El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DON MOORHEAD HARVESTING COMPANY, INC. Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 83-RC-1-EC 9 ALRB No. 58

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following the filing of a Petition for Certification by the United Farm Workers of America, AFL-CIO (UFW or Union) on February 15, 1983, a secret ballot election was conducted among the agricultural employees of Don Moorhead Harvesting Company, Inc. (Employer) on February 19, 1983. The official Tally of Ballots showed the following results:

UFW.	70
No Union	49
Unresolved Challenges. . .	5
Total.	124

The Employer timely filed objections to the election, one of which was set for investigative hearing. That objection alleged that Board agents made statements to a group of employees which were likely to promote a pro-union vote. On May 11 and 12, 1983, a Hearing was conducted before Investigative Hearing Examiner (IHE) Robert S. Dresser who thereafter issued the attached Decision in which he found that the Board agents did not make statements showing

pro-union bias and recommended the Agricultural Labor Relations Board (Board) dismiss the Employer's objection and certify the UFW as the collective bargaining representative of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's Decision and a supporting brief, and the UFW has not responded to those exceptions.

Pursuant to the provisions of California Labor Code section 1146, the 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 brief and has decided to affirm the rulings, findings, and conclusions of the IHE. The Employer's objection is hereby dismissed.

CERTIFICATION OF REPRESENTATIVE

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

Dated: September 30, 1983

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Don Moorhead Harvesting Co.
(UFW)

9 ALRB No. 58
Case No. 83-RC-1-EC

IHE DECISION

The IHE found that the Employer failed to prove that Board agents made statements which would promote a pro-union vote. The IHE recommended the Employer's objection be dismissed and the UFW be certified as the representative of all of Employer's Agricultural Employees in California.

BOARD DECISION

The Board affirmed the IHE's rulings, findings, and conclusions and adopted his recommendation that the UFW be certified as the representative of all of Employer's agricultural employees.

* * *

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

* * *

No. 1

State of California
AGRICULTURAL LABOR RELATIONS BOARD

Estado de California
CONSEJO DE RELACIONES DE TRABAJADORES AGRICOLAS

DON MOORHEAD HARVESTING COMPANY, INC.,

Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Case No. 83-RC-1-EC

Caso Núm.

CERTIFICATION OF REPRESENTATIVE
CERTIFICACION DEL REPRESENTANTE

An election having been conducted in the above matter under the supervision of the Agricultural Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no petition filed pursuant to Section 1156.3(c) remaining outstanding;

Habiéndose conducido una elección en el asunto arriba citado bajo la supervisión del Consejo de Relaciones de Trabajadores Agrícolas de acuerdo con las Reglas y Regulaciones del Consejo; y apareciendo por la Cuenta de Votos que se ha seleccionado un representante de negociación colectiva; y que no se ha registrado (archivado) una petición de acuerdo con la Sección 1156.3(c) que queda pendiente;

Pursuant to the authority vested in the undersigned by the Agricultural Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

De acuerdo con la autoridad establecida en el suscribiente por el Consejo de Relaciones de Trabajadores Agrícolas, por LA PRESENTE SE CERTIFICA que la mayoría de las balotas válidas han sido depositadas en favor de

UNITED FARM WORKERS OF AMERICA, AFL-CIO

and that, pursuant to Section 1156 of the Agricultural Labor Relations Act, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

y que, de acuerdo con la Sección 1156 del Acto de Relaciones de Trabajadores Agrícolas, dicha organización de trabajadores es el representante exclusivo de todos los trabajadores en la unidad aquí implicada, y se ha determinado que es apropiada con el fin de llevar a cabo negociación colectiva con respecto al salario, las horas de trabajo, y otras condiciónes de empleo.

UNIT: All agricultural employees of Don Moorhead Harvesting Company, Inc.
UNIDAD: in the State of California.

Signed at Sacramento, CA

On the 30th day of September 1983

Firmado en _____

En el _____ *día de* _____ *19* ____

On behalf of
AGRICULTURAL LABOR RELATIONS BOARD

De parte del
CONSEJO DE RELACIONES DE TRABAJADORES AGRICOLAS

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 915 Capitol Mall, 3rd Floor, Sacramento, CA 95814.

On September 30, 1983 I served the within Decision - 9 ALRB No. 58

Don Moorhead Harvesting Company, Inc., 83-RC-1-EC

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follows:

CERTIFIED MAIL

Patricia Rynn
Dressler, Quesenbery, Laws
and Barsamian
Post Office Box 2130
Newport Beach, CA 92663

United Farm Workers
Legal Office
Post Office Box 30
Keene, CA 93531

REGULAR MAIL

Don Moorhead Harvesting Co., Inc.
1765 Arcadia Lane
Yuma, Arizona 95364

United Farm Workers
Post Office Box 1940
Calexico, CA 92231

El Centro ALRB Regional Office
319 Waterman Avenue
El Centro, CA 92243

HAND DELIVERED

General Counsel (2)

Executed on September 30, 1983 at Sacramento, California.
I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Esther M. Torres
Esther M. Torres
Secretary to the Board

ALRB 64 (Rev. 5/80)

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board
JUL 6 1983
RECEIVED
Exec. Secretary

In the Matter of:

DON MOORHEAD HARVESTING COMPANY, INC.

Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Case No. 83-RC-1-EC

APPEARANCES:

Patricia J. Rynn, Esq.
Dressler, Quesenbery, Laws & Barsamian
Newport Beach, California
For the Employer

Ned Dunphy
Keene, California
For the Petitioner

Deborah Escobedo, Esq.
El Centro, California
Representing the Two Board Agent Witnesses

DECISION

STATEMENT OF THE CASE

ROBERT S. DRESSER, Investigative Hearing Examiner:

This case was heard before me on May 11 and 12, 1983, in El Centro, California, pursuant to a Notice of Hearing issued by the Executive

Secretary of the Agricultural Labor Relations Board (hereafter ALRB) on April 12, 1983.

