STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

EXETER PACKERS, INC. Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 82-RC-7-SAL 9 ALRB No. 76

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) on September 29, 1982, a representation election was conducted among "all agricultural employees [of Exeter Packers, Inc. (Exeter)] in Monterey and Fresno Counties" on October 7, 1982. The Amended Tally of Ballots,[1/] issued January 5, 1983, showed the following results:

UFW	91
No Union	72
Unresolved Challenged Ballots	3
Total	166[2/]

[1/] Because of an outcome-determinative number of challenged ballots in the original Tally, the Regional Director prepared a Challenged Ballot Report to which Exeter excepted. We then issued a Decision, 8 ALRB No. 95, in which we ordered the opening of 40 of the 43 challenged ballots. We declined to rule on the merits of the challenge that Manuel Mireles is a custom harvester and the employer of the agricultural employees at issue and left that issue to be resolved in the instant election objections proceedings.

[2/] 168 voted, with two ballots voided.

Exeter timely filed post-election objections to the election, 8 of which were set for hearing. A hearing was conducted before Investigative Hearing Examiner (IHE) Marvin Brenner who thereafter issued the attached Decision recommending that the Agricultural Labor Relations Board (ALRB or Board) dismiss Exeter's objections and certify the UFW as the collective bargaining representative of Exeter's agricultural employees at both its Fresno and Monterey County locations. Exeter timely filed exceptions to the IHE's Decision and a supporting brief, and the UFW filed a brief in response to Exeter's exceptions.

Pursuant to the provisions of Labor Code section 1146[3/] the Agricultural Labor Relations 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 his rulings, findings and conclusions as modified herein and to certify the United Farm Workers of America, AFL-CIO, as the collective bargaining representative of Exeter's employees in its Monterey County operations.

Exeter argues that it is not the employer of the agricultural employees at issue, claiming that they are employed by a custom harvester. In addition Exeter argues that its operations in Fresno and Monterey Counties are in noncontiguous geographical areas ill-suited for a single bargaining unit, that Exeter was not at 50% of peak in the payroll period ending

---

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

immediately prior to the filing of the certification petition, and that pre-election violence and Board agent misconduct require that the election be set aside.

We hereby adopt the IHE's findings and conclusions on the issue of Manuel Mireles' status as a labor contractor and find that Exeter is the statutory employer of the agricultural employees at issue. We also dismiss Exeter's peak objection as the record is devoid of evidence to support a claim that Exeter was not at 50% of peak at the time of filing of the petition.

Board Agent Misconduct

The IHE found that the allegations regarding Board agent misconduct were untrue and that even if the allegations had been true, the conduct would not have tended to affect the voters' free choice. We adopt the IHE's credibility resolutions[4/] and find that Board agent misconduct did not occur. However, we reject his conclusion that the statements alleged to have been made by Board agent Battles, if actually made, would have been insufficient to set aside the election. Statements by Board agents, clearly aligning them to one party to an election, such as the statements alleged herein, constitute serious misconduct which could tend to affect the voters' free choice and require setting aside an election, if heard by a sufficient number of

---

[4/] To the extent that the IHE's credibility resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) We have reviewed the record and find the ALJ's resolutions of witness credibility to be supported by that record viewed as a whole.

eligible voters. (See Monterey Mushrooms, Inc. (1979) 5 ALRB No. 2.)

Pre-Election Violence

The allegations of pre-election violence relate to two incidents, both occurring at Exeter's ranches in the King City area on September 23, 1982, two weeks before the representation election. Both incidents involve a strike or work stoppage aimed at securing a pay increase. All witnesses to the incidents denied observing any banners, pins or other paraphernalia identifying the perpetrators of the misconduct as being connected in any way to the UFW. Neither is there any evidence of contemporaneous UFW-sponsored strike activity in the area. (Compare, Vessey Foods, Inc. (1982) 8 ALRB No. 28.) The only testimony relating to UFW involvement in the work stoppage or the misconduct was properly discredited by the IHE.[5/] Because there is no credible evidence that the Union had even begun organizing the employer's work force at the time of the field rushing incidents or that the perpetrators of the misconduct were involved in the Union's organizing campaign, we cannot infer that employees' free choice

[5/] Only on cross-examination did Ignacio Gutierrez suddenly "remember" that "when they started talking with people, they said that people from Cesar Chavez union were going to come to talk to them later on." Earlier, when asked on direct who the leaders were, Gutierrez had stated "I think they were union leaders. But I don't know which union." The only other evidence of union sponsorship was Linda Montoya's testimony that she saw employees of another employer, Gonzalez Packers, whom she knew to be union "organizers" on the road near the field after the field rushing. Montoya was specifically discredited by the IHE with regard to her testimony on Board agent misconduct. In addition, she did not hear what these "organizers" said, and did not specify which union they were from or testify that she saw them participating in the work action.

was reasonably likely to have been affected at the election two weeks later.[6/] (D'Arrigo Brothers of California (1977) 3 ALRB No. 37.)

Geographical Scope of Unit

Exeter raises tomatoes in Fresno and Monterey Counties. The Fresno County operation is at Huron in the western San Joaquin Valley, and the Monterey County operation is approximately 100 miles to the west in the Salinas Valley, near King City.

The IHE found that despite differences in climate, water supply, planting and harvest times and other growing conditions, as well as the minimal interchange of employees,[7/] Exeter's Huron and King City operations were within a single definable agricultural production area. He based his conclusion on Exeter's experts' testimony that tomatoes are grown and harvested under similar circumstances at both locations using the same basic techniques, that growing and harvest seasons may slightly overlap and that "soils are basically the same in that the fertilizers, herbicides and pest control substances used, though differing slightly in chemical composition generally contain similar nutrients, which are applied and treated in the same way." In addition, Exeter's equipment is readily adaptable to both locations and the employees at both locales were hired

---

[6/] We do not rely on the cases cited by the IHE in which pre-election field rushing was engaged in by individuals identified as union agents or supporters.

[7/] Employer's Exhibit No. 5 shows that only 21 out of approximately 600 employees worked in both valleys during the 1982 season.

and supervised by the same labor contractor, Manuel Mireles.

In reaching his conclusion, the IHE erroneously relied on this Board's Decisions in Napa Valley Vineyards Co. (1977) 3 ALRB No. 22 and John Elmore Farms (1977) 3 ALRB No. 16, where neighboring valleys producing basically the same crops, with very little difference in growing seasons and need for labor, were found to constitute a single definable agricultural production area. As we stated in Napa Valley Vineyards Co., supra:

> A finding that places groups of employees of an employer in a single definable agricultural production area merely reflects that the location of the land, the nature of the soil, the climate and the available human and natural resources dictate that the crops grown, the labor force utilized and the time of peak employment will be generally the same.
> (3 ALRB No. 22, Slip Opinion, p. 14.)

Exeter's two agronomist witnesses testified that the Salinas and western San Joaquin Valleys have different climates,[8/] different types of crops,[9/] different water supplies,[10/] and

////////////////

////////////////

[8/] "Maritime influence" was said to account for strong winds in Salinas and a difference in moisture content in the air (35% more rain in Salinas) as well as a 10-15° average difference in temperature, resulting in different planting and harvesting seasons.

[9/] Agronomist Ronemus testified that vegetables accounted for 60% of the Salinas Valley crops and only 5% of San Joaquin Valley crops, whereas field crops constituted 10% of the Salinas crops and 50% of San Joaquin Valley crops.

[10/] Salinas Valley crops are irrigated by well water, whereas San Joaquin Valley crops are irrigated by the Central Valley project canal.

different farm sizes.[11/] Exeter's 1982 Salinas and San Joaquin Valley employees, except for a slight interchange, came from different labor markets and were paid at different rates, and peak employment seasons in the two locations did not overlap.

Finding as we do that Exeter's operations are conducted in noncontiguous geographical areas and separate agricultural production areas, we are not required to include employees of both units in a single bargaining unit. (See section 1156.2.)

In Bruce Church, Inc. (1976) 2 ALRB No. 38, we set forth a number of factors to consider when determining whether agricultural employees from separate agricultural production areas should be included in a single bargaining unit:

> (1) The physical or geographical "location of the locations" in relation to each other;
> (2) the extent to which administration is centralized, particularly with regard to labor relations;
> (3) the extent to which employees at different locations share common supervision;
> (4) the extent of interchange among employees from location to location;
> (5) the nature of the work performed at the various locations and the similarity or dissimilarity of the skill involved;
> (6) similarity or dissimilarity in wages, working hours, and other terms and conditions of employment;
> (7) the pattern of bargaining history among employees.

