

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

COMITE 83, SINDICATO DE TRABAJADORES CAMPESINOS LIBRES,	}	
	}	Case No. 86-RD-8-SAL(OX)
Petitioner,	}	
	}	
and	}	
	}	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	}	14 ALRB No. 13 (13 ALRB No. 16)
	}	
Certified Bargaining Representative,	}	
	}	
and	}	
	}	
HIJI BROTHERS, INC. & SEAVIEW GROWERS, INC.,	}	
	}	
Employer.	}	
<hr/>	)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following the filing of a rival union petition by the Comite 83, Sindicato de Trabajadores Campesinos Libres (Comite) on November 4, 1986, <sup>1/</sup> the Regional Director (RD) conducted a representation election among the agricultural employees of Hiji Brothers, Inc. and Seaview Growers, Inc. (Employer or Hiji) on November 13, 1986. The official Tally of Ballots showed the following results:

Comite. . . . .	68
UFW . . . . .	54
No union. . . . .	6
Challenged Ballots . . . . .	69
Void Ballots. . . . .	2
Total. . . . .	<u>199</u>

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<sup>1/</sup> All dates refer to 1986 unless noted otherwise.

As the challenged ballots were sufficient in number to affect the results of the election, the RD conducted an investigation and issued a Report on Challenged Ballots in which he recommended that 62 of the challenged ballots be sustained and seven of them be overruled.

The United Farm Workers of America, AFL-CIO (UFW), the certified incumbent representative, excepted to 50 of the RD's recommendations. The Board subsequently found that the 48 celery harvest employees who had been challenged by Board agents because their names did not appear on the eligibility list were ineligible to vote as they had not been employed by the Employer during the payroll period immediately preceding the filing of the representation petition. On that basis, the Board sustained the challenges to their ballots. In the absence of any exceptions thereto by any party, the Board adopted pro forma the RD's recommendation that the challenges to twelve ballots be sustained and that seven be overruled.<sup>2/</sup> The Board directed the RD to open and count the ballots for which the challenges were overruled and to issue a Revised Tally of Ballots to the parties.

(Comite 83, Sindicato de Trabajadores Campesinos Libres (1987) 13 ALRB No. 16.) The Revised Tally revealed the following results:

comite . . . . .	70
UFW .. . . .	59
No Union. . . . .	6
Unresolved. . . . .	<u>2</u>
TOTAL . . . . .	137



2/ The Board directed that the the two remaining ballots be held in abeyance, subject to investigation only if they ultimately proved to be outcome determinative.

Thereafter, the Executive Secretary of the Board set seven of the UFW's Objections to the Election for a full evidentiary hearing before an Investigative Hearing Examiner (IHE). On June 27, 1988, IHE Thomas Sobel issued his decision in which he found that (1) the Comite, or its agents, engaged in acts of violence and intimidation which interfered with employee free choice, and (2) the Employer and its agents indicated favoritism for the Comite by obstructing access by UFW representatives prior to the election and thereby interfered with employee free choice. On that basis, he concluded, and so recommended, that the election be set aside.

The Employer and Comite timely filed exceptions to the IHE's Decision with briefs in support of their exceptions.

The Board has considered the IHE's recommended Decision, in light of the record and the parties' briefs and has decided to overrule the IHE's decision to set aside the election. We affirm the IHE's rulings, findings and conclusions only to the extent they are consistent herewith, and we hereby certify the results of the election.

#### Comite Interference with the Election

The Employer and the Comite except to the IHE's finding and conclusion that a Comite agent engaged in acts of violence and intimidation sufficient to warrant setting aside the election.<sup>3/</sup>

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<sup>3/</sup> The Employer takes particular exception to the IHE's credibility determinations which led to his findings and conclusions with regard to this issue. We need not question the IHE's credibility resolutions since the misconduct described by the IHI does not warrant setting aside the election.

We find that these exceptions have merit.

The IHE relies upon one incident of physical confrontation, which occurred on October 11, as the basis for his conclusion that the election should be sat aside. The incident, which occurred approximately one month before the election and prior to the filing of the rival union petition, was an altercation involving UFW organizer Gilberto Rodriguez (Rodriguez) and Hiji employee Francisco Chavez, who was also a UFW member and Comite president. Three Comite witnesses and two UFW witnesses testified as to the altercation. All witnesses agree that Rodriguez entered a Hiji field, was greeted with hostility by Chavez and Otilio Sanchez, and was urged to leave. Beyond those limited areas of agreement, the witnesses' accounts of the event vary substantially. The IHE considered the testimony, concluded that the Comite witnesses lacked credibility, and credited the UFW<sup>1</sup>'s witnesses.

UFW witnesses Rodriguez and Hiji employee Antonio Diaz testified that on October 11, Rodriguez took access, as a UFW agent, to the Hiji lettuce field and, upon entering the field, was approached by Diaz regarding a grievance Diaz wished to file against the Employer. As Rodriguez was giving Diaz a telephone number to call for assistance, Chavez approached Rodriguez from behind and spun him around. Chavez then pushed Rodriguez two or three times by poking his finger into Rodriguez's chest. Chavez challenged Rodriguez to a fight, called him a "son of a bitch," and ordered him from the field. Rodriguez testified that both Chavez and Otilio Sanchez mocked him and derided the UFW for only coming for its dues ("You're here for your 2% . " ). Rodriguez

further testified he was scared enough that he got into his car and drove away with Chavez chasing him on a tractor.

In evaluating the testimony of both Rodriguez and Diaz, the IHE concluded that Chavez's conduct was sufficiently egregious to warrant setting aside the election based on T. Ito and Sons Farms (1985) 11 ALRB No. 36 (T. Ito and Sons Farms) and Phelan and Taylor Produce (1976) 2 ALRB No. 22 (Phelan and Taylor Produce). The Employer and Comite argue that Chavez's conduct and the circumstances cannot be equated to those presented in the cases cited by the IHE.

The Board has determined that the altercation between Chavez and Rodriguez was isolated in time and was not connected with the election. Moreover, this incident does not approach the level of violence and intimidation found in prior cases where the Board has set aside elections. We do not believe that it had the tendency to interfere with the employees' free choice of representation.

We agree with the Employer that the cases cited by the IHE are not controlling. In Phelan and Taylor Produce, supra, two Teamster organizers assaulted and injured two UFW organizers without provocation during an election campaign and in the presence of a group of workers. One UFW organizer was struck in the face with a fist and the other was struck and kicked in the stomach and face. Both UFW organizers required medical treatment for the injuries they sustained. The events occurred near the time of the election, during the campaign, and were part of a campaign of fear and intimidation.

T. Ito and Sons Farms, supra, involved numerous instances of violence, threats of violence, and threats of deportation which were directed at large numbers of employees by union supporters before the election and which continued up to the time and place of the election. The threats of violence began a few days prior to the election in connection with a strike and included threats to workers at the polling site. Specific threats included, inter alia, the threat of calling the Immigration and Naturalization Service in the event the Union lost the election. Many of the workers were undocumented.

The Employer argues that the facts in the instant case are materially different from the cases cited. We agree. The Chavez-Rodriguez incident occurred long before the election and prior even to the time the rival union petition was filed. The UFW witnesses' testimony credited by the IHE indicates that the altercation concerned the dissatisfaction of two employees with their union, as opposed to the use of force, violence and intimidation to influence the outcome of an election. There was no attempt to dissuade UFW organizers from campaigning through threats of physical harm as was the case in Phelan and Taylor Produce. After the rival union petition was filed, Rodriguez and other UFW organizers continued throughout the campaign to take access to the workers. There is no evidence to suggest that the employees were deprived of the opportunity to receive information pertinent to the election as a result of the incident.

This pushing incident must be contrasted with that in Phelan and Taylor Produce in which there were beatings and blatant

attempts at intimidating UFW organizers who were trying to convey their message to the voters. Further, in contrast to T. Ito and Sons Farms, this case does not involve a campaign of fear and coercion designed to force employees to vote in a particular manner. The altercation between Rodriguez and Chavez did not occur in connection with the election nor did it present a threat to employees that might cause them to vote in a particular manner. There was no violence directed at employees who supported the UFW and there was no destruction of employees' property.

By rejecting the IHE's recommendation the Board does not condone Chavez's actions. Our decision does not represent a departure from the Board's policy opposing acts of violence. The altercation was simply so far removed from the election and of such a nature that this Board cannot conclude on an objective basis that the altercation could have reasonably tended to affect the outcome of the election.

#### The Employer's Conduct

The IHE found that a foreman's actions prevented the UFW from gaining access to a Hiji crew on November 11 at the company fields on Cawelti Road. Relying exclusively on UFW witness Karl Lawson's (Lawson) testimony, the IHE found that on one occasion a company foreman along with Comite officer Remedies Paz interfered with Lawson's access to the crew at lunchtime by "shouting him down" every time he attempted to speak to the crew. Lawson testified that the foreman was "egging on" Paz and also said that the UFW "was a bunch of liars." Lawson further

testified that he entered the field *when* the lunch break was called at approximately 11:35 and remained in the field attempting to talk to the crew until the lunch break was terminated by the foreman approximately twenty minutes later. After the lunch break ended, Paz remained in the field talking to workers and the foreman,

The Employer and Comite object to the IHE's credibility determinations, claim there is no evidence from which the IHE can conclude that Paz was engaged in campaigning after the lunch break, and argue that the IHE failed to properly apply the Board's standards to the facts. Based upon a review of the IHE's recommended decision, the witnesses' testimony, and the parties' briefs in support of the exceptions, we find the exceptions have merit.

