Moorpark, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MURANAKA FARMS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 82-RC-1-OX 9 ALRB No. 20

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on March 24, 1982,[1/] the Acting Regional Director (ARD) conducted a representation election among the agricultural employees of Muranaka Farms (Employer or Muranaka) on March 25. The official Tally of Ballots showed the following results:

UFW	112
No Union	45
Challenged Ballots	4
Total	161[2/]

The Employer timely filed post-election objections to the election, four of which were set for hearing. A Hearing was conducted before Investigative Hearing Examiner (IHE) Kelvin C. Gong who thereafter issued the attached Decision in which

1/All dates herein refer to 1982 unless otherwise stated.

2/There were three void ballots.

he recommended the Agricultural Labor Relations Board (Board or ALRB) dismiss the Employer's objections and certify the UFW as the collective bargaining representative of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's Decision and a supporting brief, and the UFW filed a brief in response to the Employer's exceptions.

Pursuant to the provisions of Labor Code Section 1146,[3/] the ALRB has delegated its authority in this matter to a three-member panel.

The Board has considered the objections, the record and the IHE's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the IHE as modified herein.

Background

Muranaka grows radishes, onions, and leeks on property east of Oxnard. On March 23, some of Muranaka's employees went out on strike. During the next day, March 24, regional office personnel in the ALRB's Oxnard office received telephone calls from UFW organizers complaining that threats were being made to the employees by agents of Employer. The threats purportedly consisted of threats of job loss, eviction from company housing, immigration raids, and closure of the business. Just before 5 p.m. that day, the UFW filed with the Oxnard ALRB office a Petition for Certification which alleged, inter alia, that a majority of the unit employees were on strike. As the

[3/] All section references herein refer to the California Labor Code unless otherwise indicated.

Agricultural Labor Relations Act (Act) and our Regulations require that, if at all possible, an election be held within 48 hours following the filing of a petition where a majority of the unit employees is on strike, the ARD decided to send an investigator to the field the next morning to ascertain whether: (1) the majority of the employees were on strike; and (2) whether the allegation of threats was true. The ARD testified that she made a tentative decision during the evening of March 24 to hold the election at the close of Muranaka's workday on March 25, to insure maximum voter participation, provided the investigation disclosed the existence of a majority strike and the existence of threats.

On March 25, early in the day, the parties were notified that a preelection conference would be held at 10:30 that morning. Prior to that conference, the Board agent who had conducted the representational investigation reported to the Oxnard Regional Office, by telephone, that a majority of Muranaka's employees were on strike, that threats had been made to the employees by Employer agents, and that some of the employees had left the area and others were considering leaving because of the threat of an immigration raid. On the basis of that information, the ARD decided to conduct an election that day at 2:30 p.m., the hour she believed to be the end of the Employer's workday, and announced that decision to the parties at the preelection conference.

The Employer's counsel, Rob Roy (Counsel), objected to holding the election that day, contending primarily that the Employer could not have its eligibility list prepared by that

time.[4] Although the ARD suggested various alternatives to Counsel so that a voter eligibility list could be provided in time, he did not acknowledge or respond to the ARD's suggested alternatives, and did not check into the alternatives as he had told a Board agent he would. Rather, he left the preelection conference and did not participate any further in the election process, stating that he did not want "to give the appearance of propriety to that so-called election." The election was conducted, commencing about 4:00 p.m. that day, without the benefit of a list of employees eligible to vote.

Analysis

Title 8 California Administrative Code, section 20377 effectuates the statutory directive[5] to hold strike-time elections within 48 hours, if possible:

> Where a petition for certification alleges that a majority of employees are engaged in a strike at the time of the filing, the regional director shall conduct an administrative investigation to determine whether such a majority exists, and shall notify the parties of his or her determination. Where the regional director determines that a majority of employees in the bargaining unit were

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[4] His other objections were found in a declaration filed pursuant to section 20377 of the Board's Regulations arguing that the Board could not, on such short notice, determine whether the strike was an unfair-labor-practice strike or an economic strike, and could not verify the other allegations contained in the Petition filed by the UFW.

[5] Labor Code section 1156.3(a)(4) "... If at the time the petition is filed a majority of the employees in the bargaining unit are engaged in a strike, the board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition. The holding of elections under strike circumstances shall take precedence over the holding of other secret ballot elections...."

> on strike at the time of filing, he or she shall exercise all due diligence in attempting to hold an election within 48 hours of the filing; however, this shall not be construed to require that an election be held in 48 hours. The holding of elections under strike circumstances takes precedence over the holding of other elections.

The Employer argues, in essence, that the ARD abused her discretion by holding a strike-time election in 23 rather than 48 hours, and that prejudice resulted from her conducting an election without a list of the employees eligible to vote. The IHE found that the ARD had not acted unreasonably in so promptly scheduling the election, in view of the information she had received from the investigating Board agent.

During the hearing, the Employer argued that the facts did not warrant conducting an election on March 25, but now argues that it was denied due process at the administrative hearing by evidentiary rulings of the IHE. Specifically, the Employer argues that the IHE denied it the opportunity to prove the absence of a coercive atmosphere, and hence, the unreasonableness of the ARD's scheduling, by refusing to order the Board agent to disclose the names of the employees he talked to during his investigation and by quashing the Employer's subpoena duces tecum which requested production of the agent's investigative file. We find no merit in this argument.

The Act directs the Board to conduct strike-time elections within 48 hours after the filing of a petition, if at all possible, and mandates that such elections take precedence over other elections. In enacting this scheme, the legislature recognized the inherently volatile nature of a strike, the potential

for violence and/or disruption in production, and directed us to conduct elections in an expedited fashion in order to mollify the situation. We interpret that directive to conduct strike-time elections "within 48 hours" to mean exactly what it says rather than "at or near the 48th hour after the petition is filed and not sooner," as urged by Employer. It is beyond question that 23 hours is "within" the statutorily-recommended 48-hour period. Neither the Act nor our Regulations requires that a Regional Director, in a strike situation, have proof of violence or coercion as a basis for conducting an election within 48 hours after the filing of the petition. Moreover, there is no presumption of impropriety in the fact that a strike-time election is conducted in less than 48 hours. On the contrary, we believe that a strike-time election should be held as soon as possible, provided adequate notice is provided to the parties and the employees, that no party is prejudiced, and that eligible employees are not denied an opportunity to vote. (Melco Vineyards (1975) 1 ALRB No. 14; Verde Produce (1980) 6 ALRB No. 24; NLRB v. Tri-City Linen Supply (9th Cir. 1978) 579 F.2d 51 [98 LRRM 2155]; Beck Corp. v. NLRB (9th Cir. 1978) 590 F.2d 290 [100 LRRM 2719].) As we find that the ARD did not need proof of threats or coercion to justify conducting an election 23 hours after the petition was filed, we find the IHE had no obligation to provide the Employer an opportunity at the hearing to disprove the existence of a coercive atmosphere.

We also affirm the IHE's rulings, findings, and conclusions as to the post-election objections which were set

for hearing. Robert Grounds, the Employer's agent,[6/] received actual notice of the filing of the petition within minutes after its 5:00 p.m. filing and began taking actions to prepare the Employer for the election. Harry Muranaka, 50 percent owner of Muranaka, received actual notice about 8:00 p.m. that same day. Early the next morning, Rob Roy, attorney for VCAA, received notice of the preelection conference set for 10:30 a.m. and the tentative scheduling of the election for 2:30 p.m. that afternoon. At the preelection conference, at which Employer's counsel was present, the scheduled time for the election was confirmed. We find that the Employer received timely and adequate actual notice of the filing of the petition, the preelection conference, and the election. (Mullane v. Central Handover Bank and Trust Co. (1950) 339 U.S. 306; Potter v. Castle Construction Co. (5th Cir. 1966) 355 F.2d 212 [61 LRRM 2119].)