In the instant case, the evidence relating to the above factors was scanty and inconclusive. The two operations are approximately 100 miles apart and appear to require similar skills but, although a single labor contractor was used to obtain labor

---

[11/] Although approximately half of the ranches in both areas consist of 250-500 acre operations, 30% exceed 1500 acres in the San Joaquin Valley, while only 5% exceed 1000 in the Salinas Valley.

for both locations and the harvest and planting seasons are different, there was very little employee interchange in 1982. Unlike Bruce Church, Inc., supra, 2 ALRB No. 38, there was no history of collective bargaining including both locations and little evidence of supervisory or employee transfers.

The UFW argues that a single unit is appropriate because Exeter has not met its burden of proof with regard to the Bruce Church criteria. The UFW erroneously cites a "rebuttable presumption" that the Regional Director chose the proper unit. Although the Board does impose a heavy burden on the objecting party when misconduct affecting the election is alleged (TMY Farms (1976) 2 ALRB No. 58), considering the time constraints on pre-election unit investigations by Regional Directors, we may find it necessary to rely on evidence adduced at hearings on post-election objections or in post-certification party-initiated unit clarification proceedings to determine the full scope of a bargaining unit. In the meanwhile, we shall certify the UFW as the collective bargaining representative of Exeter's agricultural employees employed in its Monterey County operations.[12/]

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America,

---

[12/] Although the Notice and Direction of Election described the unit as including Exeter's Fresno County employees, the Huron operation was dormant at the time the petition was filed and all eligible voters were employed in Monterey County. Therefore, limiting the unit to Monterey County would not affect the results of the election.

AFL-CIO and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Exeter Packers, Inc. in Monterey County for purposes of collective bargaining as defined in section 1155.2(a) concerning employees' wages, hours and working conditions.

Dated: December 29, 1983

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

EXETER PACKERS, INC.

9 ALRB No. 76
Case No. 82-RC-7-SAL

IHE DECISION

The Investigative Hearing Examiner (IHE) found that Exeter Packers, Inc. (Exeter) was the employer of the tomato workers on its two ranches in the Salinas and San Joaquin Valleys and that Manuel Mireles was a labor contractor. He also found that the tomato ranches at King City in the Salinas Valley and at Huron in the western San Joaquin Valley locations were in the same agricultural production area, citing Napa Valley Vineyards Co. (1977) 3 ALRB No. 22 and John Elmore Farms (1977) 3 ALRB No. 16, and that a single unit should encompass both ranches.

The IHE also found that alleged Board agent misconduct did not occur but that even if it had, the election should not be set aside. In addition, the IHE found alleged strike violence two weeks before the election not to have constituted the kind of conduct which would have affected the results of the election. The IHE recommended dismissal of all objections, including Exeter's peak objection which was not supported by any evidence. He recommended certification of the UFW as the exclusive representative for all employees of Exeter Packers in Monterey and Fresno Counties.

BOARD DECISION

The Board adopted the IHE's conclusion that Manuel Mireles was a labor contractor and that Exeter was the agricultural employer of the agricultural employees at its ranches near King City in the Salinas Valley and Huron in the western San Joaquin Valley. The Board also adopted the IHE's findings that the alleged Board agent misconduct did not occur, but disavowed the conclusion that even if it had occurred, it would not have affected the election. The Board based its dismissal of the objection relating to the pre-election strike violence on the fact that no credible evidence indicated any connection between the Union and the strike or any of the strike supporters or any perpetrators of violence. Regarding the geographical scope of the unit, the Board found that the King City and Huron locations were in noncontiguous geographical areas and separate agricultural production areas. Absent more evidence of a community of interest among the employees of both locations (see Bruce Church, Inc. (1976) 2 ALRB No. 38), the Board was unable to find on this record that a single unit would be appropriate, leaving the parties to

////////////////

////////////////

supplement the record by filing a petition for unit clarification. The Board dismissed Exeter's objections and certified the UFW as the exclusive representative for all the agricultural employees of Exeter Packers, Inc. in Monterey County.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: EXETER PACKERS, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 82-RC-7-SAL

APPEARANCES:

Spencer H. Hipp
Kevin K. Cholakian
Littler, Mendelson, Fastiff & Tichy
San Francisco, California
for the Employer

Marcos Camacho
Keene, California
for the United Farm Workers of America, AFL-CIO

BEFORE: MARVIN J. BRENNER
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

MARVIN J. BRENNER, Investigative Hearing Examiner: This case was heard by me on January 18, 19, 20, and 25, 1983 in Salinas, California.

A petition for certification was filed by the United Farm Workers of America, AFL-CIO (hereafter "UFW" or the "Union") on September 28, 1982, seeking to represent all of the agricultural employees of Exeter Packers (hereafter "Employer" or "Exeter") in both Monterey and Fresno counties. The Agricultural Labor Relations Board (hereafter "ALRB" or "Board" conducted an election on October 7, 1982. The results were as follows:

UFW	91
No Union	72
Unresolved Challenged Ballots	3
Void	2

Following this election, Exeter filed timely objections pursuant to section 1156.3(c) of the Agricultural Labor Relations Act (hereafter "Act"). The Executive Secretary, while dismissing some of the objections, set five for hearing, as follows: (1) whether the determination of the bargaining unit was improper; (2) whether ALRB agents displayed a biased attitude and improperly instructed employees how to vote; (3) whether UFW agents engaged in violent activity in the field prior to the election which resulted in employees being coerced and restrained in their free choice of bargaining representative; (4) whether Exeter was the agricultural employer; (5) whether Exeter was at peak at the time of the election.

Both the Employer and the Union were present throughout the entire hearing and participated fully in the proceedings. Both also filed post-hearing briefs.

Upon the entire record,[1] including my observation of the demeanor of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties herein, I make the following findings of fact and reach the following conclusions of law:

FINDINGS OF FACT

I. THE JURISDICTION

For reasons set forth, infra, I find that Exeter is an agricultural employer within the meaning of section 1140.4(c) of the Act, and that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act.

/
/
/
/
/
/
/
/
/
/
/
/
/

---

1. Hereafter, the Employer's exhibits will be identified as "Co. Ex ___"; and Union's exhibits as "U. Ex ___". References to the Reporter's Transcript will be noted as "TR. ___ (Arabic numeral), p. ___."

II. THE SCOPE OF THE UNIT

A. Findings of Fact

This controversy surrounds the advisability of combining into one unit, for collective bargaining purposes, the two agricultural operations of the Employer herein which are physically separated from each other by approximately 100 miles. The Employer's said operations are centered in Huron, California, on the west side of the San Joaquin Valley (also referred to herein as "San Joaquin" or "the west side")[2/] and in King City in the Salinas Valley (also referred to herein as "Salinas").[3/]

The Employer called two witnesses, both experts in agronomy, William Southan and Dennis Norman Ronemus, to establish that its operations at these two locations were, because of various factors stated below, too dissimilar for them to be considered appropriate as a single unit.

1. Climate — Southan testified that the primary dissimilarity between the San Joaquin and Salinas Valleys was climate as it affected the production of various crops. The Salinas Valley, being under a maritime influence, recieved cool air through Monterey Bay whereas the San Joaquin area would receive a much

---

2. All references to San Joaquin are intended to refer to an area known as the west side of the San Joaquin Valley. Employer witness William Southan testified that the west side could be considered a separate area from San Joaquin generally because it did not develop as a productive area until the advent of the California Water Project. According to Southan, the northern-most town of the west side was Los Banos, and it extended to Bakersfield in the south. Southan also testified that Huron was a representative west side town.

3. Southan further testified that King City was a representative community of the Salinas Valley.

greater amount of heat and correspondingly, lesser amounts of humidity. This fact would, according to Southan, affect the growth rate in that tomatoes grow much faster under solar energy conditions.

Ronemus called the climate the single most important environmental factor and testified that on the average it was 15 degrees cooler in the Salinas Valley and that this more comfortable climate meant labor could operate, unlike San Joaquin, from sun up to sun down with no particular problems. On the other hand, Ronemus also testified that, unlike the west side, Salinas' wind factor had an affect upon chemical spraying operations making it necessary for growers to spray at night.

2. Planting — Southan testified that tomatoes were planted on the west side in January and February and in Salinas in February and March. Southan also testified that, owing to the long production season, each region only had one season.

Ronemus disagreed. He testified that in the San Joaquin Valley there was planting between February 10 — mid-April and then again for the fall crop between July 15-August 1. Ronemus also testified that though tomatoes were planted in Salinas in March (direct seeding), they were also planted between mid-May and mid-June (transplanted).

Southan testified that because of more severe weather conditions, there would be less precision planting on the west side than in Salinas; as a result, more thinning would be required on the west side.

But Ronemus testified that more thinning was required in

Salinas because of the higher percentage of the fresh market tomatoes that were direct seeded there.

3. Varietal Plantings — Although there were some varieties that were used in both places, Southan testified that in terms of the total percentage of varieties used, there were more differences than similarities. Ronemus testified that there were about three varieties that were only grown in San Joaquin.