The sole support for the IHE's conclusion that Lawson was prevented from delivering his message to the employees was Lawson's testimony that the foreman and Paz continually shouted him down and that the foreman shortened the lunch period by 10 minutes. Yet Lawson, himself, testified that he remained with the crew and attempted to talk to them during the 20 minute lunch Period.<sup>4/</sup>

He was accompanied by UFW volunteer Cristobal Perez who testified that the workers listened to Lawson and that Lawson was not prevented from delivering his message to the crew.

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<sup>4/</sup> Under all the circumstances present in this case, we are not persuaded that the cutting of this single lunch period by ten minutes would reasonably tend to interfere with this incumbent union's ability to sufficiently wage its campaign and to deliver it's message to the Hiji employees.

Perez's recollection of the foreman's comments also differed from Lawson's.<sup>5/</sup> While Paz's and the foreman's heckling may have been disconcerting to Lawson, who was speaking on behalf of the UPW, the testimony of Perez, a witness whose vested interest would favor the UFW and who would ordinarily be expected to corroborate the testimony of Lawson, must be given considerable weight.

The amount of time Lawson spent in the field talking to the crew also lends support' to the testimony of Perez. It does not seem likely that Lawson would remain in the field for twenty minutes if, as he claims, he was "literally shouted down" every time he attempted to speak. Furthermore, Lawson, himself, testified that the foreman's heckling consisted "mostly of egging on Paz." Perez's testimony that the foreman did not inject himself into the debate between Paz and Lawson cannot be dismissed.

The Employer correctly points out that there is no evidence in the record to support the IHE's finding that Paz continued to campaign with the approval of the foreman after the lunch break ended. There is testimony that Paz remained in the field and talked to some of the workers but there is no evidence regarding the content of those discussions. As the Employer points out, one could as easily conclude that Paz was simply engaged in performing his usual field duties. In the absence of any evidentiary support therefor, we reject the IHE's finding that

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<sup>5/</sup> We agree with the IHE's credibility determinations based upon demeanor. We do not agree with the IHE's characterization of the testimony of Perez as merely a failure to recall the incident to the extent his testimony differed from Lawson's. We perceive the differences in Lawson's and Perez's testimony as differences in the way the incident was perceived by them.

Paz continued to campaign after the lunch break.

The Employer contends that the Board correctly set forth the test to be applied to the instant situation in Sam Andrews' Sons (1978) 4 ALRB No. 59, which held that an election should not be set aside unless it is established that the unlawful conduct of a party prevented employees from receiving information. The Board agrees and finds that the election should not be set aside. The UFW was not prevented from delivering its message to the workers. Furthermore, as the incumbent union, the UFW benefited from a long period of access to the employees. The employees were familiar with the UFW as their bargaining representative. Thus, it cannot reasonably be concluded that this incident was sufficient to have deprived the employees of such knowledge about the facts and issues that it could have reasonably prevented them from exercising their free choice in the election. (William Buak Fruit Company, Inc. (1987) 13 ALRB No. 2.)

Accordingly, we shall, and hereby do, certify the results of the election.

CERTIFICATION OF ELECTION RESULTS

It is hereby certified that a majority of the valid ballots were cast for the Comite 83, Sindicato de Trabajadores Campesinos Libres in the representation election conducted, on November 13, 1986, among the agricultural employees of Hiji Brothers, Inc. and Seaview Growers, Inc. in the State of California and that the Comite 83, Sindicato de Trabajadores Campesinos Libres is hereby certified as the exclusive bargaining

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representative of said employees for the purpose of collective bargaining as defined in Labor Code section 1155.2 ( a ) .

Dated: October 28 , 1988

BEN DAVIDIAN, Chairman<sup>6/</sup>

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

WAYNE R. SMITH, Member

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<sup>6/</sup> The signatures of Board Members in all Board decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

## CASE SUMMARY

Hiji Brothers, Inc. and  
Seaview Growers, Inc.  
(Comite 83, Sindicato de  
Trabajadores Campesinos Libras)

14 ALRB No. 13  
Case No. 86-RD-86-3ALCOX)  
(13 ALRB No. 16)

## BACKGROUND

Following the filing of a rival union petition by the Comite 83, Sindicato de Trabajadores Campesinos Libres (Comite), a representative election was held among the agricultural employees of Hiji Brothers, Inc. and Seaview Growers, Inc. (Hiji). The official Tally of Ballots showed 68 votes for the Comite, 54 votes for the incumbent United Farm Workers of America, AFL-CIO (UFW), 6 votes for No Union, 69 Challenged Ballots, and 2 Void Ballots. As the challenged ballots were sufficient in number to affect the results of the election, the Regional Director (RD) conducted an investigation and issued a report on Challenged Ballots wherein he recommended that 62 of the challenged ballots be sustained and seven of them be overruled. The UFW, the certified incumbent representative, excepted to 50 of the RD's recommendations.

In Comite 83, Sindicato de Trabajadores Campesinos Libres (1987) 13 ALRB No. 16, the Board found that 48 celery harvest employees whom Board agents challenged because their names did not appear on the eligibility list were ineligible to vote as they had not performed some service for Hiji during the pre-petition payroll period and sustained the challenges on that basis. In the absence of any exceptions by any party, the Board adopted pro forma the RD's recommendation that the challenges to 12 ballots be sustained and that 7 be overruled. • The two remaining ballots would be held in abeyance and subject to investigation only if they ultimately proved to be outcome determinative. The Board directed the RD to open and count the overruled ballots and issue a Revised Tally of Ballots. The Revised Tally revealed the following results: Comite, 70; UFW, 59; No Union, 6; and Unresolved, 2.

The Executive Secretary set seven of the UFW's objections for full evidentiary hearing before an Investigative Hearing Examiner (IHE).

## IHE Decision

Following an Investigative Hearing, the IHE recommended that the election be set aside based on his findings that (1) the Comite, or its agents, were engaged in acts of violence and intimidation which interfered with employee free choice, and (2) the Employer and its agents indicated favoritism for the Comite by obstructing access of the UFW representatives prior to the election and thereby interfered with employee free choice. The Employer and Comite filed exceptions.

The Board certified the Comite as the exclusive bargaining representative of the Hiji agricultural employees in the State of California for the purpose of collective bargaining as defined in Labor Code Section 1155.2 ( a ) .

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This Case Summary is furnished for information only and is not an official statement of the case, or the Agricultural Labor Relations Board.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

COMITE 83, SINDICATO de  
TRABAJADORES CAMPESINOS  
LIBRES,

Petitioner,

and

UNITED FARM WORKERS OF  
AMERICA, AFL-CIO,  
Certified Bargaining  
Representative,

and

HIJI BROTHERS, INC. &  
SEAVIEW GROWERS, INC.,

Employer.

Case No. 86-RD-8-SAL(OX)

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Appearances:

Robert P. Roy, Esq.  
Oxnard, California for  
the Employer

Pete Maturino Salinas,  
California for the  
Petitioner

Jose Morales  
Keene, California  
for the Certified Bargaining Representative

Before: Thomas Sobel  
Investigative Hearing Examiner

INVESTIGATIVE HEARING EXAMINER DECISION

THOMAS SOBEL, Investigative Hearing Examiner: This case was heard by me in Oxnard, California in February, 1988. It concerns objections filed by the incumbent union, United Farm Workers of America, AFL-CIO, to a rival union election held upon a petition filed by the Comite' 83, Sindicato de Trabajadores Campesinos 'Libras. The following objections were set for hearing:

1. Whether the Employer, or its agents, assisted, supported and/or promoted Sindicato de Trabajadores Campesinos Libres (3TCL) by any or all of the following conduct:

- a. interfering with UFW access;
- b. allowing STCL representative Remedios Paz to utilize a company vehicle on several occasions which facilitated his taking of access;
- c. allowing STCL representatives to campaign during working hours;
- d. providing STCL representative Francisco Chavez with information regarding the Employer's reply to a UFW leaflet and allowing Francisco Chavez to participate in the noticing and distribution of that reply;
- e. allowing company foremen to remain in the work area while STCL representatives are taking access; and
- f. affording STCL representatives access opportunities which were not available to the UFW on the same basis.

2. Whether STCL, or its agents, interfered with UFW access and, if so, whether such conduct tended to affect the results of the election.

3. Whether STCL, or its agents, through acts of intimidation, harassment, coercion and/or violence, created an atmosphere of fear or coercion rendering a free choice of representative impossible.<sup>1</sup>

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<sup>1</sup>Although the first three objections all involve incidents

4. Whether Board agents failed to open the polls in a timely manner and, if so, whether such conduct tended to affect the results of the election.

