

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD

STEAK-MATE, INC.,	)	Case Nos.	
	)	80-CE-210-SAL	80-CE-309-SAL
Respondent,	)	80-CE-211-SAL	80-CE-312-SAL
	)	80-CE-213-SAL	80-CE-318-SAL
and	)	80-CE-214-SAL	80-CE-319-SAL
	)	80-CE-215-SAL	80-CE-320-SAL
UNITED FARM WORKERS OF	)	80-CE-217-SAL	80-CE-321-SAL
AMERICA, AFL-CIO,	)	80-CE-240-SAL	80-CE-322-SAL
	)	80-CE-242-SAL	80-CE-323-SAL
Charging Party.	)	80-CE-243-SAL	80-CE-324-SAL
	)	80-CE-244-SAL	80-CE-325-SAL
	)	80-CE-247-SAL	80-CE-326-SAL
	)	80-CE-248-SAL	80-CE-327-SAL
	)	80-CE-274-SAL	80-CE-328-SAL
	)	80-CE-275-SAL	80-CE-333-SAL
	)	80-CE-276-SAL	80-CE-335-SAL
	)	80-CE-277-SAL	80-CE-336-SAL
)	80-CE-281-SAL	80-CE-339-SAL
)	80-CE-289-SAL	80-CE-340-SAL
)	80-CE-290-SAL	80-CE-341-SAL
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)	80-CE-295-SAL	81-CE-6-SAL
)	80-CE-296-SAL	81-CE-8-SAL
)	80-CE-297-SAL	81-CE-12-SAL

9 ALRB No. 11

DECISION AND ORDER

On August 17, 1981, Administrative Law Judge (ALJ)^{1/} Joel Gomborg issued his attached Decision in this proceeding. Thereafter, Steak-Mate, Inc. (Respondent) and General Counsel each timely filed exceptions to the ALJ's Decision and an accompanying brief. The United Farm Workers of America, AFL-CIO (UFW or Union), the Charging Party, timely filed a brief in reply to Respondent's

^{1/}At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

exceptions.

Pursuant to the provisions of Labor Code section 1146,^{2/} the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm his rulings, findings and conclusions, as modified herein, and to adopt his recommended remedial Order, with modifications.

Denial of Access to Board Agents

General Counsel excepted to the ALJ's conclusion that Respondent did not violate the Agricultural Labor Relations Act (Act or ALRA) by denying access to Board agents who attempted to enter Respondent's property on September 16, 1980, to advise employees about the filing of an election petition and to distribute information concerning the election. We find merit in these exceptions.

On September 12, 1980, the UFW filed a petition for certification as the exclusive collective bargaining representative of Respondent's agricultural employees. On the morning of September 15, Board agent Luis Viniegra spoke with Judd Brown, Respondent's general manager, stating that he was the agent in charge of investigating the petition for certification, and that he wanted to visit the plant and talk to employees. Brown indicated that he wanted to contact his attorney. Later that morning, a representative of Respondent telephoned Viniegra and advised him

^{2/}All section references herein are to the California Labor Code unless otherwise specified.

that Respondent felt Viniegra did not have the legal authority to take access to Respondent's property. When Viniegra replied that he did have that right, he was told to contact Robert McIver at Respondent's Morgan Hill plant.

Viniegra and Board agent Luis Lopez met with Judd Brown at about 11:00 a.m. on the same day and showed him the election literature they wanted to distribute and read to the employees, including a notice of the filing of the petition, information relating to rights guaranteed to farm workers by the ALRA, and a handbook of employee rights, which includes a general description of the functioning of the Board. When McIver arrived shortly thereafter, the Board agents explained the election process to him and showed him the literature. McIver said he would be glad to post the literature, but would not allow Viniegra to read it to the employees. The Board agents were not allowed to distribute any literature on September 15,^{3/} but they were permitted to address some employees and to distribute literature to employees on September 16 and 17.

Although the ALJ found that Respondent denied access to the Board agents and that Respondent's tone in discussion with Board agents could be characterized as "hostile" or "stonewalling," he concluded that Respondent had the right to deny the Board agents

^{3/}Viniegra testified that Respondent prepared its own written interpretation of the notice of the filing of the petition and posted it on September 15. When Viniegra observed one of the notices posted on a bulletin board, he explained to McIver that it did not include the information the Board agents wished to distribute. Viniegra also said that he did not want Respondent to interpret the Board's notice, but wanted to give the employees the Board's official notices personally.

access in the absence of a regulation authorizing such access. In support of his conclusion, the ALJ cited San Diego Nursery Co. v. Agricultural Labor Relations Bd. (1979) 100 Cal.App.3d 128. In that case, Board agents attempted to enter an employer's property, after the union filed a notice of intent to take access and a notice of intent to organize, but before a petition for certification was filed, in order to advise and educate the employer and its employees as to their rights and obligations under the Act. The court held that an appropriately drafted Board regulation authorizing such prepetition access for a limited purpose would not be prohibited by the Act, or by other state law, but that the Board agents could not take access absent such a duly promulgated rule, and that the employer therefore did not violate the Act by denying the Board agents access.

Contrary to the ALJ, we find that San Diego Nursery is inapposite here, since the Board agents in that case attempted to take access before a petition for certification was filed. In the instant matter, the UFW filed its petition on September 12, 1980, and the Board agents thereafter attempted to take access on September 15, to announce the filing of the petition. The Board agents sought to take access pursuant to section 20350(c) of the Board's regulations, which provides that:

All parties shall be required, upon request by the regional director or his or her agent, to cooperate fully in the dissemination to potential voters of official Board notices of the filing of a petition and official Board notices of direction of an election and any other notices which, in the discretion of the regional director or his or her agent, are required to fully apprise potential voters of the time and location of an election.

In order to ensure a fair election in which employees can express a free and uncoerced choice, it is imperative that the employer as well as any labor organization(s) involved cooperate fully with the Board agents in the dissemination of Board notices concerning the election. The Board's desire to encourage such cooperation led to the promulgation of section 20350(c) of the regulations, cited above.

We find that the attempts of Board agents Viniegra and Lopez to take access to Respondent's property on September 15, to read and distribute the notice of the filing of a petition, were proper and authorized by section 20350(c) of the regulations.

The ALRA was enacted in 1975. Farm workers, who were excluded from coverage under the National Labor Relations Act, have had limited experience with the collective bargaining process and the rights guaranteed by the Act. Therefore, in order to conduct an election in which a maximum number of employees may participate, the Board must ensure that workers are notified when an election petition has been filed. So important do we consider this responsibility that we find it appropriate for Board agents to undertake such notification themselves, rather than relying solely on the parties to do so. Proper notification may necessarily call for entry by Board agents onto the employer's property, and our regulation section 20350(c) implicitly contemplates providing access to Board agents as an essential form of cooperation. We conclude that Respondent's denial of such access to Board agents in this matter tended to interfere with the employees' right to receive information concerning the filing of an election petition

and their right to vote for or against a union in a Board-conducted election, and therefore constituted a violation of section 1153(a) of the Act.^{4/}

The Increase in Warnings and Suspensions

We affirm the ALJ's finding that General Counsel failed to prove that, after the election, Respondent increased the number of suspensions and warnings issued to employees because their boxes of mushrooms did not weigh enough. The ALJ found that three employees were suspended for low weights from the time Respondent installed scales, in the early months of 1980, until June 20, 1980, and that there were no further suspensions for low weights until September 30, shortly after the election. The ALJ also found that four employees received suspensions after the election. In her exceptions to the ALJ's findings, counsel for the General Counsel argued that there were six suspensions after the election, a 100 percent increase over the number of suspensions issued before the election. General Counsel's exhibit 26 shows that, from January 1, 1980, through September 19, 1980 (the day of the election), there were six warnings for low weights and three suspensions. From September 20, 1980, to the end of February 1981, there were eleven warnings and six suspensions. However, of the six suspensions,

^{4/}We reject Respondent's argument that it was required only to post and/or distribute the notice to its employees. We have elsewhere noted that because a high percentage of agricultural workers cannot read, the distribution or posting of notices, without an oral reading thereof followed by a question-and-answer period, makes it difficult to communicate adequately with agricultural employees. (See M. Caratan, Inc. (1980) 6 ALRB No. 14; Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal.3d 392.)

two employees each received two of the suspensions, and the ALJ therefore correctly stated that four employees received suspensions. We agree with the ALJ that the increase in warnings and suspensions for low weights after the election was insufficient to warrant an inference that Respondent increased the number of warnings and suspensions in retaliation for the Union's victory in the election.

We also affirm the ALJ's conclusion that Respondent violated section 1153(c) and (a) by disciplining its employees for mixing mushrooms and leaving long stems on the mushrooms, in retaliation for the workers' support for the Union in the election.^{5/} We do not, however, believe that it was necessary for the ALJ to discuss each individual warning or suspension to determine whether the recipient employee had engaged in union activities, whether Respondent knew of the activities, and whether there was a causal connection between the union activities and the subsequent warning or suspension. Based on the evidence in the record and on The Larimer Press (1976) 222 NLRB 220 [91 LRRM 1379], enforced sub nom. M.S.P. Industries, Inc. v. NLRB (10th Cir. 1977) 568 F.2d 166 [97 LRRM 2403], the ALJ found that Respondent changed its standards for imposing suspensions and issuing warnings for mixing

^{5/} Respondent argued in its exceptions brief that it was never put on notice that it would have to justify any statistical disparity between warnings and suspensions issued prior to and subsequent to the election. We disagree. In its first amended consolidated complaint issued February 17, 1981, General Counsel alleged that since the September 19, 1980 election, Respondent had "instituted changes in work requirements and conditions, and embarked on a discriminatory course of conduct directed against UFW supporters and activists." We find that that allegation was sufficient to put Respondent on notice that the increase in suspensions after the election would be litigated at the hearing.

mushrooms and leaving long stems in retaliation for the employees' support for the Union. By that conduct, he concluded, Respondent violated section 1153(c) and (a) of the Act, since it tended to discourage employees from supporting the UFW, and to interfere with and restrain employees in the exercise of their section 1152 rights:

... Respondent was not so much concerned with the individual activities of the employees involved as with the fact that a majority of the employees had voted in favor of the Union, and that it was determined to punish the employees for exercising their right of self-determination. Its change of policy, therefore, affected both pronounion employees and those whose union sympathies were unknown, and thus discouraged union activities of all employees, union or non-union. The Larimer Press, supra, 222 NLRB at p. 240.

In order to find a violation of section 1153(c) and (a) for specific warnings and suspensions, it was not necessary that the ALJ find that each employee involved had engaged in union activity or other protected concerted activity, but only that the warnings or suspensions would not have been issued absent Respondent's change in its warning and suspension policy because of the Union victory in the election.

The ALJ did, however, discuss each employee individually, and concluded that the warnings and suspensions issued to Basilio Banuelos, Alfredo Bustos, Juventina Chambers, Juana Duran, Amalio Garcia, Salvador Garcia, Alfredo Hernandez, Luis Mejia, Miguel Rivera, and Antonio Tovar violated section 1153(c) and (a) of the Act, based on his finding that Respondent would not have issued the warnings and suspensions absent the employees' union activities. We affirm the ALJ's conclusions, as they are fully supported by the

record.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Steak-Mate, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, suspending, issuing warning notices to, or otherwise discriminating against any agricultural employee because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Interfering with, restraining, or coercing agricultural employees in the exercise of their right to communicate with union agents by denying agents access to its property in accordance with Board regulations.

(c) Interfering with its employees' right to receive information concerning the filing of a petition for certification and their right to vote for or against a union in a Board-conducted election.

(d) Changing its mushroom picking practices or any other term or condition of employment without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with respect to such changes.

(e) Threatening its agricultural employees with reprisals for supporting the UFW.

(f) In any like or related manner interfering with,

restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Offer to Refugio Franco and Jose Mendoza immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Reimburse the following-named employees for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55:

Basilio Banuelos
Juventina Chambers
Juana Duran
Refugio Franco
Salvador Garcia
Alfredo Hernandez

Jose Mendoza
Inocencio Nunez
Rogelio Parada
Miguel Rivera
Antonio Tovar

(c) Expunge from its personnel records all notations concerning the disciplinary actions taken against the above-named employees and employees Alfredo Bustos, Amalio Garcia, and Luis Mejia, which we have found to be discriminatory in our Decision in this matter.

(d) If the UFW requests, rescind the changes Respondent instituted on November 23, 1980, in its mushroom picking practices, and, upon request, meet and bargain with the UFW concerning those changes and any other changes in its employees' terms and

conditions of employment.

(e) 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 backpay period and the amounts of backpay and interest due under the terms of this Order.

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from July 1, 1980, until the date on which the said Notice is mailed.

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

(i) 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 their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

Dated: March 17, 1983

ALFRED H. SONG, Chairman

JOHN P. MCCARTHY, 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 (Board) issued a complaint which alleged that we, Steak-Mate, Inc., 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 warning and suspending employees because of their support for and activities on behalf of the United Farm Workers of America, AFL-CIO (UFW), by warning and suspending employees because they engaged in a work stoppage to protest a change in their working conditions, by issuing warnings and suspensions for long stems and mixed weights because of our employees' support for the UFW in the election, by not allowing representatives of the UFW to enter our property to speak to our employees about the election, by not allowing Board agents to read and distribute a notice of the filing of an election petition, by threatening employees, by discharging Refugio Franco and Jose Mendoza because of their union activities, and by changing our mushroom picking practices without giving the UFW notice and an opportunity to bargain over the change. 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 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 it is true that you have these rights, 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, suspend, issue warning notices to, or otherwise discriminate against any agricultural employee because he or she has engaged in union activity or any other protected concerted activity.

WE WILL offer to rehire Refugio Franco and Jose Mendoza to their former jobs and will reimburse them for all losses of pay and other economic losses they have suffered as a result of our discrimination against them, plus interest.

WE WILL reimburse Basilio Banuelos, Juventina Chambers, Juana Duran, Salvador Garcia, Alfredo Hernandez, Inocencio Nunez, Rogelio Parada, Miguel Rivera and Antonio Tovar for all losses of pay and other economic losses they have suffered because we discriminatorily suspended them, plus interest.

WE WILL remove from the personnel records of the above-named employee, and employees Alfredo Bustos, Amalio Garcia, and Luis Mejia, all notations concerning the disciplinary actions taken against them.

WE WILL NOT threaten any agricultural employee with reprisals for supporting the UFW.

WE WILL NOT interfere with, restrain, or coerce agricultural employees in their right to communicate with union agents by denying such agents lawful access to our property.

WE WILL NOT interfere with the attempt of any Board agent to take access to our property in order to inform our employees about the filing of an election petition and their right to vote in a Board-conducted election.

WE WILL, if the UFW requests, rescind the changes we made in our mushroom picking practices, and we will, upon request, bargain with the UFW over those changes and any other changes in our employees' terms and conditions of employment.

Dated:

STEAK-MATE, INC.

By:

Representative

Title

If you have a question 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. The telephone number is (408) 443-3161.

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

Steak-Mate, Inc.
(UFW)

9 ALRB No. 11
Case Nos. 80-CE-210-SAL,
et al.

The ALJ concluded that Respondent violated section 1153(c) and (a) when, after the Union won an election, it changed its standards for issuing warnings and imposing suspensions for mixed mushroom boxes and long stems. However, the ALJ recommended dismissal of the allegation that Respondent also violated the Act when, after the election, it issued more warnings and suspensions for mushroom boxes with low weights, and the allegation that the changes in warnings and suspensions affected union supporters more than other employees. The ALJ also concluded that Respondent violated section 1153(c) and (a) by issuing warnings or suspensions to, or discharging, certain employees because of their protected concerted activity, but that Respondent warned, suspended, or discharged other employees for legitimate business reasons.

The ALJ concluded that Respondent violated section 1153(a) of the Act by sending its employees a newspaper article which suggested that Respondent would close its mushroom operation if the Union won an election, by telling employees that a strike was inevitable if the Union won and that it would not agree to a contract but would replace strikers, and by telling employees they needed an excuse signed by an administrative law judge in order to be absent from work. However, the ALJ concluded that a foreman's instruction to employees not to speak about politics, religion, or sports during working hours did not violate the Act, and also recommended dismissal of allegations involving other alleged threats, changes in work rules, and the construction of a fence around Respondent's parking lot,

The ALJ concluded that Respondent violated section 1153(a) by interfering with a union representative's attempts to take access to Respondent's property, but dismissed charges alleging that Respondent interfered with union access on another occasion and unlawfully denied Board agents access to its premises.

The ALJ also concluded that Respondent violated section 1153(e) by unilaterally changing the duties of the mushroom pickers after the election, but found that no change was made in the punchers' duties. The ALJ found that the punchers were supervisors and recommended dismissal of all allegations pertaining to them.

BOARD DECISION

The Board affirmed the ALJ's conclusions, except his conclusion that Respondent did not violate the Act by denying the Board agents access to its property to advise employees about the filing of the election petition. The Board found that the Board agents' attempt to take access was proper and authorized by section 20350(c) of the

Board's regulations, which requires the parties to cooperate with the Board in disseminating to potential voters notice of the filing of an election petition. The Board held that the regulation implicitly requires employers to permit Board agent access as an essential form of cooperation, and concluded that Respondent's denial of Board agent access violated section 1153(a) of the Act because it tended to interfere with the employees' right to receive information concerning the filing of a petition and their right to vote for or against a union in a Board-conducted election.

* * *

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



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APPEARANCES:

Arocoles Aguilar and
Maria Elva Maldonado
of Salinas
For the General Counsel

Michael Alden and
Robert Maxwell
of St. Louis
For the Respondent

DECISION

1
2 Joel Gomberg, Administrative Law Officer. These cases
3 were heard by me on 14 hearing days from February 23 through
4 March 26, 1981, in San Jose, California. A pre-hearing confer-
5 ence was held on February 3, 1981. The first complaint in this
6 matter was issued on November 26, 1980. Complaints alleging
7 additional violations of the Agricultural Labor Relations Act
8 (hereafter the "Act") were issued on December 16, 1980, and
9 January 24, 1981. Finally, a number of additional cases were con-
10 solidated with those already the subject of the earlier com-
11 plaints in a First Amended Consolidated Complaint,^{1/} dated
12 February 17, 1981. The Complaint is based upon charges filed by
13 the United Farm Workers of America, AFL-CIO (hereafter "Union" or
14 "UFW") between September 8, 1980, and February 2, 1981. Each of
15 the charges was duly served on the Respondent, which filed a
16 timely answer to the Complaint and each of its predecessors.

17 During the course of the hearing, I granted General
18 Counsel's motion to dismiss Cases 80-CE-210-SAL and 80-CE-276-SAL
19 on the grounds of insufficient evidence. The allegations in the
20 Complaint pertaining to these cases, Paragraphs 7(a) and (e), res-
21 pectively, were also dismissed. The General Counsel also moved
22 that Case 80-CE-297-SAL be severed as a result of the unavailabi-
23 lity of the alleged discriminatee. I granted this motion. Para-
24 graphs 7(y) and (bb) of the Complaint, which relate to this
25 severed case, were dismissed without prejudice. Paragraph 7(r) of
26 the Complaint was dismissed for lack of specificity. I denied the

27 _____
28 ^{1/}For simplicity, I will refer to this document as "the
Complaint."

1 General Counsel's request, made after the conclusion of its case-
2 in-chief, to consolidate several other cases. I permitted the
3 General Counsel to make a number of corrections and several
4 amendments to the Complaint. These were reduced to writing and
5 admitted into evidence during the hearing.

6 All parties were given a full opportunity to partici-
7 pate in the hearing. The UFW appeared informally at the pre-
8 hearing conference, but chose not to intervene in the proceeding.
9 The General Counsel and Respondent filed post-hearing briefs pur-
10 suant to Section 20278 of the Board's Regulations.

11 Upon the entire record, including my observation of the
12 demeanor of the witnesses, and after consideration of the briefs
13 filed by the parties, I make the following:

14 FINDINGS OF FACT

15 I. Jurisdiction.

16 The essential jurisdictional facts are undisputed. Res-
17 pondent has admitted that it is an agricultural employer within
18 the meaning of Section 1140.4(c) of the Act, and that the UFW is
19 a labor organization within the meaning of Section 1140.4(f) of
20 the Act.

21 II. The Alleged Unfair Labor Practices.

22 As the 45 remaining charges indicate, the Complaint
23 alleges that Respondent has committed numerous unfair labor prac-
24 tices, involving violations of Sections 1153(a), (c), (d), and
25 (e). Most of the allegations relating to independent violations
26 of §1153(a) involve events prior to the representation election
27 of September 19, 1980,^{2/} while most of the remaining alleged

28 ^{2/}All dates refer to 1980, unless another year is speci-
fied.

1 violations took place after the election. Respondent denies that
2 it has violated the Act in any manner. With respect to the alle-
3 gation that it discriminatorily discharged, suspended, demoted,
4 or warned 23 employees, because of their participation in Union
5 or other protected concerted activities, in violation of
6 §§1153(a) and (c), Respondent contends that each employee would
7 have received the same discipline whether or not he or she had
8 engaged in such activities.

9 A. The Company's Operations

10 Steak Mate, a subsidiary of Ralston Purina Company,
11 grows, packs and ships mushrooms at its plant in Morgan Hill. Of
12 its approximately 300 employees, 120 are mushroom pickers,
13 divided into 12 10-person crews. Another 50 to 60 employees work
14 in the packing operation. The remainder of the employees are in-
15 volved in the cultivation of the mushrooms, transporting materials
16 from one part of the plant to another, maintenance, security, and
17 supervision. The plant is run by a general manager, Jud Brown,
18 who reports to Ralston Purina headquarters in St. Louis. He is
19 assisted by a number of department heads, including the personnel
20 director, Edward Perez; the production manager, John Stout; and
21 the chief picking supervisor, Robert Lopez.

22 Lopez oversees the picking operation with the
23 assistance of three plant supervisors, Frank Morado, Ramon Sosa,
24 and Eddie Pena. Sosa became a plant supervisor on September 5,
25 while Pena assumed that position on December 1. In addition to
26 the 10 pickers, each of the 12 picking crews has an employee re-
27 ferred to as a "crew supervisor" by the Company and as a

28 //

1 "puncher" by the mushroom pickers.^{3/}

2 The term "puncher" is derived from one of his prin-
3 cipal duties: punching a picker's time card to indicate the quan-
4 tity of mushrooms picked. The card is used to determine both the
5 picker's compensation under the piece rate system and to keep
6 track of production. The punchers also assign the pickers to par-
7 ticular mushroom beds, direct those who finish their beds early to
8 help slower employees, tell employees when they may move from one
9 growing room (mushroom house) to another, and monitor the quality
10 of the work being performed. They may order an employee to re-
11 pick a bed and at times report bad work to their superiors.
12 Punchers are also required to report the names of absent or tardy
13 employees to the picking office. Although they have no authority
14 to discipline employees, their recommendations are considered by
15 Lopez, Perez, and the plant supervisors in making disciplinary
16 determinations.

17 B. The Pre-Election Period

18 1. Early Talk About The Union:

19 Although Respondent's employees did not make con-
20 tact with the Union until August 3, there was some discussion of
21 unionization at the plant as early as June. Refugio Franco, a
22 picker, spoke to his co-workers, including Rogelio Parada and
23 Jose Mendoza, about the desirability of organizing on several
24 occasions. Franco also solicited the support of his puncher,
25 Jose Lozano. Lozano testified that Franco asked him if he would
26 like to sign an authorization card. He refused, but he did sign
27 one in September when Ramon Contreras offered him one. He did

28

^{3/}I will use the term "puncher" for the sake of brevity.

1 not tell any of his superiors about this conversation until the
2 day of his testimony. Franco never mentioned in his testimony
3 that he solicited the signing of authorization cards. Lozano
4 remembered this conversation as having occurred early in July.

