

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRIGHT'S NURSERY)	
)	
Employer,)	Case No. 83-RC-3-F
)	
and)	
)	
UNITED FARM WORKERS OF)	10 ALRB No. 18
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 or Union) on February 24, 1983, a representation election was conducted among all agricultural employees of Bright 's Nursery on March 1, 1983. The Tally of Ballots showed the following results:

UFW.	78
No Union	42
Unresolved Challenged Ballots. . . .	<u>27</u>
Total.	147

The Employer filed objections to the election. The following four were set for hearing:

1. Whether the UFW representatives threatened employees with physical harm and loss of employment if they did not support the UFW and vote in favor of the UFW;
2. Whether the pro-UFW supervisors of the Company, over Company objections, intimidated and allowed pro-UFW supporters to threaten and coerce pro-Company employees;

3. Whether the UFW misrepresented that the Agricultural Labor Relations Board (ALRB or Board) was in favor of the UFW by using facsimile ballots marked in favor of the UFW which confused the voters and made it appear that the ALRB favored the UFW; and

4. Whether the ALRB agents allowed active campaigning by pro-UFW supervisors in the voting area and whether the cumulative effect of such campaigning, in addition to the pro-UFW supervisors' intimidation of employees and their allowing UFW supporters to threaten and coerce pro-Company employees, tended to affect the free choice of the voters or the outcome of the election.

A hearing was conducted before Investigative Hearing Examiner (IHE) Laura E. Claveran who thereafter issued the attached Decision recommending that the ALRB dismiss the Employer's objections and certify the UFW as the collective bargaining representative of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's Decision and a supporting brief.

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

The Board has considered the record and the IHE's Decision in light of the exceptions and brief and has decided to affirm her rulings, findings and conclusions and to certify the United Farm Workers of America, AFL-CIO, as the collective bargaining representative of the agricultural employees of Bright's Nursery.

Credibility Resolutions

The Employer's objection regarding pre-election threats of violence and job loss was supported primarily by the testimony

of employees Jose Vera and Manual Chavez. Vera and Chavez named several of the individuals alleged to have made threats; however, none of those individuals was called to testify. The IHE nonetheless discredited the testimony of Vera and Chavez because of their evasive and uneasy testimonial demeanor, confused and nonresponsive answers, spotty memories, and repeated self-contradictions.

The Employer takes exception to the IHE's credibility resolutions on the grounds that Vera and Chavez testified without contradiction and the UFW's failure to call witnesses to deny the allegations requires an inference that the testimony of Vera and Chavez is true. In fact, their testimony is not uncontradicted, although the three individuals named as having made threats were not called to testify,^{1/} and the record supports the IHE's findings.

Vera's testimony relating to the alleged threat by UFW organizer David Villarino was specifically contradicted by Pedro Zaragoza. Although Vera testified that Zaragoza had been present

^{1/} We are mindful of the rule embodied in Evidence Code section 413 which provides as follows:

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

We are also aware of the well-established principle that "an administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence." (Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 728.) That principle is limited, however, where the evidence, though uncontradicted, is discredited when assessed "in light of all the facts." (Rivcom Corp. v. Agricultural Labor Relations Bd. (1983) 34 Cal.3d 743, 759.)

at the time Villarino made the threats, Zaragoza denied ever seeing David Villarino talk to Jose Vera at Bright's Nursery. The IHE specifically credited Zaragoza. Moreover, Vera incredibly testified he no longer remembered the names of the other threat witnesses despite the short length of time that had passed and the fact that they were the same people who "rode" with him.

Vera's allegation of physical threats arose directly from a leading question by the Employer's attorney. Vera's description of the incident on cross examination was extremely vague and fraught with internal contradictions. Although Vera had, for the past two years, regularly worked with Frankie Hernandez and a group of three other anti-union workers separate from the rest of the crew, he testified at one point that Hernandez was not working with him at the time of the alleged threat. Shortly thereafter, he changed his story and stated that Hernandez was four to six feet away from him at the time of the threats. The Employer contends that the threat testimony is uncontradicted, but Hernandez denied hearing any threats, as did Zaragoza, who, according to Vera, was also only five to six feet away.

The only other direct evidence of threats was testified to by Manuel Chavez. Chavez' testimony was even more vague and self-contradictory than Vera's. He could not name or even identify any of the alleged threateners. When asked how many days before the election the threats were made, he stated, "Before the election, no. After was when they began." The testimony that followed was confused and inconsistent, despite the clear and leading questions of the Employer's counsel. When asked what was said to him at the

time he signed the UFW authorization card, he said he was told "That I had to sign in order to get paid more money" and did not mention any threats. Later, he testified that he was physically threatened at the time of the card solicitation.

Chavez' claim to have witnessed threats allegedly made against Vera is also inconsistent with Vera's account. Uncertain if the threats occurred before or after the election, Chavez testified to having heard an anonymous group of workers threaten Vera twice "that they were going to stop him in the road." He denied hearing any threat of a beating and testified that Frankie Hernandez was working 36-40 feet away from Vera at the time of the threat.

The testimony of Vera and Chavez was riddled with evasive and non-responsive answers which cannot be attributed to their lack of sophistication or inability to speak English. We are not persuaded that Vera's denial of pre-hearing contact with company representatives, reversed the following day under questioning by the Employer's attorney, resulted from Vera's confusion over the translation or the identity of Mr. Sagaser. We also find unlikely Chavez' repeated insistence that no one from the company ever spoke against the union or talked about voting no union, given abundant evidence that the Employer conducted a vigorous election campaign, hiring labor consultants and printing no-union buttons.

We have adhered to the following National Labor Relations Board (NLRB) rule regarding credibility determinations:

... as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach

great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect, (footnote citations omitted)(Standard Dry Wall Products, Inc. (1950) 91 NLRB 544, 545 [26 LRRM 1537.]

The NLRB's deference to the hearing officer's demeanor-based credibility resolutions has met with judicial approval. In Penasquitos Village, Inc. v. NLRB (9th Cir. 1977) 565 F.2d 1074, 1078, the Court observed that:

Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records." NLRB v. Walton Manufacturing Co., 369 U.S. 404, 408, 82 S.Ct. 853, 855, 7 L.Ed.2d 829 (1962). All aspects of the witness's demeanor--including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication--may convince the observing trial judge that the witness is testifying truthfully or falsely.

The IHE herein found Vera and Chavez incredible based on their demeanor and a variety of other factors bearing upon the truthfulness of their testimony. We have carefully reviewed the record and find that the IHE's findings are supported. We therefore affirm the IHE's credibility findings and her findings of fact based thereon.

The party seeking to overturn an election bears a heavy burden of proof requiring specific evidence that misconduct occurred and that this misconduct tended to interfere with employee free choice to such an extent that it affected the results of the

election. (TMY Farms (1976) 2 ALRB No. 58.) Since the evidence presented on the threats objection was properly discredited, the Employer here has failed to meet its burden of proof and the objection must be dismissed.

CERTIFICATION OF REPRESENTATIVE

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

Dated: April 13, 1984

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Bright's Nursery (UFW)

10 ALRB No. 18
Case No. 83-RC-3-F

IHE DECISION

The IHE found that the employer's election objection, regarding threats by union representatives, was not supported by credible testimony. The IHE also found that other objections, regarding the pro-union activities of supervisors and alleged facsimile ballots, were not supported by evidence that the alleged misconduct tended to affect the outcome of the election. She therefore recommended that the objections be dismissed and the election results certified.

BOARD DECISION

The Board decided to affirm the IHE's findings, conclusions, and recommendations in their entirety.

* * *

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:

BRIGHT'S NURSERY, INC.,

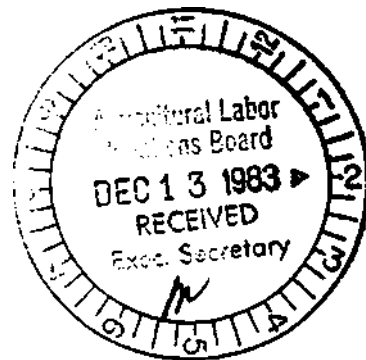
Case No. 83-RC-3-F

Employer,

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner



APPEARANCES:

Howard A. Sagaser, Esq.
Jory, Peterson & Sagaser
Fresno, California
For the Employer

Ned Dunphy
Keene, California
For the Petitioner

DECISION

STATEMENT OF THE CASE

LAURA E. CLAVERAN, Investigative Hearing Examiner:

This case was heard by me in Merced, California on June 15, 16, 17 and 20, 1983. Pursuant to the Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) on February 24, 1983, a representation election was held among the employees of Bright's Nursery, Inc. (Employer) on March 1, 1983. The Tally of Ballots from the election revealed the following results:

UFW	78
No Union	42
Challenged Ballots	27
Total Votes	147

The Employer timely filed objections to the election alleging a variety of misconduct as grounds for setting aside the election. The following objections were set for hearing:

1. Whether the UFW representatives threatened employees with physical harm and loss of employment if they did not support the UFW and vote in favor of the UFW;

2. Whether the pro-UFW supervisors of the Company, over Company objections, intimidated and allowed pro-UFW supporters to threaten and coerce pro-Company employees;

3. Whether the UFW misrepresented that the ALRB was in favor of the UFW by using facsimile ballots marked in favor of the UFW which confused the voters and made it appear that the ALRB favored the UFW; and

4. Whether the ALRB agents allowed active campaigning by pro-UFW supervisors in the voting area and whether the cumulative effect of such campaigning, in addition to the pro-UFW supervisors' intimidation of employees and their allowing UFW supporters to threaten and coerce pro-Company employees, tended to affect the free choice of the voters or the outcome of the election.

I

JURISDICTION

At the hearing, the Employer stipulated that it is an agricultural employer within the meaning of Labor Code section 1140 (c) The UFW stipulated that it is a labor organization within the meaning of Labor Code section 1140.4 (f).

II

INTRODUCTION

Bright's Nursery, Inc. grows approximately 800 acres of alfalfa, 320 acres of almonds, 700 acres of field grain crops including corn, barley, and wheat, and 309 acres of nursery stock. In the nursery operations, a variety of fruit trees such as nectarines, peaches, plums and almonds are grown for commercial purposes and sold only to other farmers. The operations of the nursery are labor intensive and require approximately 90 percent of Employer's labor force. The operations of the nursery include the barn where the trees are prepared for sale. Among functions performed at the barn, the workers place tickets on the trees to indicate their respective varieties.

Arthur Bright is the President of the Company and his wife, Lillian Bright, is the Secretary/Treasurer. His sons, William Bright and James Bright, are Vice-President and Assistant Secretary/Treasurer, respectively. Sidney Harding, who has worked for Bright's Nursery, Inc. for 32 years, is the supervisor of the nursery operations. Assisting Harding are various foremen, including Steve Green, Ramon Vallejo, Rigoberto Vallejo, Noe Arias, Everett O'Hagen, Tomas Salazar, Pedro Zaragoza, and Roberto Zaragoza.

