Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MISSION PACKING COMPANY, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-350-SAL 79-CE-355-SAL 79-CE-356-SAL 8 ALRB No. 14

DECISION AND ORDER

On February 25, 1981, Administrative Law Officer (ALO) Matthew Goldberg issued the attached Decision and Recommended Order in this proceeding.[1/] Thereafter, Respondent timely filed exceptions and a supporting brief, and General Counsel filed a reply brief.

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

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

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[1/] Case No. 79-RC-20-SAL, a representation case originally consolidated for hearing with the unfair labor practice issues herein, was severed from this matter by the ALO at the hearing.

[2/] We affirm the ALO's conclusion that the General Counsel did not adduce sufficient evidence to establish that harvest superintendent Ramirez violated the Act by telling the assembled employees that the Union would "hold back" undocumented workers.

[fn. 2 cont. on p. 2]

adopt his recommended Order as modified herein.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Mission Packing Company, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any union activity or other protected concerted activity.

(b) Threatening any agricultural employee with loss of employment or other reprisal for supporting or assisting the United Farm Workers of America, APL-CIO (UFW), or any other labor organization.

(c) Granting or promising agricultural employees a wage increase or other benefit in order to discourage them from joining or supporting the UFW or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

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

[fn. 2 cont.]

However, we reject the ALO's suggestion that the General Counsel would have to prove that Respondent's workforce included undocumented workers and that the statement had a coercive effect on employees in order to establish such a statement as a section 1153 (a) violation.

(a) Immediately offer to Antonio Lopez full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Antonio Lopez for any loss of pay and other economic losses he has suffered as a result of his discharge, reimbursement to be made according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon computed at the rate of seven percent per annum.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying and otherwise 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 backpay due under the terms of this Order.

(d) 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from August 21, 1979 to September 30, 1979.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the period and places 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.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at 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 in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the 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: February 23, 1982

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas 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 each side had an opportunity to present evidence, the Board found that we did violate the law by discharging employee Antonio Lopez on September 7, 1979. The Board also found that we violated the law in a speech to our employees on September 3, 1979, in which we threatened that they would lose work if the UFW won the election, and when we raised employees' wages in August and September of 1979 in order to influence the way our employees voted in the election. The Board has told us to post and publish 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 to obtain a contract covering 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 or protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT hereafter discharge, lay off, or in any other way discriminate against any agricultural employee because he or she has engaged in union activities or other protected concerted activities.

WE WILL NOT threaten you with loss of work because of your 'support for or participation in union activities.

WE WILL NOT raise your wages in order to encourage you to vote against the UFW, or any other union, or to discourage you from supporting or assisting the UFW or any other union.

Dated: MISSION PACKING COMPANY, INC.

By: _____

Representative]

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have any question(s) 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 112 Boronda Road, Salinas, California 93907, where the telephone number is (408) 443-3160.

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Mission Packing Company
(UFW)

8 ALRB No. 14
Case Nos. 79-CE-350-SAL
79-CE-355-SAL
79-CE-356-SAL

ALO DECISION

The ALO concluded that Respondent violated section 1153 (c) and (a) of the Act by discharging employee Antonio Lopez because of his union activities, finding that Respondent had knowledge of Lopez's union activities based on the small size of Respondent's operation and workforce and the fact that a supervisor was present when Lopez distributed union leaflets. The ALO found that Respondent had failed to show that it discharged Lopez for cause.

The ALO also concluded that Respondent violated section 1153(a) of the Act: (1) by the statement of its supervisor Jesse Ramirez to employees that Respondent would lose business and there would be less work for employees if the union won the election; and (2) by granting two wage increases during the course of the union's organizing campaign, conduct which tended to interfere with the employees' free selection of a bargaining representative.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO and ordered Respondent to reinstate Antonio Lopez with backpay and to read, mail and post a remedial Notice to Employees, but rejected the ALO's suggestion that the General Counsel must prove an actual coercive effect or impact on employees to establish an 1153(a) violation.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of	
MISSION PACKING COMPANY, INC.,	CASE NUMBERS: 79-CE-350-SAL
Respondent,	79-CE-355-SAL
and	79-CE-356-SAL
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	79-RC-20-SAL[1/]
Charging Party,	

Eduardo R. Blanco, Esq. and
Norman Sato, Esq., for the General Counsel

Abrahmson, Church and Stave, by
Arnold B. Myers, Esq. , for the Respondent

Marco Lopez, Esq., for the United
Farm Workers of America, AFL-CIO,
Charging Party

Before Matthew Goldberg,
Administrative Law Officer

DECISION OF THE ADMINISTRATIVE LAW OFFICER

I. STATEMENT OF THE CASE

The three unfair labor practice charges herein were filed by the United Farm Workers of America, AFL-CIO (hereinafter the

[1/] Originally the representation case enumerated above was consolidated for hearing with the unfair labor practice charges. However, as will appear, the hearing on objections in the representation case would have taken place more than one year following the election itself. Since the Union did not prevail in the representation election, a favorable outcome in the representation case proceeding insofar as the Union was concerned would merely have resulted in setting aside the previous election results, and directing another election. The representation case was therefore moot since the Union at this point in time need only petition for another election to realize this end. Accordingly, the Union representative moved to sever the representation , aspect from the unfair labor practice charges. Said motion was granted after the opening of the hearing.

Union) on September 11, 1979.[2/] Case number 79-CE-350-SAL was served on Mission Packing Company, Inc. (hereinafter the Respondent) on September 8, while the remaining two charges were served on September 10. The charges alleged a violation of section 1153 (c) and several violations of section 1153(a) of the Act. On July 23, 1980, the General Counsel of the Agricultural Labor Relations Board issued a complaint based on these charges. The complaint and notice of hearing were duly served on Respondent which filed an answer essentially denying the commission of the unfair labor practices alleged.

The hearing was held before me, commencing October 1, 1980. All parties appeared through their respective representatives and were afforded full opportunity to examine and cross-examine witnesses, introduce evidence, and submit oral arguments and briefs.

Based upon the entire record in the case, including my observations of the demeanor of witnesses as they testified, and having read the briefs submitted after the close of the hearing, I make the following:

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

1. The Respondent is and was at all times material an agricultural employer within the meaning of section 1140.4(c) of the Act.

2. The Union is and was at all times material a labor organization within the meaning of section 1140.4 (f) of the Act.[3/]

B. The Unfair Labor Practices Alleged

1. Preliminary Statement

The Respondent is a California corporation which has been in existence since 1976. It does not own or cultivate any agricultural properties, but rather supplies labor crews for the harvesting of one crop: iceberg lettuce. Respondent also invests in about twenty percent of the lettuce crops which it harvests. The company employs approximately 100 workers throughout the year as it follows the lettuce harvest "around the horn" in such areas as Yuma, Arizona, Huron, San Joaquin Valley, and Salinas, California. Respondent also carries out some operations in Colorado.

On August 15, in case number 79-NA-50-SAL the Union filed its second Notice of Intent to Obtain Access in 1979 for the

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[2/] All dates refer to 1979 unless otherwise noted.

