

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SAKATA RANCHES,)	Case No. 78-RC-17-M
)	
Employer,)	
)	
and)	5 ALRB No. 56
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
_____)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW), on August 15, 1978, a representation election was conducted on August 22, 1978, among the agricultural employees of Sakata Ranches (Employer), excluding packing-shed and freezer-unit employees. The official Tally of Ballots showed the following results:

UFW	73
No Union	50
Challenged Ballots	<u>13</u>
Total	136

The Employer timely filed post-election objections, which thereafter were set for hearing. Subsequent to the hearing, Investigative Hearing Examiner (IHE) Elizabeth Miller issued the attached Decision, in which she recommended that the Employer's objections be dismissed and that the UFW be certified as the collective bargaining representative of the unit employees. The Employer timely filed exceptions to the IHE's Decision and a

supporting brief.

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

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

The Employer excepts to the IHE's finding that alleged misrepresentations made by UFW agents concerning Citizens Participation Day (CPD) do not warrant setting aside the election. We find no merit in this exception. The Employer argues that the misrepresentations constitute misconduct sufficient to warrant setting aside the election, under the NLRB's Hollywood Ceramics rule.^{1/} We have previously indicated our reluctance to follow this rule in its entirety, because it is based on the NLRB's "laboratory conditions" model for election conduct, which requires representation elections to take place "under conditions as nearly

^{1/} In Hollywood Ceramics Co., 140 NLRB 221, 51 LRRM 1600, 1601 (1962), the NLRB ruled that elections should be set aside only:

where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

Hollywood Ceramics Co. was overruled by Shopping Kart Food Market, Inc., 228 NLRB 1311, 94 LRRM 1705 (1977), but the Hollywood Ceramics rule was subsequently reinstated in General Knit of California, Inc., 239 NLRB No. 101, 99 LRRM 1687 (1978T)

ideal as possible." General Shoe Corp., 77 NLRB 124, 127, 21 LRRM 1337 (1948); Jake J. Cesare & Sons, 2 ALRB No. 6 (1976); Samuel S. Vener Co., 1 ALRB No. 10 (1975). The NLRB has not used a strict or mechanical approach to the Hollywood Ceramics standard and has set aside elections only where a realistic appraisal of the pre-election conduct indicates that the integrity of the election has been impaired. See Modine Manufacturing Co., 203 NLRB 527, 83 LRRM 1133 (1973), enf'd, 500 F.2d 914, 86 LRRM 3197 (8th Cir. 1974). However, NLRB elections can be easily rerun where statements or conduct at or preceding the election fall short of laboratory conditions. In the agricultural setting, rerun elections, in most cases, must be postponed until a subsequent period of peak employment. It has therefore been our practice to set aside elections only where the employees could not express their free and uncoerced choice of a collective bargaining representative. D'Arrigo Bros, of California, 3 ALRB No. 37 (1977).

However, we would not set aside the election in this case under either the D'Arrigo rule or the Hollywood Ceramics rule, because we find that the UFW's pre-election conduct did not have a substantial impact on the election. The alleged misrepresentations were made by UFW organizers during four separate conversations with employees on the Employer's property.^{2/} During those conversations, which took place during the period from two weeks to three or four days before the election, employees asked UFW organizers whether

^{2/} The IHE found that the two UFW organizers who spoke to two employees at Riverside Grove were "apparently" Norma Aleman and Rob Everetts. The record does not support this finding; the identity of the two organizers was not established.

contributions into the CPD fund were mandatory. The organizers answered, in some of the conversations, that the contributions were voluntary and, in other conversations, that such contributions would not be required unless the majority of the employees wanted to contribute.^{3/} When asked whether workers at another ranch had been discharged for failing to contribute to the CPD fund, the organizers, in some instances, denied that was the case and, on other occasions, answered that it was the workers who decided to file charges and voted on whether to expel a member for failure to contribute.

Many of the statements made by the UFW organizers were not clearly shown to constitute misrepresentations.^{4/} See Lawrence

^{3/}We reject the IHE's finding that UFW organizer Renteria did not tell a group of workers at Wilder Ranch that if the majority decided not to pay into the CPD fund, they would not have to. The testimony of Employer witnesses Rodriguez and Calip was consistent on that point and the record shows that, during this exchange, Calip was standing only a few feet away from Renteria and was listening to the conversation. However, the record also shows that, for a certain portion of the conversation between Rodriguez and Renteria, Calip was standing about four yards away behind his car and was not paying attention to the conversation.