At the time of the election, Rigoberto Vallejo had a small "catch-all" crew that generally made cuttings for specific orders. This crew usually was comprised of three men. Raymond Vallejo's crew worked mostly in Bright's orchards, pruning the almond and peach trees and assisting Bill Bright in the harvesting.

of almonds and walnuts. This crew rarely worked in the nursery. Pedro Zaragoza's crew numbered between three and fifty workers. His crew performed suckering and topping in the fields, and, during the winter, worked in the nursery's barn, grading, counting and throwing out the bad trees (those with broken roots). Roberto Zaragoza's crew numbered between five and twenty-five workers. During the harvest season, the workers dug up the nursery stock in the fields, and, during the growing season, they did the same type of work as Pedro Zaragoza's crew, including hoeing weeds, and suckering, pruning, and trimming the trees. As of December 1982, Steve Green supervised the activities of Roberto Zaragoza's crew. Tomas Salazar's crew performed the same work during the growing season as Roberto Zaragoza's and Pedro Zaragoza's crews. During the harvesting, the crew dug up the nursery trees and brought them into the barn. Noe Arias was a part-time foreman for approximately two months out of the year. He supervised a small special crew of approximately four individuals who took care of the hybridized trees (peach/almond).

The pre-election conference was held on Sunday, February 27, 1983. Among the issues discussed was the alleged supervisory status of six employees. The Employer argued that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar, all UFW supporters, were supervisors within the meaning of the Agricultural Labor Relations Act (Act or ALRA). The UFW argued that Steve Green, Ramon Vallejo and Everett O'Hagen were supervisors within the meaning of the Act. The parties agreed that the alleged supervisors would not be allowed in the voting area during the

first part of the election, and were not to report to the voting site until 9:15 a.m.

At the pre-election conference, the parties agreed on the voting sites; the "hog pen" area of the nursery was designated as the morning voting site, and the Plainsburg Elementary School was designated as the evening site. It was undisputed that the majority of the workers cast their ballots at the "hog pen" site. The parties also agreed that there would be a designated "clear area" at the evening site, approximately one-fourth mile east of the the voting site and one-half mile north, south and west of the voting site.

ELECTION OBJECTIONS ^{1/}

I. WHETHER THE UFW REPRESENTATIVES THREATENED EMPLOYEES WITH PHYSICAL HARM AND LOSS OF EMPLOYMENT IF THEY DID NOT SUPPORT THE UFW AND VOTE IN FAVOR OF THE UFW.

A. Findings of Facts

The Employer called employees Jose Vera, Francisco Hernandez and Manuel Chavez as witnesses in support of its contention that the UFW representatives threatened employees with job loss and physical harm.

Jose Vera, who had worked for Employer for four years, testified that, prior to the election, he worked inside the barn with Pedro Zaragoza's Crew. He initially indicated that 80 employees worked in the barn, but later changed his testimony and could not remember how many people worked in the barn. He indicated that the employees

1/For the purposes of my decision, the objections are discussed in chronological order.

who did not support the Union worked together in a group. While working in the barn, Vera was asked to sign an authorization card. When questioned at the hearing as to who asked him to sign the authorization card, Vera was evasive and stated the names of several persons who were present in the barn, including Pedro Zaragoza, "Marcos," "Pat," and "Gon". Later in the hearing, Employer's counsel twice asked in a leading manner whether it was Pedro Zaragoza who asked him to sign the authorization card, to which Vera responded in the affirmative.

Jose Vera also described an incident which took place four or five days prior to the election when UFW organizer David Villarino told him to take off his "no-union" button. When Vera refused, Villarino told him that he "lacked testicles,"^{2/} and said, "you're going to lose your job, all of you that do not sign are on your way out." I note that Vera had difficulty remembering Villarino's name and it was only after extensive questioning that he could clearly identify Villarino as the UFW organizer who made the statements. In fact, throughout his testimony, Vera could not recall the names of the individuals to whom he was referring, and could not identify Villarino by name until the name was suggested to him by the Employer's counsel.^{3/}

2/On cross-examination, Vera indicated that he understood Villarino's¹ statement to mean that Vera was afraid of the Company.

3/ Q. (Mr. Sagaser): Do you know, have you heard the name Dave Villarino?"

A. (Jose Vera): Yes. That's the name, Villarino.

Vol. I, p. 126.

According to Vera, Pedro Zaragoza and four other individuals were standing four to six feet away when Villarino made the above statements. At the same time, Pedro Zaragoza told him to sign an authorization card. Jose Vera identified the four other individuals as the ones who threatened to beat him if he did not support the Union.

Vera also testified that while he was working, in the barn prior to the incident with Villarino, Javier Zaragoza and "Julio" threatened that he would be beaten up if he did not support the Union. This occurred about four and five days before the election. Pedro Zaragoza was approximately five to six feet away from him, and eight other workers were present, but Vera could not remember their names, even though he had been working at Bright's Nursery, Inc. for four years and recognized some of those present as people who had worked there for a couple of years. He also was uncertain of how many employees heard or could have heard the threats. He stated that most of the people in Pedro's crew were union supporters, and identified a group of only five workers as not supporting the Union, including himself, Francisco Hernandez, Manuel, Miguel Padilla and Noe Arias.

On cross-examination, Vera stated that he never stopped wearing his hat with five no-union buttons pinned to it, and he was never beaten.

At one point during the Employer's case-in-chief, the Employer's counsel attempted to have Jose Vera identify Pedro Zaragoza as a Union agent by eliciting testimony that David Villarino had given Pedro Zaragoza and others white identification

cards with their pictures on them, allegedly Union identification cards. On cross-examination, Vera was asked to describe the cards, and he testified that "Union" was written on them. Later Vera testified that he could not read or write, but presumed that "Union" appeared on the cards. When pressed to identify the persons who were wearing the cards with their photographs on them, Vera seemed to be confused as to whether the people were Union representatives or ALRB agents.

On the second day of the hearing, the Employer's counsel recalled Vera in order to clarify some of the testimony he had given the day before. The Employer's counsel explained that Vera had indicated to him that he had been confused and had not clearly understood the nature of the questions. On the first day of the hearing, Vera testified that he did not know who Mr. Sagaser (the Employer's counsel) was, and that he had never seen or spoken to him before the hearing. On the second day, Vera admitted that he had been "confused" and "had forgotten." The Employer's counsel's attempt to rehabilitate Vera's prior testimony as to whether or not he had spoken to or seen Sagaser before was unsuccessful. Vera still appeared confused concerning whether he had seen or spoken to Sagaser before the hearing. Vera appeared to be trying to remember someone else's name. After prolonged examination, Vera finally testified that he had spoken to Sagaser in the Employer's office. He also testified that Sagaser told him what to say.

On the second day of his testimony, Vera contradicted his earlier testimony that he had not attempted to convince any

workers to vote no union. When called by the UFW, Vera stated that he talked to other workers about voting no union.

Vera also testified that the day Javier Zaragoza and Julio threatened him, the no-union employees were not working together as a group as they had before and after the threat. When asked who was present that could have heard the threat, Vera testified that he did not remember the names of the employees. The only person he eventually mentioned was Pedro Zaragoza. Later, on cross-examination during the second day, Vera testified that Prank Hernandez (a non-union employee) was present the same distance from the site of the threat as Pedro Zaragoza.

Generally, the testimony of Jose Vera, the Employer's main witness in his case-in-chief, was replete with evasive answers, and confused as to the timing of events and the names and identities of individuals. Questions had to be repeated often, as Vera's answers were evasive and nonresponsive. This trend occurred during both direct and cross-examination. The witness's demeanor also indicated unreliability. Throughout his testimony, Vera looked at the floor or the table and gave his answers with his hand covering his mouth. He seemed uncertain and unsure of himself in responding to questions. I find that Jose Vera was not a credible witness.

Francisco Reynaldo Hernandez (referred to as Frankie or Frank Hernandez) testified that prior to the election he was working inside the barn with Pedro Zaragoza's crew marking trees. Several days prior to the election, Francisco Osegura, another worker in the crew, told him that if he did not support the Union

and sign an authorization card, and if the Union won the election, he would be fired. On cross-examination Hernandez testified that Francisco Osegura was his uncle and they lived in the same house. Hernandez was also asked on cross-examination if anyone threatened to beat him up if he did not support the Union, and he answered in the negative. Hernandez testified that Jose Vera told him that "he had been threatened by Javier Zaragoza and others whose names Vera could not remember. Hernandez acted as Vera's interpreter when the latter complained to Bill Bright and Sidney Harding about the threats he had received and asked that he be transferred from Pedro Zaragoza's crew. However, Hernandez testified that he did not hear any employee actually being threatened.

Manuel Chavez testified that prior to the election he worked in Pedro Zaragoza's crew, working in the vines and doing other jobs. While at work, several co-workers threatened that they were going to stop him on the road and beat him if he did not support the Union and sign an authorization card. He could not remember the names of the workers who threatened him, and simply identified one of the co-workers who made the threat as Frankie Hernandez' brother-in-law.

Chavez testified that he was told that if he did not support the Union and sign an authorization card, he was going to lose his job. He did not specifically identify the workers who made the threat. He did testify that he had been asked to sign an authorization card by a co-workers who said that he should sign the card in order to get more money. This co-worker drove a Camero. I note that throughout his testimony Chavez could not remember the

names of the individuals he referred to and several times identified the individuals by the types of cars they drove. At the request of the IHE, the Employer's counsel attempted to ascertain who the owners of the cars were. It was only upon redirect examination and after Sagaser suggested the names that Chavez recalled the workers' names. The owner of the Camaro was identified as Marcos Rojas.

Chavez also testified that he heard threats being made against Jose Vera that if Vera did not support the UFW he would be stopped on the road. Vera also told him that he had received threats of a beating if he did not support the UFW. Manuel Chavez did not remember the names of the people who threatened Vera. In fact, he testified that he remembered what they looked like but was not sure exactly who they were, stating "...I can't say that it was these and these, because I was just paying attention to my work. And I, well, those were just things that were happening."

Chavez specifically testified that Pedro Zaragoza did not talk to him about the UFW. The essence of his testimony was that he heard rumors about what Pedro Zaragoza was saying regarding the loss of jobs if the employees did not support the UFW, and that Pedro Zaragoza wore a pro-UFW button during the period prior to the election. Chavez testified that he heard Zaragoza tell other employees that if the Union lost the UFW supporters would lose their jobs, and if the Union won the no union supporters would lose their jobs.

Overall, Manuel Chavez was unable to remember the names

of individuals about whom he testified. On cross-examination, he was asked why he remembered the names only after they were mentioned to him. He responded that he "knew the individuals by sight, but "...their names, I don't know because I forget everything." he was also confused as to the timing and the nature of the events he testified about. When asked on cross-examination if he was aware of any anti-union campaigning at Bright's Nursery, Inc., he answered in the affirmative, and described the person who owned the Camaro (identified as Marcos Rojas, a pro-UFW adherent) as the one who was running the campaign. However, after further questioning, he identified James Bright as the person who ran the Company's campaign. When asked whether anyone came to his crew to talk about voting against the Union, Chavez said yes, and identified a person driving a brown station wagon as being the one who read a list of benefits to the group. He later identified that person as being a union supporter.