4. Diseases — Because of higher humidity, there was a greater incidence of foliar diseases in Salinas, according to Southan. As a result, tomato growers in Salinas had to use varieties that were more adaptive to a cooler and moisterized environment and were more disease resistant.

On the other hand, since there was less insect pressure on tomatoes because of the cooler climate in Salinas, the tomato plants were not treated with insecticide applications nearly as often as on the west side. In fact, Ronemus testified that overall, there were more diseases to contend with on the west side.

5. Fertilization — Southan testified that the soils on the west side tended to be coarser and saltier than Salinas and were of a different origin. As a result of this, plus the higher temperatures, more nitrogen applications were necessary during the season on the west side.

6. Tomato Beds — Southan testified that in Salinas a tomato grower would start with a 40-inch bed (meaning the rows were planted 40 inches apart) which was later spread out to 60-inch plantings, as the plant expanded its foliage; but in San Joaquin, a grower would start with a 55-60 inch bed. Though the equipment and

tractors used in both locations was the same, there would be more soil moved in Salinas because of the expanding bed sizes.

7. Irrigation — Southan testified that in the Salinas Valley there was a fair amount of sprinkler irrigation though furrow irrigation was done too. In San Joaquin, sprinklers were used to germinate but because of the large size the vines grew to, tomato growers would switch to furrow irrigation later, as it was difficult and expensive for the sprinkler pipe system to reach the bigger plants through their heavy foliar growth. Southan also testified that the primary difference between sprinkler and furrow irrigation techniques was water cost; i.e. sprinkler irrigation used water more efficiently but also required a high capital investment and was a little more labor intensive while water costs on the west side, coming from aqueducts instead of wells, were cheaper. A sprinkler system could also be used for crops besides tomatoes such as broccoli and lettuce.

Ronemus testified that San Joaquin fields were always irrigated before planting; Salinas was able to rely upon its natural rainfall.

8. Water Sources — Ronemus testified that about 70% of the water for fresh market tomatoes in San Joaquin was derived from canals and 30% from wells while all water in the Salinas Valley came from wells.

9. Field Size — Ronemus testified that the basic farm unit size differed between the two areas with the larger acreage per field (160 acres was common) present in San Joaquin while much smaller fields (40 acres) predominated in Salinas. This impacted on

water use in that 160 acres could be irrigated as easily as could just 40.

10. Harvest — Southan testified that the west side harvest took place in July and August and was finished at the end of August whereas the Salinas harvest occurred in mid or late September and usually ended in October but sometimes was extended until November. Southan further testified that generally there was no overlapping between the two seasons, but he also acknowledged that it was possible for the west side to experience a second or third picking in October.

Ronemus testified that in San Joaquin transplanted fresh market tomatoes were usually harvested between June 5 and July 15 and that the fall planted crop was harvested in late October. As for Salinas, Ronemus testified those direct seedings planted in March would have been harvested between July 25 and August 20 while the transplants would be harvested in the middle of September.

11. Labor Costs — Southan testified that Salinas had a higher labor cost for the tomato harvest than the west side and that the reason for this was that there were many other labor intensive crops in the ground at the same time as tomatoes; e.g. lettuce, broccoli and cauliflower; thus the competition for workers forced up the cost of labor. In contrast, the west side did not have as many labor intensive crops during this time (many flat crops were grown), the main one being cantaloupes, which required different labor skills from tomatoes.

12. Similarities Between the Two Areas — On the other hand, both Southan and Ronemus testified as to certain similarities

between Salinas and the west side. Southan testified that both areas grew and produced tomatoes in the same basic manner, the yield potential was equivalent, and the standards were the same. Both areas grew tomatoes not only for the fresh market but for juicing and processing purposes and in the same approximate proportion; e.g. 80 percent for processing and 20 percent for the fresh market. Southan testified also that there was an overlap during the planting season; tomatoes were planted on the west side in January and February and in the Salinas Valley in February and March.

Southan further testified that the work at both locations was still done in the same manner — hand pickers going down the rows placing the tomatoes in buckets. As to mechanization, Southan testified that the type of harvester machine used in Salinas could be used on the west side with certain modifications to account for the larger distance between beds there. Other equipment, including tractors, were also the same in both areas.

Ronemus testified that the soils in both places were similar in texture, fertilization, and cultural practices; e.g. use of herbicides, planting on beds. Ronemus also testified that the pest problems and diseases (depending on rainfall) were basically the same and their treatment through chemical sprays was also the same. Harvesting techniques were very similar if not identical.

B. Analysis and Conclusions of Law

The National Labor Relations Board has held that the appropriateness of units will be determined not by any rigid yardstick, but in light of all the relevant circumstances of the particular case. No formula for unit appropriateness is possible.

No single criterion is determinative; and what may be determinative in one situation may not be determinative in another. (Bruce Church, Inc. (1976) 2 ALRB No. 38, citing McCann Steel Company (1969) 179 NLRB No. 635; Peerless Products Company (1955) 114 NLRB 1586; and Frisch's Big Boy (1964) 147 NLRB No. 551.)

Under section 1156.2 of the Agricultural Labor Relations Act, it is provided that:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the Board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

Under this provision if an employer's operations were contiguous, all such operations would be included in the same unit. But if the operations were noncontiguous, the Board must determine the "appropriate unit or units" for collective bargaining purposes. (John Elmore Farms (1977) 3 ALRB No. 16.)[4/] In order to do this,

> . . . each determination . . . must have a direct relevancy to the circumstances within which collective-bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered. (Kalamazoo Paper Box Corporation (1962) 136 NLRB 134 at 137, cited in John Elmore, Inc., supra.)

It was also asserted in John Elmore that section 1156.2 of the Act must be interpreted in light of section 1140.2 of the Act "to encourage and protect the right of agricultural employees to

---

4. Even where the Board must use its discretion in determining the scope of the appropriate bargaining unit, it has no discretion in determining the composition of that unit since section 1156.2 of the Act requires that the Board include in the unit all the employees of the employer at the one or more noncontiguous sites it finds within the scope of the appropriate bargaining unit. (Id.)

full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment. . . ."

The ALRB's first case which attempted to determine the proper scope of the unit concluded that separate operations remained a single unit as they were still in a single definable agricultural production area. In Egger & Ghio Company, Inc. (1975) 1 ALRB No. 17, the employer claimed 2 noncontiguous ranches were separate bargaining units because they were separately supervised; and there was some difference in the type of crops grown, skills of employees and rates of pay. For example, though tomatoes and beans were grown at both ranches, only celery was grown at one requiring different tasks and pay; otherwise, the hours, rates of pay, and working conditions at both ranches were the same.

The Board found that even had the two areas been classified as separate areas, they were appropriate as a single unit because there was a substantial community of interest among the company's agricultural employees, geographic growing conditions were similar, and the nature of the employer's operations was integrated.

Thereafter, in Bruce Church, Inc., supra, a single state-wide unit was found despite the fact that the employer operated in four distinct valleys, one separated from another by distances of up to several hundred miles, and the growing and harvesting of crops occurred at different times of the year because of climatic differences. The Board found one unit approrpriate because the work skills of all the employees was basically the same, as were the work requirements, the wages and working conditions were

uniform, there was centralized management, and the interchange of supervisors and employees occurred.

In John Elmore, supra, the Board found that two valleys (Lompoc and Santa Maria), 30 miles apart and separated by hills, experienced little difference in their seasons, climate, harvest and planting times, need for labor, kinds of crops grown and growing conditions.[5/] As a result, the Board found the two valleys to be appropriate as a single unit, holding that separate operations of an employer do not have to be contiguous to be in a single definable agricultural production area. Obviously, the fact that such operations were in a single definable production area was a significant factor. The Board did not have to reach the question of what standards to apply in determining the appropriate unit in situations where an employer's operations were not in a single definable production area; e.g. Bruce Church, supra. And in Napa Valley Vineyards Co. (1977) 3 ALRB No. 22 Napa and Sonoma Valleys were said to be a single definable area in that basically the same crops were grown, there were only minimal differences in the growing season, and there were similar needs for labor. The Board also found it relevant that the union had petitioned and organized on the basis of a single unit and that this was an additional factor demonstrating that a single unit was appropriate.[6/]

---

5. Water supply and employee interchange were not factors.

6. A single definable agricultural unit was found despite the fact, as the Dissent pointed out, that apparently there was no interchange of employees or equipment, no day to day contact between the two operations, no centralization of labor relations, and no uniformity of wages and working conditions.

In the present matter the relevant circumstances convince me that these two geographic areas would be appropriate as a single unit. To begin with, both regions, despite a difference in temperature, grow and harvest tomatoes under similar standards using the same basic techniques for both fresh market and processing. There is even an overlap, according to the testimony of both of the Employer's witnesses, Southan and Ronemus, between the growing season on the west side and that of Salinas which occurs during the month of either February or March. There is also the possibility of a brief overlap during the fall harvest season as the testimony of Southan combined with Ronemus suggests and as was corroborated by Rosa Mireles. (See also Company Exhibit No. 1.)

