

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CERTAIN EMPLOYEES OF SIDHU & SONS NURSERY LTD.

("Certain Employees")

-and-

SIDHU & SONS NURSERY LTD.

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL:	Bruce R. Wilkins, Associate Chair, Adjudication
APPEARANCES:	C.B. (Joe) Coutts, for Certain Employees Michael A. Watt, for the Employer Brett Matthews, for the Union
CASE NOS.:	61942 and 61973
DATES OF HEARING:	February 20-24, February 27-29, March 2, March 12-14 and March 20, 2012
DATE OF DECISION:	March 20, 2014

DECISION OF THE BOARD

I. **NATURE OF THE APPLICATIONS**

1 Certain Employees apply for decertification under Section 33 of the *Labour Relations Code* (the "Code"). A vote was conducted pursuant to Section 33(2) of the Code on April 20, 2011; the ballots have been sealed pending adjudication of these matters. The Union says there has been improper interference by the United Mexican States ("Mexico") under Section 33(6) of the Code and that the representation vote is unlikely to disclose the true wishes of the employees. The Union also alleges the Employer and Certain Employees committed unfair labour practices prohibited under Sections 6 and 9 of the Code.

2 In *Certain Employees of Sidhu & Sons Nursery Ltd.*, BCLRB No. B28/2012, 207 C.L.R.B.R. (2d) 1, I wrote the following:

I conclude that Mexico enjoys state immunity in this matter. The Board has no jurisdiction to require Mexico to participate in these proceedings, and no remedial power to make orders against Mexico. Accordingly, I dismiss the Union's unfair labour practice complaints against Mexico.

While it is my finding that Mexico enjoys state immunity in this matter, facts arising with respect to the actions of Mexico are relevant and important to provide the background and context in which the Board may fully exercise its remedial powers, if it is appropriate to do so, once the evidence in this matter is heard and considered. I am of the view that the Board can and should take into account facts which take place in other jurisdictions in exercising its remedial authority within the province of British Columbia: *Nolin*; *Wal-Mart*. (paras. 46-47)

3 In *Certain Employees of Sidhu & Sons Nursery Ltd.*, BCLRB No. B194/2012, 219 C.L.R.B.R. (2d) 64, I found the Board was able to consider the evidence of Victor Robles Velez ("Victor Robles") in considering whether there had been improper interference by Mexico under Section 33(6) of the Code. I heard testimony from former employees of the Vancouver Mexican Consulate, but ultimately found I could not consider their evidence after considering the submissions of the parties and Mexico. I was overturned on this point by the majority in *Certain Employees of Sidhu & Sons Nursery Ltd.*, BCLRB No. B54/2013 (Leave for Reconsideration of BCLRB No. B194/2012) (the "Reconsideration Decision"). The panel in the Reconsideration Decision unanimously held that I should proceed to render a final decision in this matter.

4 The matter proceeded to the British Columbia Supreme Court. A stay of my final decision was agreed to by the parties pending the disposition of the matter in the British

Columbia Supreme Court. The British Columbia Supreme Court upheld the decision of the majority in the Reconsideration Decision in *United Mexican States v. British Columbia (Labour Relations Board)*, 2014 BCSC 54. It ruled as follows:

[156] For the foregoing reasons, the Board was correct in concluding that:

- (a) s. 3(1) of the *SIA* did not preclude the Board from considering Mexico's conduct in the course of determining whether the Employees' decertification application should be dismissed, in accordance with s. 33(6)(b) of the *Code*, on the basis that the representation vote is unlikely to disclose the true wishes of the employees due to improper interference, and
- (b) it could consider voluntary testimony of former consular employees of Mexico about the internal Mexican administration of the SAWP in the course of doing so.

5 Consistent with the direction in the Reconsideration Decision, I will now proceed to render my final decision in this matter.

6 II. FACTS

6 The Seasonal Agricultural Workers Program ("SAWP") is a bilateral agreement between Canada and Mexico which allows workers from Mexico to perform seasonal agricultural work for employers in Canada where Canadian workers are unavailable to do the work. SAWP workers typically arrive in late winter and return to Mexico in the fall. Workers working for the Employer live and work on the Employer's property in accommodation provided for them by the Employer.

7 The Union holds a certificate to bargain under the Code on behalf of employees in a unit composed of "Seasonal Agricultural Workers Program (SAWP) employees employed by Sidhu & Sons Nursery Ltd." which was granted by the Board on March 4, 2010. The Union won the certification vote, which was conducted on August 5, 2008, with 36 votes in favour and 35 against.

8 The Board received the Section 33 application on April 11, 2011. Alfredo Lopez Contreras ("Alfredo Lopez"), who has worked in the SAWP with the Employer for seven farming seasons, testified he organized the decertification campaign on behalf of Certain Employees. He testified he left the decertification forms in the houses where workers lived and said to them "sign or don't sign". He returned a short time later to retrieve the forms. Alfredo Lopez took a day off from work, with a domestic employee of the Employer named Wendy, to deliver the decertification forms to the Board. Neither Wendy nor Alfredo Lopez sought permission from the Employer to take a day off. The Employer did not discipline either employee, but asked to be informed in future when they intended to take a day off. Parshinder Brar ("Brar"), an excluded supervisor on the Employer's farm, testified if employees missed a day of work without notice, typically it was not seen as a serious matter. Gurjit Sidhu and Parmeet Sidhu confirmed this in

their testimony. Gurjit Sidhu is the General Manager for the Employer. His spouse Parmeet Sidhu is in charge of Human Resources and deals with the Vancouver Mexican Consulate (the "Consulate") with respect to the SAWP. Alfredo Lopez also testified he knew which employees supported the Union at the time of the certification vote in 2008, and that he was not aware of any who were working for the Employer presently.

9 Victor Robles is a Mexican farm worker who worked for the Employer for six farming seasons under the SAWP. After Victor Robles finished work for the Employer in September 2010, the Employer indicated on a document entitled "Notice From the Employer" (hereinafter "Return Report"), that it wanted Victor Robles to return for the 2011 season to start work in February. Workers participating in the SAWP are required to present their Return Report to their state office promptly upon return to Mexico. The presentation of a favourable Return Report allows the process to begin to return the worker to Canada for the following farming season. Alfredo Lopez testified that a worker must give the Return Report to their state employment office within five days of returning to Mexico or they risk losing their place in the program.