The Employer asserts that it was prejudiced because it was denied sufficient time to comply with the obligations imposed upon it by our Regulations, in particular the obligation to prepare the eligibility list. We have already found that the Employer and its agent did receive prompt and timely notice

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[6/] When Board agent Nuno contacted Robert Grounds shortly after 5 p.m., Grounds knew that Muranaka was not a member of the Ventura County Agricultural Association (VCAA). Nevertheless, Grounds called Muranaka and instructed office personnel to begin preparing the eligibility list. Grounds then, on his own initiative, contacted the majority of the Board of Directors of VCAA to facilitate Muranaka's membership. This was accomplished within three hours after the petition was filed and prior to Grounds' talking to Muranaka at 8 p.m. that day. He informed Muranaka at that time that there would be an expedited election and set an appointment for them to meet at 8:30 a.m. the next day.

of the petition. Indeed, the uncontradicted evidence is that the Employer's accountant, Itagaki, was directed to and began preparing the eligibility list one half hour after the petition was filed. If any prejudice resulted from the Employer's failure to have an eligibility list (of only 161 or so employees) prepared in time for the election, it was not because it lacked adequate prior notice of the necessity therefor. Accordingly, we find that the failure to have a voter eligibility list at the time of the election was the fault of the Employer, and therefore it cannot now rely upon said failure as a basis for setting aside the election.

At the preelection conference held between 11:00 a.m. and 12:00 noon on March 25, Employer's counsel protested that an eligibility list could not possibly be provided that afternoon, as the Employer's weekly payroll records were then in the possession of a computer firm in Long Beach. The ARD suggested alternatives such as allowing the Board to contact the firm and obtain the names by telephone, or using other company documents containing the names of employees. Counsel did not even respond to the ARD's suggestions. Another Board agent, who had learned from employees present at the preelection conference that the Employer's foremen maintain daily lists of their employees, asked him to provide those lists, or to allow a Board agent to telephone the computer company. Counsel replied that he would check, but failed to contact the Board agent after the preelection conference. After the election had commenced, Counsel had a letter delivered at the ALRB office which stated that no employee names

were maintained at the Employer's office.

The evidence discloses that the names of at least a large majority of the employees could have been provided to the Board at the time of the election had the Employer wished to cooperate in the effort.[7/] The Employer's accountant testified that, by noon on March 24, the hour the Employer's counsel left the preelection conference, she had already prepared and verified an alphabetical list of all the harvesting employees. Although that list did not include the truck drivers, salaried office employees, or employees then on approved leaves of absence, it is clear that it would have included a substantial majority of the employees eligible to vote.

It appears that daily and weekly lists of the eligible employees could have been delivered also. Harry Muranaka testified that the foremen for each crew, including the crews of irrigators, tractor drivers, and employees working on the dock, submit daily tally sheets to the Employer's sales office in Moorpark. Those worksheets are delivered by courier, on a daily basis, to the person responsible for making a weekly payroll sheet, which, in turn, is delivered to the Employer's Northridge office each Wednesday morning. An employee at Northridge then transfers the information onto a computer worksheet, which is sent to the Long Beach computer firm which, in turn, provides the payroll printouts each Thursday at about 1:00 p.m. On Thursday, March 25,

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[7/] We note that Labor Code section 1157.3 requires agricultural employers to maintain accurate payroll lists with the names and addresses of all employees and to make them available to the Board upon request.

the day of the election, it arrived at Northridge, 30 minutes by car from the election site, at 1:30 p.m. No effort was made to deliver the computer payroll list to the polling site prior to the 4:00 p.m. election. Moreover, no convincing evidence establishes that the daily and weekly payroll lists could not have been made available, even prior to the receipt of the computer printout.[8/] Thus, the evidence shows that the Employer produced daily and weekly tally sheets of its harvesting employees and that its accountant had a verified alphabetical listing of those employees by noon on March 24. The computer printout which included the names of the entire workforce arrived by 1:30 p.m., but no effort was made to deliver anything to this Board. The Employer argues that if the "best evidence," i.e., the eligibility list, could not be provided before the election then nothing else should be acceptable. That ignores the purpose behind the rule: to insure the orderly conduct of elections by providing a means for eligible voters to be easily identified and by facilitating challenges to ballots on the basis of ineligibility. Certainly the alphabetical listing by Itagaki of some 100 field workers would have thus helped insure the orderly conduct of the election, and the computer printout would have contained the names of other eligible employees from the relevant payroll period.

[8/] Roy's letter delivered to the Board after the election commenced denies only that records are maintained at the Moorpark office, and fails to mention the Northridge office, where the bookkeeping and accounting took place. Roy had promised to check as to whether any employee records were kept by the Employer.

We reject the Employer's contentions based on the absence of an eligibility list, an absence for which it was solely responsible. No party may allege as grounds for setting aside an election its own conduct or conduct of its agents. (Title 8, California Administrative Code, section 20365 (c)(5).)[9/]

We affirm the IHE's findings and conclusions that the ARD properly conducted an expedited election after duly considering the Employer's position. The declaration filed by Employer's counsel did not contest the ARD's finding that a majority of the unit employees were on strike at the time the petition was filed, and no witnesses testified to the contrary.

We find that the time, place, and need for observers was discussed at the preelection conference, in the presence of Employer's counsel. It is undisputed that at the end of the March 25 conference, all parties understood the election was to be held at Moorpark at the end of that workday. While the need for observers was discussed at the preelection conference, the company observer was not chosen until just prior to the election. The record does not disclose whether that was an oversight at the preelection conference or the result of Counsel's refusal to participate in that conference after it was announced that the

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[9/] At the hearing, the Employer offered to adduce evidence that ineligible persons voted and that persons who could not be identified by the company observer voted unchallenged. The IHE correctly ruled that those matters were not relevant to the issues set for hearing. Furthermore, the eligibility of voters is forever waived if not challenged at the time of the election. (8 Cal. Admin. Code section 20355(b).) Even if we did find that some ineligible persons voted and that said votes were not the result of the Employer's own misconduct, we would not set the election aside as we find the vote representative.

election would be conducted later that day. In any event, Muranaka does not claim that it had no observer, or that it was prejudiced by having one chosen at the site.[10/]

As we find that the Employer has not met its burden of proof as to any of the objections set for hearing, we hereby dismiss all of the said objections.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Muranaka Farms in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2(a) concerning employees' wages, hours, and working conditions.

Dated: April 28, 1983

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

JORGE CARRILLO, Member

[10/] Board agent Martin testified that, prior to the election, he instructed the observers as to their duties and the procedure for challenging ballots.

CASE SUMMARY

Muranaka Farms (UFW)

9 ALRB No. 20
Case No. 82-RC-1-OX

IHE DECISION

A petition for representation was filed at an ALRB regional office at 5:00 p.m. which alleged the existence of a majority strike. The next morning, the Acting Regional Director (ARD) sent a field examiner to the property to investigate whether a majority of the unit employees was on strike and, as she had been informed by the petitioning union, employer agents were threatening the employees. Upon being informed by the examiner that a strike did exist and employees were leaving as a result of said threats, the ARD tentatively scheduled an election for the end of the scheduled workday that afternoon. A preelection conference was held that morning at which all the parties were represented. The employer's representative opposed an election that day on the basis that the employer could not provide an eligibility list in time. The representative refused to agree to any of the alternatives for gathering the names of employees, as suggested by the ARD. The election was conducted that afternoon, approximately 23 hours after the petition was filed. The UFW received a majority of the votes cast.

