

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

VISALIA CITRUS PACKERS,	)	Case No. 83-RC-1-D
	)	
Employer,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF	)	10 ALRB No. 32
AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	
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DECISION AND ORDER

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW or Petitioner) on February 22, 1983, a representation election was conducted among the agricultural employees of Visalia Citrus Packers (VCP or Employer). The official Tally of Ballots showed the following results:

UFW. . . . .	41
No Union. . . . .	39
Unresolved Challenged Ballots. . . . .	<u>5</u>
Total. . . . .	85

Because the five challenged ballots were sufficient to determine the outcome of the election, the Delano Regional Director conducted an investigation of each ballot. In his Report on Challenged Ballots, issued on April 5, 1983, he recommended that all five challenges be overruled and ballots counted. The Employer timely filed exceptions to three of the Regional Director's recommendations, and the Agricultural Labor Relations

Board (ALRB or Board) determined that the exceptions raised material questions of fact about the voters' eligibility. By Order of the Board, the remaining two ballots were counted pursuant to the Regional Director's recommendation and the three contested ballots were set for hearing. The First Amended Tally issued on June 3, 1983 showing the following results:

UFW. . . . .	41
No Union . . . . .	41
Unresolved Challenged Ballots. . . . .	<u>3</u>
Total. . . . .	85

The Employer had also timely filed post-election objections, of which the following were set for hearing, consolidated with the three challenges:<sup>1/</sup>

- (1) Whether or not the misprinting of the official ballots caused such confusion among the voters that they were unable to properly indicate their choice on the ballots and whether the misprinting tended to affect the outcome of the election.
- (2) Whether an irregularly marked ballot in which the voter placed an "N"-like mark in the box next to the UFW symbol and a " + " above it could reasonably be interpreted as a pro-union vote.
- (3) Whether Board agents improperly counted six to eight irregularly marked ballots.
- (4) Whether the election was conducted in an atmosphere of threats and intimidation as a result of a bomb or rock throwing threat.
- (5) Whether the election was conducted in an atmosphere of fear and coercion as a result of a threat by a union adherent to four eligible voters.

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<sup>1/</sup> Two other objections, dealing with the identity of the Employer and the scope of the bargaining unit, were held in abeyance pending resolution of the instant objections.

(6) Whether the election was conducted in an atmosphere of fear and coercion as a result of the display of a gun to a voter by a union adherent at the voting site.

After the hearing had commenced, two of the three challenges to ballots were withdrawn by VCP, and a Second Amended Tally issued showing the following results:

UFW. . . . .	43
No Union . . . . .	41
Unresolved Challenged Ballots . . . . .	<u>1</u>
Total. . . . .	85

The hearing on objections was held between July 19 and August 9, 1983 before Investigative Hearing Examiner (IHE) Kelvin Gong, who issued the attached proposed Decision on October 14, 1983. The IHE concluded that the ballot of Mario Chavez should be counted, all objections dismissed and the UFW certified as exclusive collective bargaining agent of VCP's agricultural employees.

The Employer timely filed exceptions to the IHE's Decision and a supporting brief, and the UFW timely filed a brief in response to the Employer's exceptions.

Pursuant to the provisions of Labor Code section 1146,<sup>2/</sup> the Board has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached IHE Decision in light of the exceptions and briefs of the parties

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<sup>2/</sup> All section references are to the California Labor Code unless otherwise stated.

and has decided to set aside the election and dismiss the certification petition.

The evidence showed that the ballots used at the instant election were misprinted, the word "NO" on the no-union symbol transposed to read "ON." In addition, the Employer's agents who conducted his election campaign instructed prospective voters that they should mark the box on the right side of the ballot to vote against the Union, but the ballots were printed with the Union choice on the right side.

We affirm the IHE's ruling that evidence of an unwritten Board policy regarding ballot format is not relevant to the determination of whether this election should be set aside. We also reject the Employer's argument that employee confusion generated by its own campaign constitutes grounds to set aside this election. However, in the instant case, a change of one vote could affect the outcome of the election, and at least one voter testified that the concededly erroneous transposition of letters in the word "NO" compounded the confusion caused by the Employer's campaign instructions. In addition, at least one ballot which was counted for the Union (Exhibit 22a) was marked in such a manner<sup>3/</sup> as to indicate actual confusion on the part of the voter, given the circumstances herein. The six ballots marked with a single "X" over the Union symbol are also subject

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<sup>3/</sup> This ballot was marked with a small "+" next to the UFW eagle and a mark that resembles the word "No" inside the small box on the Union side of the ballot.

to question in light of the misprinting.<sup>4/</sup> Due to the impossibility of determining with exactitude the precise source of these voters' apparent confusion,<sup>5/</sup> we have decided to set the instant election aside and dismiss the UFW's Petition for Certification.<sup>6/</sup>

Our resolution of the issue involving the misprinted ballots obviates the need for us to consider the Employer's other objections and the challenge to the ballot of Mario Chavez.

ORDER

By authority of Labor Code section 1156.3, the Agricultural Labor Relations Board hereby orders that the election

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<sup>4/</sup> We do not find the National Labor Relations Board (NLRB) precedent cited by the IHE controlling concerning the resolution of ballot markings made on a misprinted ballot.

<sup>5/</sup> We are mindful of the conflict in the voters' testimony which caused the IHE herein to discredit their claim of confusion. However, we do not believe that admissions under cross-examination by inexperienced and unsophisticated witnesses that they understood the meanings of the union and no-union symbols foreclose the possibility that a major transposition of letters could have caused already confused first-time voters to have voted in error.

<sup>6/</sup> Member Henning wishes to register his strong view that the main contributing factor to the general confusion was this agency's failure to notice and correct the misprinting of the ballots; the Regional Director's failure to repeat the election with corrected ballots was a serious departure from common sense. As a result, the exercise of farm workers' free choice was achieved but with a futile end.

heretofore conducted in this matter be, and it hereby is, set aside and that the Petition for Certification be, and it hereby is, dismissed.

Dated: June 27, 1984

JOHN P. McCARTHY, Acting Chairman

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

## CASE SUMMARY

VISALIA CITRUS PACKERS

10 ALRB No. 32  
Case No. 83-RC-1-D

### IHE DECISION

Board ordered bifurcation of objections hearing with first phase to cover misconduct objections and challenged ballots and second phase to consider identity of employer only if objections considered in first phase should be dismissed. The tally was 43 for the UFW and 41 for no union, with 1 challenged ballot. The IHE presiding over the first hearing recommended dismissal of all objections. He also recommended the single remaining challenged ballot be opened, despite the fact that the voter was arrested and deported during the eligibility period, finding a de facto leave policy and reasonable expectation of continued employment.

With regard to the objection that the misprinting of the ballot confused voters, the IHE found that the mistaken transposition of the word "NO" on the no union symbol to read "ON" did not affect the election results because voters understood the meaning of the union and no-union symbols. The Employer sought to prove that the ballots were also misprinted in that the union and no-union sides were reversed, but the IHE quashed the Employer's subpoenas of agency officials, finding that the existence or nonexistence of a practice or policy regarding how ballots are printed does not shed any light on the state of mind of the voters. Rather, he found, the allegations of voter confusion relating to the ballot format stemmed from the Employer's own campaign representations that voters should mark the right side of the ballot to vote against the union. The IHE found that absent a written policy or other explicit representation by agency personnel, the agency could not be estopped from certifying the election, and that, at any rate, an estoppel would only operate to preclude the Board from arguing that the ballots were not standardized.

