

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

|                      |   |                    |
|----------------------|---|--------------------|
| TENNECO WEST, INC.,  | ) |                    |
|                      | ) |                    |
| Employer             | ) | Case No. 77-RC-6-C |
|                      | ) |                    |
| and                  | ) |                    |
|                      | ) |                    |
| UNITED FARM WORKERS  | ) | 5 ALRB No. 27      |
| OF AMERICA, AFL-CIO, | ) |                    |
|                      | ) |                    |
| Petitioner.          | ) |                    |
|                      | ) |                    |

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DECISION AND CERTIFICATION OF REPRESENTATIVE

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

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), on April 15, 1977, a secret ballot election, was conducted on April 21, 1977, among the agricultural employees of Tenneco West, Inc., in the Coachella Valley of the State of California. The first tally of ballots showed the following results:<sup>1/</sup>

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<sup>1/</sup>As noted by the Board in Tenneco West, Inc., 3 ALRB No. 92 (1977), the first tally of ballots should have reflected only 99 challenged ballots and a total of 396 ballots cast because Andres Gallegos, whose name was included on the list of challenged ballots, failed to follow instructions and inserted his ballot into the ballot box without using the challenged ballot envelope provide to him, resulting in his ballot being counted. No prejudice resulted from Gallegos' mistake, as we found him to be an eligible voter. There were two errors, however, in the Board's Decision: 1) the name of Rafael Cortez was erroneously included in Schedule D, and 2) the name of Honorario Hernandez was mistakenly omitted from Schedule D. Contrary to the finding of the Investigative Hearing Examiner (IHE) James E. Flynn, the Board's schedules, as corrected, should contain 99, and not 98, names.

|                         |            |
|-------------------------|------------|
| UFW.....                | 177        |
| No Union.....           | 120        |
| Challenged Ballots..... | <u>100</u> |
| Total                   | 397        |

Pursuant to the Board's Decision in Tenneco West, Inc., supra, a second tally of ballots was issued on-December 21, 1977, which showed the following results:<sup>2/</sup>

|                                      |     |
|--------------------------------------|-----|
| UFW.....                             | 196 |
| No Union.....                        | 174 |
| Challenged Ballots (Unresolved)..... | 20  |
| Total                                | 390 |

Pursuant to the Executive Secretary's Order of January 12, 1978, a third tally of ballots was issued on January 12, 1978,

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<sup>2/</sup> In our Decision in Tenneco West, Inc., supra, we directed that the ballots of the 77 employees listed in Schedules A and D be opened and counted. As indicated by the report on second tally of Ballots, only 73 challenged ballots were opened and counted, 19 of which were cast for the UFW and 54 for No Union. The other four challenged ballots were not opened at the second tally because of the Employer's objection that the spelling of these names on the list was different from the spelling on the challenge envelopes. The IHE found, erroneously, that there were only three ballots not "counted due to variances in spelling. At the second tally, the ballot of Honorario Hernandez was not counted because his name had " been mistakenly omitted from Schedule D and the ballot of Rafael Cortez was erroneously counted because his name had been mistakenly included in Schedule D. The ballot of Hernandez has not been ordered opened and counted because it is not outcome-determinative. Thus, the 20 unresolved challenged ballots consisted of 15 names listed in Schedule C (excluding Rafael Cortez, whose ballot had been counted), two names from Schedule A and two names from Schedule D not counted due to spelling variances and Honorario Hernandez, who had been mistakenly excluded from Schedule D.

which, showed the following results:<sup>3/</sup>

|                                      |           |
|--------------------------------------|-----------|
| UFW.....                             | 198       |
| No Union.....                        | 175       |
| Challenged Ballots (Unresolved)..... | <u>17</u> |
| Total                                | 390       |

The 17 remaining uncounted challenged ballots are not sufficient in number to affect the results of the election.<sup>4/</sup>

On July 7, 1978, after a hearing held on May 2, 3, 4, and 5, 1978, IHE James E. Flynn issued his decision, in which he recommended that the Employer's objections to the conduct of the election be dismissed and that the UFW be certified as the collective bargaining representative of the agricultural employees of the Employer. The Employer filed timely exceptions<sup>5/</sup> to the

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<sup>3/</sup>The Executive Secretary ordered that three of the four ballots, not opened due to the Employer's name-variance objections at the second tally, be opened and counted; two of these votes were cast for the UFW and one vote was cast for No Union. \_\_\_\_\_

<sup>4/</sup>Assuming that all 17 unresolved challenged ballots 15 from Schedule C, Ignacio De La Torre from Schedule D, and the one resolved and unopened challenged Ballot (Honorario Hernandez) were cast for No Union, that Rafael Cortez cast his ballot for the UFW, and that the challenged to Cortez' ballot would have been sustained upon investigation and review, the UFW total vote would be 197 and the No Union vote would be 192, giving the UFW a minimum possible margin of victory of five votes.

<sup>5/</sup>Employer objects to the IHE making recommendations in "connection with the hearing he conducted, claiming that the IHE is forbidden "to make recommendations by Section 115.6. 3 of the Act. As we indicated in Bee and Bee Produce, Inc. , 3 ALRB No. 84 (1977) , Section 1156.3 merely prohibits the making of recommendations by an employee or official of a Regional Office who is serving as an investigative hearing examiner. The IHE herein was not an officer or employee of any Regional Office, and he properly made recommendations as authorized by 8 Cal. Admin. Code 20370 (f). Employees and officers of Regional Officers are prohibited from serving as investigative hearing examiners by 8 Cal. Admin. Code 20370 (a).

IHE's Decision and a brief in support of its exceptions. The UFW filed a brief in opposition to the Employer's exceptions.

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

#### Challenged Ballot Security

The Employer excepts to the IHE's recommendation that its objection to the conduct of the election, based on the security of the unresolved challenged ballots, be dismissed. It contends that the Board Agents' failure to comply with the terms of the Representation Case Manual and the circumstances under which the ballots were kept require the setting aside of the representation election. It is well settled that the failure to comply with the policy set forth in the Representation Case Manual is not, by itself, enough to warrant setting aside an election. Samuel S. Vener Company, 1 ALRB No. 10 (1975) ; Harden Farms of California, "Inc., 2 ALRB No. 30 (1976); Bee and Bee Produce, Inc., supra. See also Polymers, Inc., 174 NLRB 282 (1969). Rather, in reviewing objections based on ballot security, we have inquired whether there was actual ballot tampering or a substantial possibility that such tampering took place. California Coastal Farms, 2 ALRB No. 26 (1976). Having carefully examined the record herein, we find no evidence of actual tampering and no evidence of a substantial or a reasonable possibility that such tampering took place.

The cases relied upon by the Employer are inapposite,

There is no evidence that, as in New York Telephone, 109 NLRB 788 (1954) , the ballots were ever lost. Nor is there any evidence, as in Hook Drugs , Inc., 117 NLRB 846 (1957) and Austill Waxed Paper Co., 169 NLRB 1109 (1968), that ballots were left accessible and unattended in the presence of interested parties. Finally, there is no evidence that the ballots were ever transported by a Board Agent in the company of an interested party under- conditions permitting access to the ballots by the party, as in Tidelands , Marine Services , Inc., 116 NLRB 1222 (1956), or that a Board Agent used a party's premises to "freshen up" while having custody of the ballots , as in Delta Drilling Co. v NLRB, 406 F.2d 109, 70 LRRM 2272 (5th Cir. 1969) .

There is no evidence that anyone other than Board Agents had access to the unresolved challenged ballots. We do not view the one or two isolated and short intervals in which Board Agent Viniegra may have left the ballots unattended in his partitioned while he ate lunch to have created a substantial or reasonable possibility of tampering. The possibility that an interested party could gain access to the Board Agent's Office at the precise time the challenged-ballot envelopes were left unattended, unseal the envelopes, change a sufficient, number of ballots to affect the outcome without knowing which-ballots were to be counted, reseal the envelopes, and then depart, all without detection or evidence of tampering, is remote indeed.