Generally, Chavez was evasive and failed to remember the names of individuals he referred to during his testimony. He was also confused as to who conducted the Employer's no-union campaign. His testimony regarding Pedro Zaragoza's alleged threats of job loss to employees who did not support the UFW consisted of rumors, hearsay and double hearsay, and was therefore incompetent testimony.

Pedro Zaragoza denied that he threatened to beat Jose Vera or Manuel Chavez or that he threatened them with job loss if they did not sign an authorization card. He testified that he heard Miguel Padilla state that he did not want Jose Vera to continue working with the group unless he took off his "no-Union" buttons.

Zaragoza indicated that, at that time, there were five persons putting "tickets" on the trees.

Zaragoza testified that Vera signed a Union authorization card, and, when asked on cross-examination how he knew, he indicated that Vera told him so. Zaragoza also denied that he told Vera it would be good for him to sign for the Union. Zaragoza explained that he did not make such a statement to Vera, but rather that Vera asked him what he thought of the Union, since Vera had already signed a card. Zaragoza also explained that he voluntarily asked his uncle, Javier Zaragoza, to give him an authorization card to sign, and that this incident took place at Javier Zaragoza's house.

Zaragoza confirmed that he wore a pro-UFW button prior to the election.

I find Pedro Zaragoza to be a credible witness, as his testimony was consistent and cooperative, whereas the testimony of Jose Vera and Manuel Chavez showed a pattern of evasiveness, confusion, and inability to recall the names of specific individuals.

B. Analysis and Conclusions

The record contains no competent testimony regarding threats of physical harm or job loss by Union representatives if employees refused to sign authorization cards and vote for the UFW.

David Villarino was the only UFW representative identified by Jose Vera, and the evidence presented indicated that Villarino's alleged threat of physical harm to employees consisted of his statement to Vera that Vera "lacked testicles"

if he did not take off his no-union buttons. Vera testified that he interpreted that statement to mean that he was afraid of the Employer. I find that such statement did not constitute a threat of physical harm.

The other statement that David Villarino allegedly made to Vera was that if he did not sign a Union authorization card he and all those who did not support the Union would lose their jobs. I do not credit Vera's testimony regarding this alleged threat because it was uncorroborated, despite the fact that the statement allegedly was made in the presence of other workers. Also, as discussed above, I do not find Vera to be a credible witness.

The only other evidence of threats involving physical harm were allegedly made to Vera and Manuel Chavez by Javier Zaragoza and individuals identified as Julio and other co-workers whose names Vera and Chavez could not remember. Chavez testified that four or five days before the election, these workers threatened to beat him if he did not support the Union. As discussed above, I do not credit Vera or Chavez's testimony. However, even if I were to credit their testimony, there is no indication that Chavez or Vera were threatened by UFW representatives. The Board has determined that threats made by non-parties will be accorded less weight in determining their effect on the outcome of the election than threats made by parties. (Takara International (1977) 3 ALRB No. 25; San Diego Nursery Co., Inc. (1979) 5 ALRB No. 43).

Chavez also testified that there were rumors "floating around the employees" that those who did not sign an authorization

card or failed to support the Union would lose their jobs. Many of these rumors circulated during the time when Pedro Zaragoza was wearing the UFW button. Vera, Hernandez and Chavez all testified that they were told they would lose their jobs if they did not support the Union. As noted above, I do not find Vera and Chavez to be credible witnesses. Hernandez testified that the statement regarding job loss was made by his uncle. There is no evidence that Hernandez's uncle was an agent of the UFW. However, even assuming that the statements were made as described by all three witnesses, I would find that there was insufficient grounds to set aside the election. The Board has consistently found such statements made by union supporters to be insufficient grounds to set aside an election. Jack or Marion Radovich (1976) 2 ALRB No. 12; Patterson Farms, Inc. (1976) 2 ALRB No. 59; Select Nursery (1978) 4 ALRB No. 61. Rather, such statements fall within the scope of campaign propaganda, which may be left to the good sense of the employees to evaluate in deciding how to vote.

The Employer failed to meet its burden of proof and failed to substantiate its claim that UFW representatives threatened employees with physical harm and job loss if they failed to sign authorization cards or support the Union, or that any alleged statements or threats created an atmosphere in which employees were not able to freely exercise their choice of a collective bargaining agent.

II. WHETHER PRO-UFW SUPERVISORS OF THE COMPANY, OVER COMPANY OBJECTIONS, INTIMIDATED AND ALLOWED PRO-UFW SUPPORTERS TO THREATEN AND COERCE PRO-COMPANY EMPLOYEES.

A. Supervising Status

1. Findings of Fact

The Employer argued that Pedro Zaragoza, Roberto Zaragoza, and Tomas Salazar were supervisors within the meaning of the Act and that, as supervisors, their conduct had a coercive impact on the election and is grounds to set the election aside. Their conduct consisted of wearing pro-UFW buttons and campaigning for the UFW. Pedro Zaragoza actively encouraged members of his crew to support the UFW, and Roberto Zaragoza sat at the UFW table at the pre-election conference. The UFW maintained that the three men were not supervisors within the meaning of the Act, but, even assuming that they were, the Employer failed to meet its burden of proof in establishing that the alleged conduct affected the results of the election.

Bill Bright, a Vice-president and supervisor at Bright's Nursery, Inc., testified that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were told how many men were needed to do a job and went out and found the workers. They usually recruited men they knew or who had worked for the Employer before. Some workers directly asked Sid Harding, a supervisor at the nursery, for employment. However, the three men always acted under the direction and orders of Sid Harding, and were not allowed to do anything unless directed by Harding.

Bill Bright testified that Sid Harding, who had thirty years of experience, was responsible for directing the three men. For instance, if a field needed to be suckered, Harding told Pedro Zaragoza, "to go up there with his crew and sucker." If Harding

was busy and did not have time to check the crew all day, the workers would remain under Pedro's supervision. If Harding needed a certain number of men to load a truck, he would tell Pedro to send some men, "and Pedro would pick out some men and send them over there to load the truck." Pedro Zaragoza, Roberto Zaragoza, and Tomas Salazar made sure that the work was done correctly, kept the men busy, and kept track of the hours worked by each employee.

In regard to firing, Bill Bright could not remember any specific instance when Pedro Zaragoza, Roberto Zaragoza or Tomas Salazar had fired anyone or had effectively recommended anyone's firing. He vaguely remembered an instance when Tomas Salazar had recommended that Harding let an employee go, but did not state specifically whether Harding followed the recommendation.

Bright testified that Harding had instructed the three men that "...if you can't get along with a guy, (or they) won't do what you say send them to the office, and we'll give them the check. You're the foreman, you've got to be able to give them orders, so if you have any problems send them to the office." Harding and the personnel office would then follow the recommendations of the three men.

Bright indicated that, prior to the election, the Employer did not have a well - established policy for reprimanding or warning employees.

Bright's testimony indicated that the three men in question did not exercise independent judgment in the hiring or firing of employees or in directing the work of their crews. Their functions consisted of following orders given by Harding, who

supervised their work on a daily basis and ordered and directed the crews to do specific assignments. The men did not use independent judgment to transfer, assign or direct the work of the employees in their crews. In making decisions, the foreman had to consult with Harding first, and he made the decision. The foremen were responsible for seeing that the workers did their jobs properly, keeping them busy and keeping track of their time. Their functions as foremen were of a routine clerical nature, consisting of following instructions, obeying Harding's orders and relaying those orders to the workers in their crews without the use of the independent judgment that is critical to a finding of supervisory status.

Sid Harding testified that he had worked for the Employer for 32 years and was the supervisor of the nursery operations. Harding indicated that he used Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar as his assistants and his means of communication with the workers. He does not speak Spanish and, although approximately 30% of the workers were bilingual, he did not feel that they were sufficiently fluent in English for him to engage in a conversation with them. There were a few other employees he could use as interpreters, but he relied on the foremen as his conduits to the workers in the crew.

Jose Vera's testimony corroborated Harding's. Vera indicated that Harding spoke a little Spanish and explained that Harding could say such things as "the job is no good," "I want you to do this job like this," and "go drive a tractor." I credit this portion of Vera's testimony, as it was one of the few

instances when he was certain of his recollection, gave examples, and clearly explained his answers.

Harding testified that he supervised, directed, and instructed the foremen for the nursery workers, irrigators and tractor drivers, including Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar. Harding gave numerous examples of his functions, including instructing the foremen on specific tasks. The three foremen were responsible for insuring that their respective crews got the job done, were to keep their crews busy, were to work with the employees and check that the job was done right, and were to keep records of the hours worked by each employee.

Harding testified that after he gave an order, he stayed in the area long enough to show the foreman what he wanted done and how he wanted it done, then waited until the crew got started before he left. He tried to get back to each crew at least once or twice a day to check on their progress, staying with the crew approximately 10 to 20 minutes. Harding's testimony was corroborated by other witnesses, including Manuel Chavez, Jose Vera, Pedro Zaragoza and Roberto Zaragoza. These witnesses indicated that "Sid" came to check up on the crews at least two or three times during the day and stayed anywhere between five and twenty minutes. In fact, Frank Hernandez testified that "Sid" checked on the work done by Pedro Zaragoza's crew about seven or eight times a day, staying for ten or fifteen minutes each time.

When asked how employees were hired, Harding responded that he would tell the foremen how many employees were needed, and the foremen would get them and put them to work.

Harding and Jessie Luker, the office clerk, corroborated Bill Bright's testimony that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were responsible for keeping track of the hours worked by each employee in their respective crews. Harding and Luker testified that they relied on the records kept by the foremen, The foremen usually turned in their record books to the office so that the workers' paychecks could be processed and, if the foremen failed to do so, Harding would go pick up the books and turn them in to the office. The foremen were also responsible for distributing the paychecks to the employees. However, both Harding and Luker indicated that if an employee left early or if, for some other reason, the foremen did not distribute the paychecks, the the employees were free to go to the office in person to pick up their checks.

Luker also testified that if she did not have a record of the hours worked by an employee, she would ask that employee directly if he or she was available and would check later with Harding or one of the foremen concerning whether that individual had actually worked the hours claimed.

Harding testified that the nursery operations are scattered throughout several fields, and the employees had to be moved around quite often. He explained how the transfer of employees or crews was accomplished: he would tell "...the foremen where and when to go to next and what needed to be done." Harding instructed the foreman that he needed a particular number of workers to do a job or to go to another crew. The foreman was then responsible for sending the required number of workers to the

other crew and advising the foreman in the other crew that the additional workers would be coming. If the foreman and his crew moved and Harding was not there, he would drop by later to see if they were doing the job pursuant to his instructions.

