Stockton, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRIPLE E PRODUCE CORP., a Delaware Corporation, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 94-CE-137-VI 94-CE-150-VI 94-CS-153-VI 94-CE-166-VI 94-CE-136-VI 94-CE-139-VI 23 ALRB No. 8 (July 17, 1997)

DECISION AND ORDER[1]

On December 19, 1996, Administrative Law Judge (ALJ) Barbara D. Moore issued the attached decision in which she found that Triple E Produce Corp., a Delaware Corporation (Triple E, Respondent or Employer) violated sections 1153(a),(c) and (e)[2] of the Agricultural Labor Relations Act (ALRA or Act) by refusing timely to provide requested information for collective bargaining, surveilling employees, and discharging an employee because of his support for the United Farm Workers of America, AFL-CIO (UFW or Union). The ALJ dismissed the portion of the complaint alleging that the Employer had attempted to bypass the Union and deal directly with employees about wages. The Employer and the UFW timely filed exceptions to the ALJ decision, along with

[1] All decisions of the Agricultural Labor Relations Board, in their entirety, are issued as precedent for future cases. (Gov. Code § 11425.60.)

[2] Unless otherwise indicated herein, all section references are to the California Labor Code, section 1140 et seq.

supporting briefs. General Counsel filed a reply to the Employer's exceptions, and the Employer filed a reply to the UFW's exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the attached decision of the ALJ in light of the record and the exceptions and briefs submitted by the parties, and affirms the rulings, findings and recommendations of the ALJ only to the extent consistent herewith, and adopts her recommended remedial order as modified herein.

Requests for Information

We affirm the ALJ's conclusion that in numerous instances, Triple E refused to bargain in good faith, in violation of section 1153 (e), by failing to provide the UFW with information requested for bargaining. We make no finding regarding Triple E's contention that paragraph 17 of the Second Amended Complaint was time-barred by section 1160.2, because we find that the same information request underlying paragraph 17 was renewed by the UFW orally during negotiations, and that the renewed request is reasonably encompassed within the timely-filed charges.[3]

Alleged Surveillance

During the summer of 1994, the UFW held several rallies for Triple E workers and workers from two other tomato companies

[3] Thus, we also find it unnecessary to reach the issue of whether the Employer's refusal to provide the information encompassed in paragraph 17 constituted a "continuing" violation not subject to the six months' limitations period.

in a public park located near the Sierra Vista housing complex in Stockton, California. On two occasions Triple E's Field Manager Tom Guido and Supervisor Roberto Cardenas were present across the street from the park during the evenings when the rallies were taking place. The first meeting was held inside a gym in the park. The second meeting, about two weeks later, was held outside in the park.

Guido testified that during the summer of 1994 he would meet with his foreman Cardenas several times a week at the Sierra Vista complex to go over plans for the next day's harvest. Cardenas had family and friends living in the complex whom he would visit every day when he finished the harvesting. The two men would meet on the street across from the park and would sit or stand near their trucks while they discussed business, usually for about half an hour. Guido testified that during one evening's visit he observed Union activity at a rally about 300 to 400 feet away. He acknowledged that he was present during a second rally for perhaps as long as. an hour. He claimed that on both occasions he and Cardenas simply conducted their business and paid no attention to the rally, although he sometimes looked over at the people in the park.

Cardenas testified that he had been meeting with Guido at the Sierra Vista project for all of the six or seven years he had been Guide's assistant. He testified that he recognized some of the workers who were going to one of the rallies and he talked

to them. He denied waving or making any gestures at anyone at the meeting, saying he and Guido simply conducted their business.

UFW organizer Luis Alberto Rivera testified that Guido and Cardenas were across the street from the first rally, about 100 to 200 hundred feet away, and were talking, laughing, and gesturing to workers who were coming to the rally. Rivera stated that he also saw Guido and Cardenas at the second meeting, and he claimed that Guido was calling to people, laughing, and making fun of them. UFW representative Rudolph Chavez Medina testified that Guido talked to workers who were on their way to the meetings and, on one occasion, waved his arms and mocked the proceedings, saying, "Okay, okay, come on, we're going to have a meeting."

UFW representative Dolores Huerta claimed that Guido watched both meetings with a sort of smile or smirk on his face. When she addressed him over a microphone at the second meeting, saying he knew he was not supposed to be there, she said he responded by throwing up his hands.

The ALJ found that Guido and Cardenas had a legitimate purpose in meeting near the park during the rallies, and that their mere presence did not establish a violation of law, nor did the fact that they looked over toward workers or spoke to workers who came up to them. However, she found that the supervisors' conduct (in particular, Guido's gestures to the workers to come on to the meeting, imitating the Union organizers) communicated to workers that they were being observed, and reasonably tended

to create the impression of surveillance. Their conduct violated the ALRA, she concluded, because creating the impression among employees that they are under surveillance while engaged in union activity has a chilling effect on the freedom to engage in such activity.

We overrule the ALJ's conclusion because we find that the facts of this case fall more within the range of cases where no violations have been found than cases in which supervisors have engaged in unlawful surveillance. Cases where violations have been found generally involve instances of deliberate, continuous scrutiny of employee activity by supervisors (see, e.g., Impact Industries . Inc. (1987) 285 NLRB 5 [128 LRRM 1.1.22); Yukon Manufacturing Company (1993) 310 NLRB 324 [144 LRRM 1030]; W.H. Scott d/b/a Scott's Wood Products (1979) 242 NLRB 1193 [101 LRRM 1449]), often with a purposeful intention of intimidating or coercing employees (e.g., Health Care and Retirement Corp. of America (1992) 307 NLRB 152 [141 LRRM 1138]). Cases in which violations have been found usually involve supervisor conduct occurring in close proximity to the observed union activity, close enough that it interferes with the activity (e.g., Carry Companies of Illinois. Inc. (1993) 311 NLRB 1058 [144 LRRM 1003], modified on other grounds, Carry Companies v. NLRB (7th Cir. 1994) 30 F.3d 922 [146 LRRM 3069], in which supervisors stood two to three feet from the union representatives).

The test for determining whether an employer has created an impression of surveillance is whether the employees

could reasonably assume that their union activities had been placed under surveillance. Flexsteel industries, Inc. (1993) 311 NLRB 257 [144 LRRM 1203].) An employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. (Emerson Electric Co. (1988) 237 NLRB 1065 [127 LRRM 1147].) Such conduct constitutes surveillance because it leads to the reasonable conclusion on the part of employees that the employer is threatening reprisals if they support the union. (Hendrix Manufacturing Co. v. NLRB (5th Cir. 1963) 321 F.2d 100 [53 LRRM 2831].)

In the instant case, Guido and Cardenas were not close enough to the employees' union activity to intimidate employees or even to overhear their conversations. The two supervisors had a legitimate purpose for being where they were, and the record does not establish that they remained near the Union gathering for any significant amount of time after their legitimate business was done. Although they observed the activities in the park at times, and even talked to some of the employees as they passed by on their way to the meetings, nothing about their conduct would suggest to a reasonable person that the Employer was closely monitoring the activity or was threatening reprisals for employee support of the Union.

The only item of conduct that could be viewed as untoward is Guido's gesture imitating the Union organizers, urging the employees to come on to the meeting. However, this one gesture of mockery is not sufficient to prove that the

Employer engaged in unlawful surveillance. It is, at most, a de minimis interference that does not justify the imposition of a remedy. (See Mitch Knego (1977) 3 ALRB No. 32.)

For the above .reasons, we dismiss the paragraphs of the complaint alleging unlawful surveillance. Alleged Discharge of Jesus Figueroa

Jesus Figueroa was a tomato picker who had worked in a labor contractor crew supervised by Aliseo Sanchez for three to five years. On July 29, 1993, according to supervisor Jesus Valencia, Figueroa was picking "bad" tomatoes which did not meet Triple E's standards for size, shape, and color. Both Valencia and supervisor Robert Cardenas testified that they had seen Figueroa picking bad tomatoes on other occasions, and Cardenas had counseled Figueroa two or three times about the problem. Valencia described Figueroa as not a very good worker because he had a drinking problem. Cardenas testified that for several years, Figueroa had been coming to work drunk most of the time, and that he had told Figueroa several times not to pick in that condition.

Both Valencia and Cardenas testified that Figueroa was drunk on July 29, 1993. When Valencia approached him to see how he was doing, he saw that the tomatoes in Figueroa's bucket were small, deformed, and too red. He told Figueroa that if he was going to pick, he should pick right. Valencia then went over to the tractor-trailer where workers brought their buckets of tomatoes to dump them into the bins. At that point, he became

involved in an argument with Luis Rivera, a UFW organizer who was taking access. Rivera complained that another worker had not been credited for a bucket of tomatoes he turned in, and he told Valencia that if he didn't like the tomatoes that were picked, he should throw them away rather than putting them in the truck. When Rivera began to argue with Valencia, Figueroa came over to support Rivera. Figueroa yelled "Long live the Union" and similar things to the workers, and the workers responded in kind. Guido then arrived, told Valencia to calm down and told Rivera to leave, and walked Figueroa back to his row, where Figueroa worked the rest of the day.

Figueroa testified that after that day he didn't want to return to work because "the people" told him that Guido was very angry and would not let him work anymore. About four days later, he happened to speak to Luis Rivera who advised him to go and ask for work. The next day, he went to ask Aliseo Sarichez for the card he needed to be punched to credit him for buckets-picked, but Sanchez told him he could not work.

According to Sanchez, when he first saw Figueroa that morning, Figueroa was already in the field and starting to pick. Figueroa had a beer and was walking as if he were drunk. Sanchez told Figueroa he could not work in that condition because it was dangerous, and he might hurt himself. Since that day when he told Figueroa to leave because he was drunk, Sanchez testified, Figueroa had never come to him and asked for work.

The ALJ found that Figueroa's support of Rivera's protest on behalf of the workers, as well as his invitation to co-workers to express their vocal support, constituted protected concerted union activity. Since Guido and Valencia were present, the ALJ found, Respondent had knowledge of the activity. The ALJ also found a causal connection between Figueroa's protected conduct on the 29th and Sanchez' refusal to let him return to work when he presented himself, because of the timing of the incident and because she found no justifiable reason for Sanchez' action. The ALJ concluded that General Counsel had established a prima facie case that Figueroa's union activity was a motivating factor in the Employer's decision to discharge Figueroa.

In rebuttal, the Employer asserted that Sanchez did not allow Figueroa to return to work because he was drunk, and Sanchez was concerned that Figueroa would hurt himself. However, the ALJ found that even if Figueroa was intoxicated that day, he had been permitted to work in that condition numerous times over the years; thus, she reasoned, Sanchez[1] sudden concern and enforcement of the no-drinking policy was unconvincing and pretextual. The ALJ also rejected the Employer's argument that Figueroa was not discharged but only denied work for that day because he was drunk. Because Figueroa had not previously been denied work for being drunk, she found, he was justified in inferring that he was discharged. Thus, the ALJ concluded that Triple E had violated section 1153(c) by discharging Figueroa.

We agree with, the ALJ that Figueroa engaged in protected concerted activity on July 29, 1993 and that Respondent had knowledge of the activity. However, we find that General Counsel failed to establish a causal relationship between Figueroa's protected activity and the Employer's adverse action. Further, we find that Figueroa was not discharged on the day he returned to work, but was simply told he could not continue to work on that day.

Cardenas and Valencia were both aware that Figueroa had a drinking problem that affected his work, and Cardenas had told Figueroa several times not to pick in that condition. Cardenas had also told Valencia not to let Figueroa pick when he was intoxicated. when the crew started to work on the 29th, Valencia observed that Figueroa was so drunk that instead of starting to work right away, he stayed sitting on some buckets and drinking beer. When he did start to pick, his tomatoes were not of good quality. When Valencia went to see how Figueroa was doing and saw that he was picking bad tomatoes, he told Figueroa that if he was going to pick, he should pick right. Thus, it was obvious that Figueroa had a drinking problem[4] that was interfering with his work, that Triple E's supervisors were aware of the problem,

[4] It was inappropriate for Respondent to argue repeatedly in its briefs that Figueroa was treated for alcoholism in Mexico, since all evidence on this matter was excluded by the ALJ as inadmissible hearsay. In reaching our conclusions herein, we have not considered any evidence or arguments offered by Respondent on the claimed treatment.

and that they had taken steps on several occasions prior to his protected activity to address the problem.