A Petition for Certification was filed by the United Farm Workers of America, AFL-CIO (hereafter "UFW") on February 15, 1983. (BX:1.)[1/] The Petition was filed in the El Centro office of the ALRB to certify the UFW as the bargaining representative of the agricultural employees of Don Moorhead Harvesting Company, Inc. (hereafter "Employer").[2/]

A Notice and Direction of Election was issued by the Regional Director on February 19. (BX:3.) An election was held on February 19 at two locations (Westmoreland and Calexico) (Tr. I:4). The Tally of Ballots (BX:4) shows the following results:

UFW	70
No Union	49
Unresolved Challenges	5
TOTAL BALLOTS	124

The Employer timely filed a Petition to Set Aside Election, alleging eight purported grounds for setting aside the election (BX:5). Pursuant to her authority under 8 Cal. Admin. Code § 20365(d), the Executive Secretary on April 12 dismissed seven of the objections and set one (Employer's Objection Number 8) for

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1/Board Exhibits are noted herein as "BX." The parties did not offer any exhibits into evidence. All dates refer to 1983.

2/The UFW and the Employer stipulated that the UFW is a labor organization as defined in the Agricultural Labor Relations Act (hereafter ALRA or Act) and the Employer is an employer as defined in the ALRA. This stipulation is found in the Reporter's Transcript of the hearing. See Tr. I:4. (References to the Reporter's Transcript are noted herein as "Tr." followed by the volume number in Roman numerals and the page numbers.)

hearing (See BX:6). The Employer did not file a Request for Review, and the only objection set for hearing was:

1. Objection No. 8, whether a Board agent made statements to the group of employees which were likely to promote a pro-union vote.

Both the Employer and the UFW were represented at the hearing and were given full opportunity to participate in the hearing, including examining witnesses and filing briefs.[3/]

Throughout this Decision I have noted the specific transcript references, and have often quoted specific passages of testimony, upon which I have relied in making my findings. Upon the entire record,[4/] including my observation of the demeanor of the witnesses, and after consideration of all the evidence and the parties' post-hearing briefs, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Background

The Employer is engaged in lettuce harvesting and had approximately 400 acres in production in the bargaining unit at the time of the election (Tr. I:4). An election petition was filed by the UFW on February 15 and an election was held on February 19.

3/The Employer requested and was granted a one-day extension until May 27 to file its post-hearing brief. During that portion of the hearing, when Board agents John Hernandez and Richard Delgado testified, they were represented by Deborah Escobedo of the El Centro Regional office.

4/The record includes the testimony of four witnesses called by the Employer and three witnesses called by the UFW as well as eight Board exhibits admitted into evidence.

On Friday, February 18, three Board agents obtained permission from the Employer to distribute a Notice and Direction of Election to the workers on the Employer's property and to advise them there would be an election the next day.

It is the contention of the Employer that on the day before the election one or more Board agents made statements to a crew of approximately 30 to 33 workers indicating that the workers needed a union if they desired to get a retroactive pay raise.

B. The Events of February 18

The Employer's first witness was Arturo Estrada. He testified that he has worked for the Employer as a cutter and packer for 10 years (Tr. I:9). Some two or three weeks prior to the election, a list was passed around because the workers wanted "a raise and a retroactivity." (Tr. I:15.) He testified that he signed it because "they said we needed to turn it in to the State because the State wanted it." (Tr. I:15.) Mr. Estrada did not explain anything further about the list.

Mr. Estrada testified he first learned of the election when two or three people from the State came out to his crew (Tr. I:17). When asked on direct, "Who were those people from the State?", he responded "We don't know. We don't know them, but they always come and visit us." (Tr. I:18.) He did not elaborate as to the time, place or nature of those alleged frequent visits by State representatives.

Mr. Estrada indicated that only one of the two or three State agents identified himself and addressed the crew. He could not identify the State agent by name or by a specific description.

He testifed that the State representative told the crew that he was "coming in on behalf of the State to see in what way he could help us." (Tr. I:15.) Mr. Estrada then testified that the workers explained to the State representative they wanted retroactivity and a raise in pay to which the State agent told them he could not help them with that problem and that the workers would have to be represented by some type of a union to get the help they wanted (Tr. I:19). Throughout his testimony, including his comments about what the State agents told the crew, Mr. Estrada seemed nervous and less than candid in his responses.

Mr. Estrada testified that the State representative showed the workers a "list of paper," showed the workers how they were supposed to vote, explained the vote would be in private, and said the election would be the next day (Tr. I:19, 20). On cross-examination, however, he denied that the Board agents distributed the Notice and Direction of Election in Spanish (BX:8),[5/] and he claimed that the Board agents had instead distributed copies of the sample ballot (Tr. I:24, 25). When shown a copy of BX:8, Mr. Estrada then conceded that he did "not recall" whether he had ever before seen this Notice and Direction of Election (Tr. I:26).

In response to a question on direct as to whether anyone from the crew had asked the man from the State anything about the need for a union, the witness testified that some did and that the workers told the State agent they "did not want to be under the

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5/I take administrative notice that the Notice and Direction of Election is ALRB Form 109 (Rev. 3/79) and it has an English translation on one side and a Spanish translation on the other side. BXs 3 and 8 constitute one document.

union." It was then, according to Mr. Estrada, that the State agent told them they needed to be under a union to get the retroactive and the pay raise (Tr. I:21).

On cross examination, Mr. Estrada's memory for detail became hazier and more selective and his answers did not seem very candid. For example, he did not recall whether the two or three Board agents were Mexicans or Anglos (Tr. I:23). He did not recall whether any of the Board agents had a beard (Tr. I:23). He did not "recall exactly" if the one Board agent who was speaking to the crew had a mustache though he indicated that this Board agent probably had a mustache (Tr. I:23). He did not recall whether that Board agent wore glasses, nor could he remember any distinguishing features about him (Tr. I:23). He did not know if he would recognize this Board agent if he were to see him again (Tr. I:24). He did not recall whether he had ever seen before the Spanish translation of the Notice and Direction of Election (Tr. I:26). In response to a question on cross-examination of whether the Board agent told the workers he could not answer questions about retroactivity and pay raises and was there only to answer questions about the election, Mr. Estrada answered, "I did not pay attention to other matters". (Tr. I:26). This selective memory which focused on the alleged statement by the Board agent that the workers needed a union to be able to receive retroactive and a salary increase was manifested throughout Mr. Estrada's testimony. In addition, the witness

appeared to be confused as to whether some events occured the day before the election or the day of the election itself.[6/]

Interestingly, Mr. Estrada did testify on cross-examination in response to the question of whether it was true that the agent from the State said he was there only to explain the election procedures that,

> "He did say that, but the workers said that they wanted the retroactive pay and they wanted a raise in salary. And his answer was that nothing could be done about that." (Tr. I:27).