The IHE also dismissed the objection that the election was affected by a threat to bomb or throw rocks at a day care center. Despite the fact that the anonymous phone threat, made the morning of the election, was directed at one of the Employer's election observers, the IHE found, based on the testimony of the observer and others, that no nexus existed between the Union and the threat, and he recommended dismissal of the objection for failure to affect the election. The IHE also recommended dismissal of the objection that a union adherent threatened on the morning of the election to "kick" another voter if he failed to vote for the Union. He found inadequate evidence of union agency and cited San Diego Nursery (1979) 5 ALRB No. A3 for the proposition that such a threat was the "sort of exaggeration which [is] recognized as such by the workers." The IHE also

recommended dismissal of the objection alleging that a union adherent brandished a gun to another employee after that employee voted, finding a lack of evidence that workers who had not voted would have been aware of the incident.

BOARD DECISION

The Board dismissed the certification petition and set the election aside based on the agency's conceded transposition of the letters on the no-union symbol on the ballot and evidence that at least one voter was confused thereby. The Board held that despite the voter's ability to identify the union and no-union symbol, since a switch in one vote could effect the outcome of the election, the election must be set aside. The Board found it unnecessary to consider the Employer's other objections. In interim appeals, the Board upheld the IHE's rulings (1) to grant the Petitions to Revoke Subpoenas Duces Tecum served on the Delano Regional Director and the Executive Secretary and (2) to deny the Employer's Motion to Disqualify the IHE based on its contention that the IHE's employment by the Executive Secretary would bias him in his ruling on the Executive Secretary's Petition to Revoke.

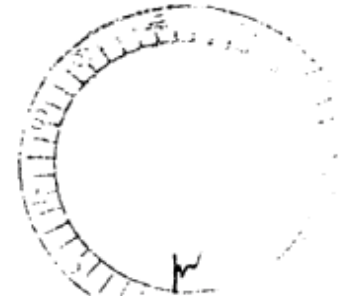
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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:

VISALIA CITRUS PACKERS,

Employer,

and

UNITED FARM WORKERS  
OF AMERICA, AFL-CIO,

Petitioner.

Case No. 83-RC-1-D

DECISION OF INVESTIGATIVE  
HEARING EXAMINER

William S. Marrs, Leon L. Gordon  
Gordon, Glade and Marrs

Marc Roberts, Roberts and Associates,  
for the Employer.

Ned Dunphy for the Petitioner

Manuel Melgoza, for the  
Agricultural Labor Relations Board

DECISION

STATEMENT OF THE CASE

KELVIN C. GONG, Investigative Hearing Examiner: This case was heard by me on July 19, 25, 26, 27, 28, 29, August 1, 2, 3, 4, 5, and 9, 1983, in Visalia, California.

BACKGROUND

Visalia Citrus Packers (Employer or VCP) is a commercial packing house located in Visalia, California, engaged in business since 1972. Bob Bellar is the packinghouse manager.

On February 22, 1983, <sup>1/</sup> the United Farm Workers of America, AFL-CIO (Petitioner or UFW) filed a petition for certification with the Delano Regional Office of the Agricultural Labor Relations Board. An election was held at VCP on March 1, and the tally of ballots showed the following results:

UFW	41
No Union	39
Challenged Ballots	<u>5</u>
Total	85 <u>2/</u>

Pursuant to 8 Cal. Admin. Code section 20365, Employer timely filed objections to the conduct of the election. Since the five challenged ballots were outcome determinative, the Regional Director of the Delano Regional Office, pursuant to 8 Cal. Admin. Code section 20363 (a), conducted an investigation of the challenged ballots of Alvaro Espinoza, Mario Chavez, Manuel Renteria, Raul Rodriguez, and Antonio Mesa.

On April 5, the Regional Director issued his Report on Challenged Ballots. (Ex. No. 13) An erratum to the report subsequently issued on April 7. (Ex. No. 13a) Pursuant to 8 Cal. Admin. Code section 20363(b), Employer timely filed exceptions to the Regional Director's Report on Challenged Ballots. On May 24, the Executive Secretary issued an Order on Challenged Ballots which stated that the challenges to the ballots of Mario

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1/ Unless otherwise noted, all dates refer to 1983.

2/ There was one "spoiled" ballot: (Ex. No. 25) Apparently the voter, after marking his ballot, failed to fold it thus possibly exposing how he voted to other employees. Board agents took his ballot, marked it "spoiled" and gave him another ballot to cast.

Chavez, Manuel Renteria, and Raul Rodriguez could not be resolved on the basis of the Regional Director's Report. (Ex. No. 4) The Executive Secretary ordered that the remaining two ballots be opened and counted.

On June 3, an amended tally of ballots issued, showing the following results:

UFW	41
No Union	41
Challenged Ballots	<u>3</u>
Total	85

After due consideration, the Executive Secretary set the following objections for investigative hearing:

1. Whether the petition for certification filed by the UFW on February 22, 1983 failed to properly name the Employer, and whether the UFW's designation of the Employer as "Visalia Citrus Packers and all growers that pack into Visalia Citrus Packers" is precluded by the ALRB's precedent?

2. Whether the bargaining unit sought by the UFW in its petition for certification including "all agricultural citrus workers of Visalia Citrus Packers and all growers that pack into Visalia Citrus Packers in the State of California" is improper under section 1156.2 of the ALRA and the ALRB's precedent?

3. Whether the misprinting error in the official ballots used at the election caused such confusion among the voters that they were unable to properly indicate their choice on the ballots and whether the misprinting of the ballot tended to affect the outcome of the election?

4. That portion of objection 4, concerning whether an

irregularly marked ballot, on which the voter placed an "N" in the box next to the UFW symbol and a "+" above it, could reasonably be interpreted as a pro-union vote?

5. That portion of objection 4, alleging that Board agents improperly counted six to eight irregularly marked ballots.

6. That portion of objection 5, alleging that the election was conducted in an atmosphere of threats and intimidation as a result of a bomb or rock throwing threat.

7. That portion of objection 6, concerning whether the election was conducted in an atmosphere of fear and coercion as a result of a threat made by a union adherent to four eligible voters to the effect that if they failed to vote for the union he would "beat the shit out of" them?

8. That portion of objection 6, alleging that the election was conducted in an atmosphere of fear and coercion as a result of an incident at the election site where a union adherent displayed a gun to another voter.

In addition, the Executive Secretary consolidated with the election objections the Employer's exceptions to the Regional Director's Challenge Ballot Report, in order to determine whether the three remaining challenged ballots were cast by eligible voters.

On July 1, the Executive Secretary severed Objections 1 and 2, which involve the scope of the bargaining unit. The Executive Secretary ordered that an investigative hearing be conducted on the remaining objections set for hearing and the challenged ballots. Furthermore, the Investigative Hearing Examiner was ordered to prepare, on an expedited basis, a Preliminary Recommended Decision

on the issues set for hearing.

An investigative hearing ensued, and on July 26, Employer withdrew its exceptions to the Regional Director's recommendations concerning the challenged ballots of Manuel Renteria and Raul Rodriguez. (TR III, p. 1) A second amended tally of ballots issued, showing the following results:

UFW	43
No Union	41
Challenged Ballot	<u>1</u>
Total	85

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings.

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

#### JURISDICTION

The parties stipulated to the Board's jurisdiction in this matter. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code section 1140.4(c), and the UFW is a labor organization within the meaning of Labor Code section 1140.4 (f).

#### OBJECTIONS AND DISCUSSION

Labor Code section 1156.3 (c) provides in pertinent part, "Unless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." Examining the effects of setting aside an election, the Board has stated that:

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...[T]o set aside an election in the agricultural context means that employees will suffer serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented. We will impose that burden upon employees only where the circumstances of the first election were such that employees could not express a free and uncoerced choice of a collective bargaining representative. D'Arrigo Brothers of California (1977) 3 ALRB No. 37, p. 4. (emphasis added)

In light of the above concern, the Board has placed the burden of proof on the party seeking to set the election aside. See Patterson Farms (1982) 8 ALRB No. 57 and TMY Farms (1976) 2 ALRB No. 58.

Objection No. 3 - Whether the misprinting error in the official ballots used at the election caused such confusion among the voters that they were unable to properly indicate their choice on the ballots and whether the misprinting of the ballot tended to affect the outcome of the election?