In addition, the soils of both these regions are basically the same in that the fertilizers, herbicides, and pest control substances used, though differing slightly in chemical composition, generally contain similar nutrients, which are applied and treated in the same way.

Moreover, the work which is done at both places is performed in the same manner[7/] under basically the same working

/

/

/

---

7. The Employer virtually concedes that the nature of the work performed at both operations is identical. (Employer's post-hearing brief, pp. 22-23.) It does, however, at one point argue that the nature of the sprinkler irrigation work is different from furrow irrigation (Employer's post-hearing brief, pp. 19-20), but it offered no evidence of the actual skills involved to support this allegation.

conditions[8] by the same kinds of employees; i.e. mainly unskilled workers who pick tomatoes by hand. These workers are employed by and are supervised by the same labor contractor. Some interchange of employees did occur in virtually all categories of work; e.g. pickers, dumpers, checkers, and tractor drivers. While this interchange was only slight, 1982 was also the first year in which the Employer operated in both the Salinas and San Joaquin valleys, as the Employer recognizes. (See Employer's post-hearing brief, p. 22.) Unlike the situation in Mike Yurosek & Sons, Inc. (1978) 4 ALRB No. 54, the Employer here does not appear to have a policy against the transfer of employees from one area to another.

Finally, the Employer's harvesting machines, tractors, and other equipment are readily adaptable to both locations.

I find that the Employer's operations are in a single definable agricultural production area.[9] (See Napa Valley Vineyards Co., supra; John Elmore, supra.) I recommend that this objection be dismissed.

---

8. The Employer argues that the hours of work were different between these two areas (Employer's post-hearing brief, p. 21) but offered no evidence of precisely what the schedules were. For example, the fact that temperatures were hotter on the west side in the summer, thereby causing a cessation of work in the afternoon, does not mean that workers did not compensate for this lost time by beginning their work day earlier than they would have in Salinas. On the other hand, if there is time lost on the west side because of the heat, there is also time lost in Salinas owing to the strong winds experienced there from time to time.

9. I can give no particular relevance to the fact that other tomato growers operating in both the Salinas and San Joaquin Valleys have contracts with the UFW only in one county and not the other. This does not prove, as the Employer argues (Employer's post-hearing brief, p. 22) that the ALRB has found that the two valleys do not properly constitute a single unit.

III. BOARD AGENT MISCONDUCT

A. Findings of Fact

Francisco Acosta testified that on the day of the ALRB conducted election, he drove to work from his home in Huron to the King City area with co-workers Ysidro Cobarrubias and Alfonso Retamosa and that once at work, he participated in the election. Acosta testified that while he was lining up in the voting area ready to vote, Board agent Luis Viniegra was at the head of the line facing Acosta's crew of around 17 workers and explaining the voting procedure by holding up a sample ballot (U. Ex 7) at chest level with both hands on either side of the paper. According to Acosta, as Viniegra held the ballot, he pointed to both symbols on the ballot but pointed mostly to the side where the eagle (UFW insignia) was:

> Q: Mr. Acosta, throughout your testimony, you keep pointing to both sides of the paper you are holding in your hand. Now isn't it true that Mr. Viniegra, when he was explaining the ballot to you, pointed to both sides of the ballot?
>
> A: Yes, he did point to both, but he did more pointing on one side than the other.
>
> -
>
> Q: So, when he pointed to one side and then the other, he didn't say anything at all?
>
> A: No. He was pointing and just said this is a sample of the one you are going to get for voting.
>
> Q: But he was pointing to both sides?
>
> A: Well, at first he did, but then later, he pointed more to one side than the other. (TR. 1, pp. 158-159.)

Acosta also testified about an incident involving Retamosa.[10/] On direct examination, Acosta testified that at one point Retamosa asked how to vote because he could not read and did not understand the procedures and that Viniegra replied, ". . . you don't have to know that. Just go in and vote." (TR. 1, p. 147.) Acosta then testified that thereafter Viniegra told Retamosa to pay attention to where his finger was pointing so he would understand how to vote and that at that time he "was pointing with his finger to the side where the eagle was." (TR. 1, p. 149, as corrected by "Errata Sheet", prepared by Peters Shorthand Reporting Corporation, February 8, 1983, and attached to Transcript herein.) On cross-examination, Acosta testified that Viniegra had told Retamosa to pay attention to his fingers so he would know how to vote and that he pointed to both sides of the sample ballot but that when it became clear Retamosa didn't know how to do it, he (Viniegra) "pointed more to the side of this eagle." (TR. 1, p. 162.) But on redirect examination Acosta stated that what Viniegra actually told Retamosa was to "pay attention to my finger so that you will know how you are going to vote" (TR. 1, p. 174) and that he pointed more to the side of the eagle.

Acosta testified that the message he received was that Viniegra was attempting to indicate to the workers that they should vote for the UFW, but Acosta made it clear in his testimony that at no time did Viniegra verbally state that votes should be cast in favor of the UFW or the side represented by the eagle.

---

10. Retamosa did not testify.

Ysidro Cobarrubias testified he arrived with Acosta and Retamosa and voted at the same time they did. According to Cobarrubias, Viniegra explained through use of a sample ballot "how we had to vote and he said that it was better for us if we voted on the side where the eagle was". (TR. 2, pp. 99-100.) At the same time, according to Cobarrubias, Viniegra was pointing "with the pen that he had in his hand to the side where the eagle was." (TR. 2, p. 100.)

Cobarrubias also testified that Retamosa expressed an inability to vote on his own and asked permission that he (Cobarrubias) accompany him into the voting booth. According to Cobarrubias, Viniegra remarked that this was not allowed but then told him: ". . . there's no problem. You can vote on this side and he pointed to the side where the eagle was with his pen." (Id.)

On cross-examination Cobarrubias stated for the first time not only that Viniegra had pointed to both sides but that he actually had made a mark on both sides with his pen. Cobarrubias then added that "he (Vinegra) pointed more to the side of the eagle and he said it was better for us if we voted for the eagle." (TR. 2, p. 103.) (Parenthesis added.) Cobarrubias also testified that right before Viniegra left, he stated, ". . . well, you already know how you have to do it." (Id.)

Linda Montoya, wife of Mireles' supervisor Rogelio Montoya, was an observer for the Employer during the election at both the morning and afternoon sites and testified about improper Board agent conduct occurring at both these sessions as well as an incident at Greenfield Park about a week before the election.

Morning Session — Election Day

Montoya testified that she was in a group of around 25 workers, including Acosta, Cobarrubias, and Retamosa, who were receiving voting instructions from Board agent Viniegra. According to Montoya, Viniegra explained to the voters that if they wanted to vote for the UFW, they should place an "X" under the square with the "black bird" and if they didn't want a union, to mark "no" in the appropriate square but that "as he hold it, he hold it where the black bird was." (sic) (TR. 2, p. 6.) When asked if Viniegra was pointing to anything, Montoya repeated that he was holding (with his right hand)[11/] "the paper where the black bird was," id., and that he did so 3 or 4 times compared to just 2 times that his hand was placed on the "no union" square. To Montoya, this was a clear indication that the Board agent was emphasizing the union side more.

Montoya did not stay for quite all of Viniegra's presentation — she testified she did not recall the Retamosa incident, for example, — as she was called away to assume her duties as an observer.

Afternoon Session — Election Day

Montoya testified she also saw Viniegra during that afternoon's voting and heard him talking to voters who were about to enter the building where the votes were being cast.[12/] At one

---

11. Later in her testimony, on cross-examination, Montoya testified that Viniegra was "pointing" with his right hand, but it is possible that what she meant was that in holding the ballot in his hand on the UFW square, it was the same as pointing to it.

12. The afternoon voting took place at a Greenfield veteran's hall.

point, the door was slightly open, and she testified she overheard Viniegra tell 8 or 9 workers that they could vote non-union or union and that they knew for whom to vote. Specifically, Montoya testified that Viniegra ". . . said this is a sample ballot and this is the way you're going to vote. They're going to give you a paper inside and it's just like this one and this is for the -- union, the black bird, and this is for the no. And then he said you know who to vote for." (TR. 2, p. 13.)

The Greenfield Park Incident

About a week before the election, Montoya testified that she arrived with her husband at Greenfield Park where workers were being paid.[13/] She recalled seeing two women employees of the ALRB who were passing out blue and white informational leaflets (U. Exhs 3 & 4.) At first Montoya testified the Board agents read these leaflets to the assembled workers; then she testified she did not hear them reading the leaflets. Montoya next testified that the agents were explaining to small groups, as they gathered after being paid, that there was going to be an election and that no one should be intimidated or afraid that he/she would be discharged for participating. She then added that one of the other things she heard said was that one of the Board agents, later identified as Helen Battles, mentioned that the Union gave greater benefits.