When responding to another question from the UFW representative, Mr. Estrada suggests that the Board agent addressing the crew asked the workers whether we were "in a union or not." (Tr. I:29.) Mr. Estrada was the only witness to recall such a question.

When Mr. Estrada was asked whether there were a lot of workers talking at the same time when the State agent told the crew that they needed a union, he testified, "No. We were listening." (Tr. I:29.) Yet one minute later he contradicted himself by stating that, "Like we were all listening, but they were talking and several were making questions."(Tr. I:29.)

The Employer's second witness was Mr. Samuel Sanchez. He testified that he has worked for the Employer for more than ten years (Tr. I:42). The day before the election three State agents came to speak to his crew at work at the Elmore Ranch. He did not

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6/See, for example, Mr. Estrada's testimony Tr. I:27 where he referred to the day of the election despite the cross-examiner's clear reference to events occurring the day before the election. He did the same thing at Tr. I:30.

know who they were. He testified they were young males and that they did not have any facial hair (Tr. I:36). He was in the same crew as Mr. Estrada, and there were thirty to thirty-three workers in the crew. He did not remember what time the State agents arrived to address his crew.

Mr. Sanchez testified that the State agents told the crew they were representing the State "and what was it that we wanted." (Tr. I:37.) We said we wanted a raise in pay and retroactive pay. "Then They distributed some leaflets to us to explain to us as to how they could be able to help us, telling us that we would have to be under a union in order that they could help us." (Tr. I:38.)

Mr. Sanchez did not, however, recall what the leaflet said (Tr. I:38). In regard to the content of this leaflet, as with much of his other testimony, Mr. Sanchez appeared to have substantial difficulty remembering what occurred and communicating what he did remember. His answers were frequently non-responsive, confused and unclear.[7/]

Mr. Sanchez further testified that he and several other workers personally talked to the State agent. One of the State agents told him that the workers had to be under a union. The agents would speak at different times because one was passing out the leaflets. Mr. Sanchez indicated that the State agents told the crew that the election would be by secret vote.

7/See, for example, Tr. I:38-39 where Ms. Rynn asks whether the alleged statement by a Board agent that the workers had to be under a union was in response to a question from someone in the crew and Mr. Sanchez answers, "Do you mean was the State going to represent the crew?" See Tr. I:44 where Mr. Sanchez testified, "And that's what they said, that in order for them to be able to help us we had to be under a union, whether it was yes union or no union."

During cross-examination, Mr. Sanchez' recollection became even dimmer and the confusion in his responses became more pronounced. For example, when asked if none of the State agents had any facial hair, he responded, "I don't recall very well." (Tr. I:42.)[8/] Nor did Mr. Sanchez "recall very well" which of the three State agents told the crew that the workers needed a union in order for the State to help the workers get retroactive pay and a salary increase (Tr. I:43). The witness' lack of memory is further illustrated by the following exchange:

Q. By Dunphy: "Do you remember anything else that the people from the State told you?"

A. Sanchez: "No."

Q. By Dunphy: "So to the best of your recollection, all they told you is that they wanted to know what you wanted, what the crew wanted and that before the State could help them they had to join a union?"

A. Sanchez: "Yes"

Q. By Dunphy: "And then they left and went to the next crew?"

A. Sanchez: "Yes.

Q. By Dunphy: "And nothing else was discussed?"

A. Sanchez: "No." (Tr. I:43-44.)

Aside from a lack of ablility to recall much detail

8/Though he testified "I think I would" in response to whether he would recognize the three agents if they were in the room, the Employer made no effort to arrange for Mr. Sanchez or any other Employer witness to identify the Board agents even though two of the Board agents testified at the hearing.

surrounding the Board agents' presentation to the crew, it strains credulity to believe that the Board agents' first statement to the workers was how can we help you or that the Board agents told the workers they would have to join a union before the State could help them.

Mr. Sanchez was asked if he remembered anybody from the State saying that they could not answer any questions about wage increases. He then testified:

> A. "Yes."
>
> Q. Tell us what they said in that regard.
>
> Q. sic (A) That the State had a fee or an amount that could be paid by the hour, which was $3 and change per hour, that they did not have a figure by contract for an amount by contract. And that's what they said, that in order for them to be able to help us we had to be under a union, whether it was yes union or no union." (Tr. I:44.)

This answer is incomprehensible and internally contradictory. It makes no sense to say that the workers had to be under a union, whether it was yes union or no union.

Mr. Sanchez testified that he believed that two State representatives told the workers they had to be under a union because "two of them, spoke." (Tr. I:51.) He did not testify, however, that he actually heard more than one State representative say this.

When asked by the Hearing Officer if he could describe the Board agents who spoke to the crew, Mr. Sanchez replied that

"I can tell you as far as the height, but I don't recall very well of their faces." (Tr. I:51.) This appears inconsistent with his earlier statement that he thinks he would recognize the Board agents if they were in the room.

Mr. Sanchez testified on cross-examination that the State agents told the workers that the State agents could not answer questions about wage increases and retroactives but could only answer questions about election procedures (Tr. II:45.) Mr. Sanchez also agreed that the State agents advised the workers that the election would be a secret ballot election and that the workers had a right to vote for a union or no union (Tr. I:45).

In response to a question on re-direct whether he or any other member of his crew said anything about a union to the State representatives, Mr. Sanchez answered "No." (Tr. I:50.)

The Employer's third and final witness for its case in chief was Mr. Julio Ernesto Rodriguez. He testified that he had worked thirteen years for the Employer (Tr. I:52). Like Mr. Estrada and Mr. Sanchez, he was in Foreman Trinidad Grijalva's crew. He said that he first learned of the election three weeks prior to the election when representatives of the State came to speak to his crew. He then changed his testimony to indicate he first learned there would be an election when some people from the UFW came to the field about three weeks prior to the election (Tr. I:53).

On the day preceding the election, three Mexican or Mexican-American males from the State came to the field to instruct the crew members on the voting process. When asked to describe them, Mr. Rodriguez said that the State agents were young, "not very tall. They were medium height. You see a lot of faces." (Tr. I:54.)