^{4/}The format and requirements of the CPD program are quite complex. CPD is a paid holiday which is usually negotiated as part of the collective bargaining agreements entered into by the UFW. Such agreements must be approved and ratified by a majority of the membership. In the CPD provision, a certain day is designated as Citizens Participation Day, and the employees are paid for that day even though they do not work. Upon receipt of authorization from the employee, the employer pays the money into the CPD fund rather than to the employee. (If the employee works on the designated day, the employer will pay the employee for his or her work and will also, upon authorization, contribute a day's pay into the CPD fund.) This authorization was originally voluntary, but a resolution at the 1977 UFW convention made the CPD contributions mandatory. The UFW constitution provides that, after a union member files charges against another member for refusing to pay an assessment, a public trial is held, and the membership votes whether to expel or suspend the member, if he or she is found guilty. A typical union security

(fn. 4 cont. on pg. 5.)

Vineyards Farming Corp. , 3 ALRB No. 9, p. 8 (.1977) . However, certain statements were misrepresentations. On two occasions, UFW organizer Norma Aleman told certain employees that contributions into the CPD fund were voluntary. When asked by an employee whether it was true that some of his friends were being disciplined for failing to contribute to the CPD fund, an unidentified UFW organizer replied that it was not true, that it was for "some other thing."

We find that these misrepresentations did not have a significant impact on the election. The record shows that these statements were no more than isolated incidents, especially in light of UFW organizer Renteria's explanation of the CPD program at a mass meeting with 50 to 70 Sakata employees at the union hall a week before the election. The two Sakata employees who testified about the meeting stated that they understood from Renteria's explanation that contributions to the CPD fund were mandatory, that the employer paid the money directly into the fund, that employees could vote to expel a union member who refused to contribute, and that workers had, in fact, been punished for their failure to contribute.

The Employer's contention that Renteria made misrepresentations about CPD at this meeting is without merit. The Employer argues that, although the workers understood that contribution was mandatory, Renteria led them to believe that the money was not

(fn. 4 cont.)

clause, usually included in the UFW collective bargaining agreements, provides that employees will be discharged if they are not members in good standing or if they have failed to pay required dues. The IHE refers to provisions in the UFW constitution whereby members can object to specific uses of CPD funds. These provisions, however, were added to the constitution after the election herein, and are therefore irrelevant to the issues at hand.

coming from their own pockets. The witnesses clearly stated that CPD was a holiday for which they did not get paid and for which the employer contributed their pay to the CPD fund; if they chose to work on that day, the employer would pay them their wages and would also contribute to the fund. The record thus establishes that Renteria gave a clear and correct explanation of the CPD program.^{5/}

Where deliberate or repeated misrepresentations have occurred in an election campaign, the fact that these misrepresentations are corrected during a mass meeting would not necessarily eradicate the effects of the misrepresentations. However, in this case, on the basis of the entire record, and noting the limited scope of the misrepresentations and the absence of any other pre-election misconduct, we find that the Employer has not met its burden of proving that these misrepresentations interfered with the employees' free choice to the extent that they affected the results of the election.

The Employer excepts to the IHE's finding that the conduct of two UFW organizers in the quarantined area around the polling site did not warrant setting aside the election. We find no merit in this exception.

The record shows that the two organizers spoke briefly with a group of prospective voters in a lettuce field which was part of the quarantined area. The conversation occurred a few minutes after the polls had officially opened but before any voters had

^{5/}Although the record shows that Employer witnesses Calip and Rodriguez attended this mass meeting, neither witness was called to contradict the testimony of the UFW witnesses concerning what was said at the meeting.

reached the polling site. In Superior Farming Co., 3 ALRB No. 35 (1977), we held that setting aside an election is not warranted where union organizers carry on conversations in a quarantined area with prospective voters waiting to cast ballots, absent a showing that the conversations affected the outcome of the election. Here, no showing of objectionable electioneering was made. Union organizer Renteria testified without contradiction that the exchange with the workers concerned their request for directions to the polling site. Furthermore, the conversations took place at the edge of the quarantined area, a quarter of a mile from the polling site, before any workers had even reached the site. Therefore, we find that the conduct of the organizers had no coercive impact and does not constitute grounds for setting the election aside.^{6/}