5 In mid-June, Perez had Morado summon Parada to his
6 office to discuss Steak Mate's wage scale in relation to that of
7 Monterey Mushroom, a company which had a collective bargaining
8 agreement with the Union. According to Parada, Perez wanted to
9 discuss some statements Mendoza had been making that morning.
10 Perez told him that it "was not a convenient thing for me to be
11 talking about the union . . . during working hours." Perez's
12 version of the conversation is somewhat different. He acknow-
13 ledged that he called Parada to his office because he had heard
14 that Parada had been saying that irrigators were better compen-
15 sated under the Monterey Mushroom contract than were the Company's
16 workers. Perez denied that Mendoza's name had been mentioned and
17 claimed that the word "union" came up only with reference to the
18 Monterey Mushroom contract.

19 I credit Parada's testimony on this issue. Whether
20 Mendoza's name was mentioned or not, it seems unlikely that Perez
21 would have been informed of the name of only one of the persons
22 involved in the discussion of wage rates. Moreover, it appears
23 that the discussion must have involved more than the pay scale
24 for irrigators, since neither Mendoza nor Parada was an irrigator
25 and no other testimony concerning irrigators was taken in the
26 course of a rather lengthy hearing. Further, Perez's warning not
27 to talk about union matters during working hours is consistent
28 both with the Company's no-solicitation rules and a number of

1 other similar statements admittedly made by Perez.

2 Alex Cortez, who has been employed by Respondent
3 since 1977, testified that he had a conversation with Perez,
4 around June, 1980, in which Perez questioned him about the Union
5 and made a number of anti-Union statements. Perez stated that he
6 had talked to Cortez many times, but never about the Union.

7 Cortez was a rather combative witness and had more than the usual
8 difficulty with remembering names and dates. The reference to
9 June, 1980, was supplied by the attorney for the General Counsel
10 conducting the direct examination. Cortez simply agreed that it
11 was more or less around June. It seems highly unlikely that
12 Perez would have developed an anti-Union argument which sounded
13 like an election statement, in June, when there was no organized
14 union activity in the plant. Perez rarely made a flat denial
15 that a conversation involving him took place. Cortez's credibi-
16 lity is further undermined by his testimony that not a single
17 puncher attended the Union organizing meetings in August, when
18 there was much credible testimony from a number of employee wit-
19 nesses that as many as half the punchers attended. I find that
20 Perez did not speak to Cortez about the Union around June, 1980.

21 Luis Mejia, an employee of the Company for about
22 eight years, testified that he was called to Perez's office
23 where Perez questioned him about statements he had been making
24 about unionization, compared the Company's benefits with those
25 the Union had to offer, and cautioned him that it was not con-
26 venient to talk about these matters at work. Mejia was vague
27 about the date of this conversation, but indicated that it took
28 place more than a year before the hearing, which was held in

1 March, 1981. Perez testified that he had talked to Mejia many
2 times over the years and had probably discussed the Union with
3 him, although he could not recall any particular conversation.
4 The pattern of this episode is strikingly similar to the one tes-
5 tified to by Parada.

6 2. The Discharge Of Refugio Franco:

7 Franco began working for the Company in 1977. At
8 the time of his discharge, he was a picker, but he had previously
9 been employed as a puncher and as a forklift driver.

10 As I have already noted, Franco discussed unioniza-
11 tion with some of his co-workers and offered an authorization
12 card to his puncher.

13 Prior to March 31, when he was issued a written
14 warning for being absent and not calling in, Franco had not re-
15 ceived any discipline from the Company. Although Franco was
16 asked a number of questions about tardiness on cross-examination,
17 Respondent introduced no evidence that Franco had a problem
18 getting to work on time, with the exception of some vague refer-
19 ences by Perez. On April 21, Franco was suspended for three days
20 for unexcused absence and leaving the job without permission.

21 On June 28, following the Company's call-in proce-
22 dure, Franco telephoned Lopez and sought permission to miss work
23 because his pregnant wife was sick and might have to go to the
24 hospital. Lopez gave his permission, but told Franco to bring a
25 note from the doctor. Lopez's memory of this conversation was
26 vague. He could not be sure whether Franco phoned or spoke to
27 him in his office. Lopez remembered Franco saying that his wife
28 had an appointment with the doctor. According to Franco, he

1 telephoned the doctor's office about 9:00. It was only then that
2 he realized that the office was not open on Saturday. His wife
3 soon felt better, so no further medical attention was sought.
4 Franco returned to work the next day. He did not bring a note
5 from the doctor, but no supervisor mentioned the incident to him.
6 Meanwhile, the matter was brought to the attention of Perez, who
7 telephoned the doctor's office and spoke to a nurse who told him
8 that the office had been closed on Saturday and that Mrs. Franco
9 had not been seen by the doctor. Perez then issued Franco a five-
10 day suspension. The notice is dated July 1. Franco testified
11 that he received the suspension notice on July 5, while Perez
12 stated that he believed that Franco must have gotten it on July 1,
13 2, or 3.

14 On July 4, Franco was late to work. He telephoned
15 Morado at about 6:20 and asked whether he would be allowed to come
16 to work. Morado told him that it would not look good for him to
17 be permitted to come to work late on a holiday. Respondent's
18 practice with respect to permitting tardy employees to work has
19 varied over time. According to Perez, until very early July, em-
20 ployees were sent home if they arrived late on a good picking day,
21 but required to work if they were tardy on a slow day, in order
22 to ensure that employees were not manipulating the piece rate
23 system to their own advantage. However, because the system
24 caused bad feelings among the employees, it was decided that all
25 tardy workers would be permitted to work, with disciplinary deci-
26 sions coming later. At least one employee, Jose Mendoza, was sent
27 home when he arrived late in August.

28 Franco's five-day suspension was scheduled to run

1 from Monday, July 7, through Friday, July 11. Tuesday, July 8,
2 was his crew's day off. Franco testified that he called Morado
3 on Sunday, July 6, to clarify his suspension. He wanted to know
4 if the day off was included in the five days. Morado replied
5 that it did not count as a day of suspension and that he would
6 have to take an extra day off. Franco elected to take July 6
7 off. Morado denied that this conversation took place and Franco
8 was charged with another unexcused absence. It is clear that it
9 is Respondent's policy not to count non-working days in calculat-
10 ing the length of a suspension. Therefore, Franco's suspension,
11 as noted on the suspension form, only included four days. Perez
12 testified that the suspension was scheduled to begin July 7 be-
13 cause it was convenient to have suspensions begin on a Sunday and
14 run through the week. In fact, July 7 was a Monday, which lends
15 some support to Franco's testimony that the situation required
16 clarification. On the basis of these considerations, I find that
17 Franco did speak to Morado on July 6 and that Morado told him to
18 include that day in his suspension.

19 Perez testified that he decided to fire Franco on
20 July 4 or 7. He determined that Franco was incorrigible and that
21 a five or 10-day suspension would not improve his behavior. Res-
22 pondent's clearly articulated policy in cases of absence or tardi-
23 ness calls for a progression in discipline beginning with a warn-
24 ing, followed by suspensions of three, five and 10 days, and cul-
25 minating in a discharge, provided that all the offenses occur in
26 a six-month period. In his testimony, Perez seemed to place re-
27 liance on two other factors to support the departure from the
28 Company's fixed policy. First, Mrs. Franco had twice sought Perez

1 out to ask for his assistance in finding her husband. One of
2 these occasions was in late June, but there is no indication that
3 Franco missed work in June, except on the 28th. Mrs. Franco, who
4 was also employed by Respondent at the time, did not testify to
5 rebut Perez's statements. While this evidence may support a con-
6 tention that Franco was having marital problems, it does not re-
7 flect on his work performance. There was no testimony from any
8 Company witness to dispute that Mrs. Franco was pregnant in June
9 or to establish that she worked on the 28th. Perez, who testi-
10 fied that he generally investigated before issuing suspensions,
11 did not speak to Franco concerning his absence from work on
12 June 28. On the other hand, there is no evidence that Franco
13 protested the suspension.

14 Perez also appeared to rely on problems that Franco
15 was having getting to work on time. He testified that Franco had
16 probably asked to switch from driving a forklift to being a
17 picker because of this problem. Again, the record shows no dis-
18 cipline to Franco except for the two unexcused absences in March
19 and April. According to Perez, he asked Priciliano Garcia, a
20 puncher who was Franco's godfather, to warn Franco that his
21 attendance problems were jeopardizing his job. Garcia testified
22 that he did warn Franco that he was in trouble "because he missed
23 an awful lot." A few days later he found out that Franco had
24 been terminated. Perez testified that he spoke to Garcia about
25 Franco in early or mid-June and explained that Mrs. Franco had
26 complained that he was not at home and that Franco had been re-
27 ported drunk in a car.

28 Franco was not informed that he had been fired until

1 he returned to the plant on July 11 to pick up his paycheck. He
2 spoke to Perez, Morado, and Lopez in an effort to get his job
3 back, but his efforts were unsuccessful. Franco said that Perez
4 had agreed to rehire him if Morado concurred. Franco got Morado's
5 permission but was not rehired. Perez and Morado denied that any
6 such promises were made.

7 Franco testified that after he was fired he was
8 told by Garcia that Perez had said that he had been fired because
9 of his Union activities. Garcia testified that he had asked
10 Perez why Franco had been fired and that Perez had said that with
11 a record like his, Franco would have been fired with or without
12 the Union. Perez testified that he was unaware of Franco's Union
13 activities at the time of the discharge, but that after the elec-
14 tion people began to say that Franco had been fired because of
15 the Union. A few days after the election Perez told Garcia that
16 these rumors were unfounded and that Franco would have been fired
17 because of his bad record, regardless of his Union activities.
18 On rebuttal, Franco testified that he spoke to Garcia about two
19 weeks after he had been fired. In resolving the conflict in the
20 testimony on this point, the Respondent urges me to bear in mind
21 that at the time Perez spoke to Garcia in September, charges had
22 already been filed alleging that Franco's discharge was discrimi-
23 natory. In fact, the charge on this issue was not filed until
24 October 2. I find that Garcia asked Perez about Franco's dis-
25 charge shortly after it occurred. It simply makes no sense for
26 Garcia to have brought up the matter more than two months later.
27 Further, there is a conflict between Garcia and Perez about who
28 initiated the conversation. It is far more likely that Garcia

1 would have been making inquiries on behalf of his godson imme-
2 diately after he was fired than that Perez would bring up the
3 subject after the election but before any charges had been filed.
4 I do not credit Franco's testimony that Garcia reported that
5 Franco had said that he had been fired because of his Union acti-
6 vity. Perez testified for about a day. I had ample opportunity
7 to observe the caution with which he speaks and I find it incre-
8 dible that he would have made such a damaging admission, either
9 before or after the election.

10 3. Respondent's Prohibition Of Talk About Politics,
11 Religion, And Sports:

12 Sometime in July, Perez went from crew to crew to
13 tell the employees that they were to save discussions of poli-
14 tics, religion, and sports for non-work time, such as breaks and
15 lunch. He cited the presidential campaign, boxing matches, and
16 the offering of meat to Hindu employees, as examples of subjects
17 that could lead to disputes and injuries on the job. Unioniza-
18 tion was not mentioned.

19 Perez's testimony concerning the genesis of his
20 visit to the crews is hard to follow. Apparently, there had been
21 solicitation by Avon salespeople as well as jewelry sales-
22 people among the Company's office employees, in violation of the
23 Company's no-solicitation rule (an exception is made for the
24 United Way). The resulting interference with work upset Jud
25 Brown, who asked Perez to deal with the situation. This, accord-
26 ing to Perez, was the impetus for reminding the pickers of the no-
27 solicitation rule. The connection between the two events eludes
28 me.

1 The Company has a separate no-solicitation rule by
2 employees, as opposed to outside organizations, which prohibits
3 solicitation for any cause during working hours. Again, the
4 connection between no-solicitation rules and Perez's talk to the
5 employees is hard to fathom. While Perez did not mention the
6 Union, he did stress that working time was meant for work and not
7 talk about other subjects. At that time, a garlic strike in the
8 Gilroy-Hollister area was a topic of discussion among the em-
9 ployees. When Morado was asked about Company rules pertaining to
10 what workers should not talk about, he replied: "no union acti-
11 vities, or politics, or things like that."

12 4. The Union Organizing Effort:

13 The garlic strike was big news in the Morgan Hill
14 area. It involved several thousand employees and was in the head-
15 lines every day. Twenty-two representation elections were held
16 and the organizing campaign spread from garlic to mushrooms.
17 Although Perez denied it, I find that he questioned Parada about
18 the cause of the strike.

19 In August, after Franco contacted John Brown, a UFW
20 organizer, four or five organizational meetings were held among
21 Respondent's employees. On September 4, the employees decided to
22 sign authorization cards in the plant the next day, even if the
23 Company found out. It is clear that the employees had not made
24 their campaign open at the plant until this time, although Perez
25 and Morado testified that they were aware of it by mid-August.
26 Captains were named for each crew and job classification in the
27 plant. Their duties included distributing authorization cards
28 and literature, as well as speaking about the Union to fellow

1 employees and informing them about the time and place of meetings.

2 5. The Suspensions And Discharge Of Jose Mendoza:

3 Mendoza began working for Respondent in 1977. Prior
4 to September, 1980, he had received several warnings for unex-
5 cused absences or being late to work, but he had never received
6 a suspension. Mendoza was one of the employees with whom Franco
7 spoke about the Union before his discharge.

8 On August 31, Mendoza arrived at work about 10
9 minutes late. He asked his puncher, Ramon Sosa, if he should
10 punch in. Sosa told him to punch his card and then reported
11 Mendoza's late arrival to Lopez. Mendoza testified that he asked
12 Sosa whether he should punch in because, in the past when he had
13 arrived late, he had been sent home. A warning notice issued to
14 Mendoza on August 4 supports this testimony, despite Perez's
15 assertion that workers who arrived late were never sent home
16 after early July. When he was allowed to work, Mendoza assumed
17 that his excuse (car trouble) had been accepted, but on
18 September 2 he received a three-day suspension.

19 On Friday, September 5, the last day of his suspen-
20 sion, Mendoza came to the plant to get his paycheck and distri-
21 bute authorization cards to crew captains. Without getting into
22 unnecessary detail concerning his movements within the plant, it
23 is clear that Mendoza was on both sides of the plant, including
24 the wharf area, where straw from racetracks is delivered to the
25 plant for eventual use as a growing medium. The wharf is off-
26 limits to most employees because of the risk of the unsterile
27 straw contaminating mushrooms in the growing rooms. The primary
28 danger is that nematodes would be carried by foot to production

1 areas of the plant.

2 According to Mendoza, he requested and received
3 permission from Lopez to visit a friend in the plant. Lopez de-
4 nied that Mendoza asked for permission. I doubt that Mendoza
5 asked Lopez for permission because he testified that he was un-
6 aware of any rule prohibiting his entry into the plant. Yet,
7 Mendoza testified that he waited in the parking lot for the pack-
8 ing workers to take their break because he did not want to cause
9 any trouble with the supervisors.

10 The Company's Employee Relations Manual contains a
11 rule prohibiting employees from being present on Company property
12 without express permission "except during working hours and rea-
13 sonable periods before and after." That this rule was not always
14 obeyed or enforced is evidenced by a memorandum from Perez to all
15 the supervisors on August 11, exhorting them to: "remind our em-
16 ployees that they are not allowed on company property after work
17 or on their day off (see Employee Relation [sic] Manual)."

18 Whether Mendoza asked for Lopez's permission to
19 enter the property or not, it is clear that he did not ask to be
20 permitted to distribute Union authorization cards. Mendoza no
21 doubt understood that such a request would have been denied.
22 Lopez testified that he asked Mendoza to leave on two separate
23 occasions. First, Lopez stated that he found Mendoza crawling
24 under a door in the case preparation area, where the growing con-
25 ditions require strict sanitation procedures, including the fil-
26 tering of the air. According to Lopez, he simply told Mendoza
27 that: "I thought I told you to leave," without asking Mendoza
28 what he had been doing. About an hour later Lopez encountered

1 Mendoza near the wharf and made an identical statement to him,
2 again without inquiring of Mendoza why he was still in the plant
3 or what he was doing there. In light of Lopez's insistence on
4 the paramount importance of sanitation procedures, I do not cre-
5 dit his testimony that he found Mendoza leaving the case prepara-
6 tion area. If he had, he certainly would not have permitted
7 Mendoza to continue walking about the plant for another hour.
8 Mendoza's suspension form mentions neither the wharf nor the case
9 preparation area.

10 The next morning Lopez handed Mendoza a 10-day sus-
11 pension. The suspension form indicates that the "employee was
12 told by his supervisor at about 9:00 A.M. that he was not allow
13 [sic] in the plant while he was on suspension. The employee was
14 seen again back in the Company area at 10:00 A.M. (rule #10 of
15 the handbook)." An argument ensued between the two men in the
16 presence of Eddie Pena and several other employees. Mendoza
17 wanted his suspension reduced to five days. He wanted to know
18 when the rule had gone into effect. According to Mendoza, Lopez
19 replied that it was a new rule, which had just been decided upon
20 the day before. At some point, Mendoza said "you're a bunch of
21 liars." Finally, Mendoza either asked if he was going to be fired
22 or asked to be fired. Lopez, who said that Mendoza was "almost
23 yelling" and that he did not have to take it, fired Mendoza for
24 insubordination.

25 Lopez said that he did not know what Mendoza was
26 doing at the plant on September 5. He testified variously that
27 he first learned authorization cards were being signed the follow-
28 ing week and later that he knew they were being signed on

1 September 5. He admitted that he testified at Jose Mendoza's un-
2 employment insurance hearing that he was unaware of union acti-
3 vity at the plant until September 12. On this and other matters,
4 Lopez was not a credible witness.

5 Despite the existence of the rule in the employee
6 manual, there is no record that Respondent has ever before disci-
7 plined an employee for being on Company property outside of work-
8 ing hours, either while on suspension or on his day off. On
9 Monday, September 8, Perez reviewed and confirmed Lopez's deci-
10 sion to fire Mendoza. Perez had previously warned Mendoza not to
11 argue with Lopez after Mendoza had complained about an earlier
12 warning for being two minutes late to work.

13 6. The Suspension Of Mario Rodriguez And Warning
14 To Alfredo Bustos:

15 On September 5, authorization cards were signed all
16 over the plant. Bustos, who also worked under the name of
17 Francisco Navarro, was the organizing captain of the crew in
18 which Rodriguez was the puncher. The crew members gathered to
19 sign the cards in a mushroom house, apparently soon after taking
20 their morning break. Rodriguez returned from the cafeteria as
21 the signing was taking place and also signed a card. At this
22 moment, Perez, who testified that he was taking a walk, entered
23 the room, approached Bustos and asked him if he was signing a
24 Union card. Perez told him there was nothing wrong with signing
25 a card, except that it should not be done during working hours.
26 He then ordered Bustos to accompany him to his office. When he
27 arrived at the office, Lopez cited two Company rules to him, and
28 told him that he was violating the rule prohibiting talking about

1 religion or politics. Lopez told him that he would either be
2 suspended or fired. But, later in the day, Bustos was given a
3 warning notice instead. Lopez told him that he was only being
4 warned because he had been signing the cards together with other
5 workers.

6 Later in the morning, Lopez told Rodriguez that it
7 was wrong for him to have allowed the crew to sign cards during
8 work. Rodriguez asked what Lopez was going to do about it.
9 Lopez said that he might demote him to picking, but that Perez
10 or Stout might even fire him. Later that day, Lopez phoned
11 Rodriguez at home and said that he should take the following day
12 off as a suspension. According to Lopez, he made the decision to
13 suspend Rodriguez in conjunction with Perez because Rodriguez had
14 permitted the crew to gather together during work time. There is
15 no written record of the suspension. The entire signing ceremony
16 took about five to 10 minutes.

17 7. The September 5 Suspension Of Vicente Prado:

18 Prado began working for the Company as a picker in
19 1977. He testified that he engaged in Union activity during the
20 organizing campaign such as attending meetings, wearing a Union
21 button at work, passing out flyers in the presence of Sosa and
22 Pena, and being part of a group which served unfair labor prac-
23 tice charges on Company representatives. While no dates were
24 given for these activities, it is reasonable to assume that they
25 did not take place until after September 5, because little in the
26 way of open campaigning occurred until after the authorization
27 cards were signed.

28 On September 5, Prado, who had been home with an

1 injury to his arm, came to the plant, at the invitation of Perez,
2 to perform some work less strenuous than picking. Lopez in-
3 structed Prado to wash and grease an estimated 40 to 50 picking
4 carts on the west side of the plant. Prado testified that he
5 finished this task (he estimated that he washed and greased about
6 20 carts) about noon and went to the picking office, which is
7 also located on the west side, to look for Lopez, in order to
8 find out what his next instructions would be. Prado asked Hunter
9 where Lopez was; Hunter replied that he might be on the east side.
10 Prado crossed the street and entered the east side of the plant.
11 A Company guard informed Perez that a worker with an injured arm
12 had entered the east side of the plant without any picking cart
13 or equipment. Perez told Sosa to investigate. Meanwhile, Prado,
14 who usually worked on the east side, had met some of his friends.
15 They asked about his health and what he was doing. Prado res-
16 ponded and one of the workers asked him to grease his cart.

17 Sosa soon arrived and asked Prado what he was doing.
18 According to Prado, Sosa said that authorization cards were being
19 signed and Perez might believe that Prado had gone to the east
20 side to deliver some. Prado told Sosa that he had come to look
21 for Lopez. He testified that he was greasing a cart when Sosa
22 arrived. Sosa denied that he said anything to Prado about the
23 Union. He testified that when he arrived, Prado was chatting
24 with friends and that Prado told him that he had come to the east
25 side to grease some carts. According to Prado, he had already
26 finished the work Lopez had given him. Lopez stated that the
27 assignment would have taken much more than one day to complete.
28 Prado was given a three-day suspension for leaving the job without

1 permission. The notice states that Prado told the east side
2 guard that he had to work on that side. Prado did not testify
3 about what, if anything, he said to the guard, but he did state
4 that he did not ask the guard if Lopez was on the east side.

5 I find that Sosa's version of their conversation is
6 more credible than Prado's. The statements attributed by Prado
7 to Sosa concerning the Union sound more like a legal theory than
8 the words of a supervisor. More fundamentally, Prado's account
9 of greasing carts on the east side is hard to believe. He origi-
10 nally testified that he was looking for Lopez. In that case,
11 there would have been no reason for him to have carried grease
12 and whatever other supplies were required in the greasing of
13 carts from one side of the plant to the other. Without this
14 equipment, it is hard to believe that Prado was, in fact, greas-
15 ing carts on the east side. Prado's own testimony supports the
16 contention that he was making no very serious attempt to find
17 Lopez, but was actually talking to his friends. Prado never
18 filed a charge concerning this incident, even though he filed one
19 after his September 29 suspension. Prado was evasive in answer-
20 ing questions about why he did not file a charge. He finally
21 stated that "I didn't want to do it." Taken as a whole, Prado's
22 testimony was not credible. He was often inconsistent and much
23 of his testimony on cross-examination in connection with his move-
24 ments on September 5 appeared to be improvised as he went along.
25 In November, 1979, Prado had received a written warning for leav-
26 ing work before assigned duties were finished.

27 8. The September 8 Warning To Luis Mejia:

28 Mejia's role in the organizing campaign was to name

1 captains for each of the classifications of hourly workers at the
2 plant and to be in charge of speaking about the Union to the
3 hourly workers. Mejia also was involved in distributing and
4 collecting authorization cards. He generally performed this work
5 during lunch and breaks, but sometimes during working periods as
6 well. He would turn over signed authorization cards to Amalio
7 Garcia.