Further, the Employer did not deal with Figueroa' s problem on his final day of work in any way that was inconsistent with how the Employer had dealt with it before. When Sanchez first observed Figueroa, he had a beer and could hardly walk because he was so drunk. Sanchez told Figueroa he could not work in that condition because it was dangerous. Sanchez' behavior is not inconsistent with Cardenas' prior behavior in telling Figueroa not to pick while he was drunk. Even if Figueroa had previously been allowed to continue working when he had been drinking, it is normal for a supervisor to make a judgment at some point that an employee is simply too drunk to be permitted to continue working. Sanchez did not tell Figueroa he was fired; rather, he simply told him he could not continue to work in that condition. Further, nothing Sanchez said could reasonably be understood to convey a message to Figueroa that he was fired.

In sum, we find that the evidence does not support a finding that there was a causal connection between Figueroa's protected concerted activity and Sanchez' decision not to let him continue working on his last day. Rather, the evidence is consistent with a finding that the reason Sanchez told Figueroa he could not continue working that day was that he was too drunk. We also find that no reasonable employee in Figueroa's position would have believed that he was discharged, but only that he could not continue to work in his intoxicated condition.

Therefore, we conclude that General Counsel failed to establish a prima facie case of discriminatory discharge, and we dismiss the related allegations from the complaint.

Remedy

In its exceptions brief, the UFW took exception to the ALJ's failure to award a makewhole remedy for Triple E's violations of 'section 1153(e) in refusing to provide requested information for bargaining. The Union asserted that the ALJ should not have denied makewhole without discussion, simply because General Counsel did not request the remedy in its complaint. Further, the Union argues, makewhole is appropriate in this case because Respondent outright refused to provide some information, it delayed its responses for long periods of time, and its reasons for not providing information were legally untenable and clearly unreasonable.

We affirm the ALJ's conclusion that the appropriate remedy for failure to provide bargaining information is a cease and desist order and an order that the Employer provide the requested information to the exclusive bargaining representative of its employees. Bargaining makewhole is not the usual or appropriate remedy for a failure to provide bargaining information. Rather, the makewhole remedy is generally reserved for cases in which the employer is found to have engaged in an overall course of refusing to bargain or surface bargaining. (Holtville Farms. Inc. (1984) 10 ALRB No. 49.) The UFW has not demonstrated any special circumstances that would justify an

award of makewhole in this case. Therefore, we affirm the decision of the ALJ not to award a makewhole remedy.

Alleged Bias of ALJ

At the hearing, Respondent orally moved for the ALJ to disqualify herself because of Respondent's belief that she had exhibited a pro-UFW bias in prior cases by consistently ruling in favor of the UFW and against employers in her legal and factual determinations. The ALJ denied Respondent's motion at the hearing, and reaffirmed her ruling in her written decision. Respondent renewed its claims in its exceptions brief and sought dismissal of the complaint in its entirety.

The law is clear that "numerous and continuous rulings against a litigant, even when erroneous, form no ground for a charge of bias or prejudice." (Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 795-796.) National Labor Relations Board case law, as well, clearly holds that statistical arguments concerning the number of rulings an ALJ has made against a litigant (or class of litigants) do not tend to establish bias.

In Fieldcrest Cannon. Inc. v. NLRB (4th Cir. 1996) 97 F.3d 665 [153 LRRM 2385], the employer argued that the ALJ had credited all of the general counsel's witnesses and none of its own. It also argued that the ALJ's prior record in other cases indicated a bias in favor of labor unions, and cited statistical evidence showing that the ALJ had ruled against employers on 550 out of 589 total allegations. However, the court declined to

evaluate the ALJ's impartiality on the basis of an overall statistical balance of whose witnesses received credit and whose did not. To evaluate a judge's impartiality by the percentage of times he or she rules on a given side of a case

> would amount to judging a case by some mechanical formula rather than the merits of the evidence. . . .To evaluate an ALJ's impartiality in this way amounts to judging his record by mere result or reputation. In reality, such statistics tell us little or nothing. . . .After all, such statistics do not inform us whether "a credibility determination is unreasonable, contradicts other findings of fact, or is 'based on an inadequate reason or no reason at all.'" (Citations omitted.) (Fieldcrest Cannon, Inc. v. NLRB, 97 F.3d 65, 68-69.)

Triple E makes no argument regarding the ALJ's alleged bias other than its claim that she has statistically ruled more often in favor of unions and against employers in numerous cases. Such *a* showing does not demonstrate bias or the appearance of bias. Moreover, Respondent has not shown, that the ALJ's rulings and findings in the instant case were based on bias rather than her impartial evaluation of the evidence. Respondent's request for dismissal of the complaint on the basis of alleged ALJ bias is therefore denied.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (ALRB) hereby orders that Triple E Produce Corp. (Respondent), a Delaware Corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith, as defined in Labor Code section 1155.2 (a), with, the United Farm Workers of America, AFL-CIO (UFW) as the exclusive collective bargaining representative of Respondent's agricultural employees in the State of California;

(b) Failing or refusing to provide to the UFW, at its request, information relevant to collective bargaining;

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employees 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) Upon request, provide forthwith all information which the UFW has requested as the exclusive bargaining representative of its agricultural employees;

(b) Sign the attached Notice to Employees and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth in the Board's order;

(c) Mail copies of the Notice, in all appropriate languages, within 30 days after the date of issuance of the Board's order to all agricultural employees employed by Respondent at any time from July 5, 1994 until July 4, 1995;

(d) Post copies of the 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;

(e) Arrange for a Board agent to distribute and read the 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 non-hourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period;

(f) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this matter;

(g) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season;

(h) 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: July 17, 1997

MICHAEL B. STOKER, CHAIRMAN

IVONNE RAMOS RICHARDSON, MEMBER

TRICE J. HARVEY, MEMBER

MEMBER FRICK, CONCURRING:

I concur in the findings and conclusions of my colleagues, with the exception of the analysis applied to the requests for information. While I also would affirm the ALJ's conclusion that Triple E violated section 1153(e) by failing to provide relevant information, I believe that it is necessary to address both the timeliness of the allegation in paragraph 17 of the Second Amended Complaint and the propriety of applying the continuing violation doctrine.

As a fundamental matter, there is no question that the six month statute of limitations prevents the finding of any violation for the failure to satisfy the 1993 request for information referenced in paragraph 17, since the failure to respond to that request occurred more than six months from the

filing of the unfair labor practice charge. (Local Lodge No. 1424 v. NLRB (1960) 362 U.S. 411 [80 S.Ct. 822].) The essential question presented to the Board is whether the failure to file a charge within six months of the initial denial of the request bars the finding of a violation with regard to the later oral request for the same information, which did occur within six months of the charge. This is a classic example of a situation which implicates the continuing violation doctrine. A continuing violation is one which, though initially occurring outside the six month limitations period, is shown to have continued into the six month period prior to the filing of the charge; that is, "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices." (Ibid.: Gourmet Harvesting And Packing. Inc., and Gourmet Farms (1988) 14 ALRB No. 9.)

In other words, the issue of continuing violations arises where, as here, no charge is filed within 6 months of the initial occurrence of the conduct at issue but there is a recurrence or renewal of the same conduct within 6 months of when a charge is eventually filed. Thus, the issue is whether a charge may be timely filed based on the recurrence or renewal, or whether the failure to file a charge within 6 months of the initial occurrence waives the right to file a charge based on a later manifestation of the same conduct. In the instant case, I would find that the ALJ was correct in concluding that NLRB precedent supports application of the continuing violation

doctrine to cases such as this involving requests for information. (See, e.g., Ocean Systems. Inc. (1977) 227 NLRB 1593.) The circumstances here are confused by the fact that, though the oral information request was on its face independent, the Employer had earlier failed to provide the same information. While it is not completely unreasonable to view the later oral request as wholly unrelated to the 1993 request, in light of the fact that the oral request sought the same information as the initial, time-barred request, I believe it is both appropriate and necessary to apply the continuing violation doctrine in order to find a violation with regard to the oral request. Dated: July-17, 1997

LINDA A. FRICK, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (Board), the General Counsel of the Board issued a complaint that alleged that we, Triple E Produce Corp., a Delaware Corporation, had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by failing and refusing to provide the United Farm Workers of America, AFL-CIO (Union) with information it requested for collective bargaining.

The Board has told us to post and publish this Notice.

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 a labor organization or bargaining representative (union);
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
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.

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 fail or refuse to provide the Union with relevant information it requests for collective bargaining.

DATED: TRIPLE E. PRODUCE CORP.

By _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite H, Visalia, CA 93291. The telephone number is (209) 627-0995.

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

Triple E Produce Corp.
(UFW)

23 ALRB No. 8
Case No. 94-CE-137-VI, et al

ALJ Decision

The ALJ found that the employer had unlawfully refused to provide bargaining information requested by the union,- engaged in unlawful surveillance of employees; and discriminatorily discharged an employee for supporting the union. The ALJ recommended dismissal of the allegation that the employer had dealt directly with employees about wages. The ALJ declined to award a bargaining makewhole remedy, which was not requested in General Counsel's complaint.

Board Decision

The Board affirmed the ALJ's finding that the employer had unlawfully refused to provide relevant information requested by the union for bargaining. The Board affirmed the ALJ's denial of a makewhole remedy, noting that the remedy is generally reserved for cases involving an overall refusal to bargain or surface bargaining which was not involved in this case. The Board issued a cease-and-desist order and an order that the employer provide the requested information. The Board affirmed the ALJ's finding that the employer did not attempt to deal directly with employees about wages.

The Board overruled the ALJ's finding of unlawful surveillance, since it found that two of the employer's supervisors had a legitimate purpose in being in the vicinity of union activity that was taking place in a public park, and that their conduct would not have suggested to a reasonable person that the employees' conduct was under surveillance. The Board overruled the ALJ's finding that the employer had unlawfully discharged one. employee, since it concluded that the employee had not been discharged but had simply been told that he could not continue to work while he was intoxicated.

The Board denied the employer's motion to disqualify the ALJ for bias, finding that no bias or appearance of bias had been shown.

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STATE OF CALIFORNIA

AGRICULTURAL LABOUR RELATIONS BOARD

In The Matter Of: TRIPLE E PRODUCE CORP., a Delaware Corporation, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO., Charging Party,	}	Case Nos. 94-CE-137-VI 94-CE-150-VI 94-C2-153-VI 94-CE-1S6-VI 94-CE-196-VI 94-CE-189-VI

Appearances :

Ted Scott
Spencer Hipp
Littler, Mendelson, Fastiff, Tichy
&. Mathiason.
for Respondent

Dolores Huerta
Secretary/Treasurer
United Farm Workers of America, AFL-CIO
for Intervene r

Victor Salazar
Visalia ALRS Regional Office
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MCCRZ, Administrative Law Judge: This case was heard by me on July 15-19 and 23-27, 1996, in Stockton, California.[1] It arises from six charges filed by the United Farm Workers of America, ATL-CIO ("UFW" or "Union") with the Agricultural Labor Relations Board ("ALRB" or "Board") against Respondent Triple E Produce Corporation ("Respondent," "Triple E" or "Company") . The hearing proceeded on the Second Amended Consolidated Complaint ("Complaint") which issued on June 27, 1996.

The Complaint alleges Respondent violated sections 1153(a) , (c) and (e) of the Act by: (1) refusing to timely provide requested information for bargaining,(2) surveiiling employees,(3) attempting to bypass the Union and deal directly with employees about wages, and (4) discharging Jesus Figueroa for

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[1]At the hearing, Respondent filed a request for me to disqualify myself, asserting that in various cases I have made legal and factual findings adverse to employers which in Respondent's opinion were insupportable and demonstrate a bias against employers. Assuming arcmendo that the decisions contain more legal and factual findings against one party than another, the law is clear that even "...numerous and continuous rulings against a litigant [which are] erroneous, form no ground for a charge of bias or prejudice," *(Andrews v. Agricultural Labor* Relations *Board. (Andrews)* (1981) 28 Cal. 3d 781.) Instead, the appropriate recourse is to seek review of any such findings or rulings, (Id. p. 795.) The National Labor Relations Board (NLRB or national board) recently reaffirmed its refusal to evaluate the impartiality of an Administrative Law Judge(ALJ) on the basis argued by Respondent here because such numbers "do not tell us whether the ALJ decided individual cases correctly...." *(Fleldcrest Cannon Inc.* v. *NLRB* (4th Cir. 1996) 97 F.3d 65 [153 LRRM 2385]. I reaffirm my ruling at hearing and deny Respondent's request.

supporting the Union,[3] Respondent filed an Answer[3] denying that it violated the law in any way and asserting that Figueroa was not discharged but was not allowed to work on one day because he was drunk, and never returned to ask for work again.[4]

The Union intervened in the proceedings, and all parties were represented at the hearing[5] and filed post-hearing briefs. Upon the entire record, including my observation of the witnesses, and the parties' briefs, I make the following findings of fact and conclusions of law.[6]

Immediately after the Complaint was amended to add paragraph 17, Respondent moved to strike it asserting the allegation.