5. Whether Board agents failed to allow a voter to cast a second ballot after being informed that the voter's first ballot had been improperly cast and, if so, whether such conduct tended to affect the results of the election.

6. Whether the Board agents failed to explain the challenged ballot procedure to a group of employees and, if so, whether such conduct tended to affect the results of the election.

I

A.

#### OBJECTIONS TO CONDUCT OF THE PARTIES

Before detailing the evidence relating to Objections 1, 2 and 3. I would like to outline what I regard as presently at issue. In support of its allegations concerning Employer interference, the UFW presented evidence at the hearing that Comite representatives were permitted to take access during work time on two occasions in October, 1986. Although the UFW does not rely on either of these incidents in its Post-Hearing Brief as grounds for overturning the election, I am not sure that it intended to waive them.

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(Footnote 1 Continued)

which arose in connection with access-taking, two different sorts of misconduct are alleged in them. Objection 1, including its subdivisions, alleges Employer misconduct in interfering with UFW campaign opportunities or in facilitating the campaign of the Comite. Objections 2 and 3, on the other hand, while locking to some of the same incidents alleged to demonstrate Employer misconduct, allege misconduct on the part of the Comite which would warrant setting aside the election entirely apart from any question of Employer responsibility in connection with them.

whatever UFW's intentions in this regard, I do not believe that the matters proved in connection with these incidents would warrant overturning the election. With respect to one of the incidents (October 16th), Francisco Rendon testified that irrigator sub-foreman Remedies Paz (among whose jobs it was to transport employees from field to field,) passed out pro-Comite leaflets to employees sitting in the company truck after the lunch hour had ended, but before he took them to their next job site. Assuming, without deciding, that, with the lunch hour over, travel time should be considered worktime, the leafleting did not interfere with work and the circumstances under which it took place were neither coercive nor intimidating. Absent any showing of a discriminatory pattern of permitting worktime access to Comite" members while denying it to UFW representatives (a question which I will address later), at the most the UFW has shown a slight amount of "excess access." I believe the incident should be regarded as de minimis. See Mid-State Horticulture Co., (1978) 4 ALRB No. 101; K. K. Ito (1976) 2 ALRB No. 51.

The second incident (October 22nd) was supported by the testimony of Gilberto Rodriguez, who observed three or four Comite members campaigning among a celery transplant crew in the presence of foreman at approximately 12.45 p.m., which Rodriguez assumed was worktime because, in his experience, the half-hour lunch period normally began at noon. Because it was clear from the testimony of a number of witnesses, that the transplant crew did

not always eat at noon, Rodriguez's testimony simply fails to establish that the Comite members were campaigning on work time.

With these matters eliminated, five "access" incidents remain to be examined. I will again briefly defer discussion of these in order to provide some background concerning the origin of Comite 83.

The UFW was certified as the representative of the employees of Hiji Brothers in 1978. Following certification, the UFW obtained contracts in 1978 and in 1983. In connection with these negotiations, UFW organized a ranch committee, initially called the Comite" '78, and eventually the Comite" '83. For reasons that are not clear on the record,<sup>2</sup> a split occurred in the bargaining unit some time prior to a decertification effort which preceded the rival union petition. Whatever happened, the anti-UFW faction simply took over the name of the previous ranch committee, denominating itself the Comite' 83.

With the exception of Ubaldo Ortega, who apparently retired in 1986, and who is considered Director of the Comite, all the members and officers of the Comite' are current employees of the Employer. Francisco Chavez, a tractor driver, is President;

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<sup>2</sup>The Employer argues that the lettuce crew in particular was vigorously anti-UFW and that some of the incidents about which the UFW is objecting are nothing more than spontaneous anti-UFW sentiment among the employees themselves. The extent of such animus among the lettuce crew was disputed by UFW witnesses. Thus, Gilberto Rodriguez testified that only Otilio Sanchez was openly hostile (II:191-192) and although Antonio Diaz's testimony on this point is somewhat confusing, I find he supported Rodriguez's testimony that only some of the members of the lettuce crew, specifically Otilio Sanchez and Faustino Guerras, were hostile to the UFW. Compare, I: 40, line 6 with line 20.

Remedies Paz, an irrigator sub-foreman<sup>3</sup> is Vice-president; Teodoro Lopez is Secretary; Otilio Sanchez, a lettuce picker, is Treasurer; and Luis Ayala is first general member.

1.

The events of October 11, 1986

a.

This incident involves an encounter between UFW organizer Gilberto Rodriguez and Francisco Chavez which took place while Rodriguez was taking access to the lettuce crew before the start of work. Rodriguez and Antonio Diaz (one of the lettuce workers,) testified that Diaz approached Rodriguez to ask him for the telephone number of the union just as Rodriguez entered upon Hiji's property.<sup>4</sup> According to Rodriguez, just as he was giving Diaz the telephone number, Francisco Chavez came from behind him and, spinning him around, pushed him two or three times; challenged him to a fight ("Come on you son-of-a-bitch"); called him names ("son-of-a-bitch"); mocked him ("You're here for your 2%")<sup>5</sup>; and ordered him out of the fields. Rodriguez also recalled hearing Otilio Sanchez in the background shouting at him

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<sup>3</sup>paz is a member of the bargaining unit; there is no contention that he is a supervisor.

<sup>4</sup>Apparently Diaz was upset because he had not been permitted to resume his stitching job and he sought the union's help.

<sup>5</sup>The references to the union's "2%" mean the dues withheld from the employees.

to leave, and deriding the Union for only coming for its dues. Rodriguez said nothing; he was so scared that he got into his car and drove away, followed by Chavez who had mounted his tractor in order to chase Rodriguez out of the fields. Rodriguez was not clear about how many members of the crew witnessed the event. At the beginning of his testimony, he said that 15 workers were in the crew; when asked how many workers were "near" him and Chavez, he said "several" were about 15 feet away. The foremen were about 20 feet away.<sup>6</sup>

Diaz corroborated the main points of Rodriguez's testimony. According to him, Chavez arrived on his tractor as he and Rodriguez were talking. Chavez immediately began pushing Rodriguez, cursing at him (saying something about his mother) and calling him a robber or a bandit. After Rodriguez left, Chavez followed him to the end of the field on his tractor. The entire incident took only a few minutes.

According to Francisco Chavez, he was working when he saw Rodriguez arrive:

By now I needed to talk to him. As an active member of the UFW, I considered the right to do it [sic] since I wanted to complain regarding his conduct toward me. I simply wanted to ask him why every time that we run into each other, he would [give me the finger.]

He further explained:

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<sup>6</sup>At one point, Antonio Diaz testified that the crew was about 200-250 meters away from Chavez and Rodriguez, but I believe he was talking about the distance of the two from the crew at the point when, according to him, Chavez broke off chasing Rodriguez on his tractor.

And I wanted to take the opportunity to ask him whether my two percent, if that was the attitude that the organizers or representatives of the UFW were taking. It's just that by the time I got there, it seemed that he wanted to talk to the people or something. But I confronted him to talk to him.<sup>7</sup>

III: 102-103

At this point, according to Chavez, Rodriguez "began to let go of his vocabulary", telling Chavez "he had nothing to [say] to [Chavez]. . . because [he] belonged to another organization." As Chavez insisted that, as a dues-paying union member, he had a right to talk to Rodriguez, and to complain about Rodriguez's attitude towards him, the entire crew started to yell at Chavez, telling him to make Rodriguez go. Chavez insisted that because he knew he had no right to make Rodriguez leave, he merely pointed out to Rodriguez that the crew did not want him there.

Rodriguez now accused Chavez of poisoning the minds of the workers, and invited Chavez out of the field to settle the matter between them. Chavez could not respond to the challenge because Rodriguez jumped in his car and fled the field a few moments later. Chavez denied chasing Rodriguez in the tractor, explaining that he couldn't have chased Rodriguez if he wanted to since the tractor couldn't go fast enough to chase a car.<sup>8</sup> He

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<sup>7</sup>Chavez later explained that it was not merely his desire to talk to Rodriguez that caused him to come over; he also had to get some materials from the part of the ranch where Rodriguez happened to be.

<sup>8</sup>Rodriguez explained that he didn't drive very fast on the way out of the field because he was on a dirt road (1:181); he also agreed that by the time he turned onto the highway, Chavez had broken off the chase.

denied pushing or cursing Rodriguez, and even denied that Diaz was present to witness the encounter. According to Chavez, Diaz couldn't have been there because Diaz always runs away when he sees him.

Otilio Sanchez corroborated Chavez's account. He remembered the crew asking Chavez to "make Rodriguez go away"; indeed, he was one of those asking Chavez to make Rodriguez go. He recalled Rodriguez's accusing Chavez of making the crew hostile and Chavez, in turn, blaming the crew's hostility on the quality of UFW representation. He remembered Rodriguez's challenging Chavez to a fight and Rodriguez's hurried departure, but he didn't notice whether Chavez followed Rodriguez because there was so much confusion. He did not observe Chavez grab Rodriguez nor did he hear him curse at Rodriguez.