8 On September 8, Mejia was looking for Garcia when
9 he was intercepted by Lopez. Lopez asked what Mejia was doing.
10 Mejia replied that he was looking for a friend. Lopez ordered
11 him to return to his work area. Later that day Robert Vantassal,
12 Mejia's supervisor, informed him that Lopez had reported the inci-
13 dent to him. Vantassal told Mejia that he was forbidden to leave
14 his work area to go to other areas even during lunch or breaks.
15 Because Mejia's record was good, Vantassal told him that he would
16 be forgiven. There is a warning notice in Mejia's file "for roam-
17 ing the production area with no reason without permission." The
18 notice states that Mejia did not accept a verbal warning, but the
19 notice itself is marked "verble" [sic]. It is Respondent's policy
20 to place written notations of verbal warnings in employees' per-
21 sonnel files in order to have a memory aid. Several employees
22 testified credibly that they were unaware of this policy.

23 C. The Election Campaign

24 Once the authorization cards were signed, the Union
25 began to campaign openly in the plant. On September 6, a large
26 group of workers served approximately four unfair labor practice
27 charges on Robert Lopez. On September 8, the Union filed a Notice
28 of Intent to Take Access. Four days later a Petition for

1 Certification was filed.

2 In August, the Company hired full-time guards to
3 regulate entry to the plant and movement from one side to the
4 other. The decision to have guards posted during the day, rather
5 than just at night, as was the previous practice, was motivated in
6 part by a fear of labor unrest. The guards' instructions in-
7 cluded directions concerning notification of key supervisors in
8 the event of labor trouble.

9 Although identification cards had been issued to
10 employees in 1979, they apparently were not used to control entry
11 to and movement within the plant until the guards were hired.
12 Employees were then required to wear the I.D. badges at all times
13 and to show them to the guards on request. Clearly, the Company
14 was alert to the possibility that the garlic strike might spread
15 to mushrooms.

16 On September 10, Parada used the Company intercom
17 system to announce to captains that a meeting was to be held that
18 evening. According to Parada, employees had been permitted to
19 use the intercom system to speak with supervisors, the office, or
20 fellow employees. The next day the intercom stopped working.
21 Several days later, when the system began to function again, it
22 was Parada's belief that the numbering system had been changed,
23 although Parada did not actually attempt to use it. Instead, the
24 employees bought walkie-talkies in order for workers on the east
25 side of the plant to communicate with those on the west side. The
26 Company did not interfere with the employee's use of the walkie-
27 talkies. Perez and Jud Brown testified credibly that the intercom
28 system often malfunctioned because the equipment was in an

1 unair-conditioned area. They denied that the numbering system
2 was changed after early 1980.

3 Respondent began waging its no-union campaign in
4 earnest the week before the election. It mailed two letters
5 signed by Jud Brown to all the employees urging a no-union vote
6 and responding to what it considered to be Union misrepresenta-
7 tions. Respondent also mailed to the employees the first page of
8 an article from the September 10 Morgan Hill Times headlined
9 "Alpine (Mushroom Culture) Closes After 25 Years." The article
10 reported that the UFW had won a representation election at
11 Alpine, that the owners refused to say whether they would agree
12 to the Union wage demands, and that one owner stated: "Alpine
13 Mushrooms is closed after 25 years and the future is uncertain."
14 This quotation is highlighted in yellow in the copy admitted into
15 evidence. It is not clear whether the emphasis was supplied by
16 the Company. Jud Brown testified that he decided to send the
17 article to "show employees what might happen if the union made ex-
18 cessive demands."

19 Sometime during the week before the election, Mejia
20 and other workers had several conversations about the Union with
21 their supervisor, Ruben Arias. According to Mejia, Arias told
22 the workers that they were provoking or causing a strike, that
23 the Company would never accept a contract with the Union, and that
24 the Company might replace them with 200 Indians. Arias also told
25 the crew members that there was a sickness in the mushroom area
26 affecting the heads of the workers.

27 Arias admitted talking with the employees about the
28 Union. He told them that the Company was going to put up as much

1 resistance as possible to keep the Union out, that as long as
2 there was no contract the Company could run the plant as it
3 wished, and that, while the Union could offer employees the world,
4 when it came down to negotiations it would all be different, since
5 both the Company and the Union were big enterprises acting in
6 their own interests, without considering the people. Arias tes-
7 tified that he had been authorized by Company management to talk
8 to the employees about the Union, and specifically to make them
9 understand that when it came to negotiations the situation would
10 be different. Arias denied saying that the employees were pro-
11 voking a strike and that they might be replaced. I find that
12 Arias did make these statements. Mejia was a credible witness who
13 testified in detail about events he remembered, but did not hesi-
14 tate to admit that he could not remember when Perez had spoken to
15 him about the Union. Arias was forthcoming up to a point, but he
16 was evasive concerning the instructions given him by management
17 concerning what to say to employees about the Union.

18 On September 13, Respondent put up a fence around
19 the parking lot on the east side of the plant. Most of the plant
20 had previously been enclosed by fences. The decision to enclose
21 the parking lot was motivated in part by the Company's desire to
22 be able to maintain operations during a strike or other labor
23 dispute. Employees would be able to enter Company property in
24 their cars and enter the plant without leaving the fenced-in
25 area.

26 On September 15, Luis Viniegra, a Board agent from
27 the Salinas Regional Office, contacted Jud Brown in order to gain
28 access to the plant for the purpose of conducting worker

1 education. Brown replied that he wished to speak to his attorney
2 first, and that the attorney would be arriving from St. Louis
3 later that day. Over the next two days, there were a number of
4 meetings between representatives of the Board and the Company in
5 which the Board agents tried to convince the Company that they
6 had statutory, regulatory, and/or judicial authority to speak to
7 the workers inside the plant concerning their rights under the
8 Act. The Board representatives even contacted the Santa Clara
9 County Sheriff's Department in their effort to persuade the Com-
10 pany. Among the authorities relied upon by the Board was the
11 decision of the Court of Appeals in San Diego Nursery v. A.L.R.B.,
12 100 Cal.App.3d 128 (1979), which clearly stands for the proposi-
13 tion that the Board has no authority to take unconsented access
14 for the purpose of worker education in the absence of a duly pro-
15 mulgated regulation. On September 16, the Company did permit
16 Board agents to distribute literature and speak to employees in
17 the parking lot. Viniegra was permitted to speak to employees
18 over the Company intercom system during the afternoon. Several
19 employees testified that Viniegra's speech was cut off abruptly
20 while he was speaking in Spanish. Viniegra first spoke in
21 English. Company officials denied that Viniegra had been cut
22 off.

23 The next day Viniegra and other Board agents
24 arrived at the plant to distribute election notices to the em-
25 ployees. Apparently, the Board agents arrived after the em-
26 ployees' break had ended. After some heated discussion, the Com-
27 pany permitted the Board agents to distribute the notices to the
28 employees in their work areas.

1 On September 16, workers gathered at 9:30 to wait
2 for a visit either from state agents or from John Brown, the UFW
3 organizer. According to Parada and Amalio Garcia, Lopez had told
4 them that he would arrange for the visitors to come at that time.
5 However, John Brown did not actually arrive until 11:30 a.m. He
6 took access on the west side of the plant, but representatives of
7 the east side picking crews testified that they were not per-
8 mitted to join that meeting. Brown arrived at the east side
9 parking lot at about 12:15. He entered the gate. Perez demanded
10 that he ride in a Company car to the cafeteria to meet with the
11 employees because, according to Perez, Brown had failed to adhere
12 to their voluntary access agreement the day before, and had
13 wandered in unauthorized areas of the plant. Brown refused, left
14 the parking lot, and returned a few minutes later on top of a car
15 to address the group from outside the fence. Perez and other
16 supervisors told the workers that their break was over and threa-
17 tened them with discipline and possibly arrest if they did not re-
18 turn to work. Brown was able to continue to address the em-
19 ployees and none was disciplined. Other than this incident, there
20 were no allegations of denials of access to the UFW.

21 On September 16 or 17, the Company picking clerk,
22 Julio Ogarre, also known as Eduardo Hunter, gave an anti-Union
23 speech over the intercom system. The speech was authorized by
24 the Company, read in advance by management and legal counsel, and
25 similar to one that was originally intended to be delivered by
26 Jud Brown.

27 Several supervisors notified employees that they
28 were about to be addressed by a state agent. Hunter then began

1 to speak. He did not identify himself as a state agent, but
2 rather as a fellow worker. He warned the employees about the
3 dangers of having a union and urged them to reject the Union at
4 the election. Hunter's voice, which is distinctly South
5 American, is well known throughout the plant, partly because he
6 typically delivered disciplinary notices to employees. Most of
7 the employees who testified about this incident acknowledged that
8 they immediately recognized that the speaker was Julio and
9 stopped listening. The Company denies that it deliberately tried
10 to mislead the employees into believing that Hunter was a Board
11 agent. Ramon Sosa said that he was under the mistaken impression
12 that the speech was going to be made by someone from the state.
13 I find it inherently incredible that the Company would have
14 attempted to pass off a clearly anti-Union speech by an employee
15 with a distinctive, well-known, and easily recognizable voice, as
16 coming from a neutral state agent.

17 The election was held on September 19. The UFW re-
18 ceived about two-thirds of the vote. The Company filed objections
19 to certification of the results. After these objections were re-
20 solved, the UFW was certified as the employees' collective bar-
21 gaining agent on December 31.

22 D. The Post-Election Period

23 After the election, the number of disciplinary no-
24 tices issued to employees, including warnings and suspensions, in-
25 creased substantially over the rate of the previous one and one-
26 half years. The General Counsel argues that the increase in sus-
27 pensions was retaliation for the Union victory in the election.
28 The Respondent maintains that all of the discipline was meted out

1 for cause.

2 As direct evidence of discriminatory intent on the
3 part of the Company, General Counsel points to a conversation be-
4 tween Perez and Ezequiel Hernandez which occurred one or two days
5 after the election. Ezequiel is the brother of Alfredo and the
6 son of Carlos Hernandez.

7 Hernandez asked Perez for permission to go to
8 Mexico because his brother-in-law had died. Perez expressed his
9 condolences and granted the leave. He asked Hernandez if the
10 people were happy about the results of the election. Hernandez
11 replied that they were. Perez stated that things were not
12 settled yet, because no contract had been signed. According to
13 Hernandez, Perez then said that things were going to be a little
14 harder than before. After being asked exactly what Perez had
15 said, Hernandez testified: "Something about--something like pres-
16 sure. Q. What kind of pressure? A. That there were going to
17 be more penalties" (Tr. VII, p. 67). Perez denied making such a
18 statement. Both men characterized the conversation as friendly.
19 Perhaps because of this friendship, Hernandez appeared to be a
20 reluctant witness, quick to minimize Perez's statements on cross-
21 examination. While, given the context of the conversation, it is
22 easy to imagine Perez saying that negotiating a contract was going
23 to be harder for the employees than winning the election had been,
24 I do not find that Perez said that there were going to be more
25 penalties. It is not clear from Hernandez's testimony whether
26 Perez actually made such a statement, or whether Hernandez later
27 read this implication into Perez's remarks, in light of the in-
28 creased discipline.

1 1. The Discharge Of Armando Lemus:

2 Lemus worked for Respondent for a year prior to his
3 discharge. He worked as a picker and a sweeper before accepting
4 a transfer to the fill line cleaning crew in late August. Lemus
5 said he wanted to transfer from picking work in order to earn
6 more money. Perez, who advised Lemus to transfer after another
7 job possibility in the plant was taken by a worker with greater
8 seniority, stated that he suggested a night job to Lemus because
9 Lemus told him he was having difficulty waking up in the morning.
10 Prior to the transfer, Lemus had received a warning in May for
11 turning off lights in a growing room, a three-day suspension in
12 June for an unexcused absence, a five-day suspension a week later
13 for the same reason, and a 10-day suspension in August for tam-
14 pering with his time card. At the time of the suspension, he was
15 warned that the next infraction would result in his discharge.
16 The record amply supports Perez's contention that Lemus had an
17 attendance problem.

18 Before the transfer, Lemus attended four or five
19 Union meetings and spoke to employees, including Hunter, about
20 the Union. After the transfer, he would arrive early to tell the
21 day workers about upcoming meetings. No supervisors were present
22 when Lemus spoke about the Union and Perez disclaimed knowledge
23 of Lemus's Union activities.

24 On September 25, Lemus received a warning for poor
25 work performance and insubordination to his lead man, evidently
26 one of the other two employees who worked cleaning the fill line.
27 Lemus testified that Russell Moriaka, the supervisor who gave him
28 the warning, said that Perez would fire him if he found out.

1 about the warning. Perez's initials appear on the warning, as
2 they do on virtually every disciplinary notice.

3 On Sunday, September 28, Lemus testified that at
4 about 2:00 p.m. he called the plant three times to find out when
5 he should report to work. This was the required call-in proce-
6 dure. Lemus was supposed to speak to Geronimo Ponce, a supervi-
7 sor on the line, to determine his reporting time. Lemus testi-
8 fied that the operator answered the phone and twice told him that
9 Ponce's line was busy. When she told him this a third time, he
10 asked to be transferred to the picking office, which is on the
11 opposite side of the plant from Ponce and the line. Roberto
12 Naranjo, who was working as the picking office clerk at the time,
13 answered the phone. According to Naranjo, Perez, and Juana
14 Duran, an alleged discriminatee called as a witness by the
15 General Counsel, no operator is on duty on the weekends. Lemus
16 asked Naranjo if he knew when Lemus was to report. Naranjo said
17 that he did not, but would ask Morado, who was sitting in the
18 office. Here, the accounts of Lemus and Naranjo diverge. Accord-
19 ing to Lemus, Naranjo told him that Morado had talked to Lemus's
20 supervisor, Larry Edwards, and that Lemus should report at 5:30 to
21 6:00 p.m. Lemus said that Naranjo told him he had also checked
22 with Ponce to confirm this. Naranjo and Morado testified that
23 Lemus was told by Naranjo to report at 5:00 p.m. Naranjo said
24 that he never talked to Ponce. Ponce testified that somebody, who
25 he thought was Naranjo, had called between 4:00 and 4:30 to ask
26 what time the line would finish and that he told the caller the
27 work would end at 5:30 to 6:00. He told the other two workers
28 when they called that the line would end at 5:00 to 5:30. The

1 other two workers arrived at 5:00. Lemus testified that he
2 arrived about 5:30. He worked that night and was fired the next
3 day.

4 Perez testified that on September 28, he was re-
5 turning to Morgan Hill from a hunting trip at a few minutes before
6 6:00 p.m. when he saw Lemus driving to work in the car immediately
7 ahead of his. He followed Lemus to the plant and saw him run in.
8 The next morning he checked Lemus's time card and realized it had
9 been tampered with, since it had been punched at about 5:30. He
10 spoke to Edwards, determined that Lemus had been late, and dis-
11 charged him. Perez claimed that he did not take into considera-
12 tion the fact that he had seen Lemus arriving at 6:00 p.m., except
13 to the extent that it caused him to investigate the matter.

14 I find that Lemus knew that he should have reported
15 to work at 5:00 p.m. Because no operator is on duty on the week-
16 ends, Lemus's testimony is particularly dubious. The other two
17 employees on the clean-up crew arrived at 5:00 after being in-
18 structed to do so by Ponce. Lemus did not ask Naranjo to transfer
19 the call to Ponce and there is no reason why Naranjo should have
20 done so after Morado had given Lemus a reporting time. Lemus's
21 account has Naranjo first checking with Ponce and then confirming
22 the time with Morado. Again, Naranjo would have had no reason to
23 double-check the reporting time. As his testimony continued,
24 Lemus moved back his reporting time to 6:00. I credit the testi-
25 mony of Naranjo and Morado that Lemus was told to report at 5:00.
26 In the absence of a conspiracy not to inform Lemus of the proper
27 reporting time, there is no reason why Naranjo would have misled
28 him.

1 2. The Suspension Of Vicente Prado:

2 Prado received a five-day suspension on
3 September 29 for playing with the lights in a growing room.
4 Prado testified that he finished picking in one room and was sent
5 by his puncher, Jose Lozano, to the next house. Prado was unsure
6 of which house to go to next, so he asked Morado, who directed
7 him to an empty house. Prado then asked Morado if he should turn
8 the lights off and Morado replied that he should. Morado directed
9 Prado to a second house which also seemed empty and, with Morado's
10 permission, turned off half the lights. He went into a third
11 house where he picked for a few minutes before being told by
12 another worker that his crew was in the second house. Teresa
13 Correa, a member of the crew, yelled at him for playing with the
14 lights.

15 Morado testified that he did not recall the inci-
16 dent, but that he sometimes told employees what rooms to pick in,
17 but never told them to turn off the lights, especially if there
18 were workers inside. Morado had previously issued a warning to
19 Armando Lemus for playing with the lights. Jose Lozano testified
20 that the order in which rooms were picked by his crew had not
21 changed in weeks and that it was the same on September 29 as on
22 other days.

23 I do not credit Prado's testimony about this inci-
24 dent. I have already found him to be a less than credible witness
25 with respect to his earlier suspension. It makes no sense that a
26 picker would suddenly forget which house to pick next, but, even
27 assuming that he was confused, it is hard to understand why he
28 would have turned off the lights in two empty houses and begun

1 picking in a third, when he claimed to be looking for a house
2 with other members of his crew. At the least, Prado was guilty
3 of an act of carelessness which had the potential of injuring
4 other workers.

5 3. The Suspensions Of Ramon Contreras:

6 Contreras is a picker who has worked for Respondent
7 since 1976. During the Union organizational campaign, he was his
8 crew's captain. As such, he spoke about the Union in the pre-
9 sence of his puncher, Jose Lozano, distributed flyers, and served
10 several charges on Company representatives, as a member of a large
11 group of employees. When authorization cards were distributed to
12 the crew members, Lozano signed one.

13 In May, not long after Respondent began to use
14 scales in the growing rooms to weigh mushrooms, Contreras was
15 suspended for not filling his baskets to the proper weight. Each
16 set of four small picking baskets is supposed to contain at least
17 13 pounds. At times, even full baskets will not yield 13 pounds,
18 because of a lower moisture content in the mushrooms. In such
19 cases, pickers are required to fill baskets to the top, but are
20 not expected to reach a certain weight. The suspension indicates
21 that Contreras's baskets weighed only 12 pounds. Contreras tes-
22 tified that the suspension was unfair, although there is no con-
23 tention that it related to Union activity, which had not yet be-
24 gun.

25 Contreras testified that in late September Lopez
26 told him that it was time to take some action, and that he
27 (Contreras) believed that Lopez meant there would be more penal-
28 ties because of the Union. He also testified that during the

1 same period Sosa looked at the mushrooms in his basket and said:
2 "This is the way I want them" and assured Contreras that he under-
3 stood that the mushrooms were light in weight. Sosa testified
4 that he warned Contreras that his baskets were under-weight. He
5 said that because Contreras had been in his crew when Sosa was a
6 puncher he wanted to give him a warning rather than suspend him.
7 There is a warning in Contreras's personnel file dated
8 September 27 and marked "verbal" which states that Sosa had told
9 Contreras to fill his baskets or receive a suspension.

10 On September 30, Contreras received a five-day sus-
11 pension for a number of picking quality violations, including low
12 weights, long stems, and mixing No. 1 (closed veil) with No. 2
13 (open veil) mushrooms. The suspension notice indicates that
14 Contreras had been warned the day before about low baskets.
15 Neither Contreras nor Lozano testified about this warning.
16 Contreras testified that he had never before been warned or other-
17 wise disciplined with respect to the quality of his picking.
18 Neither Contreras nor any supervisor testified about the quality
19 of Contreras's picking on September 30.

20 On November 13, Sosa and Jose Quintanar,
21 Contreras's puncher, weighed his baskets and found them to be
22 light. Contreras received a 10-day suspension. Carlos
23 Hernandez, who was in the same crew, received a suspension for
24 low weights on the same day. Contreras testified that after Sosa
25 weighed his baskets he double-checked them by weighing one basket
26 at a time. He weighed seven or eight baskets. Some weighed more
27 than was required; some weighed less. Contreras added mushrooms
28 to bring the light baskets up to the proper weight and found that

1 there was a net surplus of about four pounds. Quintanar testified
2 that he and Sosa weighed six of Contreras's baskets. After they
3 finished, Contreras picked three more baskets and added their
4 weights to the first six in order to get them up to the proper
5 weight. Contreras then asked Quintanar to call Sosa back to the
6 mushroom house to re-weigh his baskets. Quintanar stated that
7 Contreras's baskets were visibly shallow. The thrust of
8 Quintanar's testimony is that Contreras brought his baskets up to
9 the proper weight only after Sosa had weighed them. Therefore,
10 Quintanar refused to call Sosa. He told Contreras that it was
11 strange that suddenly his baskets weighed more. I credit Respon-
12 dent's witnesses on this issue. Contreras had a history of fail-
13 ing to fill his baskets sufficiently. This history antedated the
14 Union campaign. The fact that Contreras did not challenge Sosa at
15 the time his baskets were originally weighed supports Quintanar's
16 testimony.

17 4. The Suspensions Of Abel Meza:

18 Meza, also known as Jose Luis Chavarria, began work-
19 ing for the Company in 1977. He worked both as a picker and as
20 part of a four-person crew responsible for picking up mushrooms
21 from the growing rooms and taking them by forklift to the cooler.
22 Meza was named captain of the forklift operators during the Union
23 campaign. In addition to the more typical Union activities en-
24 gaged in by other workers, Meza acted as a messenger between
25 workers on the two sides of the plant, because his duties re-
26 quired him to take mushrooms from the east side to the west side.
27 During the Company's election campaign, when Perez was meeting
28 with small groups of workers, Meza, who had completed his work on

1 the west side, wanted to go to the east side to inform Amalio
2 Garcia that the meetings were taking place. Meza testified that
3 Sosa gave him busy-work assignments on the west side and told him
4 that he had orders not to let Meza go to the east side. Sosa did
5 not testify about this incident.

6 (a) The Suspension Of October 2

7 Meza was alone in a growing room with Juana
8 Alba, who was sweeping it out, and began to ask her whether it
9 was true that she was having sexual relations in the parking lot
10 with another employee. There is no doubt that Meza was harassing
11 Alba and falsely claiming that there were rumors about her sexual
12 activities going around in the plant. Alba testified credibly
13 that she became angry and tearful and yelled at Meza that her pri-
14 vate life was none of his business. Lopez and Pena came into the
15 growing room during this argument. Perez also testified that
16 Alba reported the incident to him that day and was crying at the
17 time. Meza received a three-day suspension for interfering with
18 the work of others.

19 (b) The Suspension Of December 2

20 The mushroom pick-up crew is comprised of two
21 two-person teams, each responsible for the growing rooms on one
22 side of the plant. Each team is made up of one person who drives
23 the forklift and one who is responsible for keeping a number of
24 production accounts and directing the forklift driver to pick up
25 mushrooms in the growing rooms. Each employee in the crew drives
26 the forklift one day and keeps accounts the next.

27 On December 2, Meza was keeping the accounts.
28 A large quantity of mushrooms was left in a growing room for more

1 than eight hours. Meza was suspended for three days and lost his
2 job on the crew. The forklift driver was not suspended or
3 warned. Pena, who issued the suspension, could not remember if
4 he had asked the driver if Meza had told him to pick up the mush-
5 rooms. Meza did not testify that he had told the driver to pick
6 them up. Meza had received a warning in early August for the
7 same offense. Another member of the crew was issued a similar
8 warning in July. Meza testified that he had never heard of a
9 warning or suspension for leaving mushrooms in a growing room.
10 Similarly, Meza had received a warning in August for not reconcil-
11 ing production accounts.