10 Once the Employer filled out the Return Report, it was given in an envelope to Victor Robles to be turned in at the Mexican Ministry of Labour office in Victor Robles' home state of Tlaxcala after his return to Mexico. The Employer did not comment on his quality as a worker on the space provided on the Return Report for that purpose, but simply ticked the "yes" space when asked on the form if the Employer wanted him to return. The Employer had written "good worker" on Victor Robles' Return Report the previous year. Towards the end of the 2010 season, Victor Robles was working with a crew covering greenhouses with nylon. He had a brief dispute with his supervisor when directed to do a particular task. He left his job in the middle of his shift and went to his living quarters having told his supervisor he was tired. This resulted in a delay to the crew's work. Gurjit Sidhu and Parmeet Sidhu testified they did not put "good worker" in the space provided because of this incident.

11 Victor Robles met with a Mexican official called Laura Tolteca Zamora ("Zamora") on September 27, 2010 at the employment office in his home state of Tlaxcala when he returned to Mexico from Canada. Victor Robles presented his Return Report from the Employer to Zamora. He asked about a change of employer for the 2011 season. Zamora informed him that in order to change employers he had to have another Canadian employer who was ready and willing to employ him. Victor Robles did not have such an employer. He consequently informed Zamora he intended on returning to the Employer for the 2011 season. With this transaction, the process to return Victor Robles to Canada to work for the Employer for the 2011 season was initiated. Zamora recorded the meeting into Mexico's computer program called the System of Labour Mobility Information ("SIMOL") which contains, among other things, information about workers in the SAWP. She wrote two entries on September 27, 2010 which are translated as follows:

The worker has 8 seasons in the program and 6 seasons with the current employer who gave him a letter for February 2011. The worker says that the request could be for 7 January 2011. The worker has experience in the harvesting of tomato, green pepper, cucumber and flowers in greenhouses; and cucumber, flowers and lettuce in the field. *[Information missing in original fax transmission at beginning of page 2]*

He was asked to renew his passport and later on, start his visa process. The Visa, passport and white card are returned to him for safe keeping. **(entry from 10:59 a.m.)**

The worker has 8 seasons in the program and 6 seasons with the current employer who gave him a letter for February 2011. The worker talks about the possibility of changing employer. He is advised that if that were the case he would be quitting from the requesting employer. The worker says that by the time he returns to apply for his visa his situation would have been defined. The worker says that the request could be for 7 January 2011. The worker has experience in the harvesting of tomato, green pepper, cucumber and flowers in greenhouses; and cucumber, flowers and lettuce in the field. He was asked to renew his passport and later on, start his visa process. The Visa, Passport and SIN card are returned to him for safe keeping. (added text and italics in original) **(entry from 11:08 a.m.)**

12 Victor Robles returned to the employment office in Tlaxcala in the second or third week of January 2011 and completed a pre-documentation process in preparation for travelling to Canada for the 2011 farming season. He received a contract for employment at the Employer's farm. Once the pre-documentation was complete, the next step in the process was for Victor Robles to report to Mexico City on January 27, 2011 to get his final documents including his passport with a visa allowing travel to Canada. Victor Robles was scheduled to depart from Mexico City to fly to Vancouver on February 1, 2011 in order to work for the Employer during the 2011 farming season. When he returned home from his pre-documentation meeting, however, Victor Robles received an urgent phone call from the employment office in Tlaxcala informing him to report to the Mexican Ministry of Labour office in Mexico City. He was informed the situation was urgent. He travelled to Mexico City as requested.

13 In Mexico City, Victor Robles met with Ener Sosa Rizo ("Sosa"), who was a Mexican official responsible for coordinating the SAWP on behalf of the Mexican Government. Sosa informed Victor Robles there was a problem with his visa because a person with his name had been caught in the United States. Sosa told Victor Robles his visa to Canada was blocked, and there was nothing that could be done because the problem was between the United States and Canada. Victor Robles was given a phone number by Sosa to call when his visa was no longer blocked. Victor Robles attempted to call the number but was unable to contact Sosa.

14 On February 2, 2011 Victor Robles again travelled from his home state to visit the Mexican Ministry of Labour office in Mexico City. Victor Robles went to the reception desk and spoke to a person who was working there called Jorge. Victor Robles asked Jorge to check the status of his visa. Jorge looked on his computer and then asked Victor Robles what he was doing and why he was upsetting people. Victor Robles asked why Jorge was making these comments, and Jorge told Victor Robles that he had been finding people to form a union. Victor Robles denied this. Jorge told Victor Robles he was blocked because of a problem with a union. Jorge told Victor Robles to wait to speak to Sosa. When Victor Robles spoke to Sosa, he confronted Sosa and accused him of lying, telling Sosa what Jorge had told him. Sosa told Victor Robles that what Jorge had said was not true and that Jorge knew nothing. Sosa left Victor Robles and spoke to Jorge for approximately 15 minutes; he then returned and told Victor Robles he could not go to Canada because his visa was blocked because of the problem between Canada and the United States. After his meeting with Sosa, Victor Robles phoned the Employer and informed them he was having paperwork issues. Victor Robles did not work for the Employer in 2011. He eventually travelled to Canada to work on another farm under the SAWP in Quebec in the summer of 2011.

15 Stan Raper ("Raper") is a National Representative for the Union. He is also a national coordinator for the Agriculture Workers Alliance ("AWA"), which maintains support centres for agricultural workers in Canada. The Union provides the funding for AWA centres. Currently there are ten such support centers operating in Canada. These centres provide assistance at no cost for agricultural workers with respect to such issues as workers' compensation, income tax, parental benefits, employment insurance, wage complaints, repatriation without cause, and health and safety education. AWA has three offices in British Columbia: one in Kelowna, one in Surrey and one in Abbotsford. Lucy Luna ("Luna") runs the AWA office in Abbotsford. Luna was involved as an organizer for the Union in its drive to organize the Employer's SAWP workers which resulted in the certification granted by the Board in 2010.

16 On March 7, 2011, an anonymous fax was sent to Raper's office in Toronto. Attached to the fax was a copy of a document from Victor Robles' SIMOL file. That document reflects a note made under the name of Sosa on January 13, 2011 at 9:54 a.m. (the "First Entry") which, when translated, reads as follows:

Call received from the Consulate in Vancouver reporting that this worker will not be able to go to Canada because he is involved in union activities. Pay attention that he does not go out.

17 Other than the fact he was blocked from returning as planned, the process followed by Victor Robles was typical of the process followed by Mexican workers returning from Mexico and preparing to go back to Canada the following season under the SAWP. The Employer requested Victor Robles by name when it completed a Labour Market Opinion ("LMO") for the 2011 farming season for Service Canada. Employers are required to complete an LMO on a yearly basis to apply to Service Canada for permission to hire Mexican workers to work in Canada under the SAWP. Service Canada allowed the Employer's request to hire 25 named Mexican workers to

work under the SAWP for the 2011 season. Victor Robles' name appeared on a list of named workers sent by Service Canada to the Employer on January 6, 2011. He also appeared on a list of travellers expected to be on a flight on February 1, 2011 from Mexico City to Vancouver created by the travel agent, Mi Tierra. The list showed that 25 Mexican workers would be on the plane. Four of the workers on the list, including Victor Robles, did not show up to get on the plane. The plane was delayed in Mexico City for an hour to see if the workers would arrive.