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[2]At hearing, I granted General Counsel's motion to dismiss paragraph 15 of the Complaint for lack of proof.

[3]Therein, Respondent asserted an affirmative defense that the Union committed a fraud on the ALRB and is guilty of unclean hands because it filed the instant unfair labor practice charges knowing they were false. This defense is struck for lack of proof.

[4]Figueroa testified he was working for Respondent in another labor contractor crew at the time of the hearing. It is not clear whether Respondent was aware of this fact.

[5]The Union was not represented by legal counsel at the hearing. Instead, Dolores Huerta, Secretary/Treasurer of the UFW, who was also a witness, represented the Union. She was frequently out of the hearing room, and I have noted where I observed she heard witnesses testify about the same events about which she testified.

[6]Citations to the official hearing transcript are denoted by the page number in parentheses. General Counsel's and Respondent's exhibits are identified as GCX number and RX number, respectively.

therein is not supper/red by any unfair labor practice charge and is time-barred by section 1160.2 of the Agricultural Labor Relations Act ("ALBA" or "Act")[7] but did not cite any legal authority for its position. General Counsel, citing *Richard A. Glass Company, Inc. (Glass)* (1988) 14 ALRB No. 8, responded the refusal to provide information was a continuing violation and not time-barred, and, in any event, conduct outside the six months' period could be considered to explain subsequent unlawful conduct within the six months' time frame.

At hearing, I ruled *Glass* was not dispositive since there, unlike here, the defense had not been timely raised.[8] However, I reserved final ruling en Respondent's motion pending full legal argument in the briefs because of precedent under the National Labor Relations Act ("NLRA") suggesting Respondent was under a continuing duty to provide information.[9]

[7]A11 code section references hereafter are to the California Labor Code unless otherwise indicated.

[8]For the same reason, *AS-H-NE Farms* (1980) *6* ALRB No. 9, cited in Glass is inapplicable here. *Ruline Nurserv Co. v. Agricultural Labor Relations Board* (1985) 169 C.A.3d 247, also cited in Glass is inapplicable since it turns on lack of notice.

[9]See, *The ChesaDeaks and Potomac Telephone* Company (2d Cir. 1982) 687 F.2d 633; National *Labor Relations Board v. The Electric Furnace Co.* (6th Cir. 1964) 327 F.2d 373. Respondent cites the latter case as clearly requiring the dismissal it seeks. To the contrary/ the court specifically left open whether a refusal to provide information could be a continuing violation and found only that in the circumstances of that case, where there was only a single request which occurred well outside the six month period and no subsequent requests, there was no

With, regard to Respondent's first argument, under both the NLRA and the ALBA, the General Counsel in issuing a complaint is not restricted to the precise allegations in a charge but may allege additional unlawful conduct, whether it occurred prior to or subsequent to the filing of the charge, so long as such conduct is sufficiently related to the charged conduct. *(Ruling Nursery Co.* v. *Agricultural Labor Relations Board* (1985) 169 Cal. App. 3d. 247; *El Correz Hotel* {9th Cir.1963) 390 F.2d 127; *Fa.in Milliner Co.* (1959) 360 U.S. 301.) The charge in case number 94-CE-150 VI reasonably encompasses the allegations in both paragraphs 17 and 13 .

As to its second argument, the NLRB rule is that charges filed more than six months after a failure or refusal to pro vie" information are not time-barred because requests for bargaining and for information are continuing requests, and parties' failures to comply are continuing violations. Section 10(b) of the NLRA is the corollary of section 1160.2 of the ALBA.

For example, in *Southern Lumber* Company, *Inc.* (1986) 279 NLRB 137, the union sent a letter on August 21, 1984, requesting bargaining and certain information concerning unit employees' wages, hours and working conditions. By letter dated August 27, 1984, the employer rejected the request to bargain stating it was

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continuing violation. Here, there was more than one request and some of the requested information was sought within six months of the date the charge was filed.

seeking judicial review of the union's certification. The union filed a refusal to bargain charge on March 21, 1985.

The NLRB found the union's request to bargain "has continued since it was first made on 21 August 1984, and the Respondent's August 27 letter was a refusal to bargain pursuant to sections 8 (a)(5) and 8(a) (1), which correspond to sections 1153 (e) and (a)of the ALBA. The NLRB dated the employer's violation of the NLRA from September 21, 1934—six months prior to the date the charge was filed. (See also *Norman Huccins,* Receiver *for Rest Haven. Corporation, d/b/a.* Rest-haven *Nursing Home and Rest Heven Corporation d/b/a Reshavan Nursing Hems* (1989) 293 NLRB 617.) Based on the foregoing, I deny Respondent's motion.[10]

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[10]The cases cited by Respondent are factually distinguishable from, this case. *A & L Underground* (1991) 302 NLRB 467, *Park Inn Home for Adults* (1989) 293 NLRB 1082 and *American Commercial Lines, Inc.* (1988) 291 NLRB 1066 involve complete repudiations of contractual obligations by employers more than six months before a charge was filed. The NLRB ruled the charges had to be filed within 6 months of the act because all of the evidence establishing a violation fell outside the six months. It distinguished cases, such as the instant case, where the separate violations were provable by evidence within 6 months of the filing of the charge. In *Millwright and Machinery Erectors, Local Union, 720, United Brotherhood of Carpenters and Joiners of America,* (1985) 274 NLRB 1506, rev'd on other grounds *Millwright and Machinery Erectors, Local Union, 720, United Brotherhood of Carpenters and Joiners of America* v. *NLRB* (5th Cir. 1986) 798 F.2d 731, the NLRB ruled that two alleged unlawful refusals to rehire involving different workers made at different times for different reasons, one within six months of the initial charge and the other beyond it, were not sufficiently related. Here, the alleged failures to respond to the information requests were not separate and unrelated, but, instead, were part of the overall, continuing bargaining process.

JURISDICTION

Respondent is a Delaware corporation authorized to do business in California with an office and principal placa of business in San Joaquin County, California. At all times material, Respondent was an agricultural employer, the Union was a labor organization, and Jesus Figueroa was an agricultural employee of Respondent within the meaning of sections 1140.4 (c) , (f) and (b) , respectively, of the Act. Additionally, Tom Guido, Alisao Sanchez, Roberta Cardenas and Jesus Valencia were agents of Respondent and supervisors within the meaning of section 1140.4 (j) of the Acr.

COMPANY OPERATIONS

In the summer of 1994, Respondent leased 1,700 acres of which 381 were in tomatoes. Tom Guido, Roberto Cardenas, and Jesus Valencia worked directly for Respondent as Field Manager, supervisor and foreman, respectively, at' the time of the complained of conduct and continued in those positions up to the time of the instant hearing. Guido was responsible for overseeing all the growing and harvesting operations of tomatoes including growing, fertilizing and irrigating.

At the times material herein, Respondent had one crew of tomato harvesters it directly employed, and several crews of harvesters provided by various labor contractors. Guido, Cardenas and Valencia oversaw the work of the contractors.

Jesus Figueroa worked for Respondent in a crew provided by labor contractor Yolanda Sanchez ("YSLC") which was supervised by Aliseo Sanchez.

Tomato harvesters were paid piece rate by the number of buckets of tomatoes each, picked. They took their full buckets to a trailer with a bin at the edge of the field, handed them to a worker (the "dumper") on top of the bin who emptied the buckets into the bin. Each harvester had a card which a worker (the "puncher" or "checker") punched for each bucket turned in.

Guido implied he had nothing to do with discipline for employees supplied by labor contractors as opposed to employees who worked directly for Respondent. (82,86-88,90,1359-1360.) Valencia, on the other hand, acknowledged he personally corrected workers supplied by labor contractors and told the contractors if he had a problem with a worker. The contractor would then discipline or fire the worker.

BACKGROUND

The events at issue here occurred against a backdrop of a long, contentious relationship between the Company and the UFW. The Union first filed a representation petition in October 1975, and won the election held a few days later. Ten years of litigation later, the California Supreme Court refused to enforce the certification. *(Triple E Produce Cornoration v. ALRB* (1985) 35 Cal.3d 42.) The UFW again petitioned for an election which

was conducted during a strike, won again, and, on November 22, 1991, was certified as the exclusive bargaining representative of all Respondent's employees in the state of California.

On December 11, 1991, the UFW requested negotiations. Respondent's refusal to negotiate in order to test the certification was found unlawful. *Triple E Corporation* (1993) 19 ALRB No. 2.) Respondent appealed the Board's decision, and both the Court of Appeals and the California Supreme Court summarily denied Respondent's requests for review.

Thereafter, the UFW requested certain information for bargaining and sought to have negotiations begin on various dates in December 1993. (GCX4.) Respondent's only reply was that its request for review in the Supreme Court was pending. (GCX6.) Review was denied on January 26, 1994.[11] The first bargaining session was not held until July 5.[12]

In furtherance of its efforts to obtain a contract, during 1994 the Union took access almost every day, sometimes twice a day, to communicate with the workers. William Boyer, Respondent's chief financial officer, would let the Union know which fields were being harvested, and the Union would decide where it would take access. During the summer of 1994, Guido saw

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[11]All dates hereafter are 1994 unless otherwise indicated.

[12]The Union cancelled the meeting originally scheduled for June 21.

as many as 200 to 300 people wearing UFW buttons.

The events at issue in this case date from 1993 into October 1994. In addition to the persons already mentioned, these events involve several individuals from the UFW.

Luis Rivera was a UFW organizer from approximately September 1993 until January 1995. Rudy Chavez Medina (Medina) was the Delta Regional Manager for the UFW in the summer of 1994. First Rivera, then Medina, and, ultimately, Dolores Huerta, Secretary/Treasurer for the UFW, handled negotiations for the Union. Zeferina Perez Garcia (Perez) was an organizer for the UFW at all material times. Reynaldo Ponce was also an organizer and took access at Triple E at least once. Only Perez and Huerta still worked for the UFW by the time of the hearing.

THE REFUSAL TO BARGAIN CHARGES I.

The Requests for Information

The UFW made two written requests for information. General Counsel and the UFW allege Respondent failed to fully and timely comply with either.

Luis Rivera sent the first of the two requests (GCX4) to Respondent's counsel, Rob Carrol, sometime in November 1993 at the latest. Respondent replied by letter dated December 1, 1993. It did not provide any of the requested information and stated it was appealing this Board's decision in the refusal to bargain

case to the California Supreme Court.[13] (GCX6.)

The second request, consisting of two pages with. 13 items, was prepared on or about May 23, 1994, by Medina, who was in charge of negotiations for the UTW at the time.[14] Apparently, the pages with the 13 queries inadvertently were not included with Medina's cover letter of that date. When this was discovered, Medina sent another cover letter dated June 2, which was mailed no later than June 6, with the two pages attached.[15]

As of late June, William Boyer, who had only started work in May, became the point person for responding to information requests. (1193-1194.) Although he did not see a copy of the first request, GCX4, until the instant hearing in July 1996, he acknowledged the UFW orally asked the questions in GCX4 in the early part of the negotiation sessions which began on July 5. He

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[13]In its brief, Respondent complains it did not know to which company the Union's request was directed, but its reply shows it understood the Union was referring to Triple E.

[14]Medina assumed primary responsibility for negotiations in about May 1994. Ms. Euerta took over responsibility for contract negotiations from Medina either in mid-June or July (her recollection) or October (his recollection) 1995.

[15]The May 23 cover letter and page one consisting of 11 of the 13 numbered items were originally identified as one exhibit, to wit, GCX2. Page two with items 12 and 13 and the June 2 letter were identified as GCX3. Later, based on Medina's testimony, the documents were reassembled so that GCX2 became the June 2 letter with the two page request, and GCX3 became the May 23 cover letter only. (Compare 53-67 with 824-327.) It is curious why Boyer's response refers to the May 23 date if he did not receive the actual information requests until June.

testified he orally responded to those questions at various sessions. Respondent gave no explanation why no one had informed Boyer about this first request or why no one else had responded to it previously.

GCX1, which Respondent either gave to the UFW at the second negotiation session on July 26 or mailed to it soon after it was prepared on July 19, was its only written response to GCX2. (1159.) Boyer, who prepared GCX1, characterized it as a complete answer to the UFW's request in GCX2. It included the information orally given to the UTW at the July 5 meeting. (69-71, 1152.)