12 (c) The Suspensions Of December 10 And 28

13 Meza was late to work on these two days and re-
14 ceived suspensions of three and five days respectively. He had
15 previously been warned about tardiness in September. Meza had
16 testified on behalf of Jose Mendoza at an administrative hearing
17 concerning Mendoza's eligibility for unemployment insurance bene-
18 fits shortly before receiving the last suspension. He had also
19 filed unfair labor practice charges with respect to his earlier
20 suspensions.

21 5. The Suspensions Of Salvador Garcia:

22 Garcia began working for the Company as a picker in
23 1977. During the Union campaign, he attended meetings, wore
24 buttons at work, accompanied other workers when unfair labor prac-
25 tice charges were served, and signed an authorization card.

26 (a) The Suspension Of October 6

27 On October 6, Morado asked Garcia to attend a
28 "slow pickers" meeting that afternoon. Such meetings were held

1 periodically for those employees who picked less than 40 pounds
2 of mushrooms per hour. According to Morado, Garcia refused to
3 attend the meeting without offering any reasons. He then asked
4 Amalio Garcia, Salvador's brother, to talk to him. Amalio said
5 that he would. Amalio did not testify about this incident.
6 Garcia testified that he told Morado that he could not attend the
7 meeting because his sister was in the hospital. Sosa also told
8 Garcia to go to the meeting. According to Sosa, Garcia refused,
9 never mentioning his sister. Sosa testified that other members
10 of the crew teased Garcia and told him that he was lazy. Garcia
11 stated that he also informed Sosa that his sister was ill and
12 that the teasing incident never took place. For refusing to
13 attend the meeting, which lasted about 40 minutes, Garcia was sus-
14 pended for five days. The following week Garcia spoke to Perez.
15 Perez testified that Garcia told him that he had not mentioned his
16 sister's illness to Morado and Sosa because he did not want to
17 share his reason with them. Garcia's version of the conversation
18 is quite different. He testified that he told Perez that he had
19 mentioned his sister's hospitalization to the supervisors and that
20 Perez said that the suspension must have been a mistake.

21 The credibility resolutions regarding this sus-
22 pension are difficult to make because they involve, for the most
23 part, flat contradictions between the only two parties to a con-
24 versation. What extrinsic evidence there is tends to support the
25 Company's witnesses. First, the General Counsel never called
26 Amalio to rebut Morado's testimony that Amalio had said he would
27 talk to his brother about attending the meeting. If Garcia had
28 mentioned his sister's illness to Morado, it is doubtful that he

1 would have turned to another member of the family in an effort to
2 persuade him to go. Second, Garcia never explained why attending
3 a 40-minute meeting, which took place early in the afternoon,
4 would interfere with his wish to visit his sister. On cross-
5 examination, Garcia said he told Morado and Sosa that he had other
6 matters to attend to, implying that he did not mention his sister.
7 Third, the only witness who rebutted Sosa's testimony that the
8 crew had been teasing Garcia about being ordered to attend the
9 meeting was Garcia himself. If Sosa's testimony were untrue, it
10 would seem that other members of the crew could have been found
11 to deny it. On the other hand, Perez's testimony was not very
12 convincing either. If, according to Perez, Garcia told him that
13 he did not want to tell Morado and Sosa about his sister's ill-
14 ness, it is difficult to understand why he was willing to tell
15 Perez. It is possible that Garcia never suspected that he would
16 be suspended for refusing to attend. On balance, I credit the
17 testimony of the Company witnesses that Garcia did not tell them
18 on October 6 that he needed to visit his sister in the hospital.

19 (b) The Suspension Of November 30

20 On November 30, after he had filed a charge con-
21 cerning his earlier suspension, and after having participated in
22 the November 23 work stoppage, Garcia received a three-day suspen-
23 sion for long stems. Garcia testified that he had never re-
24 ceived any discipline for long stems. At times in the past, he
25 had been told that the stems were too short or too long, but no
26 suspensions or warnings had resulted. According to Garcia, Sosa
27 asked him, shortly before he received the suspension, if he had
28 been warned about long stems. Garcia replied that he had not been

1 warned. Sosa did not testify about this incident. Garcia's
2 puncher, Lozano, testified that Garcia's stems were long and that
3 he had warned Garcia orally about long stems about three days be-
4 fore he was suspended. Lozano did not fill out a warning slip
5 and place it in Garcia's file because it was his practice to give
6 two or three informal verbal warnings before doing so. It
7 appears that Sosa was not aware of this informal warning.

8 6. The Demotion Of Ruben Alcantar:

9 Alcantar has worked at Steak Mate since 1971. In
10 August, after he had been working as a temporary puncher,
11 Alcantar was made a permanent puncher by Perez. Lopez gave
12 Alcantar a copy of a Company document called the "Supervisor's
13 Evaluation Form." This form contains the names of crew supervi-
14 sors (punchers) and several categories of evaluation, including
15 weight, quality, safety, attendance reporting, scales, and mush-
16 rooms on the floor. Lopez told Alcantar that this form contained
17 the rules he was to follow as a puncher. The form in evidence,
18 for the week of August 2, contains Alcantar's name and the word
19 "yes" in each category, as well as the word "good" under proper
20 bookkeeping. The form notes that "any NO rating will be subject
21 to progressive disciplinary actions." Perez testified that the
22 form was not actually used for disciplinary purposes.

23 During the organizing campaign, Alcantar attended
24 Union meetings, as did most other punchers, talked to the other
25 employees, and accompanied a group of employees serving unfair
26 labor practice charges to the cafeteria area, but did not enter
27 the cafeteria.

28 Alcantar testified that, at a meeting for punchers

1 held in early October, Perez told the punchers that they had the
2 authority to issue warnings and other disciplinary action because
3 they were foremen. Perez also told the punchers to be more
4 strict and put more pressure on their crews. Perez's account of
5 the meeting is essentially consistent with Alcantar's. Perez
6 said that he told the punchers that the Company was very con-
7 cerned with production quality because it was facing mounting eco-
8 nomic pressure and that the job had to be done more efficiently.
9 He stated that guidelines had been issued for the punchers to
10 follow in guiding their crews. Perez could not remember any
11 changes being made in the duties of punchers. While the record
12 demonstrates that there was a substantial increase in warnings
13 and suspensions relating to picking quality, there is no indica-
14 tion that the involvement of the punchers in the initiation and
15 issuance of discipline changed during 1980.

16 Alcantar was called to Stout's office around
17 October 15 and told that he was being returned to his picking job
18 because of poor work and subtracting lugs from a worker's punch
19 card in order to make his accounts come out even. Morado testi-
20 fied that he recommended Alcantar's demotion because of his bad
21 work as a puncher. He specifically cited Alcantar's failure to
22 keep track of the number of lugs picked, to tell his crew how to
23 sort mushrooms, and because his crew's weights were lower than
24 most. Alcantar was still in his probationary period as a puncher.
25 Stout cited Alcantar's poor performance on the evaluation forms,
26 but none was produced by the Company. Alcantar had received no
27 warnings or suspensions while serving as a puncher.

28 //

1 7. The Suspension Of Jesus Mariscal:

2 Mariscal works as a picker for the Company. During
3 the Union organizing campaign he attended meetings, wore a UFW
4 button along with others in his crew, and served charges on the
5 Company as a member of a large group.

6 On October 23, Mariscal's puncher, Sofia Luna,
7 ordered Mariscal to help a fellow worker pick a mushroom bed. It
8 was Company practice for the first workers who finished picking
9 their beds to help those who had not yet finished before moving
10 on to the next house. Mariscal argued that another worker or two
11 had finished first and should be required to help. He testified
12 that two employees had already been permitted to leave by Luna.
13 She denied that any employees had left. Her testimony was corro-
14 borated by Morado. Mariscal tried to leave the house, but Luna
15 blocked his way. He called Luna a brown-noser and several other
16 epithets. Morado came into the house and asked Mariscal and Luna
17 to be quiet. Mariscal threw his picking hook and several baskets
18 of mushrooms against the wall and told Morado he was sick. Morado
19 let Mariscal go home.

20 The next day Lopez told Mariscal that because he
21 had behaved badly toward Luna he was fired. Mariscal appealed the
22 decision to Perez, who reduced the penalty to a 10-day suspension.
23 Perez testified that Mariscal was a good worker who had had a very
24 bad day. Roel Garcia, Amalio's brother, corroborated Mariscal's
25 testimony that two workers had left the house, but admitted that
26 he told Lopez and Perez at the time that he supported Luna in the
27 dispute and that Mariscal was a nervous person who had just blown
28 up. I do not credit Garcia's explanation that he spoke in Luna's

1 favor because he feared that she would suspend him if he did not.

2 8. The Suspensions Of Alfredo And Carlos
3 Hernandez:

4 Carlos Hernandez and his son Alfredo began working
5 for the Company in 1979. During the organizing campaign, they
6 attended Union meetings. Carlos served several unfair labor
7 practice charges on Company representatives as a member of a
8 large group. Alfredo wore a Union button to work.

9 During the course of his work at Steak Mate, Carlos
10 had become a close friend of Sosa's. Sosa phoned Carlos at his
11 home two days before the election to urge him to vote against the
12 Union, but Carlos was away at the time. Either the following day
13 or the day of the election, Sosa made the request to both Carlos
14 and Alfredo. Carlos told Sosa that he and his children had de-
15 cided to vote for the Union. According to Sosa, the conversation
16 took place on the day of the election, after Alfredo and Carlos
17 had voted. Before the election, Sosa confided to Carlos that he
18 was feeling a lot of pressure in his new job and that he was con-
19 sidering obtaining a rifle for protection from the workers. Sosa
20 testified that he told Carlos he had gotten a rifle for shooting
21 rabbits. I credit Carlos's testimony. He was a serious, thought-
22 ful witness. I do not think it likely that he would have fabri-
23 cated this conversation. Sosa, who was usually confident in his
24 testimony, appeared embarrassed and uncomfortable when questioned
25 about this incident.

26 After the election, Sosa asked Carlos and Alfredo
27 to meet with him in an empty mushroom house. Sosa testified that
28 he spoke to the men as friends. He explained that in his new job

1 he would have to mete out discipline for bad work regardless of
2 friendships. Carlos testified that Sosa admonished them to do
3 the best possible work because there were going to be more sus-
4 pensions coming. Alfredo's version of the conversation was simi-
5 lar, except that Alfredo testified that Sosa said the additional
6 penalties would be forthcoming because of the Union. Again, I
7 credit the testimony of Carlos. It is undeniable that the number
8 of suspensions for quality violations increased after October 1.
9 There would have been no reason for Sosa to speak to the men if
10 he did not know that disciplinary standards were to be tightened.
11 But I do not credit Alfredo's testimony that Sosa mentioned the
12 Union as the reason for the increase in suspensions. If Union
13 activity rather than work quality were to be the controlling con-
14 sideration in disciplinary decisions, it would have made no sense
15 for Sosa to urge them to do their best work. Alfredo's credibi-
16 lity was impeached when he denied that Sosa had warned him about
17 poor picking before he was given the suspension to be discussed
18 below. A declaration signed by Alfredo in support of the under-
19 lying unfair labor practice charge mentions the warning. However,
20 the declaration, while stating Alfredo's belief that he was sus-
21 pended for Union activities, does not mention the conversation in
22 which Sosa supposedly said that there was about to be an increase
23 in suspensions because of such activity.

24 On October 25, Alfred was suspended for five days
25 for mixing the two grades of mushrooms and for leaving long stems
26 on the mushrooms. Sosa testified, and Alfredo's declaration con-
27 firms, that he had warned Alfredo about his poor picking four
28 days earlier. Alfredo had previously received a warning and a

1 three-day suspension in May and June, respectively, for low
2 weights. Alfredo testified that Sosa, Lopez, Morado, and Perez
3 spoke with him in the office before issuing him the suspension.
4 He told them that it was impossible to do the work the way they
5 wanted it and asked to be switched to hourly work. Sosa replied
6 that he was capable of doing the work well. After some hesita-
7 tion by the supervisors, Alfredo was given the suspension.
8 According to Sosa, Alfredo's work has improved and he has not
9 been subjected to any discipline since October.

10 Carlos had a clean disciplinary record until
11 October 4, when he received an oral warning from Sosa for mixing
12 the two grades of mushrooms and leaving long stems on them. On
13 October 23 he received a written warning from Morado for the same
14 offenses. Carlos did not testify about either of these warnings
15 and there is no allegation that they were unwarranted. On
16 November 14, Sosa suspended Carlos for three days for low weights.
17 Carlos testified that no supervisor had spoken to him about his
18 work during that week. Both Sosa and Jose Quintanar, the crew's
19 puncher, testified that they weighed baskets of each member of
20 the crew and that only those of Carlos and Ramon Contreras were
21 low.^{4/}

22 9. The Suspensions Of Juana Duran:

23 Duran, who has worked at Steak Mate both as a
24 picker and packer since 1974, was easily the most outspoken and
25 active Union supporter among the packing employees during the or-
26 ganizational campaign. She was the UFW organizing captain for

27 ^{4/}Carlos received another suspension for low weights on
28 December 19. That suspension is the basis for a separate unfair
labor practice charge not in issue in this hearing.

1 the more than 50 packing employees. In this capacity, she
2 aggressively challenged Perez's claims about the Company's medi-
3 cal plan's superiority to the one offered by the Union, when
4 Perez addressed a large group of packing employees. At the pre-
5 election conference she spoke at length in opposition to the Com-
6 pany's position on the eligibility to vote of certain injured em-
7 ployees. She was an observer for the Union at the election.

8 On Saturday, September 13, Duran was absent from
9 work. She testified that she telephoned the Company to report
10 her absence, but that the phone was not answered. No operator is
11 on duty on the weekends. On September 16, Pena and Frank
12 Hinchberger, Duran's supervisor, handed her a warning notice for
13 failing to call in and told Duran that they did not want to see
14 her talking to the people. This testimony was not countered by
15 Respondent.

16 On Saturday, November 1, Duran became ill at work.
17 She received permission to go to the doctor's office, where she
18 was given medication and told that she could return to work on
19 November 3 or 4. On Sunday, November 2, Duran called the plant
20 to report that she would be absent, but, once again, the phone
21 was not answered until 11:30 a.m. She returned to work on Monday.
22 Lopez gave her a three-day suspension for an unexcused absence.
23 Duran explained the situation to Lopez. He said that he would re-
24 move the suspension and pay her for the day she had missed if she
25 brought him an excuse from her doctor. Duran complied with the
26 request, but Lopez told her that the suspension would stand be-
27 cause she had failed to call in early enough. Lopez did not tes-
28 tify concerning this incident. The record discloses that another

1 picker, Manuel Mier, received a verbal warning for failure to
2 call in on Saturday, October 4. The warning notice states: "He
3 claims he called in but nobody answered the phone which could be
4 true. We the picking foremans [sic] were on the East side most
5 of the morning." The notice is signed by Morado and Sosa.
6 Duran's testimony that the phone was not answered is at least
7 plausible. Her testimony that Lopez at first told her that an
8 excuse from the doctor would result in the lifting of the suspen-
9 sion is very credible, particularly in the absence of any denial
10 from Lopez.

11 On November 23, Duran hurt her back. According to
12 her testimony, she noticed her back hurt when she awoke the next
13 morning after sleeping on her couch. On November 25, she re-
14 ported the injury to Pena and Sosa. They testified that she told
15 them that she had twisted her back when she slipped and almost
16 fell while picking. She thought it was nothing at the time. Pena
17 filled out an accident report confirming the conversation. Pena
18 and Sosa testified that they asked Duran's puncher if she had re-
19 ported the accident when it occurred. He replied that she had
20 not. The puncher, Jose Manuel Garcia, testified that he was un-
21 aware of any injury to Duran and that Pena did not ask him if she
22 had reported it to him until three weeks later. Duran received
23 a five-day suspension for failing to report the accident imme-
24 diately. There is nothing in the record to suggest that Duran
25 missed any work as a result of the injury. The record indicates
26 that two punchers had previously been suspended for failing to
27 report injuries to members of their crews, but there is no record
28 of any discipline taken against an injured employee for failure

1 to report an accident.

2 Duran was late to work on Sunday, December 7. She
3 received a five-day suspension for tardiness.

4 10. The Suspension Of Juventina Chambers:

5 Chambers began to work for the Company in the
6 spring of 1980. She sought permission to transfer to a crew on
7 the other side of the plant so that she would be able to have
8 lunch with her sister. In August, Morado told her that the trans-
9 fer had been approved, but the decision was overridden by Perez be-
10 cause Chambers's puncher, Mario Rodriguez, had been complaining
11 about her work and attitude. On August 26, Rodriguez gave her a
12 written warning for low weights. Chambers contended that
13 Rodriguez was treating her unfairly. She had also been required
14 to attend a "slow pickers" meeting.

15 During the organizational campaign, Chambers
16 attended Union meetings, wore a UFW button at work, and spoke
17 about the Union to her puncher, Priciliano Garcia. She also
18 served charges on Respondent along with other workers.

19 On October 30, Chambers received a three-day suspen-
20 sion for long stems. The suspension notice contains a statement
21 from Lopez that she had previously received a warning for the same
22 offense. Chambers denies having been told that her work was bad.
23 She claimed that both Lopez and Pena, who issued the suspension,
24 had told her that her work was well done. Pena testified that he
25 showed the mushrooms with long stems to Chambers and that she dis-
26 agreed with him. He claimed that her puncher that day, Silvestre
27 Delgado, agreed that the stems were long. Delgado, who was serv-
28 ing as a temporary puncher for a week, testified that there were

1 several employees in the crew with long stems on their mushrooms,
2 but that only Chambers was suspended. He said that he signed the
3 suspension notice because he had no choice. The record discloses
4 that Delgado signed another three-day suspension notice for long
5 stems on October 30. This suspension was given to Rogelio Gomez.
6 There is no allegation that his suspension was discriminatory.
7 His suspension notice also indicates that he had been warned pre-
8 viously about long stems.

9 11. The Picking Change And Work Stoppage Of
10 November 23:

11 On November 23, without notice to the Union, the
12 Company instituted a change in the order of picking mushrooms.
13 Previously, workers had picked the bottom bed first and worked
14 their way to the top bed. To reach the top bed workers had to
15 climb on the lower beds. The change required them to start at
16 the top. Before the change, workers had started picking mush-
17 rooms near the aisle of the house and worked toward the wall.
18 The change reversed this order.

19 The pickers began to work as instructed, but soon
20 began complaining to their Union leaders, Amalio Garcia and
21 Rogelio Parada. With respect to the first change, the fundamental
22 concern was safety. The employees felt that if they were re-
23 quired to climb to the top beds, over unpicked beds, which tend
24 to be slippery, the risk of falling and serious injury would in-
25 crease. The primary objection to the second change was economic:
26 mushrooms tended to be less plentiful near the wall than the
27 aisle and the change might cause the employees (who were paid on
28 a piece rate basis) to earn less.

1 Parada and Garcia asked Morado during the morning
2 break to allow them to discuss the changes with Company supervi-
3 sors in order to get a clarification. Morado replied that none
4 of the higher-ups was in the plant. He suggested that they wait
5 until the following day (Monday). Parada testified that this res-
6 ponse did not satisfy the employees.

7 At about 10:00, according to a pre-arranged signal,
8 Parada flicked the lights in several houses off and on three
9 times to advise the employees to leave their work to protest the
10 new picking rules. Garcia also advised some employees to leave
11 work, but he used his voice instead of turning the lights off and
12 on. When four crews had left their houses, Morado returned and
13 told the employees that they could continue to pick as they had
14 before the change until Perez was able to meet with them on
15 Monday. The protest lasted no more than 10 minutes. All the em-
16 ployees returned to work.

17 The following day Perez met with employees from
18 several of the affected crews. He accepted their arguments about
19 the safety problems inherent in picking from top to bottom and ex-
20 plained why picking from the wall to the aisle would not cause
21 them to earn less. Perez felt that the employees had been con-
22 vinced by his explanation. Garcia testified that they had not.
23 On Tuesday, November 25, the crews were notified that they would
24 be required to pick from the wall to the aisle beginning the next
25 day. The requirement that the employees pick from the top to the
26 bottom was abandoned.

27 On November 24, Parada was suspended for five days
28 for turning the lights on and off. Perez testified that five days

1 was an arbitrary figure. The suspension indicates that Parada
2 had interfered with the work of others by creating an unsafe con-
3 dition. Despite the testimony of Perez and Morado that turning
4 the lights on and off presents a safety hazard, there was cre-
5 dible testimony from a number of witnesses indicating that flick-
6 ing the lights was used routinely by punchers as a signal to
7 workers that it was time for their break. With the exception of
8 the suspension imposed on Vicente Prado for playing with the
9 lights (he was not following a pre-arranged signal) no employee
10 had previously been suspended for this offense.

11 Garcia received a warning on November 24 for leav-
12 ing his job without permission to take part in the work stoppage.
13 Perez testified that Garcia was only warned because he had not
14 flicked the lights.

15 On Wednesday, November 26, the day that the remain-
16 ing change went into effect, Inocencio Nunez arrived at work
17 without his picking knife. He testified that he went looking for
18 a knife in several houses and decided to call Amalio Garcia on
19 the intercom to find out if employees on the east side of the
20 plant were in agreement with the change. According to Nunez,
21 Garcia told him that the workers were not in agreement with the
22 change. Garcia never testified about this incident. Nunez then
23 notified several crews that there was no agreement about the
24 change.

25 Nunez had been active in the organizing campaign.
26 He was his crew's captain, had served charges on the Company, and
27 had been in charge of the walkie-talkie on the west side of the
28 plant that the employees used to communicate about Union matters.

1 Nunez testified that three supervisors, Lopez,
2 Perez, and Stout, complained to him about his activities on the
3 26th. Lopez told Nunez that he had been using the intercom,
4 giving orders to the employees, and organizing the people. Stout
5 told him that the Company was aware of his Union activities and
6 had not bothered him before. Perez said that he was being insu-
7 bordinate and causing turmoil among the people. These statements
8 were not denied by the supervisors.

9 Nunez was suspended for five days for leaving his
10 job without permission and going through unassigned picking
11 areas.

12 12. The Suspensions Of Miguel Rivera:

13 Rivera has worked for Respondent for about six
14 years. During the organizational campaign, he attended meetings,
15 wore a UFW button to work, served charges on Company representa-
16 tives along with other employees, and signed an authorization
17 card with other members of his crew in the presence of Sosa.

18 On November 28, Rivera was suspended for three days
19 for refusing to repick a mushroom bed after being ordered to by
20 his puncher, Guadalupe Chavez. Rivera testified that he explained
21 to Lopez and Perez that the bed in question had actually been
22 picked by Roel Garcia, Amalio's brother, who had the same picking
23 number as Rivera. Perez said that he would investigate. Chavez
24 testified that Rivera at first claimed that the bed had been well-
25 picked. After he received the suspension, Rivera claimed that
26 somebody else was responsible for the bed. Perez testified that
27 he spoke to Garcia about the matter and that Garcia stated that
28 he had nothing to do with it. On rebuttal, Garcia testified that

1 he and Rivera shared the same picking number, but he did not ad-
2 mit that he had been responsible for the unpicked bed. Garcia
3 denied that Perez had talked to him about the matter near the time
4 of the suspension, but he was unable to remember when he talked
5 to Perez or anything about the content of the conversation. I
6 credit Perez's testimony on this issue. Garcia admitted that
7 Perez did talk to him about the incident. His inability to re-
8 member anything about the conversation suggests that he did not
9 take responsibility for not picking the bed properly. I find
10 that Perez had a good faith belief that Rivera had not picked the
11 bed properly.

