

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

NASH-DE CAMP COMPANY,)
)
Employer,) Case No. 80-RC-7-D
)
and)
)
UNITED FARM WORKERS OF) 7 ALRB No. 26
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 September 19, 1980, a representation election was conducted on September 25 among the Employer's agricultural employees. The Official Tally of Ballots showed the following results:

UFW 61
No Union 46
Challenged Ballots. 7
Total 114

The Employer timely filed post-election objections, two of which were set for hearing. In these objections, the Employer alleges that a Board agent addressed the Employer's workers prior to the election, told them not to believe promises of benefits made by the Employer and said that the Employer would threaten the workers.

A hearing was held before Investigative Hearing Examiner (IHE) Michael H. Weiss on March 31, 1981. In his Decision, which

issued on June 25, 1981, the IHE found that the Board agent did not make the improper statements attributed to him in the Employer's post-election objections and that, even if the Board agent had made the alleged statements, they would be insufficient grounds for the Board to refuse to certify the results of the election. The IHE therefore recommended that the Employer's objections be dismissed and that the UFW be certified as the exclusive representative of the Employer's agricultural employees.

The Employer filed timely exceptions to the IHE Decision and a brief in support of its exceptions. The UFW filed a brief in reply to the Employer's exceptions. The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the IHE's rulings, findings,^{1/} conclusions and recommendations.

As we are affirming the IHE's finding that the Board agent did not make any improper statements when he addressed the Employer's workers, we find it unnecessary to reach the Employer's exceptions concerning the legal standard applied by the IHE for reviewing Board agent misconduct and the IHE's conclusion that the

^{1/} The Employer excepts to the IHE's credibility resolutions. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24, review den. by Ct. App., 2nd Dist., Div. 3, March 17, 1980; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531]. We have reviewed the record and find the IHE's credibility resolutions to be supported by the record as a whole. However, in discrediting the testimony of Ernest Saldivar, we do not rely, as did the IHE, on evidence of Saldivar's anti-union beliefs. There is ample support in the record for the IHE's credibility resolution without reference to Saldivar's anti-union statements.

alleged statements could not have affected the outcome of the election.

CERTIFICATION OF REPRESENTATIVE

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 Nash-De Camp Company in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2(a), concerning employees' wages, hours, and working conditions.

Dated: September 4, 1981

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Nash-De Camp Company (UFW)

7 ALRB No. 26

Case No. 80-RC-7-D

IHE DECISION

After the UFW filed a representation petition on September 19, 1980, an election was conducted among the agricultural employees of Nash-De Camp Company on September 25, 1980. The Employer objected that a Board agent addressed its employees on the day before the election and told them that the Employer would make promises that it would not keep and would threaten to call the immigration authorities if the employees did not cooperate with the Employer. Based on his credibility resolutions, the IHE found that the Board agent did not make the alleged statements. The IHE also found that, even if the Board agent had made the statements, there would have been insufficient grounds to set aside the election. The IHE therefore recommended that the Employer's objections be dismissed and that the UFW be certified as the exclusive representative of the Employer's agricultural employees.

BOARD DECISION

The Board affirmed the IHE's rulings, findings, and conclusions, except that in view of its conclusion that the Board agent did not make any improper statements when he addressed the workers, the Board declined to adopt the IHE's finding that the alleged statements, even if made, would not have tended to affect the outcome of the election. Objections dismissed. UFW certified,

* * *

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
NASH-DE CAMP,)	Case No. 80_RC-7-D
)	
Employer,)	
)	INVESTIGATIVE HEARING EXAMINER
and)	<u>DECISION</u>
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
_____)	

Michael J. Hogan and Spencer C. Hipp (on the Brief),
Littler, Mendelson, Fastiff & Tichy
for the Employer, Nash-De Camp.