We find no merit in the Employer's exception to the IHE's finding that Board Agent Pineda did not act improperly when he refused to leave the polling area after company observer Calip asked him to investigate the presence of a UFW organizer's car on a

^{6/}The Employer contends that our Decision in Perez Packing, Inc., 2 ALRB No. 13 (1976) requires us to apply the NLRB's Milchem rule in this case. Under the Milchem rule, the NLRB sets aside elections where parties have engaged in sustained conversations with prospective voters waiting to cast their ballots, without inquiry into the substance of the conversations. Milchem, Inc., 170 NLRB 362, 67 LRRM 1395 (1968). The Employer's contention is based on a misinterpretation of Perez. In Perez, where an observer repeatedly engaged in conversations with voters waiting to cast ballots despite a Board agent's warnings to stop, we concluded, without inquiring into the substance of the conversations, that the observer's misconduct was "a serious violation of the Board agent's instructions" which, when considered together with other objectionable conduct, warranted setting aside the election. The organizers here did not engage in conduct similar to that in Perez. In fact, the conversations, which were quite brief and did not involve people waiting to cast ballots, would not constitute grounds for setting aside an election even under the Milchem rule.

public road, at the edge of the quarantined area, about a quarter of a mile from the polling site.^{7/} The car left the area minutes after the request was made. At the time of the request, Pineda was the only Board agent near the polls. His refusal to leave the polls unguarded did not constitute misconduct. John Elmore Farms, 3 ALRB No. 16 (1977).

The Employer's objections are hereby dismissed, the election is upheld, and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of Sakata Ranches in the State of California, for the purpose of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, working hours, and other terms and conditions of employment.

Dated: August 28, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

^{7/}The Employer contends that Calip was not just pointing out the car to Pineda, but was also pointing to other UFW organizers. The record shows that this contention is without merit. Both Calip and Pineda testified that this incident involved only the one car and its occupants.

CASE SUMMARY

Sakata Ranches (UFW).

5 ALRB No. 56

Case No. 78-RC-17-M

IHE DECISION

After a representation election conducted on August 22, 1978, which the UFW won, the Employer filed post-election objections as to alleged misconduct of UFW organizers and a Board agent before and during the election.

The Employer objected to alleged misrepresentations by UFW organizers to employees about the requirements of Citizens Participation Day (CPD), a provision in UFW collective bargaining agreements. The IHE concluded that, even if employees had been incorrectly told in certain conversations that contribution to the CPD fund was voluntary, such statements would not warrant setting aside the election. Recognizing that the ALRB has had serious doubt about applying the NLRB's Hollywood Ceramics rule concerning misrepresentation, the IHE concluded that even under that rule, the election should not be set aside because the misrepresentations were made at least three or four days before the election, which gave the Employer ample opportunity to reply.

The Employer objected to the conduct of two UFW organizers who spoke briefly to prospective voters in the quarantined area after the polls had officially opened. The IHE found such conduct insufficient to warrant setting aside the election, where there was no evidence that the conversation constituted electioneering and where no workers had arrived at the polling site. The IHE also found that the Board Agent did not act improperly when he refused to leave the polling area unguarded in order to investigate a UFW organizer's car on the far side of the field.

The IHE recommended dismissal of the Employer's objections and certification of the UFW.

BOARD DECISION

The Board affirmed the IHE's Decision, as modified. Noting its reluctance to adopt the Hollywood Ceramics rule, based as it is on the NLRB's "laboratory conditions" model, the Board found that the alleged misrepresentations about CPD did not have a substantial impact on the election. The Board found that three such statements constituted misrepresentations but were nonetheless isolated incidents, especially in light of a UFW organizer's correct explanation of employees' CPD obligations at a union meeting with 50 to 70 employees of the Employer.

The Board concluded that the conduct of the two UFW organizers in the quarantined area during the election had no coercive impact and was insufficient to warrant setting aside the election. The conversation was brief and took place before any voter had reached the polling site. No showing of objectionable electioneering was made. Furthermore, the organizers were one quarter mile from the site itself, at the edge of the quarantined area, a lettuce field. The Board also affirmed the IHE's conclusion that the Board Agent did not act improperly in refusing to leave the polls to investigate the UFW organizer's car at the edge of the field, one quarter mile away.

The Board dismissed the objections, upheld the election and granted certification to the UFW.

* * *

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:

SAKATA RANCHES,

Employer,

Case No. 78-RC-17-M

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Jordan Bloom, Littler, Mendelson,
Fastiff & Tichy for the Employer.