12 Two days before the suspension Rivera had received
13 a warning from Perez for leaving his work place. Rivera testi-
14 fied that he had been told by Amalio Garcia to let Antonio Tovar
15 know that there was no agreement on the newly implemented picking
16 change. Neither Garcia nor Tovar corroborated Rivera's testimony.
17 Rivera testified that Perez asked him whether he knew that Nunez
18 and Parada had already been suspended for the same reason. Perez
19 denied knowledge of what Rivera was doing when he left his crew.
20 Given the fact that Nunez was suspended on the same day for
21 attempting to get several crews to protest the picking change, I
22 simply cannot believe that Perez was unaware of the purpose of
23 Rivera's visit to another crew. Perez was asked what the differ-
24 ence was between the conduct of Nunez and Rivera which justified
25 the difference in discipline. Perez replied that Lopez or Morado
26 had reported to him that Rivera, unlike Nunez, had not actually
27 attempted to have a crew stop working.

28 On December 19, Rivera was told by his temporary

1 puncher, Melecio Jimenez, to move from the bed he was picking to
2 another. Rivera testified that he refused at first because he had
3 not yet finished picking the bed and had never been told to leave
4 a bed before finishing it. When Jimenez again ordered him to
5 move, Rivera complied. Lopez came into the house and found mush-
6 rooms left on a bed. He determined from talking to Jimenez that
7 Rivera was responsible. Rivera was told to re-pick the bed.
8 Lopez and Perez suspended Rivera for 10 days. When Rivera re-
9 ceived the suspension, he asked Perez to reconsider. Neither
10 Lopez nor Jimenez testified concerning this incident. Perez was
11 unable to recall the facts of this incident in any detail.

12 13. The Alleged Threat To Alex Cortez:

13 Cortez testified that on December 5 and 8 he and
14 other employees of the Company went to the Board's Salinas Regio-
15 nal Office to demand that the UFW be certified as the winner of
16 the representation election and that suspensions at the plant be
17 stopped. Approximately 40 employees went to Salinas on
18 December 5, while 15 attended the December 8 meeting. Duran and
19 Amalio Garcia, among other employees, spoke at the December 5
20 meeting. On or about December 9, according to Cortez, Pena and
21 Lopez asked him if he had attended the meeting. Cortez replied
22 that he had. Lopez said that he might give Cortez a suspension.
23 Lopez and Pena departed, "kind of laughing."

24 Lopez denied ever talking to Cortez about anything,
25 let alone about the meeting at the ALRB office. Lopez at first
26 denied having heard that employees had ever gone to the ALRB
27 office. When pressed, he testified that he had probably heard
28 rumors "through the grapevine" about such meetings, and that the

1 fact that such meetings had occurred "was pretty well known
2 throughout the plant." Despite making this concession, Lopez
3 maintained that all he knew about employees going to the ALRB
4 office was that charges were filed there. He consistently denied
5 knowledge of any large group of workers having gone to the ALRB
6 office.

7 Neither Cortez nor Lopez was a very credible or re-
8 liable witness. And Lopez's testimony was particularly suspect in
9 the area of knowledge of Union activity at the plant. However,
10 given the state of the record, I am unable to credit Cortez on
11 this issue. His testimony was the only reference in the hearing
12 to the December 5 and 8 meetings. No other employee witness
13 corroborated his testimony, even though he testified that Duran
14 and Amalio Garcia spoke at the December 5 meeting. No Company
15 supervisor other than Lopez was asked if he had knowledge of the
16 meeting. Moreover, Lopez did not deny an equally damaging con-
17 versation with Mejia, to be discussed later.

18 14. The Suspension Of Basilio Banuelos:

19 Banuelos has worked for the Company as a picker for
20 about three years. During the organizational campaign, he
21 attended Union meetings, served charges on supervisors as a mem-
22 ber of a large group of employees, and was a crew captain for a
23 short period. At one of the meetings held by Perez to present
24 the Company's position in favor of a "no union" vote, Banuelos
25 challenged his statements concerning the relative merits of the
26 Company and Union medical insurance plans. On September 16,
27 Banuelos was with the group of employees waiting in the east side
28 parking lot to talk to John Brown. Perez arrived and told

1 Banuelos and the others that if they did not return to work he
2 could sue them or even have them sent to jail. Perez admitted
3 that he threatened the employees with possible disciplinary ac-
4 tion if they did not go back to work. After Parada and Duran
5 were suspended in late November, Banuelos took up a collection
6 for them at work.

7 On December 19, Banuelos was picking mushrooms. He
8 had a large plastic bag, called a "stump bag" on the mushroom bed
9 he was picking. The bag is used to collect mushroom stumps and
10 other waste. It is undisputed that the Company prohibits placing
11 stump bags on beds in mushroom houses other than those which are
12 undergoing their final picking prior to being cleaned and readied
13 for a new batch of young mushrooms. The problem with having a
14 stump bag on a bed is that it can damage growing mushrooms.
15 Banuelos claimed that on December 19, a Friday, the house in ques-
16 tion was in its "fourth break" or final picking, and that the
17 rule against having stump bags on beds does not apply in such
18 cases, because there can be no damage to the growth of mushrooms.
19 Salvador Garcia, a member of Banuelos's crew, testified that the
20 house in question would have its final picking on Friday. How-
21 ever, he did not testify about December 19 in particular. Be-
22 cause a house is generally picked for four weeks before it is
23 cleaned out, the fact that it would have its final picking on
24 Friday does not mean that it would not have its first picking on
25 Friday as well.

26 Sosa testified that he entered the house in which
27 Banuelos was picking and saw a stump bag on his mushroom bed.
28 Sosa stated that the house was in its "first break," which means

1 that it was being picked for the first time. Sosa said that he
2 had never seen another stump bag on a bed in his tenure as a
3 picking supervisor. Jose Lozano, the crew's puncher, also testi-
4 fied that it was a first break house. Morado stated that the
5 rule prohibited placing stump bags on beds in any house.

6 Banuelos received a three-day suspension for his
7 offense. The suspension form notes that the house was in its
8 first break. There is no contention that the suspension form was
9 not filled out on December 19. Pena handed the suspension to
10 Banuelos. When Banuelos complained, Pena referred him to Lopez.
11 Lopez told him that he was lucky that he had not been fired. The
12 record discloses that three other employees had received warnings
13 in 1980 for having stump bags on their beds, one of which was
14 signed by Sosa. None was suspended.

15 15. The Suspension Of Ezequiel Hernandez:

16 Hernandez, who is the son of Carlos and brother of
17 Alfredo, began working as a picker before his relatives were
18 hired. He was an active Union supporter, a crew captain, and had
19 had a conversation with Perez relating to the election shortly
20 after it took place.

21 Hernandez received a verbal warning from Sosa on
22 October 15, for long stems, and a written warning 10 days later
23 for long stems and mixing the two grades of mushrooms. On
24 January 5, Morado suspended Hernandez for three days after weigh-
25 ing his mushroom baskets and finding them light. Hernandez tes-
26 tified that he was only suspended for two days. Hernandez did
27 not deny that his baskets were low, but he claimed that other
28 members of his crew also had long stems and low weights but were

1 not punished. Hernandez named two crew members who fell into
2 this category, but admitted that they had also signed authoriza-
3 tion cards and supported the Union. Morado testified that
4 Hernandez was the only member of the crew whose baskets were low
5 on January 5.

6 16. The Suspension Of Antonio Tovar:

7 Tovar has worked for Respondent as a picker since
8 1974. During the organizing campaign, he attended meetings, was
9 a member of a group of employees which served charges on Company
10 representatives, and participated in the work stoppage on
11 November 23.

12 On October 25, Sosa orally warned Tovar that he was
13 leaving long stems and mixing the two grades of mushrooms. On
14 January 21, Sosa told him that his stems were too long. Two days
15 later he was given a three-day suspension for long stems. Tovar
16 did not deny that his stems were long, but stated that he had not
17 been told that there was any problem with his work.

18 17. The Alleged Threat To Luis Mejia On March 3,
19 1981:

20 Mejia was subpoenaed by the General Counsel to tes-
21 tify at the hearing in this matter. On March 3, 1981, he noti-
22 fied his supervisor, Ruben Arias, that he would be absent from
23 work the following day to testify. Late that afternoon Lopez told
24 Mejia that:

25 Ruben had told him that I had to go to
26 court, and that it was all right, but
27 that on Thursday morning I had to pre-
28 sent some kind of a paper signed by
the judge [sic] stating that I had
been here the whole day, or otherwise
I would be in great problem [sic].

1 Lopez was, at first, evasive when testifying about this issue,
2 but finally admitted that he had told Mejia he would be required
3 to bring some sort of a paper signed by me.

4 On cross-examination, Mejia, who had testified that
5 he had told other employees about the signed paper requirement,
6 was asked if he now understood that he would not have to bring a
7 signed paper when he returned to work. Mejia replied: "Yes, that
8 is what you're telling me now, but I would like to know what my
9 supervisor is going to tell me about it."

10 ANALYSIS AND CONCLUSIONS

11 A. Section 1153(a) Issues.

12 The Complaint alleges 12 violations of §1153(a)'s pro-
13 hibitions against employer interference, restraint, or coercion
14 of agricultural employees in the exercise of rights set forth in
15 §1152 of the Act. The allegations fall into three categories:
16 interference with the right of employees to communicate freely,
17 through the imposition of barriers to speech and movement within
18 the plant; denial of access to representatives of the Board and
19 the Union; and threats.

20 1. Allegations Concerning The Ability Of Employees To 21 Communicate Among Themselves.

22 The General Counsel argues that Perez's July in-
23 struction to the picking crews not to speak about politics, reli-
24 gion, or sports during their working time constitutes a violation
25 of the Act because it was aimed at Union organizing. It is undis-
26 puted that Perez did not speak about Unions when he talked to the
27 employees and that employees freely discussed unionization within
28 the plant after he spoke to them. Perez characterized his talk as

1 a reminder of the Company's long-standing rule against solicita-
2 tion. However, his explanation of the impetus for the reminder,
3 namely that an Avon lady and an employee in the office selling
4 jewelry had caused an uproar in the plant, is so incredible as to
5 require a search for some other motive for Perez's visit to the
6 pickers, who were not involved in the incidents which Perez cited
7 and to which Perez made no reference in his short speech to the
8 employees.

9 The General Counsel contends that the motivating
10 factor behind Perez's reminder was the garlic strike in Gilroy.
11 Clearly, the Company was aware of the strike and had already
12 shown its sensitivity to the possibility of unionization in its
13 admonition to Parada not to speak about the Union at work.
14 Perez's examples of employees arguing about boxing matches, the
15 Presidential election, and the religious beliefs of Hindu em-
16 ployees as additional reasons for the reminder are unconvincing,
17 since there is no indication that they led to any problems within
18 the plant except, perhaps, at breaks or during lunch, when the
19 rule did not apply. Morado also testified that the rule was
20 meant to include talking about the Union. I agree with the
21 General Counsel that the visits by Perez to the picking crews are
22 evidence that the Company had knowledge of incipient organiza-
23 tional activity among its employees or, at the very least, sus-
24 pected that the garlic strike would give rise to such activity.

25 I do not agree, however, that the mere invocation of
26 a rule prohibiting talk about politics, sports, or religion con-
27 stitutes a violation of the Act. There must be evidence that the
28 rule would reasonably tend to restrain employees in the exercise

1 of their organizational rights. The Company's Employee Relations
2 Manual does contain two versions of a non-solicitation rule. One
3 bars all solicitation by any person, at any time, for any pur-
4 pose. This rule, while clearly invalid on its face, does not
5 appear to have been enforced in a manner violative of the Act.
6 The other no-solicitation rule, listed under plant rules of con-
7 duct, bars solicitation during working hours. While a no-
8 solicitation rule referring to "working hours" as opposed to
9 "working time" is presumptively invalid, Essex International,
10 Inc., 211 NLRB 749 (1974), there is abundant record evidence that
11 employees were permitted to engage in organizational activities
12 before and after work, as well as during breaks and lunch. I
13 therefore conclude that, in telling employees not to discuss poli-
14 tics, religion, or sports while working, Respondent did not vio-
15 late §1153(a) of the Act. Paragraph 7(b) of the Complaint shall
16 be dismissed.^{5/}

17 In its brief, the General Counsel concedes that the
18 rule against sports, religion, and politics "did not work." Em-
19 ploying dramatic and colorful phrases such as "state of siege" and
20 "all-out war," the General Counsel contends that a number of mea-
21 sures taken by Respondent unlawfully restricted the ability of em-
22 ployees to communicate with each other at the plant about the
23 Union. Beginning in August, the Company took steps to tighten se-
24 curity in the plant and to monitor movement from one side to the
25 other. First, the Company hired full-time guards. Prior to this

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27 ^{5/}Whether Respondent applied its no-solicitation rules
28 in a discriminatory manner is a separate issue, which will be
discussed in connection with specific allegations of violations of
§1153(c) of the Act.

1 time, guards had not been present during the day. Second, em-
2 ployees were required to wear I.D. badges at all times. These
3 two measures enabled Respondent to enforce effectively its rules
4 prohibiting entry to the plant to off-duty employees. Respon-
5 dent's instructions to the guards demonstrate that the Company
6 contemplated that they might serve as an early warning system in
7 the event of labor unrest and is further evidence that it had
8 begun to plan for that contingency at a time when it denied know-
9 ledge of organizational activity among its employees. But, no
10 allegation has been made that the required use of I.D. badges or
11 the employment of the guards are violations of the Act.

12 The Complaint does allege that changes in rules con-
13 cerning entry to, and access within, the plant interfered with or-
14 ganizational activities and constitute violations of the Act. It
15 is undisputed that Respondent's rules prohibited employees from
16 being on Company property when they were off duty and that em-
17 ployees who left their work area without permission were subject
18 to discipline. There is no substantial evidence that Respondent
19 changed its rules concerning access and employee movement within
20 the plant during the pre-election period; the issue is whether
21 the Company enforced these rules in a discriminatory manner.
22 That issue will be addressed in connection with allegations of
23 violations of §1153(c) of the Act. Such discriminatory acts would
24 also constitute derivative violations of §1153(a). Because I do
25 not find that Respondent changed its rules concerning employee
26 access to the plant and movement within it, I conclude that Para-
27 graph 7(f) of the Complaint must be dismissed.

28 Similarly, the Complaint alleges that the enclosure

1 of the east side parking lot by a fence constitutes a violation
2 of the Act. Respondent conceded that it constructed the fence,
3 in part, as a defensive measure in the event of a strike. I am
4 unable to find that the mere construction of a fence would cause
5 a reasonable employee to feel menaced or threatened and thus
6 interfere, coerce, or restrain him or her in the exercise of pro-
7 tected rights. Whether Respondent in fact used the fence in an
8 unlawful manner is a separate issue. I conclude that Paragraph
9 7(n) of the Complaint must be dismissed.

10 The Complaint also alleges that Respondent denied
11 employees use of the intercom system in order to interfere with
12 their organizational efforts. On September 10, Parada used the
13 intercom to announce an organizational meeting. He was not dis-
14 ciplined for using the intercom. There is no evidence that
15 either employees or management had previously used the intercom
16 for purposes relating to solicitation or speeches. Employees
17 had been permitted to use the intercom to talk to the office,
18 supervisors, and other employees. A day or so after Parada's
19 announcement the intercom was out of service for several days.
20 Respondent claims that the system broke down frequently. Unlike
21 the General Counsel, I do not find this defense totally unbeliev-
22 able. I find it to be no more unbelievable than the possibility
23 that three typewriters in the Board's Salinas office would refuse
24 to work on the same day that a brief was due to be filed, as
25 happened in this case. It is a matter of almost universal know-
26 ledge in a technological society that telephones and other mach-
27 inery sometimes cease to function.

28 There was testimony that when the intercom returned

1 to service the numbers had been changed. Because no General
2 Counsel witness claimed to have tried to use the system again, I
3 find this testimony unpersuasive and accept the Company's denial.
4 The employees apparently decided to use other methods of communi-
5 cation, such as walkie-talkies. They might well have decided that
6 it was unwise to broadcast their plans to management. I conclude
7 that the General Counsel has failed to establish that Respondent
8 denied use of the intercom to employees or, that if it did, that
9 the intercom system had previously been available to employees to
10 make announcements or for other purposes unrelated to work. Para-
11 graph 7(k) of the Complaint must be dismissed.

12 2. Allegations Of Denial Of Access To The Board And The
13 Union And Impersonation Of A Board Agent.

14 On September 8, the Union filed a Notice of Intent
15 to Take Access. It designated Jose Mendoza, who had already been
16 discharged, as an organizer. Despite some testimony by John Brown
17 that the Company had denied access to Mendoza, there is no allega-
18 tion of such denial by the General Counsel. Evidently, the Union
19 did not attempt to take access until September 15. An agreement
20 was reached between the Company and the Union limiting access to
21 the parking lots and cafeterias on both sides of the plant. John
22 Brown took access at lunch time on September 15, in the cafeterias.
23 Perez expressed concern that he had attempted to go into areas
24 other than the cafeterias. On September 16, Brown took access and
25 spoke to employees in the west side cafeteria. He testified that
26 he had heard that organizing captains from the east side had been
27 prevented from going to the west side cafeteria. Assuming that
28 this is true, I do not find that the denial constitutes a violation

1 of the Act. There is no evidence that workers from one side of
2 the plant were ever permitted to eat lunch on the other side. In
3 fact, Juventina Chambers had requested a transfer several months
4 earlier to enable her to eat lunch with her sister who worked on
5 the other side of the plant.

6 When Brown arrived at the east side of the plant, he
7 was confronted by Perez. A large group of employees had gathered
8 in the parking lot. The gates were closed. They were readily
9 opened for Brown. Perez demanded that Brown be escorted to the
10 cafeteria in a car. Brown refused. He testified that he pre-
11 ferred to speak to the employees in the parking lot. He then left
12 the parking lot. The gates were opened for him. He returned to
13 the parking area atop a car and addressed the workers. The Union
14 took access several more times before the election. There were no
15 further incidents.

16 Much confusion surrounds the events of September 16.
17 While some of the details remain unclear, there does emerge a re-
18 sistance on the part of the Respondent to Union access which mani-
19 fested itself in very restrictive interpretations of the Board's
20 access regulation. It also is apparent that John Brown saw an
21 opportunity for confrontation with the Company and seized upon it
22 for tactical purposes. Despite the hostility which Perez dis-
23 played, Brown did have the option of staying in the parking lot to
24 talk to the workers, which is what he testified that he wished to
25 do. Or, he could have talked to the employees in the cafeteria.
26 While I can understand Brown's unwillingness to be seen in a car
27 with Company supervisors, I do not find that Perez's insistence
28 to be in violation of the access regulations.

1 However, Perez and other supervisors did interfere
2 with the Union's right to take access by delaying Brown's entry
3 into the parking lot and by threatening employees who remained to
4 listen to Brown with suspension or arrest. Perez claimed that the
5 situation was confusing to him, because the lunch break had ended
6 for some of the employees, but not for others. Regardless of
7 Perez's motives, his threats transformed a rather trivial inci-
8 dent into one which reasonably tended to interfere with the em-
9 ployees' organizational rights. I conclude that the Respondent
10 violated §1153(a) by interfering with the rights of its employees
11 to have access to Union organizers on September 16.

12 It is undisputed that Respondent denied access to
13 Viniegra and other Board agents who wanted to conduct worker edu-
14 cation within the plant. Again, the tone of the Respondent in
15 discussions with Board agents could be characterized as hostile
16 or "stonewalling." Clearly, Respondent did not intend to permit
17 greater access to the Board than it was legally obliged to. But,
18 the General Counsel's argument that Respondent's refusal to permit
19 access to the Board for the purpose of conducting worker educa-
20 tion is evidence of anti-Union animus is completely without
21 merit. The Company was within its legal rights to deny such
22 access to the Board in the absence of a Board regulation auth-
23 orizing it. San Diego Nursery Company, Inc. v. Agricultural
24 Labor Relations Board, 100 Cal.App.3d 128 (1979). Indeed, while
25 Viniegra relied upon San Diego Nursery as authority for taking
26 access, it is now Respondent which cites the case in its brief,
27 while the General Counsel has chosen to ignore it.

28 Later on September 16, Viniegra delivered an

1 address over the intercom system. I do not credit the testimony
2 which indicates that the Company cut off Viniegra's speech. If
3 the Company were cynical enough to have offered Viniegra an
4 opportunity to talk to himself alone, surely it would have been
5 clever enough not to have waited until several minutes into his
6 speech before cutting him off. Again, while Respondent may have
7 timed Viniegra's address to ensure that few employees would hear
8 him, I cannot find that this is a violation of the Act.

9 On September 17, Board agents arrived late to speak
10 to employees about the election process. But, after a short dis-
11 cussion, the agents were permitted to speak to the employees at
12 their work place.

13 The Complaint also alleges that the Company locked
14 employees in the parking lot in order to deny them access to
15 Viniegra. Viniegra's testimony establishes that he had no inten-
16 tion of speaking to workers when they were in the parking lot be-
17 cause of a Board policy not to do so when Union organizers are
18 present. The reason for the policy, of course, is to avoid link-
19 ing the Union and the Board in the minds of the employees.

20 In sum, I conclude that the Respondent did not im-
21 pede the Board in the carrying out of its lawful election func-
22 tions. Paragraph 7(p) of the Complaint shall be dismissed. ~~and the~~
23 ~~shall be dismissed.~~

24 It is further alleged that the anti-Union speech
25 given by Ed Hunter is violative of §1153(a) in that Hunter im-
26 personated a Board agent. The facts of the matter are not in
27 dispute. I conclude that Respondent did not intend to pass off
28 Hunter's speech as emanating from the Board. It was intended to

1 be a speech giving the Company's arguments against the Union.
2 Regardless of motive, the speech could still be a violation of
3 the Act if it reasonably tended to interfere with, restrain, or
4 coerce employees in the exercise of protected rights. Several
5 supervisors did tell employees that they were about to hear a
6 Board agent. However, the overwhelming weight of the testimony
7 demonstrates that there was in fact no confusion on the part of
8 the employees. Hunter has a distinctive South American accent
9 well known to the employees. Most listened for a minute or two,
10 recognized Hunter's voice and returned to work. Those who did
11 not immediately recognize his voice were no doubt informed of his
12 identity by other employees. I conclude that no reasonable em-
13 ployee would have been misled into believing that Hunter's speech
14 was being given by a Board agent. I shall therefore dismiss
15 Paragraph 7(q) of the Complaint.

16 3. Allegations Of Threats Made By Respondent.

17 On or about September 12, Respondent mailed copies
18 of the Morgan Hill Times article concerning the closure of Alpine
19 Mushrooms to all employees. According to Jud Brown, he sent the
20 article "to show employees what might happen if the union made
21 excessive demands."

22 Section 1155 of the Act, which is almost identical
23 to Section 8(e) of the National Labor Relations Act, insulates
24 employer speech from the provisions of §1153(a) unless it con-
25 tains a threat of reprisal or force, or promise of benefit. In
26 N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme
27 Court addressed the distinction between employer speech which
28 merely advises employees of a point of view, and that speech

1 which contains an implied or veiled threat:

2 Thus, an employer is free to communicate to
3 his employees any of his general views about
4 unionism or any of his specific views about
5 a particular union. . . . He may even make
6 a prediction as to the precise effects he
7 believes unionization will have on his com-
8 pany. In such a case, however, the predic-
9 tion must be carefully phrased on the basis
10 of objective fact to convey an employer's
11 belief as to demonstrably probable conse-
12 quences beyond his control. . . . If
13 there is any implication that an employer
14 may or may not take action solely on his
15 own initiative for reasons unrelated to
16 economic necessities and known only to
17 him, the statement is no longer a reason-
18 able prediction based on available facts,
19 but a threat of retaliation based on mis-
20 representation and coercion. . . . [395
21 U.S. at 618-19.]