18 When the Employer obtained a copy of the First Entry with the Union's unfair labour practice complaint, which was filed April 19, 2011, it contacted the Consulate to inquire about the entry. The Employer obtained a release from Victor Robles allowing the Mexican Government to share his labour information with the Employer. Gurjit Sidhu communicated with Luis Manuel Munoz Carrillo ("Luis Munoz") on behalf of the Employer. Luis Munoz was, by that time, the coordinator of the SAWP for Mexico. Luis Munoz e-mailed the Employer stating that the First Entry was false, and attached what he identified as a translation of the correct entry (the "Second Entry"). The Second Entry reflects that it was written by the same author, Sosa, at the same time and date as the First Entry. The Second Entry, which Luis Munoz sent to the Employer, said the following in translation:

The worker presents the report of return where requested change of employer, we commented to the worker that he meets with the requirements for the change but to go to Canada in the 2011 season he will have to wait for the request of other employer. Is sent to the local office of national employment service to continue with their visa process.

19 Luis Munoz included his view that the First Entry the Employer had inquired about had been falsified as the result of "an apparent malicious act that seeks or pursues interests outside the truth". On July 13, 2011, Elisa Soriano Rosasi ("Elisa Rosasi") of the Mexican Undersecretariat of Employment and Productivity wrote an official letter to Gurjit Sidhu to this effect which is reproduced, in part, below:

In answer to your request for information dated the 6th of May of this year, relative to the file of the farm worker Victor Robles Velez (File No. R3102), I inform you of the following:

- I. In the framework of the operating process of the Mexico-Canada Seasonal Farm Workers Program (PTAT), the General Coordination of the National Employment Service (CGSNE) is the entity that administers the System of Labour Mobility Information (SIMOL in Spanish), which basically contains operating information for the different processes that make up the PTAT, as well as the personal information of the workers that participate in the same.
- II. It must be mentioned that said information of the workers of the PTAT is considered in Mexico to be protected Personal Information by the Federal Law of Protection of Personal

Information as well as the Federal Law of Transparency and Access to Public Government Information.

- III. According to the Federal Law of Transparency and Access to Public Government Information, the information of the operating process of the PTAT is considered to be Reserved Information, therefore for any process where said information is to be revealed, it is necessary to present an application for authorization, a situation that was not followed in the case of the document that you sent us because the CGSNE did not receive any application whatsoever or process in this respect. Therefore, it is important to indicate that the SIMOL log for comments is a mechanism that is used internally for the PTAT operations. Therefore, said information cannot be accessed by the public and only the officials that are authorized by the institutions participating in the PTAT are able to have access to the same.
- IV. In this same sense, I inform you that the copy of the document that you sent us corresponds to one of the title pages of the file for the worker Victor Robles Velez, which is normally issued by the System of Labour Mobility Information (SIMOL). Nevertheless, it has been detected that part of the information contained in the document does not correspond to the information registered on our system, especially the comment dated 13/01/2011.
- V. According to the information existing in the SIMOL the comment of 13/01/2011 establishes the following: "THE WORKER PRESENTS A RETURN REPORT WHERE HE IS REQUESTING A CHANGE OF EMPLOYER. HE IS TOLD THAT HE FULFILLS THE REQUIREMENT FOR SAID CHANGE BUT THAT TO LEAVE IN THE 2011 SEASON HE WILL HAVE TO WAIT FOR AN APPLICATION FROM ANOTHER EMPLOYER. HE IS SENT TO HIS SNE TO CONTINUE WITH THE VISA PROCESS."
- VI. Because of the above, we presume that the information existing in the document that you sent us has been altered because the contents of said note as well as the form on which it is presented do not correspond to the System of Labour Mobility Information (I am attaching an image).

Due to the alteration of the document that was sent to us, it is necessary to indicate that the type of comments indicated in the same do not correspond to the criteria, principles and operating procedures of the PTAT, therefore to us it results to be an evident malicious action that seeks or pursues interests outside of the truth.

It is very important to mention that to provide this information for you authorization was requested from the worker himself, Victor Robles Velez, who gave written authorization to share his labour information with you and the Canadian authorities.

Finally, I inform you that according to the application to change employers presented by Mr. Robles Velez to the CGSNE on the 13th of January of this year, the worker was assigned a work contract by the CGSNE in the province of Quebec from the 30th of June.

20 The Union also made inquiries into the case of Victor Robles through Andrea Galvez Gonzalez ("Andrea Galvez"), a representative of the Union working in Mexico. Andrea Galvez began as a volunteer for the Union and was then hired as a coordinator for the AWA in Quebec. She worked on Union organizing campaigns as a part of her duties. She made a written enquiry of the Canadian Embassy in Mexico on April 18, 2011 concerning the visa of Victor Robles after obtaining a release from him. She received the following response from the Canadian Embassy the next day:

Mr Robles was issued a visa last December. He is currently in possession of this visa and it is valid for travel to Canada. We have no record of there having been any problems in this case.

21 Andrea Galvez also testified that Victor Robles would not have received a contract from the Employer had he not received a valid visa to travel to Canada from the Canadian Embassy. Andrea Galvez testified, like Alfredo Lopez, that SAWP workers were required to turn in their Return Report within a matter of days of returning to Mexico from Canada. On May 18, 2011, the Union held a press conference in Mexico City about Victor Robles being blocked from Canada because of his association with the Union. Victor Robles participated and explained his situation to the media as follows:

Good morning, I'm Victor Robles...well my problem is a bit more serious, because I have been going to Canada for 8 seasons, and all of a sudden they blocked my Visa, saying that I was having problems of a fellow in the United States and well, the truth that's what they told me, and on the day of my leave, I show up and they tell me in reception that that's not the reason why, that the issue is that I was in problems related to the Union and well, we had Union problems but many years ago and well, that's my only problem, so thank you.

22 The Union called three former employees of the Consulate as witnesses in the hearing. These witnesses were hired by the Consulate to help oversee and administer the SAWP. These included Javier Valdez, Diego Alberto Prieto Galves ("Diego Prieto") and Felix Alejandro Martinez Carballal ("Felix Martinez") (together, the "Former Employees"). These witnesses all testified voluntarily. The Board did not issue a subpoena requiring their attendance.