#### THE BALLOT IN QUESTION

A sample ballot from the election was admitted into evidence. (Ex. No. 21 and Attachment No. 1) The ballot, which is printed in both English and Spanish, includes large squares with the symbols which represent "no union" and the UFW. An obvious error in the ballot is that, within the circle with a slash, (the symbol for "no union") the word "ON" appears instead of the word "NO."

#### EMPLOYER'S CAMPAIGN

In February 1983, VCP hired Roberts and Associates, a labor relations firm, to conduct voter education for VCP employees.

Roberts and Associates conducted four separate educational seminars and continuous education in the fields prior to the election. Marc Roberts, a past ALRB San Diego Regional Director, conducted the four educational seminars. At each seminar, Roberts drew a facsimile ballot with the black eagle, the symbol of the UFW, on the left hand side, and a circle with a slash, the symbol for "no union," on the right. Roberts gave instructions on the voting procedure and explained to the workers that the union would be on the left and "no union" on the right side of the ballot.

Roberts also explained to the workers that, if they put an "x" in the box next to the black eagle, they would be voting for the UFW (TR V, pp. 3, 7, and 16), and that if they placed an "x" in the box next to the circle with the slash, they would be voting for "no union" (TR IV, pp. 120, 121, and 123).

Gloria Verdugo and Daniel Perez, field representatives for Roberts and Associates, made daily visits to the Ivanhoe and Delano crews, respectively. Verdugo did not explain the symbols on the ballot, but told workers that the union would be on the left and "no union" on the right side of the ballot. Perez also conducted a similar campaign. He and VCP foreperson Erma Lee Gabinete coined the phrase "a la derecha" meaning "to the right" in order to support the company. However, Perez did explain the symbols that would be on the ballot and what they would represent. (TR V, pp. 55, 21)

#### BOARD AGENTS AND THE MISPRINTED BALLOT

Board agent Ed Cuellar was in charge of the VCP election. There were two voting sites, Ivanhoe and Delano. Field Examiner

Joseph Sahagun was in charge of the Delano site and Field Examiner Albert Mestas was in charge of Ivanhoe.

Sahagun testified that he first became aware of the misprinted ballot five to ten minutes prior to the election. He "believed" he discussed the ballot problem with other Board agents prior to starting the election. (TR IV, p. 133) However, Field Examiner Jenny Diaz, who worked the observer table at Delano, testified that she did not become aware of the misprinted ballot until the tally of ballots. (TR VI, pp. 3, 15)

Sahagun testified that he lined up the voters at the Delano site and explained that, if they wished to vote "no union," they should simply place an "x" in the box next to the circle with a slash. (TR IV, p. 135) After voters were lined up away from the voting shed, Sahagun, who stood at the doorway of the shed, called the workers over 2 to 3 at a time and gave individual instructions on how to mark the ballot. Holding the ballot in one hand, he pointed at the two different symbols and explained that, if the workers wished to vote "no union," they should place their mark next to the circle with the slash and, if they wished to vote for the UFW, they should place their mark next to the black eagle. (TR IV, p. 157)

At the Ivanhoe voting site, Field Examiner Albert Mestas essentially did the same as Sahagun. He first gave the entire group of workers instructions on how to mark the ballot. He also explained that, if the workers wished to vote for "no union," they should place their mark next to the circle with the slash and, if they wished to vote for the UFW, they should place their mark next



to the black eagle. He gave these instructions two or three times.

(TR XI, pp. 43-44)

Approximately 8 to 10 workers arrived at the Ivanhoe site after Mestas gave the instructions. Mestas heard Field Examiner Roger Smith give instructions similar to those he had given earlier. (TR XI, p. 48) To Mestas' knowledge, everyone who voted received instructions from the Board agents on how to mark their ballots. (TR XI, p. 53)

#### WORKER WITNESSES AND THE MISPRINTED BALLOT

A number of worker witnesses testified concerning their alleged confusion over the ballot in question. All witnesses worked in the Erma Lee Gabinete crew, which voted at the Delano site. No voters from the Ivanhoe site testified.

The testimony of the worker witnesses was fairly consistent. All the witnesses but one testified that they knew prior to the election that the black eagle represented the UFW and the circle with the slash represented "no union."<sup>3/</sup> All the witnesses either remember the Board agent giving instructions on how to mark the ballot or remember the Board agent making "pointing gestures to the ballot."<sup>4/</sup> Three witnesses testified that prior to the election they saw members of the Gabinete crew wearing buttons with the UFW black eagle.<sup>5/</sup> Some of the worker witnesses were able to read the ballot.

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3/ See TR: VI, pp. 59-84; TR: VII, pp. 20 and 21; TR: VII, pp. 57-58; TR: VIII, p. 7-9.

4/ See TR: VII, p. 42; TR: VIII, p. 50; TR: VIII, p. 68; and TR: X, p. 1.

5/ TR: VII, p. 117; TR: VIII, pp. 18-19; and TR: X, pp. 17-18.

One witness, Romiro Tapia, testified that he did not know what the black eagle stood for and swore that he had never heard of the UFW. (TR VIII, p. 40) He also denied that Board agents gave him instructions on how to mark the ballot. After intensive cross-examination, Tapia admitted that he understood what the ballot symbols stood for. Furthermore, he admitted that he was able to vote for the choice he wanted. (TR VIII, p. 49) In addition, Tapia remembered that the Board agents did give instructions accompanied with "pointing gestures" (TR VIII, p. 43), that he heard the Board agent give the instructions at least three times (TR VIII, p. 50), and that he did not pay any attention to the Board agent because he spoke too fast. (TR VIII, p. 53)

I found Tapia's testimony less than credible. He contradicted himself during cross-examination and had memory lapses when questioned about what the Board agents did while he was waiting in line. Furthermore, I question his assertion that he did not know what the black eagle stood for and that he had never heard of the UFW. Tapia had worked in agriculture in the San Joaquin Valley for four years. (TR VIII, p. 40) His years in agriculture and the fact that members of the Gabinete crew wore UFW buttons undercuts his credibility. Based on his inconsistent testimony, his demeanor, and logic, I discredit Romiro Tapia's testimony.

Roberto Aguilar, an observer at the Delano site, testified that he saw three people who appeared confused at the election. He believed the voters were confused because he saw them turn their ballots upside down. Although Aguilar had been with the Gabinete crew for six years, he could not remember the names of the three

individuals who appeared to be confused. (TR VIII, p. 63)

Aguilar testified that, early in the election, one voter appeared confused and came to him for assistance. A Board agent intervened and explained to the voter that if he wanted to vote for the union he should vote "here," pointing to the box next to the eagle. The Board agent also told the voter that if he wanted to vote for the packing shed, he should vote "here," pointing to the square with the circle and slash. (TR VIII, p. 68) Aguilar further testified that the remaining two workers who appeared to be confused voted later. When they received their ballots, they turned them upside down before entering the booth and came out with the ballots folded. (TR VIII, p. 74) At first, Aguilar stated that the Board agents did not give any instructions whatsoever to the two voters. However, after further questioning, Aguilar stated that he was approximately 20 feet away from the Board agent and that he was unable to hear everything the agent told each person. (TR VIII, pp. 77-78)

#### ANALYSIS

Employer asserted that the ballot was misprinted in two ways: first, there was no "no union" selection because within the circle with a slash the word "ON" was printed instead of "NO," and second the ballot selections were reversed i.e., the UFW choice on the ballot should have been on the left side and the "NO UNION" choice should have been on the right. VCP asserted that the misprinted ballot was a per se violation of the Board's policies and procedures and is sufficient grounds to set aside the election. In the alternative, VCP proffered that the misprinted ballot created

such confusion that the voters were unable to properly vote their choice in the election.