Faustino Guerras testified that Chavez was some distance away (about a hundred feet) spraying the fields when Rodriguez arrived. According to him, Rodriguez was beginning some sort of chant or cheer when Chavez approached him to ask "what Rodriguez wanted", a question which he and other crew members picked up. Like Sanchez, Guerras, too, recalled shouting at Rodriguez not to rob "us" anymore. According to him, a number of "the people" encouraged Francisco "to make" Rodriguez go; others asked Rodriguez what he was doing there and others accused him of not being there when he was needed. According to Guerras, the "majority" of the crew of 18 or 19 was present. Like Sanchez,

Guerras neither observed Chavez assault Rodriguez nor heard Chavez curse at him. He also described Rodriguez's departure:

Q During the discussion between Mr. Rodriguez and Mr. Chavez, did Mr. Rodriguez get into his car and leave?

A Yes, because on one occasion he told him that he would wait for him over there on the freeway, that they would fix their business over there or take care of their business over there.

Q Who told who that they would fix their business over there?

A Mr. Gilberto to Mr. Chavez.

Q And when Mr. Rodriguez left in his car, did Mr. Chavez follow?

A Yes, but it was impossible to catch up with -him because the man left at about 60 miles.

II: 164-165

Q Did you observe Mr. Chavez at any time jump on his tractor and chase Mr. Rodriguez's automobile all the way down the road?

\* \* \*

A Yes, but I don't know whether he was chasing him because his job was that way also.

II: 184

Guerras supported Chavez's and Sanchez's account about Diaz not being present; according to him, Diaz was in his car during the encounter between Chavez and Rodriguez because whenever Diaz sees Chavez he just runs away. Guerras did acknowledge that Diaz had been upset about having his stitching job taken away: he remembered Diaz speaking to him previously about the incident, but he told Diaz not to complain to him because he was not the union representative.

b.

Up to certain point, the UFW and Comite versions are consistent: thus, there is no question that Rodriguez was greeted with hostility and Chavez was instrumental in making him go. However, the parties disagree entirely about the tone of the encounter between the two men, with UFW witnesses contending that Chavez was personally abusive, even violent, and chased Rodriguez from the field; while Comite witnesses, in the main, portray Chavez as a mere spokesman for the entire crew in telling Rodriguez he was not welcome, and, in a variation on the UFWs theme, represent that if anyone were aggressive, it was Rodriguez who challenged Chavez to a fight (although quickly fleeing in order to avoid fighting.) Finally, the credibility of Antonio Diaz is attacked by the consistent assertion that Diaz was not even present during the encounter.

Who is telling the truth?

The Employer argues that Diaz and Rodriguez were incredible witnesses; that Rodriguez's entire testimony was "a mixed bag of half-truths and misrepresentations;" that Diaz, too, was incredible in that he replied "I don't remember" under cross-examination 34 times; that, since he was unclear about almost everything else except Chavez's alleged misconduct, he was an obviously coached witness; that his testimony conflicts with Rodriguez with respect to whether Chavez was supposed to have pushed Rodriguez from the front (Diaz said he did) or from behind

(Rodriguez testified Chavez spun him around); that he failed to remember that Otilio Sanchez was present; and, finally, that his testimony must be suspect because he was the only employee witness the UFW could get to corroborate Rodriguez's story. Finally, the Employer points out that there was no need for Chavez to run Rodriguez out of the lettuce crew since, the crew was hostile to the UFW in the first place.

Taking the commentary on Diaz first, I must first say I had a favorable reaction to Diaz as a witness and I do not weigh any of the factors recited by the Employer against him now. Even on re-reading the transcript, I do not view his testimony as suspiciously selective. That he didn't remember the answer to questions like, "Did you work late the day before the election," or "Every time he [Chavez] pushed him, did he say, 'Where's my money, robber'", or "Did [he] say anything else" counts for little in my mind. Not everything that happens is memorable and that a person would roughly recall the details of a physical confrontation while failing to notice a lot of other things including, for example, whether or not Otilio Sanchez was present, strikes me as perfectly natural. Since I am mystified by the characterization of Diaz's testimony that Chavez pushed Rodriguez on the chest as contradictory of 'Rodriguez's testimony that Chavez spun him around before pushing him on the chest, I will not discuss it further. Nor can I accept the proposition that the testimony of Rodriguez and Diaz must be false since the UFW

could only get Diaz to testify on its behalf; indeed, such a principle would require me also to disregard the testimony of Chavez, Sanchez and Guerras since, under such reasoning, Chavez and Sanchez being members of the Comite, only Guerras would be presumptively disinterested. Although I did not have the same immediate impression of Rodriguez's credibility as I had of Diaz's, I did not find Rodriguez incredible. Accordingly, I am inclined to credit the Rodriguez/Diaz version in the absence of a stronger reason to credit, or a stronger belief in the veracity of the proponents of, the opposing account.

To my mind, the only significant reason to credit the Chavez/Sanchez/Guerras account derives from the attempt to portray the lettuce crew as so hostile towards the UFW that Chavez, as the leader of the anti-UFW Comite, would plausibly be treated by such a crew as the one to make Rodriguez go. Plausible as it is, on the entire record, the Comite account simply does not ring true. In the first place, since, as I have previously noted, UFW witnesses did not concede that the crew was hostile, the credibility of the "Chavez-as-spokesman" theme ultimately depends on the credibility of Chavez, Sanchez and Guerras, and they do not inspire enough confidence as witnesses to overcome my belief in the Rodriguez/Diaz version. Moreover, the circumstances of the encounter as described by Chavez, Chavez's attitude as a witness and the attitude he exhibited towards others in his testimony, and certain details of Guerras' testimony which are more consistent

with the testimony of Rodriguez and Diaz than that of Chavez or Sanchez, combine with my impression of Chavez to convince me that the Rodriguez/Diaz version of events is the more credible one.

Chavez himself explained that he spotted Rodriguez while he was in the fields on his tractor; Guerras, too, put Chavez some hundred feet away from Rodriguez when Rodriguez first entered the field: the important point is that both men admit Chavez had to come some distance in order to get to Rodriguez. Chavez variously described his reasons for coming over as the desire to find out why Rodriguez always "gave him the finger," (or to have Rodriguez explain the attitude he took towards him, which I presume amounts to the same thing) or to obtain some materials. In view of the fact that no one testified that Chavez picked up any materials before he left, I discount this portion of his testimony. Thus, the picture that emerges from Chavez's and Guerras' own testimony is one of Chavez not just coming to see, but going out of his way in order to complain to, Rodriguez about Rodriguez's insulting him. And once Chavez gets there, according to Chavez himself, Rodriguez is so busy talking to workers that Chavez must "confront" Rodriguez in order to get his attention. Although Chavez denied that it was Diaz to whom Rodriguez was talking, his admission that Rodriguez was talking to workers, combined with Guerras<sup>1</sup> admission that Diaz was angry about losing his stitching job, lend support to Rodriguez's and Diaz's testimony that Diaz was talking to Rodriguez about the loss of his

stitching job. Up to this point, then, there is no hint of general worker hostility, but plenty of Chavez's own, and the impression I have of Chavez is not that of a man on a diplomatic mission, but of someone primed to explode.

Skipping momentarily to the end of the incident, Guerras' initial testimony strongly implied, as Rodriguez testified, that Chavez chased Rodriguez from the field. Although Guerras tried to soften this impression when he later testified that Chavez happened to be going Rodriguez's way, I have no confidence in the afterthought. Accordingly, the Comite-men's own testimony concerning both the beginning and the end of the encounter strongly corroborates Rodriguez's and Diaz's version of the incident.

With respect to what happened in between, the clinching elements of my crediting the Rodriguez/Diaz version were provided by my impression of Chavez himself. In his description of Diaz as too cowardly to face him, he displayed a bullying personality that was consistent with the Rodriguez/Diaz version of events, but inconsistent with his own portrayal of himself. Moreover, he testified with a kind of rehearsed coolness that oozed insincerity and which *I* found totally unconvincing. Indeed, so corrosive was my distrust of Chavez that I am inclined to disbelieve Sanchez and Guerras merely because they corroborated him.

Having concluded that Chavez confronted Rodriguez and chased him from the field, it remains to discuss the legal

consequences of his having done so. And the first question that arises in this connection is: Is Chavez's conduct to be attributed to the employer?<sup>9</sup> Under our Act, this question becomes (1) would the employees "reasonably believe that [Chavez] was acting on behalf of the employer or. . . (2) [did] the employer. . . [gain] an illicit benefit from the misconduct and [did it] realistically [have] the ability either to prevent the repetition of such misconduct in the future or to alleviate the deleterious effect of the misconduct on employees' statutory rights." Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal 3rd 307, 322.