23 Felix Martinez worked for the Consulate from April 2008 until December 31, 2011. He was in charge of the movement of workers in the SAWP. Diego Prieto worked as a mediator between employers participating in the SAWP and their Mexican workers between May 2009 and March 2011. Javier Valdez worked from July 2006 until December 2010 performing mixed duties including driving, answering phones, cleaning, computer duties, organizing flights and other duties. He also greeted and picked up SAWP workers at the airport.

24 The Former Employees all gave testimony that senior officials working above them at the Consulate who were responsible for administering the SAWP expressed strong anti-union views. These included Vice Consul and coordinator of the SAWP at the Consulate Estela Garcia Leon ("Estela Garcia"), Guadalupe Palacios ("Palacios") and Angel Villalobos ("Villalobos"). They testified that Luis Munoz, who coordinated the SAWP in Mexico, also held such views. Javier Valdez testified that Villalobos, Palacios and Estela Garcia all expressed the view that if employees joined a union the employers of SAWP workers would be upset and would stop bringing them from Mexico, and that jobs administering the SAWP would also be lost. Felix Martinez testified that Estela Garcia told him that if the farmers saw that Mexican workers were being unionized, they would stop requesting them and would request workers from Guatemala instead. Javier Valdez testified he was instructed by Estela Garcia to tell workers arriving at the airport not to contact anyone except the Consulate. He said he also was instructed by Estela Garcia to tell workers not to contact the Union, and that he did so. Diego Prieto testified that Estela Garcia told him that employees of the Employer had been given instructions to decertify by Mexico, and that an unidentified worker whom he spoke with on a visit to the Employer's farm had also said this.

25 When Luis Munoz became coordinator of the SAWP for Mexico, he made a number of changes to the program. One such change was that if a SAWP worker wished to change employers, that worker had to have another employer who was willing to name that worker to work on their farm. If the worker did not have another employer willing to take him, the worker was simply put back into a general pool of SAWP workers awaiting a request from a Canadian farm for unnamed workers. Luis Munoz visited the Consulate in 2009 and 2010. Felix Martinez and Diego Prieto testified that during his visit, Luis Munoz instructed them to inform him of any workers who had contacted the Union and to use SIMOL to do so. He further informed them that log entries on SIMOL could be changed and not to worry about what was said there. Luis Munoz said if there were workers who they did not want to continue in the program, they would say the worker was denied entry into Canada. Estela Garcia also instructed Diego Prieto to use SIMOL to identify SAWP workers who had contacted the Union. Luis Munoz would be informed where such a log entry was made.

26 Log entries on worker files on SIMOL can be partially changed. The name, date and time of the entry cannot be changed, even by the person who originally made the entry. In order to change a log entry that has already been made, the password of the person who made the original entry is required.

27 Also not on the plane from Mexico on February 1, 2011 was Augusto Gomez Jimenez ("Augusto Gomez"). Augusto Gomez was name requested by the Employer, but decided not to return to work on the Employer's farm for a number of personal reasons. Augusto Gomez signed a statement which Luna prepared for him. In that statement, he said that Brar, an excluded supervisor on the Employer's farm, had attended his employee housing on Athea Road in Deroche on September 14, 2010 at 6:00 p.m. and told the workers they were not to contact Luna or the Union, or else there would be trouble. According to Augusto Gomez' statement, Brar used Alfredo Lopez as an interpreter. His statement says the following:

My name is Augusto Gomez Jimenez, I'm a union supporter and this statement is to let you know that on September 14, 2010 I was at home located at Athea Rd. In Deroche BC when Mr. Brar one of the farm's supervisors came to the house at approximated 6:00 pm accompanied by Alfredo Lopez Contreras who is the Mexican worker who translates for the farm to tell me not to contact Lucy Luna or the Union.

Mr. Brar advice me no to contact Ms. Luna in the future, he said if in the past I had contact with her was ok but contacting her from now on was going to get me in trouble with the farm.

As I am returning to Mexico on September 23, 2010, I'm leaving this statement in writing and my phone number in Mexico for you to contact me if it's necessary.

28 The document containing Augusto Gomez' statement also contains a Spanish version of the statement above.

29 Brar and Alfredo Lopez denied in their testimony that such a meeting had taken place. They said that Augusto Gomez and another worker had approached them and asked about taking time off to visit Luna to obtain parental benefits forms. Brar used Alfredo Lopez as a translator and told them they did not have to visit Luna because the Employer could now do parental benefits forms on behalf of the workers.

30 The Employer was in regular contact with the Consulate in and around January 2011 concerning the translation of the Collective Agreement. The Union had previously informed Parmeet Sidhu in November 2010 that it would translate the Collective Agreement and would send it when it was done. Parmeet Sidhu testified that she asked the Consulate to translate the Collective Agreement for her as a neutral third party. The Consulate agreed to do so and hired a lawyer, at its own expense, to translate the Collective Agreement. Parmeet Sidhu testified the translation contained many errors and that she was dealing with Estela Garcia about it over four weeks. Eventually the

Consulate provided its own copy of the translated Collective Agreement. Under cross-examination Parmeet Sidhu said the Consulate translated the Collective Agreement as a favour to the Employer, and that she did not talk to Estela Garcia about Union matters other than a previous discussion about the troubles amongst the workers during the certification drive.

31 At the time of the certification vote, there were 73 SAWP employees working for the Employer. The Employer requested 25 SAWP workers for the 2011 season. The Employer's business experienced a significant downturn during the economic crisis of 2008 and 2009. The Employer also made an error which resulted in large damage payments to some of its customers. When 4 of the 25 requested Mexican workers did not show up on the plane bringing workers for the 2011 season, the Employer did not request replacements from Mexican SAWP officials.

III. ARGUMENT

A. THE UNION

32 The Union submits the decertification vote taken pursuant to the Section 33(2) application will not reflect the true wishes of the employees because of improper interference and unfair labour practices. The Union says the facts demonstrate Victor Robles and others in the bargaining unit were blocked from participation in the SAWP because they were perceived to be involved in the Union. The Union says the evidence establishes a concerted effort on behalf of Mexico to prevent workers from contacting the Union and to block workers who contacted the Union.

33 The Union says the facts also demonstrate there was collusion between the Employer and Mexico to facilitate the decertification campaign. The Union says the evidence demonstrates that Brar specifically told employees to stay away from the Union. It also asserts the evidence demonstrates the Employer encouraged and facilitated Certain Employees' decertification campaign.

34 The Union says the Board should not have confidence in the vote given the evidence which has been called. It says there has been manipulation of who voted in the Section 33(2) application, and that Victor Robles was blocked from returning to Canada pursuant to a policy of the Mexican Government to block workers who support the Union.