The IHE recommended that the four objections set for hearing be dismissed and the UFW be certified. Specifically, the IHE found that the employer received actual notice of the filing of the petition, the preelection conference, and the election. He found that it was the employer's own conduct and not the lack of notice that precluded the Board agents from having an eligibility list at the election. According to the IHE, the Employer's lack of cooperation amounted to misconduct and it should be estopped from now claiming prejudice on the basis of its own misconduct. The IHE specifically found that the Board agent properly considered the employer's position at the preelection conference and sought to ascertain the employer's position as to the time, place, and observers for the election at the preelection conference.

BOARD DECISION

The Board dismissed the post-election objections and certified the UFW. The Board affirmed the IHE's Decision with a few modifications. The Board found that Regulation 20377, which provides for 48-hour elections if a majority strike is in existence, gave Regional Directors the authority and discretion to hold such an election at any time within the 48 hours. No special circumstances need exist as a basis for conducting an election in less time, e.g., 23 hours after a petition is filed, as in this case. Strike-time elections should be held as soon as possible, providing that notice is adequately given, no party is prejudiced by the timing, and voters are not disenfranchised.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: MURANAKA FARMS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO Petitioner.	)	Case No. 82-RC-1-OX

Peter M. Sloan, Tyre and Kamins for the Employer.

Ned Dunphy for the Petitioner.

Sylvia Lopez, for the Agricultural Labor Relations Board

DECISION

STATEMENT OF THE CASE

KELVIN C. GONG, Investigative Hearing Examiner: This case was heard by me on June 30, July 1, and 2, 1982, in Oxnard, California.

On March 24, 1982, the United Farm Workers of America, AFL-CIO (UFW) filed a petition for certification as the collective bargaining representative of the agricultural employees of Muranaka Farms (Employer). On March 25, 1982, the Oxnard Acting Regional Director conducted an election at Employer's farm. The tally of ballots showed the following results:

UFW	112
No Union	45
Unresolved Challenged Ballots	4
Total	161

Employer timely filed objections to the election and the following issues were set for hearing:

1. Whether the Board agents in charge of the election prejudicially abused their discretion by failing to notify the Employer of the filing of the instant petition for certification in violation of 8 Cal. Admin. Code section 20300(g), thereby resulting in denying the Employer sufficient time to comply with the mandate of 8 Cal. Admin. Code section 20310.

2. Whether the Board agents in charge of the election prejudicially abused their discretion by failing to timely notify the Employer of the pre-election conference and election in violation of 8 Cal. Admin. Code section 20350(d) and 20377(a) and (b), thereby resulting in a lack of proper notice to the Employer of both the pre-election conference and election such that the election must be set aside.

3. Whether the Board agents in charge of the election prejudicially abused their discretion in conducting an election in violation of 8 Cal. Admin. Code section 20377(a) and (c) without properly considering the Employer's position as required by section 20377(c).

4. Whether the Board agents in charge of the election prejudicially abused their discretion in conducting an election without prior consultation with the Employer in order to ascertain the Employer's position with respect to the times and

places of the election, the names and number of the Employer's observers and whether the holding of the election was appropriate insofar as the requirements of 8 Cal. Admin. Code sections 20310 and 20377(b) were satisfied such that the election must be set aside.

All parties were represented at the hearing and were given full opportunity to participate in the proceedings.

Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the arguments presented by the parties, I make the following findings of fact and conclusions of law.

JURISDICTION

The parties stipulated to the Board's jurisdiction in this matter. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code section 1140.4(c) and the UFW is a labor organization within the meaning of Labor Code section 1140.4(f).

FACTUAL BACKGROUND

A. Muranaka Farms

Muranaka Farms has two offices, one in Moorpark and another in Northridge. In Moorpark, red radishes, green onions, and leeks are raised, while the bookkeeping duties are administered in Northridge. The Northridge office is approximately 30 miles east of Moorpark. The Moorpark office is east of the Oxnard ALRB Regional office and is approximately a 30 minute drive. (TR III: 49). Hence, Northridge is approximately 50-60 miles away from Oxnard.

B. The Events of March 24, 1982

Early Wednesday afternoon, March 24, 1982,[1/] Baltazar Martinez, Board agent with the Oxnard Regional Office of the Agricultural Labor Relations Board (ALRB), received a telephone call from Karl Lawson of the UFW. In that conversation Lawson alleged that there was a strike at Muranaka Farms and that management was threatening employees with immigration raids, lay-offs, and evictions. In light of those allegations Lawson requested that the ALRB send a Board agent to investigate the situation. Board agent Martinez passed on the information to the Regional Field Examiner, Newman Strawbridge. No petitions had been filed with the Oxnard Regional Office at that time.

Later that same afternoon a second call was made to the ALRB Oxnard office. Jose Manuel Rodriguez, another UFW representative, spoke with Martinez, likewise alleged that threats were being made to the workers and requested that a Board agent go out to Muranaka Farms to explain to the workers the procedures under the Agricultural Labor Relations Act. Martinez again relayed the message to Strawbridge who assigned the case to Board agent, Harry Martin.

At approximately 1:45 p.m. that same day, Ann Lampus, bookkeeper for Muranaka Farms in Northridge, received a phone call from Western Union which informed her that it had a telegram for

1/ Unless otherwise indicated all dates are within the 1982 Calendar Year.

Muranaka Farms from the UFW.[2] Just ten minutes prior to the Western Union Call, Ms. Lampus had become aware of union activities and a strike at Employers. (TR I: 125, 134). Unable to locate her employer, Harry Muranaka, she refused acceptance of the telegram. After the refusal she located Harry Muranaka, who informed her not to sign for anything she was not authorized to accept. However, she was not told what she could accept and those instructions were not standard practice at Muranaka Farms.[3] Another Western Union call came in from the UFW and again Lampus refused acceptance of the telegram.

Between 4 - 5 p.m., another UFW representative, Arturo Mendoza, called the Oxnard ALRB office and spoke with Regional Attorney, Judy Weissberg. Mendoza rearticulated the earlier allegations of a strike and threats and informed Ms. Weissberg that the UFW intended to file a petition for certification later that same day.

After the second telephone call from Western Union, Lampus was handed some Ventura County Agricultural Association newsletters by Muranaka. Muranaka suggested that Lampus contact the association. (TR I: 126). At approximately 4:30 p.m., Lampus called the Ventura County Agricultural Association to speak with

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2/ The telegram was a Notice of Intent to Take Access.

3/ Muranaka testified that the order was prompted by the union activity. Muranaka testified that, "I would say I didn't want to put ourselves in the position where I couldn't get myself out, or ourselves out." (TR III: 130-131).

Bob Grounds, the Executive Vice-President. Since Grounds was unavailable, she spoke with Rob Roy, General Counsel for the association. Roy testified that she informed him that she believed Muranaka Farms was a member of the association, that there was a strike in progress,[4/] and that a Notice of Intent to Take Access had been filed with the ALRB. (TR I: 10-11).

Upon concluding his conversation with Lampus, Roy proceeded to contact the ALRB Oxnard office and spoke with Harry Martin. Martin confirmed that an access petition had been filed and that there was a possibility of a petition for certification being filed within the same day. Roy explained that he believed he represented Muranaka Farms, but did not further elaborate. (TR I: 67).