[3/] The jurisdictional facts were admitted by Respondent in its answer.

purposes of organizing Respondent's employees who were then located in the Salinas Area.[4/] On August 31, the Union filed a petition for certification in case number 79-RC-20-SAL. On September 7, the petitioned-for election was held and resulted in the majority of the votes being cast for "no union." A petition to set aside the election was filed on September 12 by the Union. However, as noted above, due to various postponements and continuances, the matter was not set for hearing until the date that the instant case was heard, and said petition was withdrawn by the Union.

The unfair labor practice charges alleged in the complaint fall into three basic categories: the discriminatory discharge of employee Antonio Lopez; threats concerning loss of employment and problems with immigration authorities made by Respondent's agents in the week prior to the representation election; and wage increases announced and implemented on August 15 and August 29, allegedly for the purposes of interferring with the organizational rights of employees.

2. The Discharge of Antonio Lopez

a. The Testimony of the Discriminatee

Antonio Lopez was hired by Respondent in April or May to work as a cutter and packer. He had previously worked for the Respondent in 1976 for a short period. Lopez was hired in 1979 by Rodimiro Covarrubias, stipulated as a supervisor. He became a member of a "quintette," which is a system for harvesting lettuce, utilized in part by Respondent, that groups three cutters and two packers into a five man harvesting unit within a crew, which is comprised of four or five such units.[5/]

Approximately three weeks prior to the election on September 7, Union organizers appeared at the fields where Respondent's harvesting crews were working. Two of these organizers, a Celestino _____, and a Steve _____, spoke with Lopez' crew and attempted to find a representative for that crew from within its ranks. Lopez testified that he himself was chosen to be that representative.[6/] Lopez stated that his foreman Rodomiro

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[4/] The Union's initial notice was not produced in evidence. The testimony of Floyd Griffin, one of Respondent's principals, however, placed the date of filing of this notice in April or May.

[5/] Respondent also utilized the trio system for two of its crews. The trios consist of two cutters and one packer.

[6/] It appears that Lopez more or less volunteered for the task and received the approval of his fellow crew members. He was not technically "elected" by them to fill the position.

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was approximately 12 feet away from the assembled crew when Lopez was chosen to be the representative.[7/]

On cross-examination, Lopez supplied further details concerning the circumstances surrounding his being chosen as representative. The organizers arrived at the Kasaca Ranch around noontime, and he spoke with them in the presence of the entire crew, including the loaders. Following the organizers meeting with the crew, a collection was taken to buy banners for a Union march, after which the workers boarded the bus to return home.

Lopez testified as follows concerning his efforts on behalf of the Union. In his capacity as representative he attended meetings with Union representatives at the Chavez office inSalinas for the purposes of "planning for the elections." He received Union pamphlets or bulletins from organizers which he ' distributed to the members of his crew, including loaders. The distributions took place in the morning as workers arrived at the fields, or when the crew was boarding or actually on the bus which transported them from a central gathering place to the fields. Lopez asserted that he engaged in such activities approximately five times in the fields by South Main Street in Salinas. His foreman, being the driver of the crew bus, was present when Lopez purportedly distributed the Union leaflets. Lopez also stated that he distributed authorization cards to members of his crew approximately one week before the election, likewise in the fields by South Main in Salinas. He was assisted in these tasks by fellow crew member Wenceslao Leyva. Lopez maintained that his foreman Rodomiro was present at such times and that Lopez even offered a card to Rodomiro. However, Lopez acknowledged that at no time did he wear a Union button or insignia which would openly display his avowed support for the Union.

During the course of his cross-examination, however, Lopez testified somewhat inconsistently regarding the distribution of authorization cards. He stated that it was the organizers who passed authorization cards out to each of the workers. After the cards were signed, some of these workers, including loaders, gave Lopez the cards which he returned to the Union office. At another point, Lopez proffered the following:

> Q (by Mr. Myers): Do you remember the day that [the authorization cards were passed out and returned by Lopez to the Union office]?
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> A: Not right now, but I have a receipt. One day before that I had bought a pick-up.

[7/] Lopez further testified that when he was selected, the matter was transacted by persons using normal tones of voice which he likened to that used by the participants in the hearing. I find in the face of Covarrubias' denial of knowledge of Lopez' appointment as representative (see discussion infra), that the choosing of Lopez proceeded in a way which was inaudible to the foreman.

Q: And is it your testimony that you passed out the cards the day after you bought this pick-up, is that correct?

A: Yes

Q: Mr. Lopez, did you pass out authorization cards on any date other than the one after you purchased this truck?

A: Yes

Q: On what day was that?

A: I don't recall; I could bring the receipt.

Q: How many days did you pass out authorization cards in the year 1979, when you worked at Mission Packing?

A: Only one day.

Lopez did not vote in the election. On that day, September 7, prior to reporting for work, Lopez was accosted by a police officer who took him to jail for failing to pay a traffic ticket. When Lopez reported to work the following day, his foreman told him that he could not board the company bus because he no longer had a job as a result of his having missed work the previous day. Lopez explained the reason for his absence, to which Rodomiro replied that if he wanted to talk with Jesse Ramirez, Respondent's supervisor, he could do so. Lopez then inquired of Ramirez whether it was true that he had been terminated, and Ramirez replied in the affirmative.

Lopez admitted that his foreman had explained to him that if a worker received three signed warnings he could be fired. Lopez stated that at the time he was terminated he had only received one such warning. On cross-examination, however, Lopez admitted that after one month of employment with Respondent in 1979, he received a warning from his foreman for being absent on a Saturday. Lopez stated that he did not actually receive a written; copy of the warning notice, but merely was told by his foreman that such a warning had been issued. Lopez received an additional warning in mid-June, approximately. He testified that despite his informing Covarrubias that he would not be able to come to work on that particular day, upon returning to work the following week he was told by Rodomiro that he had been issued another warning.

Yet another warning was received by Lopez "during the time that he was a representative." This was the sole warning that Lopez actually received a copy of and signed. This warning

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concerned bad packing or poor work performance.[8]/

Lopez also testified that his foreman Rodomiro made several statements to him concerning the Union. According to the worker, his foreman asked on August 29, the date that Lopez received a written warning, why the workers did not speak to the owner to ascertain whether they could have an "agreement." Present at the time were the remaining members of Lopez' "quintette" and Steven, the son of Floyd Griffin. Steven allegedly responded that he could not do anything about the situation because his father was not there. Lopez also testified that on other occasions Rodomiro stated to the workers that the Chavez union was not worth anything, that the Chavistas were very lazy, and would constantly talk about the Union while the workers were working.

b. The Testimony of Wenceslao Leyva

Employee Wenceslao Leyva had been hired by Mission Packing in 1979 to work as a cutter and packer. His foreman was also Rodomiro Covarrubias. Leyva testified that Union organizers met with his crew on three or four separate occasions. He stated that Lopez was chosen as a crew representative and that he himself, with the acquiescence of the crew, was also chosen. As crew representative, Leyva tried to convince the people that better benefits could be obtained with the Union. He attended meetings at the Union offices before the election, accompanied by Lopez. Representatives from the Union would give bulletins to Leyva and Lopez which they would distribute as the workers were getting on the company buses. Like Lopez, Leyva stated that Rodomiro, the foreman-driver, would be present during such times.