The evidence going to the "employee perception" prong of this test arises from Chavez's use of a company vehicle to make contact with Rodriguez and the foreman's failure to intervene<sup>^</sup> in the encounter between the two men. In view of the speed of the encounter, and the familiarity of the crew with Chavez and whom he represented, I am not inclined to view either of these factors as arguing in the employee's minds for employer responsibility.

The second prong of the analysis depends upon my finding that the Employer supported the Comite in the election since,

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<sup>9</sup>It is not clear to me that the UFW is still arguing employer agency: its Post-Hearing Brief does not mention Employer misconduct, but only that of Comite representatives. On the other hand, it is equally unclear that the UFW has abandoned its agency theory since, at one point in connection with another incident, it cites the presence of company foremen as part of the objectionable conduct. Since the Board has set the matter of Employer responsibility for hearing, I feel bound to discuss it.

<sup>10</sup>It is clear from NLRB precedent that the acts of leadmen, even when not supervisors, can lead to the perception of agency. I.A.

absent evidence that the employer wanted the UFW ousted and the Comite victorious in the election, it cannot be said to have derived any illicit benefit from Chavez's strongarm tactics: the mere substitution of one union for another cannot, as an abstract matter, be said to "benefit" the employer.<sup>11</sup> It is unnecessary to address this question at this point, since I believe that, entirely apart from the question of employer responsibility, Chavez's conduct<sup>12</sup> would warrant setting aside the election.

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(Footnote 10 Continued)

M.v. Labor Board (1948) 311 US 72. In this case, however, we are not considering the action of the foreman, but his failure to act. While the failure to act, when action is reasonably required, may constitute a ratification, Rest. Agency 2nd §94, Vista Verde v. Agricultural Labor Relations Board, supra, in view of the brevity of the encounter I am not sure anyone could have been expected to intervene. This episode is distinguishable from the labor camp access incident in Vista Verde, supra, in that in Vista Verde the agency of De Dios was established by a course of conduct in the employer's interest independent of the incident in question and then corroborated by discriminatory action on the part of the agent in connection with the incident.

<sup>11</sup>As stated above, there is another factor in this prong of the Vista Verde analysis: the Employer must be shown not only to have derived an illicit benefit, but also to "realistically have the ability to prevent repetition of [the] misconduct. . . . or to alleviate [its] effect. . . ." I think it is obvious that, if the conduct of Chavez were brought to the Employer's attention, it could, without interfering with employee rights, have made it clear that it would not tolerate any employee conduct aimed at preventing union organizers from taking access to its property. In this case, however, there is no evidence the UFW ever brought the matter to the Employer's attention. Whether, on this record, the foreman's knowledge of the encounter could be imputed to the Employer is a separate question which I do not need to reach in view of my disposition of this matter. See e.g., Pioneer Natural Gas Co. v. NLRB (5th Cir. 1981) 662 F.2d 408.

<sup>12</sup>A brief word about the standard to be applied in analyzing Chavez's conduct. Although the Employer no longer presses the point, at the hearing its Counsel appeared to be arguing that because Chavez was both an employee and a member of the Comite, the standard for non-party conduct should apply to him. I believe

In Phelan and Taylor (1976) 2 ALRB No. 22 the Board set aside in election when, six days before the election, a Teamster organizer assaulted and injured UFW organizers while they were campaigning. The Board stated:

Violence or threats of violence by representatives of the parties is objectionable for several reasons. The acts may improperly influence an employee to vote for the party associated with the violence out of fear of retaliation. Representatives of other parties, including other unions, may be deterred from campaigning • for fear of the safety of their representatives or fear that the employees and others may unwilling get involved in a dangerous or threatening scene. Violent acts may provoke retaliation by counter violence.

If we condone violent acts in the course of election campaign, not only do we risk having an election in an atmosphere not conducive to free choice, but the integrity of the Board's election processes will be impaired.

In this case, a representative of the Teamsters committed unprovoked violence in the presence of workers. We have concluded that in order to insure that the employees have an opportunity to express their choice of a bargaining agent free of intimidation, and in order to deter future threats and attacks upon persons involved in election campaigns, we must set aside the election.

2 ALRB No. 22, p. 4

Although, in Phelan and Taylor the incident took place relatively closer to the election than did the encounter in this case, I do not view that factor as decisive in the Board's

(Footnote 12 Continued)

that, as President of the Comite, Chavez's conduct is that of the Comite. The Board has also acknowledged that its relatively higher tolerance for non-party misconduct is not at play when actual violence is at issue, See T. Ito and Sons (1985) 11 ALRB No. 36, pp. 9-10 and esp. note 11. Under either standard, Chavez's action stands condemned.

analysis. It only remains to point out that although the exact number of workers who saw the incident is not clear, even Guerras indicated that it was a "majority" of the crew. Moreover, even though Rodriguez only testified that "several" workers were nearby, from all the circumstances of the encounter, including the fact that the crew had just emerged from the field, as well as the hostile nature of the episode, it is reasonable to infer that the entire crew would have been aware of it; after all, fights fascinate. Since it would take a majority vote to replace the UFW, and the Comite's majority was only 11 votes, a change of only six votes would change the results of the election. Accordingly, I find the number of workers who viewed the incident was outcome determinative and I conclude that the incident warrants refusing to certify the results of the election.

The Events of November 9, 1986

a.

According to Rodriguez, he arrived at the Teal Club ranch shortly after noon to pass out flyers. When he arrived the crew was already eating. Chavez and Ubaldo Ortega were present and, in the presence of a number of workers, Chavez told him to "get the hell out of [there]," snapping his fingers in a peremptory manner. Several workers said "Let him talk." Although the foreman was present, he did not interfere. Rodriguez gave out a few flyers, but left because Chavez "ran him out."

Chavez recalled a time when Rodriguez arrived while he, Ubaldo Ortega and Otilio Sanchez were campaigning among the

workers in the celery transplant crew at the Teal Club ranch. According to him, he did not speak to Rodriguez at any time during their encounter. The only exchange he recalled was one he overheard between Rodriguez and Sanchez, and this was initiated by Rodriguez's remarking to Sanchez something to the effect that, since Sanchez was not in his own crew, he couldn't make him (Rodriguez) go, Sanchez replied that it was the people who didn't like Rodriguez. Moreover, the exchange took place while Rodriguez was in his van since, according to Chavez, Rodriguez wouldn't alight while he was there. Chavez denied snapping his fingers at Rodriguez.

Sanchez corroborated Chavez's story: Rodriguez arrived as they were leaving, remained in his van, had the exchange with him that Chavez described, after which the three Comity-men left. Ubaldo Ortega recalled that Sanchez and Rodriguez said something to each other, but he had no idea what it might have been. He did not know whether Chavez and Rodriguez said anything to each other.

b.

While, I have no confidence in Chavez as a witness, even crediting Rodriguez's account, the episode has none of the violence of the previous one. Chavez's conduct was rude and overbearing, but not violent or physically intimidating. It may well be that, given his previous experience with Chavez, Rodriguez didn't want to take any chances with Chavez; however, since the

standard by which to judge election misconduct is its tendency to affect voter free choice, I must judge the incident from the employees' point of view, rather than from that of Rodriguez. So far as the nature of the incident is contended to warrant setting aside the election, I will not consider it further.<sup>13</sup>

3. The Events of November 11, 1986

a.

Karl Lawson, Division Manager for the UFW, testified that he went to the company fields on Cawelti Road at about 11:30 in order to visit the celery transplant crew. As he arrived he saw two company officials, (Personnel Manager) Tom Saito and Shogo Kanamori, enter the field to be followed shortly thereafter by Remedies Paz. Paz, Saito and Kanamori spoke briefly before Saito spoke to the foreman, Jose Luis Raveles. (Saito denied speaking to Paz.) Since Lawson was observing this from approximately 100 yards away, he could not say what either of the conversations was about.<sup>14</sup>

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<sup>13</sup>A final word about presence of the foremen. This is the second incident in which a foreman witnessed an incident in which Chavez took it upon himself to control access to the Employer's property, a matter which would ordinarily be within the foreman's area of responsibility. Despite this, I do not believe the Comity's repeated arrogation of a right belonging to the Employer argues for vicarious liability on the part of the Employer. Besides the encounters related in this decision, the UFW took access to the Employer's premises on other occasions without any interference. It seems to me, then, that the Employer did not have a policy of denying access.

<sup>14</sup>Saito testified without contradiction that he went to tell the foreman that Lawson was going to take access.

In any event, Saito and Kanamori left after speaking to the foreman; Paz remained. As soon as Saito and Kanamori left, --at about 11:35 -- the crew broke for lunch. Upon seeing the workers break for lunch, Lawson entered the fields. As he attempted to speak to workers, he was interrupted by both Paz and the foreman. He testified:

A The majority of the workers were seated on the ground around the outside of the bus in a small circle when I got there. Some of them had gone up onto the bus to get their lunches and had come back down and were sitting there eating. And the first thing I did was to pass out a leaflet that we had, and I requested that the foreman leave the area. I asked him -- informed him that it was all right to converse with the employees in private, that he was not allowed to surveil or listen to what we were saying, and I asked him to please leave the area. And he answered me rhetorically, "Well, where else can I eat my lunch?" and made a number of statements denigrating the Union, and he kept talking in a rather loud tone of voice.