The Employer argues that the chain of custody of the challenged ballots is not sufficiently established to rule out the reasonable or substantial possibility of tampering. We

disagree. We are satisfied that the location and security of the ballots is sufficiently accounted for during the time period at issue.<sup>6/</sup> Moreover, the Petitioner did not have the burden, as apparently assumed by the Employer, to establish a chain of custody. The Employer was given more than an ample opportunity to examine Board personnel regarding custody of the ballots,, and the Employer will not be permitted to argue that the location of the ballots was not accounted for fully during the month of July 1978, when it did not attempt to examine the Board Agent whom the record indicates was in custody during that period, Elias Munoz, then officer-in-charge of the Coachella Field-Office. Accordingly, we hereby dismiss the Employer's post-election objections which are premised on the security of the unresolved challenged ballots.

#### Voter Eligibility

We agree with the IHE that it is more likely than not that the drunk man accompanied by the man with a bad eye and the woman with the small boy were two eligible voters, Andres Gallegos and Rosa Medina respectively. We accept the IHE's resolution of the conflicting testimony given on this issue. Additionally,

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<sup>6/</sup>Board Agent Ben Romo did not testify, as found by the IHE, that the ballots were in the locked cabinet at the ALRB office when he became officer-in-charge of the Coachella Field Office in mid-August and was given keys to the cabinet by Munoz. Rather, Romo testified that this occurred at the end of July, 20 to 30 days after Viniegra left in early July. Viniegra testified that he gave the ballots to Elias Munoz on July 8th, when Munoz was officer-in-charge- of the office. We find Rome's testimony as to-the time of his first view of the ballots to be consistent and credible. Thus, the record indicates that the ballots were in Munoz' custody during the three or four week period in July with which the Employer is principally concerned.

given the UFW's minimum margin of victory of five votes, the ballots of two ineligible voters could not have affected the results of the election.

CERTIFICATION OF REPRESENTATIVES

It is hereby certified that a majority of the valid votes have 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 Tenneco West, Inc., in the Coachella.

Valley of the State of California, for purposes of- collective bargaining, as defined in Labor Code Section 115 5. 2 (a)., concerning employees' wages, working hours, and other terms and conditions of employment.

Dated: April 16, 1979

GERALD A, BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Tenneco West, Inc.

5 ALRB No. 27  
Case No. 77-RC-6-C

THE DECISION

In its post-election objections, the Employer contended that: (1) ineligible voters were permitted to vote, (2) eligible voters were not permitted to vote, (3) six challenged ballots were improperly opened, (4) the unresolved ballots were not in the original sealed box at the second tally of ballots. At the hearing the Employer was also permitted to litigate the general security afforded the unresolved challenged ballots between the first and second tallies on the basis of its ballot box security contention.

The Investigative Hearing Examiner (IHE) found that: (1) the alleged ineligible voters were specified persons who were in fact eligible to vote, (2) the alleged eligible voters not permitted to vote were not prevented from casting challenged ballots, (3) challenged ballots were not prematurely opened outside the presence of the parties as contended by the Employer, and (4) there was no substantial or reasonable possibility of tampering with the unresolved challenged ballots between the first and second tallies, although the Board Agent's use of challenged ballot envelopes to conduct his investigation rendered the security measures less than optimal.

BOARD DECISION

The Employer excepted to the IHE's recommendation that its objections, based on the voting of ineligible employees and the security of unresolved challenged ballots, be dismissed. Regarding the alleged ineligible voters, the Board found that the circumstances of the case made it probable that the voters in question were specified eligible voters, and that the ballots of these two voters could not have affected the results of the election in light of the UFW's minimum guaranteed margin of victory of five votes. With respect to the security of the ballots, the Board essentially affirmed the findings and conclusions of the IHE. The Board noted that the Board Agent's failure to comply with the "terms of the Representation Case Manual by using the unresolved challenged ballot envelopes which remained sealed, to conduct his investigation does not, by itself warrant the setting aside of the election. Citing California Coastal Farms, 2 ALRB No. 26 (1976), the Board indicated that its inquiry must focus on whether there was actual tampering or a substantial possibility that such tampering took place, and found that there was neither a substantial nor a reasonable possibility that tampering took place. It noted that the unresolved challenged ballots were in the custody of Board Agents, with only insignificant exceptions that the envelopes remained sealed, that no evidence indicating tampering, was offered and that the ballots were never left unattended in the presence of interested parties. The Board rejected the Employer's contention that the Petitioner had the burden of establishing a chain of custody of the ballots, but also found that the location and security of the ballots was adequately accounted for during the time periods at issue. Finally, the Board rejected the Employer's argument that the IHE exceeded his statutory authority by making recommendations regarding the disposition of the case.

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

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

TENNECO WEST, INC.,  
Employer,

Case No. 77-RC-6-C

and

UNITED FARM WORKERS  
OF AMERICA, AFL-CIO,  
Petitioner.

John Zenor, Seyfarth, Shaw,  
Fairweather and Geraldson for the Employer.

James Rutkowski and Jeffrey Sweetland  
for the United Farm Workers of America, AFL-CIO,

INITIAL DECISION

STATEMENT OF CASE

JAMES E. FLYNN, Investigative Hearing Examiner: This case was heard before me on May 2, 3, 4, and 5, 1978 in Indio, California. The United Farm Workers of America, AFL-CIO, (hereafter the "UFW") filed a certification petition on April 15, 1977.<sup>1/</sup> Pursuant to; direction and notice of election, the Agricultural Labor Relations Board (hereafter the "Board") conducted an election on

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<sup>1/</sup> Unless otherwise specified, all dates refer to 1977,

April 21 among all employees of Tenneco West, Inc. (hereafter the "Employer" or "Tenneco West") in the Coachella Valley. The tally of ballots was as follows:<sup>2/</sup>

|                       |     |
|-----------------------|-----|
| UFW                   | 177 |
| No union              | 120 |
| Unresolved challenges | 100 |
| Total                 | 397 |
| Void                  | 0   |

Because the number of unresolved challenges were sufficient to affect the outcome of the election, the Acting Regional Director of the San Diego Region, Coachella Field Office, conducted an investigation and issued a report on challenged ballots on July 8.

In Tenneco West, Inc., 3 ALRB No. 92 (1977), the Board resolved a majority of the challenged ballots and directed a second tally which took place on December 21.<sup>3/</sup>

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2/ In its subsequent Partial Decision on Challenged Tenneco West, Inc., 3 ALRB No. 92 (1977), the Board noted that Andres Gallegos had been challenged, but had failed to place his ballot in the challenge envelope before placing it in the ballot box. The Gallegos ballot was counted twice on the first tally of ballots, once as an unresolved challenge and again as a valid vote cast for either the UFW or no union. Based on the challenged ballot report and exceptions the Board found that Gallegos was eligible, consequently the error is not prejudicial. The Board further noted that the correct number of unresolved challenged ballots was therefore, 99 rather than 100, and that the total number of ballots was 396, rather than 397.

3/ The Board-decision erroneously listed the ballot of Rafael Cortez as resolved and to be counted, and as unresolved and not to be counted. The Board decision also erroneously failed to include the ballot of Honorario Hernandez as resolved and to be counted. Hernandez was listed on the official list of challenges and was listed in the challenged ballot report as a Cal-Date Co. employee who was challenged solely on the ground that he was not in the appropriate unit. The Board's partial decision on challenged ballots found that Hernandez and other Cal-Date Co. employees were eligible and ordered their ballots counted; however, the Board inadvertently excluded Hernandez's name, from its list of ballots to be counted. As a result of the errors on Cortez and Hernandez, the list of resolved and unresolved challenges accompanying the Board's decision should contain 98 names, rather than the 99 it does.