The argument that a per se violation of policies and procedures is sufficient grounds to set an election aside is without merit. The Board has held that deviations from the Election Manual are insufficient grounds to set an election aside without some evidence that the deviations interfered with the employees' free choice or otherwise affected the outcome of the election. See Harden Farms (1976) 2 ALRB No. 30 citing Samuel S. Vener Company (1975) 1 ALRB No. 10 and Polymers, Inc. (1969) 174 NLRB 282 [70 LRRM 1148]. Hence, in order to be grounds to set aside the election, Employer must show that the ballot created confusion and that the confusion tended to interfere with the voters' free choice.

In Sunnyside Nursery (1978) 4 ALRB No. 88, the Board discussed the function of the ballot:

We are not concerned with insuring the voters' understanding of the issues, but with providing them with a ballot which designates their choices in such a fashion that voters may recognize them when they enter the booth. Sunnyside Nursery, supra, p. 4. (emphasis added)

The presumption that a large portion of the agricultural workforce may be illiterate in all languages has been recognized by the Board. See Samuel S. Vener Company, supra, 1 ALRB No. 10 and Egger and Ghio Company, Inc. (1975) 1 ALRB No. 17. In order to overcome the problems of illiteracy, the Board uses symbols on ballots. 8 Cal. Admin. Code section 21000. A circle with a diagonal slash is a long-standing internationally recognized symbol

for "no" which would be familiar to voters, especially those from foreign countries. Samuel S. Vener Company, supra, p. 11.

The testimony of the witnesses who voted at the Delano site showed that they were aware that the black eagle stood for the UFW and that the circle with the slash represented "no union."<sup>6/</sup> Employer's campaign also informed workers at both Ivanhoe and Delano that the black eagle represented the UFW and the circle with a slash stood for "no union." In addition, prior to the election, pro-UFW employees in the Gabinete crew wore buttons with the black UFW eagle on them. Finally, the day of the election, Board agents at both sites explained to voters that the black eagle represented the UFW and that the circle with the slash represented "no union".

Employer argued that voters were confused because the ballot said "ON" instead of "NO." This argument fails to take into consideration the fact that there were symbols on the ballot which would assist illiterate voters. As discussed above, the voters were aware of the different symbols. In addition, if a voter was illiterate, s/he could not have read the word "ON" and therefore could not have been confused by that word. That voter would instead have relied entirely on the symbols. If the voter was able to read, s/he would not have been confused by the misprinting,<sup>7/</sup>

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6/ Only Romiro Tapia testified that he was unfamiliar with the symbols. However, I did not find him to be a credible witness.

7/ As mentioned above, the ballot was printed in both English and Spanish and had a section which read "NO UNION." See Ex. No. 21, Attachment No. 1.

since the ballot clearly indicated that the circle and slash represented "no union." Based on the testimony of the witnesses and the above logic, I find Employer's argument unpersuasive.

VCP also proffered that it conducted a voter education campaign based on the belief that the ballot would contain the union choice on the left side and the "no union" choice on the right side. That belief was allegedly based on the Board's past procedures and policies. During the voter education, VCP and Roberts and Associates representatives informed workers that if they wished to support the company, they should vote on the right or "a la derecha." Therefore, Employer argues, when the ballot selections were "reversed," voters were confused and may have mistakenly voted for the UFW, which appeared on the right side of the ballot.

Although not entirely clear, it appears that Employer is proffering an equitable estoppel argument. Employer asserts, in essence, that the Board should be estopped from denying that ballots always include the petitioner on the left and "no union" on the right because Employer detrimentally relied on Board policies and procedures when it conducted its election campaign.

In order for equitable estoppel to be applicable, there must be (1) a representation or concealment of a material fact, (2) made with knowledge, actual or virtual of the facts, (3) to a party ignorant of the truth, (4) with the intention that the latter act upon it, and (5) the party must have been induced to act upon it. Where one factor is missing there can be no equitable

estoppel. See California School Employees Association v. Jefferson Elementary School District (1975) 45 Cal.App.3d 698, 119 Cal.Rptr. 668; Chang v. Regents of University of California (1982) 135 Cal.App.3d 88, 185 Cal.Rptr. 167; Pinewood Investors v. City of Oxnard (1982) 133 Cal.App.3d 1030, 184 Cal.Rptr. 417.

In the present situation, Employer has not presented any evidence that a Board agent or any other Board representative informed VCP that the ballot would be printed with the UFW on the left side and "no union" on the right side. Neither was there any evidence that such information was given to Roberts and Associates. Employer argued that, although no representations were made, it was reasonable for VCP to rely upon the Board's policies and procedures for the construction of ballots. The Board's Election Manual which was in effect at the time of the election stated the following:

The position on the ballot of the various choices becomes a problem only if there is more than one labor organization involved. In such a situation, the name of the petitioner ...will be to the left...  
ALRB Casehandling Manual, Election Manual, section 2-6140, p. 6-3 (Ex. No. 36") (emphasis added)

A close reading of the above section of the Board's election manual indicates that, at the time of the election, the Board had a specific policy and procedure on the construction of ballots only where there was more than one union involved. The manual is conspicuously silent on the construction of ballots where only a single labor organization is involved.

Since there is no evidence that VCP or any of its agents received any information from Board agents concerning what the ballot for the March 1 election would look like, and the Board's Election Manual does not specifically describe the ballot, there is no proof that the Board concealed any factor with the intention that the Employer rely on any representation. Thus, there is no equitable estoppel. See California School Employees Association v. Jefferson Elementary School District, *supra*.

Even if estoppel were applicable, Employer would only estop the Board from arguing that ballots were not standardized. In order to set the election aside, the objecting party must still show that the conduct tended to affect the free choice of the voters and the outcome of the election. Harden Farms (1976) 2 ALRB No. 30. Could voters have been confused by the "reversal" of the ballot selections in light of VCP's campaign? As discussed above, the ballot contained symbols which represented the only two selections, the UFW and "no union." There was abundant testimony that workers knew what the black eagle stood for. If one symbol represented the union, it would be logical for the workers to conclude that the remaining choice represented "no union." Objectively, the "reversing" of the ballot choices could not have created such confusion that voters were unable to vote their choice.

Assuming, *arguendo*, that the "reversal" of the selections, in conjunction with Employer's campaign, created confusion, it is still questionable whether there would be sufficient grounds to set the election aside. As described above, VCP and its agents conducted a campaign in which workers were told to vote to the



right, or "a la derecha," in order to support the company. Any confusion generated by the ballot was due to Employer's campaign. A party cannot allege its own conduct or the conduct of its agents as grounds for setting an election aside. 8 Cal. Admin. Code section 20365(c)(5).

Based on the above, I recommend that the objection be dismissed.

Objection No. 4 - That portion of Objection No. 4 concerning whether an irregularly marked ballot, on which the voter placed an "N" in the box next to the UFW symbol and a "+" above it, could reasonably be interpreted as a pro-union vote.

Objection No. 5 - That portion of Objection No. 4, alleging that Board agents improperly counted six to eight irregularly marked ballots.

Employer asserted that, when the ballots were opened at the post-election tally of ballots, there were ten ballots which were "irregularly marked," and those ballots were counted by the Board agent. Eight of the ten were counted as votes for the UFW (Ex. Nos. 22a-22h), and the remaining two ballots were counted as no union votes (Ex. Nos. 23a and 23b). No testimony was proffered by either party as to the reasonableness of the Board agent's decision to count the ballots in question. Therefore, my findings are based on the ballots themselves.

The ballot in Objection No. 4 was admitted into evidence as Ex. No. 22a. Within the box next to the UFW eagle is a marking which Employer has asserted is the letter "N." A "+" is written above the box with the marking which resembles "N."