> Q: (By Mr. Hipp) . . . did you overhear these board agents say anything else to the people in the crew that were there?
>
> A: What I said that there was going to be an election and that the union gave more benefits and the people didn't have to afraid to vote. (sic) (TR. 2, p. 17.)

---

13. Her husband, Rogelio, had gone to the park specifically to pay workers.

Luis Viniegra testified that he has been a Board agent since October of 1976, has participated in approximately 150 elections, one-half of which he has been in charge, and has also trained other Board agents. Currently, he is classified as a Field Examiner II.

Viniegra testified that once an ALRB election was scheduled, part of his duties would often be to inform eligible voters how to vote and that over time he had developed certain procedures for this which he always followed and followed at the Exeter election site on October 7, 1982. Viniegra testified that first he would gather as many of the worker/voters available from each crew into a group, determine whether they were Spanish or English-speakers so as to address them in their own language, and ask them to show their identification. Next, he would pull out a sample ballot, hold it up so everyone could see, and explain that the ballot was just like the one they would receive once they had presented identification to the Board agent at the polling site who had the eligibility list. He would then ask them to look at the two different symbols that were on the ballot, explaining that each symbol represented a choice, the "eagle" (when the UFW was on the ballot) signifying the UFW, the "no" signifying no union. Then he would inform each voter that he/she should place an "X" in the square under the symbol of his/her choice but that only one square should be marked. Finally, the voters were instructed how to fold the ballot and deposit it in the ballot box inside the voting

booth.[14] Viniegra testified that giving voting instructions was his main duty during the Exeter election at both the morning and afternoon sites and that he followed the above-described procedures at least 5-6 times during the morning session and easily 10 times during the afternoon.

While testifying, Viniegra physically demonstrated how he typically would hold the ballot when instructing voters, his left hand at its top center and his right hand at its center bottom with both arms extended out in front of him. Then, as he explained what each symbol meant, Viniegra testified he would point with his right hand (he is right handed but testified he sometimes would alternate hands) to each symbol, sometimes making an imaginary "x", as he gave instructions. Viniegra also testified that he tried to make it a practice not to start out with the same symbol because that could be misinterpreted. According to Viniegra, he sometimes pointed to the squares with his pen or fingers, but he denied he ever did any writing on the sample ballot itself, such as actually making an "x" or any other kind of mark. Viniegra also testified that he made it very clear to the voters that the choice was theirs and that this was why there was a secret ballot election.

Viniegra acknowledged that during the morning of the election he may have said words to the effect of "you know how to vote" and that they could have been uttered during the time he was holding the ballot but that this would have only been asserted after

---

14. Viniegra testified that he taught this same procedure to other Board agents when he was training them and that he emphasized to them the importance of their task and to guard against any misinterpretations because of their high visibility.

he was satisfied that the workers, in fact, understood the voting procedure.

Viniegra denied ever pointing to the eagle side of the ballot and saying "you know how to vote" so as to indicate that votes should be cast for the UFW. Viniegra also denied ever instructing workers that it was better to vote for the UFW or eagle.

Viniegra could not specifically recall Retamosa or any other voter asking for help during the election.

As regards the afternoon voting, Viniegra testified its purpose purely was to accommodate those workers who, because of illness or absenteeism, were unable to vote that morning. Viniegra, who had the same job as in the morning, testified that the afternoon election activity was much slower than the morning's had been and that he frequently left the veteran's building to so outside to look for potential voters. According to Viniegra, when such voters did arrive, usually in small groups, he gave them the same voting instructions, following the same procedures, as he had that morning and would then direct them inside the building where they would proceed to vote. Viniegra recalled that sometimes the door leading to the outside was open; at other times, it was not. Though not specifically remembering saying it, Viniegra again stated he could have indicated to voters that they knew for whom to vote but emphasized that this would have only been in the context of his wanting to instill confidence in them after they had received his voting instructions.

Following the close of the voting, the observers for each party received a document for their signatures entitled

"Certification of Conduct of Election" (U. Exhs 8 & 9) and were asked to sign same if they were satisfied that the election was conducted properly. Viniegra testified that the procedure was to make it clear that such signing was purely voluntary and there was no obligation to do so. Viniegra also testified that he typically explained to observers that if they did sign, they would, in essence, be stating that they felt the election was properly held.

Montoya testified that Board agents gave her instructions as to how to function as an observer and that she was told if there was anything wrong, she should report it to them.

At the Exeter election, Linda Montoya, as observer for the Employer, signed the Conduct Certifications following the conclusion of voting at both the morning and afternoon sites (U. Exhs 8 & 9). Viniegra testified that at no time did anyone complain to him about the way the election was being conducted.[15/]

Helen Battles has been a Board agent since September of 1980 and testified she has, during that time, participated in approximately 15 elections and has been in charge of 3 of those.

According to Battles, the main reason she went to Greenfield Park on October 1 was because she needed to distribute to the workers a notice regarding the filing of an election petition; and she knew they would be there as they received their paychecks at that location. Battles testified that she arrived at the park in the company of another agent, Dolores Martin, around 10:00 a.m.,

---

15. Montoya testified that Board agents had given her instructions as to how to function as an observer and that she was told to report anything wrong to the agents.

introduced herself to the foreman who was handing out paychecks, and began to distribute the form ALRB notices (U. Exhs 3, 4, & 6) to all workers in the area, probably around 65. She also asked them to remain so that the notices could be read and further explained. Battles testified that she and Martin then read the notices to 3 groups of assembled workers.

Battles also testified that she could very well have told the workers that they need not be afraid to vote as it was standard procedure to encourage workers to exercise their right to vote and to assuage any fears they might exhibit about the process. But she denied that she ever stated to any worker that the UFW gave more benefits or, for that matter, that the subject of benefits was ever raised at all.

B. Analysis and Conclusions of Law

The burden of proof is on the party seeking to overturn an election to come forward with specific evidence showing that unlawful acts occurred and that these acts interfered with the employees' free choice to such an extent that they affected the results of the election. (TMY Farms, 2 ALRB No. 58.) This burden has been such that, in cases involving allegations of Board agent misconduct, the National Labor Relations Board has refused to set aside elections even where there was a personal conversation between the Board agent and a union representative in the presence of a large number of voters prior to the opening of the polls, Queen City Foundry, Inc. (1970) 73 LRRM 1345, cited in George A. Lucas & Sons (1982) 8 ALRB No. 61, or where a Board agent made a statement over a plant intercom system that the polls were open and employees could

vote "for your union representative" without, at the same time, making it also clear that employees could vote against the union, if they so desired. (Wabash Transformer Corp. (1973) 205 NLRB 148, 83 LRRM 1545, also cited in George A. Lucas & Sons, supra.) The NLRB stated in Wabash:

> . . . While the Board agent may have and should have made explicit what was implicit in the announcement, i.e., that the right to vote for the union necessarily carried with it the right to vote against the union, we do not believe that the agent's statement was per se so violative of the Board's standards of neutrality or so prejudicial to the employees' right to cast a negative vote that a new election must be directed. (83 LRRM at 1545.)

In analyzing these and other federal labor law decisions,[16] the ALRB has said that they represented a composite approach, on a case-by-case basis, which would encompass a determination of whether the agent's alleged misconduct tended to affect the employees' freedom of choice or the outcome of the election and whether the appearance of impropriety compromised the integrity of the administrative agency's procedures. (George A. Lucas & Sons, supra.)

The ALRB has itself addressed this particular issue and has held:

> (T)o constitute grounds for setting an election aside bias or an appearance of bias must be shown to have affected the conduct of the election itself, and to have impaired the balloting validity as a measure of employee choice. (Coachella Growers Inc. (1976) 2 ALRB no. 17.

Thus, the commission of misconduct, even when perpetrated by Board agents, has been held not necessarily to render improbable

---

16. The ALRB is, of course, required to follow precedents of the National Labor Relations Act, where applicable. See Labor Code section 1148.

the free choice of voters. In Bruce Church, Inc. (1977) 3 ALRB No. 90, the Board held that:

> (W)e do not consider that one Board Agent's statement of her opinion that the Employer was delaying the movement of a bus to the polls could or did affect the free choice of the employees. Neither do we believe that any reasonable person would be influenced, in the important matter of voting for a bargaining representative, by the mere sight of what may have appeared to be union literature on the floor of a Board Agent's car. Although another Board Agent may have been somewhat abrupt in controlling the errant conduct of an observer, we find that his manner did not affect or tend to affect the exerice of free choice by the voters. We have enough faith and confidence in the intelligence and common sense of the voters to conclude that none of the conduct alleged as objectionable would or did affect or interfere in any way with their free and untrammeled choice for or against a bargaining representative.