Mr. Paz made a number of statements'also, telling people first not to take the leaflet that we were passing out, second saying that the Union was only coming around when it wanted money, only coming around when it wanted something, that why should the workers believe all of the lies the Union has stated over the years, a number of statements like that. He was rather, agitated.

Every time I attempted to say something, I was literally shouted down by him and the foreman.

Q Okay. You just stated that the foreman made a number of statements. Do you recall some of those statements he made?

A Mostly, he was egging on Remedies, saying, "Tell him, Remedies. Tell him. You tell him."

And he also said that the Union was a bunch of liars, look at the type of people the Union sends to represent them, people who are not even farm workers, and who the hell was I to tell him where he could eat his lunch. It was also some discussion about the Union pension plan. Mr. Paz stated that the group he represented, the Comite

83, had made arrangements to transfer the Union pension fund out of the bank it was in and into another bank, that there was nothing to worry about, that their lawyers had assured them that that was going to be done.

Q Do you recall if they said anything else while you were taking to the workers - while you attempted to talk to the workers?

A It was a number of statements along those lines. I persisted there until the lunch hour was unexpectedly cut short.

II:37-38

According to Lawson, the foreman hustled the crew to go back to work after only twenty minutes. (It is undisputed that the lunch period under the contract is supposed to be 30 minutes.) Although Lawson left the field, Paz remained and Lawson observed that he continued to talk to a small group which included the foreman and 4 or 5 crew members. Lawson acknowledged that, as an irrigator sub-foreman, Paz might have occasion to visit the transplant crew to deliver irrigation pipe; however, according to him, Paz did not deliver or lay any pipe on this occasion.

On cross-examination, Lawson recalled that the foreman had not began to eat when he asked him to leave. He also recalled that, besides telling the workers not to pay attention to the union, Paz also said, "They only come when they need something"; that "his group was going to transfer the money from the union pension fund out of the bank. . . into another bank. They had already checked with their lawyers" and "there would be no problem." He could not remember whether Cristobal Perez was present during this incident.

Cristobal Perez, a volunteer for the UFW, was present when these events occurred. He, too, recalled arriving as the crew began to eat at 11:35 and also that the crew was called back to work after only 20 minutes. According to him, one worker even commented that Jose Luis was putting them back to work 10 minutes early. He recalled Lawson asking the foreman to leave because it was against the law to be there, and that the foreman replied he could not because it was his lunch hour. On direct examination, he did not recall Paz saying anything about the pension plan, but on cross-examination he did recall his saying something about it. Although he acknowledged that foreman generally take lunch with the workers, Perez did not see the foreman eat while he and Lawson were there. Perez also testified the workers listened to Lawson who was trying to inform the crew that the election was coming. He testified that Paz did not prevent Lawson from delivering this message.

Remedies Paz recalled that he went to the field on November 11th. According to him, he went to work with the irrigators who were there at the time. Lawson entered the field after the crew had started lunch, when the foreman was already seated among them and eating. Paz ate lunch with his irrigators. As Lawson was talking to the workers, Paz admitted asking him "What was going to happen to our pension plan?" According to Paz, it was Lawson, not he, who said that as long as the workers kept working the pension was transferable, and it was Perez who

criticized the Comite, telling the workers not to believe anything the Comite said. Paz also testified that shortly after Lawson stated the pension plan was transferable, he denied saying any such thing, at which point he interrupted Lawson to point out the contradiction.

b.

I find Remedies Paz to be a totally incredible witness. He started testifying with materials in front of him which had to be removed at my request; later, he refused to answer questions put to him by Counsel for the UFW and had to be told he had an obligation to answer; and throughout his entire testimony he sweated, wiping his hands and mopping his brow. My determination to disregard anything Paz said does not end the matter since Lawson and Perez do not entirely agree about what happened. Since they do agree that the foreman refused to leave and that he cut the lunch hour short, it will be convenient to discuss the implications of these actions before resolving any questions raised by the differences in their testimony.

First, in view of my total disbelief of Paz, there is nothing to contradict Perez's and Lawson's testimony that the foreman cut the lunch hour short and that Paz returned to the fields to campaign and I find, therefore, that both events occurred. Second, I do not find the foreman's refusal to leave merely because he was asked to do so to be objectionable conduct. In Carl Dobler (1986) 11 ALRB No. 37 the Board adopted the following statement of applicable principle:

A finding of illegal surveillance must be based on more than a demonstration that the supervisor was present in the area where he was entitled to be during the time the organizers are endeavoring to converse with workers in the same area.

Milagros Thomas, a UFW organizer testified that while she conversed with a crew member in the parking lot that supervisor, Don Alien was watching her and the crew members. According to her testimony, Alien was seated in his pickup truck 20 feet distance and every time she glanced over her shoulder toward him that she observed him looking in her direction.

However, she also testified that he was already parked in the particular location when she initiated her conversation with the worker.

However, more is needed than a supervisor's nearby presence in a place where he was before the union organizer began her conversation with the worker and that he was looking in the general direction of the two while they conversed to establish that he was parked there for the purpose of surveillance.

11 ALRB No. 37  
ALJD p. 34-35

Similarly, in Ukegawa Farms (1983) 9 ALRB No. 26, the Board affirmed the statement of another ALJ that "illegal surveillance must be based upon more than a showing that a supervisor[or a foreman as the case may be] was in an area where he had a right to be during the time organizers are attempting to speak to workers." Under the teaching of Dobler and Ukegawa, then, I do not believe that the foreman was required to leave the area merely because Lawson asked him to do so.

However, in Ukegawa the board also affirmed the conclusion of the ALJ that when a foreman deliberately placed himself in the midst of the crew the organizer was visiting, the Act was violated. See 9 ALRB No. 16, ALJD p. 64. In light of this,

I must determine first, whether Lawson's testimony that the foreman "injected" himself in the debate between himself and Paz is to be credited over Perez's failure to recall any such incident; and, if it is, I must next, determine whether the conduct would interfere with the free choice of employees.

Ordinarily, the failure of a presumably interested witness such as Perez to testify to such an important element of a party's case would raise questions about the credibility of the witness who contended that such an element existed. In this case, however, my confidence in Lawson as a witness more than outweighs any doubts created by Perez's failure to recall the incident. Lawson appeared to be a careful and punctilious person, much more self-conscious than Perez and, therefore, much more inclined to take note of the exact course of events than was Perez. While Lawson's testimony also reveals that he was particularly inclined to note events for whatever partisan advantage could be found in them, I had no sense that this interest would lead him to make things up out of whole cloth. Accordingly, I credit Lawson that the foreman not only injected himself into Lawson's effort to converse with the crew, but also denigrated the UFW.

While there is no question that an employer (and, therefore, an agent of an employer) may express a preference for one union over another, Morris, *The Developing Labor Law* (2nd Ed) p. 287; Corpus Engineering Corp v. NLRB (1st Cir. 1953) 204 F.2d 422, I believe Lawson's access time was an inappropriate setting

for any such remarks since such strong anti-UFW comments would likely stifle any possibility of exchange between the employees and Lawson. But even if the foreman's entering the fray between Lawson and Paz were not wrong in itself, he surely exceeded the limits of permissible conduct when he sent the employees back to work early and then appeared to condone Paz' s continued campaigning. Ravenswood Electronic Corp. (1977) 232 NLRB 609, 617 Vista Verde v. Agricultural Labor Relations Board (1979) 29 Cal.3d 307. I conclude that such conduct warrants refusing to certify the results of the election.

3.

The Events of November 12, 1988

Two incidents took place on this day: one at lunch time, the other after work.

a.

Lunchtime

1)

Karl Lawson recalled arriving at the Teal Club ranch between 11:30 and 11:45 whereupon he parked a short distance from the field in order to observe what time the crew stopped. As he waited, he saw a car with Francisco Chavez and Otilio Sanchez pull up, followed by Remedies Paz driving the company truck. Although there was still "seven to eight" minutes before the crew broke for lunch, Lawson observed the three men enter the field and begin to talk to workers. Although he was not certain, he

believed they passed out some leaflets. Some five minutes after the three Comite representatives entered the field, the foreman called the lunch break.

Lawson then entered the field bringing some leaflets with him and, in fact, exchanged leaflets with Chavez. Lawson later admitted he was mistaken; that, in fact he exchanged leaflets with Sanchez, not with Chavez. He had leafleted half the crew, and was addressing a small group of workers when Chavez and Sanchez began to shadow him and, apparently, to speak over him.

A Mr. Chavez made a statement to the workers which he repeated several times, not to pay attention to the, quote, "gavachos," that the Union sent them, that no one should pay any attention to the "gavacho,"<sup>15</sup> not to read our lies, and that "Look at the kind of people the Union sends," and he used the - that word a number of times in a rather insulting manner.

\* \* \*

Otilio was also echoing the same kind of statements. He speaks rather forcefully and was on a number of occasions interrupting the statements I was trying to make to workers.