If the foreman was having problems getting along with one of his employees, he could transfer the employee to another crew upon discussion with the crew's foreman.

Employee Frank Hernandez testified that Harding moved employees around while he was in the nursery giving orders. For instance, Harding ordered workers to help him load trucks or do other tasks, or asked Pedro to send someone.

Harding testified that he did not remember any instance of Pedro Zaragoza or Roberto Zaragoza firing an employee. He explained that both men had been told that, if an employee did not work out after he had been warned two or three times or refused to obey orders given by the foreman, the foreman was to give the employee his time and send him to the office, where the foreman's recommendation would be followed.

Harding's testimony regarding the foremen's authority to fire employees was inconsistent. On cross-examination, when asked if he would know whether Roberto Zaragoza or Pedro Zaragoza had fired employees, he answered in the negative. He also stated that "...there's so many men that come and go. Some quit, some leave and some we lay off because of not having the work. But as far as him actually firing one, I don't recall him ever." The answer applied to both Roberto Zaragoza and Pedro Zaragoza. On redirect examination, Harding was asked how he would know if an

employee quit or was fired, and he answered that he would know only if the foreman told him. Yet he had specific recollection of only one instance, when Tomas Salazar had fired an employee two or three years earlier. He testified that, before the employee was actually fired, Tomas Salazar came to him to discuss the problem and Harding told him, "Well, if you can't use him let him go. So he gave him his time and sent him to the office." This testimony indicates that the foremen actually discussed their problems with Harding and neither fired employees nor took any action on their own. The evidence also established that only Tomas Salazar had actually effectively recommended the firing of an employee. Harding could not remember any specific case where Pedro Zaragoza or Roberto Zaragoza had ever effectively recommended the firing of an employee, despite the fact that Pedro Zaragoza had been working for the Employer for fifteen years and Roberto Zaragoza for five years.

In terms of lay-off procedures, Harding testified that management determined when layoffs were necessary. Harding told the foremen how many men were needed to complete a job, and the rest were laid-off. The foremen determined whom they wanted to keep. In terms of rehiring procedures, again Harding told the foremen how many workers were needed, and the foremen would get them. Harding also hired some workers directly.

Paul Leonardo, who worked for the Employer as a tractor driver for four years, basically corroborated the testimony given by Bill Bright and Sidney Harding.

Roberto Zaragoza testified that during his tenure as a

worker/foreman for five years he had not had the authority to hire employees and he had never done so. He explained that if a worker wanted to be hired, he had to arrange it with "Sid" first. He denied that he had the authority to hire, fire, transfer employees from one crew to another, grant leaves of absence, or promote or demote employees. If an employee wanted a leave of absence, he had to go to "Sid." Zaragoza did not take any of the above actions without Sid's order.

Zaragoza kept a record of the hours each employee in the crew worked. If an employee did not show up for work, Zaragoza spoke to Harding about it, and Harding made an entry in the book. On cross-examination, Roberto Zaragoza recognized "Sid's" handwriting on several entries in his timekeeping book.

Zaragoza testified that Harding, as the supervisor of the nursery, was responsible for directing the work of the worker/ foremen. Harding checked up on his crew three times a day and stayed 15 to 20 minutes. Harding spoke a little Spanish, enough to give Zaragoza orders, and if not, he would show Zaragoza how he wanted a job done. Since he had been working at the nursery for five years, Zaragoza knew from his own experience what Harding wanted done. He also testified that this chain of command changed in December 1982, when Steve Green was assigned to supervise Zaragoza's crew full time. After Green came, Harding gave the orders to Green, who relayed them to Zaragoza and the crew. Green's job was to supervise the crew and put pressure on the workers to get the work done, and also to tell them what to do. A few days prior to the election, Green spent six hours supervising Roberto Zaragoza's crew and two hours with Tomas Salazar's crew.

Zaragoza testified that, during the time Green was in the crew, he saw Green fire employee Ignacio Alvarez.

Zaragoza testified that he worked along with the other workers in the crew and did the same type of work they did. He was paid \$4.00 an hour, whereas the other workers were paid \$3.50 an hour. However, he acknowledged that his crew consisted of relatively new and inexperienced workers.

Roberto Zaragoza explained in some detail the procedures by which the decision of who to lay off was made. When workers had to be laid off during Roberto's tenure as a worker/foreman, he turned in the time book to Harding, who examined it to determine which workers had the greatest record of absenteeism. Harding gave Roberto the names of those who were to be laid off and ordered him to carry out the layoffs. Roberto testified that he observed the same procedure when he was working in Pedro Zaragoza's crew. At no time did he make an independent determination of who was to be laid-off; rather, it was Harding who made that decision.

In regard to the distribution of paychecks, Roberto Zaragoza testified that Harding delivered the paychecks to him on payday at the location where the crews were working. Zaragoza was responsible for distributing the pay checks to the workers. When he was not there, the employees got their checks from Harding directly or went to the office and picked them up.

Roberto Zaragoza also described the differences in the duties between the worker/foreman and other foremen. For instance, Ramon Vallejo drove a company truck and spent the majority of his time supervising employees, in contrast to Roberto and Pedro

Zaragoza and Tomas Salazar, who had to work along with the crews doing the same job. Ramon Vallejo worked with his crew for short periods, and only for the purpose of assisting the crew in getting the work done.

On cross-examination, Roberto Zaragoza was asked if he hired an individual named Gabriel Granados, and he denied hiring him. He reiterated that his job was to write the names down in the time book, and it was Harding who hired Granados. Zaragoza explained that he was working out in the field when Granados arrived. Later Harding came by and told Zaragoza that he had hired Granados and told him to write his name down in the time book, which Zaragoza did.

Pedro Zaragoza denied that he had the authority to hire, fire, transfer, grant leaves of absence, or promote or demote employees on his own volition. He testified that Harding was his supervisor. During the summer when his crew was working in the field, Harding came by every hour to check on the crew's work. During the winter (November to April) when the crew was working in the barn, "Sid was there with the crew all day except when he went out to check on the crews which were working out in the fields" (usually Roberto Zaragoza's and Tomas Salazar's crews). While his crew was working inside the barn, Pedro received orders from "Sid", Paul Leonardo and Mike Padilla.

On cross-examination, Pedro Zaragoza was asked if Harding ever told him that he needed more people. He explained that Harding had told him he needed more men, and he recruited them, but Harding looked them over to see if they "were convenient for

him." He expressly denied hiring the employees himself. When asked if he had ever recommended the hiring of an employee to Harding, he answered in the affirmative, but explained that the people he had recommended were family members, i.e., his father, uncles, and cousins, and that Harding hired some of them.

In regard to transferring employees to other crews, Pedro Zaragoza testified that Harding sometimes did not give Zaragoza the names of the individuals to be transferred, but made reference to how some workers came to work in the same car, implying that groups of workers who came to work in the same car should be transferred. However, Zaragoza denied that Harding let him decide who to transfer.

In general, I credit the testimony given by Roberto Zaragoza and Pedro Zaragoza on the issue of supervisory status. In contrast to the testimony of Bill Bright and Sidney Harding, and to some extent Paul Leonardo,^{4/} Pedro Zaragoza and Roberto-Zaragoza explained in more detail the processes by which decisions were made and gave specific examples. On the other hand, Sidney Harding's and Bill Bright's explanations were vague and lacking in detail, even though, as Vice-President and general supervisor, respectively, they were in a better position to know the daily decision-making process of the nursery operation. If anything, their testimony established that Roberto Zaragoza, Pedro Zaragoza and Tomas Salazar were simply following and obeying Harding's

4/ Leonardo's testimony involved much uncorroborated hearsay and double hearsay, and has therefore been given little weight.

orders when they instructed the workers in their crew. Bill Bright's and Sidney Harding's testimony also indicated that the three foremen were constantly under Harding's direct supervision and were not allowed to do anything without Harding's approval.

At the end of the UFW's case, the Employer's counsel made an offer of proof and sought to introduce the testimony of Tomas Salazar to rebut Roberto Zaragoza's and Pedro Zaragoza's testimony that the "job duties of Tomas Salazar were the same as theirs" and that they did not have the authority to hire. Salazar would have testified that on numerous occasions he had been requested by Harding to go out and find additional employees, and that he would not be given the names of additional employees to find, but rather would go to the towns of Planada and Le Grand, find additional employees and bring them back, and Harding would hire them.

The proposed rebuttal testimony was not only repetitive and cumulative, but was consistent with the testimony already given by Harding. Salazar's testimony would have only shown that he was obeying orders and acting as a recruiter of employees for Harding, who was actually the one with the authority to hire and who in fact hired the employees. As such, the proposed rebuttal testimony was properly excluded.

The Employer also made a second offer of proof, proposing to call Steve Green, who would have rebutted the testimony of Roberto Zaragoza that he did not hire anyone, and specifically Zaragoza's testimony that he did not hire Gabriel Granados. Green would have testified that Harding expressly told him that there

was no more work available and that no more people would be hired. Yet one day after being told by Harding that there was to be no more hiring, he observed Granados working in Roberto Zaragoza's crew. The Employer asserted that Exhibit 11 (the Employer's time book) would show that Granados was added to Zaragoza's crew approximately nine weeks before the election.

Specific proof that Roberto Zaragoza in fact hired Granados should have been presented in the Employer's case-in-chief, but was not. Instead, both Bill Bright and Sidney Harding testified in very general terms on the issue of hiring and firing by the alleged supervisors. Harding had specific recollection of only one occasion when Tomas Salazar fired an employee. The Employer had the burden of establishing that the three men were supervisors within the meaning of the Act. The proper time to present Green's testimony regarding a specific example of when Roberto Zaragoza hired an employee would have been during the Employer's case-in-chief. In addition, the proposed offer of proof did not show that Green had any personal knowledge of how Gabriel Granados' name was included on the log or by whom he was actually hired. The testimony described would not prove that it was Roberto Zaragoza who in fact hired the employee.

The Employer's first offer of proof was rejected on the basis that it was cumulative. As a general rule, the trial judge may stop the production of evidence which is cumulative if its probative value is substantially outweighed by the possibility that its admission will consume an undue amount of

time or will create undue prejudice (Evidence Code .section 352; see People v. Graham (1978) 83 C.A.3d 736). The second offer of proof was rejected because it was the type of evidence that the Employer should have introduced in its case-in-chief, and because the testimony would not have established that Roberto Zaragoza hired any employees.

2. Analysis and Conclusions

The credited evidence presented established that the worker/foremen, Pedro Zaragoza, Roberto Zaragoza, and Tomas Salazar, spent the entire day with their respective crews and performed the same type of work as the rest of the workers in the crews. They checked the work being done by the crew, and were responsible for keeping the crews busy and insuring that the work was done in accordance with Harding's instructions. Harding, the admitted supervisor of the nursery operations, instructed and directed the foremen on a daily basis concerning the different jobs that needed to be done. He usually stayed with a crew long enough to show the workers what needed to be done that day, and how and where the job was to be done. He returned to inspect the work of each crew at least two or three times a day, and stayed about 10 to 20 minutes each time. As of December 1982, Steve Green supervised, directed, and relayed "Sid's" orders to Roberto Zaragoza and his crew. The week prior to the election, Green spent at least six hours supervising Roberto Zaragoza's crew and two hours supervising Tomas Salazar's crew. However, Harding still retained overall supervision of the crews' work.