Shortly after his conversation with Harry Martin, Rob Roy left for the golf course. After Roy had left his office, the UFW arrived and served on Roy's secretary a petition for certification. At approximately the same time, Bob Grounds called the Oxnard Regional Office to inquire whether any petitions had been filed that day. Grounds spoke with Board agent Martin and was informed that a Notice of Intent to Take Access had been filed involving Muranaka Farms.

At approximately 4:45 p.m., the UFW filed a petition for certification with the ALRB. Regional Director, Wayne Smith

4/ Roy testified that Lampus only informed him that employees were off work (TR I: 9-10). However, Roy had stated in an earlier sworn declaration that Lampus had informed him that employees were on strike. (PX No. 1).

docketed the petition. Since Smith was on his way to the airport and since Martin, the agent assigned to the case, was driving Smith to the airport Board agent Mauricio Nuno was assigned the duty to contact the Employer.

Nuno immediately proceeded to call Rob Roy to inform him of the filing of the petition for certification in Muranaka Farms. However, with Roy gone for the day, he ended up speaking with Bob Grounds. Nuno relayed that a strike petition had just been filed and that an election might be held within 48 hours. Grounds in turn informed Nuno that Muranaka Farms was not a member of the Ventura County Agricultural Association, and that he was unsure of whether Rob Roy or the association would be representing Muranaka Farms in the matter.

After speaking with Grounds, Nuno attempted to contact the Employer at one of the two phone numbers listed on the petition. At the Moorpark number, Nuno spoke with a Jesus Miguez, who informed him that no one with authority to accept the call was available. Nuno left a message that a strike petition had been filed and that there was a possibility of an election within 48 hours. Nuno dialed the Northridge phone number, but does not remember speaking with anyone of authority. Lampus, who answers the Northridge phones, did not recall receiving a phone call from the ALRB that day. (TR I: 140).

Meanwhile, at approximately 5:30 p.m., Bob Grounds contacted Muranaka Farms and spoke with Ann Lampus. He explained that Muranaka Farms was not a member of the association, but that a petition had been filed. He explained that there was a need to

put together an employee list. Grounds then spoke with Margaret Itagaki, another Muranaka Farms employee, and informed her of what was needed for an employee list.[5/]

Immediately after that conversation, Ms. Itagaki began compiling the necessary information for an employee list. Itagaki compiled the tally sheets. The tally sheets were broken down according to departments; i.e., the onion crew, radish crew, leek crew, etc. Each tally sheet contained the names of employees and hours worked. However, the tally sheets did not contain addresses.

At approximately 6 - 6:30 p.m., UFW representative contacted Judy Weissberg to reiterate their concern regarding the alleged threats made against employees, an impending rain storm, and the fact that workers were talking about leaving. With the Regional Director and Regional Field Agent absent, Weissberg, who was next in the chain of command, assumed the responsibilities and title of Acting Regional Director.

After her conversation with the UFW representatives, Ms. Weissberg telephoned Regional Field Examiner Strawbridge. The two of them discussed the strike petition and alleged threats made against the Muranaka Farm's employees. The threats discussed included closure of the farm if an election occurred, threats of

5/ Grounds testified that he did not inform Employer about an employee list or how to prepare one. However, both Lampus and Itagaki testified that Grounds explained the need to prepare such a list. Based on the demeanor of Bob Grounds and the inconsistencies in his testimony, especially where it conflicts with the testimony of Lampus and Itagaki, I found the credibility of Grounds questionable. Therefore I credit the testimony of the two women and reject Grounds' testimony.

loss of jobs if the union won, and threats of evictions. In addition, they discussed the allegation that employees were leaving or talking about leaving before an expedited election could be held.

Strawbridge and Weissberg decided that they needed to send a Board agent to determine whether a strike existed and to investigate the allegations. The two concluded that if the allegations were true there was a need to hold an election as soon as possible in order to maximize voter participation. Since the working day at Muranaka Farms ended at approximately 2:30 p.m., Strawbridge and Weissberg made a tenative decision to hold the election at that time on Thursday, March 25, if the investigation confirmed the allegations.

Approximately 6:30 that same evening Bob Grounds tracked down Rob Roy at the golf course and the two discussed Muranaka Farms. Grounds testified that he informed Roy that he had told Lampus that Muranaka Farms was not a member of the association.[6/] (TR III: 90). Since Muranaka Farms was not a member, Grounds proceeded to contact members of the Board of Directors to confirm that Muranaka Farms could be ratified as a member with short notice. After receiving an affirmative answer from a majority

6/ Roy testified that he did not become aware that Muranaka Farms was not a member of the Ventura County Agricultural Association until the morning of March 25. (TR I: 68). Since Grounds went to the trouble of locating Roy and knew that the ALRB believed Roy represented Employer, it seems more logical that Grounds would have informed Roy that same evening that Muranaka Farms was not a member. Therefore, I credit the version articulated by Grounds.

of the association board members, Grounds contacted Harry Muranaka at approximately 8:00 p.m. and arranged a meeting for the following morning.

C. The Events of March 25, 1982 Leading to the Pre-Election Conference

Early in the morning of March 25, 1982, Judy Weissberg received another phone call from UFW representative, Jose Manuel Rodriguez. In that particular phone call, Rodriguez expressed a great deal of concern regarding the alleged threats of loss of jobs, closure, and immigration raids. Rodriguez claimed that forepersons and a Japanese woman were threatening the workers.

After the conversation with Rodriguez, Weissberg met with Harry Martin around 8:30 a.m. to discuss the allegations and the tenative decision made by Strawbridge and herself to hold the election in the afternoon. She informed Martin to contact the parties for a pre-election conference to discuss the tentative election.

Between 8:30 - 9:00 a.m., Mauricio Nuno arrived at the ALRB office and received orders from Weissberg to investigate the allegations at Muranaka Farms. Specifically, Nuno was to distribute a general notice that an election petition had been filed and that an election might take place that day. (See PX No. 2). In addition, Nuno was to determine the extent that the work force was out on strike and confirm the allegations of threats and rumors and whether there was the possibility of potential voters leaving the area.

At approximately the same time, Bob Grounds and Rob Roy were meeting to discuss Muranaka Farms. After that discussion

Roy telephoned Harry Martin to inform him that Ventura County Agricultural Association and he were not Employer's legal representative. However, Roy also added that Harry Muranaka was coming into his office that morning, there was a good likelihood that the Employer would be joining the association and that he would be representing the Employer. Martin proceeded to tell Roy that the pre-election conference would be held at 10:30 that morning and that an election might take place that afternoon due to the alleged rumors and threats regarding closure of the farm, loss of jobs, and immigration raids. Roy stressed that since he did not yet represent Employer, that any notice of the pre-election conference was inadequate.

After the conversation with Martin, Roy telephoned the Border Patrol and spoke with Neil Jensen, the agent in charge. Jensen informed Roy that there had been no Border Patrol activity in the vicinity of Muranaka Farms for the past few weeks and that there was no intent to investigate that area in the next few days. At approximately the same time Board agent Martin was attempting to contact Employer in regards to the pre-election conference. Martin reached the Moorpark office and left a message regarding the conference with Jesus Miguez.

Around 9:30 a.m., Nuno arrived at Muranaka Farms in Moorpark to pass out the general notices and to investigate the allegations. A Muranaka Farms supervisor named Frank met Nuno and proceeded to take him around the farm. Frank pointed out a group of employees and informed Nuno that they were the striking

onion workers. When Nuno spoke with the crew, the 40-45 employees confirmed that they were on strike.