Q While they were interrupting what you were saying to the workers, about how many workers were present?

A I believe that crew had about 18 or 20 workers, could be - could be more.

Q And how long were you there talking to the workers?

A I remained for the full half hour. I should mention

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<sup>15</sup>Lawson testified "gavacho" is slang-pejorative for Anglo. Although Chavez testified the term is not necessarily offensive (11:17), Sanchez denied using "that sort of language", thereby implying that it is offensive.

that there were a couple of groups of workers, that it wasn't just one big group as it had been the day prior. There was a couple of scattered groups, and as I would go to one group, either Mr. Sanchez or Mr. Chavez would follow me to interject or interrupt, and there must have been three or four separate little groups of workers I went to.

Q Okay. Did you hear Mr. Chavez talk to the workers at all?

A Yes, I did.

Q And do you recall what he said?

A At one point he - well, I've already stated some of the things he said, which were things he repeated throughout the period of time, but one theme that he stated, he made, at one point he stood beside the bus and in a very loud voice made a small speech about how the workers had received a leaflet from the Union which accused him of working with the management of the Egg City Company in order to fight the UFW Union. And Mr. Chavez stated that that afternoon the workers would be receiving a quote, "very pretty letter," unquote, which would explain the truth of the situation, which would explain what really happened between him and the Egg City strikers.

And' he said they would be receiving this very pretty letter that afternoon. And he spoke about that quite a bit.

II:44-45

Lawson concluded that the leaflet Chavez was referring to was UFW 2 because, ( 1 ) he was given it that afternoon by Ascencion Garcia and ( 2 ) it matches Chavez's description of the letter that he said would be distributed. UFW 2 was produced by the company; indeed, Counsel for Respondent admitted he wrote it. On its face, it is couched in the form of a reply to UFW charges that the Comite was conspiring with the Employer to reduce wages and benefits, although it goes on to attack the UFW<sup>1</sup>'s conduct towards another employer .

In any event, Chavez, Sanchez and Lawson left the field at the same time after the lunch break. However, when Lawson returned to his car he observed Chavez and Sanchez again enter the field and talk to a few people. Though he was not certain, Lawson thought he might have talked to the foreman at this time. Lawson did not describe anything that Remedies Paz was doing at this moment.

Francisco Chavez recalled visiting the thin and hoe crew on November 12 during his lunch hour. According to him, he was present when Lawson arrived and he didn't interfere with him; rather, it was the crew which didn't want to talk to Lawson. In fact, according to Chavez, an employee named Jesus Arreola asked Lawson to read aloud a letter complaining about UFW representation. According to Chavez, Arreola wanted Lawson to read the letter because Arreola "didn't have the guts to confront personally."

Chavez further testified he and Lawson exchanged greetings and Lawson congratulated him because he knew the Comite was going to win. Chavez did acknowledge, that he stayed close to Lawson because he was more interested in hearing what Lawson had to say than he was in talking to the workers. Chavez denied having any flyers with him and, therefore, having anything to exchange; moreover, he did not have UFW 2 at this time and would not receive it until later that day. He denied calling Lawson a "gavacho" and he denied returning to the field.

Sanchez recalled Chavez standing near Lawson when Arreola asked Lawson to read the letter. He did not recall Lawson reading it aloud; but he remembered Lawson telling Arreola that if he were not happy he could go wherever he wanted. Although Sanchez stopped paying attention to Lawson after the encounter with Arreola, he did not recall Chavez calling Lawson a gavacho or otherwise insulting him or promising to deliver any leaflet.

b.

The Employer argues that Lawson's testimony is incredible for a number of reasons which, because of my disposition of the matter, I will not trouble to detail. With the exception of the question of the leaflet, which the Executive Secretary specifically set for hearing and which I will discuss separately, even crediting Lawson, I do not believe anything Chavez said warrants overturning the election. Unlike the previous incident, there is no hint of employer support and no question of Comite violence in this incident. Even if, as Lawson testified, Chavez and Sanchez entered the fields before noon or stayed afterwards, Lawson's failure to attempt to enter the fields at the same times leaves me without any convincing proof of discrimination. Moreover, there is no showing that the Comity-men were on their worktime. At the most, the testimony points to excess access which, by itself, is not grounds to overturn an election.

This leads me to the question of whether the Employer provided Chavez with the leaflet and, if it did so, whether that

would affect the outcome of the election. As noted, UFW 2 purports to answer a UFW leaflet which alleged that Chavez and Rob Roy, counsel for the employer in this case, were conspiring to reduce<sup>16</sup> the pay and other benefits of Hiji employees. The leaflet relates that Rob Roy did ask Chavez to submit a declaration in NLRB proceedings involving another employer and that he did so. The letter also purports to relate the course of various other legal proceedings involving either the other employer alone or the other employer and the UFW, and indicts the UFW<sup>1</sup>'s conduct in connection with them. I just cannot see that a denial of collusion can be treated as evidence of it even if the letter were given to Chavez before it was given to everyone else.

2.

After Work

Antonio Diaz testified that Gilberto Rodriguez and Ascencion ("Chon") Garcia came to his crew between 4:30 and 5:00. They waited at the edge of the field as the crew continued to work. As they waited, Paz arrived and approached Faustino Guerras remarking out loud that the people from the union were there "so they can give us 2 percent." When the crew finished work, Gilberto and Chon approached the crew along the edge of the field and asked to talk to the crew. Diaz continued:

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<sup>16</sup>The leaflet says "rebucir": I believe it probably meant to say "rebucir", to reduce.

"And they didn't let them. They all crowded around saying things to them.

Q What kind of things?

A Like "robbers" saying, "We only get 2 percent," and saying other things

Q Okay, then what happened?

A Well, when they wanted to talk to us, Francisco Chavez, Remedies, and Otilio Sanchez and Mr. Guerras, they all lunged at him.

Q At who?

A To Chon and Gilberto

Most of the crew of 19 was there; perhaps two or three workers were missing. The two foremen of the crew, Santos Andrade and Jose Lemus were also present. The UFW organizers left. On cross-examination, Diaz explained that the only crew members who "went after" the UFW organizers were Otilio Sanchez and Faustino Guerras.

Ascencion Garcia testified that Paz distributed flyers for about half an hour among the crew while the UFW representatives waited for work to end, all the while denigrating the UFW, calling it a bunch of robbers and gavachos. When work ended, and Garcia attempted to speak to the workers emerging from the field, Otilio Sanchez wouldn't let them talk to anybody saying, "You're not going to do anything here because what you need is to make an example." He also said, "We are not going to be fattening pigs like you." Although Garcia testified that Sanchez had a knife in his hand which he brandished as he emerged

from the field, at some point he put it away although he continued to make threatening gestures towards Garcia, resorting now to smacking his fist in his hand, all the while calling Garcia a pig and saying the crew was never going to pay the 2 percent.

When Chavez arrived, he confronted Garcia belly to belly, called him an "Arturo Durazo " (a corrupt Mexican political figure) and tore the UPW flyers out of his hand, cursing at him as he did so. Chavez then took some fliers from Paz, remarking, as he did so, that this was the last letter the workers would receive. He gave a copy to Garcia while Paz started to distribute the rest.

Gilberto Rodriguez testified he arrived at the field at around 4:00 with Ascencion Garcia and waited until the crew finished work. He recalled Paz being inside the field talking to workers and passing out leaflets while they waited. The foreman were nearby. As workers emerged from the field, he and Garcia were on opposite sides of the truck. He heard loud voices and a noise, which he recognized as the sound of hands hitting together, coming from the other side of the truck. Wondering what was happening to Garcia, he went around to the other side of the truck, where he saw Otilio and Garcia. Rodriguez hustled Garcia out of the fields.

Chavez testified that he was driving by Victoria and Teal ranch on that day when he observed the lettuce crew about to finish working. He stopped because he was happy about a letter

his foreman had given him which replied to the UFW leaflets. He observed Rodriguez and Garcia waiting in their van for the crew to finish. As the crew emerged from the field, a number of the workers began yelling at him asking him to make them go. Faustino Guerras was gesturing and referring to Garcia, saying he could buy him like a fat pig. Otilio Sanchez was present, but neither he nor any other worker waved a knife. Indeed, he scoffed at the testimony of Sanchez's using deadly force. As Garcia started to hand out flyers, a worker named Julio threw one back at him and no one would take anything. Chavez further asserted that Garcia grabbed the letter from Chavez's hands and took it away with him.

Sanchez recalled the incident this way: the UFW people arrived at around 4:00 and waited at the edge of the field for work to end. The crew came out at around 5:00. Sometime before work ended, Paz arrived and went into the fields to pack lettuce for the crew. Chavez arrived sometime later. At the end of work as the crew was coming out Faustino Guerras said "Here they come to give us some [beer] in payment for the 2%." When Garcia asked "Oh, you want some beer," Guerras refused, saying, "Here I have some money to buy the beer and to buy you as a fat pig." After that Garcia and Guerras started arguing and the majority of the crew started yelling for Garcia to leave. Sanchez says his knife was in his pocket and he neither threatened Garcia with it, nor displayed it. Guerras essentially corroborated the story of Chavez and Sanchez, adding some details that do not bear on my disposition of this matter.