Of the remaining seven ballots counted for the UFW in Objection No. 5, one ballot had an "X" on the eagle and an "X" in the square next to the UFW symbol. (Ex. No. 22b) Five were marked with an "X" on the UFW symbol, the black eagle. (Ex. Nos. 22c, 22e, 22f, 22g, and 22h) The final ballot had a "+" on the eagle. (Ex. No. 22d)

Of the two ballots counted for "no union," Ex. No. 23a has "no" printed in the square next to the circle with the slash and Ex. No. 23b has an "X" on the circle with the slash. The only ballots VCP objected to were the ballots counted as UFW votes, therefore, the discussion is limited to those ballots.

Since 1951, the policy of the National Labor Relations Board (NLRB) has been to give effect to the voter's intent whenever possible. As long as the markings on the ballot clearly indicate the intent of the voter, are not of such a character as to identify the voter, and there is nothing which indicates that the markings were made to identify the voter, the ballot will be counted. See Western Electric Company, Inc. (1951) 97 NLRB 933 [29 LRRM 1187]. However, any ballot which reveals the identity of the voter will be invalidated. The national board's rationale for invalidation is that any attempt by a voter to identify him/herself gives rise to the implication that the employee is complying with threats or inducements. C.F. NLRB v. Wrape Forest Industries (8th Cir. 1979) 596 F.2d 817 [101 LRRM 2001].

A sample ALRB ballot was admitted into evidence at the hearing. (Ex. No. 21) There are two large squares on the ballot. Within each square are symbols and smaller squares in which to mark

one's choice. Pursuant to Board policy, an ALRB agent must count any ballot which clearly reflects the intention of the voter, even if the marking is unorthodox. A ballot will be counted,

"...even though a check mark is used instead of an "X," or the word "no" appears in the "no labor organization" box, or the mark appears within the outer rather than the inner box, or there are erasures, or there are markings in more than one box. But a ballot, the intent of which is not clear will be considered void." ALRB Casehandling Manual, Election Manual, section 2-6860, p.6-21. (emphasis added)

The ALRB policy of counting ballots if the marking appears in the outer rather than the inner square is also followed by the national board.

C.F. Knapp-Sherrill Company (1968) 171 NLRB 1547 [68 LRRM 1286].

In examining Ex. No. 22a, which contains what Employer argued was the letter "N" and a "+," it should be noted that both marks are within the large square portion of the ballot which represents a vote for the UFW. The fact that there are two markings instead of one does not invalidate the vote. C.F. Western Electric Company, Inc., supra, where a ballot was counted which was marked with three "X's." I find that the markings within the UFW portion of the ballot clearly showed the voter's intent to vote for the union.

I also find that the marking within the square next to the eagle does not identify the voter. It is not entirely clear that the mark in question is actually the letter "N," and not some other mark. For example, when the ballot is turned

to the left, the mark looks more like the number "2" than it does the letter "N." The record is devoid of any evidence which would indicate that the marking in any way revealed the identity of the voter.<sup>8/</sup>

Assuming, arguendo, that the mark was the letter "N," I would still question whether it would be sufficient to identify a voter. In NLRB v. A.G. Parrot (4th Cir. 1980) 630 F.2d 212 [105 LRRM 2035] the circuit court upheld the national board's decision to count a ballot which contained the letter "C" in the "yes" square on the ballot. It was noted that nothing about the mark revealed the identity of the voter.

I find that the intent of the voter in Ex. No. 22a is clear and there was nothing on the ballot which reveals the identity of the person who cast it. Therefore, I find that the Board agent reasonably interpreted the ballot as a pro-union vote.

Ex. No. 22b also contains more than one marking. In closing argument, Employer asserted that it was possible that, due to the confusion caused by the misprinted ballot, the voter crossed out the eagle to signify a "no union" selection and then placed a second "X" next to that marking to indicate his/her desire to vote against the UFW. I find the argument tenuous and

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8/ In closing argument, Employer proposed that a witness, Antonio Bedolla, may have been the voter who marked Ex. No. 22a. Bedolla testified that he wrote "no" in the box next to the UFW symbol. Bedolla was asked to write "no" on a sheet of paper exactly as he had on his ballot. (Ex. No. 27) In comparing the two exhibits I find that Bedolla's "no" does not remotely resemble the mark in Ex. No. 22a. Based on the comparison and my earlier credibility resolution of Bedolla, I find that he was not the voter who made the markings on Ex. No. 22a.

remain unconvinced. As mentioned above in the discussion of Ex. No. 22a, multiple markings on the same side do not invalidate the ballot. Western Electric Company, Inc., supra. I find that the markings clearly show the intent of the voter and there are no markings which would indicate the identity of the voter. Therefore, the Board agent properly counted Ex. No. 22b.

Ex. Nos. 22c-22h each contain a mark (either an "X" or "+") on the UFW eagle. All the ballots in question contain the single mark within the larger square which represents a vote for the UFW. Under ALRB policy and the NLRB rationale in Knapp-Sherrill Company, supra, the ballots were properly counted as votes for the UFW. The intent of the voter was clear and there were no markings which would tend to identify the voter.

Based on the above discussion, I recommend dismissing Objections Nos. 4 and 5, and find that the Board agents did not abuse their discretion in counting the ballots as votes for the Union.

Objection No. 6 - That portion of Objection No. 5 alleging that the election was conducted in an atmosphere of threats and intimidation as a result of the bomb or rock-throwing threat.

#### THE THREAT

Baily Child Care Center is a pre-school for children ages three to five years old. Bulmaro Meza, a VCP employee and Employer's observer at the Ivanhoe voting site, has two children who attend the childcare center. At approximately, 7:30 a.m., on the day of the election, the center received a phone call. The caller, who spoke in Spanish, asked Sylvia Carasco, a bilingual teacher's

aide, not to admit Bulmaro Meza's children that day because he had done "something bad." The phone caller also stated that "something bad" would happen like a "bomb would be thrown or somebody would break the windows with rocks" and that he did not want to injure the children and teachers. (TR IV, p. 57) The caller did not identify himself in any manner.

Later that morning, Meza arrived at the center with his children. Carasco informed Meza of the phone call and Meza decided to leave his children at the center. Carasco testified that Meza was not at all apprehensive about leaving his children. (TR IV, p. 60)

When he returned home, Meza woke up his cousin Jorge Meza and told him that someone had threatened the childcare center, but that he did not know who had made the threat. He then went to the Lopez's house to inform them of what had happened and spoke with Serafin, Guadalupe, David, Ismael and Augustine Lopez.

#### AT THE ELECTION SITE

Before the election started, a number of employees wearing "no union" buttons (Ex. No. 29) were standing next to the shed where the voting was to take place. The group included Jorge Meza, Serafin and Guadalupe Lopez, labor contractor Ralph Diaz, and foreperson Virginia Saucedo.

Jorge Meza testified that the group was busy talking when UFW organizer Lupe Martinez walked by. As Martinez walked by without stopping, he turned to the group and said, "You are going to have the results of the phone call of the morning." (TR VIII, p. 105) Meza was unsure whether Martinez was walking with another person

or was alone. (TR IX, pp. 7, 9) Meza also testified that earlier that morning, at approximately 1:00 a.m., he received two phone calls. Both times the phone rang, he picked it up, and the caller hung up. When Martinez made the statement at the election site, Meza did not pay any attention to it and no one in the group talked about it. (TR IX, p. 24) It was not until after he voted that Meza thought about what Martinez had said. (TR IX, p. 24)

Serafin Lopez corroborated that Martinez made the statement that they would get the results of the morning phone call. However, the remainder of his testimony contradicted Meza's version. Lopez testified that he was talking to Jorge Meza when Martinez walked by and made the statement. Lopez remembered that a woman was walking with Martinez when the statement was made. When Lopez and Meza were talking to each other, they did not discuss the threat. (TR IX, p. 46) However, Lopez also testified that, prior to Martinez walking by and making the statement, the group of co-workers, including Jorge Meza, were talking about the bomb threat at the Baily Day Care Center. (TR IX, pp. 53-54) Lopez then testified that, after Martinez made the statement, he thought Martinez was referring to the bomb threat and phone calls he had received.<sup>9/</sup> Lopez testified that he spoke with Jorge Meza about Martinez's statement, and that Meza also thought that Martinez was talking about the phone calls he had received that morning.