35 The Union says the alternative explanation for Victor Robles' failure to return to Canada has no credibility, and should be rejected by the Board.

36 The Union asserts the evidence proves the existence of a "blacklist", and that perceived Union supporters were not returned to work for the Employer.

37 The Union says there has been interference with respect to how employees will vote. It says voting took place under a climate of fear, workers were blocked, and they were told not to contact the Union.

38 The Union says the Board should find on the evidence that Certain Employees,
in particular Alfredo Lopez, used intimidation and coercion during their campaign to
decertify.

39 With respect to the hearsay evidence given by its witnesses, the Union argues
the Board may consider hearsay evidence under the Code and that the twin
requirements the Supreme Court of Canada noted in *R. v. Khan*, [1990] 2 S.C.R. 531
("*Khan*") of necessity and reliability with respect to the admission of hearsay evidence
are met in this matter.

40 The Union says the simple finding that Victor Robles was blocked is sufficient for
the Board to refuse to decertify the bargaining unit without regard for the results of the
vote. The blocking of Victor Robles alters the voting constituency, and that other
workers observing his fate would be less likely to support the Union.

41 The Union seeks declarations that the Employer and Certain Employees have
breached Sections 6 and 9 of the Code. It asks the Board to refuse to decertify the unit
and to impose a two year time bar on further decertification applications. It also seeks
an order that the Employer name request a number of workers, including Victor Robles,
for the next farming season. The Union seeks the exclusion of Alfredo Lopez from the
bargaining unit.

B. THE EMPLOYER

42 The Employer argues it took all steps under the SAWP to request and obtain the
return of Victor Robles for the 2011 season. It argues the evidence establishes the
Employer had no knowledge or involvement in the decertification campaign.

43 The Employer argues there is no evidence to suggest that Victor Robles was a
Union supporter. In fact, it says the evidence tends to go the opposite way. It says it
has given a valid explanation for why it did not write "good worker" on the Return
Report. It says this was because of an incident in which Victor Robles walked off the
job.

44 The Employer argues nothing should be inferred from the fact the Employer was
in regular contact with the Consulate during January 2011. It says it makes simple
business sense that the Employer would make such contact, because it is a participant
in the SAWP. It says there is no evidence of collusion between Mexico and the
Employer, just evidence of regular business operations.

45 The Employer argues I should prefer the testimony of Brar and Alfredo Lopez
over that of Augusto Gomez and find there was no meeting at the residence of the
workers in which Brar told workers not to contact the Union or Luna.

46 The Employer says the bargaining unit was split from the beginning and the
result of the certification vote conducted in 2008 was determined by one vote. Since
then, there has been little or no contact from the Union with the employees even after

protocols were negotiated for the Union to visit the Employer's farm. It argues that Luna had visited the farm after a protocol for visits by the Union was established, and had spoken to employees, who had the opportunity to consider the views before they voted.

47 The Employer argues there is no evidence to corroborate the double hearsay from the Former Employees that workers had been given instructions to decertify; it says the Board heard from numerous employees as witnesses and none of them said they had been given instructions to decertify.

48 The Employer says the Board's policy of not allowing hearsay evidence regarding a material issue should be upheld: *7-Eleven Canada Inc.*, BCLRB No. B91/2000 ("*7-Eleven*").

49 The Employer argues the Union has shown no evidence or particulars that any other employee besides Victor Robles was not returned because they were perceived as pro-Union.

50 The Employer submits there is no objective evidence to suggest Alfredo Lopez was working on behalf of the Employer or that the Employer condoned or aided the decertification campaign led by him. It says his translation efforts were minimal, that he performed the same duties as the other employees, and was seen by others as simply another employee.

51 The Employer argues the Union has not established improper interference. It says the Union has not proven there were improper actions which were known to employees in the bargaining unit, and which would cause the vote to not represent the true wishes of employees.

52 The Employer asks the Board to draw an adverse inference from the Union's failure to provide a copy of Victor Robles' visa.

53 The Employer argues none of the Former Employees gave any specific example of an employee they had blacklisted. It says they each left the Consulate on bad terms and had the opportunity and motive to fabricate the First Entry; the evidence demonstrates the First Entry is false. The Employer argues the absence of the participation of Mexico leads to fair hearing issues.

C. CERTAIN EMPLOYEES

54 Certain Employees assert the Board should not interfere with their right under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* to disassociate unless there is clear, convincing and compelling evidence.

55 Certain Employees argue there is no evidence to suggest that Alfredo Lopez was the voice of the Employer, and certainly no evidence from which the Board could draw an inference that Alfredo Lopez was involved in anything other than exercising his right to decertify under the Code.

56 Certain Employees argue the evidence establishes that Alfredo Lopez did not use threats or intimidation to persuade employees to decertify, but only that he left the decertification forms in the houses where workers lived and only said "sign or don't sign". They say consequently there is no basis for the requested remedy that he be removed from the bargaining unit. They say Alfredo Lopez filed for decertification under Section 33(2) of the Code because he was happy with the SAWP contract and saw no need for the Union.

57 Certain Employees say the Union is interfering with the rights of Alfredo Lopez and that Certain Employees' rights should be seen as just as important as the rights of the Union and the Employer.

58 Certain Employees point to the Union's evidence that they did not ratify the Collective Agreement because they knew it would not be ratified, and knew the Union was split from the start.

59 Certain Employees say the Union's objections to their application should be dismissed and the votes should be counted.

IV. ANALYSIS AND DECISION

I. Improper Interference under Section 33 of the Code

60 The testimony of Victor Robles was not fundamentally shaken during cross-examination, and there were no internal inconsistencies in his testimony. No other witness was called to give testimony which challenged his testimony. I accept the account of events he gave as fact. Victor Robles presented his Return Report on September 27, 2010 to Zamora at his state labour office in Tlaxcala within days of his return to Mexico from Canada after the 2010 farming season. He inquired about changing employers at this time, but when he learned that he had to have another employer who would request him, he stated his preference to return to work for the Employer. I find Victor Robles had every intention of returning to Canada to work for the Employer for the 2011 season, and had complied with all bureaucratic requirements of the SAWP including obtaining a valid visa from the Canadian Government.

61 The parties have asserted two competing theories as to which entry is the true entry before me in Victor Robles' SIMOL file. The Employer argues the Second Entry reflects the intentions of Mexican officials; the Union argues the First Entry reflects the intentions of Mexican officials. There is no dispute the First Entry was in the SIMOL system on Victor Robles' file. I have decided that, on a balance of probabilities, the First Entry is the true entry which reflects the actual intentions of Mexican officials responsible for administering the SAWP. I have found the Second Entry is a fabrication created after the fact. There are a number of reasons why I have come to this conclusion.