Leyva stated that he and Lopez distributed authorization cards on one occasion prior to the commencement of work in the fields about two weeks before the election, and that Rodomiro asked Leyva for such a card. The foreman was present the entire time these activities took place, and according to Leyva, attempted to convince him to stop getting people to sign up for the Union, giving out flyers and trying to persuade workers that they would be better off with the Union.[9]/ However, Leyva noted that Rodomiro

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[8]/ I did not construe Lopez' denials of receipt of notice of disciplinary action as an attempt by him to conceal these matters, thus impinging on his credibility. Lopez seemed to draw a distinction between a verbal warning conveyed by his foreman and a written disciplinary notice which he signed and received. This inference is further supported by the following remarks made by the interpreter at the hearing "...the witness is using the word 'amonestacion' which is 'warning.' When I say the words 'ticete de advertencia,' it also means 'warning.' He is confused. He keeps using the other word for warning. I don't know what he means. He has got a different definition for it."

[9]/ Interestingly, these purported remarks were not alleged as violations of the Act.

made these remarks only to him.

Leyva averred that while on the company bus on the morning of the election he saw Antonio Lopez in his pickup being stopped by the sheriff. As he was driving the bus, Rodomiro commented on Lopez being stopped.

On cross-examination, Leyva stated that when the representatives for the crew were appointed, the entire crew was present, but that he passed out Union leaflets at the location where the crew waited for the company bus and that he did so with Lopez' assistance.

c. The Testimony of Respondent's Witnesses

The thrust of Respondent's defense to the allegation of Lopez' discriminary discharge was twofold: one, that the company did not have any knowledge of Lopez' purported Union activities, and that Lopez was discharged for cause.

Floyd Griffin, president of Mission Packing, Inc., testified that he was not specifically aware of organizing activities carried out by the Union in 1979, and that he was not advised by supervisors or foremen of the presence of Union organizers. Griffin denied any knowledge of authorization cards being passed around or of the distribution of Union literature save for a pamphlet that was given to workers on the day of the election. However, Griffin admitted that he was aware of the Notice of Intent to Obtain Access which was filed by the Union and served on Respondent.

Jesse Ramirez holds the title of "supervisor" with Respondent, and was stipulated to be a supervisor within the meaning of the Act. He testified that on occasion he discussed with Rodomiro disciplinary problems that the foreman was experiencing with Lopez. Although Ramirez was not apprised of the initial warning notice issued to Lopez, he stated that Rodomiro discussed with him a second such notice after the foreman had made it out,[10]/ and that he was aware of a subsequent notice, given to Lopez on August 29, for performing bad work.[11]/ Ramirez also noted that he discussed with Rodomiro the warning given to Lopez on September 7 which immediately led to his termination. Ramirez denied any knowledge of Lopez' status as a crew representative

[10]/ This notice was dated June 15.

[11]/ Ramirez said when he is presented with a problem involving bad packing by a worker, the difficulty is brought to the foreman's attention, and the entire crew is stopped and made to perform the work correctly while the proper procedure is explained. A review of Respondent's employment records indicates that no employees have been terminated solely for bad packing, except that one worker who had ostensibly been fired for that reason, as appears on his termination slip, had an argument with the supervisor when the problem was pointed out.

before the charge had been filed. Furthermore, Ramirez stated that henever saw Lopez distributing leaflets or authorization cards, and that neither of these matters was discussed when he and Covarrubio decided to terminate Lopez.

On cross-examination, Ramirez admitted that he spoke to his foremen about the presence of Union organizers at the fields, and also that the foremen had reported to him bulletins from the Union, as well as authorization cards, were being distributed. Ramirez was personally aware of organizers when they appeared on two occasions but denied any knowledge of crews electing representatives. He admitted that he had discussed with Griffin the organizers' presence and the distribution of Union literature.[12]/

Ramirez averred that Rodomiro, prior to speaking to the supervisor, did not make the decision to terminate Antonio Lopez. I However, the two agreed upon that course after discussing it. Reviewing Lopez' general work record, Rodomiro pointed out that Lopez had received several warnings for missing work.[13]/ Significantly, Ramirez stated at the time he knew that Lopez had been confronted by the police on the date that he did not report for work, and that Lopez had been in jail.

Ramirez stated, quite significantly, that it is possible to be excused from work if one speaks with his foreman the day previous to an absence, or in the event that it is not possible to do so, a worker might inform the office as to the reason for an absence on the next day he reports to work. Ramirez noted that a foreman generally asks the worker the reason for his absence and ascertains whether the absence is justified. Ramirez gave two telling examples for justifiable absences: one example was where an employee had gone to the doctor? the other was if the police had stopped the worker and gave him a ticket or his car had broken down. As noted above, Ramirez indicated in his testimony that he knew that Lopez was in jail, yet in spite of that fact it was determined by Ramirez and Covarrubio to terminate him.

Javier Velasco, also one of Respondent's foremen,stipulated to be a supervisor within the meaning of the Act, hired Lopez in 1976 and supervised the crew in which he worked. Velasco stated that he did not know that Lopez had been rehired in 1979. As testified to by Floyd Griffin, each foreman for each crew has discretion concerning who to hire, and that the foremen do

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[12]/ This testimony runs obviously counter to the assertions made by Griffin regarding his knowledge of Union activities.

[13]/ Another member of Lopez' crew, Jesus Herrera, was discharged after receiving two warning notices for failing to appear for work, and one notice for bad packing. He is the only employee who was so treated. The records demonstrate that employees were terminated for failing to appear for work on three occasions, at least, without advising their foremen.

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not necessarily communicate with one another when a worker is retained. Covarrubias stated that he did not discuss Lopez' previous employment with the Respondent with the prior foreman Valesco.

Respondent called as witnesses a number of loaders who worked in Lopez' crew. Each of them stated that they did not at any time see Lopez distribute leaflets or authorization cards. Alfredo Correal, one such individual, stated that although he remembered Union organizers being present at the fields, he did not attend any meetings with them or with other workers,[14]/ and even denied seeing such meetings take place, contrary to the testimony of numerous witnesses. He testified it was the organizers that passed out the authorization cards and that he did not see any workers pass them out. Further, Correal did not know whether the workers had elected a crew representative and said that he was unaware that Lopez was such a representative that neither Lopez nor anyone in the crew so informed him.

On cross-examination, Correal contradicted his previous testimony to the effect that Leyva did not give him any "Union papers" and that no workers passed out authorization cards, and admitted that Leyva did in fact hand out authorization cards. Correal's credibility was further underminded by his assertion on cross-examination that organizers spoke with workers while they were working, followed almost immediately by the statement that organizers talked to the people during lunch time. In addition, Correal exhibited a decided lack of candor when questioned about Ramirez' pre-election speeches (discussed below), omitting any damaging remarks which that supervisor openly admitted. Consequently, I do not credit the bulk of his testimony.