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9/ Serafin Lopez also claimed to have received two phone calls in the early morning in which the caller hung up.

(TR IX, p. 55)<sup>10/</sup>

Guadalupe Lopez testified that he was among the group of workers with the "no union" buttons, and he also heard Martinez's statement. However, Guadalupe stated that, when Martinez walked by and made the statement, the group was not talking at all. He also testified that he was facing both Jorge Meza and Serafin Lopez during the time in question and did not hear either of them speak about the bomb threat. (TR IX, p. 78a) Lopez stated that Martinez was definitely alone when he made the statement.

The UFW witnesses presented a different version of the same incident. Lupe Martinez testified that, while walking around the quarantined area at the election site, he informed Board agent Albert Mestas that foreperson Virginia Saucedo had threatened to fire an employee if he went to the election. Sometime after the tour of the quarantined area, Martinez was walking in front of Board agent Mestas and passed Saucedo and a group of workers wearing "no union" buttons. When asked what he said and who he said it to, Martinez testified as follows:

"I told Virginia that I had found out what she had been doing in the morning. That one of the workers had called me, telling me that she had threatened him. That if he was going to the election, she was going to fire him and she was going to report him." (TR XI, p. 91)

Martinez testified that Saucedo then turned to William Marrs, attorney for VCP, and asked whether she could respond. Martinez said that Marrs told her, "No leave it like that." (TR XI, p. 92)

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10/ Compare to Meza's testimony that the group did not discuss the statement and that Meza did not even think about the phone call and statement until after he had voted.



Martinez testified that he never told the group of workers with Saucedo that they would get the results of the phone call made that morning. (TR XI, p. 92) He also denied ever calling workers late at night and hanging up, or calling the day care center and making a bomb threat. (TR XI, p. 92-93)

The UFW called Virginia Saucedo as an adverse witness. Saucedo essentially contradicted the version proffered by Lupe Martinez. Saucedo denied that she had threatened employees,<sup>11/</sup> that Bill Marrs stood next to her, or that she asked Marrs whether she could respond to Martinez' statement. William Marrs was also called as an adverse witness; however, he did not recall the incident nor could he remember having any conversation with Saucedo that morning.

Albert Mestas corroborated much of Lupe Martinez' testimony. Board agent Mestas testified that, during the tour of the quarantined area, Martinez informed him that several employees had received threatening phone calls from a forewoman. (TR XI, pp. 70-71) Mestas testified, that, after the tour, he was walking with Martinez when they passed a group of workers. When asked whether Martinez made any statement to that group, Mestas testified as follows:

"I heard him shout out to the group that was standing off to the side, the group that was wearing no buttons, the No buttons, that we know who made the phone calls to our people this morning." (TR XI, p. 76)

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11/ I find it unnecessary to determine whether Saucedo in fact threatened employees or whether Martinez in fact spoke to employees who had been threatened by Saucedo. The issue was what was said to the workers, and not the truthfulness of the statement made.

Mestas did not recall Martinez ever telling workers that they would get the results of the morning phone calls. (TR XI, p. 76)

There were essentially three different versions of what Martinez said when he passed the workers with the "no union" buttons.<sup>12/</sup> Based on my evaluation of the witnesses who testified concerning the incident, I credit the version offered by Board agent Albert Mestas. The testimony of Employer's witnesses was riddled with inconsistencies and contradictions. I am aware that some minor inconsistencies may exist when a hearing is held approximately five months after the incident in question; however, in the present case the contradictions were great. In addition, during questioning by the UFW representative or myself, some of Employer's witnesses stared at the table or at Employer's representatives. Also, I find it unlikely that workers who were talking among themselves at the election could all hear exactly what Martinez said as he walked by, yet be so inconsistent as to the events which surrounded that incident.<sup>13/</sup> Based on the contradicting testimony, demeanor of the witnesses, and logic, I do not credit Employer's witnesses.

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12/ No party asserted nor produced evidence that there were two separate incidents where Martinez made statements to workers. The parties essentially argued over what Martinez specifically said. Therefore, I reject the possibility that Martinez made two separate statements regarding phone calls to workers.

13/ Most of Employer's witnesses testified that the group was talking and joking with each other while waiting for the polls to open. Only one witness contradicted that version. I find it more logical that workers waiting for the election to start would engage in such conversation.

I also question portions of the testimony offered by UFW organizer Lupe Martinez. Although Martinez appeared credible, I find it illogical that he made such lengthy statements while he was walking past Saucedo and the group of workers.

On the other hand, Mestas, an uninterested party, was the most credible and straightforward of all the witnesses who testified concerning the incident in question. Furthermore, Mestas' testimony that Martinez made a short statement ("We know who made the phone calls to our people this morning") is the most logical.

#### ANALYSIS

The Board will set aside an election if it was conducted in an atmosphere of fear and coercion in which employees could not vote freely. Phelan and Taylor Produce (1976) 2 ALRB No. 22. The actions of non-parties are afforded less weight than the actions of parties in determining their effect on elections. Matsui Nursery (1983) 9 ALRB No. 42. However, where violence is involved, the Board will set an election aside where the circumstances tended to create an atmosphere of fear or coercion sufficient to affect the free choice of the voters, regardless of the party or non-party status of the participants. Joseph Gubser Co. (1981) 7 ALRB No. 33, citing Frudden Enterprises, Inc. (1981) 7 ALRB No. 22

Since I credit Mestas' version of the incident and the statement Martinez made to the workers, I find that Martinez's remark was not a reference to the bomb threat call, and that there is no nexus between the bomb threat and the UFW. However, even absent a showing that an agent of the UFW threatened to bomb

the day care center, I must address the question of whether the threat itself could have had such an impact as to have affected the free choice of the voters.

The testimony indicated that Bulmaro Meza decided to leave his children at the center even after he was informed of the bomb threat. Teacher's Aide Carasco testified that Meza was not at all apprehensive about his decision to leave his two children. Aside from the Mezas and Lopezes, there was no showing that knowledge of the bomb threat was widespread among the workers. Therefore, the Mezas and Lopezes were the only people who may have been affected by the threat. Only one member of that group, Serafin Lopez, stated that the workers spoke about the bomb threat while waiting for the election to start. He also stated that he spoke to Jorge Meza about the bomb threat. However, Meza (whose cousin Bulmaro left his children at the childcare center) denied ever talking about the threat. Saucedo, who was standing with the same group of workers, further testified that they did not talk about the bomb threat. (TR XI, p. 30) I discredit Lopez' testimony and find that the group did not talk about the bomb threat. Even though there was a bomb threat, I find that there was no link between the threat and the Union or the election, and therefore the incident did not tend to affect the free choice of the voters.

Assuming, arguendo, that there were two separate incidents and, on one occasion, Martinez told the workers that they would get the results of the morning phone call, I still question whether such facts would be sufficient to set the election aside. The

statement itself is vague, especially in light of the testimony that workers received other phone calls in the early morning. In addition, the testimony of Jorge Meza and Guadalupe Lopez showed that, even after Martinez allegedly made the statement, no one talked about what Martinez had said. Based on the above analysis, I would find that the bomb incident did not prevent the voters from freely expressing their choice. Since Employer has failed to meet its burden of proof, I recommend the objection be dismissed.

Objection No. 7 - That portion of Objection No. 6, concerning whether the election was conducted in an atmosphere of fear and coercion as a result of a threat made by a union adherent to four eligible voters to the effect that if they failed to vote for the union he would "beat the shit" out of them?