Linton Joaquin for the United Farm
Workers of America, AFL-CIO.

DECISION

STATEMENT OF CASE

ELIZABETH MILLER, Investigative Hearing Examiner: This case was heard in Watsonville, California, on January 22 and 23, 1979, and in San Francisco, California, on February 5, 1979. On August 15, 1978,^{1/} the United Farm Workers of America, AFL-CIO, (UFW) filed a Petition for Certification, A representation election was held on August 22, among all the agricultural employees of Sakata Ranches (employer) in California, excluding packing shed and freezer unit employees. The result was:

United Farm Workers	73
No Union	50
Unresolved Challenged Ballots	13
Total	136

The employer timely filed objections to the election, alleging misconduct which affected the election. Pursuant to

^{1/} All dates refer to 1978, unless otherwise designated.

his authority under 8 Gal. Admin. Code §20365 (c), the Executive Secretary dismissed some of the objections and set others for hearing. The following objections were set for hearing:

1. Whether UFW agents made false representations to employees of the obligations of employees as members under UFW collective bargaining agreements and if so, whether such conduct affected the results of the election.

2. Whether UFW agents misrepresented the obligations of employees, as union members, under the union's constitution and by-laws and if so, whether such conduct affected the results of the election.

3. Whether UFW agents misrepresented the requirements of employees, as union members, under the Citizens Participation Day clause as it exists in the UFW collective bargaining agreements and if so, whether such conduct affected the results of the election.

4. Whether UFW agents entered the quarantined area and spoke to employees after the polls had opened at one of the polling sites and if so, whether such conduct affected the results of the election.

5. Whether ALRB agents showed bias against the employer and in favor of the UFW by allowing union representatives to engage in campaigning on company property in the quarantined area after the polls had opened and if so, whether such conduct affected the results of the election.

6. Whether ALRB agents showed bias against the employer and in favor of the UFW by failing and refusing to advise union

representatives to leave the quarantined area after the polls had opened and if so, whether such conduct affected the results of the election.

These objections concerned two areas of alleged misconduct: alleged misrepresentations concerning the UFW's Citizens Participation Day (CPD) program; and alleged campaigning at the polls by UFW representatives.

The employer and the UFW were represented at the hearing and were given full opportunity to participate in the hearing, including examining witnesses and filing briefs. 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 and conclusions of law.^{2/}

FINDINGS OF FACT

I. Misrepresentations Concerning Citizens Participation Day

The evidence received concerning these objections related to the format and requirements of the UFW's CPD program,

^{2/} In its post-hearing brief, the employer asserts that the sequestration order, which I granted at the employer's request during the hearing, was violated. The testimony on which the employer relies in making this allegation reflects neither a violation of that order nor any breach of professional ethics. The order required prospective witnesses to leave the hearing room during testimony which pertained to incidents about which they were expected to testify. Late in the hearing, UFW witness Javier Martinez testified that during a recess Mr. Joaquin, attorney for the UFW, had spoken with several witnesses about one of the issues set for hearing, and about questions which the employer would ask. In addition, Joe Sanchez, labor consultant for the employer, testified that he overheard Joaquin telling a group of UFW witnesses which questions the employer would ask. The testimony summarized above does not show that any witnesses discussed with prospective witnesses testimony which they had given, or that they were told how to answer any questions at the hearing.

and to statements pertaining to that program made by UFW representatives to Sakata employees during the election campaign. There was testimony about several different incidents wherein organizers allegedly misrepresented the program. Each of these incidents will be discussed separately.

Citizens Participation Day

CPD is a paid holiday which is negotiated as a part of collective-bargaining agreements entered into by the UFW. Under the provisions of a typical contract clause, the employees receive pay although they do not work on the CPD holiday. Upon receipt of an authorization from the employee, however, the company pays the money for the holiday to the CPD fund.^{3/} A typical union security clause, which is also generally part of such a contract, provides that employees shall be discharged if they are not members in good standing in the UFW, or if they fail to pay required fees, dues or assessments. At the 1977 UFW Constitutional Convention, a resolution was passed making CPD contributions by members mandatory. (These contributions had previously been voluntary.)

^{3/}Employer's exhibit 2 incorporates a collective bargaining agreement between Mann Packing Company and the UFW. The clause relating to CPD (Article 24,D) provides:

"Citizens Participation Day" shall be designated as the first Sunday of June. All workers... shall receive holiday pay...