Three resolved challenged ballots were not counted because of Employer objections that the names were not spelled the same on the envelopes as on the list of challenges attached to the Board's decision. As a result, the second tally was as follows:<sup>4/</sup>

|                       |     |
|-----------------------|-----|
| UFW                   | 196 |
| No union              | 174 |
| Unresolved challenges | 20  |
| Total                 | 390 |
| Void                  | 0   |

Following review of these Employer objections, the Board ordered that the ballots of the three voters be counted. A third tally of ballots issued on January 12, 1978, was as follows:<sup>5/</sup>

|                       |     |
|-----------------------|-----|
| UFW                   | 198 |
| No union              | 175 |
| Unresolved challenges | 17  |
| Total ballots         | 390 |
| Void                  | 0   |

4/The second tally is also in error. Board agents listed the Cortez Fallot both as an unresolved challenge and as a valid vote cast for either the UFW or no union. As a result, the number of unresolved challenges should be 19 (the is unresolved challenges, minus Cortez, plus the uncounted challenged ballots of Honorario Hernandez and the three voters not counted because of questions about the spelling of, their names for a total of 19, rather than 20. This also changes the total number of valid votes cast to 389 from 390).

I note that the error in counting Cortez's ballot was not prejudicial. If one assumes for the sake of argument that Cortez was not eligible to vote and that his vote was improperly counted and cast for the UFW, then subtracting his vote from the UFW total produces 197 and adding it to the list of unresolved challenges produces a total of 17. The difference between the UFW total, 197, and the no union total, 175, is 22 votes. Assuming all remaining unresolved challenges were counted, including the ballot of Honorario Hernandez, and that these ballots were cast for no union, the UFW would still win by a margin of five votes, As discussed below, I note that the UFW would still, receive a majority of valid votes cast even after consideration of the Employer's objections.

5/ Because errors in prior tallies were carried through on subsequent tallies, the final tally is in error. It should be as follows:

|                       |     |
|-----------------------|-----|
| UFW                   | 198 |
| No union              | 175 |
| Unresolved challenges | 16  |
| Total                 | 339 |
| Void                  | 0   |

The Employer filed timely objections on April 27, December 27, and January 17 following each tally of ballots. The International Union of Agricultural Workers (hereafter the "IUAW") also filed objections on April 27, based on allegations that they were denied an opportunity to intervene in the election.

By-order dated March 7, 1978, the Executive Secretary dismissed-certain objections filed by the Employer and IUAW and set others for hearing. The Employer filed a request for review of the dismissal of its objections which was denied by the Board in an order dated April 11, 1978. The IUAW did not file a request for review and subsequently withdrew its remaining objection on. April 27, 1978.

All parties were represented at the hearing and were given an opportunity to participate in the proceedings. Both presented oral arguments at the close of the hearing. Following a request by the UFW for permission to file additional case authority on the issue of the integrity of the ballot box, both parties were given until May 10, 1978 to do so.

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

#### FINDINGS OF FACT

##### I. Jursidiction

Neither the Employer nor the UFW challenged the Board's jurisdiction. Accordingly, I find that the Employer is an agricultural

employer within the meaning of Cal. Lab. Code §1140.4(0), that the "UFW is a labor organization within the meaning of Cal. Lab. Code §1140.4Cf), and that an election was conducted pursuant to Cal. Lab. Code §1156.3.

## II. The Alleged Misconduct

Employer's objections are based on allegations of misconduct by Board agents on the day of the election and in the time period between the first and second tallies of ballots. First, the Employer alleges that at one polling site a Board agent refused to allow two persons to vote, even under challenge, because their names did not appear on the list of eligible voters. Second, the Employer alleges that at another polling site the same Board agent allowed two persons whose names were not on the eligibility list to vote unchallenged over the protest of an Employer observer. Third, the Employer alleges that a Board agent, prior to the tally of ballots, opened and counted the ballots of persons who were challenged on the ground that their names did not appear on the list of eligible voters. Fourth, the Employer alleges that Board agents did not maintain the integrity of the ballot box in that the box containing unresolved challenged ballots on December 21 was not the same box in which they were sealed on April 21.

## III. Operations of the Employer

The Employer is a corporation involved in the growing, harvesting, and marketing of citrus, grapes, and dales in the Coachella Valley. Its operations are discussed in more detail in Tenneco West, Inc.

3 ALRB No. 92 (1977), a copy of which was entered in evidence at the hearing.

IV. Denying Voters the Opportunity to Cast a  
Ballot - the Lupine Ranch Incident

Voting took place at seven polling sites on election day. The Lupine Ranch was selected at the pre-election conference as the polling site for date workers employed by Cal-Date Co., a division of Tenneco West, Inc.; David Stanton, Employer's counsel, advised Board agents at the pre-election conference that the employer objected to inclusion of either the citrus crews working under Santiago Reyes or the date workers employed by Cal-Date Co. as eligible voters in the bargaining unit. After some discussion, an agreement was reached that Board agents would challenge all Cal-Date employees who appeared to vote at the Lupine Ranch polling site. Several Cal-Date employees were present at the pre-election conference for this discussion.

The next day, Board agent Luis Viniegra, who was the agent in charge of the election and leader of the team conducting the balloting at Lupine Ranch, told the Cal-Date Co. employees that they would all be challenged on the ground that they were employees of Cal-Date Co. and not Tenneco West.<sup>6/</sup> Some workers objected to having to provide their names and addresses in order to vote, and according to Roberto Carrillo, an Employer observer at the site, some did not vote as a result. The official list of eligible voters shows that only

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<sup>6/</sup> Viniegra had participated as a Board agent in more than 20 elections prior to the one in question. The Tenneco West election was the first for which he served as agent-in-charge.

eleven of the approximately 83 names listed as Cal-Date Co. employees failed to cast ballots.

Although all voters at the Lupine Ranch polling site were challenged on grounds they were not in the unit, Board agents also challenged several on alternative grounds.<sup>7/</sup> Carrillo testified that during the voting two persons appeared to vote whose names did not appear on the list of eligible voters. The first was an elderly man named Jose Reyes who worked as a caretaker at Lupine Ranch in exchange for free housing there.<sup>8/</sup> According to Carrillo, Reyes showed a UFW identification card and said that he should be allowed to vote, but Viniegra told him he could not because his name was not on the eligibility list. Carrillo testified that Viniegra told Reyes he could not vote because he was a "company" or "special" employee and that was why he was different from other employees who were allowed to vote. According to Carrillo, Reyes then left without saying anything.

Carrillo testified that Viniegra told the second man that his name was not on the list and that he had "very little time" with the company. Carrillo stated that Viniegra did not ask the man how

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<sup>7/</sup> From comparison of the official list of challenged ballots with the list of eligible voters at the Lupine Ranch polling site and the Employer's exceptions to the challenged ballot report, it is apparent that some voters at the Lupine Ranch polling site were allowed to vote challenged ballots even though their names do not appear on the list of eligible Cal-Date Co. employees.

<sup>8/</sup> Daryl Valdez, the Employer's supervisor of safety and loss prevention testified that Reyes had worked as a Cal-Date Co. employee for about 25 years and that he pulled weeds and performed other caretaking duties around the camp at the Lupine Ranch.

lone ha had worked for the employer or tell him that he could get a challenged ballot if he filled out an affidavit that he had not worked in the eligibility period.