Loader Saragossa Ortiz similarly denied seeing Lopez distribute any authorization cards or Union bulletins. However, he did admit that he obtained an authorization card from Leyva. Ortiz stated that when organizers arrived at the field he did not pay any attention to their activities and consequently was unaware whether the crew elected a representative. Likewise, Manuel Quintero, another loader, testified that he did not see Lopez pass out leaflets or cards, and that he was unaware if Lopez was a Union representative for the crew. He also denied hearing him talk about the Union. Although he was uncertain whether Leyva was a crew representative, he noted that this worker did give him a card which he signed. Quintero admitted that he would not speak to organizers when they arrived at the fields, that he had "nothing to talk to them about," and that he "did not want to get involved" when organizers appeared. As such, and because he rode to the work site in fellow workers' automobiles rather than by bus, as discussed below, the weight of his testimony concerning Lopez' activities on behalf of the Union is exceedingly minimal, at least insofar as it may be viewed as contradicting the assertion that he engaged in any such

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14/ On cross-examination, however, Correal stated that when the organizers first arrived, they spoke "with everyone."

activities.

Correal, Ortiz and other loaders did not ride in the crew bus to get to the work site, but rather got to the fields by private car. The evidence demonstrates that the distribution of leaflets and authorization cards took place, for the most part, at the place where the workers assembled to be picked up by the bus. Since the loaders did not ride the bus, they would of course not be present when Lopez purportedly engaged in protected activity. Therefore, although the loaders might credibly claim a lack of knowledge concerning Lopez' activities, the weight of their testimony is undermined by the fact that they were not present at the times when he performed the bulk of such acts. However, the fact that they were unaware of these _acts by Lopez reflects on the openness in which he engaged in them.

Rodomiro Covarrubias, Lopez' foreman, testified that workers were generally discharged for being absent from work, for doing a bad job, or for not having the ability to perform the work. There are a certain number of warnings a worker may receive before he is fired.[15]/ Apart from the verbal warnings given to workers to encourage them to perform better, there are written warnings which the foreman turns in to the company. As corroborated by Lopez, Covarrubias discusses the warning systems when he hires an individual.

The parties stipulated that Lopez was absent from work on June 19, July 28 and September 7.[16]/ Covarrubias testified that after the June 16th notice was issued, Lopez was warned that he had an obligation to be at work and that he could receive future such notices for failing to do so. Concerning the absence on July 28, Covarrubias stated that Lopez did not ask for permission to go to his sister's wedding which Lopez asserted was the reason for his failure to appear. During the week following, Covarrubias pointed out to Lopes that he had received a warning for failing to show up for work the previous Saturday. Covarrubias informed Lopez, according to the foreman's testimony, that the next time that Lopez received a warning he would be fired.

Similarly, when Lopez received a warning for bad packing on August 29, he was also told by his foreman that the next time he received such a notice he would be fired.

15/ Floyd Griffin testified that it was the particular foreman's prerogative to determine the number of warnings that a worker might receive before termination, and that certain foremen have a stated rule to that effect.

16/ July 29, a Sunday, was also a day when employees could voluntarily work. Respondent's cross-examination of Lopez attempted to establish that Lopez had missed two days around the 28th of July as opposed to one as he had testified. However, it appeared since he was not present on the 28th of July he could not have been informed that work was available for the 29th. Nevertheless, it was apparent that work for that Sunday was on a purely voluntary basis and that attendance by employees was not required.

On September 7, Covarrubias stated that Lopez did not show up and that the foreman did not find out where Lopez was until the end of that particular day, after the decision to terminate him had already been made. Covarrubias' testimony is in direct conflict with that of Ramirez whom I found to be a credible and candid witness [17]/ in that Ramirez acknowledged that he was aware of Lopez being confronted by police before the actual termination was discussed. Covarubbias did admit that he saw Lopez at the pickup point driving his own vehicle, but he denied that he saw anything unusual happening. He further denied that anyone from the crew informed him later that day that Lopez had been picked up by the police. In particular, Covarrubias initially denied talking with employee Josef at Margos about Lopez' whereabouts. However on cross-examination, Covarrubias contradicted himself saying that he had in fact spoken with Margos, at first stating that he spoke with this worker at 5 o'clock and that he did not speak with Ramirez about Lopez prior to this time.

On September 8, according to Covarrubias, the foreman spoke to Lopez, when the employee presented himself for work, concerning the warning notices and his termination. When Lopez stated that he was going to speak with supervisor Ramirez, Covarrubias, by his own admission, told the employee to go ahead and speak with him even though nothing could be done to affect his termination. Covarrubias also testified, that Lopez told him the reason why he was absent on September 7 .

Covarrubias stated that he did not remember ever having a conversation- with Lopez concerning the Union. He likewise denied seeing Lopez pass out Union papers or authorization cards. Furthermore, Covarrubias denied any knowledge that Lopez was a Union representative, or that he was so informed by Lopez or by anyone in the crew. Covarrubias noted that he was present every day in the fields, including those days on which Union organizers were present. On one such occasion, he testified that he spoke to one of the organizers, calling his attention to the fact that the foreman's permission had not been solicited in order that the organizers speak to the group while they were working. Covarrubias denied hearing anything that the organizer said to the people in his crew. Although Covarrubias admitted that he saw Leyva passing out Union notices and authorization cards, he denied, contrary to Leyva 's testimony, that he ever suggested to Leyva that he stop working for the Union.

As part of the documentary evidence that was introduced, employment records of at least three employees showed that these employees had received more than three warnings and had not been terminated.[18]/ For each of these employees, Covarrubias seemed

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[17]/ The basis of this conclusion lies in the testimony Ramirez proffered regarding the pre-election speeches he made to workers (see discussion below).

[18]/ As noted previously, several workers had been terminated for three unexplained, absences.

to carve out an exception to his general policy of terminating workers after they had received three disciplinary notices. For some workers, according to Covarrubias, the warnings that they received in one location did not carry over into another location. For example, if a worker received a disciplinary notice in Yuma that notice would not count towards the three notices allegedly prerequisite for termination should the worker go to Salinas. Some employees who were actually terminated had subsequently been rehired. Covarrubias averred that the "attitude and behavior on the job" of a particular worker is taken into account: at times workers are given a second chance. Insofar as Lopez was concerned, according to Covarrubias, he did not exactly ask for another chance at work but rather demanded his job back. In so doing, Covarrubias emphasized that Lopez' "mental attitude" rendered him unfit for further employment. Covarrubias denied that the Union had anything to do with the decision to terminate Lopez.

As noted earlier, Covarrubias stated that he did not speak to employee Margos until about 5:00 PM on the 7th of September and that he spoke to Ramirez after he spoke to Margos. Covarrubias later contradicted himself saying that he spoke to Ramirez in the afternoon after work was completed, which would be earlier than 5:00 PM. He admitted that he told the office to make out Lopez' termination check before the reasons for Lopez' absence had been determined. Further doubt was cast on Covarrubias' credibility by his initial denial that Leyva gave him an authorization card, which he directly contradicted when examined by this hearing officer by saying that he saw such a card when Leyva gave it to him.

The only worker who was a cutter and packer in Lopez' crew and was called to testify on behalf of the Respondent, Esteban Martinez, stated that he never saw Lopez passing out authorization' cards or union papers. Although he testified that he rode the bus to work, on cross-examination, he admitted that when crews were working in the vicinity of Watsonville, he would take his own car and go directly to the fields, not taking the company bus.[19/] Martinez made it quite clear that he sought to avoid any contact with Union organizers, and attempted to ignore any sort of Union business. When organizers were speaking to people in his crew, he studiously avoided these discussions. Despite the fact that Martinez stated that he did not see Lopez engaging in any concerted activity, he was unable to describe what Lopez looked like. Furthermore, Martinez was extremely nervous and uncomfortable when he testified, casting serious doubt on his overall credibility. In short, little, if any, weight can be given to the sum of the testimony of this witness,

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[19/] Since Watsonville is located near Salinas, one might infer that Martinez drove to work in the Salinas area, the locus of Lopez' organizational activities.