22 Here, Respondent mailed the article to its em-
23 ployees without any explanation. The headline notes the plant
24 closing and the article makes it clear that the closure took
25 place immediately after the Union won the representation elec-
26 tion. There is no indication that the closing was related to
27 positions taken by the Union on economic issues. The clear im-
28 plication of the article is that an employer is free to close its
plant after the Union wins an election. The Company's conduct
here falls far short of the requirements laid down by the
Supreme Court in Gissel. I conclude that in sending the Alpine
article to its employees Respondent has violated Section 1153(a)
of the Act.

25 Similarly, the statements made by Arias to Mejia
26 and other employees implying that a strike was inevitable and
27 that the Company would never agree to a contract, but would re-
28 place the strikers, is not a prediction based on objective fact.

1 Nor is it merely the privileged opinion of a supervisor. Taken
2 together with the Alpine article, Arias's statements convey a
3 threat to employees that a Union victory would likely result in
4 the closing of the plant or a strike. In either event, they
5 would lose their jobs. I conclude that Arias's statements con-
6 tain threats of reprisal and violate §1153(a) of the Act.

7 Although Perez told Ezequiel Hernandez shortly
8 after the election that things were going to be a little harder
9 from now on, I do not find that this rather ambiguous statement
10 is violative of the Act. It was an isolated conversation, which
11 both participants characterized as friendly. There is no evi-
12 dence that any other employee was aware of the conversation or
13 that Hernandez considered it to be of any significance at the
14 time. I conclude that Paragraph 7(s) of the Complaint must be
15 dismissed.

16 As I have found that the evidence is insufficient
17 to conclude that Lopez or Pena threatened Cortez with a suspension
18 because of his attendance at a meeting at the Board's Salinas
19 office, I conclude that Paragraph 7(ss) of the Complaint must
20 also be dismissed.

21 It is alleged that Lopez's statement to Mejia that
22 he needed an excuse signed by the Administrative Law Officer or
23 he would be in big trouble is a violation of §§1153(a) and (d) of
24 the Act. In concluding that Lopez's statement does violate the
25 Act, I rely heavily on the context in which it occurred. Despite
26 the Board's decision in Giumarra Vineyards, 3 ALRB No. 21 (1977),
27 that the General Counsel is not required to disclose the names of
28 employee witnesses to Respondent in advance of their testimony, in

1 order to minimize threats or fears of reprisal, I had asked that
2 General Counsel voluntarily make the names of the following day's
3 witnesses available to Respondent. I made this request because
4 of Respondent's expressed need to know who would be absent from
5 work in order to make necessary arrangements for replacements.
6 I had made similar requests in other cases to minimize interrup-
7 tions to the employer's operations. In this case, the General
8 Counsel was reluctant to comply because of employee fears of re-
9 prisal, and the Respondent was particularly eager to have the
10 names each day. In light of this background, even though
11 Lopez's statements were quickly disowned by the Company, I find
12 that it is extremely important for both the employees and Respon-
13 dent to understand that interference with Board processes or
14 attempts to restrain employees from testifying will not be
15 tolerated. I conclude that Lopez's statements are violative of
16 §1153(a) of the Act.

17 B. Section 1153(c) Issues.^{6/}

18 1. Legal Principles.

19 Cases involving allegations that employees were
20 discharged or subjected to lesser discipline by their employers
21 because of their participation in union activities have comprised
22 a majority of the unfair labor practice caseloads of both the
23 National Labor Relations Board and our Board since their incep-
24 tion. The number and variety of legal tests to determine a

25 _____
26 ^{6/}The General Counsel alleged that a number of suspen-
27 sions violated §1153(d) of the Act. The evidence does not sup-
28 port a finding that Respondent discriminated against those em-
ployees who filed unfair labor practice charges against it. Only
five of the many employees who filed charges were subsequently
disciplined. I conclude that Respondent has not violated §1153(d).

1 violation of Section 8(a)(3) of the National Labor Relations Act
2 (§1153(c) of the Act) have proliferated in recent years, resulting
3 in "intolerable confusion," according to the NLRB. In Wright
4 Line, 251 NLRB No. 150, 105 LRRM 1169 (1980), the NLRB made an
5 attempt to clarify the situation by setting out a test for viola-
6 tions of Section 8(a)(3) which, although it uses new phraseology,
7 is consistent with previous standards. After reviewing the his-
8 tory of the development of various tests, which I will omit here,
9 the NLRB adopted the reasoning of the United States Supreme Court
10 in Mt. Healthy City School District Board of Education v. Doyle,
11 429 U.S. 274 (1977), in arriving at its new formulation:

12 . . . [W]e shall henceforth employ the
13 following causation test in all cases
14 alleging violation of Section 8(a)(3) or
15 violations of Section 8(a)(1) turning on
16 employer motivation. First, we shall re-
17 quire that the General Counsel make a
18 prima facie showing sufficient to support
19 the inference that protected conduct was
20 a "motivating factor" in the employer's
21 decision. Once this is established, the
22 burden will shift to the employer to de-
23 monstrate that the same action would
24 have taken place even in the absence of
25 the protected conduct. [105 LRRM at
26 1174-5.]

20 I find that Wright Line is an applicable precedent
21 under the NLRA, which the Board is required to follow, pursuant
22 to §1148 of the Act.

23 In order to make out a prima facie case of a viola-
24 tion of §1153(c), the General Counsel must ordinarily^{7/} establish
25 that the affected employee engaged in union or other protected
26 activities, that the employer had knowledge of those activities,

27 _____
28 ^{7/}For an exception to this rule, see discussion in Sec-
tion B.3(a), infra.

1 and that there is some causal link between the protected activi-
2 ties and the discipline. Evidence to support a finding that such
3 a causal link exists will typically be circumstantial and the
4 reason proffered by the employer for the discipline may be so in-
5 substantial as to provide further evidence of a discriminatory
6 motive. Although the NLRB discussed the distinction between pre-
7 text and dual motive cases in Wright Line, I agree with the NLRB
8 that it is unnecessary to draw a line between them. Whenever the
9 General Counsel has met its burden of establishing a prima facie
10 case and the respondent has submitted nondiscriminatory business
11 justifications for its conduct, the Board must balance the pro-
12 tected conduct against the business justification. A pretextual
13 business justification differs from another business justifica-
14 tion insufficient to outweigh the employee's right to engage in
15 protected activities only in weight or degree, not in kind. It
16 may be said that a pretextual explanation has no weight at all,
17 but in all cases the same analytical process must be undertaken
18 in order to arrive at a decision.

19 2. The Discharges.

20 (a) Refugio Franco:

21 Franco's Union activities at the plant took place
22 before there was any organized campaign among Respondent's em-
23 ployees. Franco spoke to a relatively small number of employees
24 about the desirability of having a union more than a month before
25 he contacted John Brown of the UFW. The only evidence that
26 Franco's activities consisted of anything more than talk came
27 from his puncher, Jose Lozano, who testified that Franco urged
28 him to sign an authorization card.

1 Respondent denies that it had any knowledge of
2 Union activity at the plant in June or July and specifically de-
3 nies that it knew Franco had been talking about the Union when it
4 discharged him. Lozano testified that he never told any other
5 supervisor about Franco's activities. His denial is credible,
6 particularly since Lozano did later sign an authorization card.
7 There is, however, other evidence that the Company was aware that
8 employees were talking about the Union at the time of Franco's
9 discharge. First, Perez called Parada to his office around
10 June 20, discussed statements that he thought Parada had been mak-
11 ing about Company wages in relation to those of a mushroom grower
12 with a Union contract (apparently Mendoza had made the state-
13 ments), and advised Parada not to talk about the Union at work.
14 Clearly, Respondent had some intelligence source providing infor-
15 mation to Perez about a conversation between Parada and Mendoza.
16 It could just as easily have learned the names of the others who
17 were also discussing unionization. Second, Perez spoke to all the
18 picking crews about the Company's no-solicitation rule in early
19 July. The rather lame reasons for these speeches proffered by
20 Perez leads to the inference that concern about Union activity was
21 the real motivation for them. These considerations lend support
22 to the finding that Perez told Priciliano Garcia that Franco had
23 been fired for cause, rather than his Union activities, shortly
24 after Franco's discharge, and not several months later, as Perez
25 claimed. Respondent's denial of knowledge of Franco's protected
26 activities, when in fact it had such knowledge, coupled with the
27 Company's admitted failure to adhere to its usual progressive dis-
28 ciplinary system in Franco's case, supports an inference that

1 Franco's protected activities were a motivating factor in the de-
2 cision to discharge him. I therefore find that the General
3 Counsel has made out a prima facie case of a violation of §1153
4 (c).

5 Respondent argues that Franco would have been fired
6 even if he had not engaged in protected activities. Franco was
7 simply absent and tardy too much. Perez determined that he was
8 incorrigible and there would be no point in going through with a
9 five and 10-day suspension. In fact, prior to June 28, when
10 Franco asked for the day off because his pregnant wife might need
11 medical attention, Franco's disciplinary record was not a particu-
12 larly bad one. He had been suspended for three days in April for
13 an unexcused absence. This was his first suspension. He had
14 never been warned or suspended for tardiness, despite Perez's
15 anecdotal testimony that Franco had difficulty getting to work on
16 time, had been seen drunk in a car, and sometimes did not tell his
17 wife where he was. The unsubstantiated nature of this testimony,
18 offered in an effort to demonstrate that Franco was indeed in-
19 corrigible, actually undermines Respondent's contention that
20 Franco's was an appropriate case to deviate, apparently for the
21 first time, from its standard progression of warning, three, five,
22 and 10-day suspensions, prior to discharge.

23 Respondent points out that the General Counsel has
24 not alleged that Franco's suspension for unexcused absence on
25 June 28 was discriminatory. The only allegation concerning Franco
26 relates to his discharge. In Franco's case, I find that the cir-
27 cumstances surrounding the incidents of June 28, July 4, and
28 July 6 were fully litigated and reasonably encompassed within the

1 allegation of discriminatory discharge. With respect to the sus-
2 pension for unexcused absence on June 28, there was no testimony
3 contradicting Franco's statement that he was never asked for a
4 note from his wife's doctor after he returned to work. Perez sus-
5 pended him without asking for the note or for an explanation of
6 why there was no note. Perez must have been aware that Mrs.
7 Franco, a Company employee, was pregnant, and that doctors or hos-
8 pitals provide treatment to pregnant women even if the doctor's
9 office is closed. Perez might well have disbelieved Franco's
10 story, but the failure of any Company supervisor to ask Franco
11 for his account leads me to conclude that the suspension was dis-
12 criminatory and would not have been issued if Franco had not been
13 engaging in Union activities.

14 Franco was late to work on July 4. According to
15 Perez, a decision was made in very early July to permit all tardy
16 employees to come to work, with discipline to be decided upon
17 later. Because the exact date of this policy change was never
18 established, the evidence is insufficient for me to conclude that
19 the refusal to allow Franco to work on July 4, a holiday with
20 extra pay, was discriminatory.

21 Perez hedged about when the decision to terminate
22 Franco was made. At one point, he testified that the decision
23 may have been made before Franco missed work on July 6. In any
24 event, I have found that Franco was told by Morado not to work
25 on July 6, in order that his five-day suspension actually in-
26 clude five working days.

27 A review of the disciplinary records of other em-
28 ployees discharged by Respondent for attendance problems indicates

1 that employees were rarely fired after they had been absent or
2 tardy only the bare minimum number of times in a six-month
3 period.^{8/} In fact, Ricardo Ortiz, also known as Sergio Aguiniga,
4 who was discharged on July 5, when the decision concerning
5 Franco may also have been made, had been absent or tardy 13 times
6 in the preceding six months. Perez testified that consistency in
7 discipline was a factor that he considered when making decisions
8 about the severity of discipline. These two actions demonstrate
9 no consistency at all. And Franco was not even told by any super-
10 visor in the week preceding his termination that he was in
11 trouble. If, as Franco testified without significant contradic-
12 tion, he did not receive the five-day suspension notice until
13 July 5, the last day he worked, he had no reason to suspect that
14 his employment was in jeopardy until that day.

15 I conclude that, while Franco's attendance record
16 may have been a factor in Respondent's decision to discharge him,
17 he would not have been discharged if he had not engaged in pro-
18 tected activities at the plant. His discharge therefore was in
19 violation of §§1153(a) and (c).

20 (b) Jose Mendoza:

21 Mendoza engaged in a number of Union activities at
22 the plant. Parada was called to Perez's office in June to dis-
23 cuss statements made by Mendoza to Parada. Whether or not
24 Mendoza's name was mentioned by Perez, it seems likely that Perez
25 would have known the name of the other party to the conversation.
26 On September 5, Mendoza was distributing authorization cards to

27 _____
28 ^{8/A} number of employees who missed work three days in a
row were terminated as voluntary quits.

1 crew captains in various locations on both sides of the plant.
2 Although Lopez ejected Mendoza from the plant and was involved in
3 the decision to suspend Mendoza for 10 days, he denied knowing
4 that Mendoza was distributing authorization cards. Lopez never
5 even asked Mendoza what he was doing all over the plant. Such a
6 lack of curiosity can only be explained if Lopez already knew the
7 answer to the question he never asked. Lopez's testimony on the
8 issue of knowledge was evasive, inconsistent, and utterly unbe-
9 lievable. The fact that Mendoza was suspended while engaging in
10 concerted activity supports an inference that those activities
11 were a motivating factor in the decision to expel him from the
12 plant, suspend him for 10 days, and then discharge him. The
13 General Counsel has met its burden of making out a prima facie
14 case as to these allegations. Even though the 10-day suspension
15 was not alleged as a violation of the Act, it was fully litigated,
16 and is reasonably encompassed within the allegation of discrimina-
17 tory discharge.

18 The Complaint also alleges that the three-day sus-
19 pension Mendoza received for being late to work on August 31 was
20 discriminatory. I find that the General Counsel has not met its
21 burden of establishing a prima facie case as to this violation.
22 Mendoza was admittedly late on August 31. The General Counsel ar-
23 gues that the fact that Mendoza was permitted to work that day
24 means that the Company had accepted his excuse and that the fact
25 that he did not receive a suspension notice until September 2 or
26 3 demonstrates that the Company must have deliberated and decided
27 to suspend Mendoza for discriminatory reasons. These contentions
28 are without merit. By this time, Respondent seems to have adopted

1 the practice of permitting all tardy employees to work, rather
2 than be sent home, even though Mendoza had been sent home four
3 weeks earlier. A delay in two days from the time of the infrac-
4 tion until receipt of a suspension is not at all uncommon at
5 Steak Mate. Furthermore, there is nothing to suggest that the
6 level of Mendoza's Union activities as of August 31 differed sig-
7 nificantly from that of other employees. Union activities did
8 not become fully open and visible until September 5.

9 The facts with respect to Mendoza's 10-day suspen-
10 sion present a true "dual motive" case. It is clear that Mendoza
11 was engaging in Union activities at the plant on September 5 and
12 that the Company was aware of what he was doing, but it is equally
13 clear that Mendoza was in violation of long-standing Company rules
14 by his very presence at the plant. The question is whether
15 Mendoza would have been expelled from the plant and/or suspended
16 if he had not been engaging in Union activities.

17 Respondent presented convincing testimony that sani-
18 tation and contamination are important concerns for mushroom
19 growers. The Company attempted to demonstrate that Mendoza went
20 into off-limits areas on September 5 and that his movements pre-
21 sented serious contamination dangers. Although Respondent esta-
22 blished that Mendoza was on or near the wharf, a "dirty" area of
23 the plant just before he finally left, it did not prove that he
24 was in the case preparation area, where the air is filtered and
25 sanitation is critical. The fact that Mendoza's suspension
26 notice does not mention contamination as a reason for the disci-
27 pline and that no supervisor told Mendoza that contamination was
28 involved in his suspension, leads me to conclude that the

1 contamination issue was an afterthought, submitted by Respondent
2 in an effort to bolster its business justification defense.

3 Mendoza was in violation of Plant Rule of Conduct
4 No. 10, which prohibits employees from being on Company property
5 except during working hours. The fact that Mendoza claimed that
6 he asked Lopez for permission to be in the plant suggests that he
7 was aware of this rule. A review of Respondent's disciplinary
8 records failed to disclose a single warning or suspension to an
9 employee for unauthorized presence on Company property from
10 January 1, 1979, to the date of Mendoza's suspension. It is
11 possible that no employee had previously violated the rule, but
12 the testimony of several employees that they routinely came to
13 the plant on their day off, coupled with Perez's memo to all
14 supervisors on August 11 to remind employees that they were not
15 allowed on Company property on their day off, belies such a con-
16 clusion. On September 23, less than three weeks after Mendoza's
17 suspension, Rodolfo Chavarria received only a warning from Morado
18 "for forcing his way in to the company premises on his day off
19 Saturday 9/20/80. And was under the influence of alcohol.

20 (Breaking company rule No. 10)." Chavarria's infraction appears
21 to be at least as serious as was Mendoza's. Again, the inconsis-
22 tency in discipline meted out for roughly comparable offenses
23 supports an inference that Mendoza would not have received a 10-
24 day suspension had he not been engaged in Union activities.

25 I conclude that in expelling Mendoza from the
26 plant, Lopez was simply enforcing a Company rule and would have
27 done the same thing even if Mendoza had not been engaged in Union
28 activities. However, I find that Mendoza's 10-day suspension was

1 in violation of §§1153(a) and (c) of the Act, taking into consi-
2 deration Respondent's unbelievable denial of knowledge of
3 Mendoza's Union activities, the lack of previous discipline of
4 employees for being on Company property on their day off, the pre-
5 textual nature of the contamination defense, and the inconsis-
6 tency in discipline between the very rare 10-day suspension given
7 to Mendoza and the warning to Chavaria for comparable offenses.

8 Mendoza's discharge grew out of his reaction to his
9 discriminatory suspension, which he reasonably viewed as unfair.
10 While Mendoza was argumentative with Lopez, I do not find that
11 the argument went so far as to deny him protection under the Act.
12 Lopez said that Mendoza was "almost yelling." There was no ob-
13 scenity used. At most Mendoza hurled the epithet "liars" at
14 Lopez and Pena. If he did, it was apparently in reference to a
15 false statement by Lopez that plant rules had just been changed
16 the day before. None of this conduct rises to the level of in-
17 subordination.^{9/} Even though Mendoza had previously been warned
18 not to argue with Lopez, this warning cannot provide a business
19 justification to an employer which has discriminatorily suspended
20 an employee. Mendoza had the right to complain, within limits,
21 and he did not exceed those limits. I find that Mendoza would
22 not have been discharged if he had not been engaging in Union
23 activities and that his discharge was in violation of §§1153(a)
24 and (c).

25 //

26 ^{9/}Lopez may have attempted to provoke an insubordinate
27 response from Mendoza as a pretext for firing him. In such cases,
28 insubordination is not a valid ground for discharge. See
Highland Ranch and San Clemente Ranch, 5 ALRB No. 54 (1979), ALO
Decision, p. 24, and cases cited therein.

1 (c) Armando Lemus:

2 Lemus spoke about the Union at the plant while work-
3 ing as a picker and after his transfer to the line cleaning job.
4 He had several conversations with Hunter concerning the Union in
5 which he and Hunter took opposite sides. At the time of the
6 election, Hunter was not a supervisor, but he did act as an agent
7 of the Company when he delivered the anti-Union speech. Hunter
8 attended meetings of supervisors in his capacity as picking de-
9 partment secretary and was involved to some extent in the Com-
10 pany's anti-Union campaign. The conversations between Lemus and
11 Hunter provide some evidence of Company knowledge of Lemus's
12 Union activities, but the activities themselves did not rise
13 above the general background level of activities engaged in by the
14 majority of pickers. Hunter was discharged for tardiness after
15 having been suspended for three, five, and 10 days for tardiness
16 or unexcused absences. He had also been warned about poor work
17 and been advised that the next violation would result in his dis-
18 charge. I find that the General Counsel has not made out a prima
19 facie case that Lemus's Union activities were a motivating factor
20 in his discharge. I will order that Paragraph 7(t) of the Com-
21 plaint be dismissed.

22 Even if the General Counsel had succeeded in esta-
23 blishing a prima facie case, I would find that Respondent has met
24 its burden of proving that Lemus would have been discharged des-
25 pite his Union activities. There is no doubt that Lemus was late
26 to work on the day that he was discharged. His account of the
27 instructions he received from Naranjo was riddled with inconsis-
28 tencies. There is nothing to indicate that Lemus was

1 deliberately misinformed about the time he was to report to work.
2 Perez's testimony about following Lemus to work in his car is so
3 unusual that it would have been hard to invent. It is the kind
4 of event which would have caused Perez to check Lemus's time card
5 the following day. Finally, Lemus's record was so bad that Res-
6 pondent did not need to go out of its way to find a reason to dis-
7 charge him. And, considering that his activities in support of
8 the Union were indistinguishable from those of most of the other
9 pickers, there is no reason to assume that the Company seized
10 upon Lemus's tardiness as a pretext to fire him.

11 3. The Suspensions And Warnings.

12 (a) Introduction:

13 The General Counsel argues that after the Union's
14 election victory the Company embarked on a campaign of discrimi-
15 natory issuance of suspensions aimed at Union supporters. The
16 record confirms that there was an upsurge in warnings immediately
17 after the election. There were 21 suspensions not related to
18 attendance in the 20 months from January, 1979, through August,
19 1980. In the five months after the election, there were 26 such
20 suspensions issued to 22 individual employees. The statistics
21 relating to discipline for failing to adhere to the Company's
22 picking rules are an even more dramatic indication of a change in
23 disciplinary policy after the election. During the 20-month
24 period just referred to, the Company issued two warnings in 1979
25 to employees for not properly cutting the stems on their mush-
26 rooms. There were no suspensions for this offense. In June,
27 1980, one employee received a suspension for low weights and long
28 stems. There was one warning and no suspensions during this

1 period for mixing different grades of mushrooms. During the
2 months of October and November alone, the Company issued 25 warn-
3 ings and four suspensions for these offenses. Almost all of the
4 employees were cited for both violations at the same time.

5 But the record does not support the General
6 Counsel's contention that Union supporters were disciplined dis-
7 proportionately to their percentage of the work force. Of the 22
8 employees suspended for reasons not related to attendance during
9 the post-election period, 15 are named as alleged discriminatees,
10 while the other seven are not. Since the Union received two-
11 thirds of the votes in the election, there is no evidence of dis-
12 parate impact as to its supporters. Nor were the suspended em-
13 ployees noticeably more active in their support of the Union, for
14 the most part, than were those Union supporters who were not sus-
15 pended. In short, except in a relatively small number of cases,
16 which will be discussed individually later, the record does not
17 indicate that the Company singled out specific Union supporters
18 for retaliation.

19 What the sudden increase of discipline after the
20 election does demonstrate is that the Respondent decided to change
21 its disciplinary standards in some areas, such as picking quality,
22 and generally to enforce its existing work rules more harshly, in
23 order to demonstrate to all its picking employees, regardless of
24 their Union support, that it was still in control of the plant and
25 could make life very difficult for them. Given the statistics I
26 have just recited, I find it incredible that, absent some change
27 in the Company's standards for suspensions, its employees were
28 violating the work rules five times more often after the election

1 than they did before. But, not only did the Respondent fail to
2 provide a business justification for a change in its disciplinary
3 standards, it denied that any such change had taken place. In its
4 brief, Respondent blandly asserts that if there were an increase
5 in discipline after the election, it was caused by an increase in
6 violations of its work rules. Respondent has made no effort to
7 explain why nearly a quarter of its picking employees suddenly be-
8 gan to cut mushroom stems improperly after the election. The sta-
9 tistical evidence, taken together with testimony of several em-
10 ployees who were warned by supervisors that more suspensions would
11 be forthcoming, the threats of reprisals during the election cam-
12 paign, and the absence of any reasonable explanation by Respon-
13 dent, establish that the increased discipline was motivated by
14 Respondent's desire to punish its work force for its support of
15 the Union.