On the morning of the election, Jose Luis Aguilar saw four employees arrive at the voting site. One of the four, David Perez, was approached by Rogelio Chavez. Aguilar testified that he heard Rogelio Chavez tell Perez that if "...he had already signed some union papers, and that if he went back on his word, he was going to kick him." (TR VII, pp. 59-60)<sup>14/</sup> No physical contact occurred. Upon hearing Chavez' statement, Aguilar interrupted the conversation and stated to Chavez and Perez, "You can vote for the union or Visalia." (TR VII, p. 61) In explaining

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14/ Daniel Perez, a field representative for Roberts and Associates, testified that Chavez had threatened to "beat the shit" out of the four employees. However, he did not personally witness the incident and based his testimony on the representations of Jose Luis Aguilar. (TR V, p. 40) Neither Chavez nor any of the four threatened employees testified regarding the incident.

the aftermath of the threat, Aguilar testified that,

"I asked a question to a man who was there,<sup>15/</sup>  
'Was the voting free?' and if one wanted to change  
a vote whichever way one wanted, one could change  
it. And then he told me 'Yes.'" (TR VII, p. 62)

Rogelio Chavez did not respond to Jose Luis Aguilar. (TR VII, p. 62) No evidence was presented to establish whether Chavez responded to the man who answered Aguilar's question regarding a free election. However, Aguilar did testify that the only other statement Chavez made was his question to David Perez asking where Perez got a blue button. (TR VII, p. 66)

The Board will set aside an election where physical attacks or threats of physical attack contribute to an atmosphere which is not conducive to an election free from coercion. See Phelan and Taylor Produce (1976) 2 ALRB No. 22. The actions of non-parties are afforded less weight than the actions of parties in determining their effect on elections. Matsui Nursery (1983) 9 ALRB No. 42. However, regardless of the party/non-party status of persons involved in violence before or during an election, the Board will set aside the election if the violence tended to create an atmosphere of fear or coercion sufficient to affect the free choice of the voters. Joseph Gubser Co. (1981) 7 ALRB No. 33, citing Frudden Enterprises, Inc. (1981) 7 ALRB No. 22.

No evidence was presented which would establish Rogelio Chavez as the agent of a party; hence, I find that he was not an

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15/ Aguilar could not remember if the man he asked the question of was a state agent. However, the man was not a VCP employee and Aguilar remembered that the man helped in the election. (TR VII, pp. 75-76)

agent of the UFW. However, Chavez' status as a non-party does not eliminate a need to analyze the facts to determine whether his threat tended to affect the free choice of the voters. Joseph Gubser, supra, 7 ALRB No. 33.

In San Diego Nursery (1979) 5 ALRB No. 43, a member of the farm organizing committee threatened other employees with physical harm approximately four days prior to the election. The employee pulled down the table where another employee was working and told her, "I'm going to sock it to you, even if they fire me from work here." Several employees witnessed the incident. The Investigative Hearing Examiner found that the physical threat was insufficient grounds to set aside the election. The IHE concluded that similar statements have been characterized by the NLRB and ALRB as,

"...the sort of exaggerations which are recognized as such by workers, especially when they occur in the context of heated statements made in clashes of personalities during campaigns involving vigorous displays of emotional involvement." San Diego Nursery Co., Inc., supra, pp. 16i-17i.

Furthermore, both the ALRB and NLRB have considered such statements as "partisan puffing," and both agencies have held that the lack of actual physical violence is an indication of the absence of an atmosphere of fear in some situations. See Patterson Farms, Inc. (1976) 2 ALRB No. 59; Owens-Corning Fiberglass (1969) 179 NLRB 219 [72 LRRM 1289]; American Wholesalers, Inc. (1975) 218 NLRB 292 [89 LRRM 1352]; Zeiglers Refuse Collectors, Inc. v. NLRB (4th Cir. 1981) 627 F.2d 1000 [106 LRRM 2331].

In the present case, Chavez threatened to kick an employee

if he voted against the union. Two individuals were able to respond to that threat by stressing that the workers could vote for whomever they wanted. Such statements would indicate that an atmosphere of fear did not exist. As noted above, no actual physical violence occurred, and Chavez did not respond to the two individuals who indicated that employees could vote freely. I find that Chavez's threat amounted to a fairly common incident in election campaigns and was not of the type of conduct which would tend to create an atmosphere of fear in which voters could not freely choose their bargaining representative. Hence, I recommend that the objection be dismissed.

Objection No. 8 - That portion of Objection No. 6, alleging that the election was conducted in an atmosphere of fear and coercion as a result of an incident at the election site where a union adherent displayed a gun to another voter.

The facts are not in dispute. Immediately after voting, Jose Luis Aguilar walked back to his pickup truck which was parked approximately 30-40 feet away from the line of voters. (TR VII, p. 84A) Mario Chavez was leaning against the pickup. Aguilar had his hands in his jacket when he approached Chavez. Aguilar testified that Chavez said to him, "Take it out if you've got something to take out," and he pulled out a gun and showed it to Aguilar. Aguilar testified that he saw the handle and approximately one inch of the barrel of the gun. (TR VII, p. 85) No other employees were present when the incident occurred. (TR VII, p. 85)

Firearms have an "inherently intimidating impact" on the free choice of voters; however, the mere presence of guns



without more is insufficient to set aside an election. Silver Creek Packing Company (1977) 3 ALRB No. 13. In order to set aside an election, the circumstances must be such that the employees could not freely express their choice concerning a collective bargaining representative. D'Arrigo Brothers of California (1977) 3 ALRB No. 37.

In the present case, the gun incident occurred approximately 30-40 feet away from the line of voters and there were no other people present. The sole witness of the gun incident had already voted, and, therefore, it could not have affected his free choice. Since the display of the pistol was an isolated incident which could not have affected the outcome of the election, I find that Employer has failed to meet its burden and I recommend that the objection be dismissed.

TOTALITY OF THE CIRCUMSTANCES

Although incidents by themselves may be insufficient grounds to set an election aside, the Board will also consider whether the cumulative effect of the circumstances warrants setting an election aside. See Harden Farms of California, Inc. (1976) 2 ALRB No. 30.

I find the objection alleging voter confusion to be totally without merit. The objections that Board agents abused their discretion by counting ballots as UFW votes are equally without merit. I also find that Employer failed to establish a prima facie case that Rogelio Chavez' verbal threat or the bomb threat on the day care center tended to affect the free choice of the voters. The gun incident involved a single employee who

had already voted, hence it could not have any impact on the voters or the election. Based on the foregoing analysis, I find that the totality of the circumstances does not warrant setting the election aside.

THE CHALLENGED BALLOT OF MARIO CHAVEZ

All agricultural employees of an employer who worked during the payroll period immediately preceding the filing of a petition for certification are eligible to vote. Labor Code section 1157. In the present case, the applicable payroll period was February 11-17. Mario Chavez did not work at VCP during that period and did not appear on the eligibility list. Therefore, at the March 1 election, Board agents challenged Chavez pursuant to 8 Cal. Admin. Code section 20355 (a) (2).

The Board's regulations provide exceptions to the general rule that employees must be employed during the applicable payroll period in order to be eligible to vote. The following individuals may be eligible to vote even though their names do not appear on the eligibility list:

1. Employees who are absent from work during the applicable payroll period, but who receive pay for that period from the employer, e.g. employees on paid sick leave or paid vacation; and

2. Employees who would have been on the payroll during the applicable payroll period but for the employer's unfair labor practice. 8 Cal. Admin. Code sections 20352(a)(2) and (3).

No evidence was presented that Mario Chavez falls within either exception listed in 8 Cal. Admin. Code section 20352. However, he may still be eligible to vote. The Board has

examined situations which fall outside of those articulated in its regulations. In one case, the Board remanded a challenged ballot to the Regional Director in order to determine the voter's eligibility. The Board stated,

It appears to us inequitable to grant the vote to employees who perhaps worked half a day for an employer, and to deny the vote to long standing employees who happened to be absent during the single relevant payroll period. We therefore hold that employees who were on unpaid sick leave or unpaid holiday may, under appropriate circumstances, vote. Rod McLellan Co. (1977) 3 ALRB No. 6, p. 3.