Viniegra could recall a discussion about the eligibility of a caretaker, but could not recall the specific details. Viniegra had no memory of the incident involving the second man. Viniegra testified that he could not recall anyone being turned away without voting at the Lupine Ranch site and that it was his usual practice, when a voter's name does not appear on the eligibility list, to ask the person to vote a challenged ballot unless observers from all parties recognize the voter as having worked in the eligibility period. According to Viniegra, workers often are nervous about putting their names on the challenge ballot affidavit and envelope. A few voters refuse to do so; and, in those cases, Viniegra does not allow them to vote a challenged ballot. As discussed below, uncontradicted evidence indicates that Viniegra followed this procedure during voting among the grape crews earlier that day.

Ray Ochoa, a Cal-Date Co. employee and UFW observer at the Lupine Ranch polling site, testified that an old man appeared to vote and showed Board agents a UFW identification card and a license but that the man's name was not on the list of eligible voters. One Beard agent told him he was not on the list. According to Ochoa, the old man then said that he was not working and had been retired for about five years and then walked away. Ochoa stated that he had seen the old man around the Lupine Ranch when he was working at Cal-Date Co.

Ochoa testified that he also recalled a young man coming to vote whose name was not on the eligibility list. The same Board agent who spoke to the older man asked the young man how long he had been working and then told the man he did not have enough time with the company. Ochoa stated that he had been working more than three weeks prior to the election, but that this man had been working only a week or more prior to the election and that a UFW organizer named Linda had told him he probably could not vote in the election. Ochoa stated that the Cal-Date Co. payroll was every 15 days. Ochoa could not recall any discussion between the Board agent and either of these men about challenged ballots.

Based on this evidence, I do not find that a preponderance of the evidence supports the Employer's contention that Viniegra refused the two persons in question an opportunity to vote challenged ballots. Although witnesses for both parties could not recall discussions about challenged ballots between the two persons and Viniegra, there was no evidence that they asked and were refused a chance to vote challenged ballots. Carrillo was inconsistent in his testimony on the second younger man. He stated that Viniegra told the man that he had little time with the Employer, but insisted that Viniegra never asked the man how long he had worked for the Employer, the question which would have elicited this answer. Given the evidence that Viniegra had voters at other polling sites that day whose names were not on the list vote challenged ballots and that some voters at the Lupine Ranch site whose names were not on the list did vote under challenge, I find it improbable that Viniegra would have deviated from this practice for these two voters.

V. Permitting Ineligible Voters to Vote

Unchallenged - the Incidents at the ALRB Office

The last polling site was at the Board's Coachella Field Office. The UFW had asked for this polling site to give members of a grape thinning crew working under Ray Rubio an opportunity to vote. This crew normally worked for another company, Beckman Bender, but were eligible voters because they had worked for Tenneco West during the eligibility period; however, they were not working at Tenneco West on election day.

A. The Drunk Man

Andres Kinojosa and Saturnine Mendoza served as Employer observers at the office polling site.<sup>9/</sup> Hinojosa testified that an unidentified man came to vote without identification. He gave a name to Board agents and observers at the eligibility table, but the name was not on the official list of eligible voters. Viniegra who was in charge of the balloting at this site, then told the man he was not on the list and passed him to Board agent Isadore Gonzales who was at the challenge table. According to Hinojosa, Gonzales asked the man for his name and address. The man responded that he had no local address. Gonzales then asked who he worked for and whether the

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9/ Hinojosa and Mendoza were central Employer witnesses. Their memories, like those of other witnesses were clouded by the passage of time between the events in question and the hearing; however, unlike other witnesses, they signed declarations shortly after the election. Several objections were set for hearing on the basis of those declarations. As discussed below, those declarations, when viewed against the credible testimony, raise doubts about the accuracy of the memories of Hinojosa and Mendoza. As a result, I have generally accorded less weight to their testimony where it is contradicted or explained by more credible evidence and is in my view not probable based on a weighing of all the evidence.

man worked for Tenneco West. Hinojosa stated that the man then said he was not currently working for Tenneco West, but that he had done so for one day in 1972 and had then quit because he was no good for the work. Gonzales then told the man he was not eligible to vote, and the man left the polling area. Hinojosa stated that the man then returned a few minutes later, gave another name which appeared on the list, and showed a yellow check stub.<sup>10/</sup> Hinojosa told Viniegra that the man could not vote because he was the same one who had just been turned away. Viniegra told Hinojosa that he could challenge the man, but that Viniegra would let him vote because his name was on the eligibility list. According to Hinojosa the man put his ballot in the box without a challenged ballot envelope. Hinojosa stated that Viniegra put Hinojosa's protest in writing and signed it along with Hinojosa and a UFW observer.

Viniegra testified that he recalled only one person who appeared drunk when he came to vote at the ALRB office polling site. The voter's name was Andres Gallegos. According to Viniegra and the list of challenges, the Board challenged Gallegos who was sent to the challenged ballot table where he was given a ballot and challenged ballot envelope by Board agent David Rodriguez. Viniegra stated that

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<sup>10/</sup>Uncontradicted testimony showed that both Tenneco West and Cal-Date S3", employees were paid with checks which were blue-green in color. Although Valdez speculated that the checks issued to the Rubio crew were the same color, he had no personal knowledge of that fact. Neither Rosa Medina nor Robert Monroy, the only Rubio crew members to testify, were asked about the color of their checks when they worked at Tenneco West.

after leaving the voting booth, Gallegos failed to follow instructions and placed his ballot in the box without first placing it in the envelope.

Observers for both parties told Viniegra what had occurred. After discussions with other Board agents, Viniegra decided not to open the box because it would be impossible to determine which ballot was that of Gallegos. Viniegra did list the ballot on the challenge sheet and later investigated Gallegos's eligibility. Based on the challenged ballot report and exceptions, the Board subsequently determined that Gallegos was eligible to vote. Viniegra recalled making a note of the incident, but could not remember whether he asked observers to sign it. However, Viniegra was unable to locate the note in the working file.

Eduardo Franco, an employee at David Freedman, testified that he drove Gallegos to the polling site at the ALRB office and that Gallegos was a little drunk. Franco stated that he went in with Gallegos, but was sent out. Franco then waited outside until Gallegos came out. Franco stated that he did not give Gallegos identification and was not present in the room when Gallegos voted. On cross-examination, Hinojosa identified a declaration signed by him shortly after the election and stated that the incident involving the drunk man was set forth in the declaration. The Hinojosa declaration states that when the drunk man returned a second time to vote he came with a "gentleman from the Union" who had a bad eye and who gave Gallegos identification and a check stub. Franco had a bad eye.

Doug Adair, a volunteer UFW worker in charge of the UFW's Coachella Legal Office, testified that he presented an affidavit that Gallegos worked for Tenneco West in the eligibility period at the pre-election conference and asked that his name be added to the eligibility list. The employer objected, and Gallegos's name was not added. Adair confirmed that Franco had offered to drive voters to the polls during the election at Tenneco West, but he could not recall seeing Franco take Gallegos to the ALRB office polling site.

The contradictions in the testimony are more illusory than real. I find that the preponderance of the evidence shows that Gallegos was the drunk man about whom Hinojosa testified; that he was challenged, but placed his ballot in the box without first placing it in a challenge envelope; and that he was subsequently found to be an eligible voter.

#### B. The Woman with a Young Boy

Hinojosa also testified about a second incident during voting at the ALRB office. He stated that a woman appeared to vote without identification and gave a name which was not on the eligibility list. The woman was with a young boy who was four or five feet tall. Viniegra then sent the woman to the challenge table where she was asked by Gonzales for her name and address and the name of her employer. According to Hinojosa, the woman replied that she did not work anywhere, but that she had worked two years before for David Freedman. Gonzales then told her she was not eligible. Hinojosa stated that the woman left, but returned a few minutes later, gave a different name which was on the list, and showed a UFW identification card. Hinojosa

testified that he told Viniegra that the woman was back and that she was not eligible. Viniegra then told Hinojosa that he was "the law" and to "shut up" because "he made the decisions." Hinojosa stated that the woman then voted unchallenged.