In Paul W. Bertuccio (1978) 4 ALRB No. 91, the Board held that even if a Board agent had said to a group of workers a short time before the election that he was from the union, such conduct was isolated and inconsequential and did not affect free choice; and in Mike Yurosek & Son (1978) 4 ALRB No. 54, an isolated comment by a Board agent at a pre-election conference, even if true, did not constitute objectionable conduct affecting the election.

I conclude that the Board agent's conduct in the present case would fall into this category of cases; i.e. those in which it could be said that the conduct did not affect the voters' free choice and did not affect the election even if the allegations of misconduct were true.

However, in this case I do not believe they were true. The testimony of the Employer's witnesses was internally inconsistent on an individual basis and inconsistent in comparison to the testimony of each other. Acosta, for example, at first testified that

Viniegra, in response to Retamosa's question as to how to vote, just told him to go in and vote; and thereafter, he testified Viniegra told Retamosa to pay attention to where his finger was pointing so he would know how to vote and that at that time he was pointing to the UFW side of the ballot. Later, on redirect examination, this was changed to indicate that Retamosa was told to "pay attention to my finger so that you will know how you are going to vote." The former statement — to just go in and vote and to watch where the fingers were pointing to know how to vote — even if true, could easily be construed as an innocent, unbiased remark totally unintended to favor one side over the other. But the latter statement, if true, suggests that the Board agent was directly instructing the workers for whom to vote. As this statement was uttered for the first time on redirect and was uncorroborated by any other witness, I tend to disbelieve it was ever made.

Moreover, Acosta's testimony at the hearing was inconsistent with his signed Declaration admitted into evidence. (U. Ex 1.) Acosta denied at the hearing that Viniegra had verbally told anyone for whom to vote but signed a Declaration (jointly with Cobarrubias and Retamosa) to the effect that Viniegra had actually said it would be better to vote for the Union. Nor did Acosta testify at the hearing that Viniegra told Retamosa ". . . just mark (the ballot) on this side" (meaning the UFW side), as also was reflected in his Declaration. (Parenthesis added.) Nor did the Declaration make reference to Acosta's testimony (or Cobarrubas') that Viniegra pointed to both sides of the ballot but pointed more to the UFW side.

Acosta's hearing testimony that Viniegra at no time told voters for whom to vote contrasted sharply with Cobarrubias' who testified that Viniegra actually said it was better to vote for the UFW. Cobarrubias also testified that as Viniegra said this, he pointed and made a mark with his pen on the UFW square. Neither of these two statements was corroborated by Acosta or Montoya.

Furthermore, Cobarrubias testified that Viniegra answered Retamosa's inquiries about voting procedures by telling him that he had no real problem, that all he had to do was vote for the UFW side, to which he also pointed. This alleged Viniegra remark was also not corroborated by Acosta.[17/]

Another reason for not believing Cobarrubias was that he appeared to expand dramatically on his testimony the longer he testified.

Finally, Montoya testified differently from both Acosta and Cobarrubias. Instead of testifying that Viniegra pointed to the UFW side more than the other, she testified that as Viniegra held the ballot with his right hand, he held it under the UFW square more than he held it under the no union side.

I find these discrepancies between the testimony of Acosta, Cobarrubias and Montoya to be of a significant nature and reflecting directly upon their credibility.

I also find it of some import that Montoya, the Employer's observer, never challenged Viniegra on the way the election was

---

17. Montoya was in no position to testify regarding the Retamosa incident, as she testified she left to assume her observer duties before it occurred.

being conducted nor did she bring any such problem to the attention of any other Board agent despite the fact she had been instructed to do so, should any such problem arise. Instead, Montoya voluntarily chose to sign the "Certification on Conduct of Election" form. It is hardly convincing, as she would have me believe, that the reason she failed to report Viniegra's conduct, which she testified she considered to be wrong, was that she had to leave the area where he was giving voting instructions in order to assume her duties as an observer.

As I review this record, I am persuaded that Board agent Viniegra's conduct was perfectly consistent with his own procedures and showed no bias towards any side. At worst, he pointed to one side of the sample ballot more than the other (Montoya testified he held the ballot where the UFW side was 3 or 4 times compared to only 2 times on the no union square), but this fact does not indicate bias or that the employees' free choice was interfered with. If the UFW side were referred to more frequently, the logical explanation would most likely be that its location made such a result inevitable given the fact that Viniegra was right handed and quite naturally, would have felt more comfortable pointing to that side, as he held and displayed the ballot before groups of workers.

It is also reasonable to assume that at the moment Viniegra may have been explaining to a confused Retamosa the voting procedures, Acosta and Cobarrubias, both of whom testified that Viniegra pointed at various times to both sides of the ballot, may have just happened to observe him pointing to the UFW side.

The only witness to the alleged misconduct at the afternoon site was Montoya. But her testimony as to what Viniegra said to the workers — that they knew for whom to vote — even if true, was innocuous and could not be said to have expressed any bias on his part. Montoya did not testify that Viniegra told any worker for whom to vote or that she observed him — she could not see him — pointing or holding any particular side of the ballot.

Even if any inference of wrongdoing were raised by this remark, it was adequately explained away by Viniegra who testified that he could easily have made such a remark but it would have been said only in the context of instilling confidence in the workers after they had just received their voting instructions.

In any event, I credit Viniegra, an experienced Board agent since 1976 with a record devoid of any previous findings of bias, that he followed his ordinary procedures, that he told the voters the choice of either union or no union was up to them, and that he did not instruct the voters to vote for the UFW or point to the UFW side of the ballot in such a way as to indicate to them that that was how they should vote.

Montoya also testified about the Greenfield Park incident that allegedly occurred a week before the election. The crux of her testimony was that in the middle of Board agent Helen Battles' explanation to potential voters that no one should be intimidated or afraid to vote for their choice, Battles added that the union gave greater benefits.

I simply do not believe that this statement was made. Montoya at first testified about statements made by the Board agents

without reference to the benefits allegation. Upon prodding, she then came forth with this testimony (See TR. 2, p. 17).

I also note that Montoya testified at first that the Board agents did a reading from the informational handouts, then testified that she didn't hear any such reading, and then testified that all she heard was the alleged incriminatory Board agent comment plus the admonition not to be afraid or intimidated.

In addition, it is worth mentioning that Battles testified without contradiction that she passed out the ALRB election information form to around 65 workers (U. Exhs 3, 4, & 6) and spoke to those workers thereafter; yet, Montoya was the only witness to testify that Battles told any worker that benefits were greater with the Union.

I also credit Battles' denial that she made the statements attributed to her, as I found that she testified truthfully; and her narration of events remained consistent despite an extensive and probing cross-examination by the Employer's counsel.

In any event, even if Battles were not to be credited and were I to find the statement had been made, it would not be sufficient to set aside this election.

The Employer has failed to carry its burden that unlawful acts occurred and that this interfered with the employees' free choice to the extent of affecting the election results. (TMY Farms, supra.) I recommend the dismissal of this objection.

/

/

/

IV. THE PRE-ELECTION INCIDENTS OF VIOLENCE

A. Findings of Fact

1. The San Ardo Incident

There was only one witness regarding this event. Elena Mireles, a sister of Manuel Mireles, testified that she worked for her brother as a checker during August and September, 1982. On one occasion on September 23 about 6:45 a.m. near San Ardo, Mireles recalled observing, just prior to the start of the work day, a group of 80-90 workers who were talking to a foreman and among themselves at the end of the field and away from the work site. Some of the workers in this group indicated they did not intend to pick tomatoes unless they received a pay increase. As other workers arrived to this location to commence work, members of the group would ask them to join the protest to seek a higher wage. When the time came to actually start work, all workers, according to Mireles, refused to take their buckets. Mireles testified she heard 3 or 4 employees from this large group tell others that rocks, tomatoes, or dirt clods would be thrown if they accepted these buckets. No work was performed at the field that day.

Mireles further testified that she asked the employee who was passing out the buckets for a ride in his van to another field, near Greenfield, about 15 miles away because she wanted to contact her brother who could then give her a ride home.

2. The Greenfield Incident

Mireles testified that once at Greenfield, while remaining in the van, she observed that work was proceeding normally and that several workers were picking tomatoes. However, later on, around

9:30 a.m., many of the protesters from the other field arrived and as a result, several of the Greenfield site workers soon abandoned their work and walked off the job.

In addition, Mireles testified that at one point some members of a group, estimated to be around 60 workers, yelled and made gestures at her while clenching tomatoes and dirt clods. In fact, some tomatoes and rocks were thrown at the van, and many hit. Mireles testified she became very frightened.