Although the three foremen were told how many workers would be needed to get the work done and were ordered to locate that many workers, I find that the foremen basically acted as recruiters for Harding, who retained the authority to hire. I find that Harding, the general supervisor of the nursery, made the decisions to hire, fire, and discipline workers. The evidence was clear that, prior to the election, the Employer did not have a standard policy for disciplining or reprimanding employees. In the few examples where the disciplining, reprimanding or transferring of employees occurred, it was clear that Harding decided what had to be done.

I find that the three foremen did not have the authority to hire, fire or discipline, nor did they use independent judgement in directing the work of the crews. Instead, they acted as conduits for the orders and directions given by Harding, since the majority of the workers in the crew spoke only Spanish, and Harding spoke little Spanish. The foreman spoke and understood more English than the others and, as a result of their experience with the Employer, knew how to do the work required in the nursery operations. The evidence established that the three foremen were paid at a higher hourly rate than the rest of the employees in their crews and also had paid vacation time. However, in contrast to foremen Ramon Vallejo and Steve Green, the three foremen worked along with their crews, whereas Vallejo and Green were full-time supervisors, working with the crews only occasionally. The work of the three foremen in regard to time-keeping and distribution of the paychecks was of a routine clerical nature.

Labor Code section 1140.4(j) provides:

The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The above provision of the ALRA is identical to section 2(11) of the National Labor Relations Act (NLRA).

The exercise of or authority to exercise independent judgement is an important and key factor to be considered in determining whether an employee is a supervisor. The exercise of independent judgement must be genuine and not merely routine, clerical, or instructional in nature. A mere "straw boss" with no independent discretion will not be deemed a supervisor. NLRB v. Pilot Freight Carriers, Inc. (4th Cir. 1977) 558 F.2d 205 [95 LRRM 2900], cert. denied sub.nom. Chauffeurs, Teamsters & Helpers Local 391 v. Pilot Freight Carriers, Inc. (1978) 434 U.S. 1011; Ohio Power Co. v. NLRB (6th Cir.) 176 F.2d 385 [24 LRRM 2350], cert. den. (1949) 338 U.S. 899; Rod McLellan Company (1978) 4 ALRB No. 22; Ukegawa Brothers, Inc. (1983) 9 ALRB No. 26; Ukegawa Brothers (1982) 8 ALRB No. 90; Anton Caratan and Sons (1978) 4 ALRB No. 103, citing Montgomery Ward & Co. (1978) 228 NLRB 759 [96 LRRM 1383]. Without the exercise of such independent judgment, duties are of a merely routine or clerical nature. See, e.g., NLRB v. Doctors Hospital of Modesto, Inc. (9th Cir. 1972) 489 F.2d 772 [85 LRRM 2228], cited with approval in Dairy Fresh Co. (1976) 2 ALRB No. 55.

Employees who spend a substantial part of each workday or week as supervisors are customarily excluded from the bargaining unit. U.S. Radium Corp. (1958) 122 NLRB 468 [43 LRRM 1168]. In contrast, in this case the three foremen worked with the employees in the crew doing the same work and insuring that Harding's orders and instructions were carried out. They did not spend a substantial part of their time exclusively supervising the work of other employees. The evidence demonstrated that it was Harding and Steve Green who spent a substantial part of their work day supervising and directing the work of the crews. See Northwest Steel Inc. (1973) 200 NLRB 108 [81 LRRM 1376]; Commercial Fleet Wash., Inc. (1971) 190 NLRB 326 [77 LRRM 1156].

The NLRB has held that, even if a foreman assigns specific tasks and corrects the employees' performance, he or she is not a supervisor if his or her judgment is based on specific directions such that the action is routine rather than discretionary. Henricksen, Inc. dba Givsen Discount Center and Retail (1971) 191 NLRB 622. McNeff Industries, Inc. (1971) 191 NLRB 76. In this case, the alleged supervisors simply carried out the orders and instructions given by Harding.

The NLRB has consistently held that exercising only sporadic or irregular supervisory functions does not meet the statutory definition of supervisor. Meijer Supermarkes, Inc. (1963) 142 NLRB 513 (fn.8) [53 LRRM 1081]. In this case, there are only occasional isolated instances of conduct which might be indicative of supervisory authority, and these are insufficient to support a finding of supervisory status. Commercial Fleet Wash., Inc. (1971) 190 NLRB 326 [177 LRRM 1156]. Although

supervisor Harding testified that the three foremen had authority to fire employees, in all the years that the three had been working for the Employer, Harding could only recall one instance (which occurred several years earlier) when Tomas Salazar fired an employee. Further, the only competent testimony concerning Pedro Zaragoza's exercise of authority to effectively recommend hiring involved his recommendation that Harding hire his relatives. Similarly, the only instance when Roberto Zaragoza allegedly hired an employee was the example involving Gabriel Granados.

The Employer relied upon Dairy Fresh Products Company (1977) 3 ALRB No. 70 and Mid-State Horticulture Co. (1978) 4 ALRB No. 101, to support its position that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were supervisors.

In Mid-State Horticulture Co., the Board held that the disputed individual, named Zendejas, responsibly directed employees in the performance of their job functions, assigning employees to rows of grapes to be picked, being immediately in charge of a crew of 80 workers, telling workers when to begin and stop work and when to start picking grapes, and remaining in charge of the same group of workers as they were moved from ranch to ranch even though his immediate supervisor changed. In contrast to the facts in this case, the overall supervisor in Mid-State spent little time with the crew because he trusted Zendejas. The record in that case also established that Zendejas' exercise of authority was not merely of a routine or clerical nature but required Zendejas' exercise of independent judgement.

Here, the authority exercised by the three foremen was routine and clerical in nature. Basically, all the three did was relay Harding's orders and instructions to the crew members and report back to Harding any failure by crew members to follow said instructions. Because of Harding's, and later Green's, constant supervision, the foremen were not called upon to exercise their discretion with regard to the assignments made by Harding on any given day.

Unlike the Mid-State Horticultural Co. case, there is no evidence here that the foremen directed the crew with respect to where and when to sucker, hoe, dig up trees, load trucks or place stickers on the trees. Those decisions were left entirely to Harding.

In Dairy Fresh Products Company, the Board relied upon the following factors in concluding that disputed employees were statutory supervisors: the employees distributed checks, issued warnings for tardiness and absences, adjusted time cards, heard complaints and promised to deal with them, awarded time off, suspended employees, threatened discharge and transferred employees. In the present case, with the exception of the distribution of paychecks and time keeping, the foremen did none of the things found indicative of supervisory status in Dairy Fresh. Moreover, the distribution of paychecks and time keeping performed by the three foremen were of a routine and clerical nature.

In a more recent case, Ukegawa Brothers (1982) 8 ALRB No. 90, the Board overturned the Administrative Law Judge's (ALJ's) finding that Ukegawa's crew foremen were supervisors. The Board

found that the record did not show that the crew foremen independently determined the location and type of work to be performed or that their duties involved the use of independent judgement. The Board found that the crew foremen merely relayed to workers instructions which emanated from the field foremen. In that case, the ALJ found that the crew foremen determined the location and type of work to be performed by each crew, assigned rows to be picked, taught inexperienced workers, checked and corrected work of crew members, reported the crews' attendance and hours to field foremen, sometimes helped to distribute paychecks, and relayed instructions from field foremen concerning such matters as changes in assignment or layoffs, when the crew was to start and stop work each day, and what type and color of tomatoes were to be picked.

Since I have found that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar do not exercise independent judgement concerning the work of their crew members, their functions in regard to distributing paychecks and time keeping are of a routine and clerical nature, and they do not possess the authority to hire, fire or effectively recommend such, except for isolated instances, I conclude that they are not supervisors within the meaning of section 1140.4(j) of the Act.

B. Threats, Coercion and Intimidation by the Pro-Union Supervisors

1. Findings of Fact

Although I have concluded that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were not supervisors within the meaning of the Act, I must still determine whether their pre-election

conduct was so inherently coercive that employees were intimidated and unable to freely choose, thereby affecting the results of the election.

As I concluded above in my analysis of the Employer's first objection, based on my credibility resolutions and the competent evidence presented at the hearing, the Employer failed to substantiate its claim that UFW representatives, including Pedro Zaragoza, threatened employees with physical harm and job loss if they failed to sign authorization cards or support the union, or that any alleged statements or threats tended to create a coercive atmosphere in which the employees could not vote freely. The Employer offered no testimony concerning threats or other misconduct by Roberto Zaragoza or Tomas Salazar. I therefore conclude that the Employer has failed to demonstrate any misconduct by these three foremen that could have tended to affect the outcome of the election, and this objection therefore should be dismissed.

However, assuming, arguendo, that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were supervisors within the meaning of the Act, I will analyze the evidence to determine whether their conduct, including wearing UFW buttons, created a coercive atmosphere that tended to affect the outcome of the election.

Bill Bright testified that he was present at the pre-election conference, which was held at the Plainsburg School. At that meeting, Bright observed Pedro Zaragoza and Roberto Zaragoza wearing UFW buttons. He also observed Roberto Zaragoza sitting next to David Villarino, the UFW representative. Across the table from the UFW representative and Roberto Zaragoza were

the company representatives, James Bright and attorney Jerry Callister.

Prior to the pre-election conference, Bright attended a meeting at which company representatives Eddie Bright, James Bright and Jose Sanchez (who had been hired to campaign for the Company), and Stephen Highfill met the three foremen, Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar. At that meeting, the alleged supervisors were instructed that they were not to wear UFW buttons, as it was not in the Employer's best interest.

On cross-examination, Bill Bright testified that labor consultants Jose Sanchez and Steve Highfill were hired on Tuesday, the day the petition for certification was filed, but did not start working until Wednesday. The labor consultants met with the crews in groups. Bright was not certain exactly what was said to the crews, since the presentations were made in Spanish and he does not speak Spanish. He could not specifically testify that the labor consultants told the employees that Pedro and Roberto Zaragoza did not represent the Company's view, but he knew that the labor consultants were supposed to represent the Company's side and interests. He indicated that the labor consultants had a hard time reaching all the workers because of the rain. However, the consultants passed out anti-union literature and made it available to all the employees. Bright was not certain how many times the labor consultants met with each crew, but knew that they met with Ramon Vallejo's crew for about 45 minutes.

Jose Vera testified that two individuals hired by the Employer talked to the crew once prior to the election. They spoke to the whole crew for about an hour and did not mention Pedro Zaragoza. Unlike other portions of his testimony (see discussion, supra), Jose Vera was direct and nonevasive in his answers regarding this issue.