Viniegra did not recall a dispute over the eligibility of a woman who came to vote at the ALRB office polling site, accompanied by a young boy. He stated that there was a discussion about the eligibility of a 14-year-old boy named Robert Monroy who came to vote with his mother Rosa Medina. Robert Monroy had worked one day in the eligibility period under the name of his sister Marta Monroy who was ill that day.

Both Robert Monroy and Medina testified. Monroy's age and height fit the description given by Hinojosa of the boy who came with the woman the Employer contends was improperly allowed to vote unchallenged. Their testimony corroborates that of Viniegra.<sup>11/</sup> Medina did vote unchallenged, but Robert Monroy voted under challenge. The Board's decision on challenged ballots subsequently found that Monroy was an eligible voter.

I find it improbable that more than one incident of this kind occurred at the ALRB office polling site. Hinojosa's testimony was not corroborated, even though Mendoza was also an Employer observer at the same site, while Viniegra, Medina, and Monroy gave

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<sup>11/</sup> Medina and Adair stated that the Rubio crew normally worked, for Beckman and Bender. The UFW contended that members of the Rubio crew would not consider themselves Tenneco West employees if asked where they were employed. Based on Medina's testimony, it is apparent to me that she considered her employer to be primarily Rubio and then Beckman and Bender. She stated that the crew had worked for Tenneco West briefly in the eligibility period only after some thought, although there is no question that this was true.

substantially the same version of an incident which the weight of the evidence shows was the same incident about which Hinojosa testified. I, therefore, find that the woman referred to by Hinojosa was Rosa Medina, that she was an eligible voter who correctly voted unchallenged, and that the dispute involved the eligibility of her son Robert Monroy who voted under challenge.

VI. Premature Opening of Ballot Boxes and Challenge Envelopes

After the voting ended at the ALRB office, Board agents cleared the room of all persons other than Board agents and party observers and locked the doors to the room. Although there was some conflict in the testimony as to the exact time the polls closed, witnesses for both the Employer and the UFW agreed that 15 to 30 minutes passed before Board agents opened the doors and allowed party representatives and the public into the room for the tally of ballots. During this period, Board agents and observers took down voting booths and rearranged tables and chairs in preparation for the tally. The Employer contends that Board agent Viniegra also opened several sealed ballot boxes at this time, took out and opened some challenged ballots envelopes, and then commingled these ballots with unchallenged ballots over the objection of an Employer observer.

Hinojosa and Mendoza testified as Employer witnesses on this subject. Hinojosa stated that a few minutes after the polls closed Board agent Viniegra opened the ballot box containing ballots cast by employees in the grape crews working under foremen Simon Matias and Beatriz Vizcarra (hereafter the "Matias-Vizcarra box").

Viniegra took out 10 to 12 challenged ballot envelopes, opened them, took out the ballots, and placed them in the box used to vote the crew of Valentin Caraan saying that the ballots went there. Hinojosa stated that he protested that the ballot boxes should not be opened, but Viniegra said he was only going to combine the boxes with others. According to Hinojosa, Viniegra took the box from which he took the ballots apart and showed it to observers. Viniegra then resealed the other box in which the ballots were placed. According to Hinojosa there were seven or eight other people in the room when Viniegra did this, including Mendoza, Viniegra, and a UFW observer. Hinojosa could not recall seeing Viniegra open any other challenged ballot envelopes at any time during the evening other than this.

Mendoza corroborated Hinojosa's testimony that Viniegra opened the two ballot boxes containing the votes of three grape crews over Hinojosa's protest and that Viniegra then opened 10 to 12 challenged ballot envelopes and commingled them with unchallenged votes before party representatives and the public came into the room, Mendoza stated repeatedly that Board agent Gonzales was in the room near him when this occurred. Like Hinojosa, Mendoza stated that he never saw Board agents open any other challenged ballots during that evening.

Hinojosa and Mendoza both signed declarations which were filed with the objections petition. Hinojosa's declaration contains no mention of this incident, although on cross-examination, after reading the declaration, he stated that he thought it was included.

Mendoza's declaration refers to an incident involving six voters which he insisted on cross-examination was a separate incident from the one about which he and Hinojosa testified. Mendoza also denied signing a certification on conduct of the election at the ALRB office. Hinojosa testified that he saw Mendoza sign, and the name "Saturnine Mendoza" does appear on the document.

The UFW called several witnesses who contradicted the testimony of Hinojosa and Mendoza. Board agents Viniegra, Nuno, Romo, and Gonzales stated that no boxes were opened until the doors to the office were opened and party representatives and the public, permitted in. Andres Sanchez and Enriquetta Medina were UFW observers at various polling sites including the ALRB office site. Both stated that they were present in the period of time between the end of voting and the opening of the doors for the tally. Sanchez stated that he saw the first boxes opened after a lawyer for the Employer and UFW representatives, including Eliseo Medina, came into the room. Enriquetta Medina stated that she was setting up chairs about five feet from the ballot boxes during this period and saw none opened until the room was opened to the public.

The evidence is uncontradicted that some challenged ballots were resolved and opened prior to the actual counting of ballots. Testimony shows that when the official time for voting at the ALRB office ended, representatives of both the Employer and UFW, who had remained outside the polling area during voting, came in and waited outside until the doors were opened for the count. Employer representatives present were Stanton, William Conklin, Daryl Valdez, a man named Gimian, and a secretary. UFW

representatives were Adair, Eliseo Medina, and others. In addition, between 150 and 200 employees and members of the public came in when the doors were opened.

The ballot boxes were on one or two tables near the back wall of the room. Board agents were behind one of the tables. Stanton and Medina sat in chairs about five feet in front of the Board agents. Viniegra explained how the tally would be conducted and that there were a large number of challenged ballots. Viniegra then held up the ballot boxes one by one and showed them to the parties. Adair stated that he was about 15 feet away and could see that each box was sealed and had the signatures of observers on the boxes. After the boxes were opened, the challenged ballots were sorted by the ground for the challenges and either put together in an empty box or stacked on the table. The unchallenged ballots from the various boxes were then mixed together in one box so that the votes of a particular crew could not be identified.

Board agents then attempted to resolve challenged ballots. Adair testified that the first challenged ballots discussed were those on which the parties agreed. These were the votes of eight employees challenged because their names did not appear on the eligibility list at the site where they voted. The list of voters supplied by the Employer was a computer printout. Because that list contained a great deal of irrelevant information on large sheets, Board agents used the printout to type an official eligibility list which contained only the voter's name and social security number. Two pages of this typed list containing the names of steady employees

and employees whose last name ended in "Z" were missing from the list used at the polling site where they voted. Adair stated that the UFW learned of the missing pages in the morning when a man named Fernando Guillen-Alvarez told UFW organizers that he and employees in the Zamora family had voted challenged ballots because their names were not on the list. The organizers told Adair who in turn called Board attorney Marian Kennedy. It is unclear when Viniegra first learned of the missing page, but at the ballot count both the Employer and the UFW agreed to count those ballots. These challenged ballot envelopes were located and then the names on the envelopes were checked off a computer list by a secretary who accompanied Stanton to the count. The parties then agreed to open the ballots. Eight opened challenged ballot envelopes, marked "Resolved 4-21-77, Luis V." on one side and "These names not contested. Co. & Union concur to resolve" on the other were found in the Board's working file by this hearing officer during a search for the computer list submitted by the Employer.<sup>12/</sup>

After these ballots were opened and mixed with unchallenged ballots, Viniegra announced that he intended to open and count the challenged ballots of citrus employees in the crew of Sanitago Reyes.