In the above-cited case, the Board held that, in order to determine the eligibility of the voter, it would consider such factors as the employee's work history, continued payment into insurance funds, contributions to pension or other benefit programs, and any other relevant evidence which relates to the issue of whether there was a current job or position actually held by the employee during the relevant payroll period. Rod McLellan Co., supra, p. 4. Also see Valdora Produce Co. (1977) 3 ALRB No. 8.

The Board does not require that the employee request and receive a formal leave of absence. In deciding whether a challenged voter was granted a leave of absence, the Board will consider the following:

1. The employer's knowledge of the employee's reason for being absent and its express or tacit approval of that absence, and
2. The employee's work history and whether the employee

may reasonably be expected to return to work with the company, thus retaining his/her employee status. Mel-Pak Vineyards, Inc. (1978) 5 ALRB No. 61.

Rogelio Chavez, Mario's cousin, testified that Mario Chavez was arrested on February 9 and that he was in the county jail during the period in question. Rogelio testified that Erma Lee Gabinete approached him on February 10 and asked him "...how long [Mario] had been put in jail." (TR III, pp. 67-68 and 80) He also testified that it was common knowledge among his co-workers that Mario Chavez had been arrested. (TR III, p. 67) Rogelio then testified that Mario was deported after the arrest.<sup>16/</sup> Mario returned to work on February 22.

Erma Lee Gabinete denied having any knowledge that Mario was arrested or deported. She testified that the first time she became aware of the arrest and deportation was when Mario returned to work.

I credit the testimony of Rogelio Chavez over that of Erma Lee Gabinete. I found Gabinete's testimony to be inconsistent, evasive, and confused. Gabinete maintained Mario Chavez's name on her monthly time book and payroll even though he was absent during the payroll period of February 11. She claimed that she had her "purposes" for doing so, yet when questioned as to what those "purposes" were, she stated there was "no reason" for leaving his name on the payroll. (TR III, pp. 39-44)

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<sup>16/</sup> Rogelio Chavez's testimony was based on conversations he had with Mario's "lady."

Gabinete testified that she would probably have kept Chavez's name on her list until Thursday, the end of the work week,<sup>17/</sup> and then stated that she would have left his name on the list until the day of the election.<sup>18/</sup> (TR III, p. 40) Gabinete then denied saying she would have kept Chavez's name on the list until the election (TR III, p. 43), but later testified that she would have left his name on the list until the election. (TR III, pp. 46-47)

There are additional inconsistencies and contradictions within Gabinete 's testimony. Furthermore, I found Gabinete to be quite hostile during cross-examination. Based on her testimony and demeanor, I find that Erma Lee Gabinete was not credible, and I find that Gabinete and VCP had knowledge that Mario Chavez was in jail.

The ultimate issue to be resolved is whether Mario Chavez would have worked during the applicable payroll period, February II through 17, but for his leave of absence. An examination of his work history is necessary. Mario Chavez worked for Erma Lee Gabinete and VCP for approximately five years. (TR II, p. 29) In 1982, Chavez developed a pattern of absenteeism. On more than 20 occasions during that time, he disappeared for two to three days without giving Employer advance notice. (TR II, p. 28) Gabinete never reprimanded Chavez for his absenteeism. (TR II, p. 35)

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<sup>17/</sup> She apparently meant Thursday, February 24 (TR III, p. 40).

<sup>18/</sup> The date of the election was March 1, a Tuesday.

Chavez disappeared, reappeared, and began work without ever discussing with Gabinete why he was absent. Gabinete testified that she had no policy on leaves of absence. However, she also testified that she rehired workers only if she needed them and would not rehire if there was no space. (TR II, p. 52) The Board has held that a policy of rehiring workers as jobs become available indicates the existence of an informal or de facto leave policy. See Mel-Pak Vineyards Inc. (1979) 5 ALRB No. 61. I find that, by never warning workers concerning their absenteeism and by rehiring workers whenever space was available, Gabinete created an informal leave policy.

As mentioned above, Mario Chavez worked for Gabinete and VCP for five years. During 1981, Chavez worked all but approximately six weeks. (Ex. No. 18) In 1982, he worked until June 10, returned November 11, 1982, and worked for the remainder of the year.<sup>19/</sup> (Ex. No. 14) In 1983, Chavez worked every week up to March 3, except for the week he spent in jail. (Ex. No. 19)

Although Chavez had a history of absenteeism, the record shows that, during 1981, he was a steady worker at VCP. He worked the first half of 1982, returned and continued working every week into 1983 until he was arrested. Within approximately II days, he returned and continued to work for VCP. Mario Chavez was a longstanding employee who was absent during the single relevant payroll period. As articulated above, Gabinete had an informal

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19/ Gabinete testified that Chavez informed her he was leaving VCP in June because there was not enough work available. (TR II, pp. 38-39)

leave policy and allowed workers to return whenever space was available. Given Chavez's history of being absent and returning to work without ever being reprimanded or warned, I find that he had a reasonable expectation of continued employment. In addition, based on his work history, I find that but for his arrest, which was analogous to an unpaid leave of absence, he would have worked during the applicable payroll period.

Assuming, arguendo, that there was no informal leave policy at VCP, I would still find that Mario Chavez had a reasonable expectation of continued employment with Employer. Gabinete testified that, although she did not need Chavez, she allowed him to work because she did not want an unfair labor practice charge filed against her (TR III, p. 58), and she therefore reserved a space for him. Gabinete's inexplicable reason for retaining Chavez on her payroll list and her reserving a space for Chavez to work lead me to conclude that Chavez had a reasonable expectation of continued employment.

Based on the above, I conclude that it would be inequitable to disenfranchise Mario Chavez, a long standing employee of Erma Lee Gabinete and VCP, because he was not working during the relevant payroll period. I find that, but for his leave of absence, he would have worked during the applicable payroll period. Should Chavez's vote become outcome determinative, I recommend that it be overruled and the ballot counted.

#### CONCLUSION AND RECOMMENDATION

Based on the record evidence, I find that Employer has failed to meet its burden of proving that the ballot in question

confused voters, the Board agents improperly counted ballots, or that the election was conducted in an atmosphere of fear which rendered improbable a free choice by the voters. Mario Chavez's ballot should remain unopened unless his vote becomes outcome determinative, at which time it should be opened and counted.

In light of the above findings and conclusions I recommend that the Board dismiss Employer's objections to the election and move forward to set an investigative hearing on the remaining objections.

DATED: October 14, 1983

Respectfully submitted,

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KELVIN C. GONG  
INVESTIGATIVE HEARING EXAMINER



State of California  
Estado de California

AGRICULTURAL LABOR RELATIONS BOARD  
CONSEJO DE RELACIONES DE TRABAJADORES AGRÍCOLAS



OFFICIAL SECRET BALLOT  
OFICIAL BALOTA SECRETA

Mark an X in the square of your choice.  
Ponga una X en el cuadro de su elección.

For Employees of Visalia Citrus Packers and all Growers  
Para Empleados de that pack into Visalia Citrus Packers

Do you wish to be represented for purposes of collective bargaining by:

Desea usted estar representado para los fines de negociar colectivamente por:

NO UNION	UNITED FARM WORKERS OF AMERICA, AFL-CIO
NO UNIÓN	UNIÓN DE CAMPESINOS DE NORTE AMERICA, AFL-CIO
	
<input type="checkbox"/>	<input type="checkbox"/>

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box. If you spoil this ballot, return it to the Board Agent for a new one.

NO FIRME ESTA BALOTA. Doblela y pongala en la caja de balotas. Si echa a perder su balota, regresela a el agente del Consejo y obtenga una nueva.

EXHIBIT: 21  
IDENTIFIED: ✓  
ADMITTED: ✓

ALRB 77

SAMPLE