Roberto Zaragoza testified that Employer representatives, including Bill Bright, Steve Highfill and Jose Sanchez, came to talk to his crew once a day. They spoke to the crew for approximately 45 minutes during working hours. He was separated from the crew during the meetings and does not know what was said, nor could he testify specifically as to how many times the representatives actually met with the crew.

Pedro Zaragoza also testified that Steve Highfill came to talk to his crew several times before the election. He indicated that his crew did not work every day the week prior to the election due to rain.

Sidney Harding testified that, prior to the election, he observed Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar wearing UFW-buttons. Harding was present at a meeting with the three alleged supervisors, along with Bill Bright, Eddie Bright, James Bright and Steve Highfill. At that meeting, the three foremen were instructed that they were supposed to support the Employer and should not wear UFW buttons. Harding also confirmed that it rained often during the week prior to the election, and the crews did not work their regular hours. He testified that Steve Highfill and Jose Sanchez met with the crews at least a

few times. He did not know what they told the crews or whether they told the crews that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were not representing the Employer's position. He testified that he never told the workers in the crews that the pro-UFW foremen were not representing the Employer's position.

2. Analysis and Conclusions

It is undisputed that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar wore UFW buttons the week before the election; that Roberto Zaragoza attended the pre-election conference and sat next to UFW representative David Villarino; that the week prior to the election it rained considerably and the workers did not have regular work days; and that both the UFW and the Employer, through their representatives, conducted campaigns in furtherance of their respective interests.

As noted above, the record is devoid of any evidence that Roberto Zaragoza or Tomas Salazar ever threatened employees with physical harm or loss of jobs if the employees did not sign authorization cards, or encouraged others to do so or support the Union. Furthermore, the record was devoid of any evidence tending to prove that Roberto Zaragoza or Tomas Salazar elicited support for the Union among the employees. The evidence introduced in regard to the allegation of intimidation and coercion by alleged supervisors was directed exclusively at Pedro Zaragoza.

Pedro Zaragoza testified that, in response to their question, he told approximately 10 workers, including Jose Vera, that it would be good if the Union won. No evidence was elicited as to where, when, or how these statements were made.

I have already found that Pedro Zaragoza did not ask Jose Vera to sign an authorization card for the UFW, nor did he threaten him with physical harm or loss of work if he refused (see discussion of Objection I, supra). Even if I were to credit Vera's testimony that Javier Zaragoza and "Julio" threatened him while Pedro Zaragoza was standing approximately five feet away, there was no evidence concerning what Pedro Zaragoza was doing at the time, or whether Zaragoza in any way participated, merely acquiesced, approved of the threat, or did not hear it. The evidence simply showed that Pedro Zaragoza was present and wore a UFW button.

Pedro Zaragoza testified that he heard Miguel Padilla threaten Jose Vera that, if he did not take off his buttons, they did not want him working in the group. There was no evidence of when this threat occurred. The Employer would have me assume that, because Pedro Zaragoza was wearing a UFW button and was close by at the time the threat was made, he encouraged the threat. That inference is untenable.

Assuming, *arguendo*, that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were supervisors within the meaning of the Act, their conduct was not sufficiently coercive to warrant setting aside the election. The NLRB has consistently held that "mere supervisory participation in a union's organizing campaign does not, without a showing of possible objectionable effects, warrant setting aside an election." Admiral Petroleum Corporation (1979) 240 NLRB 894 [100 LRRM 1373]; Gary Aircraft (1975) 220 NLRB 187 [90 LRRM 1216]; Stevenson Equipment Company (1969) 174 NLRB 865

[70 LRRM 1302]. The leading case, Stevenson Equipment Company, set forth two areas of inquiry relevant to the showing of such objectionable conduct by supervisors participating in a union's organizing campaign.

The first level of inquiry is the degree to which employees may infer from the supervisor's conduct that the employer favors the union. In the instant case, the evidence established that the Employer hired labor consultants Steve Highfill and Joe Sanchez to conduct an anti-union campaign. While an unusual amount of rain disrupted the work week, Highfill and Sanchez met with the crews at least once or twice for a period of 45 minutes to an hour. Bill Bright also testified that the labor consultants met with Ramon Vallejo's crew for approximately 45 minutes and distributed leaflets. According to Harding and Bright, the labor consultants were hired to represent the Employer's interest and to make the Employer's no-union position known to the employees.

Roberto Zaragoza and Pedro Zaragoza testified that the labor consultants spoke to their crews during work on more than a few occasions prior to the election. According to the Zaragozas, the labor consultants spoke to the crews for about 45 minutes to an hour. Roberto Zaragoza specifically indicated that he had been excluded from the presentation to the crew. Furthermore, Jose Vera and Manuel Chavez testified that they knew that Pedro Zaragoza was not representing the interests of the Employer.

The Employer argued that the rain limited its ability to effectively dispel the pro-UFW activities of the supervisors. The Employer's position was clearly contradicted by Bill Bright

and Sidney Harding, who testified that the labor consultants nonetheless contacted the crews at least twice. The Employer had a sufficient opportunity to counteract the actions of any alleged supervisors, and the Employer in fact took advantage of this opportunity.

The second level of inquiry is found in the implications of continuing relationships between supervisors and employees, which may result in employee fear of future retaliation by a pro-union supervisor if they do not support the union. Stevenson Equipment Company, supra, 174 NLRB at 866. In the present case, I have already found that the substance of the alleged supervisors' pro-union activities was limited to wearing pro-UFW buttons. In addition, Roberto Zaragoza sat next to the UFW representative at the pre-election conference and Pedro Zaragoza told approximately ten employees that he favored the UFW.

I find that given the totality of the circumstances in this case, even if the three foremen were supervisors, their activities were not objectionable under the second prong of the Stevenson test. Their actions, and Pedro's remarks in particular, were not so oppressive or coercive as to lead the employees to fear possible retaliation at the foremen's hands if they were to reject the Union. Therefore, their conduct would not warrant setting aside the election, and the objection should be dismissed.

III. WHETHER THE UFW MISREPRESENTED THAT THE ALRB WAS IN FAVOR OF THE UFW BY USING FACSIMILE BALLOTS MARKED IN FAVOR OF THE UFW WHICH CONFUSED THE VOTERS AND MADE IT APPEAR THAT THE ALRB FAVORED THE UFW.

A. Findings of Fact

The Employer alleged that the UFW distributed facsimile ballots to UFW supporters, and that these facsimile ballots, which

the voters wore, were identical to the ALRB's official ballot.

The Employer alleged that the facsimile ballot confused the workers and gave them the impression that the ALRB supported the UFW.

In support of its allegation, the Employer presented six witnesses, who all testified consistently that the facsimile ballots were "identical" to the official ballot and that they had seen between 25 to 30 UFW supporters, wearing them. The witnesses all described the ballot as a piece of paper approximately 8 to 10 inches long and bluish-green in color, with two boxes (one for the "No" vote and the other with an eagle in it with an "X" in the box). All six testified that the facsimile ballot was "identical" to the official ballot, or used other words, such as "looked exactly the same" or "saw absolutely no distinction between" the ballot worn by the voters and the official ballot. However, their testimony was also characterized by the fact that, on cross-examination or questioning by the IHE, they were unable to describe with specificity the similarities between the ballots worn by the voters and the official ballot. Coincidentally, none was unable to remember with particularity any printing or wording on the facsimile ballot. Additionally, (with the exception of Mr. Nuessle, the last witness to testify on this issue), none of the witnesses could remember whether the facsimile ballot included any printing that indicated it was an "Official Ballot" or indicated that it was endorsed by the "State of California". All of the Employer's witnesses denied that the facsimile ballot looked like Petitioner's Exhibit Number 3 (a copy of the facsimile ballot the voters wore).

I do not give much weight to the testimony of the Employer's witnesses in regard to this issue because, despite

their assertions that the ballots were identical, none was able to accurately describe the ballots beyond that general statement. The following is a summary of the testimony offered by each of the six witnesses.

Paul Leonardo, the Company's observer, was asked if the facsimile ballot included something written in Spanish, and he answered, "I don't remember very well, I can't say for sure." He described the facsimile ballot as having two sides, one that said "No" and the other with an eagle with an "X" marked in favor of the Union. He was also asked to describe the official ballot, but could not remember exactly what it looked like. He did not recall if the official ballot included the words, "Official Ballot" or "State of California." The testimony of the other witnesses was similar. Leonardo testified that the election was conducted in an orderly fashion, and that the wearing of the facsimile ballots did not disrupt the voting process.

Jim LeBaron testified that he saw one person wearing a facsimile ballot with buttons around the ballot. He simply described the ballot as having "...an eagle on the side and had a button that said yes on it." He could not remember if the ballots worn by UFW supporters included any markings indicating they were official ALRB ballots or that they were endorsed by the State of California. He stated "that I couldn't say for sure. All I know is I seen an eagle and it had a "Yes" button on it."^{5/}

^{5/} The Employer's counsel argues that LeBaron actually identified the facsimile ballot as including two boxes, one for the UFW with an eagle in it, and the other a "No" side, symbolized by a circle with the word "No" in it and a slash across it. In fact, the portion of the testimony counsel cited was LeBaron's description of the official ballot (Vol. II, pages 134-135).

Mr. Hobart's description of the two ballots was more evasive and confused. His descriptions of the facsimile ballot and official ballot were confusing, as he mingled his descriptions of both and was unable to describe either in detail. On cross-examination, Hobart was asked to describe the official ballot and indicate whether "State of California" was written on the top. He answered, "No. It had Bright's Nursery, Inc. on one side and then it had UFW on the other side and had an X on UFW's side." He was then unresponsive to the question of which ballot he was actually describing and simply stated "Well I couldn't see any difference." Upon questioning by the IHE, he could not remember if the "No" side of the official ballot had a "No" in a circle with a slash across it.

On cross-examination, Hobart was asked whether the facsimile ballot worn by the employees was simply marked with an "X" on the UFW side or whether it also said in black letters "Vote yes for the UFW." He responded "I thought it had an X". However, in an affidavit signed prior to the hearing, Hobart described the facsimile ballot as simply including in black ink the words "Vote yes for the UFW."

John Nuessle was the last witness to testify on this issue.^{6/}
His testimony was similar to that of the other witnesses,

6/ I note that all the Employer's witnesses at the hearing waited in a lounge across from the hearing room. The IHE asked the Employer's counsel if the witnesses who had already testified had been segregated from those who had not, and he indicated that they had not been. He explained that they had simply been instructed not to talk to each other about their testimony. All the witnesses were questioned extensively on whether or not the ballot worn by the UFW supporters included the words "Official Ballot" or "State of California".

except that he stated that he thought the facsimile ballot also had the words "State of California" on the top. He testified, "I think it did. Not positive if it did or not." Upon further questioning on this issue by the IHE, Nuessle indicated he was not certain if the facsimile ballot actually said "State of California" on top.