Upon receipt of proper written authorization from the worker, the Company shall deduct from such workers wages the pay received for Citizens Participation Day and shall remit such sum to the Citizenship Participation Committee of the United Farm Workers, AFL-CIO, for allocation as designated by the worker.

The CPD fund is intended to be used for various political purposes related to the betterment of farmworkers. Provisions exist for objecting to expenditure of money for purposes to which the individual employee is opposed, in which case the employee may choose to contribute to one of the charitable funds selected by the UFW's National Executive Board.

The UFW Constitution provides that where a member refuses or fails to pay any mandatory assessment, another member may prefer charges. A public trial is held by members of the Ranch Committee at the ranch where the charged member works. The Ranch Committee decides whether the charged member is guilty or innocent, and relays its recommended disposition to the membership. A vote of two-thirds of the membership is required to declare the accused guilty, and a three-fourths vote is required to expel or suspend the member.

There was some testimony at the hearing as to employees at two other ranches who may have refused to authorize payment of their CPD money to the fund, and who may have been subject to union disciplinary action including expulsion, for such refusal. The testimony relating to such incidents was hearsay, and I make no finding as to whether such incidents did occur.

Conversation at Riverside Grove

Ernesto Rodriguez testified that one morning, approximately two weeks before the election, he and another employee were approached by two UFW organizers, one male and one female. Rodriguez testified that he asked if it was true that the employees

would have to contribute money on "that day," and the male organizer responded that it depended on whether the employees at Sakata wanted to pay. Rodriguez further testified that he asked if it was true about what was happening to his friends (apparently referring to the employees who were allegedly disciplined for refusing to execute CPD authorizations), and the organizer replied that it was not true.

Rodriguez' testimony was uncontradicted. The organizers involved in this conversation were apparently Norma Aleman and Rob Everetts. Aleman was out of the state at the time of the hearing. No explanation was given as to Everetts' whereabouts.

Conversation at Wilder Ranch

Approximately seven to ten days prior to the election, UFW organizers Jose Renteria and Norma Aleman visited a lettuce crew during the lunch break. According to the testimony of Ernesto Rodriguez and Eduardo Calip, workers in the crew, Renteria told them that if the majority of workers at Sakata did not want to pay into the CPD fund, they would not have to. These two employees also testified that, in response to questions concerning the workers allegedly disciplined at another ranch, Renteria explained that workers could only be expelled from the union after a vote by the employees,

Renteria's testimony is largely in conflict with the above testimony, Renteria claimed that he only explained which day the CPD holiday would be, that payment into the CPD fund was made mandatory in 1977, and that the person who had been expelled had not paid and the expulsion was voted on by his fellow workers.

I find that Renteria did not tell the workers that if the majority decided not to pay into the CPD fund, they would not have to. While there was some confusion as to exactly what was said, Rodriguez testified on cross examination that the only statement which Renteria made concerning voting was that the employees would vote on the expulsion of any employees. Although Calip also testified that Renteria said that the majority of employees could decide against paying for CPD, the testimony showed that it was Rodriguez to whom Renteria was speaking, and that Calip was not paying close attention to the whole conversation.

Conversation at San Juan Road

Salvador Bravo testified that five or six days before the election, Norma Aleman spoke to a group of employees during the lunch break. According to Bravo, when asked if the employees would have to pay for CPD, Aleman responded that they would not, and that it was voluntary rather than obligatory. Bravo also testified that, when countered with his allegation that workers at another ranch had been forced to pay, Aleman responded that was because the majority of the people had agreed to that, and had voted on it.

Conversation at Porter Ranch

Salvador Bravo related a similar conversation which occurred three or four days prior to the election. Bravo testified that Aleman approached a group of workers during lunch and, when asked about CPD, responded that it was voluntary. Aleman was again questioned about the employees at a neighboring ranch, and said that it was the workers who decided when charges

were filed.

Union Meeting

A meeting was held at the UFW hall in Watsonville for Sakata workers about one week before the election. Approximately fifty employees attended the meeting. The principal speaker at the meeting was organizer Renteria. Renteria testified that he was asked about CPD, and that he explained the program in detail. He said that the purpose of CPD is to establish a separate fund for use in political campaigns, that contributions to the fund previously had been voluntary, but were made mandatory in 1977, and that the contributions were made mandatory because it was not fair that only some members contributed to the fund. Renteria also testified that Augustin Herrera, president of the UFW Ranch Committee at a nearby ranch, explained the circumstances of the worker who had been fired there. According to Renteria, Herrera explained that charges had been filed against the worker because he had not paid into the CPD fund, and that his fellow employees had voted to expel him from the union.