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d. Legal Analysis and Conclusions

As stated in Jackson and Perkins Rose Company, 5 ALRB No. 20 (1979) at p. 5, "[t]o establish a prima facie case of discriminatory discharge in violation of Section 1153(a) and (c) of the Act, the General Counsel is obliged to prove by a preponderance of the evidence that the employee was engaged in union activity, that respondent had knowledge of the employee's union activity, and that there was some connection or causal relationship between the union activity and the discharge. "Despite the testimony of several employee witnesses that they themselves did not see Antonio Lopez occupied in the distribution of authorization cards or Union leaflets, I find that, as noted above, they were not in a position to be percipient to these events. As such, their testimony is insufficient to rebut the assertions by Lopez, corroborated by Leyva, that he in fact, "engaged in Union activity." This essential element to General Counsel's case has therefore been established. Nonetheless, the main contention raised by Respondent in defense of the allegation that Lopez was discriminatorily discharged was that the company did not possess any knowledge of Lopez' activities on behalf of the Union. It bases this argument primarily on the denials by Covarrubias that he witnessed Lopez distributing authorization cards or leaflets, or that he was aware that Lopez was a "Union representative."[20/]

In general, I did not find Covarrubias to be a credible witness. The conflicts between his and Ramirez' testimony, as well as his general demeanor while testifying, led to that conclusion. By contrast, Lopez and Leyva provided mutually corroborative accounts concerning the distribution of Union pamphlets in and around the company bus driven by Covarrubias. Although I found and noted some inconsistencies in other particulars testified to by Lopez, I do not consider these to be so serious and overriding as to warrant the wholesale discrediting of both his and Leyva's testimony regarding the Union leaflet distribution. Covarrubias, being present at such times, thus acquired knowledge of Lopez' Union activities.[21/]

Notwithstanding the foregoing, other support exists in the record for finding that Respondent knew of Lopez' Union activities, and discharged him for that reason. Proof of employer knowledge

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20/ Ramirez likewise denied any knowledge of Lopez' activities.

21/ The fact that Respondent might not have been aware that Lopez was a "crew representative" does not preclude a finding that Lopez was discriminatorily discharged. The distribution of leaflets in and of itself is a sufficient basis for establishing protected, concerted activity on his part. The Act extends its protection to all those who engage in protected, concerted activities, not just to the leaders or union "representatives." Matsui Nursery, Inc., 5 ALRB No. 60 (1979); see also As-H-Ne Farms, 3 ALRB No. 53 (1977).

may be established by circumstantial as well as direct evidence. Broad Ford Inc., 222 NLRB 922 (1976), fn. 6; S. Kuramura, Inc., 3 ALRB No. 49 (1977).

This Board has recognized the so-called "small plant doctrine:" the limited size of the work force and the close, continuing contact between supervisors and employees via the working relationship gives rise to the inference that supervisors cannot help but overhear and/or see employee union activity, and hence acquire knowledge of that activity. S. Kuramura, Inc., supra; see also Tom's Ford/ Inc., 233 NLRB No. 2 (1977); Self Cycle and Marine Distributing Co., 237 NLRB No. 9 (1978). Covarubbias' crew, consisting of between 20 to 25 cutters and packers, who rode to work on the same bus where the Union activity, in part, took place, would be sufficiently small to bring the rule in to play.

A reading of the afore-cited cases, however, demonstrates that is simply not plant or work-force size alone which creates an inference of supervisor knowledge. The First Circuit, self-proclaimed author of the small-plant doctrine, has noted that "we recognize it, to the extent that we do, not as a rubric, but only insofar as it furnishes a logical basis for an inference." NLRB v. Joseph Antell, 358 F2d 880, 62 LRRM 2014, 2015 (CA 1, 1966). A salient feature of each of these "small plant" cases is that the justification for the discharge proffered by the employer was unconvincing, illogical or inconsistent. In the instant case, the purported reason for the discharge was Lopez' failure to advise his foreman that he would be absent from work, that this was the third time he had done so during his recent tenure, and that the foreman's policy was to discharge employees for three unexcused absences. However, as supervisor Ramirez admitted, an employee could be excused from work even though he did not advise his foreman prior to the time of the absence if, following the absence, he could provide an adequate justification. Ramirez volunteered that Lopez' absence on the day before his termination would have been excusable:

> Q: There have been times when a worker had been absent from work and the day after their absence they have contacted the office and told the office why they were absent?
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> A (by Ramirez) : Correct.
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> Q: ...then do you talk to the worker to find out whether he had a legitimate reason for being absent?
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> A: His own foreman asks him if he has some excuse for his absence. Supposing if he had gone to the doctor and wasn't able to let us know. A receipt from the doctor is good enough. If a policeman stopped him on the road with a ticket that he gave him, that would be sufficient.

Whether or not one credits Leyva's testimony concerning Covarrubias remarking on Lopez being stopped by police on the day before the discharge, the fact remains that either Covarrubias decided to terminate Lopez before inquiring as to the reasons for the termination, or, knowing that Lopez had been stopped, decided to terminate him despite his excuse for being absent. In neither event would Lopez' termination be justified according to stated company practice, per Ramirez. In NLRB v. Joseph Antell, supra at 2016, the court found that the possibility of employer knowledge of union activity because of a small plant

> might be sufficient [to base a finding of a discriminatory discharge] if there was other, affirmative evidence indicating the likelihood that the employer knew...The majority of the board found this reinforcement in the nature of the discharge. This was not by the mere disbelief of the employer's given reason. Affirmative proof, however, that the reason given was false warrants the inference that some other reason was concealed...If the employer is independently shown to have an anti-union animus which the discharge would gratify, it may be a fair inference that this was the true reason.

Respondent's anti-Union attitude was amply demonstrated by its independent Section 1153(a) violations of the Act (see discussions below). The unconvincing rationale for the discharge also provides circumstantial evidence of Union animus (see Golden Valley Farming, 6 ALRB No. 8 (1980), as it does its precipitous nature, following close on the heels of the Union election (cf. Foster Poultry Farms, 6 ALRB No. 15(1980); likewise, the failure to investigate the reasons behind Lopez' absence before the termination was decided upon (Sunnyside Nurseries, Inc., 6 ALRB No. 52 (1980).

I therefore find that a motivating factor behind the discharge of Antonio Lopez was his participation in protected, concerted activities, and that, as such, the discharge violated Sections 1153 (a) and (c) of the Act.[21a/]

3. The Company Pre-Election Speeches

Although several workers testified as to the content

[21a/] I did not treat this discharge as a so-called "dual motive" case, as per Wright Line, Inc., 105 LRRM 1169 (1980) and Mt. Healthy City School District v. Doyle, 429 US 274 (1980). The element of knowledge, essential to General Counsel's prima facie case, was in part established by inference based on the inadequate "business justification" for the discharge proffered by Respondent. Under these circumstances, Respondent place even in the absence of the protected conduct.

of two addresses given by supervisor Jesse Ramirez prior to the Union election, ample evidence of the content of those speeches was provided by Ramire himself, who corroborated most of the particulars supplied by the employee witnesses. While Ramirez is to be admired for his candor while testifying, nonetheless, it is his testimony which provides a firm foundation for finding violations of the Act based on threats, coercion and intimidation of employees prior to the representation election.