Medina did net recall any ground rules that requests for information or responses thereto had to be in writing. (857-858.) There is no allegation that the Company could not orally respond but, rather, that it either never provided the information or did not do so in a timely manner.

It is undisputed that July 5 is the earliest Respondent gave the UFW any information. With regard to the UFW's first request (GCX4), Medina and Huerta each of whom reviewed the Union's requests when they began negotiating, had slightly different views as to what information was never provided.

In Huerta's view, item 1 (seniority list and hire dates), item 2 (maps of company locations), item 3 (numbers of acres),item 13(average hours worked daily and yearly by worker), item 14 (agricultural products other than tomatoes) were not provided.

Medina did not mention item 3, but to Huerta's list he added items 4, 6, and 8 tnrough 12.[16] (831.) He further added that Respondent did not give the names and titles of company representatives, which the Union requested in item 4 so it would know with whom it would be dealing both for negotiations and access, until the first negotiation session. (865.)

I turn to the Company's evidence regarding the information sought by GCX4 which the Union asserts was not provided. Boyer maintains the Company provided the Information requested by item 1 (names, addresses, social security numbers of all workers, by classification) except for the hire dates.[17] He testified the Company did not maintain information that way because it received only information as to which employees worked in a given week rather than actual hire dates. (1165.)

It is clear such information was available to the Company. The one labor contractor whose files were discussed was YSLC which kept individual time cards and other employment information for at least 5 or 7 years. Aliseo Sanchez made it clear that

[16]However, Medina later acknowledged in testifying about GCX2, the UFW's second request, that GCX1 did respond to item 10 which sought information on various fringe benefits which would include the information sought by items 9 through 12 in GCX4.

[17]The list of workers of Rafael Andrade includes a column labeled "hire dates" but there is no evidence whether the dates reflect when the workers were first hired and worked for Triple E or simply the first date they were hired for the 1994 season.

this information on individual workers was retrievable.

Although GCX1 has social security numbers and addresses for most of the workers listed, Respondent gave no explanation why such information was missing for some or why the missing data was never provided. Further, GCX1 does not contain a list of workers or the other information sought in. item 1 either for YSLC or for a labor contractor named Mendoza whom Respondent used in 1994.(1360)

Boyer testified the Company did not provide the maps requested in item 2 because legal counsel advised they were privileged and confidential.[18] (1165.) It is not clear whether he told the Union the Company would not provide the maps because he implied that the UFW dropped this request stating it did not ask for them in the negotiation sessions but only asked for locations where workers were working which the Company provided pursuant to the access agreement executed by the parties.[19]
(1165.)

[18]In its brief, Respondent makes no mention of maps being privileged or confidential but instead says none existed. There is no evidence in the record to support this statement which is inconsistent with Boyer's testimony that they were not provided based on legal advice which implies there were maps.

[19]The brief argues that Respondent was cooperative in providing the Union with daily information on crews' locations so it could take access. There is no allegation this is not true, but it is beside the point. The maps would provide information beyond locating fields where workers were working at any given time. The evidence is insufficient to support a finding that the Union abandoned this request simply because it asked for locations of crews so it could take access.

Regarding item 3, Boyer maintains Respondent replied in writing that it rented 1,700 acres and had roughly 5,000 acres in total on which it harvested tomatoes. (1166.) GCX1 is the only written response, and it does not mention 5,000 acres. Neither he nor anyone else from Respondent explained how this information dovetails with the reference to "381 Tomatoes" in GCX 1. Nor does the information provided relate the acres to areas as requested.

As to item 6, Boyer acknowledged the parties discussed only the tomato picking season. Guido testified Respondent had atleast besides picking, i.e. growing, and irrigation. As to items 8 through 12, at one of the meetings the Company told the Union it did not pay holiday pay, but Boyer could not recall any other benefits being discussed. (1167-1163.) It therefore follows that the other 3 items were not responded to until GCX1 was provided.

With regard to item 13, Boyer indicated the Company told the UFW the average number of hours was between 4 and 8 depending on the amount of tomatoes that needed to be harvested on a particular day at a particular location and on scheduling. (1168.) Boyer did net specify when this discussion occurred. Nor did he say why the Company did not provide the information requested by the Union which calls for the specific average of hours worked for each worker. Certainly time cards and payroll

records would yield such data.

Finally, as to item 14, Boyer testified they focused on tomatoes. (1168.) Ee did not say why the Company did not tell the Union what, if any, agricultural products the Company handled other than tomatoes since the Union's request clearly asked for that information. GCX1 indicates Respondent had acreage devoted to something other than tomatoes. To the extent his testimony suggests the UFW abandoned its request, the evidence does not establish the Union agreed to discuss only tomatoes.

Respondent argues in its brief that it did not have to answer items 4 and 6 because the Union had the information because of its long experience organizing at the Company. Medina testified the Union wanted to know the persons from the Company who were responsible for bargaining and for access. It also wanted to know not only the tomato harvest season, but any other work periods for any other workers. Boyer acknowledged only the tomato picking season was discussed. (1166.) It also argues that it discussed wages at the July 5 meeting and every meeting thereafter. However, only the tomato harvester and dumper wages were discussed, and Respondent never replied to the Union's inquiry whether it employed any other classifications.

Turning to the UFW's second request, Boyer decided to wait to reply until the first negotiation session set for June 21 because he needed to clarify some items. It will be recalled

that the Union cancelled that meeting, and the first: meeting occurred on July 5.

At that meeting, Boyer orally answered some items and asked if information for only 1993 would be sufficient for item 3 since it would be difficult to provide it for the prior two years.[20] (1151-1153.) First, he testified the Union agreed, but later, he modified this and said the Union was "most interested" in 1993 information for items 2 and 3 because, at the time the request was made, the Company had not accumulated the 1994 lists yet. (1153, 1157-1158.)

The Union asked for a written response .to its request which Boyer agreed to provide by July 19, one week before the next scheduled meeting on July 26. Boyer testified that he did not recall the Union objecting, but Medina testified unequivocally that the Union objected to the information not being provided, and that Respondent said it would provide the information by a set date (which at the time of the hearing Medina could not recall) but then extended that time by a couple of days. (857, 860, 871,877.)

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[20]The Company told the Union regarding item 10 that it did not pay any such benefits. Boyer testified the Company responded completely to items 1 through 6 and to items 11 and 12, and item 13 was responded to in that the Company told the Union the answers to all the previous items were consistent for each of the three years. (1154-1157.) In its brief, Respondent argues the information was the same for each year.

As noted above, Boyer prepared GCX 1 and went over it with the Union at the July 26 meeting. He did not recall providing any information at that meeting other than GCX1. (1159.) According to Boyer, he believed GCX1 was satisfactory to the Union because Medina did not complain that anything was missing, and "nothing was ever said later...." (1178,1180.)

Both Medina and Huerta testified that Respondent never fully responded to items 4, 6, 7, and 13.[21] Huerta added that the material sought in items 1, 11, and 12 was also never provided.(696; 832-833.)

Medina recalled that on July 26, Boyer just read the responses to items 4 and 6 with no further explanation other than the Company did not track the information. As to item 7, compensation paid to labor contractors on a percentage basis, according to Medina, Respondent said it was not applicable and would not give it to the Union. (861.)

Boyer testified he replied to the question as he did because the Company did not pay the contractors in the manner described in the question. Ee was evasive as to whether he or Respondent's legal counsel, Robert Carrol, told the Union that the Company

[21]When Ms. Huerta testified, the second request consisted of two exhibits, GCX 2 which was the May 23 letter and the first 11 items and GCX3 which was the June 2 letter and items 12 and 13. As noted above, later, when Medina (the author of the request) testified, the documents were rearranged so both pages with all 13 items were part of GCX2.

would not give it information as to how much it paid its labor contractors, and ultimately testified he did not recall the Union ever being told that. (1181-1186.)[22]

Respondent argues the Union got the answer it did regarding item 7 because the question makes no sense. However, Respondent also maintains in its brief that what it pays the labor contractors has no relevance to collective bargaining, and the Union is not entitled to the information.

Although Boyer testified he waited to reply to GCX2 so he could clarify items so he could respond accurately, there is no evidence he ever asked the Union what information it was seeking in item 7 if the question did not make sense to him. Rather, he testified that since the Company did not pay the labor contractol in the manner described in item 7, its response was "not applicable." (1156.) I find Respondent did not answer item 7, not because it did not understand it, but because it did not, and indeed still does not, believe the Union is entitled to the information.[23]

In the foregoing recounting of events, I have credited Boyer

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[22]When he testified on direct, Boyer was clear, straightforward and direct. In contrast, on cross-examination, he was sometimes argumentative and evasive with this being the most pronounced example.

[23]In reaching this conclusion, I do not rely on Board Agent Arthur Gonzalez' testimony regarding the meeting he had with Mr. Carrol and Mr. Boyer.

as to what happened on which dates since his recall of times was better than Medina's, but I credit Medina that the Union did object to the delay. I do so both because Medina was more certain than Boyer and because of the unlikelihood that the Union would not have protested in view of Respondent's failure to reply at all to GCX 4, which by its own admission it had received at least 7 months previously, and the admittedly incomplete response provided on July 5, which was several weeks after Respondent would have received GCX 2 and 3.

I also find that the Union did not abandon its request for any of the information it sought. Boyer modified his testimony that the Union abandoned its request for information from 1991 and 1992 to say that the Union was most interested in the information for 1993, which is different from saying it no longer wanted the other information. I find his-modified testimony more credible since the information for previous years would be very helpful in assessing what demands to make in bargaining. I note that Respondent's assertion that the information for the three years was "consistent" does not mean that it was the same as it claims in its brief. Indeed, some information, such as hours, would certainly vary.

In addition to items 7 and 13 discussed above, I find that GCX1 is an incomplete response to GCX2 in the following respects. Although Boyer testified the Company does not own any land, there

is no evidence the Company told the Union that, nor is that clea from the response to item 1.

GCX1 does not contain any of the information sought on individual workers for labor contractors YSLC or Mendoza, and some of the information on the workers for other contractors listed is missing with no explanation for the omissions nor any evidence the information was not obtainable. The evidence shows Respondent could have obtained the information to respond to item 6. There is no evidence it could not obtain the information sought in item 4. The information sought in item 11 is incomplete. No information was provided regarding any workers other than tomato harvesters. With regard to GCX4, I find item 1 was not a full response to the extent that, as described above, some information for individuals is missing, and Respondent could have obtained the hire dates. The responses to items 2, 3, 4, 6, 7, 13 and 14 were incomplete or else there was no information provided.

II. The Alleged Promise Of A Raise

General Counsel alleges that on or about October 6 Tom Guido attempted to bypass the UFW and negotiate a pay raise directly with the workers. There is no allegation such a raise was ever implemented.

Jose Luis Valencia Zambrano[24] a Triple E tomato harvester for some 10 years/ testified about a promise to raise wages.[25] From the outset, his demeanor showed he was exceedingly nervous, ill at ease and had great difficulty remembering events. I granted General Counsel's request to allow seme leeway in asking leading questions,[26] and General Counsel also showed Jose Luis a declaration he made near the time of the alleged incident, but it was clear his recollection was not refreshed as to when the alleged incident occurred or the circumstances surrounding it.

Jose Luis' declaration referred to the promise being made when there were ALRB agents in the Company fields, but when he testified, he could net recall a time when agents came to the fields. Instead, he recalled that Mr. Guido promised to raise the tomato wages When the strikers or the people from the strike (Valencia used both expressions) left. (925,928,930,933,940,941.)

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[24]I will refer to Mr. Valencia as Jose Luis to distinguish him from Respondent's foreman also named Valencia.

[25]Benjamin Figueroa testified primarily about his son's alleged discharge (see discussion infra), but he also testified that within a week after Aliseo Sanchez did not allow his son to work (sometime in early August), Guido told the crew Benjamin was working in not to pay attention to the people from the Union, that he would give them a five cent raise without the workers having to go to the Union and would pay them for the time spent for him to address them. (1117-1120.) There is no allegation in the complaint about such an incident, nor was it brought out in the Prehearing conference, so I decline to consider it.

[26]Leading questions are appropriate in such circumstances.(1 Jefferson, California Evidence Benchbook (2d ed. p.761.))

He also testified that Guido began to talk about the raise "when the strike began" and that Guido made such a promise two times when "they were over there doing the strike...." (925,932.) There is no evidence there was a strike at any time around October which is the time alleged in the complaint.