62 The Second Entry, sent in response to the Employer's request by Luis Munoz, and confirmed by Elisa Rosasi in her letter to the Employer of July 13, 2011, is completely inconsistent with the evidence I heard from Andrea Galvez, Victor Robles, Alfredo Lopez and the Former Employees concerning the manner in which workers are processed through the SAWP by Mexican officials. The Second Entry says that Victor Robles presented his Return Report on January 13, 2011. This is inconsistent with the testimony of Victor Robles, who testified that he presented his Return Report to Zamora in his state office, soon after his return to Mexico, on September 27, 2010. Zamora's SIMOL entry of September 27, 2010 in Victor Robles' SIMOL file confirms this. In her letter to the Employer of July 13, 2011 Elisa Rosasi did not take issue with the notes of Zamora.

63 I accept the testimony of Alfredo Lopez and Andrea Galvez that workers are required to present their Return Report to their state office within days following their arrival in Mexico after the Canadian farming season. Alfredo Lopez stated in cross-examination that workers were required to report to their state office in Mexico and give their Return Report within five days of returning to Mexico. He said that if a worker delayed the presentation of the Return Report, they would be endangering their participation in the SAWP for the following year. The evidence I heard from a number of witnesses confirmed that returning to work for an employer and continued participation in the SAWP is contingent upon the worker providing a favourable Return Report in which an employer indicates they wish the worker to return to work on their farm for the next season. A favourable Return Report is what allows the further necessary administrative processes to follow, including obtaining a visa to return to Canada. I therefore do not accept that Victor Robles presented his Return Report on January 13, 2011, months after he returned to Mexico from Canada, as is stated in the Second Entry. The uncontradicted testimony of Victor Robles was that he presented his Return Report in September 2010, and did not discuss the matters described in the Second Entry with Sosa on January 13, 2011.

64 Felix Martinez testified that Victor Robles' SIMOL file reflected that he was granted a visa on December 17, 2010 to go to Canada. The notation in the Second Entry that Victor Robles was sent back to his state office to continue with the visa process is inconsistent with the fact that his visa had already been approved by Canada. Victor Robles received a contract in January 2011 to return to work for the Employer, something which, according to the testimony of Andrea Galvez, would not have happened unless he had a valid visa to travel to Canada. The e-mail from the Canadian Embassy in Mexico of April 19, 2011 obtained through the inquiries of Andrea Galvez, also confirms that Victor Robles was given a visa in December 2010 to travel to Canada. The Canadian Embassy stated in its response to Andrea Galvez that there was no record of any difficulties with his visa.

65 When Victor Robles spoke to Jorge, the receptionist at the employment office in Mexico City, the statements Jorge made reflect the comments in the First Entry. Jorge's comments were unscripted and spontaneous and based upon what he was reading on the computer in front of him. Those comments did not correspond to what Sosa told Victor Robles. What Sosa told Victor Robles does not correspond with the fact that

Victor Robles had a valid visa from December 17, 2010, with no problems being reported by the Canadian Embassy as per its e-mail of April 19, 2011. Furthermore, the Second Entry does not reflect the explanation given to Victor Robles by Sosa that he was blocked by the Canadian Government because of a problem between Canada and the United States. Given the nature of SIMOL and its use in recording facts with respect to SAWP workers, had Canadian authorities actually denied Victor Robles' Canadian visa, I would expect to see this explicitly written in SIMOL; it was not.

66 The comment in the First Entry that Victor Robles will not be able to go to Canada because he is involved in union activities is consistent with the instructions given to Diego Prieto and Felix Martinez by Estela Garcia and Luis Munoz. These instructions were to inform the coordinator of the SAWP in Mexico if they knew of any workers who had contacted the Union and to use SIMOL to do so. Luis Munoz explained to Felix Martinez and Diego Prieto he would use the excuse that such workers were denied access to Canada by Canadian authorities in order to block them from the SAWP.

67 I find the evidence is overwhelmingly in favour of the finding that Victor Robles had a valid visa to travel to Canada as of December 17, 2010, and he had never been blocked from returning to Canada by the Canadian Government. The evidence convinces me that the First Entry is the true entry which reflects the reason why Victor Robles was blocked from the SAWP. I find an unknown person at the Consulate identified Victor Robles as being involved with the Union and that Sosa had mislead him about his visa in order to prevent his return to Canada. I find the Second Entry was created after the fact to cover the truth of what actually occurred. The evidence presented to me demonstrates on a balance of probabilities that Victor Robles was blocked by Mexican officials responsible for administering the SAWP for his perceived involvement in the Union. I conclude the blocking of Victor Robles took place pursuant to a policy dictated explicitly by Luis Munoz to staff at the Consulate to identify and block workers from the SAWP who were contacting the Union, using as an excuse that their visas had been blocked by Canada.

68 In coming to this conclusion I have allowed the evidence of the Employer's inquiries to Mexican authorities and those inquiries made by the Union to Canadian authorities concerning the fate of Victor Robles. Both parties put forth this same type of evidence, but objected to the other having the right to bring such evidence. The Code sets out in Section 124(1) the evidence which the Board may hear:

The board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law.

69 The evidence in question consists of answers by Mexican and Canadian officials to inquiries by both the Employer and the Union concerning the case of Victor Robles. This evidence is clearly relevant to the case before me. I have decided it is proper and fair under the Code to allow both parties to put forth the evidence of their inquiries, and also that it is proper and fair to weigh and consider this evidence. I note the letter the

Employer obtained and tendered from Mexican official Elisa Rosasi concerning Victor Robles contained no restriction as to its use, and that the letter reflects the Mexican authorities obtained a release from Victor Robles which permitted it to share his labour information for the use of the Employer and Canadian authorities.

70 A great deal of the evidence called was hearsay evidence, in particular with respect to the Former Employees' evidence concerning the instructions of Luis Munoz, Estela Garcia, and other Mexican officials who administered the SAWP. The Employer objected strenuously to my hearing this evidence on the basis that the evidence is hearsay.

71 The Employer says the Board's policy of not allowing hearsay evidence with respect to a material issue should be maintained. The Union argues I may hear the evidence under Section 124(1) of the Code and further that the twin requirements of necessity and reliability with respect to the admission of hearsay evidence in *Khan* are met in this matter. The case of *7-Eleven* cited by the Employer is distinguishable because it relies on the proposition that hearsay evidence should not be considered on a central issue where witnesses are available. I find it is necessary to rely on hearsay evidence in this matter because witnesses such as Luis Munoz, Palacios and Estela Garcia are unavailable and not compellable to testify. I find the hearsay testimony of the Former Employees to be reliable because they were participants in the administration of the SAWP, and observed its operations first hand on a day-to-day basis. Their positions and employment duties allowed them to give testimony from direct knowledge and experience of the SAWP and its inner workings. I conclude the requirements of reliability and necessity are met in this case and that I can consider the hearsay evidence heard from the Former Employees.