Ramirez addressed two of the company's crews on Monday, September 3, in the week prior to the election. Ramirez spoke to the crews from notes which were produced at the hearing. As Ramirez testified, he told the workers that there was going to be an election, but that the crews were "blind": they knew nothing concerning what the election was about. Ramirez pointed out that there was a "great conflict" with the companies that had the Union, and listed the names of those companies that had such problems, asking the workers whether they wanted to be "in the same condition." He discussed the situation at Inter Harvest and the months that they were on strike, emphasizing the losses that the workers, the company and the ranchers had experienced simply because there "wasn't any understanding." Although Ramirez attempted to mollify his remarks by stating that he did not see any problem if the workers decided to vote for the Union or for no Union, they would afterwards find out what problems would arise. Ramirez told the employees that there would be a problem with illegal aliens, that the Union would find a way .in which to hold the illegal aliens back when they were needed at the work sites, and that the Union would find ways to remove illegal aliens from the work force. In support of this contention, he related to the workers an anecdote which he witnessed while

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present in the Union official Ganz' office, where Ganz spoke to Castillo the director of the Immigration and Naturalization Service.[22/]

Ramirez, after explaining to the workers the company did not own any lands itself, told the employees a majority of the ranchers with which the company had harvesting arrangements did not like the Chavez union, that the workers should be prepared because the company was going to lose some of its ranchers. While stating that it was not the Respondent itself that was afraid of the Union or did not want the Union, problems would arise because of the other companies with which it did business. Ramirez additionally informed the workers about a fine levied I against Union members for buying goods that were the subject of a union boycott, that the workers had to participate in marches and political activities and "God knows what more." He brought up the subject of Citizen Participation Day, for which the workers "did not get one penny." Ramirez discussed retroactivity saying that no promise to increase wages could be made because of the current situation involving the Union election.[23/] After each such statement, Ramirez would ask the workers to "think about it."

In the other speech that Ramirez made during the course of that week to a different group of workers, he more or less reiterated the same remarks that had been made on Monday.

On cross-examination, Ramirez further amplified the statements that he made to the workers, referring to the booklet which contained the notes that he read from when the speeches were actually given. Ramirez testified that he told workers that the

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[22/] Ramirez' testimony concerning this incident conveys the exact opposite impression. Apparently, Ganz received a report while Ramirez was present that "they just finished picking up seven illegals that we [the Union] had working at Norton, and almost all of them were organizers from the Company," Ganz tried to reach Carillo in order, it seems, to intervene on their behalf. He advised the person conveying the news of the arrests to "advise him about the illegals that they had gotten,...go quickly and see if you can catch them before they sign a paper and tell them not to sign any paper. I [Ganz] will get them out." Ramirez' account thus implies that rather than "remov[ing] illegals," the Union was trying to protect those who had been its organizers. Even if one were not to attach this significance to Ramirez' description, at minimum he had merely been present when Ganz tried to reach the INS director: nothing he heard at that time could remotely support the inference that the Union was working against the interests of illegal aliens.

[23/] See discussion below concerning the paradox of Ramirez' (and by inference, Respondent's) sensitivity to the problem of wage demands during the pendency of the representation campaign and the raise paid to certain crews three days before the election.

ranchers did not want the Union and gave a specific example of a certain rancher, Barclay, that would cease utilizing the company for harvesting. He told them that the company would "continue operating, but it will be just one crew and who knows what will happen to those who didn't vote...,they are the ones who will pay for it." Ramirez told the workers of other specific companies that were "closed when the Union came in." On cross-examination, Ramirez admitted that he told the workers that there would be an absence of work if the Union were victorious.

Both Respondent and General Counsel correctly cite NLRB v. Gissel Packing Co., 395 US 575, 71 LRRM 2481 (1969) as enunciating the standard by which speeches such as Ramirez' are measured to determine whether they contain language which violates the Act. (See Akitomo Nursery, 3 ALRB No. 73 (1977); Abatti Farms, 5 ALRB No. 34 (1979), aff'd in part 107 CA3d 317 (1980).) In reconciling the "free speech" provision of the NLRA, Section 8(c) (ALRA §1155)) which permits an employer to express his opinions on unionism as long as they do not contain "any threat of reprisal or force," with the strictures on employee restraint and coercion embodied in Section 8(a)(1) (ALRA §1153(a)), the Supreme Court stated:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit He may even make a prediction as to the precise effects he believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization....If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a reasonable prediction based on available fact but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. we therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof. 395 US 618, 619.

Respondent argues that the contents of Ramirez speeches contain nothing which contravene Section 1153(a). However, the overall import of the speeches conveys the idea that a Union

victory would result in great hardship to the workers, cause "problems," and, most importantly, reduce employment opportunities.

A finding that Ramirez' 'Speeches violated Section 1153 (a) is primarily based on his remarks to the effect that a majority of the ranchers with whom Respondent did business did not like the Union, that the company would lose their business, and might even be forced to reduce the number of employees to just one crew. Respondent argues that as interpreted under Gissel, since Respondent will not take action "solely on [its] own initiative," but will merely react to the anti-Union ranchers on whom it depends, Ramirez' statements are not coercive.

The recent case of Patsy Bee, Inc., 249 ALRB No. 125, 104 LRRM 1285 (1980) , delineates the fallacy in such reasoning. There, a violation of NLRA Section 8(a)(1) was found based on the company president's remarks to his employees that unionization would result in plant closure because customers would "pull their contracts." The Trial Examiner had ruled that such remarks were not illegal, as they were grounded upon the president's expertise and insights into business preferences and practices of the company's customers. In reversing, the NLRB held that the president's expertise in the industry and his sincerity in making the statements in questions were immaterial, since the conveyance of an employer's belief that unionization will or may result in plant closure is not a statement of "objective fact" unless the eventuality of closing is capable of proof. The Board pointed out that the employer did not adduce any probative evidence that its customers would or might "pull their contracts."

> ...Gissel does not sanction predictions regarding the consequences of unionization which are based solely on subjective considerations. Under this test, a determination of legality or illegality would be virtually impossible. To come within the aegis of Gissel such predictions must be based on objective facts from which the employer can convey a reasonable belief as to demonstrably probable consequences of unionization. (249 NLRB No. 125, slip op. p.6.)

Since it was found that the "nature and effect of these statements are implicitly to equate economic adversity with a union election victory" (104 LRRM 1285, 1287), the Board held that they violated Section 8 (a) (1) .

