Guadalupe, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BETTERAVIA FARMS, Employer, and SAMMY A. ARCA, JR., Petitioner, and INTERNATIONAL UNION OF AGRICULTURAL WORKERS, Incumbent Union, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Intervenor.	Case No. 82-RD-1-OX(SM) 9 ALRB No. 46

DECISION AND ORDER

Following a Petition for Decertification filed by an employee of Betteravia Farms (Employer) on August 16, 1982, a decertification election was conducted among the agricultural employees of the Employer on August 24, 1982. The United Farm Workers of America (UFW) intervened in the election and was placed on the ballot along with the incumbent International Union of Agricultural Workers (IUAW or Union) and "No Union".

The Employer and the IUAW each timely filed objections to the election which were set for hearing by the Executive Secretary on October 7, 1982. On November 4, 1982, the ballots were

tallied by order of the Regional Director with the following results:

IUAW	81
No Union	157
UFW	14
Challenges	21
Void	7
Total	280

Following the ballot count, the Employer withdrew its election objections, leaving extant only the following objections of the IUAW which had been set for hearing:

1. Individuals voted who had been hired solely for the purpose of voting in the election.

2. The election took place in an atmosphere of threats and violence. Specifically it is alleged that:

   a) On August 2, a truck driver who was with Patrick Ferini pointed a rifle at Saul Rodriguez, an agricultural employee, and threatened to shoot him;

   b) On August 2, a truck driver and security person pointed a rifle at Aureliano Martinez and threatened to shoot him.

3. The employee eligibility list supplied by the Employer contained a large number of persons with no street addresses which prevented the IUAW from communicating with these workers.

A hearing was conducted before Investigative Hearing Examiner (IHE) Stella Connell Levy who thereafter issued the attached Decision in which she found that the evidence: (a) was insufficient to support a finding that persons voted who had been hired for the primary purpose of voting; (b) established irregularities in the challenge procedure but did not support a finding that

the Union was prejudiced thereby; (c) established that a coercive violent atmosphere existed at the Employer's farm prior to the election, but did not support a finding that the coercion persisted in full force at the time of the election; and (d) established that the eligibility list was deficient such that its utility was substantially impaired and that the Employer failed to exercise due diligence in preparing the list. The IHE recommended that the decertification petition be dismissed and that the election be set aside based on the cumulative effect of the deficiencies in the eligibility list and the preelection violence. The employer filed timely exceptions to the IHE's Decision and a supporting brief. The IUAW filed a responsive brief.

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

The Board has considered 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.[1/] The decertification petition is hereby dismissed.

Dated: August 26, 1983

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

[1/] Member Carrillo would not allow the IUAW to object to the election concerning any strike-related violence attributable to the IUAW itself. (See ALRB Regulations 20365(c)(5).)

CASE SUMMARY

Betteravia Farms (IUAW)

9 ALRB No. 46
Case No. 82-RD-1-OX(SM)

IHE DECISION

The IHE found that the IUAW failed to prove that workers were hired to vote and that, although there was violence perpetrated by both the IUAW and the Employer before the election, that conduct occurred three weeks before the election and would not, by itself, have affected the outcome. The IHE did find, however, that the list of employee addresses was so deficient that it materially prejudiced the Union's efforts to contact workers, and was not maintained with diligence by the Employer. She therefore recommended that the election be set aside on the basis of the cumulative effect of the list deficiencies and the pre-election violence.

The IHE also made the following procedural rulings: (1) that the Employer was not prejudiced by the IUAW's late service of a detailed statement of facts underlying its objections; (2) that the issue of incorrect addresses was implied in the IUAW's objection regarding the lack of addresses; and (3) that the Regional Director erred, though not so badly as to invalidate the election, in rejecting the IUAW's blanket challenge before the election without a written report and without notice to the IUAW.

BOARD DECISION

The Board affirmed the IHE's rulings, findings, and conclusions and adopted her recommendation to set the election aside.

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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

Agricultural Labor Relations Board
MAY 17 1983
RECEIVED
Exec. Secretary

In the Matter of:

BETTERAVIA FARMS, Case No. 82-RD-1-OX(SM)

Employer,

and

SAMMY A. ARCA, JR.

Petitioner,

and

INTERNATIONAL UNION OF
AGRICULTURAL WORKERS,

Incumbent Union,

and

UNITED FARM WORKERS
OF AMERICA, AFL-CIO,

Intervenor.

Richard S. Quandt, Esq.
Grower-Shipper Vegetable Association
for the Employer.

Barry J. Bennet, Esq. and Arturo Castro
for the International Union of
Agricultural Workers

Eduardo Blanco, Esq.
for the Agricultural Labor
Relations Board

DECISION

STATEMENT OF THE CASE

STELLA CONNELL LEVY, Investigative Hearing Examiner:

This case was heard by me in Santa Maria, California on November 16 through 19, 1982, and in Oxnard, California on December 12, 1982.[1/]

By an election held August 11, 1978, the International Union of Agricultural Workers (IUAW or Union) became the certified bargaining representative of the agricultural workers at Betteravia Farms (Betteravia or Employer). On August 16, 1982, a petition for decertification was filed by Sammy A. Arca, Jr. The ALRB conducted an election on August 24 pursuant to labor Code section 1156.3(a) (LC sec. 1156.3(a).[2/] The United Farm workers of America (UFW) intervened in the election and was placed on the ballot along with the IUAW and "No Union".

Immediately following the election Wayne Smith, then the Oxnard Regional Director, ordered the ballots impounded. The Employer and the IUAW each timely filed objections to the election. By order dated October 7 the Executive Secretary set for hearing objections of both the Employer and the Incumbent Union. The ballots were finally tallied by order of the Regional Director on November 4th with the following results:

1/All dates hereafter refer to 1982 unless otherwise specified.

2/The petition for decertification and other official ALRB documents indicate that the election was held pursuant to LC sec. 1156.7(c). However, the Regional Director testified that since the collective bargaining agreement had expired the election was in fact held pursuant to LC sec. 1156.3 in conformance with the Board's holding in Cattle Valley Farms/Nick Canata (1982) 8 ALRB No. 24. The sole practical difference between sections 1156.7(c) and 1156.3 is that a petition filed under the former must be accompanied by a 30% showing of interest whereas a petition filed under the latter requires a majority showing of interest.

IUAW	81
No Union	157
UFW	14
Challenges	21
Void	7
Total	280

Following the ballot count Betteravia withdrew its election objections, leaving extant only the following objections of the IUAW which had been set for hearing:[3/]

1. Individuals voted who had been hired solely for the purpose of voting in the election.

2. The election took place in an atmosphere of threats and violence. Specifically it is alleged that;

   a) on August 2, a truck driver who was with Patrick Ferini pointed a rifle at Saul Rodriguez, an agricultural employee and threatened to shoot him;

   b) On August 2, a truck driver and security person pointed a rifle at Aureliano Martinez and threatened to shoot him.

3. The employee elegibility list supplied by the Employer contained a large number of persons with no street addresses which prevented the IUAW from communicating with these workers.

The Employer and the IUAW were represented at the hearing and were given a full opportunity to participate in the proceeding.[4/] Both parties filed post-hearing briefs.

Upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the briefs

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3/Other objections had been raised by the Union but dismissed by the October 7 Order.

4/Neither the UFW nor the decertification petitioner filed objections or participated in the hearing on this matter. Mr. Barry Bennett was present and represented the Incumbent Union only on the final day of hearing and in the post-hearing brief. The IUAW was otherwise represented by its president, Arturo Castro.

filed by the parties, I make the following findings of fact and conclusions of law.

JURISDICTION

None of the parties to the proceeding has challenged the Board's jurisdiction. Accordingly, I find that Betteravia Farms is an agricultural employer within the meaning of LC sec. 1140.4(c) and that the IUAW and the UFW are each labor organizations within the meaning of LC sec. 1140.4(f).

BACKGROUND

Betteravia Farms is an agricultural partnership located in the Santa Maria Valley which grows mixed vegetables on about 3,000 acres. The partners, Patrick and Milo Ferini and Henri Ardantz, also operate commercial packing and cooling sheds located off the farm property. Patrick Ferini makes management decisions (Reporter Transcript Vol. III, p. 47)[5/] whereas the primary responsibility for farming operations rests with his brother, Milo. RT III:171. Betteravia employs several harvesting crews and a hoeing crew as well as tractor drivers and irrigators. During the peak summer season about 250 workers are emloyed. RT III:48.

After the IUAW was certified by the Board in 1978[6/] it signed a four-year contract with the Employer which expired on July 15. On or about July 25 approximately 80% of the workers went out on strike over issues relating to the then pending contract

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5/Hereafter citations to the Reporter Transcript will be abbreviated "RT III:47". The Roman numeral indicates the volume; the Arabic numeral indicates the page.

6/Between 1975 and 1978 the Teamsters represented the field workers at Betteravia Farms.

negotiations.[7/] RT III:48-49. When the strike ended on August 8 most of the employees returned to work. the decertification petition was filed eight days later.