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<sup>12/</sup> Neither Board agents nor this hearing officer were able to find in the working file the Board's copy of the computer list from which the official eligibility list was made. The official eligibility list placed in evidence is missing the names of the Zamora family although the page containing the names of the steadies is present with marks next to the names of Guillen-Alvarez and Jorge Rosas. Their names also appear on two envelopes of the eight marked as resolved. Two other names, Alicia C. Zamaripe and Jose F. Zamaripe, are written in on another page of the eligibility list with the notation "on computer list" and marks indicating they voted unchallenged ballots.

Kennedy stated that these ballots would be opened on the basis of a recent decision by an administrative law officer in a related case that these employees were employed by Tenneco West. Stanton objected to the resolution of these challenges, but Viniegra stated that he intended to count them. Viniegra then stated that the challenged ballots of Cal-Date Co. employees would be left unresolved pending resolution by the Board.<sup>13/</sup>

A preponderance of the evidence convinces me that no ballot boxes were opened and challenged ballots counted prior to the beginning of the tally. Both Mendoza and Hinojosa state that the incident they referred to was not set forth in their declaration. I find it difficult to believe that such a serious allegation would be omitted from these declarations, especially in the light of Hinojosa's testimony that he told Valdez of the incident after the tally and before he made the declaration with Valdez present. Mendoza was certain that he was with Gonzales when the incident occurred, yet Gonzales testified credibly that no boxes were opened when he was present until after the public was permitted in the room. Significantly, Mendoza presented no testimony about the incident set forth in his declaration which he stated was a completely different incident. It is apparent to me that Hinojosa and Mendoza

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<sup>13/</sup> Adair testified that he was the last UFW representative to leave the office, but that Viniegra and Stanton were still there when he left. According to Adair, the challenged and unchallenged ballots were in envelopes when he left and not sealed in a box at that time. Board agent Romo testified that he saw the open box containing the Tenneco West ballots on Viniegra's desk a day, or two after the election. Romo was not present during the time Valdez stated that the box was sealed.

were again confused and that the incident they recalled is that described without contradiction by Viniegra, Adair, Romo, and Nuno .

#### VII. Custody of Unresolved Challenged Ballots

The integrity of the ballot box is not in question prior to the end of the evening voting at the ALRB office. With the exception of the incident involving Gallegos, no other ballots of challenged voters were placed in the ballot box without being first sealed in a challenged ballot envelope. Uncontradicted evidence shows that ballot boxes were sealed at each polling site at the end of voting and that observers then signed the seals. If the boxes were to be used at another polling site, they were transported to the site in cars carrying observers and the seals broken in the presence of the observers. After voting at a new site, the sealing procedure was again performed. The Employer's objection relates to the possibility of tampering in the period between the first tally of ballots and the second.

After completion of the first tally of ballots, party representatives remained while Board agents drew up the official list of unresolved challenged ballots. Daryl Valdez, the Employer's supervisor of safety and loss prevention, testified that he was present during and after the tally. He stated that after the challenged list was completed and the parties given copies, Stanton asked what would happen next. Viniegra told him that the unresolved challenged ballots would be sealed in a box until they were resolved by the Board. Valdez stated that the challenged ballots were then placed in one of the ballot boxes, that Viniegra and another Board agent then sealed the box with masking tape, and that Board agents

took, the box with them when they left.

Valdez was also present at the second tally of ballots on December 21. He testified that San Diego Regional Director Marc Roberts brought in a box which was smaller than the one in which ballots had been sealed on April 21 and which was sealed with reinforced plastic tape rather than masking tape. Valdez told Stanton it was a different box and Stanton objected. Roberts then told Stanton that it was his understanding that the ballots had never been sealed in a box on April 21 and an argument ensued.

According to Valdez, there were four manila envelopes in the box when it was opened. Three of these envelopes contained challenged ballots envelopes and the fourth contained the ballots which had previously been counted. Valdez stated that neither he nor Stanton asked to see the challenge envelopes or asked Board agents to check to see whether the challenged ballot envelopes had been opened or otherwise tampered with.

Viniegra contradicted Valdez in several respects. He testified that the unresolved challenged ballots were never sealed in a box on April 21 following the tally. Instead, Viniegra testified that he placed the unresolved challenges of Cal-Date Co. employees in a sealed manila envelope. Viniegra could not recall whether the remaining unresolved challenged ballots were also placed in sealed envelopes or simply bound together with rubber bands. Viniegra stated that all the ballots and election materials were then placed in an open box which he left on the table used during the count. Viniegra was the last person to leave the office and locked the room

containing the ballots.<sup>14/</sup>

Viniegra was assigned the job of preparing a report and recommendations on the unresolved challenged ballots together with Board agent Janis Johns. He testified that after April 21 the open box containing the ballots was always in his custody. He stated that he never opened the envelope containing the challenge envelopes of Cal-Date Co. employees, but that he did use the envelopes containing the ballots of other challenged voters. Viniegra stated that he made a packet containing the challenged ballot envelope, the voter's affidavit signed at the polling site, and his investigative notes. These packets were then divided still further according to the ground for challenge. Viniegra admitted that the challenged envelopes were not sealed in manila envelopes immediately after the tally and kept in a locked cabinet as suggested in the Board's Representation Case Manual. He stated that he had used the envelopes during his investigation simply for his own convenience even though the information on the outside of the envelope could also be found on the affidavit and official list of challenges. Viniegra stated that the actual envelopes containing the ballots of voters were not opened while they were in his possession and that the box containing the ballots was at all times either locked in a cabinet behind his desk or in the trunk of his car, or in his motel room where he on occasion took it in order to work on his report. Viniegra also stated that at

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<sup>14/</sup>UFW counsel stated that he asked Board agent Viniegra for an example of a challenged ballot envelope in preparation for Viniegra's testimony and that Viniegra had given him two blank envelopes which were subsequently introduced in evidence. Viniegra stated that such envelopes were generally not given to the public or parties. The envelopes were not provided pursuant to subpoena although both parties were required to subpoena other relevant documents in the Board files. All subpoenas were honored. The Employer contended that this incident demonstrates that challenge envelopes were easily available and that tampering with challenged ballots was possible.

times the box and ballots were on his desk in the Board's office when he was not present. His desk was in an open office which was divided by partitions. There was no evidence that anyone other than Board agents gained access to this area when Viniegra was absent.

On July 8, 1978, Viniegra completed his report and gave it, the box containing the ballots, and his work materials to Elias Munoz, officer-in-charge of the Coachella Field Office, and Board agent Johns. No custody exchange form was filled out because none existed at that time. The box was open and contained a sealed envelope with Cal-Date Co. challenges and manila folders or envelopes by type of challenge containing the remaining challenged ballot envelopes.

There was no evidence as to the location of the ballots while they were in the custody of Munoz; however, Board agent Ben Romo testified that the ballots were in a locked cabinet behind Munoz's desk when Romo became officer-in-charge of the Coachella Field Office in mid-August and was given keys to the cabinet by Munoz. Romo stated that the cabinet contained unresolved challenged ballots from every election conducted in the Coachella Valley since the Board began its operations.

Around October 25, San Diego Regional Director Marc Roberts telephoned the Coachella Field Office and left orders for Romo to take all unresolved challenged ballots in the office to the local branch of San Diego Federal Savings and place them in a vault. Romo took all the sealed manila envelopes from the cabinet and placed them

in a box which he then deposited in the bank's vault. About a month later, the bank manager informed Roberts that he could no longer store the ballots there and asked that they be moved. Roberts then phoned Romo and told him to pick up the ballots and package them and that Roberts would personally pick them up. Roberts took a large sealed box from Romo the same day and drove to San Diego. The box was kept in his home for a few days because Roberts had not yet received clearance to spend the money necessary to place the ballots in a vault in San Diego and because following the break-in and theft of challenged ballots in the Oxnard Field Office, Roberts felt that the Board's San Diego Regional Office was not the safest place for the ballots. Roberts later deposited the box in an unidentified commercial bank.