According to Mr. Rodriguez, the first thing the State representative did was to speak to Mr. Don Moorhead[9/] to ask that the foreman leave the crew. The "first thing" the State agents told the crew was that "the Don Moorhead Company had eligibility for an election." (Tr. I:55.) Mr. Rodriguez then testified, "But we said that we didn't want an election, but what we were interested in and what we wanted was a retroactive pay and a salary increase, which other companies were paid." (Tr. I:55.) The State representatives then responded that the workers would have to have a union to get the retroactive and increase per box. He testified that all three State representatives said these words about the need for the union. (Tr. I:56.) In response to Ms. Rynn's question of whether all three State agents said these words at the same time, Mr. Rodriguez replied, "No. Because one representative was speaking and then another one would speak and then another one would speak." (Tr. I:56.) On cross-examination, however, Mr. Rodriguez testified in response to the question of whether all three State representatives used these words about the need for a union as follows, "No, not the three of them, only one. But it's difficult with three." (Tr. I:62.)

He was unable to remember which of the three State representatives told the crew that they needed to join a union. He testified, "No. I can't recall because a face, you see it once in a lifetime and it's hard to remember." (Tr. I:61 & 62.)

9/Mr. Moorhead was present throughout the hearing except during the cross-examination of Mr. Salvador Neri, an employee on lay-off status at the time of the hearing who was called by the UFW.

Mr. Rodriguez denied that he or anyone else in his crew expressed to the State representatives that they did not want a union (Tr. I:57). Yet, a moment later he testified as follows regarding the first statement that was directed to his crew by one or all of the State representatives:

> "the first thing that they did is that they identified themselves as representatives of the State. And then that they said there were signed cards for an election at Don Moorhead. And then we said that we didn't want the union....(Tr. I:58) (emphasis added.)

Mr. Rodriguez was asked on direct whether he said to the State agents or to someone else in his crew that they didn't want the union and only wanted retroactive pay and salary increases. He testified that, "All of us said it together. There were about 11 trios there." (Tr. I:58.) On cross-examination he again affirmed that all thirty-three workers in his crew at the same time told the State agents they didn't want a union or an election, and that they just wanted a wage increase and retroactive pay. (Tr. I:61.)

When asked on direct whether the State agents passed out any instructions or papers. He testified, "Yes. They gave us a white paper and that white page or leaflet, it said union, no union, or State." (Tr. I:59.)

On Cross-examination, Mr. Rodriguez agreed that the State agents told the crew that it would be a secret ballot election and that the workers could vote for the union or for no union. He also agreed that the State agents told the crew that they were there only to answer questions about the election procedure and to tell them when and where to vote.

During redirect, Mr. Rodriguez said none of the three State representatives had a mustache, and "I couldn't very well say it was this person or this person or that person" who made the comments about the need for a union (Tr. I:62). This conflicts with his earlier testimony that all three State agents made these remarks about the need for a union.

The first of three witnesses called by the UFW was Salvador Nunez Neri who testified he had worked nine years for the Employer and had been in Crew Number 3 at the time of the election (Tr. II:2). The parties stipulated that Mr. Neri was still employed by the Employer at the time of the hearing, that he is on seasonal layoff status, and that he will be recalled to work (Tr. II:14).

Mr. Neri was present in the fields the day before the election when three Mexican State agents came out to the fields to talk to the Employer's workers. The State agents were young and one of them had a mustache. There were two crews working that day and the State agents stopped each one separately (Tr. II:4).

When the Board agents stopped his crew, they told the crew there was going to be an election on February 19. Mr. Neri then identified the Spanish translation of the Notice and Direction of Election (BX:8) without hesitation and testified that the State agents distributed this leaflet to all the crew members when they stopped his crew (Tr. II:4). The State agents told the workers it was a free vote and asked if there were any questions. There were some questions, and the questions were related to the retroactive pay and the pay increase. A State agent said that he could not answer that question. After distributing the leaflets and

explaining the workers' voting rights, the State agent went to the next crew (Tr. II:5).

Mr. Neri testified that his foreman, Jessi Grijalva, and Arturo Estrada (an employee in Mr. Neri's crew who earlier testified for the Employer) were compadres and friends.

On cross-examination Mr. Neri credibly testified that he had no position with the UFW, and that the workers had jointly organized themselves. He indicated he had signed a blank list which disappeared and which he thought was for the union. He recalled that Luis Contreras had the list (Tr. II:6-7). He identified one (Nieblas) of the two workers who had asked the State agent questions about retroactives (Tr. II:7).

He testified that he knew the three men were State representatives because they identified themselves. When asked the first thing they said to the crew when they identified themselves, Mr. Neri testified:

> "That they were representatives from the State and that they were or going to distribute some leaflets and there was going to be a voting there." (Tr. II:9)

Mr. Neri did not recall if the State agents had a sample ballot, but he agreed that they told the workers it would be a private election.

In response to Ms. Rynn's question of whether the State agents explained that the State only had a minimum wage and they could not assist employees in making more money than the minimum wage, Mr. Neri unhesitatingly testified:

> "No, no, they didn't say that. They only explained to us regarding the election, of the voting that would happen the next day." (Tr. II:9)

He recalled that the State agents told the crew that the voting would occur in two places, "from 7 a.m. in the morning forward and then, again, there would be one in Calexico." (Tr. II:10.)

He was positive there were only two crews working, that his crew was stopped first, that the State agents talked to the crew from ten to twenty minutes and that after the Board agents had left, the workers talked among themselves about the retroactives and the pay increase (Tr. II:10 and 11). Mr. Neri testified that after the Board agents left, the workers said amongst themselves that they wanted the retroactive pay and the pay increase and that the union was the only way to obtain these goals.

He testified he had been a union observer for this election, and he candidly identified Santana as the last name of an employee organizer at Don Moorhead. He testified that the Board agents spent "only just a short time" answering questions from his crew. (Tr. II:13.) When asked which Board agent responded to the questions, he replied, "I don't know his name. He's a young person and short in stature." (Tr. II:13.) Mr. Neri believes he still has the flyer passed out by the Board agents, and he was certain that they passed out only one type of flyer, one for each worker. (Tr. II:13.)

Mr. Neri testified that he was standing approximately six feet away from the one Board agent who answered the questions and that the Board agents explained how the ballots were going to be printed and how the booths would be set up. In response to the Hearing Examiner's question regarding how many minutes the Board agents spent in answering the two questions from the crew, Mr. Neri replied "It was really fast." (Tr. II:15-16.)

I note that Mr. Neri's testimony was forthright and responsive to the questions on direct examination, and his demeanor remained trustworthy and his answers direct and responsive during cross-examination. He was a very sincere and dignified witness.