TIMELINESS

In a letter to the Exectutive Secretary dated September 9 the Employer's attorney Charley Stoll, urged that the Union's objections be dismissed because of its failure to comply with 8 Cal. Admin. Code Sec. 20365 (c) (2)(D).[8/] The Motion was renewed by Richard Quandt on the first day of hearing. RT I:18. Reg. sec 20365(c)(2)(D) prvides in pertinent part that:

> Copies of the declarations and supporting documents or exhibits shall be served upon all other parties with the objections petition, provided that, at the option of the objecting party, a detailed statement of facts may be substituted for the declarations.

The IUAW filed its objections and supporting declarations with the Executive Secretary in a timely manner. However, although the Employer was also timely served with the Union's objections, it received no supporting documentation until the morning of November 16, the first day of hearing. When I asked Mr. Castro why the Union had failed to timely comply with the regulations, he replied that he did not have "the slightest idea". RT I:21. I then asked Mr. Quandt to address the issue of whether his client had been prejudiced by the Union's conduct.

7/I do not credit the testimony of Patrick Ferini at RT III:49 that the strike began on July 12 because it is contradicted by his own later testimony as well as by the testimony of another Employer witness, Maureen Teixera at RT III:82.

8/References to the Administrative Code will hereafter be abbreviated as "Reg. sec." followed by the appropriate number.

Mr. Quandt argued that the presence or absence of prejudice to the Employer was not dispositive of the issue and cited several cases in support of this proposition. RT I:28-32. After careful consideration of the Employer's arguments I denied its motion to dismiss without prejudice to renew in a post-hearing brief. The Employer did renew the motion in its post-hearing brief, but has raised no new arguments.

The purpose of the regulatory requirement is to insure that parties receive adequate notice of the specific conduct alleged to be objectionable. I find that the Emloyer did in fact have adequate notice and was not therefore prejudiced by the Union's untimely compliance with the regulation.

The Employer argued at hearing that without supporting declarations the Union's objections did not put it on notice as to the conduct alleged to be objectionable. Specifically, Mr. Quandt argued that:

1. the Employer did not know whom, of the 306 eligible voters, the Union was referring to in its objection alleging that persons were hired to vote in the election. RT I:22;

2. the Employer did not know the identity of the person alleged to have pointed a rifle, where the incident took place or the content of the alleged threat. RT I:24;

3. the Employer knew which employees did not have street addresses but did not know which specific individuals the Union had been unable to communicate with. RT I:25.

I find, contrary to its representation, that the Employer knew exactly which employees were alleged to have been hired for the purpose of voting. The Union submitted a list of employees it intended to challenge on this ground to the Regional Director

before the election. This list was shown to the Employer as part of the regional office's pre-election investigation of the challenges. RT II:75-78. I also find that the objection on the rifle incident states specifically the basis for the objection including date, names, place and subject matter of threats. Finally, the eligibility list was prepared by the Employer itself who admits being fully aware of the number of employees who did not have street addresses.

The Employer cites Auto Chevrolet, Inc. (1980) 249 NLRB No. 70, Alfred Nichols Bakery (1974) 209 NLRB 1058 and John Gardoni (1982) 8 ALRB No. 62 in support of its motion to dismiss. I find the NLRB cases unpersuasive because they address the issue of failure to timely serve the objections themselves on an opposing party whereas the issue in this case is failure to timely serve supporting documentation. Like the NLRB, the ALRB refuses to entertain objections which are not timely filed. However, unlike the NLRB, the ALRB imposes an additional requirement of supporting documentation. NLRB procedural rulings are not precedential where, as here, the ALRB has different procedural requirements than the National Board.

John Gardoni was an unfair labor practice case in which the Respondent failed to timely file an answer to the complaint under a regulation which expressly provides that "[a]ny allegation not denied shall be considered admitted". Reg. sec. 20232. The sole issue before the hearing officer was whether Respondent demonstrated good cause for its conduct such that summary judgement should not issue.

We are not here faced with a failure to file objections. The IUAW substantially complied with the Board's regulations by timely filing all necessary documents and also timely serving objections on the opposing party. Both this Board and the national board have applied a "substantial compliance" test in determining the affect of failure to comply with regulations. For example, in Frudden Enterprises, Inc. (1981) 7 ALRB No. 22 the Board held that a union had a right to access despite its failure to technically comply with the regulation governing service of the Notice of Intent to Take Access on the Employer. In Frudden the Board concluded that the purpose of the regulation had been served because the employer had actual notice of the filing and was not prejudiced by the union's failure to strictly comply with the regulations. See also V.B. Zaninovich & Sons (1982) 8 ALRB No. 71; Allegheny Warehouse Company, Inc. (1981) 256 NLRB 44. [Party's election objections held timely despite failure to comply with regulation which requires mailing of copies to other parties]. Although I deplore the union's dilatory conduct, its failure to technically comply with the regulations does not justify a wholesale dismissal of the objections where the Employer was on notice as to the specific conduct alleged to be objectionable and the delay caused no prejudice to the Employer.

WHETHER THE ELECTION TOOK PLACE IN
AN ATMOSPHERE OF THREAT AND VIOLENCE

Findings of Fact

The four-year collective bargaining agreement between the IUAW and Betteravia Farms expired on July 15. On or about July 25, during contract negotiations, most of the Employer's

agricultural workers went out on strike. The atmosphere during the strike was highly charged with allegations of provocative conduct on both sides.

On August 2 the striking workers began picketing outside the ranch between 5 and 6 am. When the strikers arrived, a crew of 20-30 workers were already in the field harvesting lettuce. RT III:173. There were also 8 to 12 sheriff's squad cars in the area. RT 11:27, 141. Patrick Ferini testified that the Employer arranged for the sherrif's department to be there because it anticipated that the presence of strikebreakers in the field would create problems. RT III:123, 124. Approximately 80 strikers formed a picket line along the railroad tracks on Betteravia Road just outside the Employer's property. RT III:173. Among those present on the picket line were union agents Richard Espinoza and Tim Rabara, Teamsters agent John Miranda and Saul Rodriguez, a member of the bargaining unit.

By 7 a.m. the picketers had decided to enter the property together to demonstrate unity and to ask the lettuce crew to honor the strike. RT II:19 Richard Espinoza tried to dissuade the workers but was unsuccessful in his effort. Patrick Ferini testified that John Miranda took him aside and asked for permission to enter the field. RT III:124. As the striking workers moved across the property line, supervisor Joe Prandini announced through a megaphone that the workers were breaking the law and had to go back. Some people did go back but about 50 entered the property yelling "Huelga!" RT III:175. They headed south on the Ranch Road in

the direction of the lettuce crew which was working in field P-29 about 800 feet south of the railroad tracks.[9/]

The picketers did not get very far before being turned back by police. Patrick Ferini testified that the sherrifs used clubs, grabbed people by the shirt and "did anything they could to turn people back." RT III:126. All but 5-7 persons, who were ahead of the others, returned to the railroad tracks within 10 minutes or so. The few persons who continued on toward the south end of the field where the letuce crew was working included Tim Rabara, Richard Espinoza, Saul Rodriguez, and two other workers named Jose Gonzales and "Chino".

When the picketers entered the property, Patrick Ferini got into a company truck and drove south on the Ranch Road with Steve Sumners, an employee. Sumners parked the truck at the south end of the field directly west of the lettuce crew. Patrick Ferini testified that Sumners then left and was unaware of Sumners' activities for a short period of time.

Sumners was next seen by Saul Rodriguez. Mr. Rodriguez was on the Ranch Road just north of the lettuce crew when he saw Sumners driving towards him. Sumners stopped near Saul Rodriguez and got out of the truck carrying a rifle. He pointed the rifle

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9/A map of the property was offered into evidence, and admitted as Exhibit No. 11 by the Employer. The field labeled P-29 is a quadrangular parcel of land bounded on one side by Betteravia Road and the railroad tracks which run in a northwest southwest direction. The "Ranch Road", a dirt road inside the property, runs in a north-south direction along the west side of P-29 between the railroad tracks and another internal road.

at Mr. Rodriguez[10/] saying, "Get off this land you mother-fucker. I'm going to blow your head [off]."[11/]

Mr. Rodriguez testified that he did not know if the gun was loaded but Sumners did "lock and load" the rifle. At this point, Milo Ferini arrived. Milo Ferini had apprehended Jose Gonzales farther north on the road but then saw Sumners with the gun and went to tell him to put it away. Saul Rodriguez and the other workers returned to join the picket line when two sherrifs, who arrived just after Milo, told them to leave. I credit Saul Rodriguez' entire testimony. He was a nervous, soft-spoken witness who appeared to be recounting the facts truthfully. His testimony did not differ significantly from the testimony of other witnesses from both sides. Finally, his testimony was uncontradicted and should be credited where, as here, there is no basis for disbelieving the witness.

Tim Rabara testified that he attempted to speak to the lettuce crew but was stopped when foreman Andy San Diego ran towards him with a baseball bat and ordered him off the property. Mr. Rabara, who was unarmed, insisted that he wanted to speak to the workers. While Tim Rabara and San Diego were arguing, some of the lettuce workers ran to their cars which were parked on the Ranch Road. Later they returned to the field. RT II:148; III:131.

10/Rodriguez testified that the rifle was also pointed in the direction of Chino who was nearby and Richard Espinoza. Espinoza was about ten yards down the road.

11/Rodriguez testified that the rifle was not pointed at him the entire time. He also saw Sumners carrying the rifle at his waist and pointed in the air.