He was asked if the promise occurred when the UFW was taking access on Triple E property, and he replied "No, we were still fighting with that." (930.) This testimony is ambiguous. It could refer to 1994 because the Union and the Company were fighting about when midday access could be taken. It could also refer to the period of time before the Union and the Company reached any access agreement. The latter seems mere likely given the frequency of Union access in 1994.

On cross-examination, Jose Luis testified he was working for Triple E when the UFW was voted in and that before the election Guido had promised the workers they would get a raise if the Union went away. (947.) He could not recall when the election occurred. (950.) Nor could he say if the occasion Guido promised the raise was after the Union won. (950.)

Jose Luis seemed an honest witness. He readily acknowledged he had read his declaration before testifying and, in fact, brought a copy of it with him to the witness stand. He tried equally hard to answer questions of both counsel. However, not only did his testimony raise the question whether he was

referring to an incident prior to the election versus October 1994, but tie was also unable to give much context to the incident.

Although he testified consistently as to the content of Guide's remarks, in such an allegation minor variations in what was said can make the difference between the remarks being lawful or unlawful. The rest of his testimony is not sufficiently reliable for me to credit him as to what Guido said about a raise.

THE SURVEILLANCE ALLEGATIONS

General Counsel alleges three instances of unlawful surveillance: two when the Union held rallies in Stockton at a public housing project known as Sierra Vista where many of Respondent's workers lived; and one at Respondent's fields the day after the first Sierra Vista rally at which Tom Guido and Roberto Cardenas were present.

I. The Sierra Vista Rallies

During the summer of 1994, which at hearing was defined as July, August and September, the Union held approximately five rallies at Sierra Vista for Respondent's workers and workers from two other tomato companies, to discuss negotiations and, although not specifically stated, to promote solidarity. At one rally, the Union was also electing delegates to its upcoming convention.

It is uncontested that on two of these occasions Respondent's Field Manager, Tom Guido, and supervisor Roberto

("Nono") Cardenas, were present across the street from the park while Company workers were at the park for the rallies. Both meetings were in the evening after work.

Rivera, Huerta, Medina and Perez each testified for the General Counsel *as* to the alleged surveillance. Guide, Cardenas and foreman Valencia testified for Respondent.

GCX5 is a map (not to scale) showing the layout of the Sierra Vista complex. The park area is the open area between Belleview and Anne Streets containing three buildings labeled "shop/maint.," "gym" and "office."

The first of the two meetings was held in the first part of September in the gym. The second was about 2 weeks later in mid-September and was held outside in the park. Respondent was away each of the meetings through foreman Valencia because workers would tell him during the day at work that they would be attending a meeting that evening. (264-265.)

Guido testified it was coincidental that he was at the Sierra Vista housing complex when the meetings occurred because he came there approximately 2 or 3 times each week in 1994 and years prior to meet with Cardenas who would be visiting relatives living at the complex. He would meet Cardenas at 5:30 or 6:00 p.m., or even later, to go over the plans for harvesting for the next day or two. (100-101.)

In particular, Cardenas had a cousin, Francisco Salcedo, who

lived on the corner of 10th. Street just across from the park, and they usually met at his house. Cardenas' cousin testified that Cardenas came to his house every evening and met Guide there between 1 and 3 times per week. Both he and Cardenas testified that Quido and Cardenas met in the house as well as outside. Sometimes, Salcedo sat outside with them.

Despite the fact that Guido initially could not identify Cardenas' cousin by name, and did not know the cousin's address, although he could identify the location of his house, I find that Cardenas and Guido did meet there on various occasions in the summer of 1994 and thus were not necessarily present in September simply to observe the UFW rallies. I so find even though, through Valencia, Respondent was aware the rallies were going to take place.

At first, Guido only recalled being present once when there was a UFW rally, but he ultimately acknowledged he was there the second time. Both he and Cardenas testified they were outside by Salcedo’s house conducting their business paying no attention to the UFW rallies just across the street where the evidence establishes there were one hundred or more people, flags, banners, speakers talking on a sound system and, at one meeting, music.

Guido estimated he and Cardenas met for 30 to 35 minutes because that was the normal time they took, but he acknowledged

at the second rally they might have been there as long as an hour. Still, he testified, he left "well before they wera finished." (1376.)

Cardenas tried so hard to establish that he, and especially Guido, took no notice of the rally that he maintained he and Guido were sitting facing one another, and Guido had his back to the park. Cardenas testified repeatedly that he did not see anything. Later, however, he testified that while he and Guido were talking, he observed Triple E workers going to the rally, but maintained he was not paying attention to the rally and did not recognize them. Ultimately, he acknowledged that he did recognize the workers, and they talked to him.

Guido modified his original testimony that he paid no attention to the rally and, in contradiction to Cardenas' testimony that Guido was not even facing the park, acknowledged that he looked over at the people but said he did not stare or watch them for a prolonged period. He also changed his original testimony that he did not even look to see who was there. He later said he did not see any Triple E workers and then later testified he observed people coming and going, but he did not know if they were all Triple E workers.

Rivera testified first of the four witnesses for General Counsel. He gave the most extensive testimony because he gave more details on direct examination and was cross-examined in

minute detail. There were some inconsistencies which surfaced as he was cross-examined at different times and asked to go over certain details repeatedly, but most of these were on minor points (e.g. whether Guido and Cardenas were together when he first saw them, where were Guido and Cardenas positioned) which I put in the same category as Guido testifying Valencia was not present at one of the rallies when Valencia testified he stopped by to talk to Guido and Cardenas for a few minutes. With some significant exceptions noted below, Rivera was generally an impressive witness because he was clear, direct, and held up will under an exhaustive cross-examination that spanned two days.

Rivera testified that at the first meeting, Guido and Cardenas were across the street from the gym about 20 or 25 minutes before the meeting began. From his description, this was by Salcedo's house.

Periodically, Rivera would come to the door of the gym and check on Guido and Cardenas. They were always in the same general area. Both were drinking beer, talking to one another, pointing to the workers who were coming to the meeting and laughing. (314-315; 496, 498, 501.)

Rivera believed Guido stayed for the entire meeting, which lasted about an hour and a half, because he did not notice Guide's absence until about five minutes after the meeting ended.

He did not know hew long Cardenas and Valencia remained.[27] It is clear from his testimony as *a.* whole that he contended Cardenas was there for a substantial time.

At the second meeting, he saw Guido, Cardenas and Valencia in the yard across the street from the park approximately at the location marker "T2" on RX4 . The meeting had not begun. He described their conduct as essentially the same as at the first meeting, however, when pressed for details by Respondent's counsel, he began to add things such as that Guido and Cardenas were walking from one point to another along the street; they were drinking beer, laughing, seeming to whisper things to each other as if telling secrets. He also testified Guido spoke to the workers and called some of them over, but acknowledged he could not hear what they said. At one point Rivera testified Guido seemed somewhat dangerous because he had been drinking and had consumed more than one beer. This characterization seemed to be added as an afterthought and sounded contrived. I had the same impression about his testimony of Guido and Cardenas walking up and down and their drinking beer and telling secrets.

Rivera’s testimony that Valencia was taking notes as Guido spoke was somewhat more detailed than at the first meeting.

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[27]He testified inconsistently first that he saw Valencia at both meetings and then that it was at the second meeting. When he saw Guido, Guido was speaking to Valencia who was writing in a notepad. (315.)

Rivera testified he observed Guide throughout the entire one and a half hours the meeting lasted, but his testimony as a whole indicates he checked only periodically as to Guide's presence over the course of the meeting.

Rivera did not recall who spoke at the meeting other than Dolores Huerta. She told the assembly over the microphone something to the effect, that Guido was there, but they should not be afraid, and should go ahead and meet. When she spoke about his presence, he paced back and forth and laughed. (319, 321, 557-558.)

Huerta was present for much, of Rivera's testimony on this issue, but I did not find she was influenced to try to tailor hers to conform to his. She had difficulty separating some events as to whether they happened at the first or second meeting which is not unexpected given that nearly two years had passed, and there was not much to distinguish the two events. Rivera's ability to recall was unusually good.

As to the first meeting, she recalled only that Guido was watching the meeting. She did not say she observed the laughing •and pointing Rivera described. (679,686.)

After a break in the hearing during which she readily acknowledged she and General Counsel discussed the subject areas he would ask her about when they returned, she added the following details to her prior testimony: Guido was focusing on

the meeting, making it clear he was watching and had a smile or smirk on his face. (697,700.) She described his conduct during the second meeting as essentially the same as in the first, he watched the group with a sort of smile or smirk.

I trust her first recollection as more likely to be accurate. She observed that Guido was there for most of the meeting or about 45 minutes, but she did not explain how she observed this. Since I estimate she is about 5'2" tall, and she was surrounded by a crowd of people, without an explanation as to the basis for her observation, I do not rely on it.

While she was speaking to the workers assembled *at* the second meeting, she addressed Guido over the microphone saying he knew he was not supposed to be there, that his presence was a violation of the law and the Union would file an unfair labor practice charge. He responded by throwing up his hands. Her account on this point is corroborated to some extent by Medina,[28] Perez[29] and Rivera whose accounts were generally consistent without sounding contrived. I credit them over Guido and

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[28]He recalled her addressing Guido and Guide's reaction but could not recall what she said.

[29]Perez only recalled seeing Guido at this one meeting. She had great difficulty estimating times, repeatedly changing them or giving estimates which clearly were erroneous, (e.g. She saw Guido about 6:45. Huerta spoke to Guido when she took over the microphone about 7:10 p.m. and Guido left 15 to 20 minutes later compared to her estimate that Guido was present for about an hour and a half.) Thus, I do not rely on any of her testimony in this regard.

Cardenas who testified, they did not hear Huerta's remarks.

Like Euerta, Medina had difficulty distinguishing between the two meetings. He described Guido as watching as the workers come toward the meeting and waving his arms toward them as if calling them over, mimicking the gestures of those who were gesturing to the workers to come join the rally. He believed Guido was in the area for about half an hour. (837-838.)

At the second meeting, he saw Guido and Cardenas standing at the corner talking to workers. Guido sometimes moved down the street closer to the gathering, laughing and smiling, and then returned to the corner.[30] (839-840.)

At one point, Medina estimated Guido remained in the area for the majority of the second meeting, probably an hour or an hour and a half. At another, he testified he did not notice Guido was actually gone until the end of the meeting which was 2 to 2h hours after he first saw him. Medina acknowledged he did not observe Guido closely since he was preoccupied with the meeting and some sound system problems and only glanced over at him from time to time. In view of this admission and the inconsistency, I do not rely on his time estimate.

Guido denied he waved or gestured to any of the people at either meeting. He also denied smiling or smirking at the

[30]In its brief, General Counsel asserts Medina saw Guido drinking. Although literally true, the statement connotes drinking alcohol, and Medina testified he could not see what Guido was drinking. (841.)

people-while he might have been laughing, it was not at the people at the rally. He testified he never mimicked the UFW's efforts to have a meeting by saying something to the effect of "Come on, we have a meeting...." (1375) Cardenas corroborated that Guido did not mock or imitate the people at the meeting.

Guido testified he and Cardenas did have papers regarding the harvest schedules which they laid out and went over. (1378.) Cardenas recalled they were looking at papers because they were adding up the number of boxes harvested. (150-151.) In view of the inconsistencies in Rivera's testimony regarding Valencia, I do not credit him that Valencia was writing down things at Guide's direction or that Valencia was present twice.

In view of the parties' history and with a major Union contract campaign going on at the Company, it defies human experience that Guido and Cardenas would have so little interest that they would not observe the activity across the street and gauge the number and identify of the people there. Indeed, they both retreated from their initial assertions that this was the case and ultimately acknowledged they did observe the rally. Cardenas admitted he not only recognized Triple E workers, but spoke to them. Guide had enough of an idea of what was transpiring at the rally to say he left long before they were finished and to respond to Huerta's comments.

I conclude that Guido and Cardenas did observe the workers

at the rallies, recognized some as Triple E workers, and spoke with, some of them. I also conclude that, as Medina described, Guido gestured at the workers to come on to the meeting, imitating the Union organizers.

Medina had some difficulties with recall on some issues, but he was very matter of fact in his account.' Rivera had a tendency to embellish somewhat when pressed for details, but the tenor of his description of Guido mocking the people at the rally and calling to them corroborates the essence of Medina's testimony. The fact that Huerta only observed Guido pointedly watching people does not necessarily contradict Medina's or Rivera's testimony since each said they only observed Guido on occasion, and each may have observed different conduct. Further, it is common for different people observing the same event to recall different things.