As the talk continued additional workers gathered around until there were over 50 workers. During that talk spokespersons for the group confirmed the allegations. They informed Nuno that forepersons and Mama Muranaka, mother of the Employer, had been threatening the employees with loss of jobs, closure of the farm, and immigration raids. The spokespersons also confirmed that people had discussed leaving and that in fact some people had already left.

After he had finished speaking with that group Nuno asked Frank if there were any additional onion workers. Frank replied there were more and that the present group was approximately one half of the crew. Frank further confirmed that all the onion workers were on strike. Therefore, Nuno believed that approximately 80 workers were on strike. (TR III: 35-36).

Nuno next met with the radish crew, which he estimated to be approximately 12-15 workers. He later met with the leek crew members which totaled approximately 12-15. Nuno did not remember either of those two crews confirming or denying the allegations of immigration raids, closures, or loss of jobs. Finally, Nuno passed out notices to the trailer crew, which numbered 15-20. During his discussion with the crew, the packing

shed supervisor, who identified himself as Jesus Miguez,[7] remained present throughout the talk even though Nuno had asked him to leave. The trailer crew did not discuss the allegations. Nuno testified that the radish, leek, and trailer crews he spoke with appeared to be working.

Nuno's investigation lasted between 45-60 minutes. Upon completion of the investigation, Nuno contacted Weissberg between 10:30 - 11:00 a.m. and informed her of his findings. He confirmed that a strike was in progress breaking down the numbers as above. He also confirmed that rumors of farm closure, loss of jobs, and immigration raids were circulating among some workers. Furthermore, he confirmed that he had heard that some people had left and some people were contemplating similar action.

At approximately 10:00 a.m., Harry and Roy Muranaka were meeting with Rob Roy. During the interview with the Muranakas, Roy informed them of their obligations under the Act. Roy testified that he believed that during the interview Harry Muranaka indicated that most of the crews were on strike, that only one crew was still working. (TR I: 75).

After the interview ended at approximately 10:30 a.m., Roy called Martin to inform him that Muranaka Farms had joined the association and that he would be representing the Employer at the pre-election conference. Martin informed Roy that the

7/ There is a discrepancy as to the identity of Jesus Miguez. However, I find it unnecessary to resolve the discrepancy since it would not alter my findings or conclusions.

conference had not yet begun and that the UFW had not yet arrived. Roy then left for the pre-election conference.

D. The Pre-Election Conference of Marcy 25

Roy and his secretary, Mary Jeanes, arrived at the Oxnard Regional Office at approximately 11:00 a.m. Roy had convinced Harry and Roy Muranaka that there was no need for them to attend the conference. Shortly thereafter, the UFW representative and Muranaka Farm employees arrived. Seated in the conference room were Roy and Jeanes for Employer, Jose Manuel Rodriguez and a few employees for the Petitioner, and Martin and Martinez for the ALRB.

Board agent Martin began the conference by stating there was a need to make arrangements for the election. He cited the case number and stated that the purpose of the pre-election conference was to get the parties together, and to agree on the date and the time, and the people eligible to vote. Although Martin had stated a tentative date and time, a date or time certain for the election had not been stated by Martin.

Roy presented the Employer's written position as to the impropriety of a 48-hour election, pursuant to 8 Cal. Admin. Code section 20377(c). His declaration alleged that the ALRB had not properly investigated whether the strikers were unfair labor practice or economic strikers, whether there was a proper

showing of interest, and that there was insufficient time to provide a proper employee list.[8/] (EX No. 2).

Furthermore, Roy contended that it would be impossible to provide an adequate employee list by that afternoon. Roy asserted that the earliest that such a list could be provided would be sometime the next day. The assertion was made that the payroll records were computerized and the computers were in Long Beach, therefore the records were unavailable.

Martinez questioned Employer's workers as to whether there existed daily tally sheets. Upon learning there were tally sheets Martinez attempted to get Roy to locate them. An alternative presented to Roy was to contact the computer company in Long Beach and get the names over the phone so that an employee list could be developed. Roy was non-commital, but said he would speak with Employer regarding the alternatives.

Both Board agents then left the meeting and caucused with Weissberg regarding Employer's declaration and Roy's lack of cooperation in securing an employee list. During the caucus Roy telephoned Employer's Northridge office and spoke with Margaret Itagaki, who had been preparing the list. Roy proceeded to explain that the list had to be alphabetized with names and addresses. Roy explained that the list needed to include any persons who were on layoff, any persons who were sick, or any

8/ Roy did not contest whether a strike existed. (TR I: 79) Roy at that time believed a strike was in progress based on his conversation with Harry Muranaka. (TR I: 75).

person who had an expectation of employment. Itagaki informed Roy that the computer employee list was being delivered that afternoon from Long Beach. Itagaki then informed Roy that the earliest she could complete such an employee list was sometime Friday.

After a 20 minute caucus, the Board agents returned to the conference. Weissberg also came into the conference. She stated the Board's position that there were overriding circumstances which dictated that an election be held that afternoon. She discussed the alleged threats of immigration raids, farm closure, and loss of jobs, and that people were leaving or thinking of leaving due to the threats. She attempted to impress upon Roy the importance of getting an employee list and stressed the different alternatives, using payroll records from the appropriate time period, calling the computer company in Long Beach, or going to Moorpark to find whatever employee records were available to construct a list. Roy did not respond to Weissberg's alternatives or comments, but sat silent, staring at the wall. Weissberg then left the room.

Martinez reasserted the Board's position and Roy requested to see evidence in support of the allegations. The Board agents replied that they had reliable information, but did not produce any evidence. Roy asserted that he had been informed in his conversation with Border Patrol that no raids were planned in the vicinity of Employer's farm. Martin also confirmed that assertion.

Weissberg returned to the meeting and restated her position that an election would take place that afternoon and that she wanted Employer to take whatever steps necessary to secure an employee list. Roy testified that since the Board agents did not request his input as to the date and time of the election and since there was nothing else to do he decided to leave the conference. (TR I: 38). As he got up he informed all those present that he had been authorized by the Employer to represent to the group that Muranaka Farms was prepared to go out of business and that they were willing to negotiate such a closure with the UFW. Angry verbal exchanges occurred between Roy and the Muranaka Farm employees. The pre-election conference ended at approximately 12:30 p.m.

E. Events Leading Up to the March 25 Election

Sometime after the pre-election conference, Roy contacted the Employer and relayed the results of the conference. No decision was ever made on the alternatives suggested by the Board agents. Roy never got back in touch with the Board agents. Approximately 12:00 p.m. that day, Itagaki had completed a handwritten alphabetized employee list from the daily tally sheets. (TR III: 171, 174).

The tally sheets in question showed the different departments at Muranaka Farms such as the onion crew, radish crew, leek crew, irrigators, and tractor drivers. (BDX No. 3). The only employees not on the tally sheets were employees on salary which consisted of five forepersons, two field workers, and at least one office person. (TR III: 115). The number of

people not contained on the tally sheets totaled approximately 20. (TR I: 144). In addition, the tally sheets did not contain the addresses of the employees or the names of those on sick leave, layoff, vacation, or those with reasonable expectations of employment.

At approximately 2:30 p.m. that day Martin and Nuno arrived at Employer's Moorpark farm. Martin spoke with a salesperson named Mitch about obtaining the tally sheets to use as an employee list. Mitch informed Martin that the tally sheets were at the Northridge office and there were none at Moorpark.

As the polls were set up the parties present were requested to provide observers to the election. Roy chose not to attend the election and instead attended a country club where he was seeking membership. The Muranakas also chose not to attend. It was unclear as to how the observers were selected. The Board agents did not recall who selected the Employer's observer.