I credit Tim Rabara's testimony regarding his encounter with San Diego as it is uncontradicted and corroborated in part by other witnesses.

When Richard Espinoza arrived at the south end of the field, he met Patrick Ferini who told him to get out. Mr. Espinoza answered saying that he felt he had a duty to be there to make sure that nothing happened to the workers. Patrick Ferini testified that Richard Espinoza sounded almost apologetic. As they spoke, Steve Sumners came up behind Mr. Espinoza still carrying the rifle. Tim Rabara was there but to the side talking to someone in the field. RT II:140.

Mr. Espinoza testified that Sumners pointed the rifle at him. When Mr. Espinoza told him to put the rifle away before someone got hurt, Sumners responded "Just step into the field and I'll blow you away." Mr. Espinoza further testified that Sumners said that the union was a bunch of fools because the Ferinis had control of the Sherrifs Department. Patrick Ferini told Sumners to shut up and took him aside to talk to him. When some of the lettuce crew ran to their cars, Sumners began pointing the rifle at them, but was stopped by Patrick Ferini. RT II:87-89.

Patrick Ferini testified that on the night of August 1 the Employer put out a patrol of four or five vehicles to guard its property against union violence. One person left his gun in the truck and it was used by Sumners the next morning. Mr. Ferini further testified that he never saw Sumners point the gun at Mr. Espinoza or threaten him despite the fact that Sumners was

near him. Mr. Ferini admitted on cross-examination that Sumners might have used vulgar language and that he himself might have said something threatening. RT III:134.

The police were back and forth during this period. Patrick Ferini testified that one of the picketers asked a sherrif why Sumners had a gun and the sherrif responded saying, "[t]here's nothing that says a guy can't protect his own property. It doesn't matter if its with a gun or whatever." RT III:129. Patrick Ferini said nothing himself in response to the sherrif's comment. When I asked him whether he thought that the sherrif may have left the impression that Sumners was protecting Betteravia Farms, Mr. Ferini responded, "Could be." RT III:141.

I found Richard Espinoza and Patrick Ferini both to be, on the whole, credible and straight forward witnesses. However, on the question of Sumners' conduct, I credit Mr. Espinoza's version of the facts where they conflict with Mr. Ferini's[12/] The only significant contradiction between the testimonies of Ferini and Espinoza is on the question of whether Sumners' conduct was threatening.

Patrick Ferini's characterization of Sumners' conduct is inconsistent with his other testimony as well as with the testimony of the other witnesses. Sumners was not carrying a rifle by happenstance. He made a special effort to obtain the rifle.

12/The varied testimony concerning the position of the rifle is not necessarily contradictory. Mr. Espinoza saw the gun pointed directly at him. Mr. Rabara and Milo Ferini testified that when they saw the rifle it was pointed in the air. Patrick Ferini testified that he saw Sumners holding the gun in a relaxed manner at his waist. Saul Rodriguez saw the rifle in all three positions. I find it most reasonable to conclude that Sumners held the rifle in different positions at different times.

Only six or seven union people were left in the field when Sumners got the gun and they were neither armed nor were they belligerent RT II:90, RT III:128. Furthermore, there were numerous police officers present, who were there at the Employer's behest and who had already demonstrated their ability to protect the Employer's interests in their response to the field rushing. Thus, there was no need for self help. The testimony by the Ferini brothers that they told Sumners to get rid of the gun as well as the sherrif's characterization of Sumners as "protecting property" is inconsistent with innocent possession of the gun. Rather, I find that Sumners threatened Mr. Espinoza as he had threatened Mr. Rodriguez.

Milo Ferini, Richard Espinoza and Tim Rabara testified that the lettuce crew observed the rifle incident. This is consistent with the crew's location only 10-15 yards west of the witnesses. The witnesses all concluded that the people who ran to their cars did so out of fear.[13/] Milo Ferini and Saul Rodriguez testified that, in addition to the lettuce crew, other workers were nearby. Mr. Rodriguez further testified that everyone on the picketline found out about the rifle incident. RT II:43-45. Based on the uncontradicted testimony of witnesses for both sides, I find that the 20-30 workers in the lettuce crew as well as several other employees observed Sumners point a rifle at Richard Espinoza and/or Saul Rodriquez. I also find it likely that most of the

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13/The Employer's witnesses testified that the crew was afraid of the Union people. The Union witnesses testified that the crew was afraid of Employer violence.

picketers heard about the incident through word of mouth. M. Caratan, Inc. (1980) 6 ALRB No. 14.

Soon after the rifle incident, at police request, Mr. Espinoza and Mr. Rabara left the field and returned to the railroad tracks. Approximately 30 minutes later, police began arresting picketers for their previous trespass. Patrick Ferini testified that the police told them to wait before making any arrests. Later they asked the brothers to identify people who had trespassed. The Ferinis picked out the most familiar people who were also those most active in the union. When asked on cross-examination why he had picked all the union leaders, Patrick Ferini responded, "I didn't want to make a mistake. That's the reason its mostly the union guys...." Fifteen to twenty people were arrested that day out of the group of fifty who had crossed the property line. Of those arrested, seven or eight were also fired. RT III:136.

Witnesses for both sides agreed that the rifle incident took place in a context of threats and violence although each side blamed the other for causing the violence, e.g. RT III:181. Milo Ferini testified that on August 2 he noticed picketers picking up rocks along the railroad tracks. He and Steve Sumners took a camera out to the field directly opposite where Ferini directed Summers to take their pictures to "see who's there." In response, some of the workers began throwing rocks at Sumners and Milo Ferini. Two out of this group were arrested. RT III:179-180. Marcos Contreras, a supervisor, testified that during the strike people from the Union threw rocks at his house and truck. RT III:114.

There was other testimony from Employer witnesses that the decertification petitioner's truck had been set afire, and that Arturo Castro had shoved Patrick Ferini and subsequently been arrested. RT:135, 140.

Richard Espinoza testified that during the strike a supervisor carried a holstered pistol which was clearly visible and seen by many of the striking workers. RT II:96-97. Saul Rodriguez testified that on a previous day one of the strikebreakers showed him a pistol that he was hiding. RT II:16. Other Union testimony, discussed above, concerned arrests and firings.

Based on the testimony, I conclude that the rifle incident took place within a volatile atmosphere of threats and violence.[14/]

Analysis and Conclusions of Law

The election procedures provided in the Act represent the only means whereby employees can reject their certified bargaining representative. Because election results carry a presumption of validity, the burden of proof at hearing is on the party seeking to set the election aside. Patterson Farms (1982) 8 ALRB No. 57; TMY Farms (1976) 2 ALRB No. 58. Under the ALRB's "outcome determinative" test, the objecting party must put forth evidence of conduct which:

1. created an atmosphere calculated to prevent free and untrammeled choice by the employees; and

2. affected or tended to affect the outcome of the election. D'Arrigo Bros. (1977) 3 ALRB No. 37.

14/I dismiss that portion of the objection relating to Aureliano Martinez as there was no testimony in that regard.

In previous decisions, the Board has considered the following factors relevant to the question of whether an election should be set aside because of pre-election violence:[15/]

1. whether the objectionable conduct was an isolated incident or part of a general pattern of coercive activity;

2. whether the objectionable conduct can be attributed to a party;

3. whether the objectionable conduct occurred near the time of the election;

4. whether a high percentage of employees were exposed to the objectionable conduct;

5. whether the objectionable conduct was of a serious nature.

In both Frudden Produce and Jos. Gubser the respective employers' election objections were based on an incident of field rushing. In each case, although there had beeehthreats and violence, the Board found that these incidents were isolated and declined to overturn the elections. By contrast, in Phelan & Taylor the Board overturned an election based on the physical abuse of UFW organizers by Teamsters representatives. There, the objectionable conduct was of a serious nature, occurred close to the election, was attributable to a party and contributed to an atmosphere of coercion in which it was unlikely that employees could exercise free choice.

The testimony at hearing focused on the events of August 2 although witnesses agreed that a volatile, threatening

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15/Frudden Produce (1981) 7 ALRB No. 22: Jos. Gubser (1981) 7 ALRB No. 33; Phelan & Taylor (1976) 2 ALRB No. 22.

atmosphere persisted throughout the strike. Most of the Employer's workforce witnessed the activities of August 2 either as picketers or strikebreakers. Furthermore, it is likely that workers were aware through word of mouth of other incidents that they had not themselves witnessed, M. Caratan, Inc. (1980) 6 ALRB No. 14; Sol Henkind, 236 NLRB No. 68.

The rifle incident took place within the context of a strike which had polarized managment and the workforce. Although factionalism and attendant verbal friction is to be expected under strike conditions, the conduct complained of falls outside the range of expected behavior. NLRB v Hepa Corp. (9th c) 597 F2d 166. The record demonstrates no justification for Sumner's resort to self-help as the presence of numerous sherrif's deputies insured that organizers would be promptly removed from the property. Security Farms (1977) 3 ALRB No. 81.

The events of August 2 were likely have caused employees trepidation and confusion over their right to support the union. Servomation v NLRB (1977) (6th c) [96 LRRM 2862]. When the striking workers arrived in the early morning, 8-12 squad cars were already there at the Employer's behest. Later, police allowed the Ferinis to handpick the Union leaders for arrest. The clear message to employees was that the Police Department was under the Employer's control.