Marcos Camacho and Marco Lopez,
for the United Farm Workers of America, AFL-CIO

STATEMENT OF THE CASE

MICHAEL H. WEISS, Investigative Hearing Examiner: This case was heard in Visalia, California, on March 31, 1981.

Previously, on September 19, 1980, the United Farm Workers of America, AFL-CIO (UFW) filed a Petition for Certification. A representation election was held on September 25, 1980, among all the agricultural employees in California of Nash-De Camp (Employer)

The result was:

UFW	61
No Union	46
Unresolved challenged ballots	7
	<hr/>
TOTAL	114

The Employer timely objected to the election, alleging nineteen purported grounds for setting aside the election. Pursuant to his authority under 8 Cal.Admin.Code § 20365(c), the Executive Secretary dismissed seventeen of the objections and set two (.Employer's Objections 8 and 9) for hearing. Thereafter, the Employer's Request for Review of the dismissed objections was denied. The following consolidated objection was set for hearing :

1. Whether Board agents instructed the employees prior to the election not to believe promises of benefits made by the Employer, and informed the employees prior to the election that the Employer would threaten the workers, and if so, whether such statements affected the outcome of the election.

Both the Employer and the UFW were represented by counsel at the hearing and were given full opportunity to participate in the hearing, including examining witnesses and filing briefs.^{1/} Upon the entire record,^{2/} including my observation of the demeanor

^{1/} The parties requested and were granted extensions until May 8, 1981, to file their post-hearing briefs. During that portion of the hearing when Board Agent Lorenzo Alderete testified, he was represented by John Moore of the General Counsel's office.

^{2/} The record consists of the testimony of the five witnesses called by the parties, as well as Employer's Exhibit No. 1 which is attached hereto as an appendix. In addition, Administrative Notice was taken by the IHE of California's work furlough statute Penal Code § 1208, and the previous complaint filed against NASH-DE CAMP, 80 CE-56-D, et al., alleging various unfair labor practices occurring prior and subsequent to the election herein. Several of the witnesses at that prior hearing, particularly Ernest Saldivar, also testified at this hearing.

of the witnesses, and after consideration of all the evidence and the parties post-hearing briefs, I make the following findings ³ of fact and conclusions of law.

FINDINGS OF FACT

OBJECTION THAT BOARD AGENT MADE IMPROPER STATEMENTS
TO THE EMPLOYEES ABOUT PROMISES OF BENEFITS AND
THREATS BY THE EMPLOYER. _____

Respondent called two witnesses in support of this objection allegation, Board Agent Lawrence or Lorenzo Alderete and an employee, Ernest Saldivar. Alderete testified that he was assigned as agent-in-charge of the NASH-DE CAMP election the day after the Certification Petition was filed. On September 23^{3/} at the pre-election conference he advised the employer's representative and counsel that he wished to visit the employer's crews at work the following day in order to notify them of the election procedures. The next day, September 24, Alderete, accompanied by Beatrice Espinoza, a Board clerical employee, drove out to the employer's field at approximately 9:00 a.m. According to Alderete he spoke in Spanish to two separate crews that morning.^{4/} The first crew he spoke to was labor contractor and foreman Ricardo Bautista crew. After greeting Bautista in the avenue and introducing Mrs.

3/ All dates refer to 1980 unless otherwise indicated.

4/ There was testimony that a third smaller crew of 14-15 workers was also working there that morning, Tr. 38, but no evidence was presented that they were also gathered together to hear Alderete's election talk.

Espinoza, Alderete asked Bautista to gather his crew there in the avenue so they could be notified of the election. When the workers came out of the field and gathered in a group Alderete asked Bautista to leave and then addressed the group. While he spoke to the group, Mrs. Espinoza distributed the ALRB's Notice and Direction of Election form to each worker (see Appendix I). Alderete testified that he gave the same basic speech to both crews that he had developed from his experiences in conducting previous elections as well as from the Board's RC Manual ^{5/} Alderete introduced himself and informed the first group of worker that he was from the State and explained to them that an election was going to be held the next day, indicating the times and the sites. He further said that many persons from the company and the union may have already spoken to them, ^{6/} but their vote and the election was to be conducted by secret ballot so that no one would know how they voted. He then asked if there were any questions. There were none. Alderete estimated his talk lasted three to five minutes.