72 I find the testimony of the Former Employees to be credible. They gave their testimony in a straightforward and cooperative manner under both direct and cross-examination. Their testimony is also consistent with and corroborated by the testimony of Victor Robles, the First Entry, and the evidence that Victor Robles had a valid visa to return to Canada for the 2011 farming season.

73 Section 4 of the Code states the following:

- 4 (1) Every employee is free to be a member of a trade union and to participate in its lawful activities.

74 Section 33(2) of the Code provides a process by which employees represented by a union can cancel their union's certification:

- (2) If a trade union is certified as the bargaining agent for a unit and not less than 45% of the employees in the unit sign an application for cancellation of the certification, the board must order that a representation vote be conducted within 10 days of the date of the application or, if the vote is to be conducted by mail, within a longer period the board orders.

75 If a vote occurs under Section 33(2), Section 33(6) allows for a remedy in a case where a representation vote is unlikely to reflect the true wishes of employees due to improper interference:

(6) If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where

(a) any employees in the unit are affected by an order under section 14, or

(b) the board considers that because of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees.

76 The certification and decertification of trade unions under the Code is conditional upon secret ballot votes being conducted which are free from intimidation, coercion or improper interference. The Legislature has recognized in Section 33(6) of the Code that non-parties and persons other than employers could interfere with and affect votes in such a manner that those votes do not reflect the true wishes of employees. Section 33(6) allows the Board to remedy such a situation after considering all of the evidence before it.

77 The Former Employees gave uncontradicted testimony that they were instructed by senior Mexican officials to identify workers who contacted the Union so they could be prevented from returning to Canada. The evidence demonstrates there was an intention on the part of Mexican authorities responsible for administering the SAWP to block Union supporters among SAWP workers at the time Victor Robles was blocked from returning to Canada. The motivation for doing so was that Mexican officials at the Consulate thought employers participating in the SAWP would stop requesting workers from Mexico if they joined a union. They also feared jobs would be lost administering the SAWP if this occurred. Diego Prieto and Felix Martinez were instructed by Luis Munoz, a senior visiting official from Mexico, to inform him of any workers who had contacted the Union and that those workers would be blocked, using as an excuse that they had been refused a visa by Canada. The First Entry demonstrates that this policy was applied to Victor Robles by Sosa. Accordingly, I find the evidence establishes, on a balance of probabilities, that Mexican authorities responsible for administering the SAWP blocked Victor Robles because of his perceived involvement with the Union.

78 The evidence did not establish, however, the Union's allegation that Mexican authorities had instigated the decertification campaign by instructing workers to do so. Diego Prieto testified he was told by Estela Garcia and an unidentified worker that the workers on the Employer's farm had been given instructions to decertify by Mexico. There was no corroborating testimony or evidence to establish on a balance of probabilities that this occurred. Alfredo Lopez denied he received instruction or encouragement from Mexico to decertify and was not shaken in cross-examination on

this point. None of the other workers who testified said they had been given instructions to decertify by Mexico.

79 The fact that Mexican officials responsible for administering the SAWP blocked Victor Robles from returning to Canada for anti-union reasons constitutes a clear case of improper interference under the Code. But for the improper interference, Victor Robles would have had the opportunity to vote in the decertification vote on April 20, 2011. I note that given the results of the previous certification vote, the blocking of Victor Robles might swing the decertification vote one way or the other. I find the voting constituency has been improperly interfered with in a manner which renders the decertification vote compromised, unfair and unreliable.

80 I also find the blocking of Victor Robles, who was identified by Mexican authorities as a supporter of the Union, when viewed objectively, would have a dramatic chilling effect on the Union's members. I find it more likely than not the other employees of the Employer would be in a reasonable position to be aware of the fate of Victor Robles when they voted in the representation vote pursuant to the Section 33(2) application. Alfredo Lopez testified he knew who the Union supporters were at the time of the certification vote. From this, I take it that workers on the farm who wished to do so were able to form opinions about who was and was not a supporter of the Union. While Victor Robles testified he did not know who was for or against the Union, he testified that he locked himself in his room at this time in an effort to avoid the controversy between workers over the Union's certification drive. Whatever his own views were regarding the Union, it is clear from the First Entry that Victor Robles had been identified by the Consulate as being involved with the Union. While the evidence did not point to any particular person who identified workers who supported the Union to the Consulate, it is likely this information came from someone working on the farm. The fact that Victor Robles did not show up for the 2011 season when the decertification vote took place would indicate to other workers that if they were perceived as a supporter of the Union, they could be blocked from returning to work the following year. I find this would cause the members of the Union to fear reprisals if they voiced support for the Union, and would cause them to view being associated with the Union as a clear liability if they wished to return and continue to work in Canada. The climate created by all of the circumstances of this case provides a direct incentive for the members of the Union to vote against the Union to eliminate the fear of being associated with it.

81 For the reasons given above, I find the result of the vote will not reflect the true wishes of the employees in the bargaining unit. Improper interference under Section 33(6) is established on the facts of this case. Therefore, pursuant to Section 33(6)(b) of the Code, I refuse to cancel the certification of the Union as bargaining agent. Consistent with my prior ruling in *Certain Employees of Sidhu & Sons Nursery Ltd.*, BCLRB No. B28/2012, 207 C.L.R.B.R. (2d) 1, I have no power to make any orders against Mexico to cease and desist from similar activities now or in the future, nor do I have the power to make remedial orders against Mexico, a non-party to these proceedings pursuant to the *State Immunity Act*, R.S.C. 1985, c. S-18.

II. Allegations Against the Employer

82 The First Entry establishes that Victor Robles came to be identified by the Consulate as being involved with the Union. There is no “smoking gun” evidence which establishes the Employer identified Victor Robles as a supporter of the Union. The question arises as to whether I can draw an inference to this effect. The Board has the ability to draw appropriate inferences in the particular context and circumstances of a case: *Forano Limited*, BCLRB No. 2/74, [1974] 1 Canadian LRBR 13 (“*Forano*”). In *Forano*, the Board said “Employers don’t ordinarily advertise their anti-union activities. Such intention must be pieced together from a pattern of circumstantial evidence” (at p. 14). The Union asks me to draw an inference that the Employer colluded with the Consulate in ensuring Victor Robles did not return for the 2011 season. They point to a number of facts as follows: Estela Garcia and Parmeet Sidhu have known each other since 2008; they were in frequent contact in December 2010 and January 2011 at the time the call was made to the Consulate identifying Victor Robles as a Union supporter; Estela Garcia translated the Collective Agreement as a favour to the Employer; and that Estela Garcia showed interest in the workers arriving at the Employer’s farm in 2011. I find these factors and other evidence I heard do not cause me to make the inference the Union seeks against the Employer.