16 In The Larimer Press, 222 NLRB 220 (1976), enforced
17 M.S.P. Industries v. N.L.R.B., 568 F.2d 166 (10th Cir. 1977), the
18 NLRB held that an employer which changed its long-established no-
19 layoff policy immediately after a union victory in a representa-
20 tion election, violated Sections 8(a)(1) and (3) of the NLRA when
21 it laid off employees, regardless of whether they had engaged in
22 union activities or whether the employer had knowledge of any
23 such activities. The NLRB found that the employer:

24 . . . was not so much concerned with the
25 individual activities of the employees
26 involved as with the fact that a majority
27 of the employees had voted in favor of
28 the Union, and that it was determined to
punish the employees for exercising their
right of self-determination. Its change
of policy, therefore, affected both pro-
union employees and those whose union

1 sympathies were unknown, and thus discouraged
2 union activities of all employees, union or
 non-union. [222 NLRB at 240.]

3 The NLRB held that, in this type of case, it is unnecessary for the
4 General Counsel to establish that the employer had knowledge of the
5 union activities of each person laid off in order to establish un-
6 lawful discrimination. The Board has adopted the Larimer standard
7 in Kawano, Inc., 4 ALRB No. 104 (1978), enf'd Kawano, Inc. v.
8 A.L.R.B., 106 Cal.App.3d 937 (1980); and Highland Ranch and San
9 Clemente Ranch, 5 ALRB No. 54 (1979).

10 In the present case, the General Counsel failed to
11 allege that many of the warnings issued for long stem violations
12 were unlawful. Some of these warnings served as the basis for
13 suspensions for other work rule violations, in that a first
14 offense ordinarily results in a warning, rather than a suspension.
15 In the absence of the warning, there would have been no suspension
16 for the subsequent offense. Because the General Counsel failed to
17 allege that these ~~actions~~ actions were discriminatory, the facts sur-
18 rounding their issuance were not fully litigated, and I am pre-
19 cluded from finding them to be unfair labor practices. Similarly,
20 the General Counsel has not alleged that the suspensions for long
21 stems issued to several employees, who I assume were not Union
22 supporters, violated the Act. Although they could constitute un-
23 fair labor practices, under the Larimer approach, they have not
24 been fully litigated and cannot be found to have violated the Act.

25 In sum, if the record establishes that the Company
26 changed its disciplinary policy after the election with respect to
27 a particular type of work rule, the General Counsel will not have
28 to establish that the discipline instituted as a result of such a

1 change in policy was motivated by the Union activities of the in-
2 dividual employees subjected to the discipline. The burden will
3 shift to Respondent, pursuant to Wright Line, supra, to prove
4 that its change in policy was motivated by substantial business
5 reasons, or that the discipline would have issued, regardless of
6 the employee's Union activities, even under its pre-election dis-
7 ciplinary policy. In addition, because the total number of sus-
8 pensions increased so dramatically after the election, Respondent
9 will have the burden of establishing that the same kind of disci-
10 pline would have been imposed before the election.

11 (b) Suspensions Relating To Picking Quality:

12 Twelve of the allegedly discriminatory suspensions
13 were issued by Respondent for claimed violations of its produc-
14 tion standards for picking mushrooms. These standards include
15 filling baskets with sufficient mushrooms to meet the Company's
16 minimum weight requirements, separating No. 1 mushrooms (those
17 with closed veils and good color) from No. 2 mushrooms (those
18 with open veils or bad color), and cutting the stems of the mush-
19 rooms to the proper length. In addition, employees are required
20 to pick all ripe mushrooms from a bed before moving to the next
21 bed and must avoid getting an excessive amount of dirt into the
22 baskets along with the mushrooms. In this regard, employees are
23 required to keep the plastic stump bags they use to dispose of
24 waste off the mushroom beds to avoid damage to growing mushrooms.

25 (1) Suspension For Low Weights

26 In most of the individual cases of suspensions
27 for quality violations, the General Counsel does not argue that
28 there was no violation, but it does contend that the Company's

1 standards can be easily manipulated to find a violation whenever
2 the Company wishes to discriminate against a Union activist.
3 In the case of proper weights, while the standard is an objective
4 one, suspensions have been issued for failing to meet the 13-
5 pound standard by as little as a half pound. However, there is
6 no clear indication in the record of disparate treatment of Union
7 members or of an upsurge of suspensions for this offense after
8 the election. Three employees were suspended for low weights
9 from the time scales were installed in the early months of 1980
10 until June 20. Two of them are named as discriminatees. There
11 were no further suspensions for low weights until September 30,
12 shortly after the election. Four employees received such suspen-
13 sions after the election. Three are named as discriminatees.

14 a. Ramon Contreras: The General Counsel has
15 established that Contreras was active in the Union's organiza-
16 tional effort and served as the organizing captain for his crew.
17 He also was part of a group of employees which served unfair
18 labor practice charges on Respondent. I find that Contreras's
19 Union activities were sufficiently greater than those of the aver-
20 age Union supporter at Steak Mate to support the inference that
21 Respondent had knowledge of those activities. Given the timing
22 of his first suspension, shortly after the election, when there
23 had been no other suspensions for any picking quality violations
24 for more than three months, I conclude that the General Counsel
25 has established a prima facie case that Contreras's suspensions
26 were motivated in part by his Union activities.

27 Respondent's business justification is a
28 simple one: Contreras's work was bad. He had received several

1 warnings about his work in the days immediately preceding his
2 suspension, one from Sosa and the other from Lozano. Contreras
3 did not deny that his work was bad on September 30. And, while
4 Contreras disputed the fairness of his May suspension for low
5 weights, there is no contention that it was issued in retaliation
6 for nonexistent Union activities. Nor is there strong evidence
7 that Respondent was singling out crew captains for discriminatory
8 treatment. Only two other captains, Banuelos and Ezequiel
9 Hernandez were suspended for picking quality violations during
10 the post-election period and these suspensions occurred months
11 later. I conclude that Respondent suspended Contreras on
12 September 30 and November 13 for violations of its production
13 standards and not as retaliation for his Union activities. I
14 shall order that Paragraphs 7(u) and (hh) of the Complaint be dis-
15 missed.

16 (b) Carlos Hernandez: Hernandez supported
17 the Union during the election campaign. Sosa's conversation with
18 Hernandez and his son establishes that the Company had knowledge
19 of this support. The fact that Hernandez had a spotless discipli-
20 nary record prior to the election supports an inference that his
21 Union support was a motivating factor in his suspension. I con-
22 clude that Respondent has made out a prima facie case of a viola-
23 tion of the Act.

24 In support of its business justification de-
25 fense, Respondent points to the testimony of Sosa and Quintanar
26 who stated that they weighed the baskets of all of the members of
27 the crew and found only those of Sosa and Contreras to be light.
28 Hernandez had received two warnings after the election for long

1 stems and mixing the two grades of mushrooms. There is no conten-
2 tion that these were discriminatory.^{10/} Of course, those two
3 violations do not support an inference that an employee is also
4 likely not to fill his baskets to the proper weight, although it
5 is possible to assert that one form of sloppy work leads to
6 another. I also believe that Sosa's warning to Hernandez that
7 there were going to be more suspensions actually negates a find-
8 ing of discrimination in this case. Sosa would have had no rea-
9 son to warn Hernandez that he was about to be suspended for his
10 Union activities. Rather, it appears that Sosa was giving
11 Hernandez advance notice that Respondent was about to begin
12 giving suspensions for violations that had been overlooked in the
13 past. I conclude that Hernandez would have been suspended even
14 in the absence of his Union activities. Paragraph 7(ii) of the
15 Complaint shall be dismissed.^{11/}

16 c. Ezequiel Hernandez: Hernandez was his
17 crew's captain during the organizational campaign. His conversa-
18 tion with Perez after the election establishes Company knowledge
19 of his Union activities. Although his suspension occurred more
20 than three months after the election, I find that this strong
21 evidence of knowledge is sufficient to establish a prima facie
22 case that Hernandez's Union activities were a motivating factor
23 in his suspension.

24
25 ^{10/}If the issues relating to these warnings had been
26 fully litigated, it is likely that they would have been found to
be discriminatory. In that case, I would have ordered that this
suspension be reduced to a warning.

27 ^{11/}Sosa's statements to Hernandez lend strong support
28 to the notion that Respondent intentionally tightened up its dis-
ciplinary standards after the election.

1 Again, Respondent asserts that Hernandez was
2 suspended for cause. Like his father, Hernandez received two
3 warnings in October for long stems and mixing mushrooms, neither
4 of which is alleged to have violated the Act,^{12/} before receiving
5 a suspension for low weights. Hernandez did not deny that his
6 baskets were light. He did maintain that other employees in his
7 crew with light baskets were not suspended, but he admitted that
8 they also supported the Union. The evidence simply does not sup-
9 port an inference that Hernandez was singled out for suspension
10 because of his Union activities. The only other employee to be
11 suspended for low weights in January or February, 1981, was not
12 alleged to have been the victim of discrimination. I shall order
13 that Paragraph 7(xx) of the Complaint be dismissed.

14 (2) Suspensions For Long Stems

15 The difficulty with which Respondent's super-
16 visors struggled in an effort to define the proper length of a
17 mushroom stem was reminiscent of Justice Potter Stewart's efforts
18 to define hardcore pornography in Jacobellis v. Ohio, 378 U.S. 184
19 (1964). Stewart conceded that he could not define the term,
20 "[b]ut I know it when I see it. . ." Here, several punchers said
21 they could not define a long stem, because it depended on the
22 size of the mushroom, but they knew a long stem when they saw
23 one. Pena, the Company's expert on quality control, came up with
24 a more objective standard: the stem should be cut to equal the
25 diameter of the mushroom's cap. Unfortunately, Morado's standard,

26 _____
27 ^{12/}If the issues relating to these warnings had been
28 fully litigated, it is likely that they would have been found to
be discriminatory. In that case, I would have ordered that this
suspension be reduced to a warning.

1 while equally objective, was quite different. He testified that
2 the stem should equal the circumference of the cap. (The circum-
3 ference of a circle is 3.14 times longer than its diameter.)

4 There is no evidence that the Company actually spent time measur-
5 ing stems, diameters, and circumferences with a ruler. The pur-
6 pose of cutting the stem to a certain length, according to Pena,
7 was to assure customer acceptance, because some housewives re-
8 fused to buy mushrooms with long stems. Stems must, of course,
9 be cut at some point in order to remove the roots and dirt.

10 The General Counsel's argument that Respon-
11 dent's quality standards were subject to manipulation for discri-
12 minatory purposes is particularly strong here. First, there was
13 no agreement on what the standard should be. Second, the statis-
14 tical evidence already cited indicates that long stems became a
15 ground for discipline for the first time immediately after the
16 election.^{13/} The Company offered no explanation at all for this
17 occurrence, unless some very vague testimony about quality pro-
18 blems constitutes an attempt to provide a business justification.
19 Most of the discipline for long stems included citations for mix-
20 ing the two grades of mushrooms. Prior to mid-1980, employees
21 had to sort mushrooms into three sizes as well as two grades.
22 Yet, there were only a few isolated warnings and no suspensions
23 for violations of these standards prior to the election. Again,
24 Respondent offered no explanation for this dramatic change.

25 I conclude that the General Counsel has esta-
26 blished a prima facie case that discipline for mixed mushrooms

27 _____
28 ^{13/}After October, the number of warnings and suspensions
dropped sharply.

1 and long stems was motivated by Respondent's desire to punish the
2 picking work force for its support of the Union.

3 a. Alfredo Hernandez: Hernandez supported
4 the Union. His conversation with Sosa establishes Company know-
5 ledge of this support. For the reasons noted above, I find that
6 the General Counsel has made out a prima facie case as to
7 Hernandez's suspension for long stems.

8 Respondent's defense rests on Hernandez's ad-
9 mittedly nondiscriminatory suspension in June for low weights and
10 a warning from Sosa just prior to his suspension for long stems
11 and mixed mushrooms. While the General Counsel has not alleged
12 that this warning violated the Act, I find that it is reasonably
13 encompassed within the allegation of a suspension for the same
14 offense and that it has been fully litigated. Because Respondent
15 has not come forward with any business justification for the
16 sudden institution of discipline for long stem and mixed mushroom
17 violations, I conclude that Hernandez was warned and suspended in
18 retaliation for the Union's victory in the election, in violation
19 of §§1153(a) and (c).

20 b. Juventina Chambers: Chambers was a Union
21 supporter who spoke to her puncher, Priciliano Garcia, about the
22 Union. Her brother, Alex Cortez, was also an active Union sup-
23 porter. While the causal connection between Chambers's Union ac-
24 tivities and her suspension is not strong, the unexplained insti-
25 tution of suspensions for long stems is sufficient to make out a
26 prima facie case.

27 Respondent asserts that Chambers's stems were
28 too long. Chambers did not agree. She had previously been warned

1 about her work by Mario Rodriguez, who, as a Union supporter, was
2 clearly not motivated by anti-Union sentiments, but the warning
3 was unrelated to long stems. There is no evidence that the Com-
4 pany singled Chambers out for retaliation, but I conclude that
5 she would not have been suspended had Respondent not changed its
6 policies concerning discipline for long stems in order to reta-
7 liate against all the pickers for the Union's election victory.
8 In suspending Chambers, Respondent violated §§1153(a) and (c).

9 c. Salvador Garcia: Garcia's Union activi-
10 ties were rather typical of those engaged in by Steak Mate em-
11 ployees. Knowledge of these activities by the Company is esta-
12 blished through the testimony of Perez, who remembered Garcia as
13 an employee who served unfair labor practice charges on him and
14 by the fact that his father, Priciliano Garcia, was a puncher,
15 and his brother, Amalio, was a Union leader. For purposes of
16 discussion, I will assume that the General Counsel has met its
17 burden of establishing a prima facie case as to Garcia's first
18 suspension. I find that, given the unexplained institution of
19 suspensions for long stems, a prima facie case as to the second
20 suspension has been made.

21 The first suspension relates to picking qua-
22 lity in that Garcia was required to attend a meeting for slow
23 pickers. He refused. Because I have credited the testimony of
24 Respondent's witnesses on the issue of what reasons Garcia gave
25 for his refusal to attend, I conclude that he was suspended for
26 business reasons and would have been suspended regardless of his
27 Union activities. The fact that Garcia is the only person to
28 have been suspended for refusing to attend such a meeting is of

1 little significance, because there is no evidence that any other
2 employee had ever refused to attend. I will order that Paragraph
3 7(aa) of the Complaint be dismissed.

4 The suspension for long stems came after Garcia
5 had filed an unfair labor practice charge in connection with the
6 first suspension and after he had participated in the work stop-
7 page of November 23. Lozano, while confirming that Garcia's stems
8 were long, strongly implied that he did not believe that Garcia
9 should have been suspended. Lozano had informally warned Garcia
10 about long stems, but it was his policy not to issue a written
11 warning unless there was no improvement after several informal
12 warnings. Sosa, who issued the suspension, did not testify on
13 this issue. Whether or not Sosa was aware of the informal warn-
14 ing, I conclude that Garcia would not have been suspended if the
15 Company had not changed its policy concerning discipline for long
16 stems after, and because of, the Union election victory. The sus-
17 pension violated §§1153(a) and (c).

18 d. Antonio Tovar: Tovar's Union activities
19 were not remarkable. He participated in the serving of charges
20 and the November work stoppage. I find that these activities are
21 sufficient to establish Company knowledge and that, because he was
22 suspended for long stems, the General Counsel has made out a prima
23 facie case.

24 Tovar received two oral warnings after the
25 election and before his suspension for the same offense. The
26 warnings are not alleged to have been discriminatory. In the ab-
27 sence of a reasonable business justification for its change in
28 policy concerning discipline for long stems, I conclude that

1 Tovar, who had worked for the Company for six years without re-
2 ceiving any discipline, would not have been suspended had the
3 Company not changed its policy in order to punish the pickers for
4 the election victory. I conclude that Tovar's suspension vio-
5 lated §§1153(a) and (c).

6 (3) Other Suspensions Relating To Work
7 Quality

8 a. Miguel Rivera: Rivera engaged in Union
9 activities typical of those of other employees at Steak Mate. On
10 November 26, he was warned for leaving his work area when he went
11 to discuss the recently implemented picking change with Tovar.
12 As a result of this incident, I conclude that Perez associated
13 Rivera with those who were continuing to protest the picking
14 change. This association is sufficient to establish a prima facie
15 case that his concerted activities were a motivating factor in
16 his subsequent suspensions.

17 The evidence concerning Rivera's November 28
18 suspension is murky. While I believe that Rivera testified
19 honestly that he was not responsible for the badly picked bed,
20 I am in no position to resolve the facts involved in the contro-
21 versy among Rivera, Guadalupe Chavez, and Roel Garcia. Garcia,
22 who testified in General Counsel's rebuttal case, was a weak wit-
23 ness. He certainly did not take responsibility for having left a
24 bed unpicked. His failure to recall anything concerning his con-
25 versation with Perez about this incident, other than that it
26 occurred after Rivera's suspension, makes it impossible for me to
27 give much weight to his testimony. Under the circumstances, I
28 conclude that, regardless of which employee failed to pick the

1 bed properly, Perez had a good faith belief that Rivera was at
2 fault. As Respondent notes in its brief, the natural inclination
3 of someone in Perez's position, faced with a factual dispute,
4 would be to side with the puncher. I conclude that Rivera would
5 have been suspended regardless of his Union activities.^{14/} Para-
6 graph 7(oo) of the Complaint will be dismissed.

7 The facts of the December 19 suspension are, if
8 anything, even more confused. The two men responsible for the
9 suspension, Lopez and temporary puncher Melecio Jimenez, did not
10 testify. Rivera's testimony and the inconsistent reasoning on
11 the suspension notice indicate that Rivera was placed in a Catch-
12 22 situation by Jimenez. Rivera was first ordered to transfer
13 from the bed he was picking to another bed. According to Rivera,
14 he had not yet finished picking the bed. If he refused to obey
15 the order, as he did at first, he would be guilty of insubordina-
16 tion. If, on the other hand, he complied with the instruction,
17 as he eventually did, he would be cited for leaving good mush-
18 rooms unpicked. According to the essentially uncontradicted tes-
19 timony of Rivera, this is exactly what happened. There is simply
20 no rational explanation for a picker refusing to move from one
21 bed to another once the mushrooms have been picked. Pickers work
22 on a piece rate basis, so they earn nothing by standing around.
23 While Perez testified that he investigated the incident after
24 Rivera complained, it was clear that he was unable to remember any
25 of the facts. Reading the words on the suspension notice did not

26 _____
27 ^{14/}Although suspensions for refusing to re-pick a bed
28 are rare, they are not unprecedented. I cannot find that the
decision to suspend, rather than warn, Rivera is evidence of dis-
crimination.

1 assist him in his effort to reconstruct the situation. Perez
2 testified that one of the reasons that he gave Rivera a 10-day
3 suspension was that the facts relating to the prior suspension
4 were still fresh in his mind. Undoubtedly, the facts of the
5 November 26 warning also played a part. Because the Respondent's
6 business justification defense is so weak in this case, I con-
7 clude that Rivera would not have been suspended if he had not en-
8 gaged in protected Union activities, and that the suspension vio-
9 lated §§1153(a) and (c) of the Act.

10 b. Basilio Banuelos: Banuelos was a Union
11 crew captain at the beginning of the organizing campaign. He was
12 a rather vocal Union supporter and I find that his support was
13 known to Perez and the Company. Because no picker had previously
14 been suspended for leaving a stump bag on a mushroom bed, I con-
15 clude that the General Counsel has made out a prima facie case
16 that the Union's election victory or Banuelos's Union activities
17 were a motivating factor in the decision to suspend him.

18 Although I have found that Banuelos violated
19 Company rules when he placed a stump bag on his mushroom bed,
20 Sosa was not a credible witness on this issue. He testified that
21 he had never before heard of a worker committing this particular
22 offense, when the record establishes that he had signed a warning
23 notice for the same violation in early 1980. No other employee
24 had been suspended for this offense, although several had re-
25 ceived warnings. Those warning notices indicate that it was a
26 second warning. Here, Banuelos received a suspension for a first
27 offense and was threatened by Lopez with discharge. I conclude
28 that Banuelos would not have received the penalty of suspension

1 for this offense had the Company not changed its disciplinary
2 policy after the election to punish employees for the Union vic-
3 tory. The suspension violated §§1153(a) and (c).

4 (c) Suspensions And Warnings Issued To Employees
5 For Engaging In Arguably Concerted Activity:

6 (1) Alfredo Bustos

7 When Bustos signed an authorization card dur-
8 ing working time, he was in violation of Respondent's presump-
9 tively valid no-solicitation rule. However, I find that he was
10 warned because he was engaging in Union activity and would not
11 have been warned had he been engaging in other solicitation with
12 such a minimal impact on production. Signing the cards took only
13 a few minutes. Perez testified about solicitation in the Company
14 offices several months earlier which, according to the record, re-
15 sulted in no discipline to any involved employee, although it was
16 the source of a directive from Brown to Perez to remind workers
17 of the no-solicitation rule. Perez singled out Bustos, the crew
18 captain, and Rodriguez, the puncher, for punishment, while leav-
19 ing the rest of the crew alone. Clearly, a message was conveyed
20 that Union activities were dangerous. The record discloses
21 several incidents in the past several years in which an entire
22 crew refused to obey instructions from a puncher. In each case,
23 the entire crew was disciplined. Here, there was no explanation
24 for the disparate treatment of Bustos and Rodriguez. I conclude
25 that in issuing the warning to Bustos, Respondent violated §§1153
26 (a) and (c) of the Act.

27 (2) The Warning Of September 8 To Luis Mejia

28 The warning to Mejia does not, on its face,

1 appear to violate the Act. However, Vantassal's statement to
2 Mejia that he would not be permitted to leave his work area even
3 during lunch and breaks demonstrates that the warning was in-
4 tended to interfere with Mejia's concerted activities on behalf
5 of the Union even during nonworking time, in violation of §1153
6 (a) of the Act.

7 (3) Discipline Relating To The November 23
8 Work Stoppage

9 Parada and Amalio Garcia organized a peaceful
10 work stoppage to protest changes in working conditions which a
11 number of employees believed were unsafe or would result in less
12 income. Such peaceful protests are protected under the Act.
13 N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962). Parada
14 received a suspension, ostensibly because he flicked the lights
15 on and off in a growing room. The record indicates that punchers
16 often turned the lights on and off to signal employees to take a
17 break. No employee had ever been disciplined for engaging in such
18 a practice. Here, Parada flicked the lights as part of a pre-
19 arranged signal. Respondent's argument that Parada's action con-
20 stituted a safety hazard is specious. He did not leave the lights
21 off, which could have endangered the employees. It is particu-
22 larly ironic that Respondent relies on a safety justification for
23 Parada's suspension when it conceded the validity of the em-
24 ployees' contention that the picking change it had instituted
25 without notice to the Union itself created serious safety pro-
26 blems. I conclude that the Company seized on the light incident
27 as a pretext to punish Parada for engaging in protected concerted
28 activities and that, in so doing, it violated §1153(a) of the Act.

1 I further find that Parada and Garcia were singled out for disci-
2 pline because of their well-known leadership positions in the
3 Union. Perhaps 40 employees participated in the protest, but only
4 Parada and Garcia were disciplined. They were used as examples
5 to other employees not to engage in similar actions. As such,
6 the warning to Garcia and the suspension to Parada constitute
7 violations of §1153(c) as well as §1153(a).

8 The facts relating to the suspension of
9 Inocencio Nunez are largely undisputed. Nunez was suspended for
10 leaving his crew to urge employees in at least two other crews to
11 continue to resist the picking change that was implemented on
12 November 26. Perez had decided on a five-day suspension even be-
13 fore Nunez was called to the office to speak to Perez, Stout, and
14 Lopez, who made it clear to him that Union organizing would not
15 be tolerated.