Alderete and Mrs. Espinoza were then directed by Ricardo Bautista to the second crew, which was supervised by Bautista's wife, Margarita. Once again the employees were gathered in a

5/ Alderete testified to participating in 90-100 election proceedings, 40-50 as the Board agent-in-charge, in his more than four years with the agency. Tr. 29.

6/ Alderete testified he had not personally heard or observed company or union representatives speak to NASH-DE CAMP employees. He based this comment on his experience as to what commonly occurred prior to an election, Tr. 23-26

group in the avenue and Alderete addressed them. Mrs. Espinoza again distributed the Notice form to each worker while Alderete spoke. Alderete made essentially the same talk to the second crew as the first, informing them of the election sites and time, explaining the election procedure and the secret ballot. At the conclusion Alderete asked if there were any questions. There were none. The talk to Margarita's crew was equally short, lasting three to five minutes. Alderete testified that he made no reference before either crew about the company making promises it would not keep or the company threatening the workers with immigration.

Alderete was a particularly credible witness. He comes across as an articulate, sincere professional who is business-like and succinct both as to the testimonial substance as well as his testimonial manner.

The only other witness called by the Employer was an employee, Ernest Saldivar. Saldivar, an employee with Nash De-Camp for more than two years was an acknowledged strong no-union^{7/} advocate. Saldivar had been working in Margarita Bautista's crew that harvest and on the day of Alderete's talk. He corroborated that Alderete came after 9:00 a.m. and spoke to the crew which was gathered in a group in the avenue. Alderete introduced himself to the group and told them that an election was to be held the next day, explaining the sites and times and the general procedure that was to be followed. However, Saldivar then went on

7/ Two of the witnesses called by the UFW, Carolina and Rosa Felipe were known and acknowledged strong UFW advocates.

to testify that Alderete warned the group that the company would make promises which later on they probably would not fulfill and that the company may threaten to call immigration if the workers did not cooperate with it.^{8/} Saldivar estimated that Alderete spoke for twenty minutes but could give no context for these statements or any other statements Alderete made during the talk. Saldivar also testified that there were three board agents there that day.

Saldivar's testimony satisfied nearly all the indicia of untrustworthy demeanor. He was nervous and fidgety and oftentimes was inaudible. He was defensive and occasionally incoherent. In addition to his acknowledged strong no-union beliefs, he admitted on cross-examination to being significantly obligated to the Employer because of the Employer's voluntary recent participation in a work furlough program while Saldivar served five months in jail for assault and battery. Saldivar's willingness to testify on behalf of the company is understandable, but he is not to be believed.

In addition, the UFW called two other workers from Margarita's crew, Rosa Felipe and Jorge Alvarado, who fully corroborated Alderete's testimony regarding the nature and length of talk to their crew.

Finally, the Employer called no other witness to corroborate Saldivar's version of Alderete's talk to Margarita's crew, even

8/ Tr. 48-49.

though Saldivar testified that he purportedly heard at the conclusion of Alderete's talk a number of the workers discussing and being concerned about Alderete's warnings.^{9/}

CONCLUSIONS OF LAW

The NLRB has employed two different standards in determining whether to set an election aside because of misconduct by Board agents. In some cases, the Board has looked to the effect or impact of such conduct on the outcome of the election. In other cases, the Board has considered the possible detrimental effect of the agent's misconduct upon the integrity of the Board's election processes, regardless of the outcome. Williams, Janus and Huhn, NLRB Regulation of Election Conduct, pp. 360-361.