Thereafter, she crossed a field in search of her brother and testified she observed a group of 25 workers yelling and carrying tomatoes and rocks, and 5 or 6 others who were jumping up and down on top of a small car, which Mireles testified belonged to a "Leroy", who worked for Exeter Packers. However, Mireles could not identify any of these workers as having been among the previous group of protesters nor did she hear anything they were yelling.

Mireles also testified that at no time at Greenfield did she see any UFW flags displayed nor did she observe anyone wearing a UFW button.

Linda Montoya testified regarding this incident, as well as the one involving the alleged Board agent misconduct, supra. According to Montoya, around two weeks prior to the ALRB conducted election she was at work around 9:00-9:30 a.m. as a checker in a field somewhere between Greenfield and King City when around 50 persons[18/] entered the field asking for higher wages but also throwing rocks, buckets, and tomatoes and yelling at those persons

---

18. On cross-examination she testified the number was 80-90.

picking to stop working. Montoya observed one of the workers getting hit with some object and another, a tractor driver, who was actually assaulted by someone from this group. Montoya testified that she became scared and stopped working, as eventually did all the workers from all three of the crews.

Montoya testified that there was no one from this large group either carying UFW flags or wearing UFW buttons. However, Montoya also testified that present but parked outside of the field in the street were persons not employed by Mireles but who, she believed, formerly worked for Gonzalez Packing Company and were "union representatives", though she did not identify which union they supposedly were associated with. Montoya did not overhear anything these persons said nor did any of them speak to her.

Subsequent to this incident Montoya testified that she did, in fact, receive a five cent wage increase.

Tractor driver Ignacio Gutierrez also testified about the Greenfield incident. According to Gutierrez, around 9:30 a.m. a large group of 90-100 persons dressed in work clothes, whom he described as being from San Ardo and as being from crews he had previously worked with, came into the field shouting "strike" and asked him to stop working in order to obtain a higher wage.[19/] Many joined the strike at that point. As for those that did not and continued picking, Gutierrez testified that some from the large group took away their buckets and began to throw tomatoes at them.

---

19. This "strike" talk was not new to Gutierrez, as he testified he had previously heard conversations among some of the workers that such an activity was being planned.

The pickers, in turn, including Gutierrez, threw tomatoes back at the group. At one point, according to Gutierrez, as he attempted to get back to his tractor, he was punched in the ear by someone. He then got on his tractor and drove away, performing no more work that day. Before he left, he observed about 30-40 workers remaining in the field, but they were not working.

While on direct examination by counsel for the Employer, Gutierrez was asked who the leaders of this strike were, and he responded: "Talking about people or names, I do not know because I don't know them. But since they were asking for a union, I think they are union leaders. But I don't know which union." (TR. 3, p. 11.) On cross-examination, Gutierrez testified that the strikers had actually shouted "union" (TR. 3, p. 19) and for the first time testified that around 20-30 minutes after this incident he had talked with some of the strikers who told him they were going to try to get the UFW to represent them: ". . . now I remember that when they started talking with the people, they said that people from Cesar Chavez union were going to come to talk to them later on." (TR. 3, p. 19.)

Expanding on this testimony, Gutierrez testified on redirect, again for the first time, that the group of workers who entered the field shouted that they wanted ". . . the union of Cesar Chavez" (TR. 3, p. 25) and that the leaders of this group were 5 or 6 persons in front of the rest who were also shouting the name of Cesar Chavez.

According to Gutierrez, one or two days following this incident, his wages were raised 10 percent.

B. Analysis and Conclusions of Law

The burden of proof in an election proceeding under section 1156.3(c) of the Act is on the party seeking to overturn the election, and such party must "come forward with specific evidence showing that unlawful acts occurred and that these acts interfered with the employees' free choice to such an extent that they affected the results of the election." (TMY Farms, supra, 2 ALRB No. 58, citing N.L.R.B. v. Golden Age Beverage Company (5th Cir. 1969) 415 F.2d 26, 71 LRRM 2924 and N.L.R.B. v. Mattison Machine Works (1961) 365 U.S. 123, 47 LRRM 2437.) Thus, the question presented for determination in the present case is whether the two field incidents described by the witnesses succeeded in creating such an atmosphere of fear and confusion as to deprive the employees of the opportunity to express a free and intelligent choice of a collective bargaining representative at the election which followed, approximately two weeks later.

Initially, it is important to ascertain in this type of case whether the complained of conduct was committed by a party to the proceeding or by rank and file employees. (Joseph Gubser Co. (1981) 7 ALRB No. 33.) As stated by the Board in Takara International, Inc. dba Niedens Hillside Floral (1977) 3 ALRB No. 24:

> In general, misconduct by a party will be considered more destructive of a healthy atmosphere than misconduct by a non-party. Parties have far greater economic strength and institutional power than individuals, and therefore their actions and statements are more coercive of employees. With that greater power comes a strong responsibility for proper conduct. (3 ALRB No. 24 at p. 3.)

The Employer herein dramatically proclaims that these two incidents are examples of situations where " . . . an angry mob led by UFW organizers and supporters were shouting their support for Cesar Chavez and the UFW while violently attacking and assaulting the Company's employees . . . ." (Employer's post-hearing brief, pp. 50-51); and that this ". . . mob of UFW agents and supporters made it clear to the employees that the purpose of this invasion was to get the employees to support the Union." (Employer's post-hearing brief, p. 56.) (Emphasis in original.)

However, this position is not supported by the record. Both Montoya (in the case of the Greenfield incident) and Mireles (in the case of both the Greenfield and San Ardo incidents) testified that the protests were motivated by their co-workers' desire to withhold their labor until they obtained a pay increase, which in fact they received a few days later. Neither witness testified that the UFW was in any way involved in these events. Montoya did testify that she believed she saw some Gonzalez Packing Company workers who had been union representatives present parked outside the field, but there is no evidence that any of them entered the field or participated in any of the rock, tomato or dirt clod throwing or even, for that matter, what union they supposedly represented.

The only evidence that any of the strikers had any connection with the UFW was the testimony of Gutierrez, but his testimony was foreover expanding and changing and can be given little weight. He initially testified that the leaders of the strike were asking for a union and that he didn't know which union

but later changed his testimony to the effect that said leaders wanted the UFW. He also testified initially that the workers entering the field wanted a union, later changing this to wanting specifically the "union of Cesar Chavez."[20/]

Of course, even if Gutierrez were to be credited, the fact that a group of strikers wanted a specific labor union to represent them does not impute agency to that organization. In San Diego Nursery Co., Inc. (1979) 5 ALRB NO. 43, the Board held that union adherents did not become union agents even where the employees were prominent in the union's organizational campaign, solicited authorization cards and distributed leaflets in support of the union, and even functioned as an "in plant" organizing committee.

Here there is no evidence that anyone representing the UFW was present during either of these field rushing incidents. And it was Gutierrez' testimony that the idea of contacting UFW representatives did not even arise until 20-30 minutes after the incident. Nor is there any evidence that the UFW was even aware of these incidents, approved or ratified them, or had granted any particular authority to any persons to enter the fields on the day in question to act on its behalf.

---

20. Another reason for disbelieving this portion of the Gutierrez testimony was the manner in which it came into evidence. Counsel for the Employer objected in the presence of the witness to the English translation, stating that he (counsel) had definitely heard the word "union" used. The interpreter denied that Gutierrez had mentioned anything about a union. Thereafter, in immediate response to a similar question, the witness made reference to a union for the first time (See TR. 3, pp. 10-11). In view of the similarity between the English and Spanish words for "union", it seems to me quite possible counsel suggested an answer to Gutierrez that otherwise would not have been forthcoming.

But the fact that the UFW cannot be said to be involved in the field rushing incident does not mean that these non-parties did not create an atmosphere which rendered it impossible for the employees to exercise a free choice in the election. (Joseph Gubser Co., supra, IHE Decision, p. 16.) Where threats or other coercive conduct is alleged as having been made or having occurred during the critical period prior to a representation election, the Board will consider whether or not the alleged misconduct created "an atmosphere in which employees were unable to freely choose a collective bargaining representative". (Patterson Farms, Inc. (1976) 2 ALRB No. 59.) Elections will be set aside when physical attacks and threats of same create an atmosphere not conducive to free and untrammeled choice of representative. (Phelan and Taylor Produce (1976) 2 ALRB No. 22.)