16 Respondent argues that Nunez's activities were
17 such as to be unprotected under the Act. Nunez, according to
18 Respondent, simply refused to abide by an agreement between the
19 Union representatives and itself to compromise, by agreeing to
20 one of the two original picking changes. While this argument
21 would have great force had Respondent not violated its duty to
22 notify the Union prior to the implementation of changes in working
23 conditions (see Section "C," infra), Respondent chose to bypass
24 the Union. The meeting between Perez and two crews on
25 November 24 did not constitute a formal meeting between the Union
26 and the Company. Apparently, not all the affected employees were
27 even informed of the meeting, and not all the employees were in
28 agreement with the Company's decision. Under these circumstances,

1 I do not find that Nunez's conduct constituted an effort to have
2 employees engage in intermittent work stoppages of the type that
3 have been held to be unprotected under the NLRA. I conclude that
4 Nunez was suspended for engaging in protected, concerted activi-
5 ties in violation of §1153(a) of the Act.

6 (d) Suspensions Issued For Other Reasons:

7 (1) Vicente Prado

8 Prado supported the Union during the election
9 campaign. There is no evidence that his support was known by the
10 Company at the time of his September 5 suspension. However, the
11 timing of Prado's suspension, which occurred on the same day that
12 Mendoza was distributing authorization cards to be signed through-
13 out the plant, suggests that Perez may have sent Sosa to check on
14 Prado's movements in the mistaken belief that he was engaging in
15 Union activities. An employer disciplinary action, made on the
16 basis of such a mistaken belief, may constitute a violation of
17 §1153(c) of the Act. Miranda Mushroom Farm, Inc., 6 ALRB No. 22
18 (1980). I therefore conclude that the General Counsel has esta-
19 blished a prima facie case with respect to Prado's suspensions.

20 I have found that Prado's explanation of his
21 activities on the east side of the plant is not credible. It
22 appears that he was simply taking an unscheduled break to talk to
23 his friends. Even if Perez's mistaken belief that Prado might
24 have been engaging in Union activities was a factor in his deci-
25 sion to suspend Prado, I conclude that an employee taking such an
26 unscheduled break would have been disciplined regardless of such
27 a mistaken belief. Because Prado had received a warning for a
28 similar offense less than a year before, I do not find that the

1 fact that he was suspended, rather than warned, to be evidence of
2 a discriminatory motive. Paragraph 7(bbb) of the Complaint shall
3 be dismissed.

4 Prado's suspension for turning the lights off
5 in a growing room on September 29 is in no way analogous to
6 Parada's suspension for flicking lights on and off. Unless I
7 were to believe that Morado was guilty of entrapment in inducing
8 Prado to turn off the lights, it is clear that Prado's conduct
9 posed a potential safety hazard to other workers. I conclude
10 that Prado was suspended for business reasons and would have been
11 suspended even if he had engaged in no Union activities. Para-
12 graph 7(z) of the Complaint will be dismissed.

13 (2) Abel Meza

14 Meza was one of the Union's most active sup-
15 porters in the plant. It is also clear that his activities were
16 quite visible to the Company. His access to both sides of the
17 plant made him a perfect messenger for the Union. There is no
18 real dispute about whether Meza engaged in the conduct for which
19 he received the four suspensions. The issue is whether he would
20 have been suspended had he not engaged in Union activities. I
21 conclude that none of the suspensions violated the Act. For pur-
22 poses of a brief discussion of the Company's business justifica-
23 tion, I will assume that the General Counsel has made out a prima
24 facie case as to each allegation.

25 Meza did not deny harassing Juana Alba about
26 her sexual relationships. She testified credibly that Meza's ob-
27 noxious conduct reduced her to tears. There is no doubt that
28 Meza did, in fact, interfere with Alba's work. I frankly find the

1 General Counsel's attempt to characterize this incident as an or-
2 dinary "private conversation" between employees to be distasteful.
3 I conclude that Meza would have been suspended for his sexual
4 harassment regardless of any Union activities he had engaged in.
5 Paragraph 7(w) of the Complaint shall be dismissed.

6 Two months later Meza was suspended for leav-
7 ing mushrooms in a growing room for eight hours. He had pre-
8 viously received a warning for the same offense. Meza did not
9 deny that the mushrooms had been left, but attempted to shift res-
10 sponsibility to another employee. The fact that Meza was the only
11 member of the four-man pick-up crew to be suspended for this
12 offense does not give rise to an inference of discriminatory
13 treatment, given the small size of the crew and the fact that
14 another member had received a warning for leaving mushrooms in a
15 growing room. I conclude that Meza would have received this sus-
16 pension even if he had engaged in no Union activities. Paragraph
17 7(x) of the Complaint shall be dismissed.

18 Meza's last two suspensions were for his ad-
19 mitted tardiness. They came after a previous warning for tardi-
20 ness and were in conformity with the Company's consistent prac-
21 tice of progressive discipline for attendance-related offenses.
22 The General Counsel has made no argument that there was any
23 general pattern of discrimination by the Company in such cases.
24 The General Counsel's argument seems to rest on the fact that
25 Meza was late to work soon after he testified in Mendoza's behalf
26 at an Unemployment Insurance hearing. I conclude that Meza
27 would have received the two suspensions for tardiness regardless
28 of this testimony and even if he had engaged in no Union

1 activities. I shall order that Paragraphs 7(qq) and (ww) be dis-
2 missed.

3 (3) Jesus Mariscal

4 Mariscal's Union activities were quite typical
5 of those of a substantial number of the pickers. Evidence of
6 Company knowledge of these activities is slight. The only causal
7 connection between these activities and Mariscal's suspension is
8 that the severity of the penalty may be evidence of a discrimina-
9 tory motive. I will assume, for purposes of discussing this
10 issue, that the General Counsel has made out a prima facie case.

11 Regardless of the merits of Mariscal's conten-
12 tion that he was being mistreated by his puncher, there is no
13 evidence that such mistreatment was connected with Mariscal's
14 Union activities. Rather, Mariscal seemed to be saying that the
15 puncher was treating her relative more favorably than other mem-
16 bers of the crew. Even if Mariscal had been wronged, it did not
17 excuse his subsequent conduct, which was clearly insubordinate and
18 which cost the Company the loss of the mushrooms which Mariscal
19 threw against the wall. While discharge or a 10-day suspension
20 for such conduct is uncommon at Steak Mate, I have no basis on
21 which to compare this incident with others of a similar nature.
22 And there is nothing to suggest that Mariscal's Union activities
23 played a part in the decision of what penalty to impose. I con-
24 clude that Mariscal would have received the same penalty even if
25 he had not engaged in Union activities. Paragraph 7(dd) of the
26 Complaint shall be dismissed.

27 (4) Juana Duran

28 Duran was an extremely vocal, open supporter of

1 the Union. She made sure that the Company was aware of her posi-
2 tion. The level of her commitment, which manifested itself in
3 frequent challenges to positions put forth by Perez, clearly irri-
4 tated Perez. I conclude that the General Counsel has established
5 a strong prima facie case that Duran's Union activities were a
6 motivating factor in the decisions to suspend her.

7 Duran was suspended for three days for failing
8 to call the plant early enough on November 2. Her testimony that
9 Lopez had promised to revoke the suspension if she brought in a
10 statement from her doctor is uncontradicted. When she complied
11 with that request, Lopez retreated to defending the suspension on
12 the grounds that she had not called in. These shifting grounds
13 for the suspension are an indication of discriminatory motive.
14 Duran's testimony that the phone was not answered on November 2
15 is corroborated by the warning notice issued to Manuel Mier. I
16 conclude that Respondent has not established that Duran would
17 have been suspended had it not been for her Union activities and
18 that her suspension violated §§1153(a) and (c) of the Act.

19 The suspension for failing to report an injury
20 immediately is even more suspect. Respondent would never even
21 have learned of the injury had Duran not voluntarily reported it.
22 It is clear that Duran was not even aware that she had hurt her-
23 self at the time she slipped. There is not the slightest evidence
24 that the Company was in any way prejudiced by a delay of 48 hours
25 in reporting the incident. Respondent used Duran's extremely
26 technical violation of its rules as a pretext to punish her for
27 her Union activities. I conclude that this suspension violated
28 §§1153(a) and (c) of the Act.

1 With respect to Duran's five-day suspension
2 for tardiness on December 7, it is undisputed that she arrived
3 late. There is no evidence that Respondent enforced its disci-
4 plinary procedures in cases of tardiness in a discriminatory
5 manner. I conclude that Duran would have been suspended for this
6 offense regardless of her Union activities. Paragraph 7(rr) of
7 the Complaint shall be dismissed.^{15/}

8 4. Discipline To Punchers.

9 (a) The Supervisory Status Of The Punchers:

10 Section 1140.4(j) of the Act defines a supervisor
11 as:

12 . . . any individual having the authority,
13 in the interest of the employer, to hire,
14 transfer, suspend, lay off, recall, pro-
15 mote, discharge, assign, reward, or disci-
16 pline other employees, or the responsibi-
17 lity to direct them, or to adjust their
18 grievances, or effectively to recommend
19 such action, if, in connection with the
20 foregoing, the exercise of such authority
21 is not of a merely routine or clerical
22 nature, but requires the use of indepen-
23 dent judgment.

19 Here, the parties agree that the punchers possess
20 none of the listed authorities, with the possible exception of
21 the authority to assign work or the responsibility to direct em-
22 ployees in their work. But, Respondent contends that the punchers
23 have the power to make effective recommendations concerning disci-
24 pline. Because the definition of supervisor lists the various
25 factors in the disjunctive, possession of any one element is

26 ^{15/}Because I have found that Duran's three-day suspen-
27 sion for unexcused absence on November 2 violated the Act, I will
28 order that this suspension be reduced from five to three days, in
accordance with Respondent's progressive disciplinary policy.

1 sufficient to bring an employee within its terms. Perry's Plants,
2 Inc., 5 ALRB No. 17 (1979).

3 While punchers do assign employees to pick particu-
4 lar beds, no independent judgment is required to carry out this
5 routine task. The Board has held that such a duty does not bring
6 an employee within the definition of a supervisor. Anton
7 Caratan and Sons, 4 ALRB No. 103 (1978).

8 It is clear, however, that punchers are held
9 accountable for the quality of work done by the crew members.
10 They are evaluated, in part, on the basis of picking quality. In
11 connection with this responsibility, punchers have the authority
12 to order an employee to repick a mushroom bed. A substantial num-
13 ber of employees have been disciplined for failure to comply with
14 such orders. While the punchers have no authority to discipline
15 employees, they do report bad work to their supervisors, who then
16 act upon the reports. For example, Mario Rodriguez complained to
17 his superiors about Juventina Chambers's work. The record con-
18 tains many warning notices issued by punchers before the advent
19 of Union activity at the plant. Many of these refer to the
20 puncher as the "foreperson."

21 Some punchers appeared to exercise their authority
22 to a greater extent than others. Priciliano Garcia, Jose
23 Quintanar, Ramon Sosa (prior to his promotion), and Guadalupe
24 Chavez appear to be among those who considered themselves to be
25 supervisory personnel, more closely allied with management than
26 with the pickers. Other punchers appeared to consider themselves
27 to be more like rank-and-file employees than supervisors.

28 Although the General Counsel generally argues that

1 the punchers are not supervisors, it considers Jose Lozano to be
2 a supervisor for purposes of imputing knowledge of Franco's Union
3 activities to Respondent. Similarly, Respondent forgets that it
4 considers punchers to be supervisors when it comes to minimizing
5 the significance of their knowledge of pickers' Union activities.
6 The positions of both parties seem to be dictated by tactical con-
7 siderations as much as by the evidence supporting them.

8 I conclude that, because they effectively recommend
9 discipline and responsibly direct the work of pickers, tasks
10 which require the use of independent judgment, the punchers are
11 supervisors within the meaning of the Act. I am also persuaded
12 by Respondent's argument that it would be difficult to manage the
13 Company's operations with only three or four supervisors for 120
14 pickers.

15 (b) The Suspension Of Mario Rodriguez:

16 Rodriguez was suspended for one day for permitting
17 his crew to engage in Union solicitation during working time. If
18 Rodriguez were not a supervisor, I would find that his suspension
19 violated §1153(c) of the Act, because it resulted from Respon-
20 dent's discriminatory application of its no-solicitation rule.
21 But, unless the General Counsel can establish that the suspension
22 was part of a pattern of conduct by Respondent to interfere with,
23 restrain, or coerce employees in the exercise of their §1152
24 rights, Respondent has not violated §1153(a) by its suspension of
25 Rodriguez. Because there is no evidence that any employees knew
26 of Rodriguez's one-day suspension, and because the employees were
27 able to conduct a vigorous and successful organizing campaign in
28 the plant, I conclude that the suspension did not violate the Act

1 and that Paragraph 7(i) of the Complaint must be dismissed.

2 (c) The Demotion Of Ruben Alcantar:

3 Alcantar was a supporter of the Union, but there is
4 no evidence his support was especially noticeable to the Company.
5 He did not even go into the cafeteria with other employees who
6 were serving unfair labor practice charges on the Company. There
7 is little to distinguish Alcantar's Union activities from those
8 of other punchers who favored the Union. But the weakness of the
9 justifications offered for Alcantar's demotion are some evidence
10 of a discriminatory motive. Still, because Alcantar was in
11 his probationary period, I am unable to find that the General
12 Counsel has established a prima facie case. Of course, since I
13 have concluded that Alcantar was a supervisor, his demotion was
14 not, in any event, violative of §1153(c) of the Act.

15 As there is no evidence to indicate that Alcantar's
16 demotion was part of a plan by Respondent to chill the exercise
17 by nonsupervisory employees of their §1152 rights, I conclude
18 that it was not violative of §1153(a). I shall order that Para-
19 graph 7(cc) of the Complaint be dismissed.

20 C. Section 1153(e) Issues.

21 The Complaint alleges that the Respondent unilaterally
22 changed the duties of the punchers and the pickers without notice
23 to the Union, in violation of §1153(e) of the Act. Respondent
24 denies that it made any changes in the punchers' duties around
25 October 1, but admits that it did not notify the Union about the
26 November 23 picking changes.

27 Because I have concluded that the punchers are supervi-
28 sors, Respondent was under no obligation to notify the Union about

1 changes in their duties. In addition, I conclude that no such
2 changes were made. The record simply does not support Alcantar's
3 testimony that punchers were authorized to issue discipline on
4 their own. In every case of discipline in issue in this proceed-
5 ing, the testimony and the notices indicate that a supervisor
6 above the level of puncher took the action. As was the case be-
7 fore October, the puncher often signed the disciplinary notice
8 and sometimes brought the violation to the attention of his su-
9 perior. I conclude that Paragraph 7(v) of the Complaint must be
10 dismissed.

11 With respect to the picking changes, the Board has held
12 in Highland Ranch and San Clemente Ranch, supra, that an employer
13 is required to notify and give the union an opportunity to bargain
14 about unilateral changes in working conditions in cases where the
15 union has won the representation election but has not yet been
16 certified as the exclusive bargaining representative because of
17 pending objections. In the event that the union is subsequently
18 certified, the employer may be found to be in violation of §1153
19 (e) of the Act for its failure to bargain.

20 Respondent concedes that it would be required to bargain
21 about a substantial change in working conditions, but argues that
22 the changes in picking procedures which it instituted on
23 November 23 were so minor that they were not bargainable matters.
24 I do not agree. One of the two changes posed serious safety pro-
25 blems for the pickers, while the other arguably could have detri-
26 mentally affected their earnings. If the changes were as minor as
27 the Respondent suggests, the employees would not have staged a
28 work stoppage to protest them. The changes involved here were

1 much more substantial than those made by the employer in Little
2 Rock Downtowner, Inc., 148 NLRB No. 78 (1964), the principal case
3 cited by Respondent. I conclude that the Respondent violated
4 §§1153(a) and (e) of the Act by unilaterally changing its picking
5 procedures on November 23 and 26 without providing notice and an
6 opportunity to bargain about them to the Union.

7 THE REMEDY

8 Having found that Respondent has engaged in certain un-
9 fair labor practices within the meaning of Sections 1153(a), (c),
10 and (e) of the Act, I shall recommend that it cease and desist
11 therefrom and take certain affirmative action designed to effec-
12 tuate the policies of the Act.

13 I shall recommend that Respondent be ordered to offer
14 immediate reinstatement to their former or equivalent jobs to
15 Refugio Franco and Jose Mendoza and to make them whole by paying
16 to each of them a sum of money equal to the wages they would have
17 earned but for Respondent's unlawful discharge of them, less their
18 respective net earnings, together with interest at the rate of 7%
19 per annum.

20 I shall further recommend that Respondent make whole the
21 following employees for any losses in pay they suffered as a result
22 of their unlawful suspensions: Basilio Banuelos, Juventina Chambers,
23 Juana Duran, Salvador Garcia, Alfredo Hernandez, Inocencio Nunez,
24 Rogelio Parada, Miguel Rivera, and Antonio Tovar. The disciplinary
25 records relating to these unlawful suspensions shall be expunged
26 from Respondent's personnel files and shall be disregarded in consi-
27 dering any future disciplinary action. The warnings issued to Luis
28 Mejia, Amalio Garcia, and Alfredo Bustos shall also be

1 expunged and not used for any purpose by Respondent.

2 Finally, I shall order that a Notice to Employees be
3 read, posted, and mailed in accordance with Board policy.

4 Upon the basis of the entire record, the findings of
5 fact and conclusions of law, and pursuant to §1160.3 of the Act,
6 I hereby issue the following recommended:

7 ORDER

8 Respondent, Steak Mate, Inc., its officers, agents, re-
9 presentatives, successors, and assigns, shall:

10 1. Cease and desist from:

11 (a) Discharging, suspending, issuing warning
12 notices, or otherwise discriminating against any agricultural em-
13 ployee for engaging in Union or other protected concerted acti-
14 vity.

15 (b) Interfering with, restraining, or coercing
16 agricultural employees desiring to communicate with Union or-
17 ganizers on its property pursuant to 8 Cal. Admin. Code §20900,
18 et seq.

19 (c) Changing its mushroom picking practices or any
20 other term or condition of employment without first notifying and
21 affording the UFW a reasonable opportunity to bargain with res-
22 pect to such changes.

23 (d) Threatening its agricultural employees with re-
24 prisals for supporting the UFW.

25 (e) In any like or related manner interfering with,
26 restraining, or coercing agricultural employees in the exercise of
27 those rights guaranteed by Labor Code §1152.

28 2. Take the following affirmative actions which are

1 deemed necessary to effectuate the policies of the Act:

2 (a) Immediately offer to Refugio Franco and Jose
3 Mendoza full reinstatement to their former jobs or equivalent em-
4 ployment, without prejudice to their seniority or other rights or
5 privileges.

6 (b) Reimburse the following employees for all wage
7 and other economic losses they have suffered as a result of Res-
8 pondent's discrimination against them. Such losses shall be com-
9 puted according to the formula stated in J & L Farms, 6 ALRB No.
10 43 (1980). Interest, computed at the rate of 7% per annum, shall
11 be added to the net back pay to be paid to each of the following
12 persons:

13	Basilio Banuelos	Jose Mendoza
14	Juventina Chambers	Inocencio Nunez
15	Juana Duran	Rogelio Parada
16	Refugio Franco	Miguel Rivera
17	Salvador Garcia	Antonio Tovar
18	Alfredo Hernandez	

19 (c) Expunge from its records all notations concern-
20 ing the disciplinary actions taken against the above-named em-
21 ployees and Alfredo Bustos, Amalio Garcia, and Luis Mejia, which
22 have been found discriminatory in the preceding Decision. No
23 such disciplinary actions shall be taken into account in making
24 any determination with respect to any future discipline to the
25 above-named employees.

26 (d) Preserve and, upon request, make available to
27 this Board and its agents, for examination and copying, all pay-
28 roll records, social security payment records, time cards, per-
sonnel records and reports, and all other records relevant and
necessary to a determination, by the Regional Director, of the

1 back pay period and the amount of back pay due under the terms of
2 this Order.

3 (e) Upon request, meet and bargain with the UFW
4 concerning the unilateral change in picking mushrooms made in
5 November, 1980.

6 (f) Sign the Notice to Employees attached hereto.
7 After its translation by a Board agent into Spanish and any other
8 appropriate language(s), Respondent shall thereafter reproduce
9 sufficient copies in each language for the purposes set forth
10 hereinafter.

11 (g) Post copies of the attached Notice for 60 days
12 at conspicuous places on its premises, the periods and places of
13 posting to be determined by the Regional Director. Respondent
14 shall exercise due care to replace any Notice which has been al-
15 tered, defaced, covered, or removed.

16 (h) Mail copies of the attached Notice in Spanish
17 and any other appropriate language(s) within 30 days after the
18 date of issuance of this Order, to all employees employed at any
19 time from July 1, 1980, up to the date of this mailing.

20 (i) Arrange for a representative of Respondent or
21 a Board agent to read the attached Notice in Spanish and any other
22 appropriate language(s) to the assembled employees of Respondent
23 on Company time. The reading or readings shall be at such times
24 and places as are specified by the Regional Director. Following
25 the reading, the Board agent shall be given the opportunity, out-
26 side the presence of supervisors and management, to answer any
27 questions employees may have concerning the Notice or their rights
28 under the Act. The Regional Director shall determine a reasonable

NOTICE TO EMPLOYEES

1
2 After a hearing in which each side had an opportunity
3 to present evidence, the Agricultural Labor Relations Board has
4 found that we violated the law by discharging, suspending, and
5 warning a number of our employees because they engaged in activity
6 protected under the Agricultural Labor Relations Act. The Board
7 also found that we violated the law by interfering with your
8 rights to communicate with UFW organizers who were on our prop-
erty to take lawful access; by threatening employees with retri-
butions if the UFW won the election; and by refusing to notify and
consult with the UFW about the changes in mushroom picking we
made in November, 1980. The Board has ordered us to post this
Notice and to mail it to those who worked for the Company between
July 1, 1980, and the present.

9 We will do what the Board has ordered, and also tell
10 you that the Agricultural Labor Relations Act is a law of the
State of California which gives farm workers these rights:

- 11 1. To organize themselves.
- 12 2. To form, join, or help unions.
- 13 3. To choose, by secret-ballot election, a
14 union to represent them in bargaining
with their employer.
- 15 4. To act together with other workers to
16 try to get a contract or to help and
protect one another.
- 17 5. To decide not to do any of these things.

18 Especially:

19 WE WILL NOT discharge, suspend, warn, or otherwise dis-
20 criminate against any employee because he or she exercised these
rights.

21 WE WILL NOT interfere with your right to communicate
22 with any Union organizer on our property in compliance with the
Board's access rules.

23 WE WILL NOT make threats of reprisal against you be-
24 cause you support a union.

25 WE WILL NOT make any changes in your working conditions
26 without first notifying the UFW and offering to bargain with it as
your representative.

27 The Board has found that we discriminated against
28 Refugio Franco and Jose Mendoza by discharging them because they
engaged in activity protected under the law. The Board has also
found that we warned Alfredo Bustos, Amalio Garcia, and Luis Mejia,

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and suspended the following employees for the same reason:

Basilio Banuelos	Inocencio Nunez
Juventina Chambers	Rogelio Parada
Juana Duran	Miguel Rivera
Salvador Garcia	Antonio Tovar
Alfredo Hernandez	

WE WILL reinstate Refugio Franco and Jose Mendoza to their former jobs, or substantially equivalent ones, and reimburse them and the above-named employees who we discriminatorily suspended, for any loss of pay and other money losses they suffered as a result of the discrimination, plus 7% interest per annum.

Dated:

STEAK MATE, INC.

By _____

THIS IS AN OFFICIAL DOCUMENT OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA.

DO NOT REMOVE OR MUTILATE