NLRB elections, have been upheld where Board agents committed acts of fraternization or made statements which could be interpreted as favoring one side, but there was no effect on the election. See, e.g., NLRB v. Dobbs Houses, Inc., 435 F.2d 794 (5th Cir., 1970) [76 LRRM 2120]; Wald Sound, Inc., 203 NLRB 366 (1973) [83 LRRM 1125]; Wabash Transformer Corp., 205 NLRB 148 (1973) [83 LRRM 1545]. On the other hand, the NLRB has stated that it may set aside an election where commission of an act tends to destroy confidence in the Board's election processes, or

^{9/} The Employer called no workers to testify regarding Alderete's talk to Ricardo's crew even though the foreman Ricardo was present for approximately one to two minutes of the three minute talk.

could reasonably be interpreted as impugning the election standards, even if the voting is not affected. See, Athbro Precision Engineering Corp., 166 NLRB 966 (1967) [65 LRRM 1699]; cf. NLRB v. Fenway Cambridge Motor Hotel, 101 LRRM 2859 (1st Cir., 1979), where the First Circuit ruled that the Athbro standard is the only applicable standard to apply in determining whether a Board agent's conduct invalidated an election.

The ALRB, however, has held that it will not set aside an election based upon bias or an appearance of bias unless it affected the conduct of the election and impaired the balloting's validity as a measure of employee choice. Coachella Growers, Inc. 2 ALRB No. 17 (1976); Bruce Church, Inc., 3 ALRB No. 90 (1977) Mike Yurosek & Son, Inc. 4 ALRB No. 54 (1978); and Paul W. Bertuccio & Bertuccio Farms, 4 ALRB No. 91 (1978).

The Board's standard for setting aside an election because of Board agent misconduct was stated in Bruce Church, Inc., supra, and re-enunciated in Mike Yurosek & Sons, supra, as follows:

"In Bruce Church, Inc. 3 ALRB No. 90 (1977), we enunciated a standard which required the setting aside of an election where the complained-of Board agent conduct was 'sufficiently substantial in nature to create an atmosphere which rendered improbable a free choice by the voters'."

4 ALRB NO. 54 at p. 3.

This standard is consistent with the Board's strong presumption in favor of the certification of election results. See, e.g. , Perez Packing, Inc., 2 ALRB No. 13 (1976); Chula Vista Farms, 1 ALRB No. 23 (1975) .

A primary policy reason for this presumption was expressed

by the Board in D'arrigo Bros, of California, 3 ALRB No. 37 (1977) at p. 4 :
"... [T]o set aside an election in the agricultural context means that employees will suffer serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented".

It is my finding that Board Agent Alderete did not make any statements warning the two assembled crews that the Employer would make promises that it probably wouldn't keep and that the company may threaten to call immigration if the workers did not cooperate with it. The only witness to testify concerning these purported statements, Ernest Saldivar, was totally unworthy of belief. Moreover, even if the statements had been made, although highly improper, they would be insufficient to set aside the election as the Employer has failed to present any evidence that the alleged statements made by Board Agent Alderete adversely affected the results of the election. No witness testified that the alleged statements had some effect, let alone a substantial effect, that interfered with the employees' exercise of their free choice. See, e.g., NLRB v. Monroe Auto Equipment Company, 470 F.2d 1329, 1332, 81 LRRM 2929, 2930 (5th Cir., 1972); T.M.Y. Farms, 2 ALRB No. 58 (1976).

CONCLUSION AND RECOMMENDATION

Based on the findings of fact, analysis and conclusions of law herein, I recommend that the Employer's objection 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.

DATED: June 25, 1981.

Respectfully submitted,

A handwritten signature in cursive script, reading "Michael H. Weiss". The signature is written in black ink and is positioned above a horizontal line. The line is solid on the left and right sides but has a vertical gap on the right side, forming a partial rectangular box around the signature.

MICHAEL H. WEISS
Investigative Hearing Examiner