Augustin Herrera and two employees who attended the meeting, Guillermo Sandejas and Javier Marinez, also testified about the statements which were made. While it appears that each of these witnesses left the meeting with a slightly different perception of what had been said, Renteria's version was substantially corroborated, Sandejas agreed that Renteria stated that CPD payments had been made mandatory, and that now everyone would be treated the same. He also recalled Renteria saying that workers at another ranch had been punished for not paying into the CPD

fund. The main impression with which Sandejas left the meeting was that it was the employer rather than the employee who would have to pay for CPD. At one point Sandejas explained that CPD is a holiday for which the employees are not paid.

Marinez' testimony was substantially the same as that of Sandejas. Marinez agreed that Renteria said the CPD fund was obligatory and that it had not been fair when only some of the employees paid into it. He also agreed that Herrera explained that someone had been fired from West Coast because he did not want to pay into the fund. As with Sandejas, Marinez testified that he was told at the meeting that it was the employer who would pay for the holiday rather than the workers, and that if the employee chose to work on the day designated as CPD, both he and the fund would be paid.

Herrera recalled that Renteria said it was the workers' money which made up the CPD fund, and that if the workers worked on CPD, they would be paid for the work they did. Herrera testified that Renteria explained that if a worker did not sign an authorization card, the CPD money went to the worker, but if he/she did sign a card, the money would go to the fund. Herrera testified that when he spoke at the meeting he explained that a worker at West Coast was fired for not being a good union member, and was expelled by a vote of the membership. Insofar as Herrera's testimony is in conflict with that of other witnesses who attended the meeting, I would discount his testimony. His memory of the meeting and surrounding events was very weak, and he was a

hesitant witness. While he was certain that an election petition had been filed prior to the meeting, the other witness testified that it had not yet been filed, and that one of the purposes of the meeting was to decide whether to file a petition.

II. Campaigning at the Polls

There were two polling sites for the election at Sakata Ranches. The alleged misconduct occurred at the second site, known as the First Street site,^{4/} which was scheduled to open at 7:30 a.m. At approximately 7:20 or 7:25, ALRB agents Ladislao Pineda, Norman Sato and Arnold Savella, along with observers for the employer and the UFW, arrived at the First Street site. The board agents proceeded to set up the polling booths and the necessary tables, while UFW organizer Scott Washburn and another organizer watched. During this time, UFW organizers Jose Renteria and Norman Aleman were in the field adjacent to the polling area, speaking to workers.

Before the ballot box was unsealed, Washburn and the organizer who accompanied him were directed to leave the area. Washburn drove around the field and onto First Street. When Renteria and Aleman realized the polls were being set up, they had started walking towards the polling area. When they saw Washburn leaving, however, they changed their direction and headed for First Street. On their way there, when they had almost

^{4/} The polling site was situated by a levee, which borders a lettuce field on the southern side. First Street runs along the northern end of the field, and was approximately one-quarter mile from the polling site. To the east the field is bordered by Ranch Road. Both First Street and Ranch Road are dirt roads. In order for a vehicle to leave the polling site, it would follow the levee to Ranch Road, and then to First Street.

reached First Street, they passed several workers who asked about the location of the polling site. Upon answering them, Renteria and Aleman continued on to First Street.

When Washburn arrived at First Street, Tommy Sakata, accompanied by his attorney Jordan Bloom, approached him, pointed out the organizers in the field, and asked what they were doing there. Washburn responded that they had a right to be there, and then motioned to Renteria and Aleman to leave the field. The two organizers walked out of the field and onto First Street.

Meanwhile, at the polling site, board agent Sato had gone into the field to motion to the workers to come and vote, and board agent Savella had followed Washburn's car a short way, in order to make sure he left the polling place as directed. Fineda, the board agent in charge of the election, stayed at the polling site with the observers and the ballot box. Eduardo Calip, an observer for the employer, pointed out Washburn's car to Pineda as it stopped on First Street. While Calip thought that Washburn was speaking to workers, Sakata's testimony makes clear that it was to himself that Washburn spoke. Calip questioned Pineda about whether Washburn was in the "quarantined area," i.e., the area from which party representatives were prohibited during the election, and Pineda agreed that that area extended across the field to First Street, Pineda explained, however, that he could not leave the polling site to ask Washburn to leave since the car was a significant distance from the polling site.