Similarly, in the instant situation, Ramirez comments regarding the loss of work from anti-Union ranchers were not based on "objective facts": the supervisor was speculating as to possible consequences of a Union victory which were not "demonstrably probable." No probative evidence was adduced by the Respondent that these ranchers would in fact discontinue their use of Respondent's services. Furthermore, the remarks stress the diminution of employment opportunities in the event of a Union election victory, rather than the possible efforts of the Respondent to seek

contracts from growers not possessed of anti-Union attitudes. The disclaimer by Ramirez that the Respondent would continue to operate even if reduced to one crew does little to mollify the coercive impact of his speeches. In I.U.E. (Neco Electrical Product Corp.) v. NLRB, 280 F2d 757 (C.A. D.C. 1960), remarks by the employer that two of the company's largest customers would not do business with a union company and that possibly the plant would reduce operations to three or four hours per week were held to be coercive and violative of Section 8(a)(1). Accordingly, I find that Ramirez' speeches equating job losses with a Union victory violated Section 1153(a) of the Act. Abatti Farms, supra.

While many of Ramirez' remarks were permissible expressions of opinion based on objective fact (e.g., mentioning strikes that had occurred, specific companies that had ceased operating, fines levied by the Union, etc.) other elements of the speeches also gave rise to the inference that the remarks tended to coerce employees in the exercise of their Section 1152 rights. Ramirez' comments that "afterwards" the employees would "find...what the problems were going to be" implies that a change in the status quo (i.e., no union) would create "problems." (See Russell Stover Candies, Inc., 221 NLRB No. 73 (1975) where the statements that unions would cause "trouble" was held to be coercive.)

Ramirez' misrepresentation that the Union would "hold back" illegal aliens would arguably have a coercive tendency, particularly where the incident that he relied upon to reach such a conclusion (i.e., Ramirez' presence while a Union official telephoned the Director of Immigration and Naturalization Service) could not be so interpreted. However, the General Counsel neglected to show how many, if any, of Respondent's employees were illegal aliens, and the coercive impact of such a remark was not definitely demonstrated. In addition, the complaint alleged that Respondent "threatened agricultural employees that without the proper immigration documents they would lose their jobs if the UFW were to win the election." This allegation was not specifically proven and is accordingly dismissed.

4. Wage Increases Prior to the Election

Floyd Griffin, president of the Respondent, admitted that wages were raised on two separate occasions prior to the election and after notification of the intention of the Union to obtain access to Respondent's workers. The first of these raises was implimented in the week ending August 21, and the second in the week ending September 4, three days immediately prior to the election itself. Respondent had also granted its employees a raise in March of 1979.

Griffin's testimony contained broad generalities regarding the relative wage levels of Respondent's employees as compared with those of other companies. He asserted that wages needed to be equal to or higher than those paid by other companies to "reward" employees for working at a slower pace (and hence earning less under the piece-rate system) to insure a quality pack.

When speaking of the 1979 increases, Griffin neglected to make any references to specific companies with which his company competed, or their wage levels. Neither he nor anyone from Respondent conducted wage surveys at or near the dates in question to determine what compensation levels his company would need to meet. Although Griffin emphasized the necessity of paying "competitive" wages, he admitted that he would have no difficulty in obtaining employees to work at less than the "competitive" level, though the quality of their work might be inferior.

Respondent sought to establish, and argued in its brief, that since its formation it has followed a distinct pattern in the setting of wage levels and that the 1979 increases were in keeping with that pattern. Griffin testified that when it first began operating in May 1976, Respondent paid its two crews fifty cents per carton.[24/] The rate was based on "what the competitive companies were paying." Griffin noted that he considered as competitors such companies as Royal Packing, Salinas Marketing Co-op, Salinas Lettuce Farmers' Co-op, and Bruce Church, Inc. Respondent raised wages during the last week in August 1976 to S.525 per carton, but Griffin was unable to recall what the basis of that rate was. The next week another increase was paid, bringing the per carton rate to $.535. Griffin explained that this increase was prompted by the company's policy of insuring a quality pack by slowing its workers down in order that their work could be more carefully performed. This lessened pace had the effect of reducing the workers' piece rate compensation. According to Griffin, to avoid penalizing those most effected by the slow down[25/] (i.e., the cutters, packers and closers), the pay increase was given.

The next increase granted by the company was in July 1977. The per carton rate became $.5475. Griffin testified that this raise was given due to the "annual increase the other companies gave, either because of the fact that they belonged to a union, or some other factor."

The following year, Respondent began to pay workers $.5675 per carton in June 1978. The raise was vaguely explained by Griffin as prompted by the "same reason." In October 1978, wages were again increased to $.58 per carton. Griffin stated that there was no particular incident or factor that caused the October increase, merely that "we were doing better."

[24/] The fifty cents is apportioned among cutters, packers, loaders and closers according to a pre-determined schedule. In addition, the rate is based on a standard twenty-four heads per carton. A slightly higher rate is paid when thirty head cartons are utilized, as they are on occasion.

[25/] Loaders who also shared in the per carton rate were able to load at their own pace and were not affected to as great an extant, although they too benefited from the increase.

Although the record is unclear on this point, it appears that Respondent began utilizing the quintette system to a certain degree in 1978. Members of crews working under this system earned $.68 per carton in October 1978.

Griffin denied that there was any "annual time that [he] sat down and reviewed wages to determine whether [he] should increase." Wage reviews were prompted, according to Griffin, by "nothing other than being competitive and making an effort to keep our people paid a little bit more than everyone else to compensate for their earnings because of the fact that we slowed them down."

In 1979, wages were raised in March to $.6245 per carton for crews comprised of trios. At the time the company was engaged in operations in Yuma, Arizona. According to Griffin, the existence of a strike in the Imperial Valley, while not "reflect[ing]" on the Yuma area, created uncertainty regarding wage levels, and, "rather than waiting for all of this hassle to blow over and decide what the increase was going to be at the settlement of the strike, I calculated just from my experience about where it was going to end."

The next two wage changes in 1979 formed the basis for allegations in the instant complaint, that Respondent increased wages "for the purpose of interfering with the organizational rights of its employees." As previously noted, the Union filed a Notice of Intent to Obtain Access on August 15. In the payroll period from August 15 to August 21, wages for trio crews were increased to $.67 per carton while quintette employees began to receive an $.85 per carton rate, up from the previous $.73 rate. According to Griffin, the, factor which led to the increase "was a settlement of -- it was some agreement or something here, the competitive rates in Salinas went up." Griffin denied that any particular incident led to the increase, and that it was not linked to the signing of the Sun Harvest agreement.[26/] As is apparent, Griffin neglected to testify with any specificity regarding the direct basis for his wage rates, and failed to state definitively which companies were the subject of wage surveys conducted by the Respondent at that time, although he did testify that he "looked" at union and non-union companies to determine the wages to be paid. Also absent from his testimony was any mention of the date or dates on which the purported "surveys" took place, or the date on which the actual decision to increase wages was made. Since the Respondent carries the burden of proof on this issue (see legal discussion below), one may infer, absent an affirmative establishment by Respondent's witnesses to the contrary, that the decision to increase wages was made after the Union filed its Notice of Intent to Obtain Access.

[26/] Pursuant to Evidence Code §452, I take administrative notice of the fact the Sun Harvest agreement was executed in August 1979, and provided the basis or the Union's so-called "Master" agreement in the lettuce industry.

Yet another increase was granted to workers while organizational activities were in progress. Effective August 29, wages were increased to $.77 per carton for members of crews utilizing the trio system (crews one and two). Respondent sought to justify this increase on the basis that on August 27, Griffin had received a report that crew number two had engaged in a sit-down strike and refused to go to work unless their wages were increased.[27/] At that time, Griffin had been in Colorado. He returned to the state and on August 28 or 29, addressed this crew and, in effect, told them he would accede to their demands.