II. Field Access

As noted above, during the summer of 1994, the UFW took access virtually every day and sometimes more often. Each of the supervisors, including Cardenas, had to notify Guido when the organizers arrived and when they left. (241,243-244.) There was an ongoing dispute about the mid-day access period with the Company claiming the access agreement provided access for one hour from noon to 1:00 p.m. (1362.) The Union claimed there was no set hour because the workers ate lunch at different times

since they worked, piece rate and could eat whenever they wanted. Thus, it claimed access was allowed for one hour sometime in the middle of the day which varied depending on the hours of work which could vary from day to day. (445.) The language of the agreement is ambiguous, and they never resolved their dispute.

Zeferina Perez regularly took access in the summer of 1994. General Counsel asked her about her taking access in the first part of September, which is the time alleged in the Complain, but all of her testimony was very general.

She testified that every time she took access, she saw Guide in the fields. Guide was always following her saying he wanted to talk to her. (745.) He would follow her all the time. He would intervene, ask her what she was doing and ask why didn't she go to Merced. (742-743.)

She testified that on one occasion Guido followed her from the field in his truck. Guido denied this assertion unless there were a time when he just happened to be behind her on his way out of the field. He testified about an incident when they were both on foot when it was 1:30 p.m., and he was trying to get her to leave because he believed access time was over under the terms of the agreement. (1404-1455; 1428.) He denied yelling at her to get out or saying why didn't she go to Merced. (1414.)

Rivera also testified generally rather than about any specific incident in early September. He testified Guido

appeared to watch, to see to whom he and the other organizers spoke. Sometimes, Guido would be near where Rivera was talking to workers, and sometimes Guido would talk to the workers to whom Rivera had spoken. However, he also readily acknowledged that there were usually some people working while he was taking access and that sometimes Guido was talking to his supervisors or was by the truck and trailer to which workers brought their buckets.

In addition to testifying in broad generalities, I found Perez less than candid on some points. She repeatedly testified she could not recall whether she took mid-day access after noon. (759-761.) In view of the ongoing dispute between the UFW and the Company about the mid-day access, I find her professed lack of recall unconvincing. She also testified she did not recognize any of the supervisors except Guido which contradicts her testimony that at Sierra Vista she recognized two people as supervisors.

Even so, I credit Perez that Guido sometimes asked her what she was doing in the fields and asked her to leave. Depending on the circumstances, such conduct could be lawful or unlawful. I also credit Rivera that Guido sometimes sought to get them to leave before they had a full hour of access time at mid-day. The above conduct is consistent with his attempting to enforce his view of the access agreement. In fact, Guido acknowledges that on at least one occasion he followed Perez out of the field

because, under his interpretation of the access agreement, time was up. However, nothing in the above testimony establishes anything unlawful happened near the time alleged in the Complaint.

Similarly, none of Rivera's testimony that Guido sometimes was nearby when Rivera spoke to workers and that Guido spoke with workers to whom Rivera had spoken establishes any specific conduct at or near the time alleged in the Complaint. Whether such conduct was unlawful would also depend on the specific circumstances.

THE ALLEGED DISCHARGE OF JESUS FIGUEROA

Jesus Figueroa[31] was a tomato picker in the YSLC crew supervised by Aliseo Sanchez during the summer of 1994. Figuero is supervisor Cardenas' cousin, but Cardenas testified he did not have much of a relationship with Figueroa and did not see much of him. At the time of the hearing, Figueroa had worked for Respondent for some 15 or 16 years, the last 3 to 5 years in one of Aliseo Sanchez' crews.[32] Figueroa's father, Benjamin Figueroa, worked for Respondent for some 20 years and was in the same crew as his son in the 1994 season.

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[31]I will refer to him as "Figueroa." Pablo Figueroa, the checker, will be referred to by his full name.

[32]He last worked on July 29 except that at the time of the hearing he was working in a different crew at the Company. It is not clear whether Respondent knew this.

Valencia oversaw Aliseo Sanchez and his crew and had known Figueroa as a worker in the crews since Valencia had became a direct employee of the Company some 5 to 6 years earlier. Valencia characterized Figueroa as not a very good worker because he had a drinking problem for that whole time.[33] (248.) Cardenas, too, testified that Figueroa would come to work visibly drunk every day for 5 or 6 years. (1272, 1284-1285.) Cardenas also testified he had counseled Figueroa two or three times about picking unacceptable tomatoes.

Both Valencia and Cardenas testified Figueroa was drunk on July 29. According to Valencia, Figueroa was so drunk on the 29th that when the others started work, Figueroa remained sitting on some buckets drinking beer. (1296.) Figueroa denied he was drunk, and his father, with whom he rode to work that day, corroborated his son's testimony.' UFW organizer Luis Rivera and Reynoldo Ponce took access that day, stood near Figueroa, and denied he appeared drunk. Although Tom Guido testified he saw Figueroa with a beer, he did not testify Figueroa seemed drunk.

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[33]In its brief, Respondent states as a fact that Figueroa was treated for alcoholism in Mexico. Despite repeated efforts of counsel to elicit testimony from Valencia that this was the case, all the evidence consisted of inadmissible hearsay statements to Valencia. I sustained General Counsel's timely objections, and, ultimately, ruled on the basis of-asked and answered that Respondent's counsel could not again pose the question to Figueroa. Since the objections were sustained, it is improper for Respondent to include the information in its factual statement.

Rivera and Ponce took access sometime after noon. Valencia testified that at that, time he saw Figueroa sitting on a bucket, still drunk, with, a nearly full bucket containing many unacceptable tomatoes. He told Figueroa to pick properly or not at all. He and Figueroa argued back and forth about the condition of the tomatoes, and then, according to Valencia, Figueroa dumped the tomatoes on the ground at Valencia's feet.

Valencia testified he did not want to argue further, so he went to the trailer to which the workers brought the tomatoes and yelled to the crew to only pick good tomatoes. Rivera yelled to Valencia that he (Valencia) should throw them away if Valencia didn't like them. Valencia replied that tomatoes were not to be thrown away but were to go into the trailer or bin.

Valencia and Rivera were arguing, and Valencia climbed down from the trailer to continue the discussion. Guido arrived and told Valencia to calm down. Valencia went back to work and did not see 02^ hear what happened until another organizer, Zeferina Perez, came up after Figueroa started telling the workers to stop work. Perez told Figueroa, "No", and asked if he wanted to be a leader, and Figueroa said he did.[34] She and the organizers talked to Figueroa a while then left.

Figueroa stayed, but Valencia did not see him go back to

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[34]Despite the fact that Respondent's brief argues Figueroa was not a crew leader, Supervisor Cardenas testified he was.

work. (1303-1304.) He heard Figueroa shout something to the workers in the presence of the Union organizers. The workers did not yell any rallying cries but kept working undisturbed. (1337-133'8.)

No other witness testified Figueroa told the workers to stop working or to the conversation between Figueroa and Ferez, and I do not credit Valencia on these points. All the other witnesses testified the workers were yelling and shouting, so I do net credit Valencia. Although Guido did not recall what Figueroa and the workers yelled, he did confirm that they did so.

Guido was the only other witness to testify for Respondent about this incident. Aliseo Sanchez was not present when it occurred. Guido did not arrive on the scene until the point when Valencia and Rivera were arguing. He testified that Valencia had informed him that Rivera had told Figueroa to dump his tomatoes on the ground, but in fact Valencia claims Rivera told Valencia to dump them if he (Valencia) did not like them. The workers were yelling and had stopped work when he arrived.

The part of the incident Guido was involved in lasted only a minute or so. He told Rivera to leave because access time was over. After that, Rivera left, and Guido walked Figueroa back to his row, and Figueroa went back to, work.

As noted above, Guido testified he observed Figueroa take a drink of beer, but he did not describe Figueroa being obviously

intoxicated as Valencia did. Guido acknowledged he is responsible for safety in the fields and tries to make sure workers don't engage in conduct which might cause injury or be harmful or hazardous. Nevertheless, he did not say anything about Figuerca drinking on the job.

Rivera tells a different story than Valencia. A worker, not Jesus Figueroa, turned in a bucket of tomatoes. Pablo Figueroa, who inspected the tomatoes, and punched the workers' cards, passed the bucket to the dumper to put in the bin but refused to pay the worker saying some of the tomatoes were unacceptable. Rivera intervened and said it was not fair to accept the tomatoes but not pay the worker.

Ernesto Sanchez, Aliseo's brother, was on the bin dumping tomatoes. Using vulgar language, he told Rivera to mind his own business. Guido arrived at this point, came very close to Rivera pointed to Rivera' s chest in a provocative way, and told Rivera it was time to leave. Rivera replied he still had access time. Guido asked Valencia how long Rivera had been there.

Either Figueroa or Reynoldo Ponce, the other organizer, said the workers deserved respect and to treat them right. Figueroa then yelled to the workers "long live the union" and similar slogans. The workers responded in kind. Although Figueroa was wearing a union button, he had done so before and many other workers also wore them throughout the summer.

According to Rivera, Ernesto told Figueroa he was an ass and Figueroa would see what would happen. Figueroa asked if Ernesto were going to fire him, and Ernesto said he could do so. Rivera told Ernesto he could not because Figueroa was supporting the union. Guido told Ernesto to go back to work and told Figueroa they would talk later. Guido then went to talk to Valencia, and Rivera and the other organizers left.

Ponce did not have a very good recollection of events. He testified he heard Rivera arguing with a "foreman"[35] about the tokens a worker receives for each bucket of tomatoes picked.[36] A woman spoke up and said she too had her tokens stolen.[37] He was not sure which "foreman" .cursed at the woman. Ponce told the "foreman" the workers deserved respect. The foreman then cursed Ponce.

Figueroa was listening to the discussion Rivera and Ponce were having and shouted long live the Union and similar things. The workers responded in kind. He recalled Guido arriving after

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[35]This was the first day Ponce took access, and he could not identify the person. I cannot tell to whom he was referring.

[36]Respondent punches cards rather than giving tokens.

[37]I initially agreed with Respondent that this testimony was not relevant, but I was considering it in light of the truth of her statement. Upon reflection, I conclude her statement is relevant to the extent that the fact that it was made explains the subsequent statements and conduct of Ponce and ethers. Whether the statement is true is irrelevant, and it is not accepted for the hearsay purpose of establishing that the woman was not paid.

this.

He also recalled that Figueroa told the workers he was their representative and that Figueroa asked Sanchez or the other foreman if the foreman could fire him because of the Union, but his testimony on these points was disjointed. (991.)

According to Figueroa, on the 29th, Valencia counseled him about some tomatoes he had picked that Valencia found unacceptable. There was no other discussion or dispute at this time, and he simply kept working. The UFW organizers arrived later, about neon or 12:15 according to what Rivera told him.[38] Figueroa went to dump his tomatoes, and another worker came up to do the same. The puncher refused to punch the other worker's card. 'Figueroa asked the puncher why, and the puncher told him to mind his own business. "The people" were arguing about punching or not punching the card, and Guido arrived.

Guido approached. Rivera in an arrogant manner and without trying to find out what happened asked Rivera why they were there and to get out. The checker asked Figueroa what he was doing there, and Figueroa said he was the crew representative. The checker, Ernesto Sanchez, and Guido both said they could fire him. Ernesto told Figueroa to go to hell, and the workers began to yell a UFW slogan, "Si se puede" which translates "yes, it

[38]This is not accepted for the truth of when the organizers arrived.

can be done" in support. (1023.)

Figueroa walked back to his row. Guido followed him yelling at him. He told Guido he only wanted the workers to be treated well. Guido held up a. closed can of beer and accused Figueroa of being drunk.[39] Figueroa's testimony as to his reply is somewhat unclear, but he apparently indicated he was not drunk asking Guido where would he have gotten the beer - from the Company. (1024.) Guido appeared angry as if he wanted to hit Figueroa.[40]

The next day, Saturday, some co-workers told Figueroa he was not going to have a job after what had happened. There is no evidence any supervisor or manager told the workers this. These comments made him not want to go to work. A few days after the incident, he spoke to Rivera who urged him to return. He did so the next day which was either the first or second day the crew worked after the 29th.

Figueroa asked Aliseo Sanchez for the card he needed to be punched to credit him with buckets picked, and Sanchez told Figueroa he could not work, and if he used someone else's card to work, there would be reprisals.

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[39]Guido denied Figueroa told him all he wanted was good treatment for the workers. (.1391.) He denied having a beer in his hand or telling Figueroa he could fire him. (1384-85; 1391-1392.)