Generally the misconduct of a party is considered more coercive than the same misconduct by a non-party. This is because parties to an election--that is the employer and the union--usually

have greater economic and institutional strength than inidviduals[16/] Takara International (1977) 3 ALRB No. 24, H.H. Maulhardt 6 ALRB No. 42. Employees witnessing Sumners pointing a rifle at unarmed union agents and supporters could have reasonably concluded that he was acting on the Employee's behalf, Vista Verde Farms v. ALRB (1981) 29 Cal 3d 307. The doctrine of "apparant authority" is applicable whenever an act or ommission of a principle, however subtle, gives employees reasonable cause to believe an agency relationship exists. S.A. Gerrard (1980) 6 ALRB No. 49. It was Sumners who drove Patrick Ferini into the field and also Sumners who took photos of picketers at Milo Ferini's side. Although both brothers told him to put the gun away they also tolerated his behavior, as evidenced by the fact that Sumners was allowed to use the rifle for about ten minutes after Milo Ferini told him to put it away. Furthermore, when one of the sherrifs told strikers that Sumners was protecting the Ferini property, Patrick Ferini did nothing to dispel the impression that Sumners was acting on the Employer's behalf.

Based on the above analysis and credibility resolutions, I conclude that Steve Sumners pointed a rifle at Saul Rodriguez and Richard Espinoza and verbally threatened them. I further conclude that knowledge of this incident was disseminated throughout most of the workforce who would have reasonably believed that Sumners was acting on the Employer's behalf.

16/This reasoning is not based on a party's legal status. Thus, misconduct by a decertification petitioner would not carry as great weight as misconduct by an employer even though the two have equal legal status as parties.

However, although Sumners' conduct occurred in a context of threats and violence it is not itself sufficient to set the election aside. The strike ended on August 8 and the election was not until August 24. There is no evidence of any specific incident of violence during the 16-day hiatus between the end of the strike and the election. From this fact I draw the inference that the coercive atmosphere had been dissipated by election day to the degree that it did not affect the outcome of the election.[17/] Whether the eligibility list contained deficiencies which prejudiced the Union's efforts to communicate with workers.

Findings of Fact

The eligibility list compiled by the Employer was deficient in several respects. Post office boxes were listed in lieu of street addresses for 67 of the 307 persons eligible to vote in the election. An additional four employees had facially insufficient addresses.[18/] The union had received a copy of the list by the time of the pre-election conference. Tim Rabara reported the list's deficiencies to Board Agent Harry Martin who said he would check into the matter. RT II:152. However, the

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17/ In refusing to overturn the election in Frudden Produce, the Board considered significant the fact that threats did not concern voting as well as their remoteness from the election. Similarly here the violence took place in the context of a strike and was not specifically connected to the election. Nevertheless, I decline to consider this significant factor inlight of the recent NLRB decision in Industrial Disposal Service (1983) 66 NLRB 22. The NLRB expressly overruled a previous decision which had held that in order to be objectionable threats must be directed towards the outcome of the employees' voting decision.

18/ Ramiro Diaz, Luis Limon Perez and Ruben Tamborgo are listed with non-local addresses (Los Angeles and Fremont). Linda Jimenez' address is listed as "Nipomo, CA 93444".

deficiencies in the list were never corrected. RT V:115[19/] The Union presented additional testimonial evidence at hearing that the Oxnard addresses listed for the Lary Martinez crew were inaccurate.

Arturo Castro testified that the decertification petition took the Union by surprise.[20/] Union organizers decided to focus their campaign strategy on communicating with the new people who had been hired during the strike. The new employees worked primarily in the crews of Pedro Rodriguez and Larry Martinez RT III:149.

The Pedro Rodriguez thinning crew first worked for Betteravia Farms in mid-June. None of the crew members belonged to the union.[21/] (See Exhibits Nos. 15 and 22). When the crew began in June Rodriguez was employed by Felipe Zepeda, a labor contractor. Once the other Betteravia workers went out on strike, Zepeda refused to cross the picket line. In order to obtain labor during the strike, the Employer hired the Rodriguez crew away from Zepeda and thereafter carried those workers on the Betteravia Farms payroll. RT III:197. Twenty-one workers from the Rodriguez crew were eligible to vote in the election. Of these, sixteen were listed with post office box numbers.

19/Regional Director Wayne Smith testified that he was unaware of the problem. RT II:53.

20/The Employer was not surprised. Patrick Ferini testified that he heard about the decertification a day or two before the petition was filed. RT III:53.

21/The IUAW's collective bargaining agreement with Betteravia contained a union security clause under which all workers became union members after five days. There is no explanation as to why the Rodriguez crew had not been required to join the union in June.

Tim Rabara testified that he had been servicing the contract at Betteravia for four years and knew most of the permanent workers. The organizers had divided up the eligibility list, but Rabara campaigned generally among all the workers. Although he made some home visits, he concentrated on taking worksite access. During the period the Union had to campaign,[22/] Tim Rabara concentrated on trying to reach the newcomers, especially the Rodriguez and Martinez crews. RT III:9.

Tim Rabara testified that he was unable to visit the Rodriguez workers because he did not have their street addresses. He asked around among the old workers but no one knew where any of the Rodriguez crew lived.[23/] RT II:150; III:2. Mr. Rabara tried to approach the crew in the fields but was only able to talk to the crew one time. Mr. Rabara testified that he tried to take access during permissable times on several occasions. Pedro Rodriguez always told him that the crew had already taken their lunch despite the fact that Rabara arrived at noon when the workers customarily eat. RT II:150, 155. He was able to talk to the crew only one time for three or four minutes in the morning when the foreman didn't know he was there. On another occasion he saw the Rodriguez crew in the fields near the broccolli crew, but Mr. Rodriguez would not let him take access.

22/Although the decertification petition was filed on August 16, the Union did not get served until the next day when the petition was hand delivered by Harry Martin.

23/All of the sixteen post office boxes are in Guadalupe. Pedro Rodriguez testified that these workers reside in Santa Maria, a neighboring town.

The Employer offered the testimony of Milo Ferini and Pedro Rodriguez to rebut Mr. Rabara's claim that he was unable to communicate with the Rodriguez crew. I find that on the whole Milo Ferini's testimony corroborates that of Tim Rabara. Milo Ferini testified that he saw the Union approach the crew three times. The Union actually took access on only one of these occasions, when Tim Rabara talked to the crew for five to ten minutes. On another occasion Milo Ferini saw Pedro Rodriguez arguing with Art Castro in Spanish. Mr. Ferini told Mr. Castro that he would see to it that Mr. Rodriguez didn't give the Union any more problems. After Mr. Castro left, Mr. Ferini reiterated to Mr. Rodriguez that the Union had a right to take access before and after work, during breaks and at lunch. On the third occasion, Milo Ferini saw the Union talking to the broccolli crew. He noted that the Rodriguez crew was working about thirty feet away, on the other side of the dry ditch, but did not know if the Union ever mingled with the Rodriguez crew. RT III:183-187.

Pedro Rodriguez testified that the IUAW came to his crew many times and talked to the workers. The company explained to him when access was permitted. He testified on direct that the crew works under a fixed schedule always taking a break at 9:00 and lunch at 12:00. He also testified that he told the crew that he could not tell them how to vote.

On cross-examination Mr. Castro attempted to elicit testimony respecting the Union's access to the crew. Pedro Rodriguez' testimony on this issue was so evasive as to be almost completely unintelligible. Although the difficulty is partially attributable to a transtlation problem, I find that Pedro Rodriguez deliberately attempted to obscure the truth. His responses to

questions exposed by Mr.-Quandt or myself were markedly clearer than those he gave on cross-examination.

Both Tim Rabara and Milo Ferini testified regarding Mr. Rodriguez' lack of cooperation in giving the IUAW worksite access. The testimony of Donasiana Villanueva further supports the impression of Pedro Rodriguez as being openly hostile to the Union and impeaches Mr. Rodriguez' testimony. Ms. Villanueva was a member of the Rodriguez crew who voted in the election. I found her to be an extremely strong and credible witness.[24/] Ms. Villanueva testified that Pedro Rodriguez told everyone in the crew to vote "no union" in the election. She further testified that "Don Pedro" told his wife, who was chosen to be crew observer, to watch people while they voted. RT IV:48-65.

Based on the credited testimony, I find that the IUAW was unable to visit sixteen members of the Rodriguez crew in their homes because the employee eligibility list did not provide street addresses for those persons. I find that the IUAW attempted to campaign among the Pedro Rodriguez crew during the times permitted by the worksite access rules but was able to speak to the crew on only one occasion for about five minutes. I further find that Pedro Rodriguez deliberabely prevented the IUAW from campaigning in his crew.

[24/] The Employer unsuccessfully attempted to impeach Ms. Villanueva by eliciting testimony that her employment had been terminated. Ms. Villanueva stated with great forcefulness and dignity that although she thought her firing was unjust, she was not testifying in retaliation. She said "I am doing this because I know that this will help all of the workers".