Interestingly, when Ramirez spoke to crews the week prior to the election (see discussion above), he noted that he could not promise workers anything concerning wage retroactivity due to the imminence of the election. Although Respondent maintained that wages were increased as a result of a sit-down, no direct evidence was presented to demonstrate that workers would refuse to work altogether if the raise was denied. If Respondent was aware of legal complications arising from wage increases during the pendency of a resentation campaign, as Ramirez remarks indicate, the issue remains as to the rationale behind granting an increase to a crew which had in fact returned to work before their alleged demands were met:[28/] Griffin might just as easily have informed the crew, as Ramirez did subsequently, that wages could not be discussed until the representation campaign had terminated.

Contrary to Respondent's assertion, I find that no definitive pattern of wage revisions can be discerned from its company history. Increases were granted more or less at random, at times when Respondent's managers felt compelled to do so by forces in the market place. Raises were not paid at specific times during the year, nor were wage reviews or surveys conducted according to any pre-determined schedule.

The law governing the wage increases promised and/or granted during the pendency of a representation compaign is well settled, both under the NLRA and our own Act. "An employer's granting a wage increase during a union campaign 'raises a strong presumption' of illegality. In the absence of evidence demonstrating the timing of the announcement of changes in benefits was governed by factors other than the pendency of the election, the Board will regard interference with employee freedom of choice as the motivating factor. The burden of establishing a justifiable motive remains with the employer [citations omitted]." Newport

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[27/] Whether or not the sit-down in fact occurred, as well as the purported rationale behind the sit-down, was not established through competent, non-hearsay testimony.

[28/] Griffin spoke to the crew one or two days after the alleged sit-down. No evidence was presented that the sit-down continued up until the time of Griffin's speech.

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Division of Wintex Knitting Mills, Inc., 216 NLRB 1058; see also Zarda Brothers Dairy, Inc., 234 NLRB No. 15 (1978); Honolulu Sporting Goods Co. Ltd., 239 NLRB No. 173 (1979); Litton Dental Products Division, 221 NLRB 700 (1976); Rupp Industries, 217 NLRB 385 (1975); Brock Research, 4 ALRB No. 32 (1978); Coachella Imperial Distributors, 5 ALRB No. 73 (1979). 4

In examining an employer's justification for raising wages during this period, courts and both Boards look to a number of factors to determine its sufficiency. Among these are whether the employer manifested union animus, the timing of the increase, the employer's knowledge of union activity, and the relationship to past practices of the wage increase under scrutiny (Delchamps, Inc. v. NLRB, 588 F2d 476, 100 LRRM 2555 (CA 5, 1979).

Respondent's anti-union attitude was amply demonstrated by Ramirez' speeches to workers (see discussion on that issue). Respondent gained knowledge of organizing activities on August 15, when the Union's access notice was filed, and implimented the increases in question following this date. No pattern of wage revision could be discerned from past practice, Respondent's contentions to the contrary notwithstanding. Also pertinent to this issue is the amount of the wage increase whem compared with increases paid previously. See San Lorenzo Lumber Company, 238 NLRB No. 198 (1978); Cerro CATV Devices, Inc., 237 NLRB No. 179 (1979). Analysis of the increases under consideration reveals that they were greatly disproportionate to those received by employees in the past.

	Date	Rate	%Increase
Trios	5/67	$.50	n/a
	8/76	.525	5.0
	8/76	.535	1.9
	7/77	.5475	1.9
	6/78	.5675	3.6
	10/78	.582	.0
	3/79	.6245	7.7
	8/15/79	.677	.3
	8/27/79	.7715	.0
Quintettes	3/79	.73	n/a
	8/15/79	.85	16.0

In sum, the increases in question were more than double, percentage-wise, than any increase workers had previously received. Even assuming, arguendo, that such large increases were prompted by industry-wide augmentation of lettuce harvest workers' compensation, the timing of such large increases in the face of an organizational campaign renders them highly suspect, particularly in light of the "facile explanations" proffered by the Respondent for the source of such rates (see ALO Nevin's decision in Coachella Imperial Distributors, Inc., supra; Honolulu Sporting Goods Co. Ltd. , supra) . Despite reference to "competitive" rates and the "settlement of ... some agreement," the lack of

specificity regarding these details renders implausible their utilization as a rationale for increasing wages.

Therefore, I find that Respondent has not met its burden of proof in overcoming the presumption of illegality concerning wage increases implimented during the pendency of an organizational campaign, and has engaged in unlawful interference and coercion, in violation of Section 1153 (a) by so doing. See Rich's of Plymouth, Inc., 232 NLRB No. 98 (1977); Brock Research, supra.[29/]

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Mission Packing Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a. Discouraging employee membership in, or activities on behalf of the United Farm Workers of America, AFL-CIO (UFW), or any other labor organization, by discharging or by otherwise discriminating against any employee for participating in protected, concerted activities.

b. Threatening loss of employment during a union organization campaign in the event that employees vote for the union.

c. Trying to influence employee choice in a union election by granting or promising to grant wage increases during a union organizing campaign.

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

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

a. Offer to Antonio Lopez immediate and full reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights or privileges, and make him whole for any losses he has suffered as a result of his being discharged.

b. Preserve or make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel

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[29/] Respondent raised the issue of the laches as an affirmative defense. In brief, this defense is simply not cognizable under our Act. Golden Valley Farming, supra; see also NLRB v. F. H. Rutter Rex Manufacturing Company, 396 US 258 (1969).

records and reports, and other records necessary to determine the back pay due the employee named above.

c. Sign the Notice to Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies of the Notice in each language for the

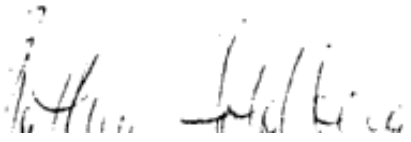
d. Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed by Respondent at any time from and including Spetmeber 7, 1979, until the date of issuance of this Order.

e. Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for 60 days, the times and places 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.

f. Arrange for a Board agent or a representative of Respondent 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 of 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.

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

DATED: February 25, 1981



MATTHEW GOLDBERG" Administrative Law Officer

NOTICE TO EMPLOYEES

After a charge was filed against us by the United Farm Workers Union and after a hearing was held at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

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

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

1. To organize themselves;

2o To form, join, or help unions;

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

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

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

Because this is true, we promise that:

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

WE WILL NOT discharge or otherwise discriminate against any of you because you are members of or support the UFW and/or engage in the protected activities listed above.

WE WILL NOT try to influence your vote in a union election by increasing or promising to increase your wages when there is a union election campaign.

WE WILL NOT threaten you with losing your job if you decide to vote for the union.

The Agricultural Labor Relations Board has found that we discriminately discharged Antonio Lopez because he supported the UFW and engaged in protected activities; therefore, we will offer Antonio Lopez full reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and privileges, and we will pay him for any losses he may have suffered as a result of his being discharged.

DATED: MISSION PACKING COMPANY, INC.

By:_____

Representative Title

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board.

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

DO NOT REMOVE OR MUTILATE