It is undisputed that no prospective voters had arrived at the polling site while Renteria and Aleman were in the field. There was also no evidence that any campaigning was undertaken after the polls had officially opened, and before the voters reached the polls. Renteria's testimony was uncontradicted that the only statement he made to workers after the polls had officially opened was his response to questions about the location of the site. The only conversation which took place on First Street was the conversation between Sakata and Washburn.

CONCLUSIONS OF LAW

I. Misrepresentations Concerning Citizens Participation Day

It was clear from the testimony at the hearing that the CPD program was important to the voters, and was also the subject of much confusion and of differing interpretations. Part of the reason for this confusion is no doubt simply that the method of funding the program is somewhat complex, especially for persons not sophisticated in the area of collective-bargaining agreements and internal union disciplinary methods. It is quite possible that upon being told that the program was mandatory, but that no penalty could be incurred without the vote of the workers at a ranch, that workers would believe that the program was in fact voluntary. Similarly, workers who attended the union meeting may have received the impression that only the company, and not the employees, would have to pay for the CPD program, when told that the company would pay for the CPD holiday whether or not the employee worked, and that the employee would also be paid if he/she worked. To the extent that this occurred,

there was no misrepresentation.

However, even if, as was claimed by Ernesto Rodriguez and Salvador Bruno, the employees were specifically told that participation in the CPD program was totally voluntary, the election may not be set aside for such misrepresentation.

The NLRB follows the Hollywood Ceramics rule in evaluating misrepresentations during election campaigns:

...an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. Hollywood Ceramics Company, 140 NLRB 221, 224, 51 LRRM 1600 (1962), (emphasis added)^{5/}

The ALRB has expressed serious doubt as to whether it will follow the Hollywood Ceramics rule, since that rule is premised on the "laboratory conditions" model. See, Samuel S. Vener Company, 1 ALRB No. 10 (1975); Jake J. Cesare & Sons, 2 ALRB No. 6 (1976). Since the ALRB has refused to adopt the "laboratory conditions" standard, and will only set aside elections where the circumstances were such that employees could not express a free and uncoerced choice (D'Arrigo Bros. of California, 3 ALRB No. 37 (1977)), it is presumed that this latter approach, rather than the Hollywood Ceramics rule, will be adopted.

^{5/}Hollywood Ceramics Company, supra. was overruled by Shopping Kart Food Market. 228 NLRB 1311, 94 LRRM 1705 (1977). The Hollywood Ceramics rule was subsequently reinstated in General Knit of Calif., Inc., 239 NLRB No. 101, 99 LRRM 1687 (1978).

Even under the stricter Hollywood Ceramics rule, however, this election should not be set aside. The NLRB has consistently held and the courts have approved, that elections will be set aside only where misrepresentations are made immediately before the election, when the other party has no opportunity to reply. See, e.g., Warner Press, Inc. v. NLRB, 525 F.2d 190 (7th Cir. 1975); S. H. Lynch and Company v. NLRB, 406 F.2d 766 (5th Cir. 1968), cert, den. , 395 U.S. 907 (1969), (objection dismissed since employer did not respond to misrepresentation made one week prior to election). Even where a misrepresentation is made on election eve, the Board has refused to set aside the election where the campaign issue was interjected early into the campaign. See, Chemi-Trol Chemical Co., 190 NLRB 302, 77 LRRM 1120 (1971).

The alleged misrepresentations were made in the instant case as early as two weeks prior to the election, and no statement was made less than three or four days before the election. The employer had adequate opportunity to respond, but failed to do so. While the employer asserts in its post-hearing brief that the employer did not know that misrepresentations had been made until after the election, there is nothing in the record to support this claim. Since the issue of CPD was interjected into the campaign at least two weeks prior to the election, was discussed on many occasions, and was clearly a focal point of employee concern during the campaign, I cannot assume that the employer was unaware of the alleged misrepresentations prior to the election. In any event, the burden is on the party objecting to the election to prove

the elements of the objectionable conduct. Cal. Lab. Code §1156.3(c).

The employer further argues that it could not have effectively replied to the misrepresentations since they were made in scattered locations and to many employees. A party may not wait until after an election, making no attempt to clarify the facts, and then claim that misrepresentations were made to which it could have responded. Since there is no evidence that the employer made any effort to respond, and since there was ample time, it cannot now claim any attempt would have been futile.