[40]Guido testified he was not angry at Figueroa but at Rivera whom he believed had told Figueroa to throw the tomatoes on the ground. Figueroa went back to work and "everything continued calm." (1125.)

According to Figueroa, Sanchez did not give him any reason, and Figueroa merely thanked Sanchez and left. He denied drinking any alcohol before coming to work. Figueroa did not see anyone close enough to have heard his conversation with Sanchez.

Benjamin testified he saw his son speaking with Guido on the 29th but could not hear what they said. He heard the workers yelling "Si se puede" and "No te rajas, Rapido." ("Don't back down Rapido," which is Figueroa's nickname.) Benjamin denied seeing his son dump a bucket of tomatoes on the ground.[41]

Aliseo Sanchez described the incident when Figueroa came to work on what Sanchez recalled was the first day the crew worked after July 29th. Figueroa had a beer and walked as if he were drunk. Sanchez told Figueroa he could not work in that condition because it was dangerous, and he might hurt himself. He did not say anything such as there would be problems if Figueroa worked or used someone else's card to work.

Elsewhere, he testified Figueroa and the other workers were already picking tomatoes. He acknowledged workers pick with both

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[41]I denied Respondent's request to admit part of Benjamin's declaration into evidence as an inconsistent statement because the declaration does not say he saw Jesus dump his tomatoes on the ground. This hearsay exception only applies where there is a clear inconsistency between a witness' testimony and a prior statement. I admitted that portion of the declaration (RX14) where he stated Ernesto Sanchez was not a foreman because it is inconsistent with his testimony that Ernesto was a foreman because he was Aliseo's brother and whatever Ernesto said had to be obeyed.

hands, and are bent over. He did not explain how under these circumstances he could see that Figueroa had a beer. He also could not say what happened to the can of beer.

Sanchez testified that he would not let any worker drink alcohol and work on Triple E property. They could stay outside the field, but they could not work. (1236.)

Sanchez also testified Figueroa was the only worker he had ever seen drinking on the job although he agreed there probably had been some others. (204.) Sanchez had worked in the tomatoes for 20 or 25 years.

Sanchez' claim that the Union's presence at Triple E was of no concern to him was belied by how he responded to questions at the hearing. He denied ever seeing Figueroa wear UFW buttons at work although Cardenas and Valencia acknowledged he did. He denied ever seeing Guido, Cardenas or Valencia talk to any UFW representatives on Company property, and several times would issue denials even, before the questions were completed. Although he acknowledged the Union came to the fields, at one point, he testified he was never present when Union representatives talked to the workers by which I understood him to mean he did not see it happen. Given the extent of the Union contract campaign, I do not credit his denials.

Neither Pablo Figueroa or Ernesto Sanchez testified. There is no single witness I found completely reliable. As before, I

found Rivera a generally good witness although he tended, to embellish somewhat as did Jesus Figueroa.

I conclude that there was a dispute when a worker other than Figueroa was not credited for a bucket of tomatoes he turned in. Rivera intervened and told Pablo Figueroa it was not fair to take the tomatoes but not credit the worker. Rivera said if the tomatoes were not acceptable, they should be thrown away rather than dumped in the bin. Valencia began to argue with Rivera that tomatoes were not to be thrown away.

Figueroa or Ponce backed up Rivera's intervention on behalf of how workers were to be credited, saying the workers deserved respect. Ernesto Sanchez told them to mind their own business. Figueroa yelled "long live the Union" and similar things, and the workers responded similarly. Guido arrived in the midst of all this commotion, told Valencia and/or Ernesto Sanchez to calm down, told Rivera to leave, and told Figueroa to go back to work. Guido walked Figueroa back to his row, and Figueroa worked the rest of the day. Rivera and Ponce left.

I do not credit Figueroa that Guido said he would or could fire him. Guido credibly denied it, and no other witness testified to such a statement. I find it unnecessary to determine what Ernesto Sanchez said since I do not credit the testimony that he was a foreman, and there is insufficient evidence to establish he was an agent of Respondent if he was not

a supervisor. It is also unnecessary to determine whether Figueroa was drunk en. the 29th and whether he dumped a bucket of tomatoes since neither conduct is alleged by Respondent as the reason he was not allowed to return to work. I also find it unnecessary to determine exactly what Aliseo Sanchez said to Figueroa when Figueroa returned to work after the incident on the 29th.

ANALYSIS AND CONCLUSIONS

A. The Requests for Information.

As part of its duty to bargain, an employer is obligated to timely provide the exclusive bargaining representative with requested information which is necessary and relevant for bargaining.[42] The failure to meet this duty is a per se violation of section 1153 (e) of the Act. *(Masaii Eto, et. al.* (1980) 6 ALRB No. 20.) A violation occurs even if the refusal or delay does not impede negotiations and even if the union is actually able to negotiate an agreement. *(AS-K-NE Farms, Inc.(AS-H-NE)* (1980) 6 ALRB No . 9 .)[43]

The duty to bargain, including the duty to provide information, arises as soon as the union is elected the

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[42]Relevancy is interpreted liberally. *(Cardinal Distributing Co. v. Agricultural Labor Relations Board (Cardinal (1984) 159 C.A. 3d 758.)*

[43]The NLRB follows the same rule. Section 8 (a) (5) is the corollary provision of the NLRA.

bargaining representative. An employer acts at its peril if it refuses to provide *the* requested information even though a final decision on its technical refusal to bargain case is pending. *(East Coast Equip. Corp.* (1977) 229 NLRB 825 [95 LRRM 1166], enf d. sub nom. *NLRB v.Steco Sales* (3d. Cir. 1978) 577 F. 2d 727 [98 LRRM 2438] .) •

Here, Respondent acknowledges it received the Union's first request for information on November 29, 1993, at the latest and did not provide any information until July 5, 1994, at the earliest.[44] Such a delay of more than six months, especially where the only reason given the Union is legally untenable[45], is clearly unreasonable, constitutes a complete refusal to bargain, and violates section 1153 (e) of the Act. *(Mario Saikhon, Inc.* (1987) 13 ALRB No. 8, six month delay unreasonable; *AS-H-NE,* delays of three months and longer held unreasonable.)

Respondent is thus required to immediately provide the Union with all the information requested in GCX4 to the extent it has

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[44]I have rejected Respondent's contention that it did not know to which company GCX4 was directed. It's reply (GCXS) shows otherwise. Further, an employer is not excused from its duty to provide information because it finds a request ambiguous. It has a duty to clarify. (Cardinal Distributing- Company *(Cardinal I.*) (1983) *9* ALRB No. 36, aff'd *Cardinal II.* ; See also, Harden, *The* Developing" *Labor* Law (1995 supplement) (hereafter "Harden") po. 211-212.)

[45]Respondent never raised relevancy or any other objection to the request until at least July 5. As the Board held in *Cardinal I,* the failure to timely raise an objection constitutes a waiver. The court on appeal in *Cardinal II* affirmed the Board.

not already done so. Respondent contends it does not maintain certain information itself or does not track it, e.g. the dates workers were hired. That does not necessarily excuse Respondent from obtaining and providing it.

Respondent should have the hire dates in its own records for the workers it hires directly. As to the workers supplied by labor contractors, those workers are legally Respondent's workers, and Respondent must obtain the information and provide it to the Union. *fAS-H-NE; Cardinal, Robert Meyer, d/b/a/ Meyer Tomatoes* (Meyer) (1991) 17 ALRB No. 17.)

Similarly, Respondent from its own records and the labor contractor's records should be able to comply with the request in item 13. It's response to date is inadequate since it does not give the Union any meaningful information from which to develop bargaining proposals on wages and hours.

The information requested in items 4, 6 and 14 are basic information about the company and its operations.[46] The fact that the Union may be aware of some of the information because of its organizing efforts does not excuse Respondent from providing such elemental information to be sure the information the Union

[46]Whether or not there is a season for irrigators or tractor drivers, information as to whether Respondent has such classifications, when the individuals work and the other information requested for workers is clearly relevant.

has is current, complete and accurate.[47]

With, regard, to the second request, the only items Respondent maintains it is not obligated to provide are numbers 4, 6 and 7 because it does not *track* the information for the first two, and the information sought by the third is irrelevant and privileged. There is no debate that the information sought in items 4 and 6 is relevant. Respondent is required to obtain the information sought in items 4 and 6 from the labor contractors, Respondent's agents, and to provide it to the UFW.[48]

With regard to item 6, information regarding wages is presumptively relevant. The amount Respondent pays to its labor contractors is part of its labor costs and is relevant arid necessary for assessing economic demands for wages for unit employees.

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[47]Using Respondent's logic that it does not have to provide the requested information because the UFW knows the seasons, the company officials, and that Respondent has no fringe benefits because the latter was an issue in the organizing campaign, an employer could refuse to provide wage and hour information because a union organized workers arguing their wages should be increased and hours decreased. Respondent's position is clearly untenable.

[48]Respondent acknowledges it has not given the Union information for any employees other than tomato harvesters arguing that since negotiations began during the harvest, wages paid to planters were of no concern to the Union since those employees were not working then. (Resp. brief, p.42.) The Union's requests addressed all employees not only tomato harvesters since it is the exclusive bargaining representative for all Respondent's agricultural employees. Respondent was required to promptly provide the information for all of its agricultural workers employed by it at any time of the year.

In *Meyer,* the employer did not even contest the relevance of this information. The cases cited by Respondent here do not, as Respondent claims, show that the information need not be provided. In *The New York Pest* Corporation (1987) 233 NLR3 430, cited by Respondent in support of its refusal to provide any information, the NLR3 affirmed the ALJ's finding that Respondent was required to provide the aggregate amount it paid to free lance contractors, freelancers and stringers but not the amounts paid to individuals. The union was not entitled to the latter because of privacy concerns for individuals whom the union did not represent because they were considered independent contractors rather than employees. The ALJ rejected the union's claim that prior arbitration decisions determining whether individuals were employees had turned on the amount the individuals were paid.

The case at bar is different since the labor contractor workers are employees of Respondent and in the unit. Even in the NLRB case, the employer had to disclose the total amount paid and so the case does not support Respondent's refusal to provide any information.

Similarly, *General Electric v. NLRB* (7th Cir. 1990) 916 F.2d 1163, [135 LRRM 2846], also cited by Respondent, concerns economic information regarding money paid to subcontractors of non-unit employees where the existing and past contracts

authorized, subcontracting. It is thus distinguishable from this case.

To the extent Respondent contends it did not understand these requests, the time to raise that was at the time the request was made. Respondent has a duty to timely clarify requests if necessary. It cannot simply fail to provide any information.

I. find it unnecessary to decide whether, in view of Respondent's unlawful failure to timely provide any information in response to GCX4, its delay in even partially responding to GCX2 until July 5 and July 19 was unreasonable[49] because it still has not provided all the information requested by the Union in its two requests. The failure to do so over more than two years is a violation of section 1153 (e).[50]

B. The Surveillance Allegations.

Employer surveillance of employees is unlawful if it has a reasonable tendency to affect the employees' free exercise of their statutory rights. *(M. Caratan, Inc. (Caratan)* (1979) 5 ALRB

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[49]A delay of a little more than a month was not unreasonable where all of the information sought in an extensive request (except for information being prepared by a third party which was provided immediately after the employer received it) was furnished two weeks before the first negotiation session, and the employer promptly provided additional information as the union requested it. *(United Engines. Inc. (1916)* 222 NLRB 50.)

[50]General Counsel did not request bargaining makewhole in the Complaint, and I have not awarded it.

No. 16.} Proof of actual interference is not necessary to such a finding. *(M&rzaian Brothers Farms Management.* Company, *Inc. , et al)* (1977) 3 ALR3 No. 62. An employer also violates the Act when it creates the impression among employees that they are under surveillance when engaged in union activity because it has a chilling effect on the freedom to engage in such activity. *(S & J Ranch, Inc. (S&J)* (1992) 18 ALRB No. 2, citing Alpine *Produce* (1983) 9 ALR3 No . 12; *'Hendrix Mfg. Co. v. NLRB* (1963) 321 F.2d 100.)

Generally, an employer is free to go about his business in normal fashion even if it means being nearby to union activity. (Id.) Citations omitted.) Nonetheless, where such observations are regular, prolonged or for the specific purpose of observing the union activity or creating the impression it is being observed, they constitute unlawful surveillance.

The mere presence of supervisors at or in the vicinity of a union meeting in a public place is not unlawful unless there is no reason to be there, the purpose is for surveillance or the supervisors engage in suspicious behavior or untoward conduct. *Health* Care *and Retirement* Corn, of *America (HCRCA)* (1992) 307 NLRB 152; *Stead Industries Inc. d/b/a/ Hovt Water Heater Company (Stead)* (1987) 282 NLRB 1348.)