83 The evidence demonstrated that the Employer went through all of the normal procedures to ensure Victor Robles was returned to work on their farm in the 2011 season. The Employer gave him a Return Report which indicated to the Mexican authorities that it wished for Victor Robles to return for the 2011 season. I do not draw any inference from the fact the Employer did not write “good worker” in the space provided on the Return Report; the fact is the Employer did not need to do so in order for Victor Robles to return for the next farming season.

84 I decline to make a finding that the Employer participated in compiling a “black list” in order to stop workers who were Union supporters from returning from Mexico. There is no evidentiary link to the Employer concerning this activity, and no compelling circumstantial evidence to this effect. I note while the Former Employees had observed first hand and been privy to a plan by the Consulate and Mexican officials responsible for administering the SAWP in Mexico to block workers who supported the Union, they did not provide any evidence that the Employer had participated in this effort.

85 In its application the Union alleged Augusto Gomez was not returned to the farm for the 2011 season because of anti-union animus. Augusto Gomez’ testimony was that he did not return for the 2011 season because of personal reasons. The Union withdrew its allegation in light of his testimony. I found the testimony of Augusto Gomez alleging a visit by Brar and Alfredo Lopez one evening in which they told him not to contact Luna or the Union to be poor and unreliable. The account given by Augusto Gomez in his testimony differed from a written statement he signed. For instance, in the written statement Augusto Gomez said he was told not to contact Luna and the Union, but in his oral testimony he said that Brar told him not to contact Luna anymore; he said

nothing about the Union. The English translation of his statement says the event occurred at 6:00 p.m. whereas the Spanish version makes no mention of the time. I rely instead on the very clear testimony of Brar and Alfredo Lopez who were adamant the meeting never occurred and such a statement was never made. Unlike Augusto Gomez' description of the alleged evening visit to Athey Road, Brar and Alfredo Lopez had detailed recall of events which they described. Augusto Gomez was very brief in his description of events and provided very little detail in his testimony. His evidence was poor and I have decided I cannot rely on it.

86 Brar and Alfredo Lopez described another meeting, which Augusto Gomez agrees occurred, in which Alfredo Lopez translated for Brar. In this exchange, Augusto Gomez and a friend asked for time off to visit the AWA office to fill out paternity benefits forms. They were told by Brar it could be done in the Employer's office and there was no need to take time off to have it done elsewhere. Augusto Gomez and his friend still went ahead and got Luna at the AWA office to fill out their forms. I conclude that Brar did not tell Augusto Gomez not to contact Luna or the Union, but rather told them that services that workers previously obtained from Luna could now be provided by the Employer. This is the only conversation the evidence reliably establishes occurred, and is the version of events in keeping with the preponderance of probabilities: *Faryna v. Chorny*, [1951] 4 W.W.R. (NS) 171, (1952), 2 D.L.R. 354 (B.C.C.A.).

87 I find the fact the Consulate translated the Collective Agreement into Spanish does not assist the Union's case against the Employer. The Consulate employed people specifically to administer the SAWP program, in large part to assist employers with issues concerning SAWP workers. In this context I find the Employer's request that the Consulate translate the Collective Agreement to be a neutral fact.

88 I find the fact that Alfredo Lopez and Wendy took the day off without permission to file the decertification application without suffering any discipline does not prove the Employer condoned or assisted the decertification campaign. The Employer's evidence was that it was not uncommon for its workers to take days off without notice for reasons of illness among other reasons, although the Employer preferred to have notice. The Employer spoke to Alfredo Lopez and asked him for notice if he intended to take time off in the future.

89 I find the incident in which Victor Robles walked off the job was of a different nature than that where Alfredo Lopez took a day off. Victor Robles had a dispute with his supervisor and walked off the job in the middle of a work process which caused the crew to stand down, causing delay. Alfredo Lopez took a day off which the evidence established was common among the workers. I therefore find the two events to be unlike one another, and cannot draw an inference that the Employer assisted the decertification campaign from the fact that Alfredo Lopez was not disciplined for taking a day off without permission from the Employer.

90 I was asked by the Union to draw an inference from the decrease in the numbers of SAWP workers working for the Employer that other workers had been identified by the Employer as Union supporters and blocked from returning to Canada. I note there were no particulars provided by the Union in this regard for any other worker other than Victor Robles and Augusto Gomez, and that the Union ultimately withdrew the complaint concerning Augusto Gomez. There was no evidence from which I could reasonably draw an inference that the Employer was identifying workers who supported the Union to Mexican officials.

91 The Union's allegations of unfair labour practices against the Employer are dismissed.

A. Allegations against Certain Employees

92 I have found there to be no reliable evidence that Certain Employees used intimidation and coercion or committed unfair labour practices in their campaign to decertify the Union. The evidence Alfredo Lopez gave concerning the manner he ran the decertification campaign was not shaken under cross-examination and no reliable evidence to the contrary was given to counter his description of events.

93 I find the fact Alfredo Lopez occasionally translated for the Employer and took time off during the farm season to return to Mexico to be facts which are neutral, and which do not lend themselves to an inference that the Employer assisted Alfredo Lopez in the decertification campaign.

94 There is no evidence which provides the basis for an inference that Certain Employees were involved in unfair labour practices. I find Alfredo Lopez' efforts to decertify the Union did not violate the Code. Consequently, the Union's allegations against Certain Employees are dismissed.

V. CONCLUSION AND ORDER

95 I have found the true wishes of the employees are unlikely to be disclosed by the vote due to improper interference by Mexican officials responsible for administering the SAWP. Therefore, pursuant to Section 33(6)(b) of the Code, having no regard to the result of the representation vote, I refuse to cancel the certification of the Union as bargaining agent. The ballots, which have been sealed pending adjudication, will not be counted.

96 Under Section 33(3)(b), no application under Section 33(2) can be made for 10 months following my refusal to cancel the certification of the Union.

97 The Union's allegations against the Employer and Certain Employees are dismissed.

LABOUR RELATIONS BOARD

"BRUCE R. WILKINS"

BRUCE R. WILKINS
ASSOCIATE CHAIR, ADJUDICATION