The UFW next called John Hernandez, a Field Examiner of the ALRB assigned to the El Centro Regional Office. He testified that he has been employed as an ALRB Field Examiner for one and one-half years[10/] and that he was one of the Board agents assigned to assist in the election at Don Moorhead Harvesting Company, Inc. (Tr. II:19.)

Mr. Hernandez testified that he visited the Employer's fields twice, once the day before the election and once on the day of the election. He very forthrightly and credibly stated that the purpose of the visit to the Employer's fields on the day before the election was, "to inform the workers that there was going to be an election conducted and read a Notice of Direction to the workers, to inform them of the procedures that would be followed in that election, in conducting that election." (Tr. II:19.)

He further testified that on the day before the election he arrived at the Elmore Ranch (the Employer's ranch) between 10:00 and 10:30 in the morning, that he was accompanied by Board agents Miguel Castro and Richard Delgado and that they were greeted at the ranch by Mr. Don Moorhead. They had a brief discussion with Mr. Moorhead related to the procedures to be followed in advising the workers about the election and stopping the crews one at a time

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10/At the time of the election he would have been employed by the ALRB for approximately one and one-quarter years.

in order to complete the notification process quickly and not hold up production (Tr. II:20).

After Mr. Moorhead signaled to his foreman to stop the crew and after receiving Mr. Moorhead's "okay" to go into the field, the three Board agents entered the field and gathered the members of a crew around them.[11/] Next, the three Board agents passed out to the workers the Notice and Direction of Election flyer (hereafter "Notice"). Mr. Hernandez positively identified the Spanish translation of the Notice and Direction of Election form (BX:8) as the one and only flyer or document distributed to the crew members that day (Tr. II:20-21.)

After the Board agents distributed the Notice to each member of the crew, identified themselves and told the workers the purpose of their visit (i.e. to notify them of the election), Mr. Hernandez testified that he then read the Notice verbatim to the workers.(Tr. II:22). Upon completing the reading of the Notice, he asked the workers if there were any questions pertaining to the Notice. He received questions about the Notice and questions related to wages and retroactive pay. Mr. Hernandez testified as follows about his response to these questions:

> Q. Did you read the notice verbatim?
>
> A. Yes, I did, word for word.
>
> Q. And after you read the notice, what was the next thing you did?

11/ Mr. Hernandez estimated there were 25 to 30 members in the first of the two crews visited by the Board agents. All witnesses agree that the alleged statement about the workers' need for a union was made to this first crew.

A. After reading the notice and upon completion of the reading of the notice, I asked the workers if there were any questions pertaining to the notice.

Q. Were there any questions?

A. Yes, there were.

Q. And do you recall what those questions were?

A. I believe the questions were not only in regard to what I had just read but also there were other questions in relation to wages and retroactive pay and things of the sorts.

Q. What was your response to those questions?

A. The questions that were--The questions that I felt were appropriate and were related to the Notice of Direction--which was the purpose of my visit--I answered. The questions that were not related to this, such as the questions regarding wages and retroactive pay, I advised the workers that those questions I was not in a position to answer, that I was there solely for the purpose of advising them of the pending election and the procedures that would be followed in that election and I limited my response only to questions regarding the direction of the election.

Q. Did you ever tell the workers in that crew that the only way they could obtain a raise and retroactive pay was to have a union?

A. No, I did not.

Q. Did you ever tell those workers that the only way the State could help them is if they had a union first?

A. No, I surely did not.

Q. Did you ever tell those workers that they have got to vote for the United Farm Workers Union?

A. I did not, most definitely, I did not.

(Tr. II:22-23.)

Mr. Hernandez' impressive demeanor and bearing throughout his entire testimony, including this above-quoted portion, indicated he was honest, straightforward and responsive in his answers. He credibly denied in an unequivocal manner making any statements to the crew members suggesting that they needed a union in order to receive salary increases or retroactive raises. Both during direct and cross-examination, he looked directly at the interrogator and gave his answers in a very persuasive and open manner.

After completing the reading of the Notice and ensuring that questions related to the Notice had been answered, he, "being the person who was reading the Notice, thanked the crew members for their attention and excused myself to the next crew." (Tr. II:23.)

His answers remained clear and direct under cross-examination. Mr. Hernandez testified that he had assisted in one other election and he was a Field Examiner I-B (a step higher than the entry level position). He testified without contradiction that he had never visited the Employer's field prior to the day before the election (Tr. II:27). He first became aware of the interest of the workers in retroactives and higher wages at the pre-election

conference held the night before his first visit to the Employer's field.[12]

Though he did not recall the exact content of the questions related to retroactivity and higher wages, he clearly remembers questions about retroactive pay and wages. He did not believe there were questions related to minimum wage or to other companies and their wage structures (Tr. II:30). There were questions concerning the Notice and election procedures. He testified that some of the workers did not know how to read, that they were trying to read and listen at the same time, and that they, therefore, missed some of the Notice thereby evoking questions related to the Notice (Tr. II:30-31).

He denied that any crew member told him that they did not want a union. He testified that he spoke with the two crews separately, that each crew contained thirty workers, and he spent a total of about one-half hour in the field speaking with the two crews. He was the only agent that addressed the crews, and the other two agents assisted him. (Tr. II:32.)[13]

He also testified that he did not get into detail regarding the mechanics of voting. Instead, he himself did that the next morning, the day of the election.[14]

12|See Tr. II:29.

13|See Tr. II:32 for Mr. Hernandez' spontaneous assertion that the reason he would never go out to a field himself was to protect himself against untruthful allegations about his conduct.

14|This would account for some of the confusion exhibited by the Employer's witnesses as to which day they received instructions on marking their ballots.

Mr. Hernandez testified that he had a mustache the day before the election.

Though Mr. Hernandez had only been involved in one previous ALRB election, he did indicate that he had addressed workers or read notices in several compliance cases and he is not aware of any complaints that he has conducted himself improperly.[15/]

The UFW called as its third and final witness Mr. Richard Delgado who testified that he has been employed as an ALRB Field Examiner in the El Centro Regional Office one and one-half years as of the date of this hearing and had participated in one other ALRB election (Tr. II:37 and 42).

Mr. Delgado testified that he, John Hernandez and a third Board agent visited the Employer's fields at about 10 a.m. the day prior to the election for the purpose of notifying the workers of the upcoming election. It was John Hernandez who spoke with the two crews, and the two crews were addressed separately (Tr. II:38).