Larry Martinez is a labor contractor who operates out of Oxnard. He was hired by the Emloyer in the middle of the strike and provided two crews who worked from August 1st until early September. Patrick Ferini testified that the Employer found it necessary to go out of town in order to find people willing to work under strike conditions. The two crews were transported to Santa Maria in a large bus. The foremen were Yeyo Blanco for the Lompoc crew and Joaquin Valadez for the Oxnard workers. Employees were compensated for travel which took about two hours each way.

During the week before the election Tim Rabara was in the fields campaigning among the crews as time permitted. He looked for the Larry Martinez crews which he had never before seen but was unable to find the. RT II:155; RT III:8.

Richard Guerrero was sent by the Union to make home visits to the Valadez crew. Guerrero had lived in Oxnard for eleven years and knew the town well. RT III:26. Mr. Guerrero testified that he looked for the addresses on the eligibility list for two consecutive days but was only able to find one worker, a Mr. Juvental Munoz. In most cases Guerrero was told that the person did not live at the listed address. In some instances the address was non-existent. Based upon his demeanor, I found Mr. Guerrero a credible witness although his testimony was somewhat vague.

The final day of hearing was devoted primarily to the Employer's rebuttal of Mr. Guerrero's testimony. Ramon Martinez, testified that he worked for Larry martinez for only two days in August, that he did not vote in the election, and that he lived at the address on the list. He further testified, corroborating Mr. Guerrero, that the IUAW came to his house while he was away but was told that Ramon no longer worked for Betteravia. I found

Ramon Martinez to be a credible witness who testified in a candid, open manner. I attribute his somewhat unclear memory to the fact that he had worked for only two days some four months earlier. Based on Mr. Martinez' demeanor, I credit his testimony that in August he lived at 1956 Colonia #8 in Oxnard.

Roberto Rodriguez worked for Larry Martinez and voted in the election. On direct he testified that in August he lived at the address given on the eligibility list. Jose Aguilar also worked in the Martinez crew and voted in the election. His testimony on direct was substantially the same as that of Roberto Rodriguez. By contrast to Ramon Martinez, both Roberto Rodriguez and Jose Aguilar appeared by their demeanors to be giving rehearsed testimony.

Roberto Rodriguez continually looked nervously at Mr. Quandt as if the "correct" answer might be written on the attorney's face. Furthermore, Mr. Quandt actually coached the witness to elicit the "correct" address. Roberto Rodriguez testified that he had been living at the same address at least since August, yet he stated the address "incorrectly" as 1472 Pine Street. Mr. Quandt then asked, "is it 72 or 62" to which Rodriguez responded "62". RT V:10.

The Employer supplemented Roberto Rodriguez' testimonial evidence with documents which were admitted as Exhibit No. 25. This exhibit consists of three pages: a photocopy of a Larry Martinez employee card; photocopies of Larry Martinez paychecks made out in the employee's name; and photocopies of the backs of paychecks endorsed by Roberto Rodriguez. One check is also endorsed

with the address "1462 Pine St. °3" below the name. This check is stamp dated September 8, '82.

Roberto Rodriguez' credibility was further destroyed by Mr. Bennett's probing cross-examination. Mr. Bennett asked why the social security number on the Larry Martinez employee card was not the same as the social security number. Rodriguez had testified was his own. Mr. Rodriguez had no explanation and become almost mute. The record does not reflect the long intervals between Mr. Bennett's questions and Mr. Rodriguez' answers. By contrast, Mr. Rodriguez responded readily and clearly to the questions I posed.

Regulation section 20370(c) provides that any relevant evidence, including hearsay shall be admitted "if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs...." However, although hearsay evidence may be used to supplement other evidence, it "shall not be sufficient in itself to support a finding unless it would be admissible in civil actions."

Exhibit No. 25 is clearly hearsay. The Employer did not argue either at hearing or in its brief that Exhibit No. 25 falls within an exception to the hearsay rule.[25/] Thus, the only permissable use of Exhibit No. 25 is to supplement Roberto

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25/I find that neither the employee card nor the cancelled checks fulfill the requirements of the business records exception to the hearsay rule. Exhibits Nos. 26, 27 and 28 A-J consist of similar documents for other employees. However, these exhibits were not given on the list. Rather, they were offered merely to show what documents the Employer had in its possession and what information the Employer relied on in compiling the list. RT V:73-74. As these documents were not offered for a hearsay purspose, it is unnecessary to analyze them as such.

Rodriguez' testimony. In fact, much of the information on the employee card is inconsistent with the testimony. For example, Mr. Rodriguez testified that the signature on the card was not his whereas the signature on the check was.[26/] Furthermore, the card is not dated and Mr. Rodriguez did not recall the date it was filled out. Only one check is endorsed and that one is stamp dated about three weeks later than Mr. Guerrero was campaigning. Thus, neither the check nor the card are probative of Mr. Rodriguez' address in mid-August.

Mr. Aguilar also appeared to be giving rehearsed testimony and was extremely evasive and unresponsive on cross-examination. For instance, when Barry Bennett asked him to give his social security number using any document in his possession to refresh his memory, Mr. Aguilar responded, "No, because I forgot it. So it's better just to give it to him." Further questioning by Bennet yielded the same evasive responses. RT V:20. Later, however, the witness proffered a card which in fact contained his social security number. The witness often paused and looked to the Employer before responding to Mr. Bennett and his voice dropped so that his answers were almost inaudible. RT V:21.

The witness's credibility was further destroyed on re-direct by Mr. Quandt who elicited the testimony that Aguilar had given an incorrect address when he began work for Betteravia. When the Employer asked Mr. Aguilar if "3656 South B" was in fact his correct address, the witness mumbled inaudibly and had to be instructed by Mr. Quandt to answer yes or no. RT V:24. I do not credit the testimony of either Roberto Rodriguez or Jose Aguilar as to their addresses in August.

26/The two signatures appear to have been made by different persons.

Joaquin Valadez testified that on the Thursday before his testimony in this hearing he and Richard Quandt looked house by house for the Oxnard people who used to work for Larry Martinez. Mr. Valadez was a credible witness who testified in a candid and articulate manner. The union objected to his testimony on the basis of relevancy, arguing that an individual's location in December was not probative of that person's residence in August. The Union also argued that Valadez' testimony as to what persons said about where they resided was hearsay and should be excluded on that basis.

Mr. Valadez testified that he and Mr. Quandt found Genero A. Garcia at 113 Cordova Street in Oxnard and located Maria Guzman at 218 A Street in Port Hueneme. Both those persons said that they had been living at that same address since August. Mr. Valadez further testified that neither Eulalio Garcia nor Miguel Perez were living at the address the Employer had listed for them.

Relevant testimony is testimony which tends in reason to prove or disprove a material fact. People v. Cordova (1979) 97 Cal. 3d 665; People v. Hughes (1954) 123 CA 2d 767. The material fact in question is whether the employee eligibility list contained street addresses which were accurate as of August when the list was given to the IUAW.

Joaquin Valadez' testimony that Eulalio Garcia and Miguel Perez were not at the listed addresses in December is irrelevant to prove or disprove their residences in August. I find, therefore, that with respect to these two workers the Employer has not rebutted the Union's testimony

The issue of the relevancy of Valadez' testimony regardir Genaro Garcia and Maria Guzman is a difficult one. I conclude after careful consideration that the testimony is relevant. One can make a reasonable inference that their presence in December at addresses listed by the Employer in August was due not to coincidence but to the fact that they had lived there since August. The hearsay testimony, that Mr. Garcia and Ms. Guzman said that they had lived at the same place in August, corroborates the inference. I find, therefore, that the Employer has successfully rebutted the Union's testimony with respect to these two workers.

The employee eligibility list for the Larry Martinez crews contains fourteen Oxnard addresses. Based on the credited testimony, I find that the IUAW was unable to make home visits to ten of these workers because of incorrect addresses on the eligibility list.[27/] I further find that the IUAW was unable to find the Larry Martinez crews in the fields and did not, therefore, campaign at all among these crews.

Tim Rabara, Richard Espinoza and Art Castro testified generally as to the Union's campaign strategy. Some of that testimony has been discussed supra. Mr. Espinoza testified that worksite access was extremely limited. Because workers tended not to be around before and after work the best time to campaign was during the half hour at lunch. The fact that both the UFW and Board agents were also taking access at this time further limited the IUAW's opportunities.

27/One additional Larry Martinez crew member was listed with a Los Angeles address.

In addition to taking worksite access, organizers contacted workers at home utilizing the employee list. RT II:91, 124. Espinoza himself visited at least fifteen different residences. There was no evidence as to the total number of residences visited by union organizers during the pre-election campaign. Union witnesses testified that organizers attempted to find employee's home addresses by checking the phone book and union records. The latter source consisted of employee cards sent over by the Employer many of which did not contain current street addresses.[28/] Tim Rabara and Richard Espinoza found the house of Mariano Camba who is listed with a post office box. They also knew how to contact shop stewards Aniano Tesoro and Raymond Garcia and a few others listed without street addresses. However, for the most part, the Union was unable to locate persons with post office boxes. RT II:92.

I find the Union's witnesses were credible and knowledgeable on this issue.[29/] Although they are all organizers

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28/ See Testimony of Maureen Teixiera discussed infra at p. 31.