After the Board's partial resolution of challenged ballots, Romo called Roberts and asked that the Tenneco West ballots be made available for counting. Roberts went with Regional Field Examiner Wayne Smith to the vault and opened the box which contained 10 to 12 manila envelopes. He then took out two or three sealed envelopes marked "Tenneco West, 77-RC-6-C" and returned to his office. There he placed these envelopes in a small box, sealed it, and drove to Indio where he gave the box to Romo. Adair, Stanton, Valdez, and other representatives of the parties were present at the time.

At this point, Stanton objected about the difference in boxes. After discussion which was at times heated, the box was opened and the challenged ballots to be counted were located. Adair testified without contradiction that party observers were about four feet from Romo as he held up and showed them each envelope to be

counted. According to Adair the observers were permitted to, and on a couple of occasions did, examine several envelopes before they were opened, Stanton objected to the fact that one envelope belonging to Gallegos was open and empty. Romo testified without contradiction that none of the challenged ballot envelopes were open and that he had to open them with a letter opener in order to take out the ballots. No evidence was presented as to possible irregularity between the second and third tallies. At the time of the hearing the remaining unresolved challenged ballots, opened challenge envelopes, and counted ballots were in a sealed box in the drawer of a locked filing cabinet in the Indio Field Office. There was no allegation that any blank ballots or envelopes used for the Tenneco West election were missing or left unguarded during or after the election.<sup>15/</sup>

The evidence on this allegation is generally not in dispute. The only material conflict in the testimony is that between Valdez and Viniegra as to whether the unresolved challenged ballots were sealed in a box after the first tally or simply placed in an open box. I have some doubts that the box was sealed as Valdez testified. There is no question that Stanton was the last Employer representative to leave the office the night of April 21 and that he would have been present for the sealing. However, at the second tally, Valdez

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<sup>15/</sup>The misconduct related to denying voters the opportunity to vote or permitting ineligible voters to vote is only outcome determinative if the misconduct related to premature opening of challenged ballots was proven. Since it was not, these ballots regardless of which party they were cast for could not affect the outcome.

testified that he had to bring the difference in boxes to Valdez's attention. Stanton was not called to corroborate Valdez's testimony. I also find it improbable that Viniegra would have sealed a box without a UFW representative present, yet Adair testified that he was the last UFW representative to leave the room and that the ballots were not in a sealed box when he left. In any event, I do not find resolution of this conflict essential. Whether the ballots were sealed in a box which was later opened by Viniegra, or simply left in an unopened box is only a factor in determining the reasonableness of the possibility of tampering. As discussed below, regardless of which testimony is credited, there is no evidence that the last line of security, the sealed challenge envelopes, were lost or tampered with so that the ballots inside and the choices indicated should be voided.

#### VIII. General Allegations of Bias

The Employer contended that a general pattern of bias against the Employer and in favor of the UFW on the part of Board agents, and in particular Viniegra, underlays its objections and attacks on the credibility of the Board agents who testified. Having considered the record evidence, I find the allegation is not supported by substantial evidence. The election campaign in this case was apparently a heated one, conducted under the usual time pressures of elections under the Act. The parties' positions on the eligibility of large numbers of potential voters were diametrically opposed. Under such circumstances, Board agents are called on to make decisions which inevitably involve a choice between one party's position and

another's. That fact alone is not evidence of bias. The record here indicates that Viniegra and other Board agents on occasion failed to follow certain guidelines for the conduct of elections and that in retrospect they might have made decisions other than those made. The question, however, is whether these were errors in judgment and procedure or the product of partisan conduct toward a particular party. Upon review of the whole record, I find that the Board agents made decisions with which one party or another disagreed. There is no pattern preferring, however, evidencing partisan conduct.

#### CONCLUSIONS

##### I. Standard and Burden of Proof

There is a strong presumption in favor of the validity of certification elections conducted under this Act in the agricultural context. Perez Packing, Inc., 2 ALRB No. 13 (1976); Chula Vista Farms, Inc., 1 ALRB No. 23 (1975) (concurring opinion). The Board will set aside an election only where the misconduct is sufficiently in nature to create an atmosphere which renders improbable a free choice by voters. Bruce Church, Inc., 3 ALRB No. 90 (1977). The burden of proof is on the party seeking to overturn an election to come forward with specific evidence of misconduct and that the misconduct interfered with the employees' free choice of a bargaining representative to such an extent that the outcome of the election was affected. TMY Farms, 2 ALRB No. 58 (1976).

## II. Board Agent Denied Voters the Opportunity to Vote

The Employer contends that Board agents turned two voters whose names were not on the eligibility list away from the polls without giving them an opportunity to cast a challenged ballot. The Board has held that/ while such conduct is improper, an election will not be set aside absent a showing that the number of voters denied the opportunity to vote was sufficient to affect the outcome of the election. E. G. Corda Ranches, dba Corda Ranches, 4 ALRB No. 35 (1978); Abatti Farms and Abatti Produce, Inc., 3 ALRB No. 83 (1977); Kawano Farms, Inc., 3 ALRB No. 25 (1977).

As discussed above, I do not find that the Employer carried its burden of showing that such conduct occurred. Furthermore, even assuming that misconduct was established, the number of voters denied the opportunity to vote, whether considered singly or in view of other objections, was not sufficient to affect the outcome of the election given the margin of the victory.<sup>16/</sup> This objection should be dismissed.

## III. Board Agent Permitted Voters to Vote Unchallenged over Protest of Observer

The Employer contends that Board agents permitted two persons whose names were not on the eligibility list to vote unchallenged over the protest of an Employer observer. As with conduct which denies voters the opportunity to vote, the Board has held that it will not set

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<sup>16/</sup>The misconduct related to denying voters the opportunity to vote or permitting ineligible voters to vote unchallenged is only outcome determinative if the misconduct related to premature opening of challenged ballots was proven. Since it was not, these ballots, regardless of which party they were cast for, could not affect the outcome.

aside an election where potentially ineligible voters are allowed to vote unchallenged unless the number of ballots so cast are sufficient to affect the outcome of the election. Agro Crop, 3 ALRB No. 64 (1977); Hatanaka & Ota Co., 1 ALRB No. 7 (1975).

As discussed above, I do not find that such conduct occurred. I note further that even had the Employer showed such misconduct, the number of ballots cast improperly, whether considered alone or in the light of other objections, was not sufficient to affect the outcome of the election given the margin of victory. This objection should be dismissed.

#### IV. Premature Opening and Counting of Challenged Ballots

The Employer contends that Board agent Viniegra opened and-counted certain challenged ballots prior to the tally of ballots over the protest of an Employer observer and in violation of Board regulations and procedures. As discussed above, I do not find that the evidence supports the specific allegations of the objection. The challenged ballots in question were opened with the consent of both parties at the tally of ballots and in the presence of observers and representatives of both parties. As a result, I do not find applicable D & N Delivery Corp., 201 NLRB 277, 82 LRRM 1208 (1973), cited by the Employer.<sup>17/</sup> I find that the weight of the evidence does not support a

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<sup>17/</sup> In that case, the NLRB set aside an election where the regional director opened and counted challenged ballots sufficient in number to affect the outcome of the election in violation of NLRB rules and prior to the filing of a request for review challenging eligibility of these voters by a party. The NLRB found that the regional director's conduct gave the appearance that the Board had prejudged the issue. The NLRB also noted that where insubstantial issues are raised in a subsequently filed request for review, the Board may decide that the regional director's action did not so seriously impugn the integrity of the NLRB's processes as to warrant setting aside the election. For example, in this case, Board agent Viniegra counted the challenged ballot, of citrus employees absent a waiver by the Employer of its challenges based on: an ALO's recommended decision finding them eligible voters. This premature counting was in violation of Board rules and procedures giving Board agents discretion to rule on challenged ballots on which all parties agree that there is no factual or legal dispute. 8 Cal. Admin. Code §20355(d)(1978). The Board chose under all the circumstances of the case to accept the ALO's recommendation and to find the citrus employees eligible voters in Tenneco West, Inc., 3 ALRB No. 92 (1977). The Employer's objection based on the Board agent's action was dismissed and a subsequent request for review denied on the basis of the decision.

finding that there were two incidents of this kind as urged by the Employer.