II. Campaigning at the Polls

The evidence produced by the employer at the hearing showed that two organizers for the UFW were present in the field, a part of the "quarantined area," and spoke briefly to prospective voters. There was no evidence that the conversation constituted electioneering. The polls were officially open at the time, but no workers had arrived at the site or cast their votes. These facts are insufficient to cause the election to be set aside.

The mere presence of union organizers at or near the polling area is insufficient to set aside an election. Sam Barbic, 1 ALRB No. 25 (1975); Konda Brothers, 2 ALRB No. 34 (1976); Veg-Pak, Inc., 2 ALRB No. 50 (1976); Superior Farming Company, 3 ALRB No. 35 (1977). And where a party representative carries on a conversation in the polling area, the ALRB has refused to set aside the election if there is no evidence the conversation included campaigning. Spring Valley Farms, 4 ALRB No. 7 (1978) ;

Missakian Vineyards, 3 ALRB No. 3 (1977) .^{6/}

In Missakian Vineyards, supra, the Board upheld an election where organizers were present in the immediate vicinity of the polls during the time voting should have taken place, but before actual commencement of the voting. As in the instant case, there was no evidence of electioneering. In another case similar to the instant one, the ALRB found only a negligible effect, and upheld the election, where two organizers spoke briefly with workers in a field approximately 150 yards from the polling place while the board agents assembled the voting booths. Yamano Bros. Farms, Inc., 1 ALRB No, 9 (1975).

In Perez Packing, Inc., 2 ALRB No, 13 (.1976), cited by the employer, the ALRB did set aside an election in part because of conversations between an observer and prospective voters, In that case, however, the conversations took place at the immediate polling site, after the board agent had checked the employees' names off the eligibility list and while they were waiting to cast their vote. The conversations also occurred several times during the actual voting period. The facts of the instant case do not reflect the kind of coercive atmosphere present in Perez Packing.

Similarly, the NLRB cases cited by the employer are distinguishable. Both Claussen Baking Company, 134 NLRB 111,

^{6/} The NLRB's Milchem rule requires elections be set aside in the face of sustained conversations with prospective voters waiting to cast their ballots, regardless of the remarks exchanged, Milchem, Inc., 170 NLRB 362, 67 LRRM 1395 (1968). The ALRB has refused to apply this rule. Superior Farming Company, supra. However, even under the Milchem rule, the instant election should not be set aside. The reported conversation was quite brief, and the voters were on their way to the polls rather than waiting to cast their ballots.

49 LRRM 1092 (1961), and Star Expansion Industries Corporation, 170 NLRB 364, 67 LRRM 1400 (1968), involved party representatives who engaged in electioneering activities in close proximity to the polls during a substantial part of the voting period. In the instant case, there was no evidence that the organizers campaigned, and the brief incident took place prior to the actual voting.

The employer's allegation that board agent Pineda acted improperly in choosing not to walk across the field when Washburn's car was pointed out to him is similarly without merit.^{7/} See, John Elmore Farms, 3 ALRB No. 16 (1977). At the time of the request Pineda was the only board agent within the immediate polling area, and he did not act improperly in refusing to leave the polling place unguarded in order to investigate a car on the other side of the field.

Conclusion

The evidence presented by the employer does not warrant setting aside the election. The evidence concerning the alleged misrepresentation showed that the employer had ample time to respond to the union's representation, but chose not to do so. No explanation was given in the record to explain this failure to respond. The circumstances on the day of the election showed only that two organizers were in a field which had been marked as a "quarantined area" after the polls officially opened, but prior to the actual voting, and that a very brief conversation

^{7/} While the employer infers in its brief that its observer, Eduardo Calip, pointed out the organizers who were inside the field to board agent Pineda, the record is clear that it was a car on First Street which Calip pointed out. Even if Calip had referred to the organizers who were in the field the result would be the same.

occurred, the uncontradicted testimony showing that there was no campaigning. These facts are insufficient to require setting aside the election.

Recommendation

Based on the findings of fact, analysis, and conclusions herein, I recommend that the employer's objections be dismissed and 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 State of California, excluding packing shed and freezer unit employees.

DATED: March 12, 1979

Respectfully submitted,

ELIZABETH MILLER
Investigative Hearing Examiner