29/ The Employer attempted to impeach Mr. Rabara's testimony that he did not know the residence of Marcos Contreras, a supervisor, by calling the latter as an impeachment. Witness Mr. Contreras testified that Mr. Rabara was part of a group of strikers that threw rocks at his house early one morning. However, on cross examination, Contreras admitted that he had not actually seen Mr. Rabara. He further stated on re-direct that he and Mr. Rabara did not know each other. Milo Ferini testified that it was very foggy that morning but he recognized Mr. Rabara's car. He also stated that he saw Mr. Rabara and the others, but from the context of his testimony I understood him to be referring to the cars and not the individuals. Thus, I do not think that the Employer's witnesses impeached Mr. Rabara. furthermore, a finding that Mr. Rabara did know Mr. Contreras' address would not change the results of this case, as I found Mr. Rabara on the whole to be a credible witness.

for the IUAW with a stake in the controversy, they were clearly the persons most qualified to describe the Union's organizing strategy. I find that the Union made a good faith effort to locate workers with post office boxes. Based on the credited testimony, I conclude that they were unable to locate all but a few of those persons.

Following the Union's case, the Employer called its own witnesses to testify to the company's diligence in complying with the requirement for a complete and accurate employee eligibility list. Maureen Teixeira, who has been the payroll supervisor at Betteravia for the past eight years, was the Employer's major witness on this issue. She sat at the Employer's table throughout the proceedings and is undoubtedly a trusted and loyal employee. Based upon her demeanor, I found Ms. Teixeira to be for the most part a credible, articulate witness.

Maureen Teixeira had primary responsibility for compiling the eligibility list under the direction of the company's attorneys Charley Stoll and Richard Quandt. RT V:124. She compiled the list for permanent employees by copying the information from the company's computerized records. No other data were used.- RT III:169. These records are based on the original information cards employees fill out at their dates of hire.

Because the cards are not routinely updated, the addresses on the employee cards (and thus the computer) are current only as of the date of hire.[30/] Some addresses were five to ten years

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[30/] After an employee worked five days, the company sent his or her name and address to the Union for its files and began checking off union dues.

old while others were more recent. RT V:126; III:156. Ms. Teixeira testified that the lack of current addresses has at times been a problem for the Employer. In an attempt to correct the problem, the company sent a notice to the lettuce crew in October 1981 informing crew members that they should "make sure Betteravia Farms has the correct mailing address where you can be reached" (Exhibit No. 21). In response to my questioning, Ms. Teixeira stated that most of the lettuce crew do not speak English. When I asked whether there was a Spanish or Tagalog version of Exhibit 21, the witness looked crest-fallen and replied in a low voice, "no, but you would need it...for the lettuce crew."[31/]

Richard Quandt informed Ms. Teixeira of the company's responsibility to compile an eligibility list within 48 hours of the filing of the petition. He told her that she needed street addresses but that if she didn't have them she should use what she had. Since employees often list a mailing address on their employee cards, the company had only post office boxes for many employees.

Patrick Ferini testified that he had no specific duties with respect to the list, but he helped compile it. He stated that he had been involved in only one previous election and was unaware that post office boxes were legally insufficient addresses until the hearing in this case.[32/] On questioning from his own

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31/ The transcript at RT III:168 is somewhat inaccurate.

32/ Mr. Ferini stated that his only previous election experience was when the incumbent union had been certified. However, I take administrative notice of the fact that Mr. Ferini is a partner of Bonita Packing Co. which also has had ALRB elections. See 3 ALRB No. 27 and 4 ALRB No. 96.

attorney Mr. Ferini admitted that the company could have furnished addresses rather than post office boxes.

> MR. QUANDT: I have maybe one question: Mr. Ferini, if prior to the election, anybody from either the union or the ALRB had approached you and asked you to provide a street address for those employees who had post office boxes, would the company have provided that request?
>
> THE WITNESS: I'm sure they would have. RT V:128

The Pedro Rodriguez crew was already on the company's computerized list by the time the petition was filed. Each employee had filled out a card when the crew was transferred from Felipe Zepeda to the company payroll. Although 16 of the 21 crew members listed post office boxes, the company made no efforts to seek out street addresses for the crew. RT III:163. Pedro Rodriguez testified that he knew where many of his crew lived and had visited some of them in their homes. However, he was never asked to supply this information. RT IV:22.

The Employer's main concern in compiling the eligibility list was in getting names and addresses for the Larry Martinez crews. These were the only workers that were not being carried on the company's records. Maureen Teixeira flew to Oxnard in the company plane to pick up the names and addresses of employees who worked during the eligibility week, August 8-14.

Jess Espinoza, business manager for Larry Martinez, testified concerning the labor contractor's business records. Like Betteravia's, Martinez' records consist of computerized printouts based on information contained on employee cards. These

cards too are neither updated nor reviewed for accuracy RT V:78, 91.[33/]

When Betteravia requested an eligibility list from Martinez, the latter's records were incomplete because there were a lot of new workers. Joaquin Valadez testified that one morning on the bus Jess Espinoza called him on the radio and requested that he immediately obtain addresses for the new workers. Valadez took a sheet of paper and gathered the needed information. He felt that one or two people were lying and did not give their correct address. After Valadez got the addresses, he radioed the information to Espinoza.

Analysis and Conclusions of Law

Mr. Guerrero testified on the morning of the third day of hearing without objection. On the fourth day of hearing, at the close of the Employer's rebuttal case, the Employer moved to strike Richard Guerrero's testimony. The basis of the motion was that the issue of the accuracy of the eligibility list was not set for hearing and was therefore not properly before the hearing examiner. I denied the Employer's motion, ruling that the Employer had notice that the eleigibility list was at issue when it received the Executive Secretary's Notice of Objections Set for Hearing. Furthermore, under LC sec 1157.3 the Employer was under a continuing obligation to maintain an accurate employee list. Following my ruling, the Employer moved for a continuance in order

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[33/] Exhibits Nos. 26, 27 and 28A-J consist in part of employee cards relied upon by Larry Martinez.

to effectively rebut Mr. Guerrero's testimony. I denied the motion based on my position that the Employer was on notice that the eligibility list was at issue. The hearing was closed on the understanding that the Employer might take an interim appeal from my rulings. The Employer did, in fact, appeal my rulings to the Executive Secretary. On December 8 the Executive Secretary denied the appeal to my denial of the motion to strike the testimony of Mr. Guerrero because the accuracy of the eligibility list was a forseeable issue in the case and the objection was not limited to the issue of post office boxes. The motion for continuance was granted and the hearing was thereafter re-opened for the purpose of addressing the issue of whether the employee list was insufficient. Such that its utility was substantially impaired. The Employer urges reconsideration of its motion in its post hearing brief but has raised no new argument in defense of its position.

Clearly the objection as set for hearing put the entire eligibility list at issue. The Employer itself raised the sub-issue of accuracy in its defense of due diligence. Furthermore, the Employer was granted a continuance in order that it might rebut Mr. Guerrero's testimony and almost the entire last day of hearing was devoted to the Employer's rebuttal. Thus, the Employer utilized its opportunity to fully present its case.

For the above reasons, I have considered the testimony regarding the accuracy of the list as fairly presented and relevant to the election objection.

Labor Code section 1157.3 imposes a duty on agricultural employers to "maintain accurate and current payroll lists containing the names and addresses of all their employees." Section 20310(2) of the Board's regulations provide that an employer's written response to an election petition shall contain a complete and accurate list of the full names and current street addresses of its employees. This employee eligibility list must be provided to the Regional Director within 48 hours after the filing of an election petition. Regulation section 20310(d). The Regional Director must then provide copies of the list to all parties to the election. Regulation section 20313. The purpose of the latter requirement is to allow parties to an election to communicate with eligible voters at their homes. Yoder Brothers, Inc. (1976) 2 ALRB No. 4.

In Yoder Brothers, one of its earlier cases, the ALRB adopted the NLRB's "Excelsior Rule" despite the recognized difference between application of the rule in the industrial setting and in the agricultural context. Our Board found that LC section 1157.3 imposed a clear duty on employers to exercise due diligence in fulfilling the names and address requirement. Simply stated, the Excelsior Rule provides that an employer's failure to comply with the requirement to provide a complete, accurate employee eligibility list shall be grounds for setting aside the election. Underlying the rule is a policy that the electorate should be fully informed of the issues and a perception that communication of differing viewpoints can only be insured if all parties have access to the names and addresses of all the voters. Excelsior Underwear,

Inc. (1966) 156 NLRB 1236. In adopting the Excelsior Rule, the ALRB has recognized the list as essential to the election process and has given it an importance at least as great or greater than that given it by the NLRB. Jack T. Baillie Co., Inc. (1979) 5 ALRB No. 72.

Under our Act a union has no more than five days with which to utilize the eligibility list. Thus, any deficiencies in the list have an even greater tendency to interfere with communication between union and employees than in the industrial setting.

In order to sustain its burden of proving an election objection based upon an inadequate eligibility list, the IUAW in this case must satisfy a two-pronged test showing:

1. that the list was deficient; and
2. that the deficiencies substantially impaired the utility of the list. Mapes Produce (1976) 2 ALRB No. 54.