V. Security of Unresolved Challenged Ballots

The Employer contends that between the conclusion of the first tally of ballots and the subsequent tally following the Board's decision on unresolved challenges, Board agents failed to follow policy guidelines regarding the security of the ballots and handled ballots in a way which created the possibility that tampering, occurred.

The Employer in closing argument cited a number of cases in support of its position. Those cases stand for the proposition that the NLRB will set aside an election where a possibility of tampering with ballots or the ballot box existed which raised questions about the integrity of the Board's processes. As noted in Polymers, Inc., v. NLRB, 414 F.2d 999 (2nd Cir. 1969), cert. denied 396 U.S. 1010 (1970), the NLRB precedents on this issue are in conflict, some adopting a per se rule of mere possibility and others a case-by-case approach weighing the reasonableness of the possibility.<sup>18/</sup>

This Board has adopted the standard set forth in Polymers, Inc., supra, in refusing to set aside an election where there was no evidence of actual impairment or any substantial possibility of impairment of a sealed envelope containing ballots to be counted from a split site election. California Coastal Farms, Inc., 2 ALRB No. 26

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<sup>18/</sup>The Employer urges that the board apply a per se rule consistent with the NLRB's decision in Austill Waxed Paper Co., 169 NLRB 1109, 67 LRRM 1366 (1968) and other cases, rather than the Polymers, Inc. approach. In the alternative, the Employer argues that even under a Polymers, Inc. test a reasonable possibility of tampering existed in this case.

(1976). The Board has applied similar reasoning in subsequent cases in which a party's objections raised questions about either the security of blank ballots, or the integrity of the ballots or the integrity of the ballot box itself.<sup>19/</sup>

There is no allegation here that blank ballots or the unsealed ballot box were left unattended during the balloting itself. The Employer's objection relates only to the security of unresolved challenged ballots in the period between the first and second tallies of ballots. The Employer does not allege, actual tampering, but only that a reasonable possibility for such tampering existed in this period.

The evidence shows that Board agent Viniegra did not follow procedures set forth in the Board's Representation Case Manual for the handling of unresolved challenged ballots at the close of the tally of ballots. Those procedures state that unresolved challenged ballots should be placed in a sealed envelope or box following the tally of ballots, and then brought back to the Board office, where they should be placed in a locked cabinet with other ballots from the election.

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19/ D'Arrigo Brothers of California, 3 ALRB No. 37 (1977) (Board agents left blank ballots and an open box unattended in custody of observers for brief time to investigate a disturbance); Dairy Fresh Products Co., 4 ALRB No. 2 (1978) (Board agent kept box sealed in a way which would permit ballots to be inserted using a knife or screwdriver during a split session election); Bee and Bee Produce Co., 3 ALRB No. 84 (1977) (Ballot box contained two ballots of a different color from others which were samples inadvertently handed out to two voters.) Abatti Farms and Abatti Produce, Inc., 3 ALRB No. 83 (1977) (Board agent improperly slipped one challenged ballot into ballot box after it had been sealed in the presence of observers who resigned seal).

The challenge envelopes containing challenged ballots should not be opened until the Board issues a final decision on challenges. The evidence shows that Viniegra did not completely follow these procedures but instead sealed only the challenged ballot envelopes of Cal-Date Co. employees in a larger sealed envelope. The remaining unresolved challenged ballot envelopes and this larger envelope were then placed in either an open box or one which was sealed and later opened. Whether opened or closed, the box and ballots were in Viniegra's custody until he completed his report on challenged ballots. Following the submission of his report, all unresolved challenged ballot envelopes from this election were kept in sealed envelopes in a locked cabinet at the Coachella or Indio Field Offices or in sealed envelopes in a sealed box kept at bank vaults in Indio or San Diego. For several hours in this period, the unresolved challenged envelopes were in sealed envelopes in a sealed box while Regional Director Roberts transported them by car from Indio to San Diego.

The sealed box remained at Roberts's home for several days until arrangements for storage in a bank vault were completed. The box was not kept at the Board's San Diego Regional Office because of Roberts concerns over the security of his office following an earlier break in at the Oxnard Field Office which resulted in the theft of unresolved challenged ballots.

The record shows that for about two months following the initial tally of ballots, the Board agent's conduct did not provide optimal safeguards for the security of unresolved challenged ballots. The Board has recognized that some deviations from the ideal inevitably occur in holding representation elections in spite of the best efforts

of all to prevent them. Bruce Church, Inc., supra. In particular, the Board has held that deviations from the procedures contained in the Representation Case Manual are not in themselves grounds for setting aside an election absent evidence that the deviations interfered with the employees' free choice or otherwise affected the .outcome of the election. Harden Farms of California, Inc., 2 ALRB No. 30 (1976). I do not find that the deviations here created a reasonable possibility of irregularity. As stated by the court in Polymers, Inc., supra, the determination of reasonableness requires a weighing of the remoteness of the possibility of irregularity. In this case, the ballots were with few exceptions in the custody of a Board agent in the Board's offices. On a few occasions when the ballots were kept at a Board agent's residence, there is no evidence that any party or unknown third person had access to the ballots. As evidenced, by the theft of ballots from a Board office, the mere fact that proper procedures were followed is no guarantee of security unless the particular circumstances of the deviations from the guidelines are weighed. All the unresolved challenged ballots were in sealed challenged envelopes. The majority of these envelopes were kept in a larger sealed envelope which was not opened until the second tally. There was no evidence that any challenge envelope was opened or tampered with prior to the second tally.

The Employer's allegations of a reasonable possibility for tampering presuppose that a party or unknown person was able to break into a Board office, car trunk, motel room, or home at the precise moment when the ballots were unguarded. The person would then have to open

one or more sealed manila envelopes containing challenge envelopes and 98 challenge envelopes themselves without leaving a trace of tampering. The person would then have to remove the ballots and substitute new ones. This, of course, presupposes that the Board kept at least 100 blank ballots used in the Tenneco West election following the vote and that the person was able to break in or secure these blank ballots or obtain them by other illegal means. There is no evidence that this was done. The envelopes would then have to be resealed in a way that the party representatives did not notice any irregularity or new envelopes substituted, and filled in by forging the handwriting on the outside of the original envelopes. I note that the vast majority of the unresolved challenged ballots were ultimately counted for "no union." I find it difficult to believe that the UFW, having gone to the trouble and risk of tampering with the ballots, would not have given themselves a better share of these votes. An unknown person interested in altering the election results would have changed a sufficient number of votes to assure a no union victory or would have stolen all the unresolved challenged ballots so that the election would have to be set aside or rerun. I find the possibility of irregularity under all the circumstances of this case too remote to be considered reasonable. This objection should be dismissed.

RECOMMENDATION

Based on the findings of fact, analysis, and conclusions, I recommend that the Employer's objections be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in the Coachella Valley.

DATED: July 7, 1973

Respectfully submitted,

A handwritten signature in cursive script, reading "James E. Flynn". The signature is written in black ink and is positioned above a solid horizontal line that spans the width of the signature.

JAMES E. FLYNN  
Investigative Hearing Examiner, ALRB