Ricardo Ornelas, the ALRB agent in charge of the election, identified Employer's Exhibit Number 16 as a copy of the official ALRB ballot used at the election, and the parties stipulated to the authenticity of that exhibit. Ornelas also identified Petitioner's Exhibit Number 3 as being similar to the facsimile ballot the UFW supporters had pinned to their shirts as they came up to the voting table. At the election, Ornelas sat between the two observers and checked off the voters' names.

Ornelas also testified that the instant election was not the first time he had seen the type of document the UFW supporters wore, and that he had seen UFW supporters wearing a similar document at other ALRB elections. He had seen the document in different colors, including yellow and green. Ornelas testified that the facsimile ballots worn at the Bright's Nursery, Inc. election were dark green or blue.^{7/} Ornelas described the facsimile ballot as four inches wide and six inches long.

Ornelas also testified that, in his opinion, the election was conducted in an orderly fashion and the wearing of the ballots and other UFW paraphernalia did not disrupt the election process.

7/ Petitioner's Exhibit Number 3 is blue in color. The official ballot used at the election was light green.

Roberto Zaragoza testified that he saw some of his co-workers wearing stickers and a ballot on the day of the election. He pointed to Petitioner's Exhibit Number 3 and testified that the ballots the co-workers wore were "like the one here."^{8/} Zaragoza described the facsimile ballot as being five inches by six inches with the words "Vote Asi" on it. He indicated that when he returned to the Plainsburg market after voting, he observed several of his co-workers still wearing the ballots. He knew that a newspaper photographer had just taken their picture, although he arrived at the Plainsburg market after the photographer had already left. He also testified that a newspaper picture appearing in the "Merced Sun Star" on March 1, 1983 accurately portrayed the ballots the workers wore the day of the election at Bright's Nursery, Inc.^{9/}

Pedro Zaragoza testified that, on the day of the election, he observed his co-workers wearing a ballot similar to Petitioner's Exhibit Number 3 when they returned from voting at the Plainsburg-Four Stars market. He explained that he gave nine workers a ride in his van that morning. Since he was not supposed to vote until later that day, he lent the nine voters his van so they could vote. He also observed other workers wearing the ballots as they passed the intersection of Plainsburg Road and Grand Road, the corner where the Plainsburg market was located.

8/ I note that at this time, the exhibit was face down and Zaragoza could only see the back side.

9/ Petitioner's Exhibit Number 4 is a copy of a picture from a newspaper article, showing a worker wearing one of the facsimile ballots at the Bright's Nursery election.

The workers passed the intersection on their way to and from the voting site. Zaragoza had an opportunity to look at the facsimile ballots closely, since the worker who returned his van keys was wearing one, and the riders in his van left four or five extra facsimile ballots, which he threw away when he cleaned the van. He described the ballot as square, smaller than an 8 by 11 inch piece of paper, and blue in color. "It had an eagle painted on it with a little square to one side," which had been marked with an "X."

Pedro Zaragoza also testified that the picture in the "Merced Sun Star" accurately portrayed the ballots that he saw pinned to his co-workers' shirts. When he returned from voting at the Plainsburg market, Zaragoza observed a newspaper photographer taking the photograph which appeared in the newspaper. He specifically observed that the worker was wearing a ballot like the ones that were left in his van. He described the facsimile ballot as being smaller than the official ballot; however, he did not remember much more about the official ballot. When Employer's Exhibit Number 16 was placed in front of him, he recognized it as the official ballot, but denied that it resembled the one worn by his co-workers.

Based on the totality of the testimony presented, I credit the description given by Ricardo Ornelas, Roberto Zaragoza and Pedro Zaragoza of the ballot worn by the UFW supporters at the election. They all identified Petitioner's Exhibit Number 3 as being similar to the ballot worn by the UFW supporters, and this identification was corroborated by the newspaper article

picture of a UFW supporter wearing the same facsimile ballot pinned to his shirt at the Bright's Nursery, Inc. election. I do not credit the testimony of the Employer's witnesses that the facsimile ballots worn by the UFW supporters did not resemble Petitioner's Exhibit Number 3. The Employer's witnesses were unable to describe with specificity the ballots worn by the UFW supporters and the official ballot, despite their claim that the ballots were identical. Furthermore, with the exception of Mr. Neussels, none of the Employer's witnesses were able to recall whether the facsimile ballot worn by the UFW supporters included any indicia that it was an "Official Ballot" or that it was in any way endorsed by the State of California or the ALRB. The Employer's witnesses focused on the fact that the UFW eagle symbol was identical on both ballots. Additionally, none of the Employer's witnesses testified that they saw on the facsimile ballot the international symbol which the ALRB uses on its official ballots to symbolize a "No" vote (i.e., a circle with a "No" in it and a slash across it).

B. Analysis and Conclusions

In Allied Electric Products (1956) 109 NLRB 1270 [34 LRRM 1538], the NLRB held that elections may be set aside where a party has engaged in campaign conduct that improperly involves the board and its processes. In Allied Electric, the union distributed a sample copy of the NLRB's official election ballot, after altering it by placing an "X" in the "Yes" box, adding the word "Yes" in large type next to that box, and adding the phrase "Do not mark it any other way-Mark "Yes" box only." Id. at 1271. In overturning the election, the national board stated that it

would not allow parties in a representation election "to misuse [its] processes to secure a partisan advantage." Id. at 1271-72. The NLRB also prohibited the use of campaign propaganda which suggests that the board endorses a particular choice. Id. at 1272.

In a more recent case, Midland National Life Ins. Co. (1982) 263 NLRB 24 [110 LRRM 1489], the NLRB reiterated its earlier ruling in Allied Electric and stated that it will set an election aside where a party has used forged documents that render voters unable to recognize propaganda for what it is, as when an official board document has been altered in such a way as to indicate that the board is endorsing a party to the election.

In scrutinizing cases involving the use of facsimile ballots, the NLRB considers how closely the facsimile resembles an official ballot, such that the voters may mistake it for an official ballot, and whether the facsimile places the board's neutrality in issue. The other danger which the national board had guarded against is the situation in which a party creates the impression that the board endorses its propaganda or where the party fails to disassociate adequately its own partisan remarks from the contents prepared by the board. See Gliden Co. (1958) 121 NLRB 752 [42 LRRM 1428]; Rett Electronics, Inc. (1968) 169 NLRB 1111 [67 LRRM 1461]; Anderson Air Activities (1953) 106 NLRB 543 [32 LRRM 1486].

In Midland National, supra, the NLRB made it clear that "...as long as the campaign material is what it purports to be, i.e., mere propaganda of a particular party, the Board would leave

the task of evaluating its contents solely to the employees." Id. LRRM 1493.

The NLRB's discussion in Allied Electric Products, supra, and its application of the rule in other cases, clearly indicate that the initial basis for finding Allied and its progeny to be germane is the distribution of materials which are replicas or suggestive facsimiles of official NLRB documents, leading the voters to believe that the board endorses a certain party. In the case at hand, Petitioner's Exhibit Number 3 did not purport to be an official ballot; is not a replica of the official ALRB ballot; did not make any reference to endorsement of the UFW by the ALRB; and did not include any mention of the ALRB or the State of California. The ballot worn by the UFW supporters was a propaganda piece which endorsed the UFW as a choice and indicated that the voters should place an "X" by the black eagle, the UFW's symbol. It clearly identified the UFW as the endorser.

Not only did the facsimile ballot worn by UFW supporters not purport to be an official Board ballot, but a comparison between the facsimile and the official ballot reveals so many differences that it is unreasonable to assume that voters would mistake the former for the latter.

Unlike the ballot in Allied Doctrine and other cases which involved forgeries or copies of NLRB official ballots, the ballot used in this case did not convey the impression that the ALRB was endorsing the UFW.

In support of its position, the Employer cited NLRB v. Carroll Contracting and Ready-Mix, Inc. (5th Cir. 1981) 636 F.2d 111 [106 LRRM 2491], in which the NLRB set aside the election

based on conduct attributable to the union. In that case, the NLRB held that a "free representation election was rendered impossible by the election conduct of two former employees," who wore "Vote Teamsters" signs on their hats and enlarged reproductions of ballot with "X" marked in the "Yes" box pinned on their shirts. Before the polls opened, the two ex-employees positioned themselves in a parking lot where the line of waiting voters formed and urged voters to vote for the union as they passed by. The national board held that the "...employees waiting outside in line to vote became part of the polling place and were entitled to safeguards against interferences." Id. 1104 LRRM 2492. The facts of that case are distinguishable from the case at hand in that no evidence was introduced indicating that the UFW supporters who wore the facsimile ballot actually campaigned or urged other voters to vote for the UFW. In addition, the facsimile ballot they wore was not a replica of the official ballot. The evidence indicated that the election was conducted in an orderly manner and the wearing of UFW buttons, stickers and the facsimile ballot did not interfere with or disrupt the election process. The UFW supporters did nothing more than wear pro-UFW campaign paraphernalia which the Board has consistently found to be insufficient grounds to set an election aside, absent evidence of disruption of the election or actual interference with the voting. George A. Lucas & Sons (1982) 8 ALRB No. 61; John Elmore Farms (1977) 3 ALRB No. 16. Therefore, the Employer's objection should be dismissed.

IV. WHETHER THE ALRB AGENTS ALLOWED ACTIVE CAMPAIGNING BY PRO-UFW SUPERVISORS IN THE VOTING AREA AND WHETHER THE CUMULATIVE EFFECT OF SUCH CAMPAIGNING, IN ADDITION TO THE PRO-UFW SUPERVISORS' INTIMIDATION OF EMPLOYEES AND THEIR ALLOWING UFW SUPPORTERS TO THREATEN AND COERCE PRO-COMPANY EMPLOYEES, TENDED TO AFFECT THE FREE CHOICE OF VOTERS OR THE OUTCOME OF THE ELECTION.

A. Findings of Fact

Paul Leonardo was an observer for the Employer, and during the election he sat next to ALRB agent Ricardo Ornelas. He testified that, at the pre-election conference held at the Plainsburg School, the parties agreed that the six foremen were not to be allowed in the voting area until the last 30 minutes of the election, at which time they were to vote. Leonardo testified that he arrived at the election site at approximately 6:30 a.m. the day of the election, and assisted the Board agents in setting up the polling place. The polls opened at approximately 7:00 a.m. Just as the polls opened, he observed Roberto Zaragoza, Pedro Zaragoza and Tomas Salazar in the voting area. Roberto Zaragoza was the first voter in line. Leonardo immediately notified the ALRB agent about the presence of the Zaragoza's and Tomas Salazar. The ALRB agent said he would take care of it and make sure that the foremen were removed. Leonardo observed the ALRB agent talk to the three foremen. Roberto Zaragoza then moved away to the front of the hog pen office, where he remained the rest of the morning. Leonardo was not able to see Pedro Zaragoza or Tomas Salazar after that.