However, I conclude from this record that there is insufficient evidence that a general atmosphere of fear and intimidation affecting free choice was created by the September 23 incidents or that those events were connencted to the voting that occurred two weeks later. In A & D Christopher Ranch (1981) 7 ALRB No. 31, the conduct of picketers 2-3 days before an election, including the throwing of garlic and rocks and the blocking of an entrance so strikebreakers could not work, did not tend to affect the outcome of the election; and there was no showing the election was conducted in an atmosphere of fear. (See also, Jack or Marion Radovich (1976) 2 ALRB No. 12.) In Frudden Enterprises, Inc. (1981) 7 ALRB No. 22, union organizers' and supporters' encouragement of access violations was said not to affect the employees' free choice

at the election even though there was evidence of violence, disruption of work schedules, the throwing of tomatoes and dirt clods at employees still working, and the shouting of obscenities. And in Joseph Gubser Co., supra, 30 persons, many of whom were carrying UFW flags, got out of their cars and rushed a field where a crew was working, throwing rocks and dirt clods, yelling and swearing. The company's farm manager was struck by a flag carried by one of the field rushers, and a worker on a forklift was struck by dirt clods. However, these incidents occurred approximately nine days before the election. In refusing to overturn the election, the Board held that:

> . . . All violence, actual or threatened, is coercive to a greater or lesser degree depending on the circumstances and the character of the author. The violence in this case was isolated and remote from the election and therefore would not tend to create an atmosphere of fear or coercion sufficient to affect the free choice of the voters regardless of the status of the field rushers. (7 ALRB No. 33 at p. 2.)

Thus, it is clear that even if the evidence supported the claim of coercive conduct, such conduct must also be so related to the election itself as to have an effect on the employees' voting. (Frudden Enterprises Inc., supra, IHE Decision, p. 59, citing Hickory Springs Manufacturing Co. (1978) 239 NLRB 641, 99 LRRM 1715.) Here, there were no specific threats related to the actual voting that occurred at least two weeks later; and, in any event, the incident itself was so isolated and remote from the election that it could not be said to have affected free choice. (Joseph Gubser, supra; Frudden Enterprises Inc., supra.

I recommend the dismissal of this objection.

V. THE LABOR CONTRACTOR/CUSTOM HARVESTER ISSUE

A. Findings of Fact

One of the issues set for hearing herein was whether Exeter Packers was improperly designated as the agricultural employer and whether Manuel Mireles was improperly found to be a labor contractor instead of a custom harvester. The Employer's only witness on this issue was Rosa Mireles. Mrs. Mireles testified that her husband, Manuel, had been in business since 1976, that the name of his business was "Manuel Mireles Labor Contractor", and that the office was located in the family home in Coalinga where all records were kept. Mrs. Mireles testified that Manuel has served as a "labor contractor" for various growers for various jobs besides the tomato harvest, including the supplying of thinning and weeding crews for lettuce. In each of these jobs, Manuel merely provided workers and was paid on a commission basis. Mrs. Mireles further testified that 1982 was the first year Manuel ever provided workers for Exeter Packers and that he did so for its 1982 tomato harvest in both Salinas and the west side of the San Joaquin Valley.

According to Mrs. Mireles, the rates of pay for Manuel's workers were always determined by the company that employed him, and he would pay what they told him to pay. The business received its earnings exclusively from a 12-13 percent commission based upon, in the case of tomatoes, the number of buckets picked that particular day. More specifically, as regards Exeter's method of payment, Mrs. Mireles testified that the company would pay Manuel by check which he would then deposit. Later on, from this deposit, he or she would make the required deductions, prepare the receipts (U. Ex 5), and

pay the net amount in cash to the workers and to the business.

Mrs. Mireles also testified that Manuel did little else except provide the tomato harvesters, as he owned no machinery, tractors, or trucks that were used in the harvest. In fact, except for supplying buckets, there was no equipment provided by him at all.[21/]

B. Analysis and Conclusions of Law

The question presented here is whether Manuel Mireles is to be considered a labor contractor and therefore, excluded by the Act from being an agricultural employer[22/] or is a custom harvester and the employer of the agricultural employees on his payroll for collective bargaining purposes. Although the Act excludes "any farm

/

/

/

/

---

21. Employer witness Ignacio Gutierrez, a tractor driver, testified that many of the tomato bins had the name, "Exeter Packers", painted on their sides.

22. Section 1140.4(c) of the Act provides that:

> The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual growers, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.

labor contractor as defined by Section 1682"[23] from the definition of an agricultural employer, the Board has consistently held that a person's status as a labor contractor will not automatically bar him from being deemed an agricultural employer in situations where the services provided by the contractor to the grower in question go beyond those generally performed in the ordinary course of the labor contractor/grower relationship. (Sutti Farms (1982) 8 ALRB No. 63; Kotchevar Brothers (1976) 2 ALRB No. 45.

The Agricultural Labor Relations Board has, of course, issued several decisions on the distinctions between labor contractors and custom harvesters but has not looked to any single factor; instead, it often reviews the whole activity of the business enterprise. (Joe Maggio, Inc. (1979) 5 ALRB No. 26; San Justo Farms (1981) 7 ARLB No. 29; Tony Lomanto (1982) 8 ALRB No. 44.) Cases have been decided on the basis of different factors in different circumstances, and no conclusive factor or combination of factors has emerged to control all custom harvester cases. (Id.) What is required is that the decision should focus on the ultimate goal of attaching the collective bargaining obligation to the entity which

---

23. Labor Code section 1682 provides:

> (b) "Farm labor contractor" designates any person, who for a fee, employs workers to render personal services in connection with the production of any farm products, to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for such workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payment to such persons.

would promote the most stable and effective labor relations. (Id.; San Justo Farms, supra.)

Of course the "whole activity" of both entities is only reviewed where that entity which provides workers to any employer is acting as something more than a labor contractor. (Sutti Farms, supra; Kotchevar Brothers, supra.)

Here the Employer failed to show either that it was not the agricultural employer under the Act or that Manuel Mireles was a custom harvester.

Initially, it should be pointed out that Mireles supplied no specialized equipment. Providing buckets for tomato pickers is not within the category of "specialized" as at least two ALRB decisions have suggested. (See The Garin Co. (1979) 5 ALRB No. 4; Tenneco West, Inc. (1977) 3 ALRB No. 92.)

Furthermore, the Employer here failed to show that Mireles exercised the managerial judgment required to qualify him as a custom harvester or that he performed any functions, beyond the mere supplying of labor, where it could be said that he assumed "the primary employer relationship to the employees . . . ." (Gourmet Harvesting and Packing (1978) 4 ALRB No. 14.)

There is also no evidence that Mireles made any of the major decisions concerning the harvest, that he controlled the timing or the extent of the harvest, or, for that matter, that he ever performed any important function except at the exclusive direction of Exeter Packers.

Finally, it is clear that Mireles supplied labor for a fee and was compensated on a commission basis; he was not paid on a

per-acre management fee nor did he operate under any other kind of fee management arrangement. (See Sutti Farms, supra.) What Mireles did for Exeter and what he was paid for was to supply that company with workers, as determined by it. As such, Mireles cannot be considered as anything else except simply a labor contractor; Exeter is the agricultural employer. Mireles' services to Exeter did not go substantially beyond those normally provided by farm labor contractors and did not exceed those contemplated by section 1140.4(c) of the Act. (Id.)[24]

I further find that since Mireles was clearly a labor contractor under the Act, it is not necessary to analyze his operation in terms of the "totality of operations" test set forth in Tony Lomanto, supra, as there is not a situation here where both entities were possible employers. (See Sutti Farms, supra.)

I recommend that this objection be dismissed.

/

/

/

/

/

/

/

---

24. The fact that Mireles may have supervised, directed and/or checked the work of the employees he provided to Exeter does not mean that he was performing services beyond those customarily provided by a labor contractor because such a function is explicitly included in the statutory definition of a farm labor contractor. (Sutti Farms, id., IHE Decision, p. 9, citing Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.3d 307, 323.)

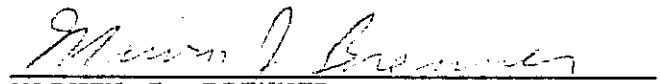
VI. THE PEAK ISSUE

One of the issues set for investigative hearing in this matter was whether "the ALRB . . . improperly conducted the petitioned for election despite the fact that the agricultural employer was not at 50 percent of its peak agricultural employment for the current calendar year." However, the Employer failed to meet its burden of proof on this objection in that it offered no substantial[25/] evidence to show that the Regional Director's formula for peak was incorrect or that peak did not otherwise exist. I conclude that the Employer has abandoned this objection, and I recommed it be dismissed.

VII. CONCLUSION

Based on the foregoing findings of fact and conclusions of law, I recommend that the Employer's objections be dismissed and that the UFW be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in the Monterey and Fresno counties.

DATED: July 19, 1983



MARVIN J. BRENNER
Investigative Hearing Examiner

---

25. There was limited testimony on the Employer's peak period, but this was in reference to its position that differences in peak employment further demonstrated that the Salinas and San Joaquin Valleys should be considered separate agricultural areas. Furthermore, the Employer's post-hearing brief mentions peak only in the context of the scope of the unit question, as well. (See Employer's post-hearing brief, pp. 13-14.)