Prior to Mr. Hernandez reading the Notice (BX:8), the three Board agents (including Mr. Hernandez) passed out these Notices to the workers. Mr. Delgado credibly testified that the Notice was the only leaflet distributed to the workers that day.

Mr. Hernandez read the Notice to the crew members and then asked if there were any questions. Mr. Delgado did not address the crew.

When asked about his role that day, Mr. Delgado answered,

15/ No evidence was introduced by the Employer related to any history of bias or improper conduct pertaining to any of the three Board agents present at the field the day before the election.

"When we got there, I read the forms, got the crew and prior to the reading, we passed out the leaflets, and after we passed them out, I was an observer." (Tr. II:39.)

After passing out the Notices, and as Mr. Hernandez started reading the Notice, Mr. Delgado worked his way out of the crew of workers and ended up on the right side of Mr. Hernandez. (Tr. II:39-40.) The majority of workers were around Mr. Hernandez. At that point a worker walked up to Mr. Delgado and asked him whether if the union won, would the workers get retroactive pay. Mr. Delgado testified that he told the worker, "No, if the union won, then that could be negotiated." (Tr. II:40 and 41.) Mr. Delgado testified that his answer was in a normal tone of voice[16/] and there were only two or three workers in the immediate area.[17/]

Mr. Delgado testified in a responsive and forthright manner both on direct and cross-examination. He was not nervous, his testimony was clear, he kept eye contact with the person asking the questions, and his demeanor indicated he was an open and honest witness.

After the UFW presented its witnesses, the Employer called Mr. Gumecindo Perez for purposes of rebuttal. Mr. Perez testified that he has worked for the Employer for fifteen years and that he was present the day prior to the election when the State spoke to his crew (Tr. II:46). He testified that he "believed" that two

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16/ He didn't speak in a raised voice. "I spoke to him one-on-one." (Tr. II:41.)

17/ The substantial majority of the workers were gathered around Mr. Hernandez who was some twenty feet away from Mr. Delgado. (Tr. II:39 and 43.)

State agents spoke to his crew, and he indicates that they gave a piece of paper to the crew and that both State agents read from the paper. On cross-examination, Mr. Perez identified the paper as BX-8, the Spanish translation of the Notice and Direction of Election, and he testified this was the paper he received from the State agents on the day before the election (Tr. II:58-59).

Mr. Perez' testimony was not entirely clear or responsive regarding several matters, including whether both State agents answered questions from the crew. For example, when he was asked on direct, "Did both agents that spoke to your crew answer questions?" He responded, "Yes, just take answers and questions." (Tr. II:47.) Later, he testifies in a manner suggesting that only one Board agent answered questions from the crew. (Tr. II:48.)

Mr. Perez testified that the crew asked about thirty questions of the two State agents. On cross-examination, however, when he was asked how he remembered that thirty questions were asked, Mr. Perez answered, "Because he was there for a short while, that's why." (Tr. II:56.) Not only is this answer non-responsive, but it again suggests that only one State agent was answering questions from the crew.

Mr. Perez testified that someone in the crew asked a question about how the workers could receive retroactive pay and that the response was, "The answer to that question was that we would have to be under a union in order for us to recuperate that money." (Tr. II:53-54) Mr. Perez did not really indicate, however, whether one or both State agents gave this answer. Nor did Mr. Perez ever describe or identify either of the two State agents who allegedly made these statements.

In response to a question on direct as to whether Mr. Perez' crew named a representative for the union, he answered, "There was one representative named by our crew--he was named by another crew." (Tr. II:54) His name was "Salvador Hari, I believe." (Tr. II:54) Ms. Rynn asked, "Could that be Salvador Neri?" Mr. Perez relied, "I'm not too sure but I know Salvador Neri is his last name." (Tr. II:54) On cross-examination Mr. Perez testified that "Salvador" works in his crew on a seasonal basis, that he does not know if Salvador is a staff person for the UFW and that he does not know if the people who called the meeting to select a union representative were staff members of the UFW. Mr. Perez then repeated that Salvador was named as a representative by another crew.

Mr. Perez testified on cross-examination that some of the questions could not be answered because "there were too many speaking at the same time." (Tr. II:56.) When asked whether the State agents told the crew that they could not answer any questions about retroactive pay and could only answer questions about the election, Mr. Perez testified, "They said--or they answered that there was going to be an election so that this could be straightened out regarding the retroactive, that we had to be under a union." (Tr. II:56.) He gave a similar answer to that question a short time later, but when he was asked by Mr. Dunphy, "You don't recall them saying that they couldn't talk about retroactive pay?", Mr. Perez answered, "I don't recall very well. Very many workers would ask something, would talk about something and I don't grasp everything." (Tr. II:57-58.) When asked if he could have missed

that statement by the agents, Mr. Perez replied, "I don't recall that very well." (Tr. II:58.)

Mr. Perez did testify that the State agents advised the workers that the election would be by secret ballot and that the workers could vote the way they wanted to vote. He also testified he saw Salvador Neri at the hearing this morning.[18/]

C. Credibility Resolutions

The accounts of the Employer and UFW witnesses of what transpired on the critical day before the election differ substantially in several important areas, particularly as to whether a Board agent told a crew of some thirty workers that they needed a union to receive retroactive wages and wage increases. The respective versions of events are irreconciliable.

I have decided to credit the UFW witnesses over the Employer witnesses. The Employer's four witnesses contradicted each other on significant matters, and much of their testimony was internally inconsistent, confused, implausible and subject to change. In contrast, the three witnesses called by the UFW gave generally consistent and straightforward testimony. The following is a summary of the testimony earlier set forth in detail which I have used to make the credibility resolutions.

At the outset it is important to note that no Employer witness identified or gave a detailed description of the Board agent who made the alleged pro-union remarks. Mr. Estrada indicated the Board agent who spoke to the crew may have had a mustache whereas

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18/I note that Mr. Perez was not asked if he also saw or recognized Board agents Hernandez and/or Delgado who were also present the same morning at the site of the hearing.

Mr. Sanchez testified the Board agents had no facial hair and Mr. Rodriguez testified that the Board agent did not have a mustache. Mr Perez failed to give any description of the Board agents.

Nor could the Employer's witnesses agree as to how many Board agents answered questions from the crew members. Mr. Estrada testified one Board agent answered the questions. Mr. Sanchez testified one or two Board agents responded to the questions. Mr. Rodriguez said three responded, and Mr. Perez said that two Board agents answered questions.