Leonardo indicated that the hog pen office was approximately 20 to 25 feet from the horse barn. The voting took place inside the horse barn, and two voters were allowed inside

at a time. The doorway of the horse barn was about six feet wide, through which Leonardo could see about 10 voters at a time. Since the voters were lined up against the wall of the horse barn, he could not see the rest of the voters waiting in line. He estimated that the line of voters was approximately 15 to 20 feet from the hog pen office.

From his position at the election table, Leonardo could see Roberto Zaragoza, who was standing across the way in front of the hog pen office, talking to the voters waiting in line. Leonardo was too far away from where Zaragoza was standing to hear what he was saying, but he did observe Zaragoza gesturing with his hands. He also observed that Roberto Zaragoza, who was about 10 feet away from the people waiting in line to vote, was wearing a UFW button. Leonardo testified that Zaragoza voted at the end of the election, approximately two hours after he had arrived at the voting area. Leonardo indicated that another ALRB agent regulated the line of voters at the entrance to the horse barn. Although there was laughing and the voters were talking in Spanish, the election was conducted in an orderly manner. After his first warning to the ALRB agent, Leonardo did not observe the ALRB agent again ask Roberto Zaragoza to leave.

On cross-examination, Leonardo testified that, in the morning, he observed Roberto Zaragoza, Pedro Zaragoza and Tomas Salazar at the front of the line. After he objected to their presence, he could only observe Roberto Zaragoza.

Ricardo Ornelas testified that there was a discussion at the pre-election conference regarding the individuals alleged

to be supervisors, including Roberto Zaragoza, Pedro Zaragoza and Tomas Salazar. It was agreed that the alleged supervisors were to arrive at the end of the morning voting session, 15 minutes before the closing of the polls.

Ornelas testified that, on the day of the election, the polls opened 10 to 15 minutes later than scheduled. The polls were to open at either 6:30 or 6:45 a.m. and close between 8:30 and 8:45 a.m.

Ornelas was asked if the presence of Roberto Zaragoza and Pedro Zaragoza was pointed out to him prior to the opening of the polls. He responded that he was not certain whether it was before or after the polls opened. He specifically recalled that, before the polls opened, he instructed the parties to leave the voting area. He also told the parties that all six alleged supervisors would have to leave the area.

Ornelas remembered that Roberto Zaragoza arrived at the voting area with the other two alleged supervisors before the predesignated 15 minutes prior to the closing of the polls. Since they were running behind because a large number of voters showed up to vote, Ornelas told the three men that "...they had to wait a little longer before they could vote." He could not specifically remember seeing the three men before that time. He indicated that he might have seen them prior to the opening of the polls, but he was not certain. Before the polls opened, he went outside the horse barn to insure that all the parties had left the area. After that, he remained in the horse barn, seated at the voting table. Ornelas did not remember seeing Roberto or Pedro Zaragoza attempt to vote before the other voters.

Ornelas relied on the reports given to him by another ALRB agent, Charlie Atilano, to whom he had delegated the responsibility of making sure that no parties or alleged supervisors were in the polling area during the voting. During the course of the morning voting, agent Atilano, under Ornelas' instructions, made one or two trips to ensure that nobody was in the quarantine area, and he reported to Ornelas that everything was in order.

Roberto Zaragoza testified that, on the day of the election, he and Pedro Zaragoza arrived at the election site at approximately 7:00. He did not vote until 7:45 a.m., along with the rest of the other supervisors, and by then most of the workers had already voted. Zaragoza also testified that at the time he voted the only people present were Roberto Vallejo, Ramon Vallejo, Everett O'Hagen, Sandra Luker, Jessie Luker, James Bright and Eddie Bright. He also testified that he waited approximately 10 minutes from the time he arrived before he voted.

Pedro Zaragoza testified that, prior to driving to the election site and while waiting for the other workers to vote, he was standing at the Four Stars market at the corner of Plains-burg Road and Grand Road. Roberto Zaragoza, Tomas Salazar, David Villarino, and other workers were also standing there. He drove to the election site in the same car with Roberto Zaragoza, but he and Roberto separated when they arrived at the election area. Pedro Zaragoza testified that he and Roberto went to vote at approximately 10:30 or 11:00 a.m., but he was not certain about the time.

B. Analysis and Conclusions

The testimony given by the witnesses for the Employer and for the UFW was unclear as to the exact time the polls opened and closed. Paul Leonardo testified that he arrived at the voting area early, at approximately 6:30 a.m., and assisted the Board agents in setting up. Ricardo Ornelas testified that the polls were scheduled to open at 6:30 or 6:45, but he could not recall the exact time. He acknowledged that the polls opened 10 to 15 minutes late. Ornelas testified that the polls were to close at 8:30 or 8:45 a.m. However, the official Notice and Direction of Election indicated that the election was to be held from 6:30 a.m. to 9:30 a.m.

Ricardo Ornelas also testified that he did not specifically remember seeing the alleged pro-UFW supervisors prior to the opening of the polls. He remembered seeing them when they came to vote, and at which time he told them to come back later.

Paul Leonardo testified that he first saw Roberto Zaragoza, Pedro Zaragoza and Tomas Salazar in the voting area just as the polls opened, and that Roberto Zaragoza was the first voter in line. However, Ornelas testified that, prior to the opening of the polls, he personally instructed the parties that they were to leave the area. He also made sure that no party was present, including the alleged Company and Union supervisors. He did not recall seeing the alleged supervisors until later, when they came to vote.

I credit Roberto Zaragoza's testimony that he and Pedro Zaragoza arrived at the voting area at approximately 7:00 a.m.,

after the polls opened, and that he did not vote until approximately 7:45 a.m. I credit his testimony over that of Pedro Zaragoza, who indicated that they left to vote at approximately 10:30 or 11:00 a.m. However, he was very uncertain as to the time. Although there was no evidence of exactly what time the polls closed, they were scheduled to close at 9:30 a.m., and there was no evidence that they remained open as late as 10:30 or 11:00. Additionally, Pedro Zaragoza testified that he and Roberto Zaragoza drove to the election area in the same car. My finding is also based on Ricardo Ornelas' testimony that he did not remember seeing the Zaragoza's prior to the opening of the polls.

In the Employer's case-in-chief, nine employee witnesses testified regarding their observations at the election site. Yet only Mr. Leonardo testified concerning Roberto Zaragoza's presence outside the hog pen office throughout the voting period.^{10/}

10/ At the hearing, the Employer attempted to also present the testimony of James Bright to rebut and impeach the testimony of Pedro Zaragoza. Bright would have testified that, on the morning of the election, he went to the voting site before it opened and observed Pedro Zaragoza at the voting site. The Employer argued that this testimony would be relevant to impeach Pedro Zaragoza's testimony that he did not go to the voting site until approximately 10:30 or 11:00 o'clock, and also to the issue of whether or not alleged supervisors were in the voting area. The Employer's offer of proof was rejected on the basis that it was cumulative. As a general rule, the trial judge may stop the production of evidence which is cumulative if its probative value is substantially outweighed by the possibility that its admission will consume an undue amount of time or will create undue prejudice. Evidence Code section 352. See People v. Graham (1978) 83 C.A.3d 736. As noted above, I credit Roberto Zaragoza's testimony that he and Pedro Zaragoza arrived at the polling site at 7:00 a.m.

The Employer objected to the election on the basis that the presence of the alleged supervisors had a coercive and intimidating effect on the workers because of the alleged supervisors' prior pro-UFW activities (the extent of which has already been discussed, supra) and because they allegedly campaigned for the UFW while they were waiting in line to vote. Yet the evidence indicated that Paul Leonardo observed only Roberto Zaragoza, and he stood approximately 20 to 25 feet away from the door to the horse barn and 10 feet away from the line of voters. Mr. Leonardo could not hear what Roberto Zaragoza was saying; he could only see him gesturing with his hands.^{11/}

Additionally, the Employer introduced no evidence that alleged supervisors Roberto Zaragoza or Tomas Salazar intimidated, coerced, or threatened employees, or asked any employee to sign authorization cards. The only evidence presented involved Pedro Zaragoza. As set forth in my discussion of the Employer's election objections, I have concluded that Pedro Zaragoza, Roberto Zaragoza and Tomas Salazar were not supervisors within the meaning of the Act, and that Pedro Zaragoza never threatened any workers, nor encouraged others to do so, nor did he ask any employee to sign a Union authorization card. Even assuming that Roberto Zaragoza stood outside the hog pen office between 7:00 and 7:45, there is insufficient evidence to show that he campaigned for the Union or that his presence alone was coercive or intimidating.

11/ I note that, in the Employer's post-hearing brief, counsel indicated that Leonardo observed Pedro Zaragoza talking to the voters in the line and gesturing to them with his hands. However, the portion of Leonardo's testimony referred to involves Roberto Zaragoza, not Pedro Zaragoza.

The ALRB has held that conduct which violated a pre-election agreement not to campaign on buses would be judged by the same standard as any other conduct, and the test is whether the conduct tended to affect the free choice of the voters. D'Arrigo Bros, of California, (1977) 3 ALRB No. 37. In this case, I have found that Roberto Zaragoza and Pedro Zaragoza arrived at the voting site at approximately 7:00, earlier than had been agreed to at the pre-election conference. However, as discussed above, the Employer failed to demonstrate that their early arrival and presence at the election tended to have a coercive impact on the employees' free choice.

The evidence failed to show how Roberto Zaragoza's gestures and statements could have tended to affect the outcome of the election. In D'Arrigo Bros., supra, the Board held that the outcome of the election was not affected when two workers, who handed out union bumper stickers and buttons to employees on the bus that carried them to the polls, talked to voters near the booths prior to the voting, or when a crew observer and UFW organizers went in and out of the polling area several times carrying material which appeared to be campaign material. In the present case, the evidence established that only Roberto Zaragoza was seen standing 10 feet away from the line of voters, and the extent of his conduct was talking and gesturing to the voters waiting in line to vote. The Employer failed to provide any evidence concerning the contents of his statements, even though it presented six witnesses who voted at the election. Paul Leonardo did not know where Pedro Zaragoza or Tomas Salazar were

after the Board agent apparently asked them to leave; he did not see them in the election area. On the basis of the above analysis, this election objection should be dismissed.

V. CUMULATIVE IMPACT

The ALRB has consistently held that allegations affecting an election must be considered as a whole as well as separately. To cause an election to be set aside, they must, when so viewed, reflect an atmosphere in which employees were unable to vote freely. Harden Farms (1976) 2 ALRB No. 30; Veg-Pak, Inc. (1976) 2 ALRB No. 50; Patterson Farms (1976) 2 ALRB No. 59; D'Arrigo Bros, of Calif. (1977) 3 ALRB No. 37.

I have already found that the misconduct alleged in the Employer's objections, viewed separately, is insufficient to set aside the election. Even when viewed cumulatively, such conduct was not so coercive and intimidating that the employees were unable to freely choose their collective bargaining representative.

RECOMMENDATION

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

DATED: December 13, 1983



LAURA E. CLAVERAN
Investigative Hearing Examiner