F. After the Election

The day following the election Employer presented to the Oxnard ALRB office an employee list and the Employer's Response to the Petition for Certification. Five days after the election, the Border Patrol conducted a raid on Muranaka Farms.

ANALYSIS

Labor Code section 1156.3(c) provides in pertinent part, "Unless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." The Board has also examined the effects of setting aside an election.

> ...[T]o set aside an election in the agricultural context means that employees will suffer serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented. D'Arrigo Brothers of California (May 10, 1977) 3 ALRB No. 37, p. 4.

In light of the above concern the Board has placed the burden of proof on the party seeking to set the election aside. See Patterson Farms (Aug. 27, 1982) 8 ALRB No. 57 and TMY Farms (Nov. 29, 1976) 2 ALRB No. 58. In the present case, Employer has objected to the conduct of Board agents. In determining whether to set aside an election for such conduct the Board has set a particular standard.

> In Bruch Church, Inc., 3 ALRB No. 90 (1977), we enuncicated a standard which required the setting aside of an election where the complaint of Board agent conduct was "sufficiently substantial in nature to create an atmosphere which rendered improbable a free choice by the voters." Id., p. 3. Yurasek and Sons (Aug. 4, 1978) 4 ALRB No. 54, p. 3.

OBJECTION NO. 1 - Whether the Board agents failed to notify Employer of the filing of the petition for certification resulting in denying Employer sufficient time in which to comply witn 8 Cal. Admin. Code section 20310.

Under 8 Cal. Admin. Code section 20300(g), once a petition for certification is filed, the regional office in which the petition is filed must telephone or telegraph the employer to inform the employer of the date and time of the filing of the petition and the case number assigned to the petition.

After the filing of the petition, Employer is obligated to file a response. Under 8 Cal. Admin. Code section 20310

Employer must file a written response which includes among other items, the following:

1. Employer's full and correct legal name;

2. A complete and accurate list of the complete and full names, current street addresses, and job classifications of all agricultural employees;

3. Names of employees employed during the payroll period immediately preceding the filing of the petition for certification;

4. Statement of peak employment; and

5. Any challenges to the accuracy of the allegations contained in the petition for certification.

The facts of the case show that Board agent Nuno was assigned the duty of contacting the Employer about the filing of the petition for certification. Although he did not directly contact Employer, Nuno did contact Bob Grounds who informed Employer of the filing of the petition. Bob Grounds also directed Employer to prepare an employee list. Therefore, I find that Employer received actual notice of the petition and Employer began preparing for its section 20310 obligations the night of March 24.

The Employer in its post-hearing brief concedes actual notice of the filing of the petition, but contends that no one informed Employer that an election would be held so quickly and that it was held so quickly that there was insufficient time in which to prepare an adequate employee list for the election. Although the issue was not set for hearing, Employer argued in its post-hearing brief that since there was an inadequate employee

list to determine voter eligibility, ineligible employees were allowed to vote. If an adequate employee list would have been available, those ineligible voters would have been automatically challenged pursuant to 8 Cal. Admin. Code section 20355(a)(8).

Employer made an offer of proof that 40 ineligible people voted in the election. Employer contends that so many ineligible people voted that it affected the outcome of the election thereby creating an atmosphere which rendered improbable, a free choice by the voters and prejudicing Employer. Employer's offer of proof related to an objection which had been earlier dismissed by the Executive Secretary. Since investigative hearings are strictly limited to the issues set forth in the Executive Secretary's notice of hearing, Employer's offer of proof was stricken. See 8 Cal. Admin. Code section 20365(g).

Assuming, arguendo, that the Board would consider Employer's offer of proof, Employer must still show how the ineligible voters affected the outcome of the election. The tally of ballots showed 112 for the UFW and 45 for No Union. Substracting 40 from 112 leaves 72 for the UFW which still provides the union with a wide margin of victory. Hence, even if 40 ineligible people voted and voted for the UFW it would still not have affected the outcome of the election.

Even if the alleged ineligible votes would have been outcome determinative, I would question whether Employer had been prejudiced by Board agent conduct. Employer has attempted to paint a portrait of due diligence in its attempt to prepare an appropriate employee list for the election. However, I find

Employer failed to exercise due diligence in making the list available for the election.

By noon, the day of the election, Itagaki had taken the daily tally sheets and compiled a handwritten alphabetized list of the Muranaka Farm employees. (TR I: 173). The list was not complete because it did not contain addresses nor did it contain the truck drivers, office and clerical workers, or those on salary. Those not on the daily tally sheets totaled approximately 15-20 workers. (TR I: 144). The computer payroll list arrived at Northridge at approximately 1:30 that election day afternoon.

Since the employee list with most of the employees, minus addresses, was completed by 12:00 p.m., I find that Employer did exercise due diligence in preparing an employee list. However, even though the Employer had a list and the computerized payroll list by 1:30 p.m., Employer did nothing to make the list available for the election.

Since the election did not begin until 4:00 p.m., there was sufficient time in which to bring the two lists to Moorpark before the election.[9/] The two lists could have been used in conjunction in order to determine voter eligibility.

In addition, under Labor Code section 1157.3, an employer must maintain an accurate and current payroll list and make it available upon Board request. During the pre-election conference the Board agents suggested alternatives to creating an employee list. Alternatives included using the payroll tally sheets or phoning the computer company to obtain the names over

9/ Moorpark is approximately 30 miles from Northridge.

the phone. Although alternatives were suggested, Employer failed to cooperate. Employer may have exercised due diligence in preparing the employee list, but I find that the lack of cooperation in helping the Board agents develop a list or obtain the payroll records negated the due diligence exercised earlier by Employer.[10/]

Employer's own conduct precluded the Board agents from having an employee list for the election. 8 Cal. Admin. Code section 20365(c)(5) precludes a party from alleging its own conduct as grounds for setting an election aside. I find that Employer created or contributed to the situation which it now alleges prejudiced Employer. I conclude that Employer cannot take advantage of its own misconduct. Hence, I recommend that Objection No. 1 be dismissed.

OBJECTION NO. 2 - Whether the Board agents prejudicially abused their discretion by failing to timely notify the Employer of the pre-election conference and election, thereby resulting in a lack of proper notice to the Employer of both the pre-election and election such that the election must be set aside.

Employer contends that the Regional Director failed to consult with Employer in order to set a time and place for the pre-election conference. The Board's regulations discuss the setting of pre-election conferences.

10/ Employer's conspicuous absence from the pre-election conference also complicated any attempts to expedite decision-making.

> ...[T]he Board agent assigned to the election shall have the discretion to set the time and place of the pre-election conference after consultation with the parties. 8 Cal. Admin. Code section 20350(d).

However, such procedures shall apply to the conduct of elections under strike situations "insofar as practicable." 8 Cal. Admin. Code section 20377(b).

Due to the time constraints the Board agents did not consult with the parties to determine the time and place of the pre-election conference. However, all parties did attend and the conference did not start until all parties were present.

Employer could have been prejudiced by untimely notice of the pre-election conference if it had not been allowed to participate in the conference or had it not been afforded an opportunity to contest the propriety of a 48-hour election pursuant to 8 Cal. Admin. Code section 20377(c). However, as further discussed below in Objection Nos. 3 and 4 Employer was allowed to participate in the conference and did in fact file a declaration alleging the impropriety of a 48-hour election. (TR I: 81-82). Since Employer had a representative present during the entire pre-election conference and Employer was allowed to participate, I find that Employer was not prejudiced by the timing of the notice of the pre-election conference.