In this case the burden of proving the first prong was easily met because 71 of the 307 addresses on the list were facially deficient: there were 67 post office boxes and 4 out-of-town addresses. I found that an additional 10 workers from the Larry Martinez crew had inaccurate addresses.

The Union also carried its burden of proving that the insufficient addresses impaired the list's utility. Home visits were part of the unions overall campaign strategy. The Union sent Richard Guerrero, who was living in Oxnard, to conduct home visits among the Oxnard workers. He spent two days trying to locate workers at the addresses on the list but, due to the inaccuracies,

was only able to communicate with one worker. Union organizers were able to locate only a few of the workers with post office boxes.[34/] Thus, the IUAW was unable to make home visits to approximately 24-25% of the electorate.

The Employer contends that the evidence fails to establish that the lack of addresses significantly impaired the Union's ability to communicate with the workers. The Employer argues that the following facts support a conclusion that the Union did not need an accurate eligibility list:

1. The Union campaigned among the crews at the workplace;
2. As an incumbent union, the IUAW had intimate knowledge of the permanent employees;
3. The Union did not diligently pursue alternative means of obtaining the data.

The Employer argues that worksite access alleviated any need for the Union to make home visits. The record indicates that the Union communicated with permanent workers at the worksite and also managed to take brief access to the Rodriguez crew. The issue of the relationship between the Board's access regulations and the Excelsior Rule was settled by the Board in Yoder Brothers which held that;

> ...the Board's access rule is designed in part to compensate for the fact that even a substantially complete and accurate employee list cannot be used as effectively in an agricultural election as in an industrial election because of time constraints and the mobility of many agricultural workers. The names-and-address rule and the access rule thus stand on independent though complementary footings. Ibid. at footnote 4.

[34/] Union witnesses testified as to three persons with post office boxes whom they were able to contact. Tim Rabara stated that he knew the addresses of "a few" other workers.

Furthermore, the quality of communications at home is potentially superior to that at the worksite. Mr. Castro testified that this is particularly true where a crew is intimidated by a foreman who manifests hostility to union organizers and supporters. RT V:110 Pedro Rodriguez was just such a foreman. It is unlikely that the Union could have engaged in meaningful communications with his crew even if it had been permitted to take access. Had the Union had street addresses for these workers, they could have talked to them individually away from the watchful eyes of Pedro Rodriguez and his wife.

The Employer argues that the decertification context has unique implications for the Excelsior Rule reasoning that the list is not needed because the union, by virtue of its incumbent status, has intimate knowledge of the workforce.[35/] The NLRB applies the Excelsior rule with equal force in both decertification and representation elections.[36/] In a decertification election the petitioning employees are entitled to the names and addresses of fellow employees so as to communicate their position against continued representation. Similarly the incumbent union, as another party to the election, is also entitled to the eligibility list. Ibid. at p. 1242 footnote 14.

Although this Board has never addressed the issue of application of the Excelsior Rule in a decertification, I see

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[35/] The Union argues that the list is more important in a decertification where there has not been a pre-petition organizational drive, as there is in a representation election.

[36/] The only exception to the Excelsior Rule recognized by the NLRB is in the expedited election.

no reason that it would not adopt the NLRB position. There is no basis in law or fact for adopting a presumption that an incumbent union has its own eligibility list. Certainly the facts of this case militate against such a result.

Tim Rabara testified that he knows all the permanent workers, but in many cases he does not know their names. When asked by the Employer whether they knew particular persons, Union organizers consistently testified that if they saw a person they would know him or her but could not always connect the name with a face. No one seemed to know the replacement workers. Furthermore, the Union's records in this case consisted of employee cards sent over by the Employer. As such they were no more accurate than the Employer's own records. There is no evidence that the Union had its own addresses for employees other than for shop stewards and a few personal acquaintances or organizers. Absent a showing that the Union does in fact have addresses for employees, its incumbency alone should not make the list unnecessary.

The Employer contends that the Union's failure to utilize all means at its disposal to locate employees at their residences proves that the lack of street addresses was unimportant to the union. The Excelsior Rule is predicated upon the presumption that an accurate list is critical to employee free choice.[37/] Furthermore,

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[37/] It is unclear whether the Employer's presumption is rebutable. If so, the Employer would have to show that the Union would not have made home visits even if it had current street addresses. The Employer cannot rebut the presumption by showing merely that the Union did not make as many home visits as it might have. I regret the Employer's contention, unsupported by case law, that the Union's failure to campaign among every employee's residence proves that street addresses were unimportant to the Union.

the Employer's duty to supply current street addresses for its employees is not mitigated by the obvious existence of various means by which a union might be able to obtain employees' addresses. Although the union may solicit addresses from sympathetic employees, as did the IUAW, this method is bound to have a limited rate of success. As noted by the NLRB in the Excelsior case;

> In a large plant or store where many of the employees are unknown to their fellows, this method may not yield names and addresses of a major proportion of the total employee complement...Employees are frequently known to their fellows only by first names or nicknames so that there may be significant problems in obtaining the home addresses even if those employees whose names are known. Finally, all the foregoing difficulties are compounded by the more or less constant turnover....- Ibid. at 124.

The problems cited by the Excelsior board are even more acute in agriculture than in industry.[38/] Here, the IUAW had very little success in locating employees through word of mouth.

The Employer errs in posting an obligation of due diligence on the union either to maximize its campaigning or to remedy deficiencies in the list. There is no such duty imposed either by statute or case law. On the contrary, the law imposes the duty of due diligence in compiling and correcting the list solely upon the Employer.

In previous cases the Board has considered the Employer's diligence in compiling its eligibility list to be a factor in

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[38/] Yet another problem is the limited time in which to communicate with workers. Under even the best of circumstances the Union does not receive the list until five days before an election. Time for home visits is of necessity limited to evening after work. Thus, the IUAW had five evenings within which to visit 307 workers at their homes. Clearly there was precious little time to campaign much less to "diligently pursue" alternative means of access to correct addresses.

determining whether deficiencies in the list warrant setting aside an election. The due diligence defense appears to be an exception to the general rule that objectionable conduct is measured not from the actor's perspective, but by its affect on the electorate.[39] Perry Farms v. ALRB (1978) 86 Cal. App. 3d 448. Unfortunately, the concept of "due diligence" has not been defined by the Board and is difficult to infer from the cases. See Yoder Brothers, dissent by Member Ortega.

It appears that due diligence is synonymous with "good faith, "[40] and lack thereof is equivalent to "bad faith," or "negligence."[41] Thus, in Yoder Brothers the Board upheld an election in which the Employer "acted in good faith without intent to mislead." By contrast, in Mapes Produce an election was set aside where the employer was "negligent" in failing to update the addresses in its files. Under the analysis in these cases, once the union establishes its prima facie case, the Employer can mitigate the showing of prejudice by evidence of its own due

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[39] Where failure to comply with the list requirement is charged as an unfair labor practice the concept of Employer negligence is clearly relevant to the assessment of liability. In Jack T. Baillie the Board separately analyzed an Excelsior issue as a violation of section 1157.3 and as an election objection.

[40] But see Patterson Farms where the Board found that the Employer failed to exercise due diligence but that there was no bad faith.

[41] I would suggest defining due diligence by a reasonable employer standard. Thus, an employer would be found to have exercised due diligence where it produces the best list it has or can compile from available information

diligence.[42] Under the balancing test suggested by the Board in Yoder Brothers, the greater the prejudice to the union the less the importance of employer due diligence in determining whether the election should be set aside.[43] Presumably, failure of the Employer to present this "affirmative defense" or rebut the unions prima facie case would leave the latter intact.

The fact pattern of the instant case is similar to that in Salinas Lettuce (1979) 5 ALRB No. 21. There the Board set aside an election where the employer "made no effort to update its employee lists or change its practices in order to obtain street addresses instead of post office boxes." (See also Mapes Produce Co., the ALO found that the employer's failure to exercise due diligence affected the election because a shift of 12 votes would have resulted in a run-off election.

Betteravia made up its list from employee cards filled out at the time of hire. These cards were never updated and thus were current only for the most recent hires. Furthermore, the cards from which the list was compiled do not specifically call for street addresses. Maureen Teixeira testified that employees usually fill in the cards with a mailing address.

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[42] In both Jack T. Baillie and Patterson Farms the Board upheld elections in which the Employer had negligently prepared the list but the Union had not been prejudiced by the deficiencies. These cases stand for the proposition that Employer due diligence or lack thereof is immaterial if the union fails to make a prima facie showing of prejudice. (See also H. H. Maulhardt (1980) 6 ALRB No. 42 which upheld an election based on a lack of evidence that the union's ability to cummunicate was substantially impaired).

[43] Thus, in Mapes Produce where the Board found that the list was so deficient as to be almost useless, its determination that the Employer was negligent was unnecessary to its decision to set aside the election

In mistakenly undertaking to prove the Union's lack of due diligence, the Employer inadvertently exposed its own negligence in supplying current addresses. For instance, Mr. Quandt questioned Ms. Teixeira as to whether the Employer was aware of a problem with respect to the currency of its addresses. The witness responded in the affirmative, acknowledging that the Employer was fully aware that addresses were out of date.[44/] Another Employer witness, Pedro Rodriguez, testified that he had personal knowledge of the residences of many of his crew members; yet, he was never asked to supply this information. Neither were any foremen asked to collect current street addresses from their crew.[45/] The Employer also put on evidence that at least one person was listed with a street address in the phone book. Nevertheless, the Employer's list contained a post office box for this individual.