Thus, supervisors who took shifts using a room which overlooked an area near the employer's facility where employees

were handing out union literature in order to observe the handbilling engaged in unlawful surveillance, but other supervisors who merely drove or walked by the area and saw the activity did not. *(HCRCA.)*

Similarly, an employer who circled the hotel where he knew his workers were having a union meeting and took down license plate numbers violated the law. *W.H. Scott d/b/a Scotts Weed Products* (1979) 242 NLRB 1193. Thus, intentional observation even in a public place may violate the law.

In Carrv *Companies of Illinois, Inc.* {(1993) 311 NLRB 1058), modified on other grounds Carrv Companies v. *NLRB* (7th Cir. 1994) 30 F.3d 922. [146 LRRM 3069], a company manager stood about 2 to 3 feet away from union representatives passing out union leaflets at the gate to the plant where workers passed through. He remained there for the last 3 hours of leaf let ting. The ALJ, affirmed by the NLRB, found unlawful surveillance. Citing Impact *Industries* (1987) 285 NLRB 5, rev'd. on other grounds *Impact Industries* v. *NLRB* (7th Cir. 1988) 847 F.2d 379 [128 LRRM 2455], the ALJ concluded that although an employer's mere observation of open and public union activity is not unlawful, doing so for the entire duration of the activity, in such close proximity to it and in such a conspicuous manner that it virtually interferes with the activity constitutes unlawful surveillance.

In *Yukon Manufacturing* Company (1993) 310 NLRB 3234, the NLRB found unlawful surveillance on the following facts. Supervisors sat in a parking lot drinking beer across from a youth center where they knew employees were having a union meeting. Employees driving up to the meeting saw the supervisors/ and some of them drove off and did not go to the meeting. The plant manager during this time was driving up and down the street between the center and the lot where the supervisors were parked.

In a similar vein, a company manager engaged in unlawful surveillance when on his way to work he drove through the parking lot of a local business where he knew a union meeting was occurring. His asserted reason for doing so was "curiosity." The NLRB found the manager had no legitimate purpose for being at the lot and that his presence was tantamount to surveillance. Although he asserted he was present for only a few seconds, he recognized one worker and waved to another. *(BRC Injected Rubber Products, Inc.* (1993) 311 NLRB 66.)

In contrast, the NLRB found no unlawful surveillance where an employer knew his workers were having a union meeting and drove by where they were gathered in front of the post office on a principal street prior to going to the meeting because there was no evidence the employer did not live nearby or take that route home. *Serv-Air Aviation* (1955) 111 NLRB 689.

Similarly, in *Atlanta Gas Light Company* (1966) 162 NLR3 436 there was no unlawful surveillance when employees holding a union meeting at *a.* bowling alley saw one of their company managers looking toward them across the playyard, the manager came to the meeting when invited, left after a few minutes when asked to do so, but stayed and bowled for the remainder of the evening. Despite the fact that he knew of the meeting, he was free to patronize the alley, even had he not been a periodic customer, unless he did so for the purpose of observing the meeting.

This Board has also found that where a supervisor has a reason to be where there happens to be a union meeting, his mere presence is not unlawful. Thus, a supervisor who lived in the labor camp and went to the TV room in a common living area where there was a union meeting did not have to leave.[51] (Caratan)

I have found that Guido and Cardenas had a legitimate purpose in meeting near the park. Based on the foregoing, I find that the mere fact that Guido and Cardenas were present across the street from the park does not establish a violation. Nor does the fact that they just looked over toward workers at the

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[51] In the same case, the Board found a violation where a supervisor would not leave a Union meeting in the courtyard of the labor camp when asked to do so when his presence caused the workers not to ask questions or respond to the union representatives. The ALJ found the only reason for his presence was to chill the workers' exercise of their rights. Contrary to Respondent's argument in its brief in citing this case (pp. 57-58.), the ALJ did net find that a chilling effect was necessary to establish a violation.

meetings or spoke to workers who came up to them. The critical issues are whether their other conduct and the time they remained in the area constituted intentional observation or created the impression of surveillance.

I find they did. The conduct communicated to workers that they were being observed. Coupled with the minimum half hour to hour that they were across the street from the rallies, they created the impression of surveillance. The fact that Dolores Huerta tried to defuse the effect of their presence by calling attention to Guido' s presence and trying to turn it into a rallying point does not alter the fact that the conduct of Respondent reasonably tended to create the impression of surveillance.

I turn now to the alleged surveillance at Jack Tone Road. Without more, the simple fact that Respondent kept track of when the union organizers arrived and how long they stayed when they took access on Respondent's property does not establish unlawful surveillance. Respondent has a legitimate interest in determining that the organizers comply with the access times. General Counsel has not established any surveillance on or about the date at the place alleged in paragraph 13 of the Complaint, and that allegation is dismissed. C. The Figueroa Incident

In cases of discrimination in employment under Labor Code

section 1153(c) and. (a), General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union activity was a motivating factor in the employer's action which is alleged to constitute a violation of the Act. General Counsel must show, by a preponderance of the evidence that: (1) the alleged discriminatee engaged in activity in support of the union; (2) the employer had knowledge of such conduct; and (3) there was a causal relationship between the employee's protected activity and the employer's adverse action (in this instance the discharge of Jesus Figueroa).

Where it is clear that the employer's asserted reasons for its actions can be viewed as wholly lacking in merit, i.e., pretextual, the presentation of General Counsel's prima facie case is in itself sufficient to establish a violation of the Act. In 1980, the NLRB acknowledged that in certain cases, in which the record evidence disclosed an unlawful as well as a lawful cause for employer's actions, the classic or traditional pretext case analysis proved unsatisfactory, and decided that such cases should not depend solely on the General Counsel's prima facie showing. In order to devise a standard approach for what came to be characterized as "dual-motive" cases, the NLRB modified the traditional discrimination analysis. Thus, in *Wright Line A* Division *of Wright Line, Inc. (Wright Line*) (1980) 251 NLRB 1083 [105 LR3M 1169], enf' d (1st Cir. 1981) 662 F.2d 899 [108 LRRM

2513], cert. Den. (1982) 455 U.S. 989 [109 LRRM 2779], as approved in *NZR3 v.* T.r3r!.sco.rt:aCion *Management Corp.* (1983) 462 U.S. 393 [113 LRRM 2357], the national board established the following two-part test of causation in all cases of discrimination which involve employer motivation:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (*Wright Line,* supra, at p. 1089.)

I find that Figureroa's support of Rivera's intercession on behalf of the workers so they would be paid for buckets that were placed in the bins and his exhortation to his co-workers to express their support too as evidenced by his cries to the effect of "Long live the Union" constitutes protected concerted union activity. Guido and Valencia were present which establishes knowledge of the activity.

I have found that Guido did not threaten to fire Figueroa and that there is insufficient evidence to establish that Ernesto Sanchez is a supervisor or agent of Respondent.[52] Thus, anything

[52]Even where an employee does not meet the statutory criteria of supervisory status, s/he may still be properly classified as an agent of the employer if other employees would reasonably perceive her/him as reflecting company policy and . acting on behalf of management. Thus, where a worker gave orders

that he said is not imputed to Respondent. There is no evidence whether the workers who told Figueroa that he might net have a job after the July 29 incident based their views on anything said by a supervisor or agent or whether this was simply their expectation based en what happened.

I find there is a causal connection between Figueroa's protected conduct on the 29th and Sanchez' refusal to let him work when he presented himself because of the timing and the lack of any substantial reason for Sanchez' action. Both are classic indicia of discriminatory motive.

In rebuttal to the prima facie case, Respondent asserts that Sanchez did not allow Figueroa to work because he was drunk, and Sanchez was concerned Figueroa would hurt himself. Sanchez asserted his refusal was in keeping with his long-standing policy. In his 20 to 25 years working, in the tomatoes, Sanchez testified, Figneroa was the only worker Sanchez had ever seen drinking on the job.

I find Sanchez' professed rationale pretextual. Clearly this is the case if Figueroa was not intoxicated that day. If, on the other hand, as Respondent contends, Figueroa was

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to employees which they were instructed to follow, and he assigned work hours and work to other employees, he was an agent even though he did not exercise sufficient independent judgement to be found a supervisor. *Vista Verde Farms* v. *ALRB* (1981) *(Vista Verde)* 29 Cal • 3d 307; (.Kosher Plaza *Supermarket* (1993) 313 NLRB 74. Case citations omitted. See p. 85.)

intoxicated that day, according to supervisor Cardenas and foreman Valencia, Figueroa had worked for Sanchez in that condition numerous times over the years. In that case, Sanchez' sudden concern and enforcement of this policy is unconvincing and is a pretext. Respondent has not rebutted the prima facie case.

Respondent argues that Sanchez acted independently in not letting Figueroa work, that there is no evidence Guide told him to act as he did. Even is this is true, Sanchez is Respondent's agent, and Respondent is liable for his conduct. *(Vis'za* Verde)

Respondent also argues that Figueroa was not discharged but only refused work on the one day and could have returned to work any day that he arrived sober. In view of the fact that Figueroa had not previously been denied work, and in the absence of any such indication from Sanchez, he was justified in inferring that he was fired, and I so find. Since I have found the only articulated reason for not allowing Figueroa to work is pretextual, I find Respondent violated section 1153 (c) of the Act.

ORDER

By authority of Labor Code §1160.3, of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Triple E Produce Corp., a Delaware Corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Unlawfully discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any tern or condition of employment because he or she has engaged in activity protected by §1152 of the Act;

(b) Surveilling or creating the impression of surveilling employees when they engage in protected activities;

(c) Failing or refusing to provide requested information relevant to collective bargaining requested by the United Farm Workers, of America, AFL-CIO, (UFW) the certified exclusive collective bargaining representative of said employees; and;

(d) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their 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 Jesus Figueroa immediate and full

reinstatement to his former position of employment, or if his former position, no longer exists, to *a* substantially equivalent position without prejudice to his seniority and other rights and privileges of employment;

(b) Make whole Jesus Figueroa for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful discharge. Loss of pay is to be determined in accordance with established Board procedures. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharge. The award also shall include interest to be determined in the manner set forth in *E.W. Merritt Farms* (1988) 14 ALRB No. 5;

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay and/or make whole amounts due those employees under the terms of the remedial order as determined by the Regional Director;

(d) Provide all information which the UFW has requested as the exclusive bargaining representative of its agricultural employees;

(e) Upon request of the Regional Director, sign the attached Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent

shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order;

(e) Mail copies of the Notice, in all appropriate languages/ within. 30 days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from August 5, 1994, until August 4, 1995.

(f) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's 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 may be altered, defaced, covered or removed;

(g) Arrange for a Board agent to distribute and read the Notice in all appropriate languages to all of Respondent's 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 non-hourly wage employees in order to compensate then for lost time at this reading and during the question-and-answer period;

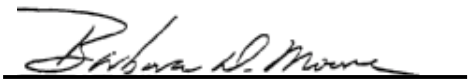
(h) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year

following the issuance of a final order in this manner;

(i) Upon request of the Regional Director or designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates/ Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season;

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

Dated: December 19, 1995



BARBARA D. MOORE
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALR3), the General Counsel of the ALRB issued a complaint that alleged we, Triple E. Produce Corp., a Delaware Corporation, had violated the law. After a hearing at which ail parties had an opportunity to present evidence, the Board found that we did violate the law by discharging Jesus Figueroa because of his support for the United Farm Workers of America, AFL-CIO (Union), by creating the impression of surveying workers in their union activities, and by failing and refusing to provide the Union with information it requested for collective bargaining.

The ALRB has told us to post and publish this Notice.

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative (union);
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
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.

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

WE WILL NOT discharge or otherwise retaliate against employees because they protest about their wages, hours or other terms and conditions of employment or because they support the Union.

WE WILL offer the employee who was discharged immediate reinstatement to his former position of employment, and make him whole for any losses he suffered as the result of our unlawful acts.

WE WILL NOT engage in surveillance or create the impression of surveilling employees in their Union activities.

WE WILL NOT fail or refuse to provide the Union with relevant information it requests for collective bargaining.

DATED: TRIPLE E. PRODUCE CORP.

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you
may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite H, Visalia, CA 93291. The telephone number is (209) 627-0995.
This is an official notice of the Agricultural Labor Relations Board, an agency of the
State of California.

DO NOT REMOVE OR MUTILATE