Counsel asks that the UFW's certification be extended for one year, no necessity appears to warrant this extension. By ordering the Respondent to recognize and bargain with the UFW, and by setting aside the results of the decertification election, the UFW is returned to its pre-existing position of being the certified bargaining representative. Finally, it seems appropriate to order that the Respondent grant the UFW's representatives access to the Respondent's work force in conformity with the provisions of its expired contract with the Company. This access will provide the UFW an opportunity to pursue their representation of employees while negotiations are under way for a new collective bargaining agreement.

Upon the basis of the entire record, the findings of fact, the

conclusions of law and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Instigating, assisting, or supporting any effort to decertify the employees' certified bargaining representative.

(b) Discharging, laying off, suspending, eliminating the seniority of, or otherwise 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 (o) of the Act.

(c) Refusing to recognize and bargain in good faith with the UFW.

(d) Interfering with, restraining, or coercing in any other manner the right of employees to engage in protected activities.

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

(a) Offer Clemente Femandez, Gregorio Fernanda z, and Jose Armando Fernandez full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges.

(b) Restore the full and complete seniority of Rosa Briseno.

(c) Make Clemente Fernandez, Gregorio Fernandez, Jose Armando Fernandez, and Rosa Briseno whole for any loss of pay and other economic losses each has incurred as the result of the discriminatory conduct of Respondent, together with interest thereon computed at the rate of 7% per annum. Back pay shall be computed in accordance with the formula established by the Board in Sunnyside. Nurseries, Inc., 3 ALRB No. 42 (1977).

(d) Recognize and bargain in good faith with the UFW as the employees' certified collective bargaining representative. Also, to make employees whole for any loss of pay or other economic losses any has incurred as a result of Respondent's refusal to bargain with the UFW, such refusal commencing from the time that the Respondent refused to recognize and bargain with the UFW and extending to such time as the Respondent commences to bargain with the UFW in good faith.

(e) To permit UFW representatives to take access to its properties in accordance with the expired contract, until such time as a new collective bargaining agreement is entered into or until the

parties bargain to impasse.

(f) Preserve and, upon request, make available to the 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.

(g) 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.

(h) 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 between November 28, 1978, and the time such Notice is mailed, and thereafter distribute copies to all employees hired by Respondent during its next peak season.

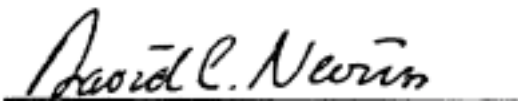
(i) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the time (s) and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may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

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in -all appropriate languages, to its employees assembled on Company 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 non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(k) 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.

Dated: March 23, 1980

AGRICULTURAL LABOR RELATIONS BOARD

By 

David C. Nevins
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by discriminating against employees; by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 1152 of the Agricultural Labor Relations Act, primarily because we assisted and supported an effort to decertify the UFW; and by refusing to recognize and bargain with the UFW when they still represented the employees. We have been ordered to notify you that we will respect your rights in the future. We are advising each of you that we will do what the Board has ordered, and also tell you that:

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

1. To organize themselves;

2. To form, join, or help unions;

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

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

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

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.

WE WILL NOT discharge, lay off, eliminate a worker's seniority, or otherwise discriminate against employees with respect to their hire or tenure of employment because of their involvement in activities protected by law.

WE WILL OFFER Clemente Fernandez, Gregorio Fernandez, and Jose Armando Fernandez their old jobs back and we will pay each of them any money they lost because we discharged them. WE WILL ALSO reimburse Rosa Briseno and restore her seniority.

WE WILL RECOGNIZE AND BARGAIN with the UFW as your certified collective bargaining representative.

Dated:

ABATTI FARMS AND ABATTI PRODUCE

By _____ _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA. DO NOT REMOVE OR MUTILATE.