Employer contends that it was prejudiced by the untimely notice of the election. However, I find that Employer failed to meet its burden of proving prejudice. Employer alleged that since the election was held so quickly it was unable to prepare

an adequate employee list. That argument was fully analyzed and dismissed in Objection No. 1.

Board agent Martinez was the only witness who testified that during the pre-election conference Roy complained that Employer would be prejudiced because it did not have a chance to campaign. (TR III: 11). Employer provided no evidence during the pre-election conference that it would be prejudiced if the election was expedited. Furthermore, Employer proffered no evidence during the investigative hearing that it lacked an opportunity to campaign, that Employer would have campaigned if given additional time, or that it had a campaign plan it would have implemented, but for the expedited election. In light of the lack of evidence, I find that Employer has failed to meet its burden of proving that it was prejudiced by the notice of the election. Therefore, I recommend the dismissal of Objection No. 2.

OBJECTION NO. 3 - Whether the Board agents prejudicially abused their discretion in conducting an election without properly considering Employer's position as required by section 20377(c).

8 Cal. Admin. Code section 20377(c) states in pertinent part:

> Any party who contends that a 48-hour election is improper shall notify the regional director of its contention and shall submit evidence in the form of written declarations under penalty of perjury supporting the contention and the manner in which the party would be prejudiced. (emphasis added).

The facts show that Roy submitted a handwritten declaration outling Employer's position as to the impropriety of a 48-hour election. Roy testified that the Board agents caucused for 20 minutes, returned and discussed Employer's position.

Q. (By Hearing Officer) Now, they came back and they discussed with you your position?

A. Yes

Q. What else did you discuss, just the contents of the declaration, or were there other items?

A. No. The discussion was with respect to my position as to why it would be inappropriate to hold the election, and then he responded with the fact that there were exigent circumstances in his mind as to why they should go ahead, and that got us into our discussion about the threats, as well as the border patrol activity. (TR I: 79-80).

A review of the facts shows that Roy specifically explained that Employer was unable to provide an employee list on such short notice, he complained about the lack of proper notice, and explained that Employer would be prejudiced since the Board had not ascertained whether there had been a sufficient showing of interest, whether the strike was economic or an unfair labor practice one, and whether the information contained in the petition for certification was correct. (EX No. 2).

Employer's declaration of the impropriety of the election was simply conclusionary. There was no evidence submitted during

the pre-election conference that the showing of interest was inadequate or fraudulently obtained. Whether a strike was economic or an unfair labor practice strike does not negate that a strike existed or that less than a majority were on strike.[11/] Employer failed to allege which portions of the petition for certification, if any, were inaccurate. Futhermore, Employer failed to produce any evidence during the investigative hearing to substantiate the allegations contained in the section 20377(c) declaration.

When the Board agents rejected Employer's allegations as to the impropriety of the 48-hour election, Roy informed the agents of his conversation with Border Patrol agent Neil Jensen. Jensen had informed Roy that there were no plans for a raid on Muranaka Farms and that Border Patrol had not been in the vicinity of Employer's property for the past few weeks. Furthermore, Roy demanded to see evidence of the threats.

The allegation that Border Patrol had no intention of conducting an investigation on Employer's farm has some bearing on the case, but was not dispositive of the issue of threats. What was important was the state of mind of the workers, the fear of deportation, and whether that fear might motivate potential workers into leaving the area before an election could be held. Employer presented no evidence during the pre-election conference

11/ Roy did not contest whether a strike existed. (TR I: 79). Roy believed a strike was in progress, based on his conversation with Harry Muranaka. (TR I: 75).

nor during the investigative hearing that the threats or rumors had not been circulating or that there was no fear among the workers. In addition, I conclude that the Board agents' failure to produce evidence of the threats to Employer did not negate Employer's burden of producing evidence as to the impropriety of a 48-hour election.

I find that the Board agents did consider Employer's position, but simply rejected it because they felt that exigent circumstances existed which dictated that the election be held. I also find that Employer failed to produce sufficient evidence during the pre-election conference to convince the Board agents that an expedited election was unwarranted. Finally, I find that Employer has failed to meet its burden of proving that the Board agents abused their discretion in rejecting Employer's position as to the impropriety of the expedited election and that they was prejudiced by the decision. Hence, I recommend that Objection No. 3 be dismissed.

OBJECTION NO. 4 - Whether the Board agents prejudicially abused their discretion by not obtaining Employer's position with respect to times and places of the election and the names and number of Employer's observers and whether the holding of the election was appropriate insofar as the requirements of 8 Cal. Admin. Code sections 20310 and 20377(b) were satisfied.

8 Cal. Admin. Code section 20350 states in pertinent part:

(a) ...Reasonable discretion shall be allowed to the agent supervising the election to set the exact times and places

to permit the maximum participation of the employees eligible to vote.

(b) ...Each party may be represented at the election by observers of its own choosing who should be designated at least 24-hours before the start of the election.... The Board agent has the discretion to determine the number of observers which each party may have.

Employer alleges that the Board agents failed to discuss Employer's position with respect to the time and place of the election and the names and number of observers. The record shows that Harry Martin began the pre-election conference by outlining the issues to be discussed. (TR II: 10). As soon as the issue of an employee list was raised Rob Roy informed the Board agents that Employer could not have a proper list for an election that day.

Most of the discussion during the pre-election conference focused on the employee list, alternatives to the list, reasons why the election had to be held that day, and Employer's position as to why the election was improper. Martin testified that he discussed with the parties the time and location of the election as well as the issue of observers. (TR II: 112). In addition, Martin testified that there was only one place to hold the election, at the farm in Moorpark. The decision to hold the election at 2:30 p.m. was based on the exigent circumstances. When the issue of observers was raised, Martin does not recall Roy mentioning any names. (TR II: 112).

Roy testified that the Board agents never discussed with him the issue of observers or the issue of time and location of the election. (TR I: 80). Based on Roy's demeanor, the inconsistent statement regarding whether Lampus had informed him that a strike was in progress, his assertion that he became aware on the morning of March 25 that Employer was not a Ventura County Agricultural Association,[12/] and his evasiveness during questioning, I found him less than credible. Although Martin had memory lapses, I found him to be sincere and a more credible witness. Therefore, I credit Martin's testimony that he did discuss the issues of time and location as well as observers.

Assuming, arguendo, that the Board agents had failed to discuss the time and location of the election, such an oversight would not be grounds to set aside the election in the present case. Under 8 Cal. Admin. Code section 20350(a) the Regional Director has the discretion to set the time and location of an election. Employer had the burden of proving that the time and location would have affected the outcome of the election.

In regards to the timing of elections, the Board has shown concern that the timing not serve to disenfranchise voters or deprive employees the full freedom to choose their representatives. c. f. Melco Vineyards (Nov. 28, 1975) 1 ALRB No. 14 and V. V. Zaninovich (Dec. 22, 1975) 1 ALRB No. 24. In the present case, the timing of the election neither disenfranchised voters or precluded voters from exercising their right to select a bargaining

12/ See footnotes 4 and 6.

representative. In fact, there was the possibility that more people voted than were eligible, which resulted in at least 100 percent voter turnout.

Assuming, arguendo, that the Board agents neglected to discuss the issue of observers, I would find that Employer had waived the right and opportunity to discuss it. Rob Roy testified that he had participated in five to ten pre-election conferences and elections. He was familiar with the process. Roy testified that in pre-election conferences employee lists, challenges, company observers, and recommendations from the parties as to the times and locations of an election are discussed. (TR I: 77-78).