While I would ordinarily be disinclined to credit Chavez and Sanchez, in this matter, the UFW version suffers from a similar difficulty: my severe mistrust of Garcia, who was simply not believable. Although I generally credit Rodriguez, it is interesting that, except for hearing sounds from behind the truck, he does not claim to have witnessed an attack on Garcia. This leaves Diaz's testimony as the only support for that of Garcia: despite Diaz's use of the word "lunge", it is not clear to me that he is describing anything more than the Comite-men suddenly surrounding Garcia and shouting him down. I find that the UFW failed to prove any threats or violence in connection with this incident.

This leaves only the questions of Remedies Paz's campaigning on worktime and his use of a company vehicle. Although I do not believe Paz was present to pack lettuce, the trouble with any argument concerning employer favoritism on this record is that because the UFW representatives chose to stay within the limits of the access regulation, it is not clear that the Employer had a policy of discriminatorily providing campaign opportunities to the Comite which it denied to the UFW.

Although I have already concluded that the incidents of October 11 and November 11, considered alone, do not warrant overturning the election, there remains to consider whether Paz's use of the company vehicle to go from field to field in order campaign warrants overturning the election. There are cases in

which an employee's use of company vehicles for union purposes has been held to evidence illegal assistance and domination, See Milgo Undergarment Co. (1953) 106 NLRB 767; Ohio Power Company (1939) 12 NLRB 6, enf'd in part, part the Ohio Power Company v. NLRB (6th Cir. 1940) 115 F.2d 839. This is a close question; however, in view of Paz's previous use of the vehicle and the lack of any evidence that the Employer, or its supervisors (as opposed to foreman), knew of his use of the vehicle for campaign purposes, I do not find that it evidences either agency or employer support.

## II

### OBJECTIONS RELATING TO THE CONDUCT OF THE ELECTION

#### 1.

Board agent Jack Matalka testified that the evening before the election, he and fellow agent Harry Martin discussed the mechanics of voting with Regional Director Tim Foote. Because the voting was to take place at multiple sites, the three men discussed how to prevent duplicate voting. The Board's Representation Case Manual suggests two procedures:

(1) dividing the eligibility list between the different sites so that a voter could vote at the one site where his or her name appeared on the list; or in the event the eligibility list could not be broken down, (2) requiring voters at the secondary sites to vote challenged:

Where the work locations are extremely distant from each other or the workday is unusually short, simultaneous voting sessions may be appropriate. In this circumstance, voters should be assigned to vote at particular locations, usually determined by work location, which have been designated in the Notice and

Direction of Election. The voter list should be broken down by location; no voter's name should appear on lists at more than one polling place. If a voter appears at a location where his/her name is not on the list, s/he should vote there by challenged ballot, and should not be sent to his/her "scheduled" location.

If the voter list cannot be broken down, it should be maintained at the location where the largest number of employees is expected. Voters at other locations will have to vote by challenged ballots, which can be resolved prior to the ballot count to ensure that no one voted twice. In such a situation, the board agent at a "challenged ballot" location should have a copy of the employee list to use for identification purposes only. Ballots from all locations should be commingled and counted together.

Discuss the procedure to be followed during simultaneous voting sessions thoroughly at the pre-election conference.

Election Manual, Section 2-6710<sup>17</sup>

Before the polls opened at Colonia the next morning, Matalka told union representative Karl Lawson that the voters at that site would be challenged. Both men agree that Matalka explained the purpose behind conducting voting in this manner, and that Lawson agreed to the procedure and asked only that the workers be informed of the reason for it. Lawson emphasized that his agreement was grudgingly given; according to him, he told Matalka it was not a good idea because it violated the secrecy of the ballot, adding "if that's what you have decided to do, make sure you tell the workers what you're doing and why." Matalka testified that pursuant to Lawson's request, he asked Beto

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<sup>17</sup>The national Board utilizes similar procedures when multiple polling sites are used. NLRB Case Handling Manual, (Part Two) Representation Proceedings section 11334. I should point out that the recommendation on the Election Manual quoted above to discuss the procedure at the pre-election conference refers to discussing

Mestas, another Board agent and one who spoke Spanish, to explain the procedure to those waiting in line to vote. Since Matalca does not speak Spanish, he could not testify that Mestas, in fact, so advised anyone. Although some workers testified they received instructions about the mechanics of voting, including the challenge procedure - no one testified about receiving any explanation about why they were voting challenged at the Colonia site.

Jorge Vargas, another Spanish-speaking Board agent, testified he was not told to explain the purpose behind the challenge procedure and did not do so. Antonio Diaz, who voted at the Colonia site, testified he did not receive any explanation about why his vote was being placed in an envelope bearing his name. He testified that not only he, but also a number of workers (only one of whom he named) felt the procedure jeopardized the secrecy of the ballot - since, he explained, either the company or members of the Comites 83 would be present when the ballots were counted. (In fact, Otilio Sanchez was present at the Tally.) Karl Lawson testified that a dozen or more workers expressed concern to him after they voted about the appearance of their names on the challenge envelopes and that perhaps 25 to 30 more

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(Footnote 17 Continued)

it with the parties, not the voters. There is a separate section of the Election Manual which instructs Board agents to advise voters "what it means to be challenged." Election Manual 2-6600 However, deviations from the Manual are not necessarily grounds to overturn an election.

workers expressed similar concerns in the weeks after the election.

It is clear the Board agents utilized a standard procedure in voting the workers challenged and the UFW does not contend that the agent's abused their discretion in choosing the procedures. Rather, the crux of the objection is that no one explained to the voters why their names were being written on the outside of the challenged envelopes. Although, I find that no one did explain the reason for the challenges, I am not persuaded that such an oversight requires overturning the election.

The UFW cites no cases supporting its contention that a voter's - even an outcome determinative number of voters'-feeling that the secrecy of the ballot was violated has a tendency to affect the outcome of the election and I have found none. I have found cases in which a voter's having reason to believe that someone could see how his ballot was marked warranted overturning an election, Royal Lumber Co. (1957) 118 NLRB 1015, Imperial Reed & Rattan Furniture Co. (1957) 118 NLRB 911, and a case in which, even though a voter's marked ballot was visible, the Board refused to overturn the election on the grounds that no one was aware of the lack of secrecy, thus implying that voter perception is important, Sewell Plastics Inc. (1979) 241 NLRB 887; Crown Cork & Seal Company, Inc. v. NLRB 10th Cir. (1981) 659 F. 2d 127, but, essential to the reasoning on all these cases, was the possibility that the choice of the voter could actually be seen.

In this case there is simply a misunderstanding about how the challenge procedure works for, of course, once the challenge is resolved the ballot is commingled with the others and, absent unusual circumstances, the identity of the person is not known.

I recommend this objection be dismissed.

2.

A second UFW objection concerning the mechanics of voting also arose at the Colonia site when an employee, Luis Rodriguez, wrote his name on the ballot. After he sealed his ballot in the challenge envelope and placed it in the ballot box, he told a UFW observer what he had done. The observer promptly asked for another ballot. The request was denied. There is no evidence that the Board agents were responsible in any way for Rodriguez's signing the ballot; he simply made a mistake.

The Election Manual specifically permits Board agents to give another ballot to any voter who returns a spoiled but I understand the provision to refer to situations prior to the ballot's having been placed in the ballot box, Election Manual 2-6620. On the other hand, the Board has endorsed permitting a voter to cast another ballot in similar circumstances. Sam Andrews (1978) 2 ALRB No. 28.

That Board agents did not abuse their discretion permitting a voter to cast another ballot in the Sam Andrews election, does not mean they were required to do so in this case. I recommend this objection be dismissed.

3.

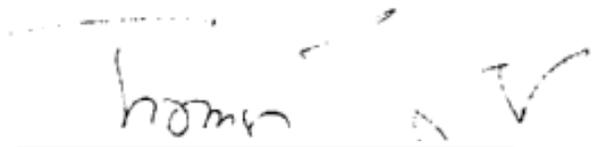
The final objection relating to voting procedures concerns another site, the company's nursery at Seaview. Although the polls at Seaview were supposed to open at 8:30, the Board agents were delayed at another site, and did not arrive at Seaview until after 9:00. Karl Lawson testified that he was present at the Seaview site at 8:30 when a woman arrived prepared to vote. She waited for 10-15 minutes but, despite being urged to stay by him, did not wait for the polls to open. Although the Board has overturned elections when the late opening of polls disenfranchised an outcome determinative number of votes, (See Hatanaka & Ota (1975) 1 ALRB No. 7, ) the single vote in this case is not outcome determinative. I recommend this objection be dismissed.

III

CONCLUSION

On the basis of the findings made in connection with Part I of the Decision, I recommend that the Board refuse to certify the results of the election and that the Petition be dismissed.

DATE: June 27, 1988



THOMAS SOBEL  
Investigative Hearing Examiner