There were also very different answers from the four Employer witnesses related to what the Board agents first told the crew their purpose was in visiting the fields. Mr. Estrada and Mr. Sanchez indicated the Board agents gathered the crew and then asked how it was they could help the crew members, but Mr. Rodriguez testified that the Board agents first advised the crew they were there because the Employer was eligible for an election.

Regarding the first time that the four Employer witnesses learned of the election, Mr. Rodriguez indicated he learned of the election three weeks prior to the election from the State agents. He then changed his testimony to reflect he learned of the election three weeks before from the UFW. Mr. Estrada, Mr. Sanchez and Mr. Perez indicated they first learned that there would be an election from the State agents the day before the election.

The four Employer witnesses could not agree on the type of notice or flyer distributed to the crew members the day before the election. Mr. Estrada first denied that he had received the Notice and Direction of Election (BX:8), but, instead, he claimed

he received a sample ballot. Mr. Sanchez received some type of leaflet which he could not describe. Mr. Rodriguez recalled receiving a white paper which said union, no union, or State. Mr. Perez, however, remembered receiving a Notice and Direction of election (BX:8).

There was also conflicting testimony about whether the crew told the Board agents they did not want a union. Mr. Estrada testified that the workers told the Board agents they did not want to be under a union, but Mr. Sanchez testified that the workers said nothing to the Board agents about the union. Mr. Rodriguez first testified that the workers did not tell the Board agents they did not want a union. He later testified that the workers told the Board agents they did not want a union.

Though all four Employer witnesses testified that one or more Board agents advised the crew members they needed a union to get retroactive wages, Mr. Sanchez on cross-examination conceded that the State agents told the workers that the State agents could not answer questions about wage increases and retroactives but could only answer questions about election procedures. As previously noted, the four disagreed as to how many Board agents made these statements about the need for the union, and none of the four identified or specifically described the Board agent who made the statement.

Though Mr. Estrada testified that these people from the State always come and visit the crew, the other three Employer witnesses indicated that the day prior to the election was the first time they were visited in the fields by the Board agents.

All four Employer witnesses did agree, however, that the Board agents advised the crew that the election would be by secret ballot and that the workers could vote for or against the union.

In addition to a number of contradictions between the four Employer witnesses, I find that portions of each of their testimony were confused, internally inconsistent or improbable. Mr. Estrada testified that the State agents always came and visited the crew. Contrary to Mr. Estrada's testimony, I find that the Board agents did not pass out a sample ballot. I find unlikely Mr. Estrada's testimony (not corroborated by other witnesses) that a Board agent asked the crew whether or not they were in a union.

Mr. Rodriguez was the only witness to testify that all three Board agents told the workers about the need for a union. He later conceded on cross-examination that only one Board agent made this statement.

Mr. Rodriguez insisted both on direct and on cross-examination that all thirty-three members of the crew said to the Board agents at the same time that they didn't want the union, that they only wanted retroactive pay and salary increases. Aside from the improbability of all thirty-three workers saying the same thing at one time, I note that Mr. Neri is also a member of that crew and was a union observer.

Mr. Sanchez also changed his testimony related to an important element of the case. He first testified that he would be able to recognize the Board agent who talked about the need for a union, but, on cross-examination, he conceded he did not recall their faces very well.

In light of Mr. Perez' testimony that many workers spoke at the same time and that he did not grasp everthing, I find it unlikely that he could accurately estimate the number of questions (thirty) asked of the Board agents.

I find that the demeanor and manner of testifying of the four Employer witnesses did not indicate trustworthiness. Mr. Estrada had a selective memory and appeared nervous and less than candid in his testimony. Mr. Sanchez suffered from a marked inablility to recall much detail surrounding the events of the day before the election, and he was frequently unclear in his testimony. Mr. Rodriguez did not appear to take very seriously his role as a witness, and he volunteered testimony which seemed improbable in many instances. Mr. Perez was not very responsive or clear in several of his answers.

By contrast, the UFW witnesses testified in a generally consistent manner. All three witnesses testified that only one Board agent addressed the entire crew,[19/] that that Board agent notified the crew about the election to be held the following day, that a Notice and Direction of Election (BX:8) was the only document distributed to the crew members,[20/] and that he asked if there were any questions.

19/Mr. Neri testified that two Board agents spoke to the crew, but only one Board agent answered questions. It is clear from the context of the testimony that the one Board agent to whom Mr. Neri refers is the one who was answering questions from the entire crew.

20/Though Mr. Neri testified that he did not recall if the Board agents had a sample ballot, I find based upon the credited testimony of Mr. Hernandez and Mr. Delgado that no sample ballot was passed out on the day prior to the election.

Mr. Hernandez testified without contradiction that he was the Board agent who spoke to the entire crew. Mr. Neri testified that that Board agent was asked questions about retroactive pay and pay increases and that the Board agent responded that he could not answer those types of questions. Mr. Hernandez agreed that he was asked such questions, and he emphatically denied that he told the workers anything suggesting they needed a union to obtain retroactive wages and/or higher wages. He credibly testified he told the workers he could not answer those questions.

Though Mr. Neri did not testify that the Notice and Direction of Election was read to the crew members, Mr. Hernandez and Mr. Delgado both testified that the Notice was read to the crew members. I find this to be only a minor inconsistency, and I find that Mr. Hernandez distributed and read the Notice and Direction of Election in Spanish to the crew members.[21/]

Mr. Hernandez testified that the crew asked him a number of questions, including questions related to retroactive wages and wage increases. Mr. Neri recalled that two questions were asked related to these subjects, and he identified a crew member named Nieblas as one of the workers who asked a question about retroactives. His testimony on this specific was uncontradicted.

Mr. Neri's testimony that the crew members talked about the need for a union <u>after</u> the Board agents left his crew was not rebutted by Mr. Perez.

All the UFW witnesses agree that there were no questions

21/Mr. Perez testified that he received a copy of the Notice.

asked about minimum wage. Mr. Hernandez testified that no crew member told him that they did not want a union, and I credit his testimony in light of the contradictions between the Employer witnesses on this point.

Mr. Delgado testified without contradiction that he was approached by one worker who asked him whether the workers would receive retroactive pay if the union won the election and that he told the workers "No, if the union won, then that could be negotiated." The only Employer witness who testified that he actually spoke to a Board agent was Mr. Sanchez who said he and several other workers personally talked to "the individual from the State."[22/] Mr. Sanchez did not, however, describe or identify the Board agent with whom he spoke and was not recalled to attempt to identify Mr. Delgado or Mr. Hernandez. I credit the unrebutted testimony of Mr. Delgado regarding this incident.