Since Roy could not convince the Board agents that a 48-hour election was improper, he testified to the following:

> "Since the Board agents did not discuss with me or did not request of me my position with respect to the election, observers, times and places, et cetera, I indicated to them that there really was nothing I could do, that I would leave, that I would attempt to try to get the information that they needed as soon as possible." (TR I: 38)

For the rest of the day Roy contacted Employer to inform him of the results of the pre-election conference, drafted letters regarding Employer's position, and spent the remainder of the afternoon at a country club in order to obtain a membership. (TR I: 58-59). Roy never recontacted the Board agents again. Roy did not attend nor did he send a representative to the election. (TR I: 59).

For an attorney who is experienced in the ALRB election procedure and is knowledgeable about elections, it is difficult

to comprehend why he did not discuss the issues. There was no question that the election would proceed as scheduled, yet Roy on his own accord chose to leave knowing that those items had not yet been discussed.

Although the election was scheduled for 2:30 p.m., it was not held until 4:00 p.m. Employer had until 4:00 p.m. to select an observer, yet Employer and counsel chose not to attend, thereby eliminating their opportunity to select observers.

Employer had an opportunity to name observers at the pre-election conference. Roy knew it was an issue to be discussed, yet he decided to leave before it was discussed. Employer had until the start of the election in which to choose observers, yet decided not to attend the election. Employer did not take full advantage of the opportunity to choose its observer.

The final contention by Employer is that the Board agents abused their discretion by holding the election as the requirements of 8 Cal. Admin. Code section 20310 and 20377(b) were not satisfied. Section 20310 outlines Employer's obligations in filing a response to the petition for certification. Section 20377(b) authorizes a Regional Director to shorten deadlines for receipt of information and establish reasonable procedures for expedited elections.

8 Cal. Admin. Code section 20377(b) also states in pertinent part:

> The procedures set forth in Chapter 3 of these regulations shall apply to the conduct of elections under this section <u>insofar as is practicable</u> under strike circumstances. (emphasis added).

Verde Produce Company, Inc., (May 16, 1980) 6 ALRB No. 24, discusses the issue of 48-hour elections. In that case an election was held within 48-hours of the filing of the petition for certification. However, due to inadequate notice procedures, a number of voters were disenfranchised. In light of the turnout, which was too low to provide a representative election, the Board set the election aside. The Board held that the Regional Director may, in his or her discretion, schedule an expedited election to be conducted more than 48-hours after the filing of the petition for certification, if necessary, in order to insure a representative election.

Although that case is not on point, the Board's concern for maximum participation of voters in order to insure a representative election is relevant to the present case. In order to gauge the reasonableness of the acting Regional Director's decision to expedite the election it must be viewed in light of the existing facts.

As mentioned above, Weissberg and Strawbridge had made a tenative decision to hold the election at 2:30 p.m. the following day because of the alleged threats and the possibility of losing voters. The following morning Nuno was directed to investigate the situation at Muranaka Farms.

Although Nuno did not personally see anybody leave the property while he was present, members of the radish and onion crews informed him that Muranaka Farm employees had left because of the threats. (TR III: 16). The onion crew confirmed that there had been threats of deportation, loss of jobs, and closure

of the farm. (TR III: 5). In speaking about the threats a few of the spokespersons stated that threats were coming from "Mama Muranaka" the Employer's mother.

Nuno testified that the onion crew admitted that many of them were undocumented and that they took the threats very seriously. (TR III: 52). At the time of speaking with the onion workers Nuno had the impression that the workers feared the immigration raids and it was the biggest concern of the group. (TR III: 54).

Nuno reported back to Weissberg and confirmed that he had heard the rumors and alleged threats and that some people were leaving or contemplating such action. In light of Nuno's investigation, Weissberg decided to move ahead with the 2:30 p.m. election and discuss it during the pre-election conference. Furthermore, at the end of the pre-election conference Roy announced to the UFW and Muranaka Farm employees that he had been authorized to inform them that Employer was going out of business and that they would bargain with the UFW over the effects. (TR II: 18, 69). Such a statement would appear to confirm the rumor of closure if an election was held.

In light of the information with which Weissberg had which confirmed all the allegations she had heard earlier, Employer's inability to deny those allegations during the pre-election conference, and the fear of losing voters, the decision to expedite the election was not unreasonable.

Employer contends that the decision to hold the election was an abuse of discretion since the facts did not warrant such

expeditious action. Employer points out that it was Board agent Nuno's opinion that the Board could have waited another 24 hours and that it might have helped. (TR III: 57). However, an examination of the line of questioning shows that Nuno's opinion was made in hindsight.

Q. (By Hearing Officer) Yes. How would that [waiting an additional 24-hours] have impacted the election?

A. It's the first time it enters my mind... (TR III: 56).

Even if in hindsight Nuno believed that the Board could have waived an additional 24-hours to hold the election there was no evidence that he had formed that opinion at the time of the investigation nor that such an opinion was communicated to Weissberg who made the ultimate decision. In examining the reasonableness of the Board agent conduct, it must be reviewed in light of the information or beliefs they had at the time of the decision.

The workers had verified the alleged threats and rumors. Whether the rumors were true is not at issue, what is at issue is whether those rumors and alleged threats circulated among the workers, whether there was fear among the workers, and whether there was talk of workers leaving or contemplating such action. Nuno's investigation confirmed the threats and rumors and that was communicated to the Acting Regional Director.

Employer contends that the investigation was improperly conducted. In addition, Employer questions the allegations since there was no opportunity to cross-examine those who testified to

confirm the threats and rumors.[13/]

However, Employer could have presented its case without cross-examining worker witnesses. Employer could have produced witnesses from the different crews to testify that there were no rumors or threats, that the alleged threats did not create an atmosphere of fear, if the threats did exist the workers were not affected by them, or that none of the workers had left or contemplated leaving because of the threats. In addition, Employer could have produced "Mama Muranaka" to testify that she did not make such threats or that she had no power to implement such threats and the employees knew of her lack of power. Employer has failed to produce any witnesses to negate the allegations of rumors or threats. Hence, I find that Employer has failed to meet its burden of proving that the Board agents had abused their discretion in holding an expedited election.

Due to the time constraints of the election, I find that the Board agents applied the Chapter 3 procedures to the present case insofar as it was practicable, as mandated by 8 Cal. Admin. Code section 20377(b). The Board agents were confronted with a situation in which they believed they would lose voters, hence in order to maximize voter participation the election was expedited. Therefore, I recommend that Objection No. 4 be dismissed in its entirety.

13/ Employer attempted to subpoena the names of worker witnesses. General Counsel filed a petition to revoke which was granted pursuant to 8 Cal. Admin. Code section 20250 and Evidence Code section 1040.

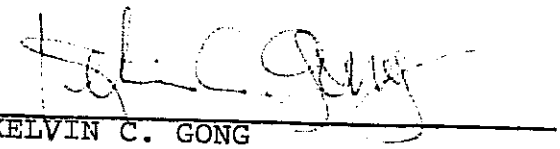
CONCLUSION AND RECOMMENDATION

Based on the record evidence I find that Employer has failed to meet its burden of proving that the Board agents acted unreasonably and abused their discretion. Furthermore, I find that Employer has failed to show how it has been prejudiced by the conduct of the Board agents or how such conduct created an atmosphere which rendered improbable a free choice by the voters.

In light of the legislative mandate of Labor Code section 1156.3(c) to certify election unless there are sufficient grounds to refrain from doing so, I recommend that the Board dismiss Employer's objections to the election and certify the United Farm Workers of America, AFL-CIO, as the bargaining representative for the employees of Muranaka Farms.

DATED: November 10, 1982

Respectfully submitted,



KELVIN C. GONG
Investigative Hearing Examiner