The Employer offered into evidence a list of employees with post office boxes in which asterisks are placed by the names of persons who reside on Betteravia Farms property. Clearly the Employer could have provided proper addresses for these workers as well. In fact, Mr. Quandt made a point of asking Patrick Ferini on the last day of hearing whether the company could have provided

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[44/] The "notice to the lettuce crew" submitted by the Employer corroborates this conclusion. It does not, however, constitute a meaningful attempt to update the list because it called for a "mailing address" and was not written in a language comprehensible to the majority of the crew members.

[45/] Judging from the Employer's insistent cross examination of Tim Rabara at RT III:17 it would not have been undully burdensome for foreman to collect this information.

street addresses for those employees with post office boxes. Mr. Ferini responded in the affirmative.[46/]

In the instant case almost a quarter of the workforce was unreachable by the IUAW due to Betteravia's failure to exercise due diligence in compiling the eligibility list. Many of the workers with whom the Union was unable to communicate were replacement workers unfamiliar with the Union's position on issues. A shift of 17 votes from "no union" to the IUAW would have resulted in a run-off election. Thus, it is clear that the outcome of the election was affected by the deficiencies in the list. I find that the election should be set aside on this ground alone.

WHETHER PERSONS WERE HIRED FOR THE PRIMARY PURPOSE OF VOTING IN THE ELECTION

Findings of Fact

Regional Director Wayne Smith testified that he usually attempts to resolve as many challenges as possible before the election. RTII:64. Smith was not at the pre-election conference but was informed by Board Agent Harry Martin that pursuant to Smith's request the IUAW had submitted a list of voters it intended to challenge on the basis that they were hired to vote in the election.[47/] The list consisted of replacement workers hired during

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[46/] Patrick Ferini testified that he personally was unaware that post office boxes were legally insufficient addresses. I find that his knowledge of the law is irrelevant to the question of Betteravia's responsabilities under the Excelsior Rule. I also note testimony that Charley Stoll and Richard Quandt, two experienced management attorneys, were advising the Employer of their legal responsabilities. Mr. Ferini also testified that Board agents never asked the Employer to correct the deficiencies in the list. While this fact is regretable, I find that it too is irrelevant to resolution of the legal issue.

[47/] The Union also submitted other proposed challenges at this time.

the strike and included individuals as well as the Martinez and Rodriguez crews.

The challenges were investigated by a Board agent who interviewed Sammy Arca to determine the date he began his decertification effort. The Board agent then compared this date to the Employer's records of dates of hire for the individuals and the two crews. Since the hire dated in all cases preceded the date Arca began circulating the petition, Mr. Smith concluded that these workers could not have been hired to vote in the election.

Richard Espinoza testified that when he informed Harry Martin of the proposed challenges Martin indicated that the persons listed by the Union would vote challenged ballots. The Union was never informed of Smith's investigation or of his decision to refuse the challenge. RT II:82.

Saul Rodriguez and Javier Cervantes acted as observers during the election. Cervantes testified that neither he nor any of the other observers had ever seen the Larry Martinez crew working at Betteravia. Mr. Cervantes and Mr. Rodriguez challenged the crew members on the basis that they had been hired to vote. Wayne Smith testified that the challenged voters were referred to him. He checked the voters' names against the list of persons and crews who had been previously investigated. All members of the Martinez crew were permitted to vote if their names appeared on the eligibility list. However, Cervantes persisted in attempting to make challenges unaware that they had been previously resolved. He testified that he stopped making challenges because a Board

agent became angry with him for continuing to challenge voters and threatened to kick him out.

The major testimony relevant to whether employees were hired to vote was offered by the Employer. I find Patrick Ferini's testimony in particular to be extremely equivocal in this area. His testimony that Pedro Rodriguez was put on the payroll because the company required more workers to farm newly acquired acreage is in direct contradiction to the company's position that the Rodriguez crew had been hired away from Felipe Zepeda to replace striking workers. Patrick Ferini testified that the company was forced to hire the Martinez crew and pay them travel time because they could not find any local people willing to work during the strike. However, the company did in fact have local workers. There was earlier testimony from the Employer that many of the strikers had returned to work after the first week of the strike and the Rodriguez crew was local as well. Why did the company continue to pay travel time after the strike was over? Permanent out-of-town workers were not given this extra compensation. The testimony of Mr. Valadez indicates that a select group was brought to vote in the election. Normally he brought a large bus of about 35 workers to work at Betteravia. Why, on election day, was he given for the first time a small van and told not to bring the usual people?

Here the record evidence consists of isolated bits of testimony which raise serious questions as to the Employer's good faith. I find, however, that the Union failed to establish that persons were hired for the primary purpose of voting in the election.

Analysis and Conclusions of Law

In view of the lack of evidence that persons were hired to vote, the sole issue for analysis is whether the Regional Director's unilateral resolution of the challenge issue is itself objectionable conduct. I reject the Employer's argument that review of the challenge procedure is beyond the Board's authority because it was not specifically set for hearing.

The question of the challenge procedure was fairly implied by the objection as it was set for hearing. Reg. sec. 29355(b) provides that:

> Failure to challenge the eligibility of a person to vote prior to receiving a ballot shall constitute a waiver of the right to challenge that person's vote and any post election objection raising the issue of the eligibility to vote of a person whose ballot was not challenged at the election shall be dismissed.

Thus, in order to reach the merits of an objection based on voter eligibility it is necessary to first determine if voters were properly challenged. Wayne Smith was called by me to testify as to the challenge procedure utilized in this election as the record was unclear on that issue.[48/]

Clearly the procedural issue is closely related to the substantive issue. The Board has a continuing authority to examine its own procedures and act thereon as long as no party is denied a fair hearing. There is no claim here that the matter was not fully litigated. Regulation section 20355(d) provides that the Board agent supervising the election shall have discretion to

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[48/] Smith's testimony was also necessary to establish that the election was properly conducted under LC sec. 1156.3 and not 1156.7(c) as indicated by the relevant Board documents.

unilaterally resolve challenges only with respect to ballots on which all parties agree that there is no factual or legal dispute. The Board has also held that clearly frivolous challenges need not be accepted. Since the status of the replacement workers at Betteravia was a disputed issue and clearly not frivolous,[49/] the ballots of the challenged voters should not have been comingled with those of the others. The integrity of the ballot box would thus have been preserved in the event the Board decided that challenge was meritorious.[50/]

Despite the procedural irregularities and rather shabby treatment of the IUAW, I conclude that the election should not be set aside on this basis. The Union was afforded an opportunity to fully litigate its objection at the instant hearing and was unable to substantiate its claim. thus, there was no procedural prejudice from the Regional Director's actions.

[49/] Regulation section 20355(a)(4) expressly provides that a prospective voter can be challenged on the grounds that his or her employment was willfully arranged for the primary purpose of voting in the election.

[50/] Normally the Regional Director is required to issue a written report on unresolved challenged ballots if they are outcome determinative. the findings of this report are appealable to the Board which may order a hearing on disputed facts. In this case, Smith conducted an investigation and erroneously decided that the date of hire was dispositive of the legal issue. His decision was based on the unproved assumption that the Employer did not know or suspect that there would be a decertification election at the time replacement workers were hired. His investigation was also flawed because it treated the Martinez and Rodriguez crews as a whole in dating the original hire. RT II:84 This approach did not account for the possibility that the crews had been padded with anti-union workers during the eligibility week. Value City Furniture (1975) 222 NLRB 455.

The Union also contends that the Board agents' actions in refusing its challenges at the polls created an impression of favoritism towards the Employer. Board agents have a duty to maintain an appearance of impartiality in conducting an election, however, there was no evidence here that any voter overheard the angry colloquy between Cervantes and a Board agent. Since the administration of the challenge system is an essential part of the Board agents' job, I decline to find that the mere act of disallowing challenges, without more, exhibits partiality. NLRB v Computer Sciences Corp. (1979) 589 F2d 232.

SUMMARY AND CONCLUSIONS

The evidence is insufficient to support a finding that persons voted who had been hired for the primary purpose of voting.

The evidence establishes irregularities in the challenge procedure but does not support a finding that the union was prejudiced thereby.

The evidence establishes that a coercive violent atmosphere existed at Betteravia Farms prior to the election, but does not support a finding that the coercion persisted in full force at the time of the election.

The evidence establishes that the eligibility list was deficient such that its utility was substantially impaired and that the Employer failed to exercise due diligence in preparing the list.

RECOMMENDATIONS

Based on the foregoing findings of fact, analysis and conclusions of law, I recommend that the decertification petition be dismissed and that the election be set aside abased on the

deficiencies in the eligibility list. In the alternative, I recommend that the election be set aside based on the cumulative prejudicial effect of the deficient eligibility list and the pre-election violence. Harden Farms (1976) 2 ALRB No. 30, NLRB v Claxton Mfg. Co. Inc. (1980) 61 (5th c 1980) 613 F2d 1364 I also recommend that the objection based on challenged voters be dismissed.

DATED:

Respectfully submitted,

STELLA CONNELL LEVY
Investigative Hearing Examiner