Though Mr. Hernandez did not recall the specific and detailed content of the questions related to retroactive and higher wages, he remembered that he was asked these type of questions and that he responded he could not answer them. In general, Mr. Hernandez had good recall of the events occurring during his visit to the crew and his testimony on cross-examination was consistent with his testimony on direct. His version of events is buttresed by the mandate of section 2-5800 of the ALRB Election Manual which requires Board agents to visit fields to hand out copies of the Notice and Direction of Election to all employees prior to

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22/The Employer did not call worker Nieblas as a witness.

the election. I note that Mr. Perez, the Employer's rebuttal witness, agreed that the Board agents read from a paper which is BX:8, the Notice and Direction of Election.

Mr. Delgado also had a good memory for the events of the day prior to the election, and his testimony on cross-examination was generally consistent with his testimony on direct. I note that nothing in the record suggests any pro-union or anti-employer history or attitude on the part of Mr. Delgado or Mr. Hernandez.

Despite Mr. Neri's somewhat ambiguous recollection of the contents of a list which he signed prior to the election, his testimony generally was clear and consistent. As Mr. Neri was still employed at the time of the hearing and his testimony was contrary to the interest of his Employer, these factors are supportive of his credibility.[23/]

I find that the demeanor and bearing of Mr. Hernandez, Mr. Delgado and Mr. Neri support their general credibility. Each answered questions in a forthright manner and gave the appearance of giving candid answers both on direct and cross-examination.

For the reasons outlined above, I credit the testimony of the three witnesses called by the UFW and I discredit the testimony of the four Employer witnesses.

Analysis and Conclusions

The Board will set aside an election "only where the circumstances of the first election were such that employees could

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23/See Georgia Rug Mill & Textile Workers Union of America, AFL-CIO, 131 NLRB 1304, at 1305 (f.n.2)(1961); Gifford & Hill Co., Inc.,188 NLRB 337, at 344 (f.n. 18)(1971).

not express a free and uncoerced choice of a collective bargaining representative." D'Arrigo Bros. of California (1977) 3 ALRB No. 37 at p.4.

The Board has held that:

> 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 (1976) 2 ALRB No. 58 at p.9.

Recently, the ALRB reaffirmed a standard for setting aside an election in the agricultural setting based on Board agents' bias or appearance of bias. In George A. Lucas (1982) 8 ALRB No. 61, the Board, after indicating that the NLRB does not apply a "per se" or strict neutrality test in Board agent misconduct cases, stated:

> We have previously announced a standard for setting aside an election in the agricultural setting based on Board agents' bias or the appearance of bias. In a unanimous Decision in Coachella Growers, Inc. (Jan. 22, 1976) 2 ALRB No. 17, we noted that:
>
> '[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. (Id., at P.5.)'

The burden, then, is on the Employer in this case to prove by a preponderance of the evidence that (1) one or more Board agents made pro-union statements to the crew and (2) that said statements, assuming them to create an appearance of bias, tended to affect the conduct of the election and impair the balloting's validity as a measure of employee choice.

On the basis of my credibility resolutions, I find that Board agent Hernandez did not make any statements to the crew

indicating they needed a union to receive retroactive wages and/or higher wages. I credit his emphatic denial and the testimony of Hernandez, Delgado and Neri as to the events which occurred during the visit by the Board agents to that crew. I note the many contradictions between the Employer's witnesses and the general unreliability of their testimony and the lack of any identification of Mr. Hernandez as the Board agent who made the alleged pro-union remarks.

I also find that the Employer did not carry its burden of proving that Board agent Miguel Castro made the alleged pro-union remarks. No specific evidence was adduced to indicate that Mr. Castro addressed the crew or made the remarks.

I find that Board Agent Delgado was approached by a crew member and asked whether workers would receive retroactive pay if the union won. I find that Mr. Delgado responded, "No, if the union won, then that could be negotiated," and that this response was heard by a total of not more than four workers. This is the only Board agent remark made to the crew which could possibly be the basis for Objection No. 8, the issue at this hearing.

There remains the question of whether Mr. Delgado's remark constitutes bias or the appearance of bias which affected the conduct of the election and which impaired the balloting's validity as a measure of employee choice.

I do not find Mr. Delgado's statement to be improper. In no manner did he suggest that the three or four workers vote for the union. He was merely responding to a question from a worker, and his response was not shown to be false, misleading or inaccurate.

In fact, he indicated that a union win would not necessarily result in the receipt of retroactive pay. The subject would have to be negotiated. Were this type of response held to constitute bias or the appearance of bias, Board agents would have to remain silent when asked legitimate and important questions by workers. Though Board agents must remain careful not to volunteer information about certain aspects of the collective bargaining process, I do not believe that their discretion should be so limited so as to preclude them from answering this type of question or from encouraging employees to vote.

Even were the Board to hold that Mr. Delgado's remark constituted bias or the appearance of bias, only three or four workers heard the remarks. If these workers voted for the union on the basis of this remark and the four votes were subtracted from the seventy votes received by the UFW, the UFW would still have a majority of the valid votes cast. Moreover, the Employer has failed to present any evidence that Mr. Delgado's remark would have tended to adversely affected the results of the election.[24/]

24/See Bruce Church, Inc. (1977) 3 ALRB No. 90, where several incidents of alleged Board agent conduct were held not to have affected the free choice of the voters; Mike Yurosek & Sons (1978) 4 ALRB No. 54 where a comment at a pre-election conference (where workers were present) by a Board agent alleging that the employer had threatened employees was held to be an isolated comment which, did not tend to affect the employees' free choice; Bertuccio Farms (1978) 4 ALRB No. 91 where, even if the Board agent had told workers he was from the union, it was an isolated, and inconsequential incident and did not affect employees' free choice in the election; and Monterey Mushroom, Inc. (1979) 5 ALRB No. 2, where the presence of Board agents at a UFW hall to interview witnesses in an unfair labor practice case (but not while a union organizing meeting was in progress) was held insufficient grounds for setting aside an election.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions of law herein, I recommend that the Employer's objection be dismissed and the UFW be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in the State of California.

DATED: July 6, 1983

Respectfully submitted,

ROBERT S. DRESSER